SC97412 (Consolidated)

IN THE SUPREME COURT OF MISSOURI

SALLY BOLAND, ET AL.
Appellants,

v.

SAINT LUKE'S HEALTH SYSTEM, INC., ET. AL,
Respondents.

CONSOLIDATED SUBSTITUTE REPLY BRIEF OF APPELLANTS

Appeals from the Circuit Court of Livingston County, Missouri
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ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENTS BASED ON THE DOCTRINE OF *RES JUDICATA*.

At pages 20-27 of their Consolidated Substitute Brief of Appellants (hereafter, "Appellants' Brief"), Plaintiffs set out both scholarly opinion and case law explaining that in order for an earlier judgment to bar a subsequent action—even if the two actions *relate* to the same subject matter—the two actions must be "founded upon the same or substantially the same cause of action." *Kimpton v. Spellman*, 351 Mo. 674, 173 S.W.2d 886, 891 (1943). In Defendants' general overview of the law found in their Substitute Brief of Respondents (hereafter, "Respondents' Brief") at 29-30, they cite language from *Andes v. Paden, Welch, Martin & Albano, P.C.*, 897 S.W.2d 19, 21 (Mo.App.W.D. 1995), that recognizes "the same cause of action" requirement:

> [***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.

(Emphasis added.) Similarly, Defendants cite *Xiaoyan Gu v. Da Hua Hu*, 447 S.W.3d 680, 687 (Mo.App.E.D. 2014), to the same effect: "*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. . . ." Respondents' Brief at 30. (Internal citations and quotation marks omitted; emphasis added.) But the converse is true as well; that is, "what might have been litigated in the first action is *res judicata* only to the extent it constituted a part of the cause of action involved in the first action." Cleary, *Res Judicata Reexamined*, 57 YALE L. J. 339, 346

(1948); *Dierkes v. Blue Cross and Blue Shield of Missouri*, 991 S.W.2d 662, 666 (Mo. 1999).[1]

So, the critical issue at bar is this: Are Plaintiffs' wrongful death claims and their fraud claims the same causes of action? In determining if a later action is barred by an earlier adjudication, the later suit must arise "out of the same transaction or occurrence ***and*** involve the same parties, subject matter, ***and*** evidence." *Williams v. Rape*, 990 S.W.2d 55, 60 (Mo.App.W.D. 1999) (emphasis added). In this context, as Defendants note, "transaction" focuses on "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) (Respondents' Brief at 31). Defendants do not deny that "cause of action" is defined as "the underlying facts combined with the law, giving a party a right to a remedy of one form or another based thereon." *Grue v. Hensley,* 357 Mo. 592, 210 S.W.2d 7, 10 (1948). Determining the issue of identity of a cause of action "depends on the facts and circumstances of the particular case." *Collins v. Burg*, 996 S.W.2d 512, 515 (Mo.App.E.D. 1999).

The requirement that the death claims and the fraud claims constitute the same cause of action is dispositive of Plaintiffs' first point that the trial court erred in granting summary judgment on the basis of *res judicata*; if they are ***not*** the same causes of action, then the trial court erred in granting summary judgment on the ground of claim preclusion.

The transactions out of which Plaintiffs' wrongful death actions arose were Jennifer Hall's administration of lethal doses of improper medications to Decedents for the express purpose of killing them. Those were the "facts and circumstances out of which an injury [to each *Decedent*] arose," causing their deaths. *Burke, supra*, 663 S.W.2d at 407. In the context of the Wrongful Death Act:

[1] Cited in Appellants' Brief at 21-22.

> Whenever the death of a person results from any act, conduct, occurrence, transaction, or circumstance which, if death had not ensued, would have entitled such person to recover damages in respect thereof, the person or party who, or the corporation which, would have been liable if death had not ensued shall be liable in an action for damages, notwithstanding the death of the person injured. . . .

R.S.Mo. § 537.080.1 (2010). To paraphrase *Grue, supra*, 210 S.W.2d at 10, for purposes of the death actions, in the first suits the "underlying facts combined with the law, giving [Plaintiffs] a right to a remedy," were those pertaining to the cause of Decedents' deaths.

In contrast to the death actions, Plaintiffs' second suits seek redress for the loss of their right to sue for wrongful death; the underlying facts and circumstances, out of which Plaintiffs' loss of their causes of action for death arose, focused on Defendants' ***nondisclosure*** of Hall's conduct, preventing them from timely filing actions for wrongful death. This nondisclosure went on, quite literally, for a period of years, well past the expiration of the statute of limitations for filing death actions.

The temporal disparity between the killings and the cover-up is critical. Defendants cite to THE RESTATEMENT (SECOND) OF JUDGMENTS § 24(2), where it is noted that:

> 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.[2]

Another source amplifies this principle:

> Some wrongs result from a single event, others from a series of events. If a defendant's conduct culminates in a single event, such as an automobile collision, multiple aspects of the defendant's negligence—speeding, failing

[2] Cited in Respondents' Brief at 31-32 n. 43.

> to look out, and so on—will not permit multiple suits. But if defendant's continuing conduct causes more than one injurious event, then the question arises whether more than one cause of action is involved. In the end, the problem is a matter of degree. If the events are closely connected both temporally and spatially, and the incidents of defendant's conduct are substantially the same so that the evidence supporting them will largely overlap, then there is only a single cause of action. As the overlap in time and elements of injury diminishes, so does the likelihood that the courts will see a single cause of action.

G. Hazard, J. Leubsdorf, D. Bassett, CIVIL PROCEDURE § 14.10 at 623-624 (6th ed. 2011).[3]

The transactions involved in Plaintiffs' death cases and the fraud cases were not closely connected in time. The conduct in the death actions—the killing of Decedents—caused an action to accrue immediately, upon their deaths.[4] In contrast, the continuing non-disclosure meant that an action for fraud did not accrue until years later, when it was finally determined that the statute of limitations had expired and damage was thereby sustained.[5] In Missouri the accrual of actions on different dates strongly suggests that the causes of action are not the same, *see* discussion in Appellants' Brief at 33.

Moreover, the incidents of Defendants' conduct were not substantially the same in the two actions. The incident in each death action that gave rise to a cause of action for wrongful death was the administration of deadly medications to the Decedent. In the fraud actions, the incidents of conduct that gave rise to the fraud actions consisted of hiding what Hall did for years after the fact. Additionally, the motivation of the conduct giving rise in the two actions was not related. In the death actions, Hall's perverse motivation to kill nine people—presumably, her

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[3] An earlier edition of this treatise was cited by this Court in *Chesterfield Village, Inc. v. City of Chesterfield,* 64 S.W.3d 315, 318 n.5 (Mo. 2002).

[4] That was the precise holding of *Boland v. Saint Luke's Health System, Inc.,* 471 S.W.3d 703, 710 (Mo. 2015) ("*Boland I*").

[5] See Point II, *infra*.

bloodlust—differed greatly from that animating Defendants in covering up what Hall did—presumably, the desire to avoid liability.

As Plaintiffs noted in their Appellants' Brief at 38, even if their fraud actions arose out of the "same 'transaction' or constellation of background facts as the first lawsuit," that does not prevent the fraud case from being "a separate and distinct cause of action." *Collins v. Burg*, 996 S.W.2d 512, 517 (Mo.App.E.D. 1999). That is so because "the evidence necessary to sustain their respective claims for relief" is altogether different. *Id.* Stated another way, the fraud action will involve proof concerning Defendants' post-homicide cover-ups that was not necessary—indeed, according to Defendants, evidence that was "legally immaterial"[6]—to resolution of the wrongful death actions, *State ex rel. Todd v. Romines*, 806 S.W.2d 690, 692 (Mo.App.E.D. 1991).

Defendants claim that the fraud and death actions are the same based on the fact that in their original petitions for wrongful death, Plaintiffs pled the cover-up by Defendants after the murders as an affirmative avoidance of the anticipated defense of the statute of limitations, Respondent's Brief at 35-42.[7] In the trial court and the Court of Appeals, Defendants argued, "There is no doubt that both lawsuits involved the same facts, as both fraud and wrongful death were a ***necessary component*** of each lawsuit for the Plaintiffs to state a viable claim for relief." Respondents' Brief in WD80928 at 24 (emphasis added).

Defendants cited no authority for their argument that fraudulent concealment of a claim as a vehicle for avoiding the statute of limitations is proven

[6] *See* Appellants' Brief at 41-42.

[7] Plaintiffs also pled the cover-up before all of the deaths occurred, at a time when some of the decedents could have avoided being placed at risk of encountering Respiratory Therapist Hall, thereby saving their lives, *see discussion* in Appellants' Brief at 39-40. Since that conduct contributed to the deaths of decedents, it is not the basis for Plaintiffs' claims for fraud that deprived them of their causes of action.

by the same evidence as the underlying tortious conduct. To the contrary, it is a matter of black-letter law that when fraudulent concealment is available to a plaintiff to toll the statute of limitations, the conduct constituting the underlying tort is not the same as that necessary to show fraudulent concealment:

> [Such] concealment necessarily requires active conduct by a defendant, ***above and beyond the wrongdoing upon which the plaintiff's claim is filed***, to prevent the plaintiff from suing in time. Fraudulent concealment, such as will toll the running of the statute of limitations, does not depend upon the underlying cause of action being inherently fraudulent but requires independent acts of fraudulent concealment of the events or circumstances constituting the underlying cause of action.

54 C.J.S. *Limitations of Actions* § 138 (March 2019 Update) (emphasis added). In Missouri the essence of fraudulent concealment as a mechanism to avoid statutes of limitation "is that a defendant, by his or her ***post-negligence conduct***, affirmatively intends to conceal from plaintiff the fact that plaintiff has a claim against the defendant." *Batek v. Curators of University of Missouri*, 920 S.W.2d 895, 900 (Mo. 1996) (emphasis added).[8] In *Doe v. Ratigan*, 481 S.W.3d 36, 44 (Mo.App.W.D. 2015), the Court similarly recognized a distinction between an underlying tort action for fraud and "allegations necessary to claim that a defendant's fraudulent concealment of his own negligent conduct tolls the statute of limitations for negligence." Hence, when it is available as an avoidance, fraudulent concealment necessarily requires evidence of conduct ***above and beyond*** the wrongdoing giving rise to the underlying tort claim.

Even more fundamentally, Defendants' argument requires consideration of this question: Was Defendants' fraudulent concealment of the circumstances of

[8] *Batek* was not a wrongful death action, and as we now know from *Boland I, supra,* the general rules regarding tolling by fraudulent concealment do not apply to death cases. However, even if they did, the proof necessary to support a finding of fraudulent concealment would still differ substantially from the proof necessary to support the underlying death action.

Decedents' deaths a "necessary component" of the wrongful death actions? When they filed their wrongful death actions, relying on *Howell v. Murphy*, 844 S.W.2d 42 (Mo.App.W.D. 1992), Plaintiffs certainly thought it was necessary to plead fraudulent concealment, not as a "necessary component" of their death claims, but as an affirmative avoidance to prevent the bar of the Wrongful Death Act's three-year statute of limitations. Were they correct in that assumption? Not according to the brief Defendants filed with the Supreme Court in *Boland v. Saint Luke's Health System, Inc.*, 471 S.W.3d 703 (Mo. 2015) ("*Boland I*"), where they argued:

> As both circuit court judges who granted judgment to Defendants recognized, the allegations of fraudulent concealment are ***legally immaterial***, as only the General Assembly may create exceptions to a statute of limitations provided for a statutory cause of action.
>
> * * * *
>
> Because Missouri law does not allow for tolling of the wrongful death statute of limitations, regardless of any concealment allegations, the Appellants failed to timely file their claims.

Combined Substitute Brief of Respondents at 15, filed on June 18, 2014 in *Boland I,* SC93906, SA4 (emphasis added).[9]

Ultimately, this Court agreed with Defendants in *Boland I*, holding that their fraudulent concealment of Hall's homicides would not, as a matter of law, avoid the bar of the Wrongful Death Act's statute of limitations, 471 S.W.3d at 710. Stated another way, the fraudulent concealment alleged by Plaintiffs in their death actions could not be a "necessary component" of the death actions because the cover-up was "legally immaterial." Immaterial matter in a pleading is surplusage and "ordinarily will be disregarded." 71 C.J.S. *Pleading* § 62 (March 2019 update); *accord, Kraus v. Kraus*, 693 S.W.2d 869, 873 (Mo.App.E.D. 1985).

[9] Defendants admit that this Court can take notice of the record in *Boland I*, Respondents' Brief at 16.

Defendants also argue that the identity of the fraud actions and the death actions was demonstrated by the "unassailable" reality that "[t]here is **nothing** that prevented the Plaintiffs from pursuing their current 'Fraudulent Concealment' theory in the first lawsuits." Respondents' Brief at 49-50 (emphasis in original). Of course, the fact that Plaintiffs could have added counts to the death actions for fraud occurring after the poisoning of their Decedents does not establish the identity of the two causes of action. Since adoption of the Civil Code of 1943, plaintiffs have been free to join all independent claims they have against opposing parties. R.S.Mo. § 509.090 (2016).[10] The right to join independent claims exists even if they do not arise out of the same transaction. *White v. Sievers*, 359 Mo. 145, 221 S.W.2d 118, 121 (1949).[11] More fundamentally, Defendants' argument amounts to a claim that Plaintiffs were ***required*** to join ***all*** causes of action they had in their first suits, even if the subject matter in the two actions was different.

Defendants rely heavily on *Kesler v. The Curators of the University of Missouri,* 516 S.W.3d 884, 891 (Mo.App.W.D. 2017), where the Court of Appeals said that, "To constitute 'new' ultimate facts [so as to be a separate cause of action], 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." Respondents' Brief at 48. Taken to its logical conclusion, this language suggests that a claim is the same cause of action if it could have been joined in the previous suit, amounting to a mandatory joinder rule, contrary to the authority discussed in Appellants' Brief at 24-27. It is irreconcilable with the rule announced in cases like *Grue, supra*, when this Court said:

> There are, it is true, instances where a plaintiff may join in one suit separate claims against the same defendant, ***but is not required to do so***; and others where cause of action overlap or possess certain elements in

[10] The same right is granted by Supreme Court Rule 55.06(a).

[11] Before 1943 the old civil code limited joinder of claims to those arising out of the same transaction, *White, supra,* 221 S.W.2d at 121.

> common, ***but still differ in essential facts*** or parties. ***These are considered separate causes of action.***

210 S.W.2d at 11 (emphasis added). In support of this principle, *Grue* cites *Chamberlain v. Mo.-Ark. Coach Lines, Inc.*, 354 Mo. 461, 189 S.W.2d 538 (1945) ("*Chamberlain II*"), which is discussed *infra*. As will be seen, the second suit filed by the plaintiff in *Chamberlain* was considered a separate cause of action despite the fact that plaintiff was fully aware of its factual basis at the time he filed his first suit.

The only case cited by *Kesler* for the notion that the scope of a claim is determined by its amenability to joinder in an earlier action is *Chesterfield Village, Inc. v. City of Chesterfield,* 64 S.W.3d 315, 320 (Mo. 2002). In that case the City denied plaintiff's request that it rezone plaintiff's property. Plaintiff successfully sued to have the denial of its rezoning request declared illegal on the ground that it violated its rights under the United States and Missouri Constitutions, *Id.* at 316-317. Later, it filed a second action for damages on the ground that the same refusal to rezone violated its constitutional rights, *Id.* Since the facts giving rise to the second action arose out of the "same act or occurrence as the first action," this Court held that *res judicata* barred the second suit, *Id.* at 316.

This was an unremarkable result where plaintiff tried to recover damages in the second suit for the very same conduct—illegally denying its rezoning request—that gave rise to its first suit. Unfortunately, *dicta* in *Chesterfield* suggested that in order to avoid *res judicata,* the plaintiff had to show that when it filed the first action, it did not know of the ultimate facts forming the basis of the second action, or the ultimate facts alleged had not yet occurred at the time of the first action, 64 S.W.3d at 320. There was no discussion of cases holding that parties need not join all claims they may have in the first action, provided they are not the same cause of action.

Plaintiffs noted earlier that in order for *res judicata* to bar a later action, it must arise out of the same transaction or occurrence and involve the same ***subject***

matter and evidence as the earlier case, *Williams, supra*, 990 S.W.2d at 60. Conversely, a "former judgment is not an absolute bar to a subsequent action, if the ***subject matter*** involved in the two actions is not the same. . . ." *Kimpton, supra*, 173 S.W.2d at 891 (emphasis added). It does not matter that both the death actions filed by Plaintiffs and the fraud actions would not have arisen without Hall's homicidal conduct, because the subject matter of the two cases is dissimilar, *Todd, supra,* 806 S.W.2d at 692.

In their Appellants' Brief at 34-44, Plaintiffs cited many cases where Missouri courts have held that plaintiffs may file separate causes of action separately, even if they arise out of the same transaction. "This is true ***even where joinder of the two separate causes in one lawsuit would be permissible***. . . ." *Collins, supra*, 996 S.W.2d at 516 (emphasis added). Thus, the fact that "**nothing** . . . prevented the Plaintiffs from pursuing their current 'Fraudulent Concealment' theory in the first lawsuits," Respondents' Brief at 50, is of no moment if the causes of action in the two cases were not the same.

That principle was at the core of *Chamberlain II, supra,* where plaintiff and his wife were injured in a car wreck on December 14, 1940. The wife died on December 16, 1940.[12] Plaintiff later filed two separate lawsuits: one for the death of his wife, and a second suit for his own injuries arising out of the same wreck, 189 S.W.2d at 539. Rejecting a claim that plaintiff split his cause of action by not joining his injury claim in the death action, this Court held that the causes of action in the two suits were different, even though they arose out of the same occurrence, so that plaintiff "could bring separate suits on separate causes of action ***even if joinder of the separate causes in one action is permissible***. . . ." *Id.* at 539.

Chamberlain is especially persuasive at bar because—to paraphrase Defendants' argument in their Respondents' Brief at 49—"all of the 'facts' pleaded

[12] *Chamberlain v. Missouri-Arkansas Coach Lines*, 351 Mo. 203, 173 S.W.2d 57, 58 (1943) ("*Chamberlain I*").

in the second lawsuit occurred before [Mr. Chamberlain] filed [his] initial lawsuit; as such, no new facts occurred after [his] first lawsuit [was] filed that form[ed] the basis of [his] second lawsuit." Moreover, "there was **nothing** that prevented [Mr. Chamberlain] from pursuing" his claim for his own personal injuries in the prior death action. Respondents' Brief at 50. Nonetheless, this Court held that Mr. Chamberlain's failure to join his personal injury action with the earlier-filed death action did not bar the later case. ***Chamberlain has never been overruled and is fatal to Defendants' argument because their argument cannot be reconciled with its holding***.

Defendants virtually ignore *Chamberlain*, consigning it to the middle of a footnote, claiming that it is distinguishable because it involved "different parties" in the first action, Respondents' Brief at 57 n. 84. That assertion is flatly wrong: the two *Chamberlain* cases did not involve different parties; Mr. Chamberlain was the plaintiff in both his personal injury action and his wrongful death action, and the defendant was the same in both cases.

For Defendants to prevail in the case *sub judice*, this Court must find one of two things: (1) that *Chamberlain II* has been overruled *sub silentio*, a fate contrary to the presumption followed by *Boland I*, 471 S.W.3d at 709; or (2) that the Court decides to overrule a long line of cases holding that multiple actions can be pursued separately if they involve different causes of action. The latter course would be without the benefit of any argument by Defendants since they declined to explain in their Respondents' Brief how the instant causes are distinguishable from *Chamberlain II*.[13]

Defendants assert in their Respondents' Brief at 49 that Plaintiffs judicially admitted claim preclusion bars their action because of this statement in Fact 26 of

[13] Defendants' failure to engage on this issue is particularly egregious, inasmuch as the Court of Appeals relied heavily on *Chamberlain II* in finding that the death actions and the fraud actions were separate and independent causes of action, Slip Opinion at 8, A.71.

their Motion for Summary Judgment: "The actions in *Boland* arose out of the **same conduct** by Hall **giving rise to the case at bar**." L.F. 2332 (emphasis in original). This argument fails for two reasons.

First, to the extent the statement is a legal conclusion, it is inappropriate for summary judgment. "A legal conclusion brandished as a statement of fact must be disregarded in evaluating a motion for summary judgment, even if that statement is admitted by non-movant." *Metropolitan National Bank v. Commonwealth Land Title Insurance Co.*, 456 S.W.3d 61, 66 (Mo.App.S.D. 2015), *citing Jordan v. Peet*, 409 S.W.3d 553, 560 (Mo.App.W.D. 2013).

Second, the statement is pulled out of context. Here is the entire paragraph of Fact 26:

> Plaintiff's 2016 Petition cites the Missouri Supreme Court's opinion which brought an end to Plaintiff's 2011 lawsuit and states, ***in part***: "The actions in *Boland* arose out of the same conduct by Hall giving rise to the case at bar." (Ex. H: 16LV-CC00105 Petition ¶49).

L.F. 2332 (emphasis added). Respondents' Brief left out the words "in part," referring to other allegations in Plaintiffs' Petitions in the fraud actions, which is a critical omission when considering just what it is Plaintiffs alleged.

A review of Ms. Boland's ***entire*** 2016 Petition demonstrates that she alleged a lot more. Paragraphs 40-43 detailed the efforts by Defendants ***after Decedent's death*** to cover up what happened to him. L.F. 2291-93. She also alleged that this cover-up was "designed to prevent the survivors of the fatal victims of Jennifer Hall from pursuing a timely wrongful death action," and that Defendants knew Plaintiff would be unable to learn the true facts surrounding the death of her father "because of the actions of Defendants to conceal such information," and that the cover-up damaged her because she lost her right to pursue a cause of action for wrongful death. L.F. 2293.

For the reasons already noted, these additional facts, which could not "properly have been raised and determined" in the death action, *Andes, supra*, 897 S.W.2d at 21, render the fraud case a separate cause of action. As in *Miller v. SSI*

Global Security Service, 892 S.W.2d 732, 734 (Mo.App.E.D. 1994), the fact that the death case and the fraud case both involve—***in part***—"the same assault" by Hall does not prevent the causes of action from being "separate and distinct."[14]

Finally, Defendants claim that Plaintiffs admitted in the oral argument in *Boland I*, almost five years ago, that their first action was really an action for fraud in depriving them of their cause of action, Respondents' Brief at 33. They contend that this judicial admission resolves this case.

There is no question that Plaintiffs' counsel misspoke at the 2014 argument because as Plaintiffs point out in reviewing the pleadings in the first actions in their Appellants' Brief at 39-41, nearly all of the allegations of fraud in the first suits related to concealment that occurred ***before*** the deaths of decedents. To the extent they allege post-mortem concealment, it was designed to avoid the affirmative defense of the wrongful death statute of limitations, *Id.* at 41. There is no allegation in the first Petitions that Defendants' nondisclosure deprived Plaintiffs of their causes of action for wrongful death.

Moreover, the problem with Defendants' argument is that it displays a misapprehension of the nature of judicial admissions. It is a matter of black letter law that, "A judicial admission, to be binding, must be one of fact and not a conclusion of law. . . ." 32 C.J.S. *Evidence* § 542 (March 2019 Update). Missouri law is consistent with this position, *DiStefano v. Saint-Gobain Calmar, Inc.*, 272 S.W.3d 207, 214 (Mo.App.W.D. 2008) ("admission, to be binding, must be one of fact and not a conclusion of law"); *Wright v. Quattrochi*, 330 Mo. 173, 49 S.W.2d 3, 7 (1932) ("it is well settled that the admissions of a party in relation to a question of law is no evidence").

But if Defendants want to play "gotcha" with statements made during the oral argument in *Boland I*, they might want to consider their own "admission." During oral argument Defendants' counsel asserted that the General Assembly

[14] *Miller* is described in greater detail in Appellants' Brief at 41-42.

really did intend to allow tortfeasors who killed people to take advantage of the death statute of limitations when they covered up their wrongful acts, which led to this colloquy:

> **THE COURT**: Well, let's talk about that because that's where Judge Manners started, and it's sort of the underpinning for the whole argument. What possible policy is served by allowing someone, if they are successful in, by whatever active means, concealing their liability for a wrongful death, to allow them to escape that liability by their own act? What – why would the Legislature have made that decision?
>
> **MR. DAVIS**: A few points, Your Honor, first with the caveat that ultimately it's up to the Legislature to make that choice, although I recognize that you're not supposed to interpret the statue in a way that would lead to absurd results, and here's why it's not absurd as they recite. First of all, there is a benefit in certainty of the law. That again is a principle that has been stated by this Court many times, that statues of limitations are favored in the law, that they promote certainty in the law. If you create an exception based on something like fraud, you essentially risk the exception swallowing the rule.
>
> **THE COURT**: But they've created an entire fraud cause of action that says that you can sue for. You've got 10 years for it to accrue and then five years to sue, so they weren't afraid of fraud as a cause or the subjectivity of what constitutes fraud.
>
> **MR. DAVIS**: ***Yes, but that's an entirely separate cause of action that's outside of the wrongful death statue, and so within the wrongful death statue is an entirely new cause of action created to allow people who are not the ones directly under suit to sue,*** and the Legislature had the right to say okay, how are we going to limit this if we're going to limit it at all?[15]

Applying the logic of Defendants' argument—that judicial admissions can encompass opinions offered by counsel during oral argument about the legal meaning of pleadings—then they have judicially admitted that the cause of action for fraud is "an entirely separate cause of action that is outside of the wrongful death statute." It is Defendants' burden to show their entitlement to the judgment

[15] Oral Argument Recording in *Boland I* 27:45-29:32 (emphasis added).

on the basis of *res judicata,* as Plaintiffs argued in their Appellants' Brief at 22. If Defendants admit that a cause of action for fraud is an "entirely separate cause of action that is outside of the wrongful death statute," then the framework of their argument collapses, and this case should be remanded to the Circuit Court for trial.

Since Plaintiffs' fraud actions did not arise out of the same transaction or occurrence as the death cases, and since they did not involve the same subject matter and evidence, it follows that the trial court erred in granting summary judgment on the basis of *res judicata*.

II. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON THE GROUND THAT PLAINTIFFS' FRAUD CLAIMS WERE BARRED BY THE STATUTE OF LIMITATIONS FOR FRAUD, R.S.MO. § 516.120(5), BECAUSE THEIR FRAUD ACTIONS DID NOT ACCRUE UNTIL THEY DISCOVERED THERE WAS ACTIONABLE FRAUD.

In response to Plaintiffs' statute of limitations argument, Defendants argue that the occurrence of damage caused by their fraud is irrelevant because, they claim, "the case law clearly separates damages and the underlying fraud facts, the discovery of which triggers accrual." Respondents' Brief at 73. That statement reveals a profound misunderstanding of the law of fraud that is fatal to Defendants' argument.

It is certainly true that a fraud action does not accrue "until discovery of the facts constituting the fraud." § 516.120(5). But Defendants never answer the question that is critical at bar: What are the facts constituting the fraud? The elements of a tort claim for fraud are set out in many cases, including *Hess v. Chase Manhattan Bank, USA, N.A.*, 220 S.W.3d 758, 765 (Mo. 2007), and include injury proximately caused by fraudulent nondisclosure. Since damage caused by the fraud is an essential element of the tort, the failure of a plaintiff to establish damage is "fatal to the claim," *City of Harrisonville v. McCall Service Stations*, 495 S.W.3d 738, 749 (Mo. 2016).

In their Appellants' Brief at 57, Plaintiffs cited this Court's opinion in *Rippe v. Sutter*, 292 S.W.2d 86 (Mo. 1956), as did the Court of Appeals below, A.73-74. It is worth considering at some length the facts and holding of *Rippe*, given the decisive effect it has on Defendants' claim that damages are separate from the underlying fraud facts in determining when the fraud statute of limitations begins to run.

In *Rippe* plaintiff sued defendants, claiming that in 1945 they fraudulently filed a lawsuit to annul her marriage and void deeds to property that was rightfully hers. The 1945 suit resulted in a judgment in November of 1950 that annulled

plaintiff's marriage and voided the deeds. Plaintiff commenced her action in June of 1955, more than five years after the fraudulent representations were made in the 1945 pleadings. Since the gist of a civil conspiracy is the act done in furtherance of the conspiracy, *Id.* at 89, defendants argued on appeal that plaintiff's suit was untimely under the five-year limitations period for fraud, § 512.050(5).

This Court read § 516.120 *in pari materia* with § 516.100, which applies to sections 516.100 to 516.370:

> Section 516.100 provides in part that for the purposes of applying the provisions of Section 516.120 "the cause of action shall not be deemed to accrue when the wrong is done or the technical breach of * * * duty occurs, but when the damage * * * therefrom is sustained and is capable of ascertainment * * *." The general rule, however, is that a statute of limitations beings to run when the cause of action accrues, and that "accrual" occurs at the time when a breach of duty has occurred or wrong sustained as will give the right to the injured party to bring and maintain an action. The aforequoted statute does not change the general rule that when an injury is complete as a legal injury at the time of the act, the period of limitation will at once commence; [and] if the action is of a nature to be maintained without proof of actual damage, the period of limitation will begin to run from the time the act is done without regard to any actual damage, * * * ***but*** * * * ***when the act which gives the cause of action is not legally injurious until certain consequences occur, then the period of limitation will take date from the consequential injury.*** * * * ***the injurious consequences or resulting damages which bring about the accrual of the cause of action are the indispensable elements of the injury itself,*** and not mere aggravating circumstances enhancing a legal injury already inflicted, * * * ***and*** * * * ***the resulting damage is sustained and is capable of ascertainment within the contemplation of the statute whenever it is such that it can be discovered or made known***.

292 S.W.2d at 90 (internal quotation marks and citation omitted; emphasis added). In *Rippe* the fraudulent representations made by defendants in their 1945 lawsuit did not give rise to a fraud claim immediately because there were no injurious consequences at that time:

> As we see it, plaintiff had no claim or cause of action against defendant until and unless the wrongful institution and maintenance of the suits resulted in damage to her. That must be true, because, irrespective of how

> fraudulent or wrongful defendant's acts in causing the institution and maintenance of the suits may have been, no right of plaintiff was violated unless defendant's acts of institution and maintenance proximately contributed to cause her to not receive property that was rightfully hers.

Id. at 91. In *Rippe* the injurious consequences did not occur until November of 1950, when the trial court entered judgment against plaintiff. *Id.* Since plaintiff's fraud suit was filed in June of 1955, less than five years after entry of the judgment, it was not barred by § 512.150(5).

The clear teaching of *Rippe* is this: damage must be sustained before a fraud action accrues since damage is one of the facts constituting the fraud. And later cases qualify the rule to require more than just the fact of damage. In a case cited by Defendants in their Respondents' Brief at 73—*Thomas v. Grant Thornton LLP*, 476 S.W.3d 440, 445 (Mo.App.W.D. 2015)—the Court held that an action for fraud does not necessarily accrue when damage occurs, but "when facts constituting the fraud are discovered." Thus, a "cause of action for fraud accrues at the time the defrauded party discovered or in the exercise of due diligence should have discovered the fraud." *Id.*

What if the fact of damage is not discovered at the time it occurred? To the extent a defrauded party, exercising due diligence, could not have discovered the injurious consequences of the fraud when it occurred, there is no accrual, *Thomas, supra*, 476 S.W.3d at 445; *Lehnig v. Bornhop*, 859 S.W.2d 271, 273 (Mo.App.E.D. 1993). And that is especially true "where a relationship of trust and confidence exists between the parties." *Burr v. National Life & Accident Insurance Co.*, 667 S.W.2d 5, 7 (Mo.App.W.D. 1984).

So, the real question is whether Plaintiffs, exercising due diligence, should have realized that they were damaged when they found out about Hall's conduct, long after the three-year Wrongful Death statute of limitations found in § 537.100 had expired, sometime before they filed their first suits. As they argued in their Appellants' Brief at 60, *Howell v. Murphy*, 844 S.W.2d 42 (Mo.App.W.D. 1992),

provided them a basis for believing that Defendants' fraudulent concealment would avoid the wrongful death statute of limitations.

Ultimately, this Court held that *Howell* was erroneously decided and "should no longer be followed." *Boland I*, 471 S.W.3d at 709. Was it reasonable for Plaintiffs to believe in 2010 and 2011—four years before the decision in *Boland I*—that *Howell* was good law? Opinions of the Court of Appeals are *stare decisis* on the issues they decide. *State ex rel. KCP&L Greater Missouri Operations Co. v. Missouri Public Service Commission*, 408 S.W.3d 153, 169 n. 9 (Mo.App.W.D. 2013) (a "court's decision has *stare decisis* effect upon a lower court or one of the same rank but not upon a court higher in rank than the court in which the decision is cited as precedent"). If such opinions were not *stare decisis*, why would they be published in the SOUTHWESTERN REPORTER? One of the virtues of *stare decisis* is the reliance by lower courts and parties on the decisions of appellate courts. Thus, "reliance interests are a critical part of what gives *stare decisis* its value; precedents are among the key 'materials on which the community necessarily places its principal reliance in trying to figure out what the "law" is.'" Kozel, *Stare Decisis as Judicial Doctrine*, 67 WASH. & LEE L.R. 411, 414 (2010), *citing* R. Posner, LAW, PRAGMATISM, AND DEMOCRACY 63 (2003). Indeed, *stare decisis* is "the preferred course" because it fosters, *inter alia*, "reliance on judicial decisions." *Michigan v. Bay Mills Indian Community*, 572 U.S. 783, 798 (2014) (Scalia, J. concurring). Of course, *Howell* was not binding on this Court, but when Plaintiffs relied on it, they were simply "trying to figure out what the 'law' is." They should not be penalized for doing that.

Defendants do not argue that had *Howell* been good law, it would not have avoided the statute of limitations in the death actions in *Boland I*. Instead, they claim that Plaintiffs should have realized that four years after they filed their first suits, this Court would reject *Howell's* holding that *Frazee v. Partney*, 314 S.W.2d 015 (Mo. 1958), had been superseded by *O'Grady v. Brown*, 654 S.W.2d 904 (Mo. 1983), Respondents' Brief at 65. Of course, hindsight is always 20/20, but that

does not bespeak a lack of diligence, any more than changes of law bespeak a lack of diligence in post-conviction relief matters, Appellants' Brief at 55.

Defendants argue in their Respondents' Brief at 74 that because they successfully engaged in fraud that prevented Plaintiffs from filing a timely wrongful death action, they had a *vested right* to avoid accountability, *citing Doe v. Roman Catholic Diocese of Jefferson City*, 862 S.W.2d 338 (Mo. 1993), where this Court held that once an action has expired, it is unconstitutional for the legislature to enact a statute that revives the time for filing it. Of course, Plaintiffs have never claimed in their first suits that their wrongful death actions could be *revived*; rather, they argued that Defendants' fraud estopped them from asserting the statute of limitations as a defense. None of the cases cited by Defendants involved claims of fraud that prevented the running of the statute of limitations. Obviously, cases that recognize that fraud will avoid the statute of limitations (where applicable) do not impinge on constitutional rights.

Defendants argue that Plaintiffs were aware that they were damaged by fraudulent concealment in the first suits because they pled that the concealment of what Hall did ***before the deaths of Decedents*** contributed to cause those deaths, Respondents' Brief at 77. That argument misconstrues the nature of the second suits, which seek damages sustained by *Plaintiffs*—not their Decedents—caused by ***postmortem*** nondisclosure, continuing for a period of years, in the form of the loss of their wrongful death actions. That is why, with one exception, all of the allegations in the first suit focused on fraud that preceded and contributed to the deaths of Decedents, Appellants' Brief at 39-40. Of course, as Defendants' counsel argued in 2014, the actions for fraud are ***different causes of action*** than the wrongful death actions.[16]

Defendants argue that since Plaintiffs knew that they had "a **potentially actionable** injury" caused by Defendants' fraud when they filed their death

[16] Oral Argument Recording in *Boland I* 27:45-29:32 (emphasis added).

actions, their cause of action for fraud accrued at that time, citing *Powel v. Chaminade College Preparatory, Inc.*, 197 S.W.3d 576, 582 (Mo. 2006), Respondents' Brief at 79-80 (emphasis in original). More specifically, they claim that when Plaintiffs filed their wrongful death suits, they knew that the three-year statute of limitations ***might*** bar their ability to recover for wrongful death, and since they knew of the ***potential*** actionable injury the fraud ***might*** cause, their actions for fraud accrued when they filed their original suits, more than five years before they filed their fraud actions. The problem with that argument is that *Powel* is not a fraud case, and its rule is inapposite to fraud cases.

To constitute the ***tort of fraud***, damage must be "real and substantial." *Doe, supra*, 481 S.W.3d at 47. "Mere speculation" is not enough, *Id*. In *Roberts v. BJC Health System*, 391 S.W.3d 433, 438 (Mo. 2013)—which, unlike *Powel,* was a tort action for fraud—plaintiffs argued that their liability for "potential damages" adequately supported the element of damages necessary to establish their fraud claims. This Court disagreed, holding that, "Plaintiffs' ***potential*** liability remained ***a speculative harm,"*** insufficient to support a finding of actionable fraud. 391 S.W.3d at 438 (emphasis added). Although Plaintiffs cited *Roberts* in their Appellants' Brief at 58, Defendants make no effort to distinguish it from the case *sub judice*.

In the instant causes Plaintiffs had to have suffered more than ***potential*** damages for fraud when they filed their death actions for the statute to run, *Roberts, supra*. The inevitable question is this: By acting diligently to discover the facts constituting actionable fraud when they filed their original suits, would Plaintiffs have known that they had more than speculative harm? If they had been successful in avoiding the statute of limitations for wrongful death, would they have suffered injurious consequences as a result of Defendants' cover-up? What if they had learned about the fraud two years after the deaths and filed suit for wrongful death? Could they still pursue a fraud action for the post-mortem cover-up? The answer to these questions is obviously that they could not because they

would have suffered no damage proximately caused by the fraud. The damages they suffered until *Howell* was clearly overruled were speculative and contingent on the outcome of *Boland I*.

It follows that their causes of action for fraud did not accrue until their potential damages became actual damages, when they lost their causes of action for wrongful death by the holding of *Boland I*. It follows that Plaintiffs' fraud actions were timely.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that on April 2, 2019, the foregoing instrument was filed electronically with the Clerk of this Court, to be served by operation of the Court's electronic filing system upon all attorneys of record.

I further certify that this brief includes the information required by Rule 55.03 and complies with the requirements contained in Rule 84.06. Relying on the word count of the Microsoft Word program, the undersigned certifies that the total number of words contained in this brief is 7,218, not including the cover, the signature block, and this Certificate of Compliance.

The electronic copies of this brief were scanned for viruses and found virus-free through Endpoint Security by Bitdefender.

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