Case No. SC93760

SUPREME COURT OF MISSOURI

MARY ELLISON, et al.,
Appellants/Cross-Respondents/Plaintiffs

v.

LINDA FRY, TRUSTEE OF THE JOHN DELBERT FRY REVOCABLE INTER VIVOS TRUST, et al.,
Respondents/Cross-Appellants/Defendants.

Appeal from the Circuit Court Of Camden County, Missouri
26th Judicial Circuit

Honorable Ralph Jaynes, Judge
Case No. 08CM-CC00244

RESPONDENTS'/CROSS-APPELLANTS' INITIAL SUBSTITUTE BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes of Missouri ("RSMo.")

Missouri Supreme Court Rules ("MSCR")

Missouri Constitutional Provisions

JURISDICTIONAL STATEMENT

This case is an appeal from the Circuit Court of Camden County, Missouri (the "Trial Court") wherein the Trial Court entered judgment consistent with jury verdicts which were rendered against Defendant/Respondent/Cross-Appellant Linda Fry, as Trustee of the John Delbert Fry Revocable Trust on April 20, 2012. The Trial Court's judgment assessed costs against all parties. Respondents/Defendants/Cross-Appellants (collectively "Defendants")[1] timely filed a Motion for Judgment Notwithstanding the Verdict, and alternatively a Motion for New Trial, on May 2, 2012, both of which were denied. An amended judgment was entered on June 12, 2012. Defendants timely filed their Notice of Appeal with the Missouri Court of Appeals – Southern District on June 22, 2012 as the Circuit Court of Camden County is within the Southern District's territorial jurisdiction. MSCR 81.04 and 81.05; RSMo. § 477.060. On December 24, 2013 this Court sustained Plaintiffs' Application for Transfer, after the Missouri Court of Appeals – Southern District issued its opinion dated September 23, 2013. Pursuant to MSCR 83.09 and Article V, § 10 of the Missouri Constitution, this Court has jurisdiction over this cause as if on original appeal.

This Court has jurisdiction to hear this appeal, despite pending counterclaims severed by the Trial Court, since all claims of Plaintiffs' petition (as it existed on the date

[1] As this is a cross-appeal and for the convenience of the Court, Respondents/Cross-Appellants will be referred to as Defendants throughout the body of the brief and Appellants/Cross-Respondents will be referred to as Plaintiffs.

of trial) were resolved against all Defendants and the Trial Court in its amended judgment expressly found that there was no just reason for delay. See *Comm. Educ. Equal. v. State*, 878 S.W.2d 446, 453 (Mo. banc 1994) (when at least one claim is fully resolved as to at least one party, a court has the discretion to enter a final judgment for appeal purposes on a finding of "no just reason for delay.") and MSCR 74.01(b).

STATEMENT OF FACTS

Vincil Fry ("Vincil"),[2] deceased, and Willa Fry ("Willa"), deceased, were married and had three children: Plaintiff Arthur Fry ("Arthur"); original Defendant John Delbert "J.D." Fry ("J.D."), now deceased; and Plaintiff Mary Ellison ("Mary"). *LF*[3] at 50. Vincil was a farmer. *Tr*. at 238-39. Willa was a school teacher. *Tr*. at 221. Vincil was born January 13, 1908 and died February 11, 2000. *LF* at 50 and 51. Willa was born July 7, 1907 and died November 10, 2005. *LF* at 51. Vincil's and Willa's farm consisted of two, contiguous tracts of land in Morgan County, Missouri, to wit: a 160 acre, more or less, tract of pasture ground with their residence (the "Home Place") and a 200 acre, more or less, tract of mixed pasture and bottom ground (the "200 Acres") (the Home Place and 200 Acres are referred to herein collectively as the "Farm"). *LF* at 50. Immediately prior to Vincil's death, Vincil and Willa owned a life estate in the Farm and, as tenants by the entireties, modest farm equipment, household furnishings and personal effects, and approximately $360,000.00 in certificates of deposit ("CD's") and bank account balances at local banks. *Resps.' Exhs.* at 39, *LF* at 71. Immediately prior to her death almost 6

[2] First names are used herein to avoid confusion caused by multiple parties with the same family name. No disrespect is intended.

[3] For the convenience of the Court, the following are used in reference to the Record on Appeal: *LF* – Legal File, *Tr*. – Transcript, *Resps.' Exhs.* – Respondents' Exhibits, *Aplts.' Exhs.* – Appellants' Exhibits, *Resps.' Supp. LF* – Respondents' Supplemental Legal File, and *Resps.' 2nd Supp. LF* – Respondents' Second Supplemental Legal File.

years after Vincil's death, Willa continued to own the life interest in the Farm, the same modest farm equipment, household furnishings and personal effects and approximately $500,000 in CDs and checking account balances at local banks. *Resps.' Exhs.* at 38, *LF* at 71.

With the sole exception of their personalty, all of Vincil's and Willa's assets transferred to their descendants through lifetime or other non-probate transfers. *Resps.' Exhs*. at 38, *Aplts.' Exhs.* at 1, 3, 4. No probate estate for either Vincil or Willa was opened. *LF* at 51. The life interests in the Farm were the result of lifetime transfers by Vincil and Willa of the 200 Acres by general warranty deed to J.D. and the Home Place by a separate general warranty deed to Defendant Delbert Fry ("Delbert"). *Aplts.' Exhs.* at 1, 3. On the same day Vincil and Willa deeded the Farm to J.D. and Delbert, Vincil and Willa also transferred a 40 acre tract with a residence in Cooper County, Missouri via warranty deed to Mary, also reserving a life estate for Vincil and Willa ("Mary's Deed"). *Aplts.' Exhs.* at 4. All three deeds will be collectively referred to as the "Deeds". The Deeds were promptly recorded in the respective county deed records. *Resps.' Exhs.* at 9. On the same day Vincil and Willa signed the Deeds, they each executed a last will and testament and they settled a trust for the benefit of Arthur during his lifetime and David Fry ("David") and Susan Sleeper ("Susan") as remainder beneficiaries ("Arthur's Trust"). *Aplts.' Exhs.* at 6, 8, *Tr*. at 710-11. The CDs were distributed to the POD beneficiaries shown on the date of Willa's death. *Aplts.' Exhs.* at 33, 66, 82. All bank accounts, some of which were held as joint tenants with rights of survivorship by Willa and J.D. and some of which were held as joint tenants with rights of survivorship by Willa, J.D. and

Arthur, were ultimately combined and used to pay the final expenses of Willa. *Tr*. at 402, 325, 668. J.D. paid himself, Arthur and Mary equally the balance of these combined funds. *Tr*. at 325.

The Suit

Mary filed the six count initial petition for damages against three Defendants: her brother, J.D.; J.D.'s wife, Defendant Linda Fry ("Linda"); and Defendant Fry Grain Enterprises, Inc. ("Fry Grain"), a business in which J.D., Linda and Delbert are principals. *Resps.' Supp. LF* at 1. Count I claimed that J.D. used fraud or undue influence to cause Vincil and Willa to transfer the Farm to himself and Delbert in 1990; Count II claimed that J.D. and Linda breached fiduciary duties and deceived Mary and Arthur related to the beneficiary designations and existence of certain certificates of deposit; Count III claims that the personalty belonging to Willa upon her death was wrongfully converted by J.D. and Linda and sought replevin of such property; Count IV claims that the retention by J.D. and Linda of the proceeds of CDs which were owned by Mary or designated her as a beneficiary would unjustly enrich them; and Count VI claimed conversion against Fry Grain related to government payments paid to Fry Grain, Farm and equipment rent it did not pay to Willa and for keeping Vincil's and Willa's farm equipment following her death. *Resps.' Supp. LF* at 1-23.

Although not a party to the lawsuit, out of due caution, Defendants immediately settled any and all potential claims with Arthur, who was not a party to the case when the petition was originally filed. *Resps.' Exhs.* at 1, 3 and 5. The initial petition was amended by the first, second and third amended petitions filed herein. *LF* at 2, 10, and 17. Judges

Moore and Hayden heard various motions during the pendency of the suit. *LF* at 2, 4. John Hutcherson was appointed discovery master. *LF* at 1. Senior Judges Donald Barnes, then Byron Kinder and finally Ralph Jaynes were appointed to hear the case, which was filed April 10, 2008 and was tried to a jury from April 16, 2012 to April 20, 2012. *LF* at 15, 24, 25, and 27.

The third amended petition was amended one week before trial (the "Final Petition"), and was the pleading setting forth the claims tried to the jury. *Tr.* at 5.[4] The Final Petition contained 10 counts by 4 Plaintiffs against 4 Defendants.[5] *LF* at 49-81. The Final Petition removed any claim by Mary related to the Farm. *Resps.' 2nd Supp. LF* at 3. Defendants moved for directed verdicts at the close of Plaintiffs' evidence and at the close of all evidence. *LF* at 181, 197. Each motion was granted in part and denied in part. *LF* at 189, 204. At the close of Plaintiffs' evidence, Arthur's claims were dismissed; all

[4] The pleadings filed by Plaintiffs were the source of great confusion for the Trial Court and Defendants. For example, the Second Amended Petition purported to be against all Defendants in all counts. The Final Petition had counts against and sought relief from both J.D. and the Trustee. *LF* at 49.

[5] Plaintiffs treat J.D. and the Trustee as separate party Defendants. Judge Barnes overruled Defendants' Motion for a More Definite Statement finding that it was clear that, although the Final Petition makes claims and seeks relief against both J.D. and the Trustee, the case was old and the issue could be addressed by jury instructions at trial. *Resps.' 2nd Supp. LF* at 1.

counts were dismissed as to Delbert; and the Court found the Plaintiffs failed to present clear and convincing evidence warranting punitive damages; *LF* at 190 and 194-95. At the close of all evidence, all counts against Fry Grain were dismissed. *LF* at 206-07. The Trial Court denied Defendants' motions for directed verdict at the close of Plaintiffs' evidence and the close of all evidence related to the absolute bar to David and Susan's claims against the Trustee of the John Delbert Fry Revocable Inter Vivos Trust ("Trustee" and "Trust" respectively) for J.D.'s conduct based on the statutes of limitation for suits on land or fraud or against a deceased person's estate. *LF* at 189, 204.

Verdicts and the Final Judgment

The jury completed the six verdict forms in favor of Plaintiffs. *LF* at 212-217. Verdict A assessed damages in favor of David and against the Trustee in the amount of $5,500 under the theory of unjust enrichment; Verdict B assessed damages of $0 in favor of David against the Trustee under the theory of undue influence; Verdict C assessed damages in favor of Susan and against the Trustee in the amount of $5,500 under the theory of unjust enrichment; Verdict D assessed damages of $0 in favor of Susan against the Trustee under the theory of undue influence; Verdict E assessed damages of $35,000 in favor of Mary against the Trustee under the theory of "breach of fiduciary duty, fraudulent concealment, conversion, and/or unjust enrichment;" and Verdict F assessed

damages of $0 in favor of Mary against Linda under the theory of "breach of fiduciary duty, fraudulent concealment, conversion, and/or unjust enrichment."[6] *LF* at 212-217.

In its amended judgment, the Trial Court entered judgment against the Trustee in favor of David and Susan for $5,500 each and in favor of Mary against the Trustee for $35,000. *LF* at 294. The costs of the court reporter for trial were to be shared equally "by the parties;" the costs of the Special Master were assessed "as ordered by the appointing judge;" and all other costs were assessed against the defendants. *LF* at 295.

Substitution of the Trustee

J.D. died December 9, 2008. *LF* at 33. Suggestions of Death were filed by Defendants on December 15, 2008. *LF* at 33. A Motion to Substitute J.D.'s daughter, Lori Bestgen, was timely filed by Mary. *LF* at 33, 36. Suggestions in Opposition of Plaintiff's motion were filed by Defendants, and a hearing on the motion was held. *Resps.' Supp. LF* at 24, *LF* at 4. Following the hearing, the Honorable Kenneth Hayden substituted the Trustee as a party for J. D. over Defendants' objections. *LF* at 39. There was no probate estate opened at any time for J.D. *LF* at 50.

[6] Although four claims (breach of fiduciary duty, fraudulent concealment, conversion, and unjust enrichment) are listed on Verdict Form F, Mary only submitted verdict directors for three of the claims against Linda, individually (breach of fiduciary duty, conversion, and unjust enrichment). *LF* at 217, 261-71.

Intervention by Arthur, Susan and David

Arthur, Susan and David moved for leave of the Trial Court to intervene and join Mary in filing the Third Amended Petition on October 11, 2011. *LF* at 41. By his order dated November 14, 2011, the Honorable Donald Barnes ("Judge Barnes") found that the representations of Plaintiffs "facially" met the burden required for intervention; and that no substantial prejudice to Defendants would come from permitting intervention and litigating these issues. *LF* at 106. The jury was instructed at trial that J.D. is deceased and any finding against J.D. must be a verdict against the Trustee. *LF* at 223. The verdict directors given to the jury for David and Susan's claims set forth the conduct of J.D. that the jury should consider in awarding judgment against the Trustee. *LF* at 231, 238.

Statutes of Limitation

Vincil and Willa executed a joint will in 1981 (the "1981 Joint Will"). *LF* at 50. The 1981 Joint Will was discovered by both parties during the course of this litigation. *LF* at 2. There is no evidence that any of the parties to the litigation knew of the existence of the 1981 Joint Will before the Trial Court ordered the Buckley Law Firm (the law firm that drafted the 1981 Joint Will) to produce its legal file in this action. *Tr.* at 241, 394, 865, 1029. The 1981 Joint Will provided for Arthur to farm the 200 Acres for as long as he desired and for Susan and David to have the ground in fee thereafter. *LF* at 83. Arthur stopped farming the 200 Acres following the 1987 crop year for a number of reasons. *Tr.* at 467, 489, 490, 651. The wills signed in 1990 (the "1990 Wills") contained a clause cancelling all prior wills. *Aplts.' Exhs.* at 6, 8. Neither the 1981 Joint Will nor the 1990 Wills were offered or admitted to probate. *LF* at 50, 51. The claims by David, Susan, and

Arthur are based on their claim of rights under the terms of the 1981 Joint Will. *LF* at 55, 56.[7] Vincil and Willa transferred the Farm to J.D. and Delbert, as described above, in 1990. *Aplts.' Exhs.* at 1, 3. Arthur became aware of the transfers in 1990 when he read about them in the newspaper. *Tr*. at 738. Susan learned of the transfers from Arthur, after Arthur read about the land transfers in the newspaper and while Vincil and Willa were still alive. *Tr*. at 238-239. David learned of the transfers from Arthur after Arthur had read about the transfers in the local paper. *Tr*. at 476. David could not remember when he learned of the land transfers. *Tr*. at 476. The claims by Arthur, David, and Susan were filed in November, 2011 when Judge Barnes permitted their intervention and the filing of the Third Amended Petition. *LF* at 106.

[7] The 1981 Will also stated that J.D. was to receive the Home Place and Mary was to receive $5,000 and the Cooper County property. *LF* at 83. The Cooper County property was conveyed by Mary to Vincil and Willa in 1995 by quitclaim deed and then Vincil and Willa sold it to unrelated third parties with the sale proceeds going into a CD naming Mary as POD beneficiary. *Tr*. at 839, 407, 150.

RESPONDENTS' BRIEF FOR RESPONDENTS' CROSS-APPEAL

POINTS RELIED ON

1. The Trial Court erred in denying Defendants' Motion for Judgment Notwithstanding the Verdict because the claims made by Plaintiffs David Fry and Susan Sleeper as against J.D. Fry are barred by the statute of limitations for bringing a claim against a dead person in that Plaintiffs David Fry and Susan Sleeper brought their claims against J.D. Fry, deceased, more than a year after J.D. Fry's death.

1. RSMo. § 473.444.
2. *In the Estate of Alva Ray Spray*, 77 S.W.3d 12 (Mo.App. E.D. 2002).

2. The Trial Court erred in denying Defendants' Motion for Judgment Notwithstanding the Verdict because the claims made by Plaintiffs David Fry and Susan Sleeper concerning the real property at issue are barred by the applicable statute of limitations (RSMo. § 516.120) for claims related to the conveyances of real property in that said Plaintiffs brought their claims against Defendants more than 15 years after those claims arose.

1. RSMo. § 516.120.
2. *Graf v. Michaels*, 900 S.W.2d 659 (Mo.App. S.D. 1995).
3. *Turnmire v. Claybrook*, 204 S.W. 178 (Mo. 1918).
4. *Pemberton v. Reed*, 545 S.W.2d 698 (Mo.App. W.D. 1976).

3. The Trial Court erred in denying Defendants' Motion for Judgment Notwithstanding the Verdict because Plaintiffs do not have standing to bring the claims alleged in the Third Amended Petition in that Plaintiff Mary Ellison is not the proper party to bring the claims contained in the Third Amended Petition and in that Plaintiffs David Fry and Susan Sleeper do not have a cognizable interest which can be asserted by the claims contained in the Third Amended Petition.

1. RSMo. § 537.010.
2. RSMO. § 537.021.2.
3. *Britton-Paige v. Am. Health & Life Ins. Co.*, 900 S.W.2d 7 (Mo.App. E.D. 1995).
4. *Carter v. Pottenger*, 888 S.W.2d 710 (Mo.App. S.D. 1994).

4. The Trial Court erred in denying Defendants' Motion for Judgment Notwithstanding the Verdict because the facts at trial did not establish a submissible case against the Trustee of the John Delbert Fry Revocable Trust for damages in that the Trust was not in existence during the conduct complained of and that the Trustee was improperly substituted for a deceased party.

1. Missouri Supreme Court Rule 52.13(a)(1).
2. RSMo. § 537.021.1.
3. *Griffin v. Miller*, 899 S.W.2d 930 (Mo.App. W.D. 1995).

5. The Trial Court erred in its assessment of costs because the assessment is ambiguous in that the assessment does not specify which Defendants and parties are responsible given certain parties were dismissed, certain Defendants were improperly substituted, certain Defendants had no claims submitted against them, and only one Defendant had a judgment entered against it.

1. *Jacobs v. Georgiou*, 922 S.W.2d 765 (Mo.App. E.D. 1996).
2. *Woodfill v. Shelter Mut. Ins. Co.*, 878 S.W.2d 101 (Mo.App. S.D. 1994).

6. The Trial Court erred in assessing significant costs against the Defendants because such an assessment is an abuse of the Trial Court's discretion in that the apportionment of costs must bear some relationship to the judgment on all the issues and Defendants were the prevailing Parties on the principal issues litigated.

1. RSMo. § 514.090.
2. RSMo. § 514.100.
3. *Kopp v. Franks*, 792 S.W.2d 413 (Mo.App. S.D. 1990).
4. *Cox v. Crider*, 721 S.W.2d 220 (Mo.App. S.D. 1986).

ARGUMENT

1. The Trial Court erred in denying Defendants' Motion for Judgment Notwithstanding the Verdict because the claims made by Plaintiffs David Fry and Susan Sleeper as against J.D. Fry are barred by the statute of limitations for bringing a claim against a dead person in that Plaintiffs David Fry and Susan Sleeper brought their claims against J.D. Fry, deceased, more than a year after J.D. Fry's death.[8]

1.1. **Standard of Review.**

The standard of review of a trial court's denial of motions for directed verdict and judgment notwithstanding the verdict are treated the same. *Twin Chimneys v. J.E. Jones Constr.*, 163 S.W.3d 488, 495 (Mo. 2005). In reviewing a trial court's denial of a motion for judgment notwithstanding the verdict, the primary inquiry is whether the plaintiff has made a submissible case. *Id.* In determining whether a plaintiff has made a submissible case, the court will view the evidence and all reasonable inferences therefrom in the light most favorable to the plaintiff. *Id.* Whether a party made a submissible case is a question of law the court reviews *de novo*. *Rinehart v. Shelter Gen. Ins. Co.*, 261 S.W.3d 583, 595 (Mo.App. W.D. 2008). Further, whether the statute of limitations applies to an action is a

[8] In the even the Court holds that Arthur's release was not enforceable and therefore Arthur was wrongly dismissed from the suit, then this Point would bar his claims as against J.D., J.D.'s heirs, devisees, and legatees.

question of law that is reviewed *de novo*. *Braun v. Petty*, 129 S.W.3d 449, 451 (Mo.App. E.D. 2004).

1.2. **Plaintiffs David Fry and Susan Sleeper's claims against J.D. Fry are barred by the one-year statute of limitations for claims against a deceased person.**

"All claims against the estate of a deceased person, …, which are not filed in the probate division or are not paid by the personal representative, shall become unenforceable and shall be forever barred against the estate, the personal representative, the heirs, devisees and legatees of the decedent one year following the date of the decedent's death, whether or not administration of the decedent's estate is had or commenced within such one-year period …." RSMo. § 473.444. Section 473.444 requires claims against an estate to be filed within one year of the decedent's death or else be forever barred. *In the Estate of Alva Ray Spray*, 77 S.W.3d 12 (Mo.App. E.D. 2002). The only way to toll the statute of limitation contained in § 473.444 is to file a claim in the probate court. *Hatfield v. McCluney*, 893 S.W.2d 822, 826 (Mo. 1995).

J.D. died on December 9, 2008. *LF* at 33. David and Susan intervened and brought their lawsuit based on the 1981 Joint Will, in October of 2011. *LF* at 41. David and Susan did not file a claim in J.D.'s probate estate as no probate estate was opened for J.D. *LF* at 50. David and Susan's claims were made outside the one year period to bring claims against a deceased person and therefore are time barred pursuant to RSMo. § 473.444.

1.3. **Plaintiffs David Fry and Susan Sleeper's claims against J.D. Fry do not relate back to the claims made by Plaintiff Mary Ellison.**

"The breath of life cannot, by judicial hands, be instilled into a petition devoid of life." *State ex rel. Jewish Hospital of St. Louis v. Buder*, 540 S.W.2d 100, 107 (Mo.App. E.D. 1976). Alleging a new cause of action which is subject to the bar of the statute of limitations cannot be considered a mere amendment and is not authorized by Rule 55.33. *Southwestern Bell Telephone Co. v. Missouri Com'n on Human Rights*, 863 S.W.2d 682, 685 (Mo.App. E.D. 1993). David and Susan's claims related to the 200 Acres are based upon and are derived from the 1981 Joint Will. *LF* at 50, 55-56. A copy of the 1981 Joint Will was discovered after this suit was originally filed and while J.D. was still alive.[9] The 1981 Joint Will disposed of the 200 Acres by devising a life estate to Arthur and devising the remainder interest in David and Susan, while in 1990 Vincil and Willa granted a life estate to themselves by deed and granted the remainder interest to J.D. Mary's claims to the 200 Acres in the prior petitions were based upon the Deeds executed in 1990. Not until the Petition was amended for a third time in November 2011 did David and Susan's claims based on the 1981 Joint Will appear in the pleadings; they were not parties to the litigation before that pleading was filed. There is no logical way that David and Susan's claims, based upon the 1981 Joint Will, can relate back to Mary's prior claims.

[9] What happened to the original 1981 Joint Will is not known.

1.4. **Conclusion.**

Even if David and Susan have a viable claim against J.D. related to the 200 acres, that claim became barred one year after J.D.'s death pursuant to RSMo. § 473.444. [10] David and Susan did not make their claim within a year of J.D.'s death. Further, their claims cannot relate back to Mary's prior petitions as the prior petitions were based on the 1990 Wills and their claims are based on the 1981 Joint Will. The Trial Court's denial of Defendants' motion for directed verdict on this issue should be reversed and judgment entered in favor of Defendants with regard to any claims made by David and Susan against J.D., his heirs, devisees, legatees, and successors.

[10] Defendants argue below that any claims related to the 200 acres are barred by the statute of limitations found in RSMo. § 516.120(5).

2. The Trial Court erred in denying Defendants' Motion for Judgment Notwithstanding the Verdict because the claims made by Plaintiffs David Fry and Susan Sleeper concerning the real property at issue are barred by the applicable statute of limitation (RSMo. § 516.120) for claims related to the conveyances of real property in that said Plaintiffs brought their claims against Defendants more than 15 years after those claims arose.[11]

2.1. **Standard of Review**

The standard of review of a trial court's denial of motions for directed verdict and judgment notwithstanding the verdict are treated the same. *Twin Chimneys v. J.E. Jones Constr.*, 163 S.W.3d 488, 495 (Mo. 2005). In reviewing a trial court's denial of a motion for judgment notwithstanding the verdict, the primary inquiry is whether the plaintiff has made a submissible case. *Id.* In determining whether a plaintiff has made a submissible case, the court will view the evidence and all reasonable inferences therefrom in the light most favorable to the plaintiff. *Id.* Whether a party made a submissible case is a question of law the court reviews *de novo*.

[11] In the event the Court holds that Arthur's release was not enforceable and therefore Arthur was wrongly dismissed from the suit, then this Point would bar any claims of Arthur's related to the 200 Acres.

2.2. **Plaintiff David Fry and Susan Sleeper's claims for money damages related to the real property are barred by RSMo. § 516.120.**

The Final Petition claims that Vincil and Willa named David and Susan as beneficiaries to the 200 Acres in the 1981 Joint Will; that J.D. damaged David and Susan by unduly influencing or otherwise defrauding Vincil and Willa so they signed the 1990 Wills and Deeds; and that the Defendants intentionally hid and concealed the true circumstances surrounding the execution and existence of the Deeds. *LF* 51-56. Any claim which Plaintiffs have made for damages as a result of the conveyance of the 200 Acres is barred by the statute of limitations stated in RSMo. § 516.120. Subsection (5) requires that actions for relief on the ground of fraud be brought within five years, with a maximum ten year period for the aggrieved party to discover the facts constituting the fraud. RSMo. § 516.120(5). The fraud is deemed not to accrue until its discovery or is discoverable, or, at the latest, the end of the ten year discovery period. *Graf v. Michaels*, 900 S.W.2d 659, 661 (Mo.App. S.D. 1995). After the fraud is discovered or the ten year discovery period has expired, the five year statute of limitations begins to run. *Id*.

In *Turnmire v. Claybrook*, 204 S.W. 178 (Mo. 1918), this Court barred claims from heirs of a grantor which were brought after the expiration of the statute of limitations and held that: 1) the right of action accrued upon the delivery and acceptance of the deed, so as to trigger the statute of limitations; and 2) the statute of limitations, which expired during the grantor's life, barred the rights to the grantor's heirs after his death. *Id*. at 180. A later case, *Pemberton v. Reed*, 545 S.W.2d 698 (Mo.App. W.D. 1976), found that the

right of an heir to set aside a deed is derived from the grantor and if the grantor has no right to sue at his or her death, neither do the heirs. *Id*. at 702-03.

The event which would result in a claim for damages related to the conveyances would have been the execution of the deed conveying the 200 Acres.[12] The deed was executed on June 28, 1990. *LF* at 86-88. On June 28, 2000 the ten year discovery period for Plaintiffs to have discovered any fraud related to the conveyance would have expired and on June 28, 2005 the five year statute of limitations would have expired pursuant to RSMo. § 516.120(5).[13] Willa was still alive on June 28, 2005. *LF* at 51. Mary brought her claims in April of 2008. *Resps.' Supp. LF* at 1.[14] David and Susan brought their claims in October of 2011. *LF* at 44.

[12] Defendants address the issue of David and Susan's standing in their Point III below.

[13] This is assuming Arthur, David, and Susan had not previously discovered the alleged fraud. There was evidence that Arthur read about the transfer in the newspaper (*Tr*. at 654) and then talked to both David (*Tr*. at 476) and Susan (*Tr*. at 245, 247) about it after reading about the transfers.

[14] Mary initially made claims related to the land as well, but abandoned those claims when she filed her amendments to the Third Amended Petition a week before trial. *Resps.' Supp. LF* at 1.

2.3. **There is no evidence of concealment to toll the statute of limitations.**

"As a general rule, the statute of limitations begins to run in favor of a person who commits a fraud as soon as committed, unless it be concealed from the plaintiff or party complaining, or which is of such a character as necessarily implies concealment." *Womack v. Callaway County*, 159 S.W.2d 630, 632 (Mo. 1942). The burden of proving concealment is on the party asserting it. *Id*. For concealment to toll the statute of limitations there must be something more than mere silence by the defendant. *Gilliam v. Gohn*, 303 S.W.2d 101, 107 (Mo. 1957). Concealment requires the employment of some means or device to prevent discovery. *Id*. "The plaintiff is deemed cognizant of facts which he could have discovered by exercising ordinary care." *Id*.

Plaintiffs claim that the statute of limitations was tolled because Defendants concealed material facts, such as the existence of the 1981 Joint Will, the Deeds, and the 1990 Wills. As discussed above, none of the parties were aware of the 1981 Joint Will until it was found during the course of this litigation. It is not possible for Defendants to have employed some means or device to conceal the 1981 Joint Will when they did not know it existed. Without the 1981 Joint Will, any concealment of the 1990 Wills or Deeds is irrelevant. That is, assuming, *arguendo*, that David and Susan did not know of the 1990 Wills and Deeds because of active concealment by Defendants, without the 1981 Joint Will, they would not have any basis for the instant claim. Since none of the parties knew about the 1981 Joint Will, there can be no tolling of the statute. Said another way, without evidence sufficient to prove that Defendants knew of the 1981 Joint Will

and its provisions for the benefit of David and Susan, they could not have intended to defraud David and Susan by the claimed misconduct.

Plaintiffs claim that Defendants concealed the Deeds by failing to disclose the existence of the Deeds to Plaintiffs. Plaintiffs have cited no authority for the proposition that any of the Defendants had a duty or obligation to speak to Plaintiffs regarding the Deeds. The transfers were recorded and published in the appropriate newspapers and Arthur was aware of the transfers in 1990. *Tr*. at 738. David and Susan learned of the transfers from Arthur after Arthur had read about the transfers. *Tr*. at 238 and 476. Further, had any Plaintiff exercised ordinary care and looked in the appropriate deed records, the Deeds would have been found.

Finally, Plaintiffs claim that Defendants concealed the both the 1981 Joint Will and the 1990 Wills so that no probate estate for Willa could be opened. Section 473.017 provides for letters testamentary or of administration to be granted to a qualified person who so petitions the court. Section 473.020 allows for a probate estate to be opened by any interested person after twenty days of the death of the decedent. Plaintiffs argue that they were unable to open a probate estate for Willa because they allege that Defendants concealed the 1990 Wills and the 1981 Joint Will. There is no evidence that Defendants did anything to prevent Plaintiffs from opening a probate estate for Willa. Plaintiffs' failure to open an estate for Willa is not due to a means or device employed by the Defendants.

2.4. **Conclusion.**

Any recovery by David and Susan[15] related to the conveyance of the 200 Acres is barred by RSMo. § 516.120(5). David and Susan brought their claim in 2011 and the claim became time barred, at the latest, in 2005. Plaintiffs claim that the Defendants concealed the 1981 Joint Will, the Deeds, and the 1990 Wills. Defendants did not know of the 1981 Joint Will until it was found during the course of this litigation. The Deeds were recorded, notices of the transfers were published in the local papers, and Arthur read about the transfers and subsequently told Susan and possibly David about the transfers during the ten year discovery period.[16] Plaintiffs failed to produce evidence of concealment sufficient to toll the statute and Defendants presented sufficient evidence to meet their burden to prove that the statute of limitations bars Plaintiffs' claims related to the 200 Acres. The Trial Court's denial of the Defendants' motion for directed verdict on that issue was in error and should be overturned with judgment in favor of the Defendants on those claims.

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[15] This argument would include any of the Plaintiffs as Mary did not file her lawsuit until 2008 and Arthur did not file his lawsuit until 2011, both of which are after June 2005 when the statute of limitations would have expired.

[16] David is unable to recall exactly when he was told about the transfers from Arthur. *Tr.* at 476. Susan testified that both Vincil and Willa were still alive when she learned of the transfers from Arthur. *Tr.* at 238. Vincil passed in 2000.

3. The Trial Court erred in denying Defendants' Motion for Judgment Notwithstanding the Verdict because Plaintiffs do not have standing to bring the claims alleged in the Third Amended Petition in that Plaintiff Mary Ellison is not the proper party to bring the claims contained in the Third Amended Petition and in that Plaintiffs David Fry and Susan Sleeper do not have a cognizable interest which can be asserted by the claims contained in the Third Amended Petition.[17]

3.1. **Standard of Review**

The question of whether a party has standing is a question of law that the Courts of Appeal will review *de novo*. *In Their Rep. Capacity as Trustees for the Indian Springs Owners Assn. v. Greeves*, 277 S.W.3d 793, 797 (Mo.App. E.D. 2009). Standing requires that a party seeking relief has a legally protectable interest in the subject matter and that it has a threatened or actual injury. *Id.* at 798. When the lower court rules on a question of law, it is not a matter of discretion. *State ex rel. Igoe v. Bradford*, 611 S.W.2d 343, 350 (Mo. App. W.D. 1980). "The judgment of the trial court is afforded no deference when the law has been erroneously declared or applied." *State v. Plastec, Inc.*, 980 S.W.2d 152, 154-55 (Mo. App. E.D. 1998).

[17] In the event the Court holds that Arthur's release was not enforceable and therefore Arthur was wrongly dismissed from the suit, then this Point would bar any claims by Arthur because he would not have standing to make the claims for the reasons stated in Sections 3.2 and 3.3.

3.2. **Plaintiff Mary Ellison lacks standing as she is not the proper party to bring the claims submitted to the jury for verdicts in her favor.**

Mary claims that she was entitled to one-third of Willa's assets at the time of Willa's death and that she was damaged in that J.D.'s conduct diminished the amount of Willa's assets subject to division at the time of Willa's death (exclusive of the real property).[18] *See*, Third Amended Petition, paragraphs 38, 68, 82, 89, 95, 107, 114, and 121 (LF starting page 49); as well as jury instructions 23, 24, 26, 27, 28, 29, 30, 31, 32, 34, 36, 37, and 38 (LF starting at 219).

Standing requires that a party seeking relief has a legally protectable interest in the subject matter and that it has a threatened or actual injury. *Indian Springs*, 277 S.W.3d at 798. The issue of standing is jurisdictional and the lack of standing cannot be waived. *Britton-Paige v. American Health and Life Ins. Co.*, 900 S.W.2d 7, 8 (Mo.App. E.D. 1995). Until the death of the testator, a devisee under a will is merely an "heir expectant" or "heir apparent" with only the expectancy of an inheritance. *In re Estate of Schulze*, 105 S.W.3d 548, 551 (Mo.App. E.D. 2003). An attorney-in-fact does not owe a fiduciary duty to the individual heirs of its principal. RSMo. § 404.714.

[18] Mary instituted the instant action and prosecuted it from April 2008 through October 2011 as the sole Plaintiff seeking damages related to the Farm, personalty, and the CDs; however, immediately prior to trial, the Final Petition was filed to remove any allegations by Mary of wrongdoing related to the Farm. *Resps.' 2nd Supp. LF* at 3.

Persons have no fixed or vested property interests as heirs at law before the death of the testator. *White v. Mulvania*, 573 S.W.2d 184, 189 (Mo. 1978). At common law, most torts did not survive the death of the injured party. *Manson v. Wabash R.R. Co.*, 338 S.W.2d 54, 57 (Mo. banc 1960). In Missouri, damage to property or a property interest will survive death if brought "by the person appointed as fiduciary for the estate of the deceased person." RSMo. § 537.010. The personal representative of the decedent's estate must assert the claim. *Britton-Paige v. Am. Health and Life Ins. Co.*, 900 S.W.2d 7, 8 (Mo.App. E.D. 1995), *State ex rel. Cunningham v. Wiggins*, 156 S.W.3d 473, 476 (Mo.App. S.D. 2005), *Carter v. Pottenger*, 888 S.W.2d 710, 712 (Mo.App. S.D. 1994). A personal representative is a person to whom letters testamentary or letters of administration have been issued in a probate estate. *Cunningham*, 156 S.W.3d at 476. If a party fails to take the necessary steps required to become a personal representative of the deceased's estate within the statutory time limit, the party loses standing to assert the action as a representative of the estate. *Carter*, 888 S.W.2d at 713.

The jury rendered a single verdict for money damages for Mary ("Mary's Verdict").[19] *LF* at 216. Mary's Verdict assessed damages against the Trustee for breach of fiduciary

[19] The Verdict Form makes it impossible for the Court to determine which claim(s) were determined in favor of Mary because the Verdict Form submitted was for multiple claims, including claims which no verdict directors were submitted on. *LF* at 217, see Footnote 6.

duty, fraudulent concealment, conversion, and/or unjust enrichment[20] ("Mary's Claims"). *LF* at 216. Mary's Claims are based on the notion that had J.D. not engaged in the conduct described in the Final Petition, the value of Mary's share of Willa's property would have been greater.[21] Mary's Claims also include allegations that J.D. concealed his conduct from Mary. The damages contained in Mary's Claims are the result of J.D. receiving more than he was entitled to receive under the terms of the 1990 Wills or the belief that Willa wanted each child to have one-third of Willa's money. *LF* 243-271.

Mary's Claims must fail because they derive from claims which belonged to Willa. The proper course of action required that an estate be opened for Willa and a personal representative appointed. Mary failed to take the necessary steps to appoint Willa's personal representative within the statutory time limit and therefore, now, no person has standing to assert these claims. *Carter*, 888 S.W.2d at 713.

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[20] Mary's claim of unjust enrichment is based off the assertion that she is entitled to one-third of the value of the CDs and one-third the value of the tangible personal property. As to the CDs, this assertion is against Missouri law, pursuant to RSMo. § 461.031, as the POD beneficiary of the CD would become the owner of the CD upon Willa's death and therefore Mary would not have been entitled to one-third the value of all the CDs.

[21] Since Vincil and Willa owned all property at issue as tenants by the entirety prior to the claims of wrongdoing, the undersigned treats the claimed harms as they relate only to Willa since, presumably, had any claimed conduct during Vincil's lifetime not occurred, Willa would have survived to ownership of the joint interests.

3.3. Plaintiffs David Fry and Susan Sleeper do not have a cognizable interest sufficient to confer standing to bring the claims contained in the Third Amended Petition.

David and Susan claim standing herein as testamentary heirs under Vincil and Willa's 1981 Joint Will, which devised the remainder interest in the 200 Acres to them.[22] *LF* at 55. Although their claims of heirship are only as testamentary heirs, the rules of standing applicable to Mary apply equally here. "A party which is neither a beneficiary under a presented will, nor an heir at law fails to demonstrate that they have standing to bring a claim for undue influence and unjust enrichment . . .." *Hawkins v. Lemasters*, 200 S.W.3d 57, 62 (Mo.App. W.D. 2006).

The 1981 Joint Will was revoked by the 1990 Wills executed by Vincil and Willa, individually. *Aplts' Exhs.* at 6 and 8. The 200 Acres was conveyed to J.D. in 1990 with a life estate reserved in Vincil and Willa. *LF* at 86. For David and Susan to have standing to bring the claims for undue influence and unjust enrichment related to the 200 Acres, they would have to either be Willa's heirs at law or be a beneficiary under a presented will. *Hawkins*, 200 S.W.3d at 62. Because Arthur, who is David and Susan's father, was

[22] The 1981 Will provided that the 200 Acres would be available to Arthur for as long as he wanted to farm it and then to David and Susan equally. In 1990, when Arthur was no longer farming the 200 Acres and the 200 Acres was conveyed to J.D., a trust was declared and funded for Arthur's benefit during Arthur's lifetime and for the benefit of David and Susan following Arthur's death. *Tr.* 710-711.

alive in 2005 when Willa passed away, David and Susan are not Willa's heirs at law. RSMo. § 474.010. As no will has ever been presented or probated for Willa, David and Susan are not devisees of a presented will. *LF* at 51.

David and Susan lack standing to bring any claims related to the 200 Acres. They have not suffered an ascertainable injury as they do not have a vested or fixed property interest in the 200 Acres. As such, the judgments entered for David and Susan should be reversed and entered in favor of the Defendants.

3.4. **A Will was not required to open a probate estate for Willa Fry.**

Plaintiffs argue that they were not aware of the 1990 Wills until the end of 2006, after the time for filing an action had expired. As detailed in Section 2.3 above, Plaintiffs failed to do what was necessary to administer Willa's estate. A direct result of that failure is that there is no person with standing to bring these claims.

3.5. **Conclusion.**

Mary, David, and Susan do not have standing to bring the claims contained in the Third Amended Petition. Mary does not have standing because the proper party to bring Mary's Claims would be the personal representative of the Estate of Willa and Mary is not the personal representative. David and Susan do not have standing because they do not have a cognizable interest because as only heirs expectant, they had no vested or fixed property interest in the 200 Acres. As Plaintiffs do not have standing, they were unable to make a submissible case and so the Trial Court's denial of the Defendants' motion for directed verdict on the issue of standing should be reversed by this Court and judgment entered in favor of the Defendants on all counts.

4. The Trial Court erred in denying Defendants' Motion for Judgment Notwithstanding the Verdict because the facts at trial did not establish a submissible case against the Trustee of the John Delbert Fry Revocable Trust for damages in that the Trust was not in existence during the conduct complained of and the Trustee was improperly substituted for a deceased party.[23]

4.1. **Standard of Review.**

The standard of review of a trial court's denial of motions for directed verdict and judgment notwithstanding the verdict are treated the same. *Twin Chimneys v. J.E. Jones Constr.*, 163 S.W.3d 488, 495 (Mo. 2005). In reviewing a trial court's denial of a motion for judgment notwithstanding the verdict, the primary inquiry is whether the plaintiff has made a submissible case. *Id.* In determining whether a plaintiff has made a submissible case, the court will view the evidence and all reasonable inferences therefrom in the light most favorable to the plaintiff. *Id.* Whether a party made a submissible case is a question of law the court reviews *de novo*. *Rinehart v. Shelter Gen. Ins. Co.*, 261 S.W.3d 583, 595 (Mo.App. W.D. 2008).

[23] In the event the Court holds that Arthur's release was not enforceable and therefore Arthur was wrongly dismissed from the suit, then this Point would apply to his claims as well.

4.2. **The Trustee cannot be liable for conduct before the Trust came into existence nor can any successor liability theory be established to hold the Trustee responsible for J.D.'s alleged bad acts.**

Actions for wrongs done to property or interests therein may be brought against the wrongdoer by the person whose property or interest therein is injured. RSMo. § 537.010. The Trust was settled in 2008. *Tr*. at 176. The conduct Plaintiffs complained of takes place between 1986 and 2007. *LF* 39-76. There is no evidence which was presented to the jury that the Trust or the Trustee performed any of the acts or conduct which are alleged in this action to be improper or wrongful (and indeed no such evidence *could* have been presented because of the fact that the Trust was not settled until 2008). There is no claim that the Trustee, acting in the capacity of Trustee, was the wrongdoer. There are no allegations in the Final Petition, nor was there evidence presented, that the Trustee is the successor to J.D. and that successor liability should attach.[24]

There are statutory processes by which the Trustee could have been held responsible for J.D.'s alleged bad acts, specifically the recovery provisions of RSMo. § 461.300 for non-probate transfers and RSMo. § 456.5-505 for claims against the settlor of a trust.

[24] Defendants also note that none of the Plaintiffs' petitions, including the Final Petition, made claims against the Trustee or assets of the Trust under any successor liability theory, nor did Plaintiffs expressly argue any successor liability theory in their initial brief in this Court, but Defendants have included this section on successor liability to address the theory to the extent it was implied in Plaintiffs' initial brief.

Section 461.300 requires that an action for accounting be commenced by the personal representative of the decedent's estate within eighteen months of the decedent's death. If such an action is requested by a qualified claimant and the personal representative refuses to file an action for accounting, then the qualified claimant may file for the action for accounting. RSMo. § 461.300.2. Section 456.5-505 provides procedures for a creditor to collect against the assets of a trust, such as claiming a conveyance to the trust was fraudulent as to creditors pursuant to Chapter 428 RSMo. Plaintiffs failed to follow any of these procedures. Plaintiffs were aware of the lawsuit and claims pending against J.D. at the time of his death, but took no action to protect their rights by opening a probate estate, filing an action for accounting, or claiming that any of the conveyances to the Trust were fraudulent. Plaintiffs now ask this Court to hold the Trustee responsible for J.D.'s alleged bad acts, despite the fact they have failed at every turn to follow any of the clearly established procedures which were available to them. This Court should reject the Plaintiffs' arguments.

4.3. **The Trustee was not the proper party to have been substituted.**

"If a party dies and the claim is not thereby extinguished, the court may, upon motion, order substitution of the proper parties." MSCR 52.13(a)(1). "Actions for wrongs done to property or interests therein may be brought against the wrongdoer by the person whose property or interest therein is injured . . . If the wrongdoer is dead, the action survives and may be brought and maintained in the manner set forth in section 537.021." RSMo. § 537.010. "The existence of a cause of action for an injury to property, . . ., which action survives the death of the wrongdoer . . . shall authorize and require the appointment by a

probate division of the circuit court of: . . . (2) a personal representative of the estate of a wrongdoer upon the death of such wrongdoer." RSMo. § 537.021.1. A personal representative is appointed only in a probate estate. RSMo. § 472.010.26. Opening an estate was found to be necessary to identify the personal representative, the proper party to be substituted for the deceased party. *Griffin v. Miller*, 899 S.W.2d 930, 934 (Mo.App. W.D. 1995). The representative of the decedent, who was the proper party to be substituted, was found to be a necessary and indispensable party to the lawsuit whose non-joinder was the grounds for dismissal. *Clark v. Fitzpatrick*, 801 S.W.2d 426, 430 (Mo.App. W.D. 1990).

Courts have jurisdiction to render judgments for or against viable entities only. *Rowland v. Rowland*, 121 S.W.3d 555, 556 (Mo.App. E.D. 2003). A dead person is by definition not a viable entity.[25] *Id.* A judgment entered after a party's death, without substitution, is void. *Meadows v. Jefferys*, 929 S.W.2d 746, 752 (Mo.App. S.D. 1996).

The Trial Court's substitution of the Trustee for J.D. is in direct contravention of RSMo. § 537.021 which requires the substituted party be the personal representative. J.D. died December 9, 2008, during the pendency of this case. *LF* at 33. The Trial Court learned of the death of J.D. when the remaining Defendants filed their Suggestions of Death on December 15, 2008. *LF* at 33. Mary filed her Motion for Substitution of Party

[25] A trust is likewise not a viable entity, as the proper party to sue or be sued related to a trust is the Trustee. *Orla Holman Cemetery, Inc. v. Robert W. Plaster Trust*, 304 S.W.3d 112, 114 Fn. 1 (Mo. 2010).

on March 9, 2009 requesting Lori Bestgen[26] be substituted for J.D. *LF* at 36. Defendants filed their Suggestions in Opposition to Plaintiff's Motion to Substitute Party on April 14, 2009 stating that proper party to be substituted had not been served. *Resp.'s Supp. LF* at 24. The Trial Court substituted the Trustee on April 14, 2009 over the objection of the Defendants. *LF* at 39. No probate estate had been opened for J.D. as of the date of the Trial Court's order of substitution. *LF* at 39. The Trustee has not been issued letters testamentary or of administration for J.D. The Trustee is not the personal representative of the Estate of J.D. and therefore is the wrong party to be substituted.

4.4. **The personal representative of the Estate of John Delbert Fry would have been the proper party to substitute.**

A personal representative shall defend all actions brought against the decedent. RSMo. § 473.270. A personal representative shall defend all actions commenced against the decedent during his lifetime which are maintainable against the personal representative. RSMo. § 473.273. If an estate has not been opened within twenty days of a decedent's death, then "any interested person" may petition the probate court for letters testamentary or of administration. RSMo. § 473.020.

When the Probate Code and the survival statutes are taken and read together, Missouri law is unambiguous and perfectly clear that the proper party to be substituted for a deceased defendant is the personal representative of that defendant's estate. Mary

[26] Lori is the daughter of J.D. and Linda and was named as attorney-in-fact for J.D. for the purposes of the litigation.

brought suit against J.D. on April 10, 2008. J.D. died December 9, 2008. The personal representative of J.D.'s estate was the proper party to continue to defend Plaintiffs' claims. Section 537.021 states that an estate shall be opened for a deceased wrongdoer and §§ 473.270 and 473.273 state that the personal representative is the party to defend the suit. Plaintiffs completely ignored the proper process and maintained their action against the Trustee instead of opening an estate for J.D. and substituting the personal representative.

If Plaintiffs are concerned that the estate for J.D. would not have had any assets to satisfy the Plaintiffs' claims, then their concerns are misplaced. The probate code allows the personal representative to fund the estate to the extent necessary to administer the estate and satisfy the claim. A personal representative may recover property, "so far as necessary for the payment of claims," which was transferred by the decedent with intent to defraud his creditors. RSMo. § 473.267. "A deceased owner's creditors . . . shall have the rights set forth in section 461.300 with respect to the value of property passing by nonprobate transfer." RSMo. § 461.071. "Each recipient of a recoverable transfer[27] of a decedent's property shall be liable to account for a pro rata share of the value of all such property received, to the extent necessary to discharge . . . claims remaining unpaid after application of the decedent's estate. . ." RSMo. § 461.300.1. "The recipient of any

[27] Section 461.300 defines "recoverable transfer" as "a nonprobate transfer of a decedent's property under section 461.003 to 461.081 and any other transfer of a decedent's property . . ."

property held in trust that was subject to the satisfaction of the decedent's debts immediately prior to the decedent's death . . . are subject to this section. . ." RSMo. § 461.300.8.

The personal representative, pursuant to § 461.300, could have funded the estate with J.D.'s assets sufficient to defend the suit and pay any judgment entered against it. By funding the estate pursuant to § 461.300, the recipients of the recoverable property would have been responsible for a pro-rata share of the value of the property received and it would not have been left to one beneficiary to shoulder the cost of defending the action. By disregarding the established procedure, Plaintiffs could pick and choose who to charge with the debts of the estate, a result clearly not intended by the legislature and which has never been allowed by the courts. See generally, *Britton-Paige v. Am. Health & Life Ins. Co.*, 900 S.W.2d 7, 8 (Mo.App. E.D. 1995).

4.5. **Conclusion.**

Plaintiffs could not have made a submissible case against the Trustee for at least two reasons. First, the Trustee could not be the wrongdoer for conduct which happened before the Trust came into existence. Plaintiffs produced no authority or evidence at trial which establishes liability on behalf of the Trustee for conduct prior to when the Trust was settled. Second, the Trustee's substitution was improper, as the only proper party to have been substituted was the personal representative of J.D.'s estate. Now, there is no viable entity which may be substituted for J.D., as no estate was opened for J.D. within a year of his death. The claims against J.D. are extinguished and the judgment entered against the Trustee should be reversed as Plaintiffs failed to make a submissible case against the

Trustee. Further, the judgment should be considered void as the Trustee was not the proper party to be substituted. The Trial Court's denial of the Defendants' motion for directed verdict should be overturned and judgment entered in favor of the Trustee on all counts.

5. The Trial Court erred in its assessment of costs because the assessment is ambiguous in that the assessment does not specify which Defendants and parties are responsible given certain parties were dismissed, certain Defendants were improperly substituted, certain Defendants had no claims submitted against them, and only one Defendant had a judgment entered against it.[28]

5.1. **Standard of Review.**

Construction of a court order is a question of law calling for the independent judgment of the appellate court. *Jacobs v. Georgiou*, 922 S.W.2d 765, 769 (Mo.App. E.D. 1996).

5.2. **The Judgment is ambiguous as to which of the Defendants are responsible for the court costs.**

In construing a judgment, a court must examine and consider the language of the judgment in its entirety. *Woodfill v. Shelter Mut. Ins. Co.*, 878 S.W.2d 101, 103 (Mo.App.

[28] In the event the Court holds that Arthur's release was not enforceable and therefore Arthur was wrongly dismissed from the suit, then this Point would apply to Arthur as well.

S.D. 1994). The intention of the court must be determined from all parts of the judgment, and words and clauses are to be construed according to their natural and legal import. *Id.*

The Trial Court's order was unclear as to who was responsible for the costs. Delbert and Fry Grain were completely dismissed out of the case and pursuant to RSMo. § 514.100 should have their costs taxed against the Plaintiffs. Costs should not be assessed against the Trust assets generally, as no claims were submitted to the jury against the Trustee related to the Trustee's conduct. Judgment was not entered against Linda in her individual capacity. Finally, although the jury found against the Trustee as the substituted party for J.D., the costs should not be taxed against the Trustee because the substitution was improper. When the Court entered its Judgment against all "defendants" there was only one "defendant," the Trustee, as the improperly substituted party for J.D. remaining in the case. As such, the Trial Court's assessment is ambiguous and requires interpretation by this Court.

6. The Trial Court erred in assessing significant costs against the Defendants because such an assessment is an abuse of the Trial Court's discretion in that the apportionment of costs must bear some relationship to the judgment on all the issues and Defendants were the prevailing party on the principal issues litigated.[29]

6.1. **Standard of Review.**

A trial court's assessment of costs will be reversed if the taxing of costs is an abuse of discretion. *Sadowski v. Brewer*, 693 S.W.2d 891, 893 (Mo.App. S.D. 1985).

6.2. **The Trial Court abused its discretion in assessing costs because Defendants were the prevailing party on all of the principal issues litigated in this case.**

In all civil actions, the party prevailing shall recover his costs against the other party, unless otherwise provided. RSMo. § 514.060. The prevailing party is the party prevailing on the main issue, even though not necessarily to the extent of its original contention. *Birdsong v. Bydalek*, 953 S.W.2d 103, 124 (Mo.App. S.D. 1997). Where there are several counts in any petition, and any one of them be adjudged insufficient, or a verdict, or any issue joined thereon, shall be found for the defendant, costs shall be awarded at the discretion of the court. RSMo. § 514.090. "Where several persons are made defendants to any action, and any one or more of them shall have judgment in his favor, every person

[29] In the event the Court holds that Arthur's release was not enforceable and therefore Arthur was wrongly dismissed from the suit, then this Point would apply to Arthur as well.

so having judgment shall recover his costs . . ., unless it shall appear to the court that there was reasonable cause for making such person defendant to such action." RSMo. § 514.100. Apportionment of costs in equity, as well as in other cases where the Trial Court has discretion, must bear some relationship to the judgments on all of the issues and the principle issue litigated. *Kopp v. Franks*, 792 S.W.2d 413, 423 (Mo.App. S.D. 1990). Consideration should also be given to the verdicts on the issues that generated the costs. *Cox v. Crider*, 721 S.W.2d 220, 224 (Mo.App. S.D. 1986).

The principal issues litigated in Plaintiffs' case were: 1) whether or not Vincil and Willa were unduly influenced or otherwise defrauded by the Defendants so as to harm Plaintiffs with regard to their inheritance; 2) whether or not J.D. defrauded Mary and Arthur when he was acting as attorney-in-fact and assisting Willa manage her affairs; and 3) whether Defendants converted or were unjustly enriched by receipt of real and personal property from Vincil and Willa Fry. No judgment was entered in favor of any Plaintiff for claims of undue influence or fraud with regard to Vincil and Willa. Arthur was completely dismissed from the case. *LF* at 190. The verdict form which was returned in favor of Mary which awarded her money damages against the Trustee is flawed so that it is impossible to determine which theory of recovery the jury awarded damages for. *LF* at 217. Out of the five counts for conversion or unjust enrichment, David and Susan only succeeded against one Defendant, and then only for a fraction of the amount prayed for.

Further, the counts against Delbert and Fry Grain were dismissed entirely before Plaintiffs submitted their case to the jury.[30] *LF* at 195, 206-07.

At the close of all evidence, the parties and claims remaining were a mere skeleton of the eight[31] party, ten count Final Petition. Prior to trial, Plaintiff's Third Amended Petition was amended to remove any allegations or claims by Mary related to the 200 Acres and all claims related to the Home Place. Whether J.D. seized an opportunity to impose his will on his parents when Vincil injured another driver and her passengers in a car collision so that he could receive the 200 Acres and Delbert could receive the Home Place was at the heart of Mary's claims throughout the four plus years of this lawsuit. At trial, none of Mary's claims had anything to do with the Farm and the only part of the Judgment entered in Mary's favor related to whether the division of the cash assets and/or personal property was equitable. To reward Mary with all her costs related to the abandoned claims, and those for which a verdict was directed in favor of Defendants, ignores the responsibility of the Court to justly apportion the costs. There was evidence at

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[30] Defendants would like to note that the claims contained in the Third Amended Petition related to the 160 acres were withdrawn by the parties. *Tr*. at 1522. The only reason Delbert was joined as a party was because he received the 160 acre tract. Plaintiffs Fourth Point Relied On is an example of Plaintiffs' conduct which significantly increased the costs of this action and why costs should be taxed against Plaintiffs.

[31] The conclusion that there were eight parties is arrived at by treating the Trust, Trustee and J.D. as one party; otherwise, according to the Final Petition, there were 10 parties.

trial that the 200 Acres was valued at $1,439.00 an acre or a total of $295,000.00. *Tr.* at 285.[32] Mary claimed in her closing argument that her claim for the CDs was $21,000.00. *Tr.* at 1450. The amount at stake shows that the claims related to the real property was the key issue to be litigated and was an issue on which Defendants were the prevailing party.

The Trial Court's order was unclear as to who was responsible for the costs. As was previously stated, Delbert and Fry Grain were completely dismissed out of the case and, pursuant to RSMo. § 514.100 should have their costs taxed against the Plaintiffs. Defendants argue that costs should not be assessed against the Trust assets generally, as no claims were submitted to the jury against it. No judgment was entered against Linda, individually. Finally, although the jury found against the Trustee, as the substituted party for J.D., the costs should not be taxed against the Trustee because the substitution was improper as the Trustee was not the personal representative of J.D.'s estate.

The assessment of costs against the Defendants as stated in the Judgment did not take into consideration the verdicts on the issues which generated the costs nor did the Judgment take into account parties who were dismissed by directed verdict or had no judgment entered against them. To assess costs against the Defendants is an abuse of discretion and should be reversed with costs assessed against the parties responsible for incurring the costs: the Plaintiffs.

[32] Evidence of the value of the Home Place was not presented at trial, as the claims related to the Home Place had been abandoned.

CONCLUSION OF RESPONDENTS' BRIEF FOR RESPONDENTS' CROSS-APPEAL

In conclusion, Defendants pray this Court reverse the judgment entered against them by the Trial Court for the reasons stated above, including the following:

1. Mary lacks standing to bring the claims she succeeded upon as she is not the personal representative of Willa's estate and therefore is not the proper party to bring such claims;
2. David and Susan lack standing to bring the claims they asserted as they lack a cognizable interest in the 200 Acres because they are only prospective heirs;
3. Plaintiffs with standing would not prevail upon claims related to the 200 Acres as the applicable statute of limitations, RSMo. § 516.120(5) bars any such claims because Plaintiffs did not bring the claims within fifteen (15) years of the claim arising and there can be no tolling of the statute of limitations as Plaintiffs failed to meet their burden on establishing concealment;
5. Any claims made by Arthur, David, and Susan against J.D. are barred by the statute of limitations contained in § 473.444, as they brought their claims more than a year after J.D.'s death and no tolling of that statute can apply;
6. The substitution of the Trustee for J.D. after J.D.'s death was improper as the proper party to substitute would have been the personal representative of J.D.'s estate; and
7. Finally, whether or not this Court sets aside or reverses the judgment in this matter, the Trial Court's assessment of costs as set out in the Amended Judgment

is an abuse of the Trial Court's discretion when considering the course of the litigation, the ultimate disposition of the main issues, and the fact that only one Defendant had a judgment entered against it.

RESPONDENTS' RESPONSE BRIEF TO APPELLANTS' APPEAL

POINTS RELIED ON

1. The Trial Court did not err in granting Defendants' Motion for Directed Verdict on the issue of punitive damages because Plaintiffs did not make a submissible case for punitive damages in that Plaintiffs did not present sufficient evidence to prove that Defendants' conduct was outrageous, with evil motive, or with reckless indifference to the rights of others.

1. *Ries v. Shoemake*, 359 S.W.3d 137 (Mo.App. S.D. 2012).
2. *Drury v. Mo. Youth Soccer Assn.*, 259 S.W.3d 558 (Mo.App. E.D. 2008).
3. *Horizon Meml. Grp., LLC v. Bailey*, 280 S.W.3d 657 (Mo.App. W.D. 2009).
4. *Claus v. Intrigue Hotels, LLC*, 328 S.W.3d 777 (Mo.App. W.D. 2010).

2. The Trial Court did not err in granting Defendants' Motion for Directed Verdict by dismissing Plaintiff Arthur Fry because Plaintiff Arthur Fry released his claims against Defendants in that there was sufficient evidence to prove that Plaintiff Arthur Fry executed the release and Plaintiffs failed to present sufficient evidence to prove otherwise.

1. *Hatfield v. Cristopher*, 841 S.W.2d 761 (Mo.App. W.D. 1992).
2. *Austin v. Trotters Corp.*, 815 S.W.2d 951 (Mo.App. S.D. 1991).
3. *Andes v. Albano*, 853 S.W.2d 936 (Mo. 1993).

3. The Trial Court did not err in granting Defendants' Motion for Directed Verdict by dismissing Defendant Fry Grain Enterprises, Inc. because Plaintiffs did not make a submissible case in that Plaintiffs did not present sufficient evidence to prove that Defendant Fry Grain Enterprises, Inc. converted property which is subject to conversion and to which Plaintiffs had an ownership interest in or immediate right of possession.

1. *Osborn v. Chandeysson Elec. Co.*, 248 S.W.2d 657 (Mo. 1952).
2. RSMo. § 537.010.
3. *Britton-Paige v. Am. Health & Life Ins. Co.*, 900 S.W.2d 7 (Mo.App. E.D. 1995).
4. *In re Estate of Boatright*, 88 S.W.3d 500 (Mo.App. S.D. 2002).

4. The Trial Court did not err in granting Defendants' Motion for Directed Verdict by dismissing Defendant Delbert Fry because Plaintiffs did not make a submissible case against Defendant Delbert Fry in that Plaintiffs failed to present evidence sufficient to prove Defendant Delbert Fry unduly influenced Vincil and Willa Fry (Count I) and that the claims remaining against Delbert Fry at trial were dismissed by the Plaintiffs (Count VII) or the Trial Court (Counts IX and X, Arthur Fry's claims related to the release).

1. *Davis v. Pitti*, 472 S.W.2d 382 (Mo. 1971).
2. *In re Estate of Hock*, 322 S.W.3d 574 (Mo.App. S.D. 2010).
3. *Mathews v. Turner*, 581 S.W.2d 466 (Mo.App. S.D. 1979).

5. The Trial Court did not err in denying Plaintiff Mary Ellison's Motion for Equitable Order because Plaintiff Mary Ellison was not entitled to such an Order in that Plaintiff Mary Ellison had submitted a request for money damages for her claims.

1. *Stromberg v. Moore*, 170 S.W.3d 26 (Mo. 2005).
2. *Whittom v. Alexander-Richardson Partn.*, 851 S.W.2d 504 (Mo. 1993).

ARGUMENT

1. The Trial Court did not err in granting Defendants' Motion for Directed Verdict on the issue of punitive damages because Plaintiffs did not make a submissible case for punitive damages in that Plaintiffs did not present sufficient evidence to prove that Defendants' conduct was outrageous, with evil motive, or with reckless indifference to the rights of others.

1.1. **Standard of Review.**

On review of a grant of a directed verdict against a plaintiff, the court must determine whether the plaintiff made a submissible case. *Moore v. Ford Motor Co.*, 332 S.W.3d 749, 756 (Mo. banc 2011). The question of whether a plaintiff has made a submissible case is a question of law that is reviewed *de novo*. *Id.* A case may not be submitted unless each and every fact essential to liability is predicated upon legal and substantial evidence. *Id.* In determining whether a plaintiff has made a submissible case, the court views the evidence in the light most favorable to the plaintiff. *Id*.

1.2. **Plaintiffs did not make a submissible case for punitive damages.**

The claims for punitive damages should have failed, because the Plaintiffs lacked standing to bring the claims adjudicated in their favor and should have been barred by the applicable statutes of limitation. To the extent this Court has not reversed the judgments entered by the Trial Court in favor of Plaintiffs for the reasons set forth in Defendants' cross-appeal, this Court's scrutiny of the Trial Court's orders of dismissal of the claims for punitive damages should, nonetheless, be in affirmation thereof. To make a submissible case for punitive damages, there must be clear and convincing proof of a

defendant's culpable mental state. *Drury v. Mo. Youth Soccer Assn.*, 259 S.W.3d 558, 573 (Mo.App. E.D. 2008). Punitive damages are an extraordinary and harsh remedy and should be applied only sparingly. *Id.* Clear and convincing evidence means the court should be clearly convinced in the affirmative of the proposition to be proved. *Chmieleski v. City Prods. Corp.*, 660 S.W.2d 275, 290 (Mo.App. W.D. 1983). A plaintiff establishes a defendant's culpable mental state by showing either that the defendant committed an intentional, wanton, willful and outrageous act without justification, or acted with reckless disregard for the plaintiff's rights and interests. *Horizon Meml. Grp., LLC v. Bailey*, 280 S.W.3d 657, 663 (Mo.App. W.D. 2009). A jury can infer the defendant's evil motive when the defendant recklessly disregards the interest and rights of the plaintiff. *Drury*, 259 S.W.3d at 573. Likewise, if a defendant intentionally does a wrongful act, and knows at the time the act is wrongful, it is done wantonly and with a bad motive. *Claus v. Intrigue Hotels, LLC*, 328 S.W.3d 777, 783 (Mo.App. W.D. 2010).

Plaintiffs cite to *Ries v. Shoemake*, 359 S.W.3d 137 (Mo.App. S.D. 2012)[33] for their authority that they met the clear and convincing evidence standard and as such should have been able to submit their claim for punitive damages. In *Ries*, the defendant, McCleney, had knowledge which he was contractually obligated to disclose. *Id.* at 145. McCleney's multiple affirmative misrepresentations and non-disclosures were the basis

[33] Defendants would note for the Court that the original defendant in *Ries*, McCleney, died during the pendency of the case and that the party properly substituted for him was the Personal Representative of his estate.

of the Trial Court's finding that McCleney's conduct was willful and reckless as to be in utter disregard for Ries' rights. *Id*. A major distinction between *Ries* and the instant case is that none of the Defendants had a contractual obligation or other duty to disclose anything complained of to any of the Plaintiffs.

Plaintiffs claim they meet the clear and convincing standard as a result of the cumulative conduct of Defendants' wanton and reckless disregard for their rights. Plaintiffs argue that the following conduct constitutes a pattern of reckless disregard by the Defendants of the rights and interests of the Plaintiffs: 1) changing a 1986 USDA contract; 2) J.D., Linda, and Delbert unduly influencing Vincil and Willa to execute the deed to the 200 Acres; 3) J.D. and Linda unduly influenced Vincil and Willa to execute the durable powers of attorney executed in 1998; and 4) J.D. tricking Arthur into executing a release.

First, Plaintiffs allege that Delbert changed a 1986 USDA contract so that Arthur did not receive his corn-subsidy payment in 1988. *Tr*. at 495. Plaintiffs do not cite to, nor is there evidence in the record to support this claim. Further, USDA contracts are done on a yearly basis. *Tr*. at 495. Fry Farms, a partnership between Delbert and J.D., began farming corn on the 200 Acres in 1987. *Tr*. at 490. Nothing in the record connects the alleged conduct of Delbert in 1986 and the claim by Arthur that he did not receive a payment in 1988.

Second, Arthur, David, and Susan allege that J.D., Linda, and Delbert unduly influenced Vincil and Willa to execute the deed for the 200 Acres after Vincil and Willa's car accident in June of 1990. *LF* at 51, 53. Plaintiffs ignore the jury verdicts

finding no damages for the claims of undue influence, Arthur's Trust[34] and Mary's Deed, in making their claims for undue influence. *Tr*. at 1188. Arthur's Trust, Mary's Deed, the deed conveying the Home Place to Delbert, the deed conveying the 200 Acres to J.D., and the 1990 Wills (collectively referred to as the "1990 Estate Plan") were executed contemporaneously. *Aplts.' Exhs.* at 1, 3, 4, 6, and 8, *Tr*. at 710-11. The 1990 Estate Plan included the 1990 Wills, which were not the subject of complaint (other than they were not timely filed with the Court) and which directed that each child of Vincil and Willa were to receive equal shares of the respective probate estate. *Aplts.' Exhs.* at 6, 8. Plaintiffs' argument that the Defendants' unduly influenced Vincil and Willa with regard to the 1990 Estate Plan as a facet of Defendants' wanton and reckless disregard of Plaintiffs' rights lacks adequate evidentiary support.

Third, Plaintiffs argue that Defendants unduly influenced Vincil and Willa in 1998 to execute durable powers of attorneys naming J.D. as their attorney-in-fact and which were subsequently used to manage CDs to benefit the Defendants. The only actions taken by J.D. as attorney-in-fact affecting any Plaintiff occurred when J.D., while acting as attorney-in fact for Willa, cashed in a CD titled to Willa and naming Arthur as payable on death beneficiary. The evidence at trial was that these proceeds were combined with

[34] Plaintiffs have continued to argue that David and Susan have not received anything from Vincil and Willa, yet they are the residuary beneficiaries of Arthur's Trust, and upon Arthur's death, will receive approximately $50,000.00 each. *Apps' Brief* at 14, *Tr*. at 710.

funds from a checking account of Willa's in which J.D. had a survivorship interest to create four CDs. *Tr*. at 930, 935-937 and 356. Mary benefited from these actions by receiving a CD in the amount of $39,000.00 which she would not have otherwise received, had this not had occurred. *Tr*. at 936-37. Furthermore, when the bank accounts were aggregated following Willa's death, J.D. withdrew all funds formerly held jointly with Willa and then held jointly with Arthur to combine them and to divide them equally between Arthur, Mary and himself. As a result of this act Mary received approximately $10,000.00 she would not have received had J.D. not acted as he had done. *Tr*. at 325. That J.D. used the power of attorney for any wrong which harmed Mary is not evidenced by the record.

Plaintiffs' final allegation of any Defendant's pattern of wanton disregard of Plaintiffs' rights concerns the release proposed by Defendants and executed by Arthur. The Trial Court found that Arthur executed a valid, binding release which clearly informed him that he would be relinquishing any rights he would have to assert claims against the Defendants. *Tr*. at 1197, *Resps.' Exhs*. at 1, 3, and 5. Any legal issues Plaintiffs have raised to the release Arthur executed are addressed in Respondents' response brief, Section 2, below. The allegations of wrongdoing related to the CDs were included in the petition referenced in the cover letter and settlement agreement, and the claims against J.D. related to the 200 Acres were barred as briefed in Defendants' cross-appeal above.

This Court should uphold the Trial Court's order directing a verdict concerning Plaintiffs' claims for punitive damages because Plaintiffs failed to meet the standard for

making a submissible case to the jury for punitive damages. The record is adequate to support the Trial Court's finding that there was not clear and convincing evidence of Defendants' culpable mental state under either the "reckless disregard of the Plaintiffs' rights" standard or an "intentional wanton, willful, and outrageous act without justification" standard related to conduct injurious to these Plaintiffs at the close of Plaintiffs' evidence. Whether alone or cumulatively, the points raised by Plaintiffs to support a finding of reckless disregard or intentional conduct is simply not "clear and convincing." Defendants have demonstrated, with the evidence produced at trial and under consideration of the Trial Court, why the Trial Court did not err in granting Defendants' Motion for Directed Verdict on the issue of punitive damages. This Court should affirm the Trial Court's ruling for the foregoing reasons.

2. The Trial Court did not err in granting Defendants' Motion for Directed Verdict by dismissing Plaintiff Arthur Fry because Plaintiff Arthur Fry released his claims against Defendants in that there was sufficient evidence to prove that Plaintiff Arthur Fry executed the release and Plaintiffs failed to present sufficient evidence to prove otherwise.

2.1. **Standard of Review.**

On review of a grant of a directed verdict against a plaintiff, the court must determine whether the plaintiff made a submissible case. *Moore v. Ford Motor Co.*, 332 S.W.3d 749, 756 (Mo. banc 2011). The question of whether a plaintiff has made a submissible case is a question of law that is reviewed *de novo*. *Id.* A case may not be submitted unless each and every fact essential to liability is predicated upon legal and substantial evidence. *Id.* In determining whether a plaintiff has made a submissible case, the court views the evidence in the light most favorable to the plaintiff. *Id*.

2.2. **Sufficient evidence was presented for the release to be presumed to be valid.**

The claims by Arthur should have failed because Arthur executed the settlement agreement and general release ("Release") and because Arthur was barred from bringing his claims by the applicable statutes of limitations as argued in Respondent's cross-appeal above. The general rule is that release, being an affirmative defense, requires that the party asserting the defense carry the burden of proof. *Hatfield v. Cristopher*, 841 S.W.2d 761, 766 (Mo.App. W.D. 1992). An exception to the general rule exists where the party against whom the release is asserted admits signing the release, the release purports to rest upon consideration, and the release is admitted into evidence. *Id*. In such a situation,

the release is presumed valid and the burden of producing evidence to overcome this presumption, and to prove some invalidity in the release, shifts to the party against whom the release is being asserted. *Id*. The presumption of validity of an executed release is founded in the policy of law encouraging freedom of contract and the peaceful settlement of disputes. *Andes v. Albano*, 853 S.W.2d 936, 940 (Mo. 1993).

The defendants in *Andes* received the benefit of the presumption because they met the three requirements. *Id*. at 940. First, the plaintiff admitted to signing the release. *Id*. at 939. Second, the release purported to rest upon consideration as both sides agreed to "release all claims known and unknown agst. the [sic] other & their respective counsel." *Id.* Finally, the defendants attached the release as an exhibit to their motions to dismiss. *Id*.

The facts of the instant case are much the same. Arthur admits to signing the Release. *Tr*. at 659. The Release purports to rest upon the following consideration: "One Hundred Dollars ($100.00) in exchange for Arthur's release of J.D., Linda, Fry Grain Enterprises, Inc., Delbert, and their heirs, successors, assigns, personal representatives, and agents, and all other persons, firms, or corporations. . ." *Aplts.' Exhs.* at 191. Further, the recital of consideration in the Release states that the sum of One Hundred and 00/100 Dollars is sufficient to Arthur. *Resps.' Exhs*. at 5. Finally, Plaintiffs introduced the complete Release into evidence as Plaintiffs' Exhibit #124. *Tr*. at 661. As the three requirements of the presumption of validity have been met, the Release is presumed valid and the burden shifts to the Plaintiffs to prove some invalidity.

2.3. Arthur Fry did not present sufficient evidence to rebut the presumption of validity.

Arthur makes the following arguments to rebut the presumption of validity of the Release: 1) lack of mutual asset; 2) inadequate consideration; and 3) fraud.

2.3.1. Mutual Assent

Settlement agreements are contracts and subject to contract law. *Emerick v. Mut. Ben. Life Ins. Co.*, 756 S.W.2d 513, 518 (Mo. 1988). An enforceable contract requires a meeting of the minds on the subject matter of the contract. *Id*. Contracts are formed according to outward manifestations and not unexpressed intentions. *Id.* The nature and extent of a contract's essential terms which form the basis of the parties' mutual assent must be certain or capable of being certain. *L.B. v. State Comm. of Psychol.*, 912 S.W.2d 611, 617 (Mo.App. W.D. 1995). If the parties reserve any of the essential terms of the purported contract for future determination, there is no valid binding agreement. *Id.* "A party cannot use parol evidence to create an ambiguity or to show that an obligation is other than that express in the written instrument." *Angoff v. Mersman*, 917 S.W.2d 207, 211 (Mo.App. W.D. 1996).

Arthur's first argument against the validity of the Release is a lack of mutual assent. The essential terms of the Release were set forth in the document. *Resps.' Exhs.* at 5. Defendants would pay Arthur $100.00 and Arthur would release the Defendants from any and all claims related to any real estate conveyance, J.D.'s conduct as attorney-in-fact for

Vincil and Willa, or the purchase or disposition of CDs.[35] Arthur manifested his assent to the Release by signing the document, having it notarized, and then returning the Release to Defendants' counsel's office. Arthur is now attempting to use his subjective thoughts and intent to deny that there was mutual assent for the contract. The Release is clear and unambiguous despite Arthur's attempt to dispute its meaning.

2.3.2. Inadequate Consideration

The recitation of consideration in an agreement is *prima facie* evidence that consideration to support the agreement was present; it creates a presumption that the recitals are true, which presumption continues unless overcome by evidence to the contrary. *Austin v. Trotters Corp.*, 815 S.W.2d 951, 953 (Mo.App. S.D. 1991). A person under no disability and under no compulsion may convey his property or relinquish his rights for as small consideration as he may decide. *Sanger v. Yellow Cab Co. Inc.*, 486 S.W.2d 477, 480 (Mo. 1972). Mere inadequacy of consideration is not valid ground for relief. *Id.*[36]

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[35] This is a paraphrased version of the release which can be found in its entirety at Plaintiffs' Exhibits Vol. 3, page 191.

[36] As the *Sanger* Court noted, "The law does not go to the romantic length of establishing the relation of guardian and ward between the courts and adults who are in full possession of their faculties and capable of managing their own affairs, and to indemnify them from the consequences of their own actions which they later regret. *Id.* at 480-81."

Arthur's second argument against the validity of the Release is inadequate consideration. Arthur was found to be capable of managing his affairs, was under no disability, and that there was no compulsion on the part of the Defendants to force Arthur to execute the Release. *Tr*. at 1197, 692. Arthur is in full control of his faculties and can read. *Tr*. at 725. There is no question that Arthur received the $100.00 for signing the Release. *Tr*. at 659. Arthur's complaint is that the consideration he received for the Release is inadequate when compared to the potential amount his claim could have been worth. This complaint is not a legal justification for setting aside the Release.[37]

2.3.3. Fraud

The evidence necessary at trial to cancel an instrument on grounds of fraud must go beyond a mere preponderance of testimony and remove all reasonable doubt. *Hackett v. St. Joseph Light & Power Co.*, 761 S.W.2d 206, 209 (Mo.App. W.D. 1988). "To make a submissible claim of fraudulent misrepresentation a party must show: 1) a false material representation; . . .." *Id.* at 209-10. Before silence can amount to a representation upon

[37] Plaintiffs rely on *Ensmingers v. Burton*, 805 S.W.2d 205 (Mo.App. W.D. 1991) for their support related to the consideration argument. Plaintiffs misstate the holding in *Ensmingers*. The Court found that the $10,000 payment was not sufficient consideration for an accord and satisfaction of an adjudicated, pre-existent debt of $25,800. The Court found the release to be insufficient not because it was unsupported by consideration, but because it was vague, indefinite, and inconclusive, none of which the Plaintiffs have alleged.

which another party may rely, there must be a duty to speak. *Andes v. Albano*, 853 S.W.2d 936, 943 (Mo. 1993). This duty to speak arises either where there is a relation of trust and confidence between the parties or where one party has superior knowledge or information not within the fair and reasonable reach of the other party. *Id.* Superior knowledge, alone, is not always sufficient. *Id.* A party to a lawsuit is not bound to disclose to his adversary facts which tends to defeat or weaken his own right of recovery and he commits no fraud by remaining silent. *Id.*

Arthur's final argument against the validity of the Release is that he was induced to execute the Release as a result of fraud committed by the Defendants. This argument is based on Arthur's argument that J.D. had a duty to disclose certain information and failed to do so. J.D. owed no duty to disclose to Arthur. There was no relationship of trust and confidence between J.D. and Arthur. Arthur interprets the "superior knowledge" prong of the duty to disclose as requiring J.D. to disclose all of the specific actions Mary alleged J.D. did. Defendants argue that J.D. only had to disclose to Arthur that there were claims being made by Mary, in which Arthur may also have a claim. This disclosure was made by the cover letter which accompanied the Release as well as in the Release itself. *Resps.' Exhs.* at 3. As J.D. did not owe a duty to disclose to Arthur there was no misrepresentation made by silence and therefore no fraud.

Arthur attempts to bring into question whether he was presented with the cover letter and all three pages of the Release. The evidence at trial was that Defendants' counsel mailed the cover letter and the three page Release to Arthur on or about May 13, 2008 (*Tr.* at 694), that Arthur signed the Release in the presence of a notary (*Tr.* at 695, 732),

that Arthur placed two, first class stamps and his custom return address sticker on an envelope containing Arthur's signature and mailed the Release and the cover letter to Defendants' counsel's office (*Tr*. at 732-33), that Arthur received a check in the amount of $100.00 from Defendants' counsel which he then negotiated and retained (*Tr*. at 659), and that Arthur doesn't remember signing the Release (*Tr*. at 660). Arthur's inability to remember signing the Release is not sufficient to cancel the Release on the grounds of fraud.[38]

2.4. Conclusion

Arthur's claims relate to the conduct of J.D. who was deceased nearly three years before Arthur's claims were brought and more than twenty years after Arthur was aware that Vincil and Willa had transferred the 200 Acres to J.D. To the extent this Court does not find that Arthur is barred by the applicable statutes of limitation, then Defendants should receive the benefit of the presumption of validity which shifts the burden to prove the Release's invalidity onto Arthur, who failed to meet the burden. Lack of mutual assent fails because the essential terms of the release were set forth in the Release and left nothing to further determination. Lack of consideration fails because Arthur received $100 for his release of his claims and mere inadequacy of consideration is not a valid

[38] Arthur also argues that he was not represented by counsel and that should be a consideration. The cover letter which accompanied the Release states that Arthur should "consult with an attorney . . . regarding the potential advantages and disadvantages of executing the [Release]." *Resps.' Exhs.* at 4.

ground for relief. Plaintiffs' argument for fraud fails because they did not produce evidence which goes beyond a mere preponderance of testimony and removes all reasonable doubt as J.D. disclosed the existence of the possible claims to Arthur before Arthur executed the Release. Arthur executed the Release knowing this information and without consulting an attorney. The Trial Court found that Arthur executed the Release and that the Release was valid and, as a result, Arthur was dismissed from the lawsuit. This Court should uphold the Trial Court's ruling for the same reasons.

3. The Trial Court did not err in granting Defendants' Motion for Directed Verdict by dismissing Defendant Fry Grain Enterprises, Inc. because Plaintiffs did not make a submissible case in that Plaintiffs did not present sufficient evidence to prove that Defendant Fry Grain Enterprises, Inc. converted property which is subject to conversion and to which Plaintiffs had an ownership interest in or immediate right of possession.

3.1. **Standard of Review.**

On review of a grant of a directed verdict against a plaintiff, the court must determine whether the plaintiff made a submissible case. *Moore v. Ford Motor Co.*, 332 S.W.3d 749, 756 (Mo. banc 2011). The question of whether a plaintiff has made a submissible case is a question of law that is reviewed *de novo*. *Id.* A case may not be submitted unless each and every fact essential to liability is predicated upon legal and substantial evidence. *Id.* In determining whether a plaintiff has made a submissible case, the court views the evidence in the light most favorable to the plaintiff. *Id.*

3.2. **Plaintiffs did not make a submissible case as they were not the owner of the property, nor were they entitled to its immediate possession.**

The claims for conversion should have failed, because the Plaintiffs lacked standing to claim damages for the conduct described in the Final Petition. To the extent this Court has not affirmed the orders entered by the Trial Court in favor of Defendants for the reasons set forth in Defendants' cross-appeal, this Court's scrutiny of the Trial Court's orders should, nonetheless, be in affirmation thereof. "Conversion" is the unauthorized assumption of the right of ownership over another's personal property to the exclusion of the owner's rights. *Mackey v. Goslee*, 244 S.W.3d 261, 263 (Mo.App. S.D. 2008). The elements of conversion are: (1) plaintiff was the owner of the property or entitled to its possession; (2) defendant took possession of the property with the intent to exercise some control over it; and (3) defendant thereby deprived plaintiff of the right to possession. *Id.* at 264. To maintain an action for conversion, the plaintiff must have title to, or a right of property in and a right to the immediate possession of, the property at the time of conversion. *Osborn v. Chandeysson Elec. Co.*, 248 S.W.2d 657, 663 (Mo. 1952).

Actions for conversion are brought against the wrongdoer by the person whose property or interest therein is injured. *See* RSMo. § 537.010. In Missouri, damage to property or a property interest will survive death and may be brought against the wrongdoer by the person appointed as fiduciary for the estate of the deceased. RSMo. § 537.010. The personal representative of the decedent's estate must assert the claim. *Britton-Paige v. Am. Health & Life Ins. Co.*, 900 S.W.2d 7, 8 (Mo.App. E.D. 1995).

Plaintiffs allege in the Final Petition that the conversion took place while Willa was still alive. *LF* at 071. During Willa's life, Plaintiffs could claim no right of ownership of or immediate possession to the converted property. Further, Plaintiffs claim their interests in the converted property as heirs of Willa. *LF* at 71-72. Plaintiffs' status as heirs-at-law or heirs expectant would not have created a sufficient ownership or possessory interest in the property to grant them the ability to bring a conversion claim for the property. After the death of Willa, the claim for conversion would not pass to Plaintiffs as heirs-at-law or heirs expectant but would pass to the personal representative of the Estate of Willa pursuant to RSMo. § 537.010. As such, Plaintiffs could not have made a submissible case for conversion as they were not the owners of or entitled to immediate possession of the property.

3.3. **The USDA payments are not subject to conversion.**

Money represented by a general or ordinary debt is not subject to a claim for conversion. *In re Estate of Boatright*, 88 S.W.3d 500, 506 (Mo.App. S.D. 2002). A claim for money may not be in conversion because conversion lies only for a specific chattel which has been wrongfully converted. *Id*. Money can be an appropriate subject of conversion when it can be described or identified as a specific chattel, such as for a claim to a deposit previously made for a purchase of a vehicle or when funds placed in the custody of another for a specific purpose are misappropriated. *Id.* Notes, bills, checks and other representations of value can be described or identified as specific chattels so as to support an action for conversion because the representation of value itself has value. *Moore Equip. Co. v. Callen Constr. Co., Inc.*, 299 S.W.3d 678, 681 (Mo.App. W.D.

2009). To fall within the misappropriation exception which distinguishes conversion from an action on a debt, the plaintiff must have delivered funds to the defendant for a specific purpose and the defendant must have diverted them to another and different purpose. *Hall v. W.L. Brady Investments, Inc.*, 684 S.W.2d 379, 384 (Mo.App. W.D. 1984).

For the USDA payments to fall come within the "representation of value" prong of the exception there must be some misconduct on the part of the Defendant. In *Moore Equipment*, the defendant refused to return a check which had been sent to him in error and which he deposited. In *Good Roads Mach. Co. v. Broadway Bank*, 267 S.W. 40 (Mo.App. 1924), the defendant cashed a cashier's check in the name of the Plaintiff by an unauthorized endorsement. Plaintiffs have not alleged, nor was there evidence presented which would prove that the USDA checks were wrongfully sent to Fry Grain or that Fry Grain forged Willa's signature on the checks. Plaintiff's argument is that Fry Grain was supposed to pay rent to Willa and did not; a contract claim and not a claim for conversion.

3.4. **Conclusion.**

Plaintiffs failed to make a submissible case for conversion. Plaintiffs were not entitled to immediate possession of the property nor were they the owners of the property, Willa was. The USDA payments are not subject to conversion because they do not fall within either exception to the rule which states that conversion cannot lie for money. The Trial Court's grant of the directed verdict dismissing Fry Grain should be affirmed for the foregoing reasons.

4. The Trial Court did not err in granting Defendants' Motion for Directed Verdict by dismissing Defendant Delbert Fry because Plaintiffs did not make a submissible case against Defendant Delbert Fry in that Plaintiffs failed to present evidence sufficient to prove Defendant Delbert Fry unduly influenced Vincil and Willa Fry (Count I) and that the claims remaining against Delbert Fry at trial were dismissed by the Plaintiffs (Count VII) or the Trial Court (Counts IX and X, Arthur Fry's claims related to the Release).

4.1. **Standard of Review.**

On review of a grant of a directed verdict against a plaintiff, the court must determine whether the plaintiff made a submissible case. *Moore v. Ford Motor Co.*, 332 S.W.3d 749, 756 (Mo. banc 2011). The question of whether a plaintiff has made a submissible case is a question of law that is reviewed *de novo*. *Id.* A case may not be submitted unless each and every fact essential to liability is predicated upon legal and substantial evidence. *Id.* In determining whether a plaintiff has made a submissible case, the court views the evidence in the light most favorable to the plaintiff. *Id*. Plaintiffs failed to present a submissible case that Delbert Fry unduly influenced Vincil and Willa Fry.

Undue influence is defined as such overpersuasion, coercion, force, or deception as breaks the will power of the testator or grantor and puts in its stead the will of another. *In re Estate of Hock*, 322 S.W.3d 574, 579 (Mo.App. S.D. 2010). The mere lack of consideration in a deed from parent to child does not per se invalidate the deed but it is an element to be considered. *Davis v. Pitti*, 472 S.W.2d 382, 387 (Mo. 1971). A presumption of undue influence arises where substantial evidence shows 1) a confidential and

fiduciary relationship; 2) benefaction to the fiduciary; 3) some additional evidence from which undue influence may be inferred. *Estate of Hock*, 322 S.W.3d at 579. A fiduciary relationship is created and established where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing the confidence. *McKeehan v. Wittels*, 508 S.W.2d 277, 280 (Mo.App. E.D. 1974). A confidential relationship is usually found when the person in whom confidence is reposed had either control or influence over at least a portion of the transferor's property, finances, or business affairs. *Kay v. Kay*, 763 S.W.2d 712, 714 (Mo.App. E.D. 1989). Factors which tend to establish undue influence are: an unnatural testamentary disposition, an onset of solicitude of the grantor by the beneficiary, a change in a predetermined testamentary intent, unusual circumstances surrounding the execution of the will [or deed], the actions of the beneficiary in discouraging visits by others or keeping others uninformed about the grantor, hostile feelings of the beneficiary toward and expected recipient which may be demonstrated by acts before and after the execution of the will [or deed], remarks of the beneficiary to the grantor derogatory of the contestant, and recitals of the will [or deed] itself indicative of undue influence. *Mathews v. Turner*, 581 S.W.2d 466, 472 (Mo.App. S.D. 1979).

Delbert was not in a confidential or fiduciary relationship with Vincil and Willa in 1990. Plaintiffs argue that because Delbert was farming the Home Place he was in a confidential or fiduciary relationship with Vincil and Willa. *Tr*. at 1202. There is no evidence that Delbert had any control or influence over Vincil and Willa's finances, property, or business affairs. Further there is no evidence that Vincil and Willa placed

any special confidence in Delbert, other than the fact that a company Delbert was an owner of was renting the Home Place. The evidence Plaintiffs produced is insufficient to raise the presumption of undue influence because Delbert was not in a confidential or fiduciary relationship with Vincil and Willa. Plaintiffs' evidence on the general proposition of undue influence is that Vincil and Willa were involved in a car accident weeks before the 1990 Estate Plan was executed (*Tr.* at 768), that J.D. called the Rugens "mean sons-of-bitches," (*Tr.* at 434) and that no one told Mary or Arthur about the 1990 Estate Plan (*LF* at 53, 57, and 64). Even if this evidence is deemed to be indicative of undue influence, which Defendants do not concede, it has nothing to do with Delbert other than Delbert failed to tell anyone about the conveyances which had already been recorded in the appropriate deed records and published in the newspaper. *Tr.* at 654.

4.2. **All other claims against Delbert Fry were withdrawn or otherwise dismissed.**

Plaintiffs withdrew the claims related to the Home Place. *Tr.*at 1203-04, *LF* at 226. Delbert was brought into the lawsuit because of his receipt of the Home Place and his failure to disclose that to Plaintiffs. *Tr.* at 1201-02. The claims against Delbert in Counts IX and X were dismissed when Arthur was properly dismissed from the lawsuit.

4.3. **Conclusion.**

Plaintiffs do not have standing and are barred by the applicable statutes of limitation, as set forth in Defendants' cross-appeal and failed to make a submissible case against Delbert for the undue influence of Vincil and Willa with regards to the 200 Acres. Plaintiffs are unable to raise the presumption of undue influence because there was no evidence that Delbert was in a fiduciary relationship with Vincil and Willa. The evidence

produced at trial which related to Delbert's conduct and the potential for undue influence would be that Delbert failed to disclose to his extended family members that he had been deeded the Home Place and that there was no consideration given for it. This evidence alone is not sufficient to prove undue influence. When the bigger picture is looked at, the conveyance to Delbert was part of a comprehensive estate plan Vincil and Willa executed in June of 1990, most of which Plaintiffs do not complain of.[39] The Trial Court's grant of the directed verdict dismissing Delbert should be affirmed for the foregoing reasons.

[39] Vincil and Willa valued the land and raised their children to keep the land in their name for as long as they could. While Arthur continues to farm, David, Susan, and Mary are not farmers. J.D. was a farmer, Delbert was a farmer, and Jacob Fry, Delbert's son, is a farmer. The disposition of the Home Place to Delbert is most definitely in line with Vincil and Willa's values and ultimate wishes.

5. The Trial Court did not err in denying Plaintiff Mary Ellison's Motion for Equitable Order because Plaintiff Mary Ellison was not entitled to such an Order in that Plaintiff Mary Ellison had submitted a request for money damages for her claims.

5.1. Standard of Review.

The standard of review in a court-tried action in equity is that the Trial Court's judgment will be sustained unless there is no substantial evidence to support it, it is against the weight of the evidence, it erroneously declares the law, or unless it erroneously applies the law. *Citizens for Ground Water Protec. v. Porter*, 275 S.W.3d 329, 347 (Mo.App. S.D. 2008). The court accepts all evidence and inferences favorable to the judgment, and disregards all contrary inferences. *Stromberg v. Moore*, 170 S.W.3d 26, 29-30 (Mo. 2005).

5.2. Plaintiffs elected to pursue money damages and not equitable relief.

The claims for equitable relief regarding Willa's personal property should have failed, because the Plaintiffs lacked standing to bring such claims. To the extent this Court has not affirmed the Trial Court's dismissal of the equitable claims for the reasons set forth in Defendants' cross-appeal, this Court's scrutiny of the Trial Court's orders should, nonetheless be in affirmation thereof. The election of remedies doctrine, a doctrine of estoppel, originates from the theory that where a party has the right to pursue one of two inconsistent remedies and he makes his election, institutes suit, and prosecutes it to final judgment, he cannot thereafter pursue another and inconsistent remedy. *Stromberg v. Moore*, 170 S.W.3d 26, 30 (Mo. 2005). The purpose of the election of remedies doctrine

is to prevent double recovery for a single injury. *Whittom v. Alexander-Richardson Partn.*, 851 S.W.2d 504, 506 (Mo. 1993). "The plaintiff whose horse has been stolen can sue the thief for damages for conversion, or he can bring replevin to get the horse back, but he cannot do both, for this would give him both the value of the horse and the horse itself, a form of double recovery." *Id*.

Plaintiffs submitted their claims for breach of fiduciary duty, conversion, and unjust enrichment to the jury. *LF* at 278-79. Plaintiffs elected to seek legal damages for the wrongs they claim the Defendants had committed and received a judgment which the jury believed to be sufficient to rectify their injuries. After receiving the judgment, the Plaintiffs then asked the Trial Court to give them the certain pieces of personal property when they filed their motion for equitable order. *LF* at 284. In effect, Plaintiffs have received value for the "horse" and are now asking for the "horse" itself. The request for equitable relief is a form of double recovery which the Trial Court properly denied. Further, Plaintiffs fail to cite to a single authority which stands for the proposition that they may recover the personal property in the manner in which they have requested.

The Trial Court properly denied Plaintiffs' motion for equitable relief because to have granted it would have been a form of double recovery which is not allowed by the election of remedies doctrine. This Court should uphold the Trial Court's denial for the same reasons.

CONCLUSION TO RESPONDENTS' RESPONSE TO APPELLANTS' APPEAL

In conclusion, Defendants pray this Court uphold the Trial Court's grant of directed verdicts on each point raised by Plaintiffs for the reasons stated above, including the following:

1. Plaintiffs failed to prove by clear and convincing evidence that the Defendants' conduct was in reckless disregard for Plaintiffs' rights so that punitive damages would be appropriate;
2. Arthur failed to rebut the presumption of validity of the Release so that the Release should be considered valid and enforceable;
3. Plaintiffs were not the proper party to bring claims for conversion because they were not the owners of nor were they entitled to possession of the property;
4. Delbert was properly dismissed because Plaintiffs were unable to make a submissible claim against him for undue influence against Vincil and Willa; and
5. Plaintiffs were not entitled to an equitable order because such an order would have constituted double relief.

CERTIFICATE OF COMPLIANCE

Pursuant to Missouri Supreme Court Rule 84.06, the undersigned certifies that:

1. This brief complies with the typeface and type style requirements of Supreme Court Rule 84.06 as this brief has been prepared in Times New Roman font, a proportionally spaced typeface, using Microsoft Office 2010 in 13 point.
2. The signature block of the foregoing Brief contains the information required by Rule 55.03(a). To the extent that Rule 84.06(c)(1) may require inclusion of the representations appearing in Rule 55.03(b), those representations are incorporated herein by reference.
3. This brief contains 19,557 words, excluding the parts of the Brief exempted by Rule 84.06(b), as counted by Microsoft Word 2010.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing document to Plaintiffs' attorneys, Beverly J. Figg and Joshua K. Friel, electronically via Missouri's eFile system this 3rd day of February, 2014:

/s/ Daniel S. Simon
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