Case No. SC97412 (Consolidated)

IN THE SUPREME COURT OF MISSOURI

SALLY BOLAND, SHERRI LYNN HARPER, DAVID C. GANN, JENNIRAE LITTRELL, and HELEN PITTMAN,

Plaintiffs-Appellants,

vs.

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 BRIEF OF RESPONDENTS

Consolidated Appeals from the Circuit Court of Livingston County, Missouri
The Honorable Daren L. Adkins, Circuit Judge

Circuit Court Case Nos. 16LV-CC00104 (Gann), 16LV-CC00105 (Boland), 16LV-CC00106 (Harper), 16LV-CC00107 (Pittman), 16LV-CC00106 (Littrell)

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STATEMENT OF FACTS

There are no operative facts in dispute for purposes of this appeal. A large portion of the Appellants' Statement of Facts is written as if the allegations are proven facts, which they are not.[1] A law enforcement investigation in 2002 did not result in charges against anyone, and all Defendants vehemently deny that they "concealed" any information regarding what was, in 2002, a public investigation.

Regardless, for purposes of this appeal, the only relevant facts are (1) the pleadings in the prior litigation, (2) the end result of that litigation, and (3) the pleadings in this litigation. Thus, this Statement of Facts compares the Plaintiffs' Petitions in October 2010/January 2011 to those in the cases currently on appeal, which were all filed more than five years later on October 18, 2016.

I. Glossary of terms

A short glossary of terms may benefit this Court. In this brief, the **following terms or phrases** have the following meaning:

- **"The Plaintiffs":** Refers collectively to the Appellants, Sally Boland, David Gann, Sherri Lynn Harper, Jennirae Littrell, and Helen Pittman. They are the Plaintiffs in the five cases on appeal and were also the Plaintiffs in five cases they filed in 2010 and 2011 against these same Defendants, which culminated

[1] It is doubtful that Appellants' citation to the Court of Appeals Opinion from the first lawsuits complies with Supreme Court Rule 84.04(c), which requires citation to specific pages in the Record on Appeal. However, because the veracity of Plaintiffs' allegations is not at issue on this appeal, Respondents are not moving to strike that material.

in this Court's *Boland I* (as defined below) opinion. Individual Plaintiffs will be referenced as "Plaintiff Boland," etc.

- **"The Defendants":** Refers collectively to the Respondents, Saint Luke's Health System, Inc.; Saint Luke's Hospital of Chillicothe; and Community Health Group. These parties are the Defendants in the five cases on appeal and were also the Defendants in the 2010 and 2011 *Boland I* cases.
- **"Hedrick Medical Center":** Refers to the medical facility where various events allegedly took place in 2002. The formal name was later changed to Saint Luke's Hospital of Chillicothe, but the facility still does business as Hedrick Medical Center.
- **"*Boland I*":** Refers specifically to this Court's opinion in the first lawsuits: *Boland v. Saint Luke's Health System, Inc.*, 471 S.W.3d 703 (Mo. banc 2015).
- **"The *Boland I* cases" or "the first lawsuits":** Refers generally to the five cases the Plaintiffs filed in October 2010 and January 2011, in which Judgment on the Pleadings was granted to the Defendants and ultimately affirmed by this Court after those cases were consolidated for appeal in *Boland I*.
- **The "2010-11 Petitions":** Refers to the nearly identical petitions filed by each Plaintiff in October 2010 and January 2011.
- **"The 2016 Petitions" or "the second lawsuits":** Refers to the nearly identical petitions filed by each Plaintiff on October 18, 2016, which are currently on appeal.

II. Procedural history of the predicate cases

On October 4, 2010, Plaintiffs Gann and Harper filed petitions against the Defendants in the Circuit Court of Livingston County.[2] These petitions—which were nearly identical to each other—alleged that an employee of Hedrick Medical Center intentionally caused the deaths of Coval Gann and David Harper in 2002.[3]

On October 6 and 8, 2010, amended petitions submitted by Plaintiffs Littrell and Pittman were deemed filed by the Circuit Court of Livingston County.[4] These petitions—which were nearly identical to each other and to the petitions filed by Plaintiffs Gann and Harper—asserted that an employee of Hedrick Medical Center intentionally caused the deaths of decedents Clarence Warner and Shirley Eller in 2002.[5]

On January 7, 2011, Plaintiff Boland filed a petition in the Circuit Court of Livingston County.[6] Her First Amended Petition—which was nearly identical to the four previously filed petitions—asserted that an employee of Hedrick Medical Center intentionally caused the death of Charles O'Hara in 2002.[7]

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[2] Gann L.F. at 191; Harper L.F. at 4889.

[3] Gann L.F. at 192-94; Harper L.F. at 4890-92.

[4] Pittman L.F. at 7179, 7198; Littrell L.F. at 9458.

[5] Pittman L.F. at 7180-82; Littrell L.F. at 9478.

[6] Boland L.F. at 2335. The Appellants have submitted the "First Amended Petition" from Plaintiff Boland's first lawsuit as part of the Appendix. The counts are the same as in the original petition, and the allegations are largely the same, with some additional details added to the fraud counts—Counts VI and VIII. (*Compare* Boland L.F. at 2335-54 *with* Boland L.F. at 2355-74 (Appellants' Appendix ("App.") at A19-A38)).

[7] *Id.* at 2356-58 (App. at A20-A22).

All of the Plaintiffs alleged in the first lawsuits that they were unable to learn the details of what had transpired before the time of filing, due to what they claimed was a cover-up by the Defendants.[8] Each of their Petitions contained a paragraph alleging, in conclusory fashion, that the Plaintiff was "not reasonably able to ascertain whether [he/she] had a cause of action against the named Defendants until the filing of this petition, as a direct result of Defendants' conduct described herein"—referring to the alleged cover-up.[9]

Included in all of the 2010-11 Petitions were two counts specifically denominated as "fraud"— Count VI for "Civil Conspiracy of Fraudulent Concealment" and Count VIII for "Fraudulent Misrepresentation by Concealment."[10] A third count was also clearly premised on the alleged "fraudulent cover-up"—Count VII, for "Civil Conspiracy"—which averred that Defendants "conspired to fraudulently conceal information from patients and the general public … .".[11] The "WHEREFORE" or *ad damnum* paragraph at the end of each of these three counts prayed for judgment against the Defendants in excess of $25,000 for damages resulting from the alleged fraud (1) to "fairly compensate Plaintiff for the wrongful death of [each case's decedent]", (2) "for prejudgment interest

[8] Gann L.F. at 194; Boland L.F. at 2358 (App. at A22); Harper L.F. at 4892; Pittman L.F. at 7182; Littrell L.F. at 9461.

[9] Gann L.F. at 204-08; Boland L.F. at 2368-73 (App. at A32-A37); Harper L.F. at 4902-06; Pittman L.F. at 7191-96; Littrell L.F. at 9471-75.

[10] Gann L.F. at 203-06; Boland L.F. at 2367-71 (App. at A31-A35); Harper L.F. at 4901-04; Pittman L.F. at 7191-94; Littrell L.F. at 9470-73.

[11] Gann L.F. at 205-06; Boland L.F. 2369-70 (App. at A33-A34); Harper L.F. at 4903-04; Pittman L.F. at 7193-94; Littrell L.F. at 9472-73.

in accordance with Mo. Rev. Stat. 408.040," (3) "for exemplary damages," and (4) "for such other and further relief as [the circuit court] may deem just and proper."[12]

On January 13, 2012, and January 27, 2012, the Defendants filed Motions for Judgment on the Pleadings in all of the *Boland I* cases, arguing that the Plaintiffs' claims were time barred.[13] The Defendants asserted that the three-year limitations period found at Mo. Rev. Stat. §537.100 began running in 2002, when the five deaths at issue occurred, such that the claims filed in 2010 and 2011 were untimely.[14] In response, Plaintiffs argued that the three-year limitations period should be tolled—or that the claims' accrual should be delayed—due to the fraud allegedly committed by the Defendants.[15] The trial courts rejected Plaintiffs' arguments and granted the Defendants' motions, holding that the statute of limitations had expired, and granting Judgment on the Pleadings in each case.[16]

Plaintiffs appealed, arguing the trial courts erred when holding their five wrongful death lawsuits were time-barred by the three-year limitation in section 537.100. *See Boland I*, 471 S.W.3d at 704-05. The Court of Appeals agreed and reversed, holding that

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[12] Gann L.F. at 203-09; Boland L.F. 2369-73 (App. at A33-A37). Harper L.F. at 4901-07; Pittman L.F. at 7191-97; Littrell L.F. at 9470-76.

[13] Gann L.F. at 226-36; Boland L.F. at 2500-10; Harper L.F. at 4924-34; Pittman L.F. at 7214-24; Littrell L.F. at 9494-9504.

[14] Gann L.F. at 228-29; Boland L.F. at 2502-03; Harper L.F. at 4926-27; Pittman L.F. at 7216-17; Littrell L.F. at 9496-97.

[15] Gann L.F. at 239; Boland L.F. at 2376; Harper L.F. at 4937; Pittman L.F. at 7226-27; Littrell L.F. at 9506-07.

[16] Gann L.F. at 244; Boland L.F. at 2381; Harper L.F. at 4942; Pittman L.F. at 7227-28; Littrell L.F. at 9507-08.

Plaintiffs' wrongful death claims did not accrue until the Plaintiffs could reasonably discover what had transpired.[17] This Court then accepted transfer of the five consolidated cases.

At oral argument in this Court, Plaintiffs' counsel opened his remarks with the following:[18]

> MR. MANNERS: May it please the Court. Your honors, I, as I think you know, I am Mike Manners, I'm on behalf of the Appellants here today, and there are some really esoteric and complicated legal issues involved in this case. And I fear sometimes that we lose sight of what brought us there to begin with, so I want to give you a very brief thumbnail sketch of why we're here and why I think this is an important case.
>
> We are here because – allegedly, and we have to assume it's true, the allegations of the Plaintiffs' Petitions – a respiratory therapist at the defendants' hospital purposefully injected patients, up to eight patients, with drugs for the purpose of killing them. This was not negligent. It was not an accident. It was for the purpose of causing their demise.
>
> Now, that's bad enough, but what happened afterwards is almost as bad, because the allegation is that after the killings took place, the defendants covered up what happened. They called in employees and told them to inform family members that their loved ones died of natural causes. They told them if they breathed a word of the truth about what happened to anybody outside the hospital, that they would be terminated from their employment, because it would bring undue attention, media coverage, and possible litigation to them if they told what really happened. So they

[17] Boland L.F. at 2540 (Opinion applied to all cases).

[18] The audio of the oral argument can be heard by clicking the link SC93906.mp3 set forth after "Listen to oral argument:" on the Court's website: https://www.courts.mo.gov/SUP/index.nsf/fe8feff4659e0b7b8625699f0079eddf/265ae77c7601987286257d1200624c99?OpenDocument (hereinafter "Oral Argument Recording"). Of course, 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*, 175 S.W.2d 889, 894 (1943).

> purposefully, fraudulently covered up what happened, and when it finally leaked out more than three years after the fact, and suit was brought against them, they said well, we have successfully covered up what happened, and therefore we are entitled as matter of law to assert the three year statute of limitations.[19]

Later, when asked if *Boland I* was an accrual case or tolling case, Plaintiffs' counsel responded:

> MR. MANNERS: I think it's both. And I don't know that it makes a whole lot of difference. I want to win, on this case, and frankly I don't care if you call it an accrual case or a tolling case. I think there's good arguments to be made for both of them. … You can call it tolling or you can call it equitable estoppel or you can call it Fred, I don't care, but the bottom line is there is an exception I think in the law for what the defendants did that is implicit in the statute of limitations for wrongful death.[20]

Most importantly, at the end of Plaintiffs' rebuttal argument, the following exchange occurred:

> MR. MANNERS: … But let me mention one other thing. It's interesting they cite a 1919 New Hampshire case which did not mention the 1849 case New Hampshire case that I cited. The interesting thing about that 1919 New Hampshire case was they said you can't bring a wrongful death action *but* they permitted the plaintiff to sue the defendant for fraud in depriving the plaintiff of the benefit of the wrongful death act because they concealed by fraudulent concealment the existence of the cause of action, and **we have pled fraud in our Petition below**.
>
> JUDGE'S QUESTION: A stand-alone count, separate from the wrongful death?
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> MICHAEL MANNERS: **Yes. It's kind of a, a muddle – but it's in there, Your Honor**.[21]

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[19] Oral Argument Recording at 0:00-1:44 (these numbers refer to the beginning and ending time for the quoted statements) (emphasis added).

[20] Oral Argument Recording at 2:12-2:24, 2:35-2:55.

[21] Oral Argument Recording at 37:43-38:24 (emphasis added).

This Court affirmed the trial court's decisions in *Boland I*, holding that *Frazee v. Partney*, 314 S.W.2d 915 (Mo. 1958), "remains good law and is directly on point in this case." *Boland I*, 471 S.W.3d at 711. The majority wrote that the three-year limitations period could not be tolled, adding that "the legislative branch of the government has determined the policy of the state and clearly fixed the time when the limitation period begins to run ... . Our function is to interpret the law; it is not to disregard the law as written by the General Assembly." *Id.* at 713 (quoting *Laughlin v. Forgrave*, 432 S.W.2d 308, 314 (Mo. banc 1968)).

On August 31, 2015, Plaintiffs filed a Motion for Rehearing, asking this Court to remand the case, asserting once again that the facts they pleaded "demonstrate, at the very least, fraud which has deprived Plaintiffs of their cause of action for wrongful death."[22] On October 27, 2015, this Court overruled Plaintiffs' Motion for Rehearing—refusing to remand the case. The Court also, on its own motion, modified its initial opinion by making a single change, to clarify that it was not "commenting on whether Plaintiffs have other viable remedies at law."[23]

[22] Gann L.F. at 290-91; Boland L.F. at 2564-65; Harper L.F. at 4988-89; Pittman L.F. at 7274-75; Littrell L.F. at 9554-55.

[23] *Compare* Boland I Opinion as issued on August 18, 2015, at L.F. 2727, *with Boland I*, 471 S.W.3d at 713.

III. Procedural history of the present cases

Nearly one year later, Plaintiffs filed the instant cases on October 18, 2016.[24] Each of their 2016 Petitions contained a single count denominated as "Fraudulent Concealment," claiming that the Defendants concealed the details of what transpired at Hedrick Medical Center in 2002, thereby preventing them from timely filing their wrongful death actions.[25] Thus, Plaintiffs are once again pursuing a claim for fraudulent concealment on the same historic facts as they did in the 2010-11 Petitions, though they are now arguing that their "Fraudulent Concealment" claim is separate and distinct from their claims in *Boland I*.[26]

Community Health Group and the Saint Luke's Defendants filed separate motions for summary judgment in each case, on March 2, 2017, and March 7, 2017, respectively.[27] All motions asserted a right to summary judgment on two grounds: the doctrine of res judicata, and the running of the five-year statute of limitations for fraud claims.[28] The trial court agreed with the Defendants on both issues and granted all

[24] Gann L.F. at 212; Boland L.F. at 2284 (App. at A40); Harper L.F. at 4910; Pittman L.F. at 7200 Littrell L.F. at 9480.

[25] Gann L.F. at 222-23; Boland L.F. at 2494-95 (App. at A50-A51); Harper L.F. at 4920-21; Pittman L.F. at 7210-11; Littrell L.F. at 9490-91.

[26] For example, on page 40 of their Substitute Brief, Plaintiffs argue that "[i]n her First Amended Petition Boland did not seek damages for the loss of her cause of action for the wrongful death of her father … ."

[27] Gann L.F. at 44, 179; Boland L.F. at 2319, 2453; Harper L.F. at 4742, 4877; Pittman L.F. at 7017, 7167; Littrell L.F. at 9295, 9446.

[28] *See id.*

motions for summary judgment on July 10, 2017.[29] Specifically, the court held that *res judicata* barred the instant suits because "the claim stated in the Second Lawsuit was and/or could have been brought in the First Lawsuit" as it derived from the same "act, contract or transaction."[30] The court further held that the five-year statute of limitations had run because Plaintiffs made the same allegations of fraud more than five years earlier in *Boland I*, so their claim for fraudulent concealment had accrued more than five years before the current petitions were filed.[31]

As occurred in *Boland I*, Plaintiffs appealed and the Court of Appeals reversed. The court held that the claims for fraudulent misrepresentation did not become a "ripe controversy" until this Court's Opinion in *Boland I*, so *res judicata* principles did not apply.[32] It also held that the Plaintiffs' causes of action for fraud did not accrue until this Court's Opinion in *Boland I* caused those claims to become ripe.[33] This Court then accepted transfer.

IV. The similarities in the 2010-11 Petitions and the 2016 Petitions

The factual allegations in the 2010-11 Petitions and the 2016 Petitions are extremely similar. Notably, other than describing the disposition of the *Boland I* cases,

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[29] Gann L.F. at 2251; Boland L.F. at 4684 (App. at A63); Harper L.F. at 6959; Pittman L.F. 9237; Littrell L.F. at 11515.

[30] Gann L.F. at 2254-58; Boland L.F. at 4677-81 (App. at A56-60); Harper L.F. at 6952-56; Pittman L.F. at 9229-34; Littrell L.F. at 11508-12.

[31] Gann L.F. at 2260; Boland L.F. at 4683 (App. at A62); Harper L.F. at 6958; Pittman L.F. at 9236; Littrell L.F. at 11514.

[32] App. at A71-A72.

[33] App. at A76-A77.

Plaintiffs did not include any allegations in their 2016 Petitions that referred to any factual events that occurred **after** they had filed their 2010-11 Petitions.[34] Some of the similarities between the Petitions in the two cases are as follows:

- Paragraph No. 15 of the **2010-11 Petitions** alleged: "Upon information and belief, Defendant Hedrick's employee(s) while acting in the course and scope of his/her/their employment, administered a lethal overdose of succinylcholine and/or insulin and/or other medication to Decedent prior to Decedent's death . . . ."[35]

- Paragraph 17 of the **2016 Petitions** alleged: "Hall, acting in the course and scope of her employment with Hedrick Medical Center, administered a lethal overdose of succinylcholine and/or insulin and/or other medication to several patients . . . ."[36]

- Paragraph No. 17 of the **2010-11 Petitions** alleged: "Upon information and belief, doctors, nurses, administrators and agents of Defendant Hedrick knew

[34] *See generally* Gann L.F. at 212-24; Boland L.F. at 2284-96 (App. at A40-A52); Harper L.F. at 4910-22; Pittman L.F. at 7200-12; Littrell L.F. at 9480-92.

[35] Gann L.F. at 193; Boland L.F. at 2357 (App. at A21); Harper L.F. at 4891; Pittman L.F. at 7181; Littrell L.F. at 9460.

[36] Gann L.F. at 216; Boland L.F. at 2288 (App. at A44); Harper L.F. at 4914; Pittman L.F. at 7204; Littrell L.F. at 9484.

that there were a number of suspicious deaths involving patients at Defendant Hedrick's facility."[37]

- Paragraph 40 of the **2016 Petitions** alleged: "Hedrick Medical Center possessed demonstrably superior knowledge of Hall's wrongful and tortious misconduct which resulted in the code events and/or death of several patients, including Decedent, as compared the knowledge possessed by Decedent and/or Plaintiff Sally Boland [or other name]."[38]

- Paragraph 91 of the **2010-11 Petitions** alleged: "That both Defendants [Hedrick and Health Midwest] were in a position of superior knowledge and had a duty to disclose to the families of Decedent and the patients at Defendant Hedrick the information they knew or by reasonable care should have known concerning the excessive number of deaths and codes in Defendant Hedrick's hospital."[39]
- Paragraph 45 of the **2016 Petitions** alleged: "Hedrick Medical Center knew that the survivors of the fatal victims of Jennifer Hall, including Plaintiffs in this cause, would be unable to learn the true facts surrounding the

[37] Gann L.F. at 194; Boland L.F. at 2358 (App. at A22); Harper L.F. at 4892; Pittman L.F. at 7181; Littrell L.F. at 9460.

[38] Gann L.F. at 219-20; Boland L.F. at 2291-92 (App. at A47-A48); Harper L.F. at 4917-18; Pittman L.F. at 7207-08; Littrell L.F. at 9487-88.

[39] Gann L.F. at 207; Boland L.F. at 2351; Harper L.F. at 4905; Pittman L.F. at 7195; Littrell L.F. at 9474. That same paragraph appears in the Boland First Amended Petition as Paragraph 97. (Boland L.F. at 2371-72, App. at A35-A36).

death of Decedent because that information was known solely to Defendants and their agents and because of the actions of Defendants to conceal such information as aforedescribed."[40]

- Paragraph 93 of the **2010-11 Petitions** alleged: "That Defendants Hedrick and Health Midwest committed the following acts and/or failed to act when they had a duty to do so, in the following manners:

    a) Threatened and coerced employees of Defendant Hedrick to conceal information concerning the actions of Jennifer Hall described above; and/or

    b) Defendants failed to request that autopsies be performed so as to conceal the true causes of the patients' deaths when they knew that there were a number of suspicious deaths that were occurring; and/or

    c) Informed and/or instructed employees of Hedrick to notify patient's families that the cause of death of Decedent and others were of "natural" causes instead of at the hands of Jennifer Hall; and/or

[40] Gann L.F. at 221; Boland L.F. at 2293 (App. at A49); Harper L.F. at 4919; Pittman L.F. at 7209; Littrell L.F. at 9487.

d) Defendants disbanded committees put in place by Defendant Hedrick to evaluate codes and determine preventative measures; and/or

e) Failed to inform pertinent individuals and relevant medical committees that had authority to act about Jennifer Hall's intentional and/or negligent battery of patients so that other medical personnel and committee members could act to prevent further harm by Jennifer Hall to the Decedent and others; and/or

f) Failed to investigate and/or monitor the activities of Jennifer Hall when requested to do so by law enforcement; and/or

g) Defendants removed patients' medical records so that they were not accessible by the patient's physicians; and/or

h) Defendants discarded and/or failed to preserve crucial material evidence contained in Jennifer Hall's locker pertaining to her intentional and/or negligent battery committed as described above; and/or

i) Defendants impeded the investigation of Jennifer Hall by law enforcement.[41]

[41] Gann L.F. at 207-08; Boland L.F. at 2351-52; Harper L.F. at 4905-06; Pittman L.F. at 7195-96; Littrell L.F. at 9474-75. The same allegations appear as Paragraph 99 in the Boland First Amended Petition. (Boland L.F. at 2372-73, App. at A36-A37).

- Paragraph 41 of the **2016 Petitions** alleged that "[t]his information and knowledge was not within the fair and reasonable reach of Decedent and/or Plaintiff Sally Boland, because Hedrick Medical Center":

    a) threatened and coerced its employees to conceal information concerning Hall's misconduct;

    b) failed to request autopsies in order to conceal Decedent's cause of death and that of other patients who coded or died under suspicious circumstances;

    c) informed and instructed its employees to notify patients' families that they died of "natural" causes rather than because of Hall's misconduct;

    d) disbanded internal committees put in place to investigate and evaluate code events and determine preventative measures;

    e) failed to inform the appropriate persons, authorities medical committees who had authority to act in response to Hall's misconduct;

    f) removed and concealed medical records that show Hall's wrongful and tortious conduct;

    g) destroyed or failed to preserve key physical evidence of Hall's wrongful and tortious conduct obtained from her locker; and

h) impeded law enforcement's investigation of Hall.[42]

ARGUMENT

Introduction

The Plaintiffs do not dispute any of the uncontroverted facts that formed the basis of the Defendants' Motions for Summary Judgment. The legal issues presented are whether the Plaintiffs' second lawsuits—which reasserted fraud claims Plaintiffs had included in their first lawsuits more than five years earlier—are barred by the doctrine of *res judicata* and/or the statute of limitations. The Defendants are entitled to summary judgment on both theories, as each provides an independent basis to affirm the trial court's grant of summary judgment.

Plaintiffs' current lawsuits are barred by the doctrine of *res judicata* because Plaintiffs litigated their first lawsuits against these same Defendants to an adverse final judgment which was affirmed by this Court. Their second lawsuits are based on the same set of operative facts that gave rise to their 2010-11 Petitions, and are therefore barred by *res judicata*. Even if one were to accept Plaintiffs' current effort to characterize their "Fraudulent Concealment" theory of liability as being somehow different from the fraudulent concealment claims they pleaded in their 2010-11 Petitions (despite Plaintiffs' prior representations that stand in opposition to their current effort), this Court should deny Plaintiffs a "second bite at the apple." Plaintiffs either did bring their present fraud claim in the first lawsuits, or they could have, and should have, brought their present

[42] Gann L.F. at 220-21; Boland L.F. at 2292 (App. at A48); Harper L.F. at 4918-19; Pittman L.F. at 7208-09; Littrell L.F. at 9488-89.

fraud claim in their first lawsuits. Under either scenario, allowing their second lawsuits to proceed would allow Plaintiffs to improperly split their causes of action. This Court, therefore, should affirm the judgments of the trial court.

Whether or not *res judicata* applies, the five-year statute of limitations on fraud claims clearly ran before Plaintiffs filed their second lawsuits. The statute of limitations for fraud is five years from discovery of the "facts constituting the fraud." Mo. Rev. Stat. §516.120.1(5). The same facts that form of the basis of Plaintiffs' fraud claims in the second lawsuits were pleaded in the first lawsuits—all of which preceded Plaintiffs' second lawsuits by more than five years. Because the facts constituting the alleged fraud were known when the first lawsuits were filed, Plaintiffs' second lawsuits are time-barred. Plaintiffs' argument that they had not been damaged by the fraud when they filed their first lawsuits is unavailing. Their ability to timely file a wrongful death cause of action expired in 2005—when the statute of limitations ran on their wrongful death claims—so the damage they now allege had already occurred when they filed their first lawsuits. In fact, Plaintiffs actually pleaded that they had been damaged by fraud at that time. The 2010-11 Petitions included counts for "Civil Conspiracy of Fraudulent Concealment" and for "Fraudulent Misrepresentation by Concealment." Plaintiffs clearly knew the facts that support their present claims when they filed their first lawsuits, so their second lawsuits are time-barred.

For these reasons, and those stated below, this Court should affirm the judgments of the Circuit Court of Lexington County.

Standard of Review

"The standard of review of appeals from summary judgment is essentially *de novo*." *Stacy v. Bar Plan Mut. Ins. Co.*, 522 S.W.3d 914, 917 (Mo. App. E.D. 2017). "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." *Throneberry v. Mo. State Highway Patrol*, 526 S.W.3d 198, 202 (Mo. App. 2017) (quoting *ITT Comm. Fin. Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993)). If the trial court's grant of summary judgment "is sustainable on any theory, it should be affirmed on appeal." *Id.* at 203.

Summary judgment is not disfavored, as the Missouri Supreme Court has stated there is no "doubt that summary judgments play an essential role in [the Missouri court] system." *ITT Commercial Finance Corp.*, 854 S.W.2d at 376. The Missouri Rules of Civil Procedure encourage the use of summary judgment "to permit resolution of claims as early as they are properly raised in order to avoid the expense and delay of meritless claims or defenses and to permit the efficient use of scarce judicial resources." *Id.* "Summary judgment is designed to permit the trial court to enter judgment, without delay, where the moving party has demonstrated, on the basis of facts as to which there is no genuine dispute, a right to judgment as a matter of law. *Id.* (*citing* Mo. Sup. Ct. R. 74.04).

I. Response to Point One: The trial court did not err when granting the Defendants' Motions for Summary Judgment because each of the Plaintiffs' lawsuits were barred by the doctrine of *res judicata*, in that fraud claims were—or, at least, should have been—included in the Plaintiffs' first lawsuits, which arose out of the same operative facts.

The first question presented in these consolidated appeals is whether the Plaintiffs can have a second bite at the apple, or whether the trial courts correctly applied the doctrine of *res judicata*. Defendants' Motions for Summary Judgment clearly showed that, under Missouri law, Plaintiffs are not afforded a second chance. This conclusion is supported by the uncontroverted facts, by the extensive Missouri precedent cited by Defendants, and also by an unambiguous admission by Plaintiffs' counsel to this Court.

A. The doctrine of *res judicata* has been broadly applied by Missouri courts to all subject matter properly belonging to the first litigation.

"The Latin phrase '*res judicata*' means 'a thing adjudicated.' The common-law doctrine of *res judicata* precludes relitigation of a claim formerly made." *Chesterfield Village, Inc. v. City of Chesterfield,* 64 S.W.3d 315, 318 (Mo. banc 2002) (*citing King General Contractors, Inc. v. Reorganized Church of Jesus Christ of Latter Day Saints*, 821 S.W.2d 495 (Mo. banc 1991), and *Norval v. Whitesell,* 605 S.W.2d 789, 790 (Mo. banc 1980)).

> *Res judicata* is based on the principle that a party should not be allowed to litigate a claim and then, after an adverse judgment, seek to relitigate the identical claim in a second proceeding…. The doctrine of *res judicata* provides:
>
> > [W]here two actions are on the same cause of action, the earlier judgment is conclusive not only as to matters actually determined in the prior action, but also as to other matters

> which could properly have been raised and determined therein.

Andes v. Paden, Welch, Martin & Albano, P.C., 897 S.W.2d 19, 21 (Mo. App. W.D. 1995) (citations omitted).

> Res judicata, or claim preclusion, "bars the same parties … from relitigating the same cause of action that has been previously adjudicated by a final judgment on the merits...." *Kinsky v. 154 Land Co., LLC*, 371 S.W.3d 108, 112 (Mo. App. E.D. 2012). The doctrine precludes the parties or privities from later bringing claims arising from the same set of facts *that could or should have been pursued* in the prior action. *See Kesterson v. State Farm Fire & Cas. Co.*, 242 S.W.3d 712, 715–16 (Mo. banc 2008); *see also Vogt v. Emmons*, 158 S.W.3d 243, 247 (Mo. App. E.D. 2005) ("The doctrine of res judicata renders conclusive a judgment in a subsequent action between the same parties *as to all issues which might have been litigated* in the first action, not only as to all issues tried." (emphasis added)). Accordingly, the doctrine applies "not only to points and issues upon which the court was required by the pleadings and proof to form an opinion and pronounce judgment, but to every point properly belonging to the subject matter of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time." [*King Gen. Contractors, Inc.*, 821 S.W.2d at 501]. The purpose of this rule is to protect individuals from the burden of litigating multiple lawsuits, to promote judicial economy, and to minimize the possibility of inconsistent decisions. *Lauber–Clayton, LLC v. Novus Props. Co.*, 407 S.W.3d 612, 618, 619 (Mo. App. E.D.2013); *Kinsky*, 371 S.W.3d at 112.

Xiaoyan Gu v. Da Hua Hu, 447 S.W.3d 680, 687 (Mo. App. E.D. 2014) (emphasis in original). "Claim preclusion 'prevents reassertion of the same claim even though additional or different evidence or legal theories might be advanced to support it.'" *Chesterfield Village*, 64 S.W.3d at 320 (citing James, Hazard & Leubsdorf, *Civil Procedure*, § 11.8, p. 684 (5th ed. 2001)).

"*Res judicata*, or its modern term, claim preclusion, prohibits 'splitting' a claim or cause of action. [*King General Contractors, Inc.*, 821 S.W.2d at 501]. Claims that could

have been raised by a prevailing party in the first action are merged into, and are thus barred by, the first judgment." *Chesterfield Village*, 64 S.W.3d at 318 (footnote omitted).

"Missouri has adopted a broad rule of res judicata. In Missouri, res judicata bars *every point and issue* properly belonging to the litigation that the parties *could have*, exercising reasonable diligence, brought forward at the time." *Xiaoyan Gu*, 447 S.W.3d at 688 (*emphasis in original*). "The doctrine of res judicata renders conclusive a judgment in a subsequent action between the same parties *as to all issues which might have been litigated* in the first action, not only as to all issues tried." *Id.* (*citing Vogt*, 158 S.W.3d at 247) (*emphasis in original*).

"To determine whether a claim is barred by a former judgment, the question is whether the claim arises out of the same "act, contract or transaction." *Chesterfield Village*, 64 S.W.3d at 318-19 (citing *Grue v. Hensley*, 210 S.W.2d 7, 10 (Mo. 1948); *King*, 821 S.W.2d at 501). "The word 'transaction' … has been defined as the aggregate of all the circumstances which constitute the foundation for a claim. It also includes all of the facts and circumstances out of which an injury arose." *Burke v. Doerflinger*, 663 S.W.2d 405, 407 (Mo. App. E.D. 1983) (citing *Grue*, 210 S.W.2d at 10).

> The term "transaction" has a broad meaning: *King General Contractors, Inc.* cites the Restatement (Second) of Judgments, section 24, which says that the "claim extinguished includes all rights of the plaintiff to *remedies* against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose."[43]

[43] Section 24 of the Restatement (Second) of Judgments states in full:

> (1) When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar (see secs. 18, 19), the

Chesterfield Village, 64 S.W.3d at 319 (*footnote and emphasis in original*).

> The key question is what is the "thing"—the claim or cause of action—that has previously been litigated? A claim is "[t]he aggregate of operative facts giving rise to a right enforceable by a court." The definition of a cause of action is nearly the same: "a group of operative facts giving rise to one or more bases for suing." Whether referring to the traditional phrase "cause of action" or the modern terms "claim" and "claim for relief" used in pleading rules such as Rule 55.05, the definition centers on "facts" that form or could form the basis of the previous adjudication.

Chesterfield Village, 64 S.W.3d at 318 (footnotes omitted).

> Generally, the test used to determine whether a cause of action is single and cannot be split is: (1) whether the separate actions brought arise out of the same act, contract or transaction, or (2) whether the parties, subject matter and evidence necessary to sustain the claim are the same in both actions. *Eugene Alper Constr. Co. v. Joe Garavelli's of West Port, Inc.*, 655 S.W. 2d 132, 135 (Mo. App. 1983). Missouri's strong bias against the splitting of claims arises from the judicial desirability of litigating all claims in one suit rather than wasting the court's time on separate lawsuits for separate claims between the same parties arising out of the same transaction. *Long v. Walters*, 833 S.W.2d 38, 39 (Mo. App. 1992). The purpose of the general rule against the splitting of claims is to discourage a multiplicity of lawsuits. *Id*. Adjudication of the first case, when the rule is applied, acts as a bar to the successful prosecution of the subsequent case. *Id*.

McCrary v. Truman Medical Center, Inc., 943 S.W.2d 695, 697 (Mo. App. W.D. 1997)

(barring a plaintiff's 402A strict liability tort action that was initiated after her first suit

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> claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.
>
> (2) What factual grouping constitutes a "transaction," and what groupings constitute a "series," are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.

for medical malpractice when implanting the device at issue was dismissed on the basis of the statute of limitations). "The rule against splitting a claim for relief serves to 'prevent a multiplicity of suits and appeals with respect to a single cause of action, and is designed to protect defendants against fragmented litigation, which is vexatious and costly.'" *Kesterson*, 242 S.W.3d at 716 (*citing Bagsby v. Gehres*, 139 S.W.3d. 611, 615 (Mo. App. E.D. 2004)).

B. Plaintiffs admitted to this Court that their 2010-11 Petitions alleged that Defendants' fraud caused them to lose the ability to timely file their wrongful death claims in *Boland I*.

The bulk of Appellants' Substitute Brief argues that their present causes of action are separate and distinct from what they pursued in *Boland I*, such that *res judicata* should not apply. Plaintiffs' concern over *res judicata* is warranted, since their position on this appeal stands in direct contrast to a representation made by their attorney to this Court during oral argument in *Boland I*:

> MR. MANNERS: … But let me mention one other thing. It's interesting they cite a 1919 New Hampshire case which did not mention the 1849 case New Hampshire case that I cited. The interesting thing about that 1919 New Hampshire case was they said you can't bring a wrongful death action *but* they permitted the plaintiff to sue the defendant for fraud in depriving the plaintiff of the benefit of the wrongful death act because they concealed by fraudulent concealment the existence of the cause of action, and **we have pled fraud in our Petition below**.
>
> JUDGE'S QUESTION: A stand-alone count, separate from the wrongful death?
>
> MICHAEL MANNERS: **Yes. It's kind of a, a muddle – but it's in there, Your Honor**.[44]

[44] Oral Argument Recording at 37:43-38:24 (emphasis added).

Plaintiffs reiterated that they pleaded facts that "demonstrate, at the very least, fraud which has deprived Plaintiffs of their cause of action for wrongful death" in their Motion for Rehearing.[45] Thus, Plaintiffs **admitted** in the *Boland I* appeal that they pleaded the **legal theory** that Defendants' fraud deprived them of their opportunity to timely file a wrongful death action as a "stand-alone count, separate from the wrongful death," and they admitted that the **factual basis** for that claim was part and parcel of their pleadings in the *Boland I* cases.

The significance of these admissions cannot be overstated, and should not be overcome. "An unequivocal admission in counsel's opening statement constitutes a judicial admission which is conclusive on the issue being admitted." *Fust v. Francois*, 913 S.W.2d 38, 46 (Mo. App. E.D. 1995). As "facts stated in appellate briefs may also be the foundation for judicial admissions," *Peace v. Peace*, 31S.W.3d 467, 471 (Mo. App. W.D. 2000) (*citing Ortmeyer v. Bruemmer*, 680 S.W.2d 384, 397 n.5 (Mo. App. W.D. 1984)), it stands to reason that a clear and unequivocal answer to a direct question from a Supreme Court judge should also constitute a judicial admission.

Again, the basis of Plaintiffs' argument that *res judicata* should not bar their second lawsuits is that cause of action is wholly separate and distinct from what they pleaded in their first lawsuits. As that premise stands in direct contradiction to the unambiguous representation Plaintiffs' attorney made to this Court, the judgments on the basis of *res judicata* should be affirmed.

[45] Gann L.F. at 290-91; Boland L.F. at 2564-65; Harper L.F. at 4988-89; Pittman L.F. at 7274-75; Littrell L.F. at 9554-55.

While "[f]acts stated in a brief in a prior appellate proceeding … are not binding and conclusive judicial admissions," those facts are nonetheless held to "constitute ordinary admissions against interest" that are admissible in subsequent proceedings. *Kansas City v. Keene Corp*., 855 S.W.2d 360, 373 (Mo. banc 1993) (*citing Mitchell Engineering Co. v. Summit Realty Co., Inc.*, 647 S.W.2d 130, 140-42 (Mo. App. W.D. 1982)). *Mitchell Engineering* held that "[w]hat we now decide and rule is that briefs from prior appellate proceedings are permissible sources of admissions against interest and as such … are admissible as competent and substantial evidence in subsequent trials or hearings." *Mitchell Engineering*, 647 S.W.2d at 142.

Thus, even if the statements Plaintiffs' counsel made to this Court are not deemed to rise to the level of a judicial admission, the clarity and context of those admissions should still constitute a hurdle which Plaintiffs cannot overcome – especially in light of the similarities extant between the petitions in the Plaintiffs' two lawsuits.

C. The operative facts in Plaintiffs' petitions from the *Boland I* cases are the same as those pleaded in support of the cause of action Plaintiffs are now attempting to pursue in their second lawsuits.

Although Plaintiffs' counsel acknowledged their petitions in the *Boland I* cases were "kind of a muddle," the content of those petitions nonetheless gave him a substantial basis to represent to this Court that Plaintiffs' "petition below" included a claim for "fraudulent concealment" "in depriving the plaintiff of the benefit of the wrongful death act" as a "stand alone count, separate from the wrongful death."[46] Plaintiffs accurately stated in their Motion for Rehearing that the factual basis for their

[46] Oral Argument Recording at 37:43-38:24.

current claim for fraud which deprived them of the ability to timely file their wrongful death cases was pleaded in their *Boland I* Petitions. However, Plaintiffs' current Brief, wrongly avers that "*all* of the counts of the First Amended Petition in the [first lawsuits] was *conduct that preceded and caused the death of Decedent.*" (App. Br. at 39) (emphasis in original). That simply is not true.

Plaintiff Sally Boland not only pleaded the death of Mr. O'Hara on February 3, 2002,[47] she further alleged there were attempts to "kill numerous patients" from "January 2002 to May 2002" and a "number of suspicious deaths involving patients."[48] Obviously, this pleading encompasses events spanning nearly four months **after** the death of Mr. O'Hara that **could not possibly** have caused his death. Plaintiff Boland then set forth conclusory allegations of the alleged cover-up,[49] which purportedly prevented her from ascertaining whether she had a cause of action against the defendants "until the filing of this petition" in 2011.[50] Obviously, since the death occurred in 2002 and Plaintiff Boland filed her Petition in 2011, these paragraphs reference conduct spanning more than nine years **after** the death of Mr. O'Hara which could not possibly have caused his death.

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[47] L.F. at 2357, ¶ 12 (App. at A21).

[48] L.F. at 2357-58, ¶¶ 14, 17 (App. at A21-A22).

[49] L.F. at 2358, ¶¶ 17-22 (App. at A22).

[50] L.F. at 2358, ¶ 23 (App. at A22). How the "filing of this petition" somehow enabled Plaintiff Boland (and the other Plaintiffs) to learn that their respective causes of action existed is in no way explained, and is obviously of dubious logic—if it was the filing of the Petition that caused Plaintiffs to learn they had a cause of action, then how could they have learned they had a cause of action so as to file their Petitions?

These events, pleaded as "General Facts" in Plaintiff Boland's First Amended Petition in *Boland I*, occurred after her decedent's death and could not have caused his death. However, they did provide a **factual basis**[51] for claiming that Defendants fraudulently deprived Plaintiff Boland ("and others")[52] of the ability to timely file a wrongful death case. Plaintiff further expounded on the factual bases for her fraud claims thereafter, such as in Paragraph 37, which alleged various actions characterized as "fraudulent concealment."[53]

Plaintiffs concede four counts of their Petitions "allege some kind of concealment by Defendants." (App. Br. at 39). They cannot help but make such a concession, as three of those counts are clearly premised on, if not denominated as, "fraud." After incorporating by reference all prior allegations made in her Petition, Plaintiff Boland pleaded the following pertinent allegations in Count VI, which she denominated as "Civil Conspiracy of Fraudulent Concealment":

> 70. Upon information and belief **Defendants**, by and through their agents, servants and employees, **conspired to conceal** and withhold

[51] Appellants' correctly cite *Kesterson*, 242 S.W.3d at 716, for the proposition that, "[i]n deciding whether an action arises out of the same act or transaction that was the subject matter of an earlier lawsuit, courts look at the factual bases for the claims, not the legal theories." (*See* App. Br. at 29).

[52] Each of the fraud counts of Plaintiff Boland's First Amended Petition included an allegation that the acts and/or omissions of the defendants were done with "complete indifference to and conscious disregard for the safety of Decedent *and others*." (*See* L.F. at p. 2369, ¶ 82; p. 2370, ¶ 90; p. 2372 ¶ 102 (App. at A33-A36)). Thus, the scope of her pleading was broader than just seeking damages for aggravating circumstances attending the death of Charles O'Hara, as the prayer for relief sought exemplary damages for fraud in depriving "others" from timely filing her claims for wrongful death.

[53] L.F. at 2360-61 (App. at A24-A25).

knowledge of **Jennifer Hall's intentional** and/or negligent **misconduct** as described above **to benefit their business entities**.

* * *

73. **That Defendants concealed from** the decedent and **the plaintiff** the suspicion activities [sic] of Jennifer Hall both prior to **and after decedent's** admission to Hedrick and **death**.

74. **That Defendants failed** to inform the decedent **and the plaintiff of the suspicious circumstances surrounding Charles O'Hara's death** and Jennifer Hall's involvement in the same.

* * *

82. **The acts and/or omissions of these Defendants were done with complete indifference to and conscious disregard for the safety of** Decedent and **others**.

WHEREFORE, Plaintiff prays for judgment … that will fairly compensate Plaintiff for the wrongful death of CHARLES O'HARA, … for **exemplary damages and for such other and further relief as this Court may deem just and proper**.[54]

Thus, not only did Plaintiff Boland clearly plead conduct that occurred **after** the death of decedent Charles O'Hara, she did so for the purpose of seeking not only damages for wrongful death, but also as a basis to obtain an award of "exemplary damages," per the *ad damnum* clause of Count VI.

Similarly, in Count VII of Plaintiff's First Amended Petition, denominated "Civil Conspiracy," after incorporating all prior allegations,[55] Plaintiff Boland pled:

84. Upon information and belief **Defendants**, by and through their agents, servants and employees, **conspired to retain** Jennifer Hall in Defendant Hedrick's employment **so as to conceal her intentional** and/or

[54] L.F. at 2367-69 (App. at A31-A33) (emphasis added).

[55] L.F. at 2369 (App. at A33).

> negligent **misconduct** as described above **to benefit their business entities**.
>
> 85. Upon information and belief **Defendants**, by and through its agents, servants and employees, **conspired to fraudulently conceal information from patients and the general public** about Jennifer Hall's negligent and/or intentional actions.
>
> 86. Upon information and belief, these Defendants each had a meeting of the minds on keeping Jennifer Hall in Defendant Hedrick's employ and further knowingly and intentionally formulated a course of action to [sic] concerning Jennifer Hall's intentional and/or negligent battery of **patients**, including Decedent.
>
> * * *
>
> 90. **The acts and/or omissions of these Defendants were done with complete indifference to and conscious disregard for the safety of** Decedent and **others**.
>
> **WHEREFORE, Plaintiff prays for judgment** … that will fairly compensate Plaintiff for the wrongful death of CHARLES O'HARA, … **for exemplary damages, and for such other and further relief as this Court may deem just and proper**.[56]

Of note, an alleged civil conspiracy is not in and of itself actionable, and requires some unlawful act be done by the conspirators. *Blaine v. J.E. Jones Const. Co.* 841 S.W.2d 703, 713 (Mo. App. E.D. 1992). Thus, it seems clear that by this Count Plaintiff Boland sought exemplary damages on the basis of the alleged "conscious disregard for the safety of … **others**" by concealing information from **"patients and the general public"**—not just Charles O'Hara or the Plaintiff herself.

[56] L.F. at 2370-71 (App. at A34-A35) (emphasis added).

Finally, in Count VIII of Plaintiff's First Amended Petition—denominated "Fraudulent Misrepresentation by Concealment" —after incorporating all prior allegations made in the Petition,[57] Plaintiff Boland pleaded:

> 92. That [Defendants] each knew of the dangers and risks attributed to admission into the Defendant Hedrick's hospital because of the inordinate number of deaths and codes that were occurring in said hospital during the time period of January 2002 **to May 2002**.
>
> * * *
>
> 95. The decedent and his family and **others had no opportunity to make an informed decision as to whether or not they wanted to be admitted to the hospital for care and treatment because of the concealment of information by Defendants**.
>
> 96. **That Defendants had a duty to protect their patients** and disclose information **to patients and the general public** about Jennifer Hall's negligent and/or intentional actions.
>
> 97. That both **Defendants** were in a position of superior knowledge and **had a duty to disclose to the families of** Decedent and **the patients at Defendant Hedrick** the information they knew or by reasonable care should have known concerning **the excessive number of deaths and codes** in Defendant Hedrick's hospital.
>
> 98. **That Defendants fraudulently concealed this information from** Decedent and **others** to prevent negative publicity, **to further their business interests, to increase their collection of revenues and to promote corporate interests of each Defendant without regard to the safety of** the Decedent and **others**.
>
> * * *
>
> 102. The acts and/or omissions of these Defendants were done with complete indifference to and conscious disregard for the safety of Decedent **and others**.

[57] L.F. at 2371 (App. at A35).

> WHEREFORE, Plaintiff prays for judgment … that will fairly compensate Plaintiff for the wrongful death of CHARLES O'HARA, … for **exemplary damages, and for such other and further relief as this Court may deem just and proper**.[58]

Thus, once again, Plaintiff Boland sought exemplary damages on the basis of the alleged "conscious disregard for the safety of … **others**" by concealing information from "**patients and the general public**"—not just Charles O'Hara or the Plaintiff herself.

The foregoing citations make it clear that Plaintiff Boland intended the Counts in her First Amended Petition to be broader in scope than just seeking recovery for those damages allowed by the wrongful death statute for only those events that preceded the alleged wrongful death of Charles O'Hara. The emphasis her First Amended Petition placed on the alleged cover-up, its consistent references to "**others**" aside from Plaintiff Boland and decedent O'Hara, the inclusion of events occurring months after O'Hara's death, and the prayer for separate elements of damage not recoverable under the wrongful death statute, all belie Plaintiffs' current declaration that their first lawsuits were "limited in scope" to just seeking wrongful death damages for the death of their individual decedents.

Plaintiffs wrongly maintain that "[t]he *ad damnum* clause of each count sought damages for the *wrongful death* of Mr. O'Hara" and only that wrongful death. (App. Br. at 39-40). The *ad damnum* clause in each fraud count sought "exemplary damages," as a distinct element of recovery, in addition to damages allowable under the wrongful death statute. Notably, "exemplary damages" is **not** a phrase found in Missouri's Wrongful

[58] L.F. at 2372-73 (App. at A36-A37) (emphasis added).

Death Act. *See* Mo. Rev. Stat. §537.090. Clearly, Plaintiffs intended to pursue punitive damages, arising out of the alleged cover-up, on a broader scale than just "aggravating circumstances attending the death" of each individual decedent in the *Boland I* cases. This conclusion is buttressed by the introductory comments of Plaintiffs' counsel to this Court at the oral argument in *Boland I* after alleging that Jennifer Hall purposefully killed patients: "Now that's bad enough, but what happened afterwards is almost as bad, because the allegation is that after the killings took place, the defendants covered up what happened."[59]

Even if one ignores the plain language utilized by Plaintiff Boland in her prayer for "exemplary damages," and construes that request to seek damages only for aggravating circumstances under the Wrongful Death Statute, Plaintiffs' prayers for general relief still support the application of *res judicata*. *See Siesta Manor, Inc. v. Community Federal Sav. & Loan Ass'n.*, 716 S.W.2d 835, 839 (Mo. App. E.D. 1986) (holding Siesta's second action for legal relief—which was filed after it had litigated an equitable action to set aside a foreclosure to a final judgment—was barred by *res judicata* even though only an equitable remedy being overtly pursued by Siesta in its first lawsuit. "By including a prayer for general relief in its petition, Siesta cannot now deny seeking legal relief if that is what the court deemed appropriate.").

Thus, although Plaintiff Boland's First Amended Petition did not expressly state that she was seeking damages for the fraudulent deprivation of her ability to timely file a wrongful death action, there can be no doubt of Plaintiffs' intent to bring such fraud

[59] Oral Argument Recording at 0:49-1:01.

claims. As discussed above, in the prior appeal, counsel argued to this Court that the Plaintiffs had pleaded an **independent** count for fraud below**,** premised on **the loss of their wrongful death actions.**[60]

The foregoing belies Plaintiffs' argument that the Defendants are trying "to artificially broaden the scope of what was included" in *Boland I.* (App. Br. at 52). The Defendants are merely reiterating the Plaintiffs' own characterization of those same claims, as unequivocally represented to this Court by Plaintiffs' counsel. As "muddled" as Plaintiffs' petitions may have been in the first lawsuits, they clearly encompassed the same cause of action Plaintiffs are now trying to pursue, as their attorney admitted. The trial court, therefore, correctly held that *res judicata* bars Plaintiffs' second lawsuits.

D. Well-established Missouri law supports applying *res judicata* to prohibit Plaintiffs from splitting their causes of action, as they had a full and fair opportunity to litigate all of their claims to a final judgment on the merits in the first lawsuits, as the four identities are met, and as their second lawsuits did not allege any new facts that arose after they filed the first lawsuits.

Appellants' Brief spends a great deal of time discussing the jurisprudence of *res judicata*, in what appears to be an effort to complicate or impugn its application. But the policies supporting the application of *res judicata* have long been supported by this Court. As this Court observed as early as 1898, "the court requires the parties to bring forward their whole case … which the parties, exercising reasonable diligence, might have brought forward at the time." *Donnell v. Wright*, 147 Mo. 639, 49 S.W. 874, 875 (1898) ("[T]he tendency of the American cases is to regard all the issues which might

[60] Oral Argument Recording at 37:43-38:24.

have been raised and litigated in any case to be as completely barred as if they had been directly adjudicated and included in the verdict."). For that reason, in *Kelly v. City of Cape Girardeau*, 89 S.W.2d 41 (1935), this Court stated:

> We therefore hold that when plaintiff brought suit for a part only of his claims for damages which had accrued in 1927 when the last former suit was filed, he is barred from claiming damages for overflows to his property which had occurred prior to the date said former suit was filed. * * * The idea of harrassing [sic] a defendant by splitting a cause of action has ever been condemned in this state. Plaintiff having seen proper to sue for only a part of the damages that had accrued from a single tort, is barred, we think, from recovery for damages which he voluntarily renounced or omitted from his former suit.

Id. at 43-44.

Plaintiffs' second lawsuits are barred by *res judicata* because they brought the same claim in their first lawsuits. Whether analyzed under the prohibition against splitting a cause of action or claim preclusion, Plaintiffs' second lawsuits cannot survive Missouri's "broad rule of res judicata." *Xiaoyan Gu*, 447 S.W.3d at 688. There is no disputing that the second lawsuits represent the second iteration of the same claim, as Plaintiffs have admitted time and time again.[61]

[61] *See, e.g.*, Plaintiffs' counsel's admission during oral argument in *Boland I, supra*; Plaintiffs' Motion for Rehearing in *Boland I, supra*; Paragraph 49 of Plaintiffs' 2016 lawsuits (L.F. at 2294) (pleading that the actions in the *Boland I* cases "arose out of the same conduct by Hall giving rise to the case at bar"); App. Br. at 11 (acknowledging the "considerable overlap between the First Amended Petition from the first suit and the fraud petition in the second suit").

1. The "Four Identities" are met.

Because there was a final judgment "on the merits" in the first lawsuits when the Missouri Supreme Court issued its Mandate in *Boland I*,[62] *res judicata* bars Plaintiffs' second lawsuits.[63] In *Prentzler v. Schneider*, 411 S.W.2d 135 (Mo. banc 1966), the Supreme Court held that, in order to sustain a bar of *res judicata*, these four elements must be present:

> (1) [i]dentity of the thing sued for;
> (2) identity of the cause of action;
> (3) identity of the persons and parties to the action; and
> (4) identity of the quality of the person for or against whom the claim [of *res judicata*] is made.

Andes, 897 S.W.2d at 23. All "Four Identities" are met in the cases on appeal:

> (1) The **identity of the thing sued for** is the same, as both lawsuits put forth a theory of liability for "fraudulent concealment" and seek compensatory damages and punitive damages arising out of the deaths at Hedrick Medical Center in 2002 and the alleged fraudulent cover-up thereof.[64]

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[62] Gann L.F. at 145; Boland L.F. at 2419; Harper L.F. at 4843; Pittman L.F. at 7133; Littrell L.F. at 9412.

[63] "The dismissal of an action based upon the running of the statute of limitations is a final adjudication on the merits for purposes of *res judicata.*" *Snelling v. Kenny*, 491 S.W.3d 606, 615, 614 (Mo. App. E.D. 2016) ("To any extent that these issues or arguments were not directly resolved in the prior appeals, they arise out of the same set of operative facts and thus they are equally barred, as they could have been brought in the prior appeals.").

[64] *See* Facts 6, 14 & 25 of CHG's Motions for Summary Judgment (Gann L.F. at 47, 50, 58; Boland L.F. at 2322, 2325, 2332; Harper L.F. at 4745, 4748, 4755; Pittman L.F. at 7020, 7023, 7031; Littrell L.F. at 9298, 9301, 9309).

(2) The **identity of the cause of action**[65] is indistinguishable, as demonstrated by the similar factual averments pleaded in the General Allegations of both lawsuits, and as candidly admitted in the Petitions from the second lawsuits: "The actions in *Boland* arose out of the same conduct by Hall giving rise to the case at bar."[66]

(3) The **identity of the persons and parties to the action** are identical.

(4) The **identity of the quality of the person for or against whom the claim is made** is likewise identical, as each Plaintiffs' right to sue arises out of their relationships with decedents in each case.

As in *Andes*, all "Four Identities" of *res judicata* are met, and claim preclusion applies. In *Andes*, the defendants were dismissed from a federal litigation on the basis of the statute of limitations. *Andes*, 897 S.W.2d at 20-21. The Plaintiffs' present counsel successfully argued that *res judicata* applied to bar a subsequent state action, as the "four identities" were met. The "thing sued for" was identical, as the plaintiff sought actual and punitive damages in each case. *Id*. at 23. The "identity of the cause of action" was also met, as the "modern test of a 'claim" … is whether the claims arose out of the same act, contract or transaction." *Id*. "The term 'transaction' is broadly construed to include all of the facts and circumstances which constitute the foundation of a claim." *Id*. Even

[65] The "identity of the cause of action" has defined as "the underlying facts combined with the law, giving a party a right to a remedy of one form or another based thereon." *State* ex rel. *J.E. Dunn Const. Co. v. Fairness in Construction*, 960 S.W.2d 507, 514 (Mo. App. W.D. 1997) (as modified 1998).

[66] *See id.* at Fact 26 (Gann L.F. at 58; Boland L.F. at 2332; Harper L.F. at 4756; Pittman L.F. at 7031; Littrell L.F. at 9309). *See also supra*, pp. 20-26.

though the federal suit was brought under a federal wiretap statute, while the state case was based on common law claims, the claims were held to be identical because they both arose out of the interception of telephone conversations, and "separate legal theories are not to be considered as separate claims." *Id*. at 23-24. As all four identities were met, *id.* at 24, the court held that *res judicata* barred the state suit "because the plaintiff could have raised the present state claims in the federal court but declined to do so …" *Id*. at 25.

Similarly, in the cases on appeal, Plaintiffs' lawsuits arose out of the same "broadly construed" transaction. Both Plaintiffs' first and second lawsuits alleged fraud and the wrongful death of a decedent as necessary components to state a claim for relief, and both lawsuits sought essentially the same relief:

- The first lawsuits alleged that wrongful deaths occurred in 2002, and that the Defendants engaged in a cover-up then and thereafter, praying for consequential damages under the Wrongful Death Act as well as "exemplary damages" and other relief.
- The second lawsuits alleged that the Defendants covered up wrongful deaths in 2002, so as to fraudulently deprive Plaintiffs of their ability to timely file wrongful death actions, praying for consequential damages

including the loss of her ability to recover damages under the Wrongful Death Act, as well as punitive damages and other relief.[67]

Thus, the "operative facts" in each case included *both* the wrongful deaths and the claimed cover-up, and only when considered in concert could the allegations provide Plaintiffs a viable route to recover all of the damages sought in either case.

2. There were no new operative facts arising after the first lawsuits.

"For a subsequent claim on the same transaction to be considered separate, 'there must be new ultimate facts, as opposed to evidentiary details, that form a new claim for relief.'" *Kesler v. The Curators of the University of Missouri, et al*, 516 S.W.3d 884, 891 (Mo. App. W.D. 2017)[68] (*citing Kesterson*, 242 S.W.3d at 716). "To constitute 'new' ultimate facts, those facts that form the basis of a new claim for relief must be unknown to plaintiff or yet-to-occur at the time of the first action." *Id*. (*citing Chesterfield Vill.*, 64 S.W.3d at 320). For *res judicata* to apply, "it is not necessary that all of [plaintiff's] allegations were actually litigated" in the first suit, it "is sufficient that the claims [in the second suit] consisted of facts that formed or could have formed the basis of the previous adjudication." *Id*. at 892-93 (*citing Chesterfield Vill.*, 64 S.W.3d at 318). "[A]ll possible damages do not have to be known, or even knowable, before the statute accrues" as "claims accrue when a reasonable person would have been put on notice that an injury

[67] *Compare* Facts No. 9 & 24 to Defendant CHG's Motion for Summary Judgment (Gann L.F. at 47-49, 52-58; Boland LF. at 2322-24, 2327-32; Harper L.F. at 4745-47 & 4750-55; Pittman L.F. at 7020-22, 7025-31; Littrell L.F. at 9298-30, 9303-09).

[68] *Kesler* is examined in detail in Defendant Community Health Group's Notice of Additional Recent Authority that was filed in the trial courts on May 3, 2017. Gann L.F. at 2213 *et seq.*; Boland L.F. at 4607 *et seq.*; Harper L.F. at 6911 *et seq.*; Pittman L.F. at 9189 *et seq.*; Littrell L.F. at 11467 *et seq.*

and substantial damages may have occurred and would have undertaken to ascertain the extent of damages." *Id*. at 893 (*citing Powel v. Chaminade Coll. Preparatory Inc.*, 197 S.W.3d 576, 584 (Mo. banc 2006)). This Court has long held that, even for separate claims under a single continuing contract, though one may sue for each as it matures, a plaintiff "must include all such claims as had come due when the action was brought." *Grue*, 210 S.W.2d at 599.

As no new operative **facts** occurred after Plaintiffs filed their first actions, they cannot split their claim, as they are attempting to do in their second lawsuits. That both of Plaintiffs' lawsuits constitute the same "claim" is demonstrated by these unassailable realities:

1) Plaintiffs **admit** that their lawsuits constitute the same claim, as their 2016 Petitions state: "The actions in *Boland* arose out of the **same conduct** by Hall **giving rise to the case at bar.**"[69]
2) With the sole exception of referencing the Missouri Supreme Court's final adjudication of the first lawsuits, all of the "facts" pleaded in the second lawsuits occurred **before** Plaintiffs filed their initial lawsuits; as such, **no new facts** occurred after their first lawsuits were filed that form the basis of their second lawsuits.[70]

[69] *See* Fact 26 of CHG's Motions for Summary Judgment Fact (Gann L.F. at 58; Boland L.F. at 2332-33; Harper L.F. at 4756; Pittman L.F. at 7031; Littrell L.F. at 9309) (emphasis added).

[70] *See* Facts 24 & 29 to CHG's Motions for Summary Judgment (Gann L.F. at 52-58; Boland L.F. at 2327-33; Harper L.F. at 4740-56; Pittman L.F. at 7025-31; Littrell L.F. at 9309-10).

3) The allegations of fraud and wrongful death integral components to both the Plaintiffs' first lawsuits and second lawsuits.

4) There is **nothing** that prevented the Plaintiffs from pursuing their current "Fraudulent Concealment" theory in the first lawsuits. To the contrary, Plaintiffs told this Court they **did** plead that theory in their first lawsuits, which had counts denominated as "Fraudulent Misrepresentation by Concealment" and "Civil Conspiracy of Fraudulent Concealment."[71]

5) Plaintiffs represented to this Court in *Boland I* that they had included a stand-alone claim for fraudulent nondisclosure in their first lawsuits, or had made factual allegations which "demonstrate, at the very least, fraud which has deprived Plaintiffs of their cause of action for wrongful death."[72]

As Plaintiffs' present actions are not based on any **new** facts and are virtually indistinguishable from their prior actions, they are barred by the doctrine of claim preclusion. "Claim preclusion … applies to 'every point properly belonging to the subject matter of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.'" *Kesterson*, 242 S.W.3d at 715-16 (emphasis in original; quoting *King General Contractors, Inc.*, 821 S.W.2d at 501). "Stated another way, 'a party may not litigate an issue and then, upon an adverse verdict, revive the claim on cumulative grounds which could have been brought before the court in the first

[71] *See* Fact 14 to CHG's Motions for Summary Judgment (Gann L.F. at 50; Boland L.F. at 2325; Harper L.F. at 4748; Pittman L.F. at 7023; Littrell L.F. at 9301).

[72] *See* Fact 18 to CHG's Motions for Summary Judgment (Gann L.F. at 51; Boland L.F. at 2326; Harper L.F. at 4749; Pittman L.F. at 7024; Littrell L.F. at 9302).

proceeding.'" *Jordan v. Kansas City*, 929 S.W.2d 882, 887 (Mo. App. W.D. 1996). This Court has long held that "under the broad policies of the law, … those issues which are germane and should or might naturally have been tendered are precluded by judgment once for all … under the doctrine of the thing adjudged, which belong to the subject of the litigation, and which, by the exercise of reasonable diligence, might have been brought forward at the time." *Cantwell v. Johnson*, 139 S.W. 365, 375 (Mo. 1911) (applying *res judicata* to bar a plaintiff's subsequent case "which, by the exercise of reasonable diligence, might have been brought forward" earlier).

E. The trial court correctly applied the well-established doctrine of *res judicata*.

Plaintiffs argue 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." (App. Br. at 24). In support of this contention, Plaintiffs cite only a portion of the "Conclusions of Law" from the Judgments before arguing "[e]ssentially, 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) …" and thereby "transmogrified Rule 55.06(a) from a permissive to a mandatory joinder rule." (*Id.*). Plaintiffs' argument is simply wrong. Nowhere in any Judgment was the permissive joinder rule cited or discussed.[73] The various precedents cited by the trial court were controlling authority that were directly on point for the issue of *res judicata*.

[73] Gann L.F. at 2251-61; Boland L.F. at 4674-84; Harper L.F. at 6949-59; Pittman L.F. at 9227-37; Littrell L.F. at 11505-15.

Nor was any Judgment based solely on the possibility of joinder. Plaintiffs' argument ignores that, immediately after the heading "Conclusions of Law," the trial court stated "the Second Lawsuit is barred by the doctrine of claim preclusion, as the claim stated in the Second Lawsuit **was and/or could have been brought** in the First Lawsuit.[74] Thereafter, the Judgments stated Plaintiffs "did bring 'claims' for fraudulent concealment in the First Lawsuit":

> The First Lawsuit included counts denominated as Civil Conspiracy of Fraudulent Concealment and Fraudulent Misrepresentation by Concealment, in which Plaintiff affirmatively alleged that the Defendants concealed information about Hall's wrongdoing to protect their business interests, to the detriment of the Plaintiff and Decedent, so as to give rise to civil liability. **Thus, Plaintiff did bring "claims" for fraudulent concealment in the First Lawsuit** …"[75]

As the trial court properly recognized, either the doctrine of *res judicata* or the related rule against splitting a cause of action would preclude Plaintiffs from bringing their claims (or different theories of liability) in piecemeal fashion. *King*, 821 S.W.2d at 501.

This conclusion in the Judgment was appropriately based on operative facts from the first lawsuits. Finding of Fact No. 4 stated: "Plaintiff pled in the First Lawsuit that Defendants' fraudulent concealment prevented Plaintiff from knowing the cause of action existed at the time of the Decedent's death. The Petition alleged that this fraud damaged

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[74] Gann L.F. at 2254; Boland L.F. at 4677; Harper L.F. at 6952; Pittman L.F. at 9230; Littrell L.F. at 11508 (emphasis added).

[75] Gann L.F. at 2256; Boland L.F. at 4679; Harper L.F. at 6955; Pittman L.F. at 9233; Littrell L.F. at 11510 (emphasis added). Again, this is the same posit Plaintiffs' counsel related to this Court at oral argument in *Boland I*.

Plaintiff … ."[76] Finding of Fact No. 8 noted that the petitions in the second lawsuits alleged "that fraudulent concealment by Defendants prevented Plaintiff from timely filing a wrongful death cause of action …" and that "[t]he actions in *Boland [I]* **arose out of the same conduct** by Hall giving rise to the case at bar."[77]

Thus, the trial court appropriately considered the factual bases for the Plaintiffs' claims when concluding they "did bring 'claims' for fraudulent concealment in the First Lawsuit which were litigated to final judgment."[78] While the trial court further stated that the rule against splitting a cause of action would also apply to bar claims or theories of liability arising out of the same broadly construed "act, contract or transaction" that **could** have been brought in the first lawsuits, it is clear the rule against splitting a cause of action was not the only basis for the Judgments.

The trial courts neither mischaracterized nor misapplied Missouri law regarding either *res judicata* or the rule against splitting a cause of action. Notably, Plaintiffs in no way argue that the trial court relied on any invalid or inappropriate precedent. Rather, throughout the Judgment the trial court appropriately cited controlling precedent, including the following propositions:

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[76] Gann L.F. at 2252; Boland L.F. at 4675; Harper L.F. at 6950; Pittman L.F. at 9228; Littrell at 11506.

[77] Gann L.F. at 2253; Boland L.F. at 4676; Harper L.F. at 6951; Pittman L.F. at 9229; Littrell L.F. at 11507 (emphasis added).

[78] Gann L.F. at 2256; Boland L.F. at 4679; Harper L.F. at 6954; Pittman L.F. at 9232; Littrell L.F. at 11510.

- To assess whether a case derives from the same "act, contract, or transaction" as a prior case so as to apply *res judicata*, Missouri Courts consider the four identities. (Judgment, p. 5, *citing Andes*, 897 S.W.2d 23).[79]
- "Missouri law is clear that alleging new theories of liability or characterizations of damages does not create a new cause of action." (Judgment at 6, *citing Chesterfield*, 64 S.W.3d at 319-20).[80]
- "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." (Judgment at 6, *citing Johnson Controls, Inc., v. Trimmer*, 466 S.W.3d 585, 593 (Mo. App. W.D. 2015) (*quoting King*, 821 S.W.2d at 501)).[81]
- "Plaintiff cannot assert or reassert the current theory of liability in a second lawsuit ... ." (Judgment at 8, discussing *Kesler*, 516 S.W.3d 884).[82]

In short, the trial court appropriately construed the law when applying it to the factual bases of Plaintiffs' first and second lawsuits and when determining that the second lawsuits were barred by the doctrine of *res judicata*.

[79] Gann, L.F. 2255; Boland, L.F. 4678; Harper, L.F. 6953; Pittman, L.F. 9231; Littrell 11509.

[80] Gann, L.F. 2256; Boland, L.F. 4679; Harper, L.F. 6954; Pittman, L.F. 9232; Littrell 11510.

[81] Gann, L.F. 2256; Boland, L.F. 4679; Harper, L.F. 6954; Pittman, L.F. 9232; Littrell 11510.

[82] Gann, L.F. 2258; Boland, L.F. 4681; Harper, L.F. 6956; Pittman, L.F. 9234; Littrell 11512.

F. Plaintiffs seek to misapply the doctrine of *res judicata* and fail to recognize Missouri's broad view as to what constitutes a "transaction."

It is actually Plaintiffs who consistently attempt to shift the focus away the proper analysis of *res judicata* under Missouri law. Despite acknowledging that their first lawsuits pleaded facts to support their current "fraudulent deprivation of the ability to timely file a wrongful death claim" theory of liability, Plaintiffs argue that their causes of action in the second lawsuits are different from those in their first lawsuits. Their argument fails as they continually ignore Missouri's broad view of what constitutes a "transaction" for purposes of *res judicata*.

> In order to have identity of the cause of action, the actions do not have to be identical, but the claims must have arisen out of the "same act, contract or transaction." The term "transaction" is to be broadly construed and includes "all of the facts and circumstances which constitute the foundation of a claim."

Jordan, 929 S.W.2d at 886 (*citing Andes*, 897 S.W.2d at 23).

Plaintiffs' argument that "the evidence necessary to sustain their respective claims for relief for wrongful death and fraud is different," (App. Br. at 47), fails, as it inappropriately attempts to shift the focus away from the nature of the transaction sued upon to whether the evidence is the same under both theories of liability:

> Although the [plaintiffs] recognize that for purposes of *res judicata*, the term "transaction" is broadly construed, they consistently attempt to shift focus away from an assessment of the nature of the transaction and towards a consideration of whether the evidence is the same in both actions. The [plaintiffs'] focus on the "sameness" of the evidence, however, is misplaced. As the Supreme Court has held, "we find no authority for appellant's contention that her two demands cannot be regarded as split parts of a single cause of action unless both the *same* evidence and measure of *damages* apply to each." *Grue v. Hensley, 357 Mo. 592, 210 S.W.2d 7, 10 (1948)* (emphasis in original). Rather, "the character of the evidence

> must be such as to preserve the *general identity* of the transaction." *Id.* (emphasis in original).

Becker v. St. Charles Boat & Motor Inc., 131 S.W.3d 868, 871 (Mo. App. E.D. 2004). The *Becker* Court noted that this Court defines "cause of action" as a "group of operative facts giving rise to one or more bases for suing," a definition which "centers on 'facts' that form or could form the basis of the previous adjudication." *Id.* at 870. As such, in *Becker*, even though the plaintiffs' two lawsuits may have been mutually exclusive, nothing prevented them from seeking alternative and even inconsistent theories of liability. *Id.* at 869-72.[83]

In an effort to counter this established law, Plaintiffs cite various authorities without discussing the context of the quotation or the holding of the case. For example, Plaintiffs cite *Cantwell* for the proposition that "*Res judicata* in full bloom and vigor has drastic results"—under the heading "Limitations on the Rule" (App. Br. at 19)—without relating that this Court found no error in that trial court's application of *res judicata*. *Id.* at 375. In fact, the *Cantwell* Court placed that statement immediately after noting that "[t]hose points are precluded under the doctrine of the thing adjudged, which belong to the subject of the litigation, and which, by the exercise of reasonable diligence, might have been brought forward at the time." *Id.* Thus, as opposed to denigrating the doctrine of *res judicata*, the context of the statement seems to be a warning to others not to follow the example of this plaintiff who "slept on his right to appeal or bring error." *Id.*

[83] *See also Kesler*, 516 S.W.3d at 894 ("Kesler could have pled his *Kesler II* claims in the alternative. Rule 55.06(a) allowed Kesler to join 'either as independent or alternative claims, as many claims, legal or equitable, as the party ha[d] against an opposing party.'").

Plaintiffs purport to "examine cases that illustrate how" their characterization of "these rules" pertaining to *res judicata* "work in practice," (App. Br. at 30), but it is not entirely clear what "rules" they are applying. Plaintiffs cited 17 Missouri cases in Section G. Eleven of those cases did not apply *res judicata* because the second case involved "different parties" from the first (such as spouses who are not in privity for *res judicata*).[84] For obvious reasons, Plaintiffs make no effort to argue there are "different parties" in their first and second lawsuits.

The two other cases cited in Section G that did not apply *res judicata* to bar a second lawsuit are distinguishable. *Collins v. Burg*, 996 S.W.2d 512 (Mo. App. E.D. 1999), held that the required notice to accrue the state lawsuit's trespass claim occurred *after* the plaintiff's federal lawsuit (alleging infliction of emotional distress and not seeking recovery of possession of the residence) had been filed. *Id.* at 513-14, 516-17. Thus, the event at issue in the second lawsuit **had not yet occurred** when the first lawsuit was filed in *Collins*. Conversely, in the cases at bar, all facts supporting Plaintiffs' fraudulent deprivation claim occurred prior to the first lawsuits. And, in *Kesterson*, it appears the appellate court clearly would have applied *res judicata* to bar a plaintiff's second lawsuit against an insurer, arising out of the same crash as the

[84] *Norval*, 605 S.W.2d at 791; *Lee v. Guettler*, 391 S.W.2d 311, 313 (Mo. 1965); *Chamberlain v. Mo.-Ark. Coach Lines, Inc.*, 189 S.W.2d 538, 540 (Mo. 1945); *Womach v. City of St. Joseph*, 100 S.W.443, 446 (Mo. 1907); *Imler v. First Bank of Mo.*, 451 S.W.3d 282, 293 (Mo. App. W.D. 2014); *Spath v. Norris*, 281 S.W.3d 346, 350 (Mo. App. W.D. 2009); *Shores v. Express Lending Services, Inc.*, 998 S.W.2d 122, 128 (Mo. App. E.D. 1999); *Bridges v. Van Enterprises*, 992 S.W.2d 322, 326 (Mo. App. S.D. 1999); *Wendt v. General Accident Ins. Co.*, 895 S.W.2d 210, 213 (Mo. App. E.D. 1995); *Miller v. SSI Global Security*, 892 S.W.2d 732, 734 (Mo. App. E.D. 1994); *State* ex rel. *Todd v. Romines*, 806 S.W.2d 690, 692 (Mo. App. E.D. 1994).

plaintiff's prior suit, but an "exception" applied because the trial court in the first case had "expressly reserved the plaintiff's right to maintain the second action" (albeit for reasons that were befuddling to the appellate court). *Kesterson*, 242 S.W.3d at 716-17. There was no such "express reservation" in this case.

The remaining four cases cited by Plaintiffs all applied *res judicata* to bar subsequent lawsuits.[85] Synthesizing the holdings in these cases, if the factual basis for the second lawsuit had occurred by the time the first lawsuit between the same parties was filed, and if the factual basis for both lawsuits was generally the same (which, per Missouri law, is "broadly viewed"), then *res judicata* bars the second lawsuit, as plaintiff already had a full and fair opportunity to bring all theories of liability in the first suit.

One of these cases is particularly instructive. In *Chesterfield Village*, plaintiff Chesterfield Village filed its first action in 1995 and obtained a judgment for injunctive relief, forcing the city to rezone the property at issue in April of 1996. 64 S.W.3d at 316-17. The defendant city rezoned the property two months later. *Id.* at 317. Chesterfield Village sold the property in 1997 and then filed its second action against the city in 1999, seeking damages for the city's failure to properly zone the property initially. *Id.*

Despite Chesterfield Village's second lawsuit requesting a different remedy and adding theories of liability, this Court held the suit was barred by *res judicata*, which "looks to the factual bases for the claims, not the legal theories." *Id.* at 319. The operative facts upon which both cases were based related to the city's zoning decision in

[85] *Chesterfield Village*, 64 S.W.3d at 321; *King General Contractors, Inc.*, 821 S.W.2d at 501; *Williams v. Rape*, 990 S.W.2d 55, 60-61 (Mo. App. W.D. 2002); and *Peper Automobile Co. v. St. Louis Union Trust Co.*, 187 S.W. 109, 111-12 (Mo. App. 1916).

1994, so the "claim for damages could well have been included in the first action for declaratory and injunctive relief." *Id*. at 320. This Court rejected Chesterfield Village's plea that there were two facts it could not have known when it filed its first action: (1) the exact nature of the city's rezoning decision **after** the judgment in the first case, and (2) the amount of total damages for the taking of its property resulting therefrom. *Id*. This Court held those "unknown facts" were insufficient to provide "new ultimate facts, as opposed to evidentiary details, that form a new claim for relief." *Id*. (*citing King General Contractors, Inc.*, 821 S.W.2d at 501). This Court held that, since plaintiff had pleaded a violation of its rights in the first action, it "knew at the time of the first action that it **may** have had a claim for damages." *Id.* (emphasis added).

> The fact that Chesterfield Village did not know at that point precisely what its damages would be is of little importance. An injured party, whether injured in body or property rights, can assert a claim for damages even though the party may not know precisely the nature and extent of injury.

Id. (*citing* Restatement (Second) of Judgments, § 18, illustrations 1-3 (1982)). Although the damage claims did not fully ripen until after the first lawsuit, the fact that there was "no second claim arising from new facts occurring after the judgment in the first action" led this Court to reject Chesterfield Village's claim, as a "somewhat altered legal theory, or even a new legal theory, does not support a new claim based on the same operative facts as the first claim." *Id*. at 321.

Chesterfield Village negates Plaintiffs' argument that they could not have pursued their current "fraudulent deprivation of the ability to timely sue for wrongful death" theory of liability in their 2010-11 Petitions. Although the wrongful death claims and the

fraudulent deprivation claims may not have arisen at the exact same time, both claims had clearly accrued **long before** Plaintiffs filed their first lawsuits, such that they both could have been filed *ab initio.*

This Court's holding in *Chesterfield Village* is consistent with a great deal of precedent cited in the Substitute Consolidated Brief of Appellants.[86] "[Missouri] courts have decided, time without number, that all matters properly involved in an action are to be adjudicated, and the rule of *res judicata* applies to all matters that are germane to any cause of action regardless of whether presented or not." *Autenrieth v. Bartley*, 176 S.W.2d 546, 550 (Mo. App. 1943). *Autenrieth* barred a plaintiff's second action, stating:

> [P]laintiff had knowledge of the facts and of what the dispute and controversy was before he brought his first suit and that he had every opportunity of presenting to the court whatever claim, right, title or interest he had in and to such land. Being possessed of such knowledge, it was his duty to bring forth whatever claim of title or interest he had and whether he did so or not, he had an opportunity to do so, and if he failed, he is nevertheless estopped to relitigate an issue which was or could have been litigated in the first suit.

Id. at 551.

> At times it may seem like a harsh rule, but it has been well said, "that the doctrine of res judicata may be said to inhere in the legal systems of all civilized nations as an obvious rule of expediency, justice and public tranquility. … The doctrine of res judicata rests upon the ground that the party to be affected … has litigated, *or had an opportunity to litigate*, the same matter in a former action in a court of competent jurisdiction, and should not be permitted to litigate it again to the harassment and vexation

[86] Examples include *Howey v. Howey*, 240 S.W. 450, 456 (Mo. banc 1922); *Cantwell*, 139 S.W. at 374-75; *Kelly v. City of Cape Girardeau*, 89 S.W.2d at 43; *Grue v. Hensley*, 210 S.W.2d at 600-01; *Autenrieth v. Bartley*, 176 S.W.2d 546, 551 (Mo. App. 1943); and *Roy v. MBW Construction, Inc.*, 489 S.W.3d 299, 305 (Mo. App. W.D. 2016) ("So long as the underlying facts are the same, res judicata bars re-litigation of the matter whether upon the same or different causes of action, claim, demand, ground or theory.").

> of his opponent." (Italics ours.) 30 American Jurisprudence, page 910, Section 165. Our own courts have defined the doctrine of res judicata to mean, in substance, that every man is entitled to one day in court, one fair trial of his case, and only one, and no one shall be permitted to harass another or occupy the time and attention of the court for the second time for the same controversy.

Id. at 550.

Notably, Plaintiffs quote *Autenrieth* on page 27 as follows: "*Res judicata* 'applies to all matters that are **germane** to any cause of action regardless of whether presented or not.'" (App. Br. at 27, emphasis added). Plaintiffs acknowledge that *State ex rel. Beisly v. Perigo*, 469 S.W.3d 434 (Mo. banc 2015), involved the same legal issue as *Boland I* ("whether the fraudulent concealment of the circumstances of a death could serve to prevent the effect of §537.100," *id. at* 10). Despite noting the "common issue" between *Boland I* and *Beisly* (App. Br. at 10), Plaintiffs take the irreconcilable position that the post-death fraud allegations in their first lawsuits "had nothing to do with [their first] actions," despite explicitly declaring that "the post-death fraud" was "**germane**" in *Beisly*. (*Id.* at 46). If the post-death fraud claim was "germane" in *Beisly*, then it must also have been "**germane**" in the *Boland I* cases since they shared the same legal issue. As such, Plaintiffs once again cannot help but acknowledge the post-death fraud claims they pleaded in the first lawsuits were **"germane"**[87] to the operative facts in their first lawsuits, thereby triggering *res judicata's* effect as to their current lawsuits. *See Autenrieth, supra*.

[87] The common meaning of "germane" is "relevant to the point at hand." *Webster's II New College* Dictionary 469 (1995).

Though Plaintiffs may rue that "the Principal Opinions in *Beisly* and *Boland I* were irreconcilable" (App. Br. at 10), the fact that Plaintiffs' legal strategy in *Boland I* did not have the same legal effect as it did for the plaintiff in *Beisly* is irrelevant. Defendants believe this Court's decision in *Boland I* was correct, but one's perception of the merits of that decision is immaterial as to *res judicata* principles: "Nothing is better settled than the principle that an erroneous judgment has the same effect as to *res judicata* as a correct one." *St. Bethel Missionary Baptist Church, Inc., v. St. Louis Builders, Inc.*, 388 S.W.2d 776, 780 (Mo. 1965) (*citing Metcalf v. American Surety Co. of New York*, 232 S.W.2d 526, 529 (Mo. 1950)).

> A judgment does not lose its effectiveness as *res judicata* from the mere fact this it is irregular or erroneous. Until set aside or corrected in a manner authorized by law, an erroneous decision is as binding as a correct ruling. Consequently, the doctrine of res judicata is not dependent upon the correctness of the judgment.

46 Am. Jur.2d *Judgments* §488 (2017).

G. Plaintiffs either brought the wrongful deprivation claim in the *Boland I* cases, as their counsel asserted, or they could have brought the claim with "reasonable diligence," which negates their argument as to any perceived "injustice."

Plaintiffs' Point One concludes with a plea that *res judicata* should not be applied to perpetuate an alleged injustice, (App. Br. at 49), largely focusing on their disagreement with *Boland I*. Plaintiffs attempt to equate the "reasonable diligence" standard to "clairvoyance," (*id. at* 55) arguing that they should be excused from not adequately pursuing their "fraudulent deprivation of the ability to timely file a wrongful death

action" theory of liability in their first lawsuits because some judges agreed with Plaintiffs' view of *Frazee* in *Boland I* and *Beisly*. (*Id.* at 54).

As noted above, the doctrine of *res judicata* precludes relitigation of "every point properly belonging to the subject matter of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time." *Xiaoyan*, 447 S.W.3d at 687. As has been demonstrated, Plaintiffs either did bring their claim for wrongful deprivation—as stated by their counsel at oral argument in *Boland I*—or they could have pursued that theory of liability with the exercise of reasonable diligence.

Plaintiffs' argument ignores the essential distinction between themselves and the judges who may have reached a different result in *Boland I*. The role of a judge is to decide a case as it is presented, not to advance all potentially available theories of liability. Conversely, the Plaintiffs had to advance **all** potential theories of liability when prosecuting their first lawsuits, under pain of losing the opportunity to advance any theories that they abandoned or ignored. *See Autenrieth*, 176 S.W.2d at 551 ("Being possessed of such knowledge, it was his duty to bring forth whatever claim of title or interest he had and whether he did so or not, he had an opportunity to do so, and if he failed, he is nevertheless estopped to relitigate an issue which was or could have been litigated in the first suit.").

The deaths at issue occurred in 2002, and the wrongful death statute of limitations expired in 2005. Thus, when Plaintiffs filed their first lawsuits in 2010 or 2011, alleging not only the deaths but also a fraudulent cover-up, the law afforded them one full and fair opportunity to "bring forward their whole case." *Donnell*, 49 S.W. at 857. If the Court

agrees with Plaintiffs' counsel's comment at the prior oral argument—asserting that Plaintiffs brought a claim for fraudulent deprivation in the first lawsuits[88]—then clearly *res judicata* applies, and the diligence point is moot. But assuming, *arguendo*, that the Plaintiffs did not plead fraud that caused them to lose their ability to timely file their wrongful death claims in the first lawsuits, those claims could have, and should have, been brought.

Plaintiffs' current theory of liability—that they were fraudulently deprived of their ability to timely sue Defendants for wrongful death—was clearly a "point properly belonging to the subject matter" of their first lawsuits, as it was "part of the transaction, or series of connected transactions, out of which [both lawsuits] arose." *Chesterfield Village*, 64 S.W.3d at 319. It was part of the same "claim" (i.e., "aggregate of operative facts giving rise to a right enforceable by a court") and/or "cause of action" (i.e., "group of operative facts giving rise to one or more bases for suing") that formed the basis of both lawsuits. *Id.* at 318. As the allegations of both fraud and wrongful death were necessarily pleaded in both lawsuits to state a basis for liability, Plaintiffs must have, or at least should have, expected that those facts would constitute part of the series of occurrences to be litigated in the first lawsuits. *Id.* at 319 & n.6. They certainly had an opportunity to fully and fairly litigate their current theory of liability in the first lawsuits, but they chose a different strategy.

[88] Oral Argument Recording at 37:43-38:24.

Plaintiffs admit[89] that, when they filed their first lawsuits, they had knowledge of this Court's opinion in *Frazee*, 314 S.W.2d at 920-21 (holding that the wrongful death statute of limitations could not be tolled on the basis of fraudulent concealment despite recognizing "undoubtedly a hardship has resulted here, and this decision has not been easy"). Despite that knowledge, Plaintiffs chose to base their litigation strategy on *Howell v. Murphy*, 844 S.W.2d 42 (Mo. App. W.D. 1992), a Court of Appeals decision asserting that *Frazee* had been "superseded," such that it did "not provide guidance for this case." *Id.* at 46-47. As it is well settled that that the Court of Appeals is constitutionally required to follow the precedent of this Court, *see Doe v. Roman Catholic Diocese of St. Louis*, 311 S.W.3d 818, 822-23 (Mo. App. E.D. 2010), the Plaintiffs should not have assumed *Frazee* had been overruled *sub silentio*, but rather should have pleaded both theories of liability in the alternative. *See Kesler*, 516 S.W.3d at 894 (holding that "Rule 55.06(a) allowed Kesler to join 'either as independent or alternative claims, as many claims, legal or equitable, as the party ha[d] against an opposing party,'" and thus Kesler's failure to plead his *Kesler II* claims in the alternative barred his second suit under *res judicata* principles).

However, even when confronted with defendants' motions in the trial courts, Plaintiffs elected to continue their reliance on *Howell*. A Missouri court has stated that a prudent plaintiff, in response to a motion for summary judgment which could be dispositive of a claim, should immediately seek leave to plead additional theories of

[89] Gann L.F. at 126-27, 2142; Boland L.F. at 2400-01, 4499; Harper L.F. at 4824-25, 6840; Pittman L.F. at 7114-15, 9117; Littrell L.F. at 9393-94, 11396.

liability. *Geringer v. Union Elec. Co.*, 731 S.W.2d 859, 861 (Mo. App. E.D. 1987). But Plaintiffs did not seek leave to refine their pleading—much less argue to the trial courts that their petitions had viable fraud claims—even after the Judgments on the Pleadings were granted. Rather, they chose to appeal, and the sole focus of *Boland I* became whether or not allegations of fraudulent concealment could toll the Wrongful Death Act's special statute of limitations.

Plaintiffs maintained that focus until the closing seconds of their rebuttal argument to this Court. Only then, more than 2½ years after the initial dispositive motions were filed, did Plaintiffs mention that they had pleaded fraud in their "petitions below" as a stand-alone count separate from their wrongful death claims.[90] Only thereafter did they expressly pursue their theory of fraudulent deprivation of the ability to timely file their wrongful death claims, despite having fraud claims pleaded "in there" in their "Petition below."[91] However, at that belated point, the consequences of Plaintiffs' litigation strategy decision were set. *See Charter Comm. Operating LLC v. SATMAP Inc.*, --- S.W.3d ---, 2018 WL 6497793 at *12 (Dec. 11, 2018) (holding that *res judicata* precluded plaintiff's effort to recover greater than $1.5 million that defendant acknowledged it owed under the contract at issue, as plaintiff's strategy relinquished its right to pursue that money, even though it was "seemingly unfair," and even though "Charter belatedly sought to address the issue … by filing a motion with [the appellate court]" to direct payment of the amount acknowledged to be owed).

[90] Oral Argument Recording at 37:43-38:24.

[91] *Id.*

Thus, like the plaintiff in *Charter* and the plaintiff *Geringer* (who waited three years before attempting to amend his petition), Plaintiffs "had a full and fair opportunity to litigate the same issue in the previous lawsuit that [they are] now asserting," and should not be allowed to improperly split their cause of action. *Geringer*, 731 S.W.2d at 865-66 ("A cause of action which is single may not be split and filed or tried piecemeal, the penalty for which his that an adjudication of the first suit is a bar to a second suit.").[92] As the Western District recently held, when a plaintiff has previously lost on the merits, after having had a full and fair opportunity to bring any theories of liability as he saw fit, "there is nothing unfair about holding him to that result." *Kesler*, 516 S.W.3d at 896.

Now, Plaintiffs are requesting a "do-over," in essence improperly attempting to collaterally attack the merits of the final judgment from the first lawsuits. *See Atkinson v. Firuccia*, --- S.W.3d ---, 2018 WL 5259202 at *3 (Mo. App. W.D. Oct. 23, 2018) ("A corollary of *res judicata* is that parties cannot collaterally attack the merits of a final judgment entered in a previous proceeding."). Plaintiffs' request for a second bite at the apple should be denied, and this Court should affirm the Judgments holding that *res judicata* bars Plaintiffs' belated attempt to pursue their current theory of liability, even if some might find such a result "troublesome." *See Johnson Controls, Inc.*, 466 S.W.3d

[92] The *Geringer* court also rejected the plaintiff's argument that his second suit was based on a "separate set of acts" by Union Electric, where his first suit was for malicious prosecution based on its failure to comply with statutory provisions that required joining plaintiff's minor daughter when it sued him for damages for her negligently damaging a utility pole, and his second suit was premised on it subsequently notifying the Director of Revenue of an unpaid judgment to suspend his driving privileges. *Geringer*, 731 S.W.2d at 864-65. Like the case at bar, even though the specific acts at issue in the two lawsuits occurred at different times and were not the same, the Court held the two lawsuits did not present separate causes of action.

585, 595 (Mo. App. W.D. 2015) (holding that *res judicata* precluded a workers' compensation claimant's suit to recover benefits because was aware of, and should have brought, his occupational disease claim in his original hearing).[93] Plaintiffs had a full and fair opportunity to bring all aspects of their claim including all theories of liability as they saw fit, so—whether or not one agrees with the result in *Boland I*—"there is nothing unfair about holding [them] to th[e] result" after they lost on the merits. *Kesler*, 516 S.W.3d at 896. *See also McIntosh v. Wiggins*, 204 S.W.2d 770, 772-73 (Mo. 1947) ("[N]othing is better settled than the principle that an erroneous judgment has the same effect as to res judicata as a correct one. ... On the contrary, we have held 'that when a court has jurisdiction, it has jurisdiction to commit error.'").

II. Response to Point Two: The trial court properly granted summary judgment on the statute of limitations because the "facts constituting the fraud" clearly were known more than five years before filing, in that they were actually pleaded more than five years before filing. In addition, Plaintiffs had suffered the damage that they now claim by that time, as the statutes of limitations on their wrongful death claims had run by 2005.

A second basis for affirming the trial court's summary judgment rulings is that the statute of limitations had run on the Plaintiffs' claims before they were filed. The statute of limitations for fraud claims is five years. The statute reads:

> 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.

[93] The court commented that "[t]his is a troublesome case because I suspect the claimant's injury was the result of 30 years of hard physical labor for the employer. This should have been compensable. However, the claimant has pled an alleged injury from a fall" and failed to meet his burden of proof arising from his pleading. *Id.* at 589.

Mo. Rev. Stat. § 516.120.1(5). Thus, claims must be filed within five years after accrual, which occurs upon discovery of the "facts constituting the fraud." *See Ellison v. Fry*, 437 S.W.3d 762, 769 (Mo. banc 2014).

The Plaintiffs knew all of the facts that underlie their current fraud claims more than five years before filing the second lawsuits. This point is indisputable because the Plaintiffs **actually pleaded** those same facts in their 2010-11 Petitions. Plaintiffs also included three fraud counts in their 2010-11 Petitions. Thus, Plaintiffs not only pleaded the applicable facts, they also alleged that they had been damaged by fraud. More than five years passed between those 2010-11 Petitions and the filing of these second lawsuits in October 2016, meaning that the statute of limitations had run before the current fraud claims were filed.

Plaintiffs have essentially made two arguments on appeal. The first is that the fraud statutes of limitations did not run on their current claims because they were not damaged by fraud until this Court issued its *Boland I* opinion in 2015. The second is that the damage, if sustained, was not ascertainable until then. This Court should reject both of those arguments, as the trial court did, and affirm the Judgments.

A. Section 516.100 does not govern the statute of limitations for fraud, as several Missouri appellate cases have held. Regardless, the Plaintiffs' wrongful death claims expired in 2005, and therefore the Plaintiffs had sustained the damage that they now claim long before they filed their 2010-11 Petitions, in which they alleged damage from fraud.

The Plaintiffs' argument that they had not been damaged as of 2010-11 should be rejected as contrary to Missouri precedent and their own pleadings. First, the accrual of a fraud claim is governed solely by Mo. Rev. Stat. § 516.120.1(5). *See Judy v. Arkansas*

Log Homes, Inc., 923 S.W.2d 409, 416 (Mo. App. W.D. 1996). Thus, Plaintiffs' argument that Mo. Rev. Stat. § 516.100 governs the analysis is contrary to law. Regardless, even if was necessary that damage be sustained for Plaintiffs' fraud claims to accrue, the damage that they allege had been sustained by 2005, when the three-year wrongful death statute of limitations ran on all of their present claims. *See Doe v. Roman Catholic Diocese of Jefferson City*, 862 S.W.2d 338 (Mo. banc 1993). Plaintiffs' argument is particularly spurious given that they pleaded that they had been damaged by fraud in their 2010-11 Petitions. For all of these reasons, this Court should conclude that the Plaintiffs had been damaged by the alleged fraud when their 2010-11 Petitions were filed.

1. The only condition for accrual stated in the fraud statute of limitations is discovery of the "facts constituting the fraud." Case law recognizes that Section 516.100 does not apply, and the alleged fraud was clearly discovered more than five years before the present lawsuits were filed.

Plaintiffs' argument that the Defendants' alleged fraud had not damaged them, as of the filing of the 2010-11 Petitions, is based on a flawed legal premise. They assert that the accrual of Plaintiffs' claims is governed both by the fraud statute, Mo. Rev. Stat. § 516.120.1(5), and the general provision regarding statutes of limitations, Mo. Rev. Stat. § 516.100. (*See* App. Br. at 57). Under Section 516.100, a cause of action accrues when "the damage resulting [from the defendant's conduct] is sustained and is capable of ascertainment." Mo. Rev. Stat. § 516.100.

Several opinions of Missouri appellate courts directly contradict Plaintiffs' argument and hold that only the statute specific to fraud, Mo. Rev. Stat. § 516.120.1(5),

governs the accrual of fraud claims. *See Judy*, 923 S.W.2d at 416 (stating that "[a]n action for relief on the ground of fraud ... accrues—not when the resulting damage is capable of ascertainment—but when the facts constituting the fraud are discovered") (citing *Schwartz v. Lawson*, 797 S.W.2d 828, 832 (Mo. App. W.D. 1990)); *see also Thomas v. Grant Thornton LLP*, 478 S.W.3d 440, 445 (Mo. App. W.D. 2015) ("While section 516.100 governs when negligence and breach of fiduciary duty causes of action originate or accrue, section 516.120(5) determines when a cause of action for fraud accrues."). Thus, "[a]n action for fraud accrues **not when the damage occurs or can be ascertained**, but when 'facts constituting the fraud are discovered.'" *Thomas*, 478 S.W.3d at 445 (emphasis added) (quoting *Cmty. Title Co. v. U.S. Title Guar. Co., Inc.*, 965 S.W.2d 245, 252 (Mo. App. E.D. 1998)). *See also Lehnig v. Bornhop*, 859 S.W.2d 271, 273 (Mo. App. E.D. 1993) (same); *Olean Assocs., Inc. v. Knights of Columbus*, 5 S.W.3d 518, 521–22 (Mo. App. E.D. 1999) (contrasting the accrual rules for fraud with other claims); *cf. Anderson v. Dyer*, 456 S.W.2d 808, 813 (Mo. App. 1970) (explaining that the 10-year discovery provision shows that the fraud statute of limitations is meant to be treated differently from the general statute-of-limitations rules).

In these second lawsuits, Plaintiffs contend that they would have timely filed their wrongful death actions but for the Defendants' alleged fraudulent concealment.[94] Plaintiffs assert that their present claim did not accrue until this Court ended the first lawsuits with the *Boland I* opinion.[95] Their brief relies on several Missouri cases that do

[94] *See, e.g.*, Boland L.F. at 2294 (App. at A50).

[95] App. Br. at 48.

not address any statute of limitations issues, and stand only for the general proposition that damages are an element of a fraud claim. *See, e.g.*, *City of Harrisonville v. McCall Serv. Stations*, 495 S.W.3d 738, 749 (Mo. banc 2016); *Lammers v. Greulich*, 262 S.W.2d 861, 864 (Mo. 1953). These cases do not indicate whether Section 516.100 governs the **accrual** of fraud claims. That question is directly answered by the numerous cases cited above.

If this Court agrees that accrual of a fraud claim is governed by Mo. Rev. Stat. § 516.120.1(5), then the path to affirming summary judgment is simple. The statute indicates that a claim accrues when the "facts constituting the fraud" are discovered. Mo. Rev. Stat. § 516.120.1(5). Thus, a fraud claim accrues when the plaintiff discovers the facts constituting the fraud, or when the plaintiff "in the exercise of due diligence should have discovered the fraud." *Larabee v. Eichler*, 271 S.W.3d 542, 546 (Mo. banc 2008). Here, there is no need to address when the fraud should have been discovered, because the "facts constituting the fraud" were included in the 2010-11 Petitions. Thus, they were obviously "discovered" by that time.

Paragraph 93 of the 2010-11 Petitions laid out a series of accusations describing how the Defendants supposedly prevented the Plaintiffs from learning how their decedents had died.[96] A similar list of accusations appears in Paragraph 41 of the 2016

[96] Gann L.F. at 207-08; Boland L.F. at 2351-52; Harper L.F. at 4905-06; Pittman L.F. at 7195-96; Littrell L.F. at 9474-75. The same allegations appear as Paragraph 99 in the Boland First Amended Petition. (Boland L.F. at 2372-73, App. at A36-A37).

Petitions.[97] Plaintiffs pleaded in the 2010-11 Petitions that they were "not reasonably able to ascertain whether [they] had a cause of action … until the filing of this petition, as a direct result of the Defendants' conduct described herein."[98] Similarly, in the 2016 Petitions, Plaintiffs alleged that the Defendants' concealment "was designed to prevent the survivors of the fatal victims of Jennifer Hall from pursuing a timely wrongful death action."[99] Notably, there is not a single factual allegation in the 2016 Petitions that occurred after the time of the 2010-11 Petitions.

Plaintiffs may argue that damage was an undiscovered "fact," but the case law clearly separates damages and the underlying fraud facts, the discovery of which triggers accrual. *See Thomas*, 478 S.W.3d at 445 (holding that a fraud claim accrues "not when the damage occurs or can be ascertained, but when 'facts constituting the fraud are discovered'"). Because the fraud claims accrued by the time of the 2010-11 Petitions, the five-year statutes of limitations had run when the second lawsuits were filed in October 2016. Summary judgment, therefore, was properly granted.

2. <u>This Court's opinion in *Doe* demonstrates that the Defendants had a vested right to be free from suit for wrongful death once the three-year statutes of limitations expired in 2005.</u>

If this Court agrees with the analysis above, then that issue is dispositive. The reverse is not true. Even if this Court somehow concludes that damage must have been sustained and "capable of ascertainment" for a fraud claim to accrue, summary judgment

[97] Gann L.F. at 220-21; Boland L.F. at 2292 (App. at A48); Harper L.F. at 4918-19; Pittman L.F. at 7208-09; Littrell L.F. at 9488-89.

[98] *See citations supra*, n.8.

[99] *See, e.g.*, Boland L.F. at 2293 (App. at A49).

was still proper. Per the clear precedent of this Court, the Plaintiffs **had been damaged**, long before filing their 2010-11 Petitions.

This Court's opinion in *Doe* demonstrates that the injury alleged in the second lawsuits—the running of the statute of limitations on Plaintiffs' wrongful death claims—had occurred as of 2005, when the three-year limitations period expired. *Doe* was a childhood sexual abuse case. The plaintiff argued that new statute-of-limitations rules had revived her claim, even though the limitations period had run under the previously applicable statute. *See Doe*, 862 S.W.2d at 340. This Court rejected that argument, holding that "once the original statute of limitation expires and bars the plaintiff's action, the defendant has acquired a vested right to be free from suit, a right that is substantive in nature, and therefore, *article I, section 13*, prohibits the legislative revival of the cause of action." *Id.* at 341.

If the plaintiff's claim had not been lost until this Court **determined** that the statute of limitations had run, then no "vested right" would have been acquired. If a judicial determination was required for the statute of limitations to run, then at the time of this Court's opinion, this Court could have simply applied the new statute. Instead, this Court determined that the change in the statute was irrelevant because the claim had already been lost at some point in the past. *See id.* at 341. This Court, therefore, determined that it was powerless to revive the previously lost claim. *Id.*

Doe is consistent with how Missouri courts discuss the statute of limitations in ordinary cases—as having run at some date in the past. *See, e.g.*, *Forehand v. Hall*, 355 S.W.2d 940, 944 (Mo. 1962) ("The statute of limitations therefore ran on the minor

child's cause of action on October 6, 1960."); *State ex rel. Gasconade Cty. v. Jost*, 291 S.W.3d 800, 805 (Mo. App. E.D. 2009) ("The statute of limitations ran on January 1, 2005, and, because Plaintiffs did not file their initial petition until February 2007, well beyond the five-year limit imposed by Section 516.120.2, Plaintiffs' claims were barred."). *Doe* is also consistent with this Court's limited role "to interpret the law, not rewrite it," as recognized in *Boland I*. *Boland I*, 471 S.W.3d at 712. In its role as interpreter, this Court determines when a statute of limitations has already run; it does not **cause** the running of the statute by its decision.

Under the Plaintiffs' theory, this Court's Opinion in *Boland I* was the final act that ignited the Plaintiffs' right to assert fraud. Plaintiffs cite no cases for the proposition that Missouri courts can cause a claim to accrue by their decisions. Instead, Plaintiffs rely on a statement from Corpus Juris Secondum, asserting that damages for fraud cannot be contingent on the outcome of unsettled disputes. (Appellants' Brief at 58, citing 37 C.J.S. Fraud § 70). That C.J.S. proposition cites a single 1914 case from Rhode Island. *See* 37 C.J.S. Fraud § 70 & n.2 (citing *Dunn & McCarthy v. Bishop*, 90 A. 1073 (R.I. 1914)). In *Dunn*, the plaintiff alleged that the defendant fraudulently induced the plaintiff to accept the defendant as a surety, using certain personal property as a bond. *Id.* at 1073. Whether the plaintiff would have to give over that property remained in dispute. *Id.* Because the plaintiff had no obligation to the surety at that time, the court held that the plaintiff had not been damaged. *Id.*

The circumstances are very different here. No damages could have been properly pleaded in *Dunn*, because none had been sustained. Here, Plaintiffs absolutely could

have brought a fraud claim for loss of their ability to timely file a wrongful death action in 2010-11, as the three-year statute of limitations had expired. In fact, Plaintiffs' counsel represented during oral argument in this Court that the Plaintiffs **did** bring stand-alone fraud claims, based on the loss of their causes of action, in the first lawsuits.[100] At the very least, their 2010-11 Petitions alleged the factual basis for such a claim, as evidenced by their assertion that they were "not reasonably able to ascertain whether [they] had a cause of action … until the filing of this petition, as a direct result of the Defendants' conduct described herein."[101] Even if this Court were to disbelieve Plaintiffs' prior assertions that they pleaded such a claim in the 2010-11 Petitions, they certainly **could have** brought such a claim under Missouri's alternative pleading rules. *See, e.g.*, *Mays-Maune & Assocs., Inc. v. Werner Bros.*, 139 S.W.3d 201, 206 (Mo. App. E.D. 2004) ("Missouri recognizes a party's right to plead in the alternative and to state inconsistent claims or defenses."). Thus, *Dunn* is wholly inapposite, and the C.J.S. entry that relies solely on *Dunn* has no persuasive value.

The damages now being claimed had been sustained by 2005. The *Doe* decision makes this point clearly, under binding precedent of this Court. Thus, the Plaintiffs had been damaged by the fraud that they now allege, as of the filing of the 2010-11 Petitions. If Mo. Rev. Stat. § 516.100 requires that damages be "sustained" for a fraud claim to accrue, then that requirement was satisfied.

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[100] Oral Argument Recording at 37:43-38:24. As noted above, Plaintiffs also made this assertion in their Motion for Rehearing. *See citations supra*, n.22.

[101] *See citations supra*, n.8.

3. This Court should also conclude that the Plaintiffs had sustained damage for fraud in 2010-11 because they pleaded that they had been damaged by fraud.

Another straight-forward basis for concluding that the Plaintiffs were damaged by fraud at the time of their original filings is that they alleged it in those very filings. The 2010-11 Petitions included three affirmative claims for fraud—for Civil Conspiracy of Fraudulent Concealment (Count VI); for Civil Conspiracy (Count VII, which was based on alleged fraud); and for Fraudulent Misrepresentation by Concealment (Count VIII).[102] The Plaintiffs alleged that the civil conspiracy of fraudulent concealment "directly and proximately cause or contributed to cause Decedent severe and permanent injuries resulting in [his or her] death," and that "Defendants' fraudulent misrepresentation directly and proximately caused or contributed to cause Decedent severe and permanent injuries resulting in [his or her] death."[103] Again, Plaintiffs' counsel told this Court that these claims were **independent** of the Plaintiffs' claims for wrongful death in the first lawsuits.[104]

It could not be clearer that the Plaintiffs knew the facts upon which they have built the present case when they filed the 2010-11 Petitions.[105] It is equally clear that the Plaintiffs believed, at that time, that the Defendants' alleged fraud had harmed them. Whether Plaintiffs appreciated the full extent of that harm has no bearing on whether the

[102] *See citations supra*, n.10-11.

[103] Gann L.F. at 204, 208; Boland L.F. at 2478, 2482; Harper L.F. at 4902, 4906; Pittman L.F. at 7192, 7196; Littrell L.F. at 9471, 9475.

[104] Oral Argument Recording at 37:43-38:24.

[105] *See citations supra*, n.41-42.

limitations period began running. *See Dixon v. Shafton*, 649 S.W.2d 435, 439 (Mo. banc 1983) ("The most that is required is that some damages have been sustained, so that the claimants know that they have a claim for some amount."). Because the Plaintiffs pleaded that they were damaged by the Defendants' alleged fraud on or before January 7, 2011, this Court should reject their argument that they were not damaged by the alleged fraud until this Court's *Boland I* Opinion, in 2015.

For all of these reasons, the Court should conclude either that damage is unnecessary to accrual under the fraud statute of limitations, or that damage had been suffered when the 2010-11 Petitions were filed. By either conception, the statues of limitations ran on all of the Plaintiffs' second lawsuits before they were filed.

B. Plaintiffs' discovery rule argument also fails, because the facts constituting the fraud were clearly discovered, because they actually pleaded that they had been damaged by fraud, and because they clearly were on notice of a "potentially actionable injury."

Also untenable, in light of both Missouri law and Plaintiffs' prior filings, is Plaintiffs' assertion that the damage from the fraud could not have been ascertained at the time of the 2010-11 Petitions. Plaintiffs claim that they could not have known that they had lost their wrongful death claims before this Court ruled as much, given that the decision was 4-to-3, and given that *Beisly* reached the opposite result. There are several problems with this argument.

First and foremost, Plaintiffs' argument ignores the language of Mo. Rev. Stat. § 516.120.1(5) and Missouri case law, both of which demonstrate that knowledge of **facts**, not knowledge of a legal claim, triggers the running of the statute of limitations. Second,

the Plaintiffs' 2010-11 Petitions are again fatal to their argument. The Plaintiffs pleaded in the first lawsuits that they had been damaged by fraud, and they are now saying that they had no way to know, at the time of the first lawsuits, that they had been damaged by fraud. Finally, at the time of the 2010-11 Petitions, precedent on point from this Court showed that the Plaintiffs' wrongful death claims were time barred. Thus, the Plaintiffs undoubtedly had sufficient information "to place a reasonably prudent person on notice of a **potentially actionable** injury." *Powel*, 197 S.W.3d at 582 (emphasis added).

Any or all of those points is sufficient to defeat the Plaintiffs' discovery rule argument. This Court, therefore, should affirm the grant of summary judgment.

1. Section 516.120.1(5) only requires that the facts constituting the fraud be discovered for the limitations period to run, and Missouri case law shows that discovering the legal basis for a claim is not required.

The argument above regarding Mo. Rev. Stat. § 516.120.1(5) applies with equal force to any assertion that the Plaintiffs' damages were not "ascertainable" when the first lawsuits were filed. Again, the statute dictates that a fraud claim does not accrue "until the discovery by the aggrieved party, at any time within ten years, of the **facts constituting the fraud**." Mo. Rev. Stat. § 516.120.1(5) (emphasis added). The statute says nothing about understanding the legal basis for the claim; rather, one merely has to understand the facts that underlie the claim. As discussed in Section II(B)(1), *supra*, the Plaintiffs undoubtedly knew all of the **facts** underlying their present fraud claims more than five years before the 2016 Petitions were filed.

Plaintiffs' discovery argument relies on the false premise that the legal basis for a claim must be ascertainable for a claim to accrue. The Court of Appeals rejected a

similar argument in *State ex rel. Brandon v. Dolan*, 46 S.W.3d 94 (Mo. App. S.D. 2001). *Brandon* was a wrongful death case brought by the relatives of a man who was killed by a drunk driver in 1995, against a bar owner who served drinks to the driver. *Id.* at 95. There was a statutory bar to any claim against the bar owner until 2000, when this Court held that bar to be unconstitutional. *Id.* at 95-96. The plaintiffs filed suit once that legal obstacle was removed, and the trial court dismissed the claim. The Court of Appeals held that the plaintiffs' claim accrued when the **factual** right to sue arose, upon the decedent's death, not when the **legal** right to sue arose, upon this Court's decision. *Id.* at 98-99. The court noted that the plaintiffs could have challenged the constitutionality of the statute during the three-year limitations period, as a later plaintiff did. *Id.* at 98. Thus, plaintiffs' claim was held to be time barred. *Id.* at 98-99.

In *Brandon*, there was no doubt, under then-existing law, that the claim was barred. By contrast, in Plaintiffs' first lawsuits, there was existing precedent—*Frazee v. Partney*, 314 S.W.2d 915 (Mo. 1958) —holding that the wrongful-death statute of limitations could not be tolled, nor could its accrual be delayed. *See id.* at 920-21. Thus, *Frazee* clearly demonstrated that the Plaintiffs had suffered the damage that they now claim—the loss of their wrongful death actions. If the plaintiffs' claims in *Brandon* accrued before this Court struck down the dram shop statute that had **precluded their case**, it seems impossible that the *Boland I* court's ratification of **existing precedent** (*Frazee*) could cause the Plaintiffs' fraud claims to accrue.

For these reasons, this Court should reject Plaintiffs' argument that their claim was not yet ascertainable because they did not know whether they had been damaged. The

Plaintiffs undoubtedly knew the **factual** basis for their fraud claims, and under both Mo. Rev. Stat. § 516.120.1(5) and Missouri case law, the factual basis is all the Plaintiffs needed to know, for their claims to accrue.

2. Plaintiffs pleaded in the 2010-11 Petitions that they had been damaged by the Defendants' fraud, so it is illogical for them to now claim that they had not discovered the fraud at that time.

A second reason that the Plaintiffs' discovery rule argument has no merit is that it is contradicted by the Plaintiffs' own filings. As noted above, the 2010-11 Petitions included three affirmative claims for fraud—for Civil Conspiracy of Fraudulent Concealment (Count VI), Civil Conspiracy (Count VII), and Fraudulent Misrepresentation by Concealment (Count VIII).[106] The Plaintiffs alleged that the civil conspiracy of fraudulent concealment "directly and proximately cause or contributed to cause Decedent severe and permanent injuries resulting in [his or her] death," and that "Defendants' fraudulent misrepresentation directly and proximately caused or contributed to cause Decedent severe and permanent injuries resulting in [his or her] death."[107] Thus, the Plaintiffs clearly alleged, in 2010-11, that they had been damaged by the same cover-up that they have alleged in the second lawsuits.

Plaintiffs insist that the damages pleaded in 2010-11 were somehow different from those pleaded in their second lawsuits, even though they were based on the same alleged conduct and produced the same alleged result—i.e., the Plaintiffs not learning what had

[106] *See citations supra*, n.10-11.

[107] Gann L.F. at 204, 208; Boland L.F. at 2478, 2482; Harper L.F. at 4902, 4906; Pittman L.F. at 7192, 7196; Littrell L.F. at 9471, 9475.

allegedly transpired at the Hospital. If the Court agrees that only Section 516.120.1(5) applies, then Plaintiffs' argument is immaterial, as the facts constituting the fraud, the Defendants' alleged actions, are the same. In addition, if the Court deems it to be relevant, damages were "capable of ascertainment" when the first lawsuits were filed. Each of the 2010-11 Petitions alleges that the Defendants' fraud caused the decedent's death.[108] The fact that Plaintiffs now claim that they are asserting different fraud damages, for the loss of claims, does not help their argument.

Under case law interpreting Section 516.100, the limitations period began running "when the evidence was such to place a reasonably prudent person on notice of a potentially actionable injury." *Powel*, 197 S.W.3d at 582. The claim for damages accrues where there is **some** knowledge of damage related to the defendants' alleged conduct. "All possible damages do not have to be known, or even knowable, before the statute accrues." *Id.* at 584 (quoting *Klemme v. Best*, 941 S.W.2d 493, 497 (Mo. banc 1997)).

Unquestionably, the Plaintiffs alleged fraud in the 2010-11 Petitions, and alleged that it had damaged them. Regardless of whether the Court construes the present fraud claims as having been brought in 2010-11, or as now alleging different damages, Plaintiffs absolutely were "on notice of a potentially actionable injury." *Powel*, 197 S.W.3d at 582. Even if they did not understand **all** of the damage caused by the Defendants' alleged fraud, they understood that they had been damaged by fraud. For

[108] *See* App. Br. at 39.

these reasons, the limitations period began running no later than the filing of the 2010-11 Petitions, based on the allegations contained therein.

3. Even if knowledge of the legal claim were necessary to accrual, the Plaintiffs were on notice of a *potentially* actionable injury, based on precedent from this Court showing that their wrongful death claims were time-barred.

Finally, even if the Court ignores all of the above reasoning—which it should not—and begins with the assumption that the **legal** viability of the claim is relevant to accrual, the Plaintiffs' claims are still time-barred. Plaintiffs' "tie goes to the runner" approach to the discovery issue ignores the reality of the accrual rules. Plaintiffs claim that because the result of *Boland I* was unknown, they could not have known that they had fraud claims for the loss of their wrongful death claims. But again, even if the Court applies Mo. Rev. Stat. § 516.100, the claim accrues "when the evidence was such to place a reasonably prudent person on notice of a **potentially actionable** injury." *Powel*, 197 S.W.3d at 582 (emphasis added).

The claim that fraud by the Defendants cost the Plaintiffs their wrongful death claims was, at the very least, **potentially** actionable at that time. The wrongful death claims were filed more than three years after the five decedents' deaths. *Boland I*, 471 S.W.3d at 705. There was precedent on point from this Court, in *Frazee*. The defendant in *Frazee* was responsible for a fatal auto accident, but he successfully hid his identity for more than one year, then the limitations period for wrongful death. *Frazee*, 314 S.W.2d at 916-17. This Court held that the wrongful death statute of limitations could not be

tolled for fraud, and that a wrongful death claim always accrues at the time of death. *Id.* at 920-21.

Frazee remains good law, as recognized by all eight judges who decided *Boland I* and *Beisly*. *See Boland I*, 471 S.W.3d at 711 (stating that "*Frazee* remains good law and is directly on point in this case"); *Beisly*, 469 S.W.3d at 440. Thus, all eight judges—the majority four in *Boland I*, and the majority four in *Beisly*[109]—held that *Frazee* remained good law. The only distinction is that the *Beisly* majority did not allow the defendant to raise the statute of limitations as a defense. *Beisly*, 469 S.W.3d at 444.

Given this unanimity that *Frazee* controlled whether the wrongful death statute of limitations had run, the Plaintiffs clearly had, at least, a **potential** claim for the loss of their wrongful death actions. Plaintiffs either did plead this theory in the first lawsuits,[110] or they could have pleaded it in the alterative to their wrongful death claim. Mo. Sup. Ct. R. 55.06(a); *Kesler*, 516 S.W.3d at 894. The Plaintiffs made a strategic decision to focus on their wrongful death theory, and that was their right. But Plaintiffs absolutely had knowledge of a **potential** claim, and therefore their discovery rule argument has no merit.

For all of these reasons, the Court should affirm the judgments holding that the statutes of limitations expired on each of the five consolidated claims. All of the facts that underlie the second lawsuits were pleaded in the first lawsuits, more than five years before the second lawsuits were filed.

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[109] The majority in *Beisly* included the Hon. Rex Gabbert, sitting by designation from the Missouri Court of Appeals, Western District.

[110] As discussed above, Plaintiffs' counsel represented that they did plead independent fraud claims, for the loss of their causes of action, in the first lawsuits.

CONCLUSION

This Court should affirm the summary judgments granted by the Circuit Court of Livingston County for the following reasons:

- The Plaintiffs are attempting to revive lawsuits that already were litigated through the entire Missouri court system, and thus these suits are barred under the doctrine of *res judicata*.
- The facts upon which the current claims are based were known more than five years before these claims were filed, and thus the five-year statute of limitations for fraud claims clearly had run before these claims were filed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I filed the foregoing on March 15, 2019, using the Court's electronic filing system, thereby sending notice of the filing to all counsel of record in this matter.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the word limitation of the Missouri Supreme Court Rules. The brief contains 21,450, as measured by Microsoft Word.

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