

Spring 2016

## Dueling Decisions: The Wrongful Death Clock Clangs Twice on the Same Day

Stacey Ann Lannert

Follow this and additional works at: <https://scholarship.law.missouri.edu/mlr>



Part of the [Law Commons](#)

---

### Recommended Citation

Stacey Ann Lannert, *Dueling Decisions: The Wrongful Death Clock Clangs Twice on the Same Day*, 81 Mo. L. REV. (2016)

Available at: <https://scholarship.law.missouri.edu/mlr/vol81/iss2/11>

This Note is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Missouri Law Review by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact [bassettcw@missouri.edu](mailto:bassettcw@missouri.edu).

## NOTE

### Dueling Decisions: The Wrongful Death Clock Clangs Twice on the Same Day

*Boland v. Saint Luke's Health System, Inc.*, 471 S.W.3d 703 (Mo. 2015) (en banc).

STACEY ANN LANNERT\*

#### I. INTRODUCTION

"Hard cases . . . are apt to introduce bad law."<sup>1</sup> This maxim concerning hard cases is an apt description of what may be a first in the Supreme Court of Missouri's history: dueling decisions issued on the exact same day.<sup>2</sup> On August 18, 2015, the court issued contradictory opinions centered on the statutory interpretation of the wrongful death statute of limitations.<sup>3</sup> Both cases display polar opposite outcomes to the question of whether fraudulent concealment by tortious defendants defeats meritorious claims brought beyond a three-year statute of limitations in wrongful death cases.

Two contradictory lines of reasoning have developed in Missouri wrongful death causes of action.<sup>4</sup> The clashing decisions demonstrate the collision of strict interpretation and liberal construction and serve to illuminate the difficulty that dominates the issue. In *Boland v. Saint Luke's Health Systems, Inc.*, the court applied strict construction interpretation standards to

---

\* B.S., Southeast Missouri State University, 2014; J.D. Candidate, University of Missouri School of Law, 2017. Associate Managing Editor, *Missouri Law Review*, 2016–2017. I would like to sincerely thank Professor Brad Desnoyer for his assistance and direction with this Note, Dean Robert Bailey for his guidance and encouragement, and my friends and loved ones for their patience and support.

1. *Boland v. Saint Luke's Health Sys., Inc.*, 471 S.W.3d 703, 713 (Mo. 2015) (en banc) (citing *Winterbottom v. Wright* (1842) 152 Eng. Rep. 402 (Exch.)).

2. *See id.*; *State ex rel. Beisly v. Perigo*, 469 S.W.3d 434 (Mo. 2015) (en banc); Rick Montgomery, *Missouri Supreme Court Ruling Blocks Lawsuit Over Deaths at Chillicothe Hospital*, KAN. CITY STAR (Aug. 29, 2015), <http://www.kansascity.com/news/business/health-care/article32747469.html>.

3. *See generally Boland*, 471 S.W.3d 703; *Beisly*, 469 S.W.3d 434.

4. *Compare Boland*, 471 S.W.3d at 708 (barring equitable estoppel in wrongful death actions concerning defendant's use of fraudulent concealment), *and Frazee v. Partney*, 314 S.W.2d 915, 918 (Mo. 1958) (en banc) (finding that wrongful death statutes do not provide for the tolling of statutes due to fraudulent concealment), *with Beisly*, 469 S.W.3d at 444 (allowing equitable estoppel to bar the defense of time limitations), *and O'Grady v. Brown*, 654 S.W.3d 904, 907–08 (Mo. 1983) (en banc) (creating a liberal construction standard for wrongful death statutory interpretation).

bar the plaintiffs from filing a wrongful death suit due to time limitations.<sup>5</sup> Conversely, the court in *Beisly v. Perigo* applied a liberal construction standard and injected a judicially-created common law maxim, equitable estoppel, to bar the defense of a statutory time limitation when the defendants engaged in fraudulent concealment.<sup>6</sup>

Even though the contrary opinions were factually dissimilar,<sup>7</sup> the hearts of both cases beat identically in that the defendants allegedly employed intentional and fraudulent concealment of the facts, which made it impossible for the plaintiffs to bring their respective wrongful death suits within the statute of limitations. Both cases held that a cause of action for wrongful death was a “purely” statutory creation.<sup>8</sup> Both cases attempted to decipher the intent and plain language of the legislature<sup>9</sup> so as to untangle fraudulent concealment entwined in the hands of the wrongful death clock in order to properly determine when time started or accrued<sup>10</sup> and when time should freeze or toll.<sup>11</sup> Both cases were also closely decided by a 4-3 majority.<sup>12</sup> However, the *Beisly* decision was only made possible due to the recusal of a Supreme Court of Missouri judge and the participation of a Special Judge from the Missouri Court of Appeals for the Western District.<sup>13</sup> For purposes of this Note, *Boland* will be the focus.<sup>14</sup>

Part II of this Note provides the facts and holding in *Boland*. Part III presents the legal background of *Boland*, discusses both the statutory and common law origins of wrongful death causes of action, and explores Missouri’s unique history of wrongful death statutory interpretation. Part IV analyzes the rationale of the *Boland* court’s return to the strict interpretation standard of days past. Finally, Part V discusses the ramifications of the

5. 471 S.W.3d at 709.

6. 469 S.W.3d at 444.

7. *Boland* involved the alleged fraudulent acts of a hospital in an attempt to conceal alleged intentional acts of an employee. 471 S.W.3d at 705. *Beisly* centered on the murder of a woman allegedly killed by her husband and another man who hid their involvement in the crime. 469 S.W.3d at 436.

8. *Beisly*, 469 S.W.3d at 455 (Russel, J., dissenting).

9. *See id.* at 445 (majority opinion); *Boland*, 471 S.W.3d at 707.

10. As stated by the court in *Beisly*, “[g]enerally, ‘[a] cause of action accrues . . . when the right to sue arises.’” *Beisly*, 469 S.W.3d at 437 (alteration in original) (quoting *Hunter v. Hunter*, 237 S.W.2d 100, 103 (Mo. 1951)).

11. Tolling “occurs when a party shows facts that act to remove or interrupt the bar of the statute of limitations to a cause of action.” *Id.* at 437 (citing 2 MO. PRACTICE SERIES, *Methods of Practice: Litigation Guide* § 5.9 (4th ed. 2002)).

12. *Boland*, 471 S.W.3d at 713; *Beisly*, 469 S.W.3d at 445.

13. *Beisly*, 469 S.W.3d at 445 (Fischer, J., dissenting). The Missouri Court of Appeals for the Western District heard *Boland*. *Boland v. Saint Luke’s Health Sys., Inc.*, No. WD75364, 2013 WL 6170598 (Mo. Ct. App. Nov. 26, 2013), *aff’d*, 471 S.W.3d 703.

14. The action in *Beisly* involved a writ of prohibition compared to a grant of transfer found in *Boland*; therefore, *Beisly* presents the opportunity to reappear before the court. *See Beisly*, 469 S.W.3d at 446 (Fischer, J., dissenting).

court's decision and explores why the court should have acknowledged wrongful death claims that ascended from common law.

## II. FACTS AND HOLDING

Five people seeking treatment at a Chillicothe, Missouri hospital died in 2002.<sup>15</sup> The family members alleged a rogue nurse<sup>16</sup> employed by the hospital was responsible for the deaths.<sup>17</sup> The nurse, Jennifer Hall,<sup>18</sup> purportedly dosed the patients with lethal amounts of unneeded medication<sup>19</sup> and, therefore, caused the decedents' deaths.<sup>20</sup> A minimum of nine suspicious deaths and eighteen suspicious "codes"<sup>21</sup> were attributed to the nurse.<sup>22</sup>

Dr. Cal Greenlaw became suspicious when a patient in the emergency room suddenly "coded" for cardiovascular collapse, and Dr. Greenlaw could not explain "the patient's unusual blood sugar/insulin events."<sup>23</sup> This event, combined with Dr. Greenlaw's knowledge of two previous suspicious incidents, led the doctor to voice concerns to the hospital administration – twice.<sup>24</sup> The doctor's concerns were met with a denial of the problem, an admonishment to remain silent, and a command to abandon the issue out of fear this news would affect hospital enrollment.<sup>25</sup> One hospital administrator said, "We don't have a problem here, and if anyone breathes a word of this,

---

15. *Boland*, 471 S.W.3d at 705. The deceased were treated at Hedrick Medical Center in Chillicothe, Missouri. *Id.*

16. Specifically, a respiratory therapist. *Id.*

17. *Id.*

18. Hall has an interesting background: she was convicted and later exonerated of setting a fire at a previous place of employment. Rick Montgomery, *Hospital Deaths Cast a Shadow Over Jennifer Hall*, KAN. CITY STAR (Aug. 28, 2015), <http://www.kansascity.com/news/local/article32652306.html>.

19. Specifically, succinylcholine, insulin, and/or other medication. *Boland*, 471 S.W.3d at 705, 720 n.2. Succinylcholine, a muscle relaxant that paralyzes the respiratory muscles, is usually used when inserting breathing tubes for conscious patients. *Id.* Succinylcholine can be fatal when given in large doses, as the patient will suffocate to death due to paralysis. *Id.*

20. *Id.* at 705.

21. Codes are "medical emergencies, often involving cardiac arrest or the inability to breath." *Id.*

22. *Id.* The respiratory therapist had not been officially charged as of August 28, 2015. Rick Montgomery, *Missouri Supreme Court Ruling Blocks Lawsuit Over Deaths at Chillicothe Hospital*, KAN. CITY STAR (Aug. 29, 2015), <http://www.kansascity.com/news/business/health-care/article32747469.html>.

23. *Boland*, 471 S.W.3d at 706.

24. *Id.* On the first occasion, Dr. Greenlaw told the hospital's director of nurses, and on the second occasion, he told the hospital's administrator. *Id.*

25. *Id.*

you'll be fired."<sup>26</sup> The doctor disregarded the administration and gathered evidence that pointed to eighteen code blues and nine suspicious deaths that occurred while the nurse was on duty.<sup>27</sup> Dr. Greenlaw contacted local authorities.<sup>28</sup>

Aleta Boyd, a registered nurse and the hospital's internal risk manager, detected a "dramatic increase in code blue events and deaths" in March 2002.<sup>29</sup> Boyd began an investigation after she suspected patients were intentionally injected with unnecessary insulin.<sup>30</sup> Boyd determined Hall was the perpetrator and reported the findings to both the director of nursing and the hospital's administrator.<sup>31</sup> Similar to Dr. Greenlaw's experiences, Boyd was met with a directive to remain quiet. However, like Dr. Greenlaw, Boyd continued to investigate.<sup>32</sup> Boyd uncovered "approximately 15 patients who either coded or died under suspicious circumstances," and Hall attended to each patient.<sup>33</sup> Boyd and other concerned nurses threatened to alert the media if the hospital "failed to stop Hall."<sup>34</sup>

In May 2002, Hall was suspended and eventually fired after yet another patient expired under suspicious conditions.<sup>35</sup> A post-suspension investigation of Hall's locker revealed a bottle of insulin, even though Hall could not give a legitimate explanation for the insulin's presence.<sup>36</sup> After Hall's termination, the suspicious codes and deaths stopped.<sup>37</sup>

An independent investigation was conducted by the Joint Commission on Accreditation of Healthcare Organizations and concluded a number of "sentinel" events occurred during 2002.<sup>38</sup> The Supreme Court of Missouri defined a "sentinel" event as "an unexpected occurrence involving death or serious physical or psychological injury, or the risk thereof."<sup>39</sup> Healthcare providers must report notice of sentinel events to patients and their families.<sup>40</sup> However, the families of the deceased reported they were not notified of the

---

26. Brief of Appellant Sherri Lynn Harper, as Spouse of Deceased David Harper at 5, *Boland v. Saint Luke's Health Sys., Inc.*, No. WD 75366, 2013 WL 6170598 (Mo. Ct. App. Nov. 26, 2013) (No. WD 75366), 2013 WL 623705, at \*5.

27. *Boland*, 471 S.W.3d at 706.

28. Brief of Appellant Sherri Lynn Harper, *supra* note 26, at \*5.

29. *Boland*, 471 S.W.3d at 706.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

sentinel events suspected in connection with the deaths, despite the hospital's duty to do so, until shortly before their petitions were filed in 2010.<sup>41</sup>

The families filed separate petitions for damages under the wrongful death statute, Missouri Revised Statutes Section 537.080.<sup>42</sup> The hospital argued the claims were time-barred by Missouri Revised Statutes Section 537.100,<sup>43</sup> the three-year wrongful death statute of limitations, and the hospital filed motions for judgment on the pleadings.<sup>44</sup> The trial court granted summary judgment for the hospital because the claims were filed eight years after the deaths, five years past the statute of limitations.<sup>45</sup>

On joint appeal, the families of the deceased<sup>46</sup> contended that the trial court erred by granting judgment on the pleadings in favor of the hospital because the wrongful death statute of limitations time-bar should not have been applicable due to the hospital's fraudulent concealment.<sup>47</sup> The families argued two main points concerning why the statute of limitations did not apply in this case; both points centered on the inability to ascertain a cause of action for wrongful death because the families were unaware that tortious conduct, instead of natural causes, contributed to the deaths.<sup>48</sup> First, the families argued that the hospital's fraudulent concealment<sup>49</sup> stopped the clock or

41. *Id.* at 706–07. See Brief of Appellant Helen Pittman, Natural Sister of Decedent, Shirley R. Eller at 4, *Boland v. Saint Luke's Health Sys., Inc.*, No. WD 75366, 2013 WL 6170598 (Mo. Ct. App. Nov. 26, 2013) (No. WD75485), 2013 WL 1234150, at \*4.

42. MO. REV. STAT. § 537.080 (2000); *Boland*, 471 S.W.3d at 707.

43. § 537.100.

44. *Boland*, 471 S.W.3d at 707.

45. *Id.*; see Brief of Appellant Helen Pittman, *supra* note 41, at \*4.

46. *Boland*, 471 S.W.3d at 705, 707–8. The families appealed, and the separate, but “essentially identical,” appeals were consolidated. *Id.*

47. Substitute Brief of Appellants at 12, *Boland*, 471 S.W.3d 703 (Mo. 2015) (en banc) (No. SC 93906), 2014 WL 3706773, at \*12.

48. *Boland v. Saint Luke's Health Sys., Inc.*, No. WD75364, 2013 WL 6170598, at \*5 (Mo. Ct. App. Nov. 26, 2013), *aff'd*, 471 S.W.3d 703.

49. *Boland*, 471 S.W.3d at 705–06. The families alleged the hospital fraudulently concealed Hall's actions because it: (1) threatened and coerced employees of Hedrick to conceal information concerning the actions of Hall; (2) failed to request autopsies so as to conceal the true causes of the patients' deaths when they knew a number of deaths were suspicious; (3) informed and/or instructed Hedrick employees to intentionally mislead the patients' families that the causes of death were “natural” instead of caused by Hall; (4) disbanded committees previously put in place by Hedrick to evaluate “codes” and determine preventative measures; (5) failed to inform pertinent individuals and relevant medical communities about Hall's intentional and/or negligent battery of patients; (6) failed to investigate and/or monitor Hall when requested to do so by law enforcement; (7) made patients' medical records inaccessible to their physicians by removing the records; (8) discarded and/or failed to preserve crucial material evidence contained in Hall's locker pertaining to her intentional and/or negligent batteries; and (9) impeded the investigation of Hall by law enforcement. *Id.*

“tolled” the statute of limitations.<sup>50</sup> Second, the families argued that due to fraudulent concealment, the cause of action for wrongful death did not accrue at the time of death, but rather began when “the causes of death became evident or reasonably ascertainable.”<sup>51</sup>

The Missouri Court of Appeals for the Western District reversed the judgment on the pleadings and remanded for further proceedings.<sup>52</sup> The appellate court reasoned “tolling” could not apply due to the legislature’s creation of a special time limitation.<sup>53</sup> However, the court concluded that “accrual” could apply,<sup>54</sup> because the legislature did not define “accrue,” and therefore, “accrual” was open for judicial interpretation.<sup>55</sup> The court declined to apply the strict interpretation standard, but rather applied liberal construction as set forth by the Supreme Court of Missouri’s directive in *O’Grady v. Brown* – that “in order to promote the purpose and objectives of the Wrongful Death Act, the Act shall not be strictly construed.”<sup>56</sup> The appellate court held the legislative time limitation in Section 537.100 did not accrue until, by reasonable diligence, a cause of action for wrongful death could be ascertained.<sup>57</sup>

The Supreme Court of Missouri granted transfer of this case.<sup>58</sup> The court affirmed the orders of the trial courts for judgment on the pleadings in favor of the hospital.<sup>59</sup> The court held that the wrongful death claim accrued at the time of death, not eight years later when the cause of death was reasonably ascertained,<sup>60</sup> and that common law maxims for fraudulent concealment, such as equitable estoppel, were not appropriate to toll statutory time-bar creations.<sup>61</sup> The court further held that accrual should be interpreted under the strict interpretation standard set forth in a case from 1952, *Frazee v. Partney*.<sup>62</sup> The strict interpretation standard required the court to “construe the

50. *Boland*, 2013 WL 6170598, at \*5.

51. *Id.*

52. *Id.* at \*10.

53. *Id.* (“[T]he Wrongful Death Act contains its own special statute of limitations. We agree with Respondents on that point and do not apply those provisions, as section 516.300 makes clear that the limitations contained within sections 516.010 to 516.370 do not extend to this action.”).

54. *Id.*

55. *Id.* (“Accrual is not defined within the Wrongful Death Act and, thus, is open to interpretation by the courts.”).

56. *Id.* at \*6 (citing *O’Grady v. Brown*, 654 S.W.2d 904 (Mo. 1983) (en banc)).

57. *Id.* at \*10.

58. *Boland v. Saint Luke’s Health Sys., Inc.*, 471 S.W.3d 703, 703 (Mo. 2015) (en banc).

59. *Id.* at 713.

60. *Id.* at 710; see Combined Substitute Brief of Respondents at 45, *Boland*, 471 S.W.3d 703 (No. SC 93906), 2014 WL 3706775, at \*45.

61. *Boland*, 471 S.W.3d at 710.

62. *Id.* at 705.

cold, clear words of the statute” and refrain from judicial enlargement of the time limitation set forth by the statute.<sup>63</sup>

### III. LEGAL BACKGROUND

Missouri has applied two lines of interpretation to wrongful death causes of action. The standard used significantly impacts the outcome of the wrongful death statute of limitations analysis. One line reflects the harshness of the strict interpretation standard, while the liberal construction line alleviates the severity of possible injustices through the application of judicially-created common law maxims of estoppel.<sup>64</sup> Because wrongful death causes of action were first considered “a purely statutory creature”<sup>65</sup> of the legislature, early courts strictly construed wrongful death statutes, which resulted in harsh applications of the statute of limitations.<sup>66</sup> However, when a court acknowledges that wrongful death causes of action existed at common law, it may depart from strict interpretation and apply a liberal construction standard.<sup>67</sup> Statutes interpreted liberally gain the availability of common law maxims to prevent injustice and allow courts to appreciate the moral and ethical issues surrounding the statute.<sup>68</sup> Missouri has consistently held that wrongful death causes of action are a statutory creation that did not exist at common law,<sup>69</sup> but has fluctuated between which standard to apply – strict interpretation or liberal construction.<sup>70</sup>

---

63. *Frazee v. Partney*, 314 S.W.2d 915, 921 (Mo. 1958).

64. Gregory E. Maggs, *Estoppel and Textualism*, 54 AM. J. COMP. L. 167, 167 (2006).

65. *State ex rel. Beisly v. Perigo*, 469 S.W.3d 434, 455 (Mo. 2015) (en banc) (Russel, J., dissenting).

66. See Mary C. Doesburg, Note, *Wrongful Death Statute-Limitation of Actions-Period within which Beneficiary Must Sue Still Strictly Construed*, 42 MO. L. REV. 496, 500 (1977).

67. See *LaFage v. Jani*, 766 A.2d 1066, 1077 (N.J. 2001).

68. See *id.* at 1076–80.

69. See, e.g., *O’Grady v. Brown*, 654 S.W.3d 904, 907 (Mo. 1983) (en banc); *State ex rel. Kan. City Stock Yards Co. of Me. v. Clark*, 536 S.W.2d 142, 144 (Mo. 1976) (en banc); *Frazee v. Partney*, 314 S.W.2d 915, 918 (Mo. 1958); *Coover v. Moore*, 31 Mo. 574, 574 (1862).

70. Compare *Boland v. St. Luke’s Health Sys., Inc.*, 471 S.W.3d 703, 705 (barring equitable estoppel in wrongful death actions concerning defendant’s use of fraudulent concealment), and *Frazee*, 314 S.W.2d at 919 (finding that wrongful death statutes did not provide for the tolling of statutes due to fraudulent concealment), with *Beisly*, 469 S.W.3d at 441 (allowing equitable estoppel to bar the defense of time limitations), and *O’Grady*, 654 S.W.3d at 911 (creating a liberal construction standard for wrongful death statutory interpretation).

### A. Statutory Creation

The traditional rule, that a cause of action for wrongful death is purely a statutory creation and has no roots in common law, can be traced back to 1808 in the English case of *Baker v. Bolton*.<sup>71</sup> In dictum, and without cited authority or supported reasoning, Lord Ellenborough created “Baker’s Rule,” which stated, “[i]n a civil court, the death of a human being could not be complained of as an injury.”<sup>72</sup> The English remedied the absence of a wrongful death cause of action with legislation.<sup>73</sup> The Fatal Accidents Act of 1846, more commonly known as Lord Campbell’s Act,<sup>74</sup> provided “a distinct remedy for wrongful death in favor of designated members of the deceased’s family.”<sup>75</sup> The preamble of this Act reflected the drafters’ belief that no common law precedent for wrongful death existed.<sup>76</sup>

---

71. *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 382–83 (1970) (citing *Baker v. Bolton* (1808) 170 Eng. Rep. 1033); see Dennis M. Doiron, *A Better Interpretation of the Wrongful Death Act*, 43 ME. L. REV. 449, 453 (1991); Daniel J. Scheffner, *Taking Wrongful Death Seriously: Dworkinian Interpretivism and the Common Law Right of Action for Wrongful Death*, 5 FAULKNER L. REV. 223, 224 (2014).

72. *Glick v. Ballentine Produce Inc.*, 396 S.W.2d 609, 614 (Mo. 1965) (quoting *Baker*, 170 Eng. Rep. 1033), *overruled on other grounds by* *Bennett v. Owens-Corning Fiberglas Corp.*, 896 S.W.2d 464 (Mo. 1995) (en banc).

It must be remembered that *Baker v. Bolton* was a *nisi prius* case, tried in the local court before a single judge rather than en banc in the superior court at Westminster. The case involved only a small amount of money and apparently was not extensively argued. Ellenborough’s reported opinion is very brief, and the controversial rule of law was laid down without either sustaining reasoning or supporting authority.

Appellants’ Brief in Opposition to Motion to Dismiss Appeal at 3, *Glick*, 396 S.W.2d 609 (Mo. 1965) (No. 51298), 1966 WL 100819, at \*3 (quoting TA Smedley, *Wrongful Death: Bases of the Common Law Rules*, 13 VAND. L. REV. 605, 614–615 (1960)).

73. Steven H. Steinglass, *Wrongful Death Actions and Section 1983*, 60 IND. L.J. 559, 572–73 (1985).

74. *Id.* at 572.

75. Wex S. Malone, *The Genesis of Wrongful Death*, 17 STAN. L. REV. 1043, 1058 (1965).

76. *Id.* There is some debate that Baker’s Rule sprang from penal felony murder. See *id.* at 1055; *LaFage v. Jani*, 766 A.2d 1066, 1076–77 (N.J. 2001) (citing F. POLLOCK, *LAW OF TORTS* 52–57 (Landon ed. 1951); W. Holdsworth, *The Origin of the Rule in Baker v. Bolton*, 32 L.Q. REV. 431 (1916)).

Under the felony-merger doctrine, no civil recovery was permitted under the common law for an act that constituted both a tort and a felony. The felony was against the Crown and was deemed more serious than the tort, and thus the tort was merged into, or pre-empted by, the felony.

*Id.* at 1077.

A few American jurisdictions, including Missouri,<sup>77</sup> recognized common law wrongful death causes of action in the late eighteenth and early nineteenth centuries.<sup>78</sup> However, the common law wheels of wrongful death jurisprudence ground to an abrupt halt when American courts first adopted Baker's Rule in *Carey v. Berkshire Railroad Co.* in 1848.<sup>79</sup> In *Carey*, the Supreme Judicial Court of Massachusetts applied Baker's Rule to a wrongful death action and denied relief to a widow in the negligent death case of her husband, a railroad employee.<sup>80</sup>

The Supreme Court of the United States, in *The Harrisburg*, later cited *Carey*,<sup>81</sup> and various state courts followed.<sup>82</sup> As a result, American state legislatures passed wrongful death statutes to alleviate the harshness of no recovery.<sup>83</sup> Today, all fifty states have statutes for recovery under wrongful death causes of action.<sup>84</sup>

The Missouri legislature enacted the state's first wrongful death statute in 1855.<sup>85</sup> Consequently, when Missouri courts applied the wrongful death statute, they considered the action to be substantive law<sup>86</sup> and construed the statute strictly.<sup>87</sup> Strict interpretation mandates that judicial construal is "bound to consider only the plain language . . . and the legislative intent that language evidenced."<sup>88</sup> Additionally, when reading and applying the statute,

77. See *James v. Christy*, 18 Mo. 162, 164 (1853).

78. See, e.g., *Gross v. Guthery*, 2 Root 90, 90 (Conn. 1794); *Ford v. Monroe*, 20 Wend. 210 (N.Y. 1838).

79. *Carey v. Berkshire R.R. Co.*, 55 Mass. 475, 478 (1848), *overruled in part by* *Gaudette v. Webb*, 284 N.E.2d 222 (Mass. 1972); see *Doesburg*, *supra* note 66, at 497.

80. *Carey*, 55 Mass. at 475. See *Doiron*, *supra* note 71, at 454.

81. *The Harrisburg*, 119 U.S. 199 (1886), *overruled by* *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970).

82. See *Doiron*, *supra* note 71, at 453–54.

83. See, e.g., *Steinglass*, *supra* note 73, at 573; Jonathan James, Comment, *Denial of Recovery to Nonresident Beneficiaries Under Washington's Wrongful Death and Survival Statutes: Is It Really Cheaper to Kill A Man Than to Maim Him?*, 29 SEATTLE U. L. REV. 663, 667 (2006).

84. See *James*, *supra* note 83, at 666–67.

85. MO. REV. STAT. § 3, p. 648 (1855) (current version at MO. REV. STAT. § 537.080–.090 (2000)); see 5A JOHN A. BORRON, JR., MO. PRAC., PROBATE LAW & PRACTICE § 852 (3d ed.).

86. *Coover v. Moore*, 31 Mo. 574, 574 (1862). In *Coover*, the Supreme Court of Missouri held that wrongful death was "purely a statutory right" and a common law cause of action did not exist for the "negligent killing of another." *Id.* *Coover* also stated, "Penal statutes must be strictly construed." *Id.*

87. *Cummins v. Kan. City Pub. Serv. Co.*, 66 S.W.2d 920, 925 (Mo. 1933); see also Michael T. Kokal, Note, *Rambo I: The Missouri Supreme Court vs. the Wrongful Death Statute—Prelude to the Sequel?*, 57 MO. L. REV. 321, 322–23 (1992) (discussing strict interpretation of wrongful death causes of action).

88. *Boland v. Saint Luke's Health Sys., Inc.*, 471 S.W.3d 703, 709 (Mo. 2015) (en banc); see *Maggs*, *supra* note 64, at 167.

judicial analysis should not be influenced by policy arguments<sup>89</sup> and judges should not “take it upon themselves to find exceptions, glosses, or creative interpretations of the plain meaning of statutes”<sup>90</sup> – even when the conclusion reached is “distasteful.”<sup>91</sup>

An excellent example of Missouri’s strict interpretation standard can be found in the 1958 Supreme Court of Missouri case *Frazee v. Partney*.<sup>92</sup> In *Frazee*, a sleepy truck driver ran a car off the road and killed two of the car’s passengers, a mother and daughter.<sup>93</sup> The truck driver failed to report the accident.<sup>94</sup> The victims’ family filed a wrongful death cause of action once the identity of the driver became known; however, the suit commenced past the one-year statute of limitations due to the fraudulent concealment of the defendant’s identity.<sup>95</sup> The *Frazee* court held that the wrongful death statute did not provide for the tolling of the statute of limitations due to fraud or concealment and that a wrongful death cause of action accrued at death.<sup>96</sup>

### B. Discovering Common Law Origins

Other jurisdictions have analyzed the historical bedrocks of wrongful death causes of action and acknowledged that codification originated at common law before statutory creation.<sup>97</sup> Missouri, however, has consistently held fast that wrongful death causes of action sprang from statutory creation rather than common law.

Missouri first confronted the idea of common law origination for wrongful death actions in 1965 in *Glik v. Ballentine Produce, Inc.*<sup>98</sup> The Supreme Court of Missouri addressed statutory criticism and defended Lord Campbell’s Act because it was “accepted as a parliamentary recognition of the pre-existing rule” and created a model for all ensuing statutory rights of wrongful

---

89. Maggs, *supra* note 64, at 167.

90. *Id.*

91. *Boland*, 471 S.W.3d at 711 (quoting *Laughlin v. Forgrave*, 432 S.W.2d 308, 314 (Mo. 1968) (en banc)).

92. *See* 314 S.W.2d 915, 921 (Mo. 1958).

93. *Id.* at 917.

94. *Id.*

95. *Id.*

96. *Id.* at 921.

97. *LaFage v. Jani*, 766 A.2d 1066, 1076–80 (N.J. 2001). New Jersey is one of the more recent jurisdictions to recognize that wrongful death claims originated through common law and overrule all past cases that held wrongful death was a statutory creation. *Id.* at 1079; *see, e.g., William S. Bailey, Flawed Justice: Limitation of Parental Remedies for the Loss of Consortium of Adult Children*, 27 SEATTLE U. L. REV. 941, 953 (2004).

98. *Glick v. Ballentine Produce Inc.*, 396 S.W.2d 609 (Mo. 1965), *overruled on other grounds by* *Bennett v. Owens-Corning Fiberglas Corp.*, 896 S.W.2d 464 (Mo. 1995) (en banc).

death recovery in Missouri.<sup>99</sup> The court vehemently declined to overturn the long held view of statutory wrongful death based on “the scattered voices of protest and criticism.”<sup>100</sup> The court firmly held, “*There is no common law right of action for wrongful death in Missouri.*”<sup>101</sup> This early confrontation assisted in Missouri’s rejection of common law origination for wrongful death claims found five years later in other jurisdictions.<sup>102</sup>

Cracks in the theory of wrongful death statutory creation began in 1970 after the Supreme Court of the United States decided *Moragne v. States Marine Lines, Inc.*<sup>103</sup> In *Moragne*, the Court evaluated historical applications of actions for wrongful death and determined the traditional justification for Baker’s Rule “never existed in this country.”<sup>104</sup> The Court specifically overruled its holding in *The Harrisburg*, which established the precedent for wrongful death actions not found under common law.<sup>105</sup>

Following *Moragne*, the Supreme Judicial Court of Massachusetts overruled *Carey*, the case that laid the foundation for Baker’s Rule in America.<sup>106</sup> In *Gaudette v. Webb*, the court held the Commonwealth of Massachusetts’s wrongful death recovery right originated at common law.<sup>107</sup> *Gaudette* explicitly barred the statute of limitations as an affirmative defense because interpreting wrongful death statutes through the lens of common law allowed the general application of limitations, instead of merely specific limitations.<sup>108</sup> By allowing a general application, the court held that, when appropriate, the limitations could be tolled.<sup>109</sup>

The Supreme Court of Missouri had the opportunity to change course and acknowledge common law origins in 1976 through *Kansas City Stock Yards Co. of Maine v. Clark*.<sup>110</sup> In *Kansas City Stock Yards*, the court considered an untimely filing of a wrongful death claim and held fast to the ap-

---

99. *Id.* at 614.

100. *Id.*

101. *Id.*

102. See, e.g., *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 402–03 (1970); *Gaudette v. Webb*, 284 N.E.2d 222, 229 (Mass. 1972); *LaFage*, 766 A.2d at 1076–80.

103. 398 U.S. 375.

104. *Id.* at 381.

105. *Id.* at 409 (1970). Although both *Moragne* and *The Harrisburg* dealt with maritime law, the Court ascertained the common law applicable on land also applied on sea. State *ex rel.* Kan. City Stock Yards Co. of Me. v. Clark, 536 S.W.2d 142, 153 (Mo. 1976) (en banc) (Bardgett, J., dissenting).

106. *Kan. City Stock Yards*, 536 S.W.2d at 154.

107. 284 N.E.2d 222, 229. The court found that even if wrongful death causes of action began in statutory creation, wrongful death causes of action now “evolved to the point” that they should be considered common law. *Id.*

108. *Id.*

109. *Id.*

110. 536 S.W.2d 142.

plication of strict interpretation and statutory creation precedent.<sup>111</sup> The court reasoned the Missouri legislature's 1967 amendment of the wrongful death statute could have provided inclusions that would alter the limitations.<sup>112</sup>

In his dissent in *Kansas City Stock Yards*, Judge Bardgett looked back to a case decided in 1853, *James v. Christy*, which planted Missouri's common law seeds two years prior to statutory creation.<sup>113</sup> After a thorough historical analysis, Judge Bardgett concluded that the origin of a wrongful death claim was "firmly rooted" in common law.<sup>114</sup>

In *James*, the Supreme Court of Missouri established that a father could sue the party responsible for the negligent death of his son.<sup>115</sup> The court further held the father could recover both non-pecuniary and non-economic damages "for the loss of society or comforts" of his son.<sup>116</sup> The Supreme Court of the United States cited *James* as one of the early American "common-law courts against the [Baker] rule."<sup>117</sup>

### C. Missouri's Liberal Interpretation Standard

In 1983, the Supreme Court of Missouri finally changed course, rejected strict interpretation, and applied a liberal interpretation standard to a wrongful death cause of action in *O'Grady v. Brown*.<sup>118</sup> The court held a stillborn, yet viable, fetus was considered a "person" under the wrongful death statute.<sup>119</sup> The opinion was written by Special Judge James A. Pudlowski,<sup>120</sup> who held that the statute was intended to "mend the fabric of the common law" and promote the "apparent object of the legislative enactment."<sup>121</sup> The court set out three objectives of the statute: "(1) 'to provide compensation to bereaved

---

111. *Id.* at 150 (Bardgett, J., dissenting) "The principal opinion does not say in so many words that the Missouri wrongful death act must be strictly construed because it created a right of action nonexistent at common law, yet, that is the theory that pervades many of the earlier cases cited therein." *Id.*

112. The amendment occurred three years prior to *Moragne*. See *id.* at 144; *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970).

113. See *Kan. City Stock Yards*, 536 S.W.2d at 151 (Badgett, J., dissenting) (citing *James v. Christy*, 18 Mo. 162 (1853)); BORRON, *supra* note 85.

114. See *Kan. City Stock Yards*, 536 S.W.2d at 153 (Badgett, J., dissenting).

115. *James*, 18 Mo. at 164. In *James*, the father perished before the adjudication of his case and an administrator pursued the cause of action after his demise; the court allowed the recovery of the son's death to be passed to the administrator. *Id.* See Daniel J. Sheffner, *Wrongful Death's Common Law Antecedents in Missouri*, 70 J. Mo. B. 194, 196 (2014).

116. Sheffner, *supra* note 115, at 196 (quoting *James*, 18 Mo. at 164).

117. *The Harrisburg*, 119 U.S. 199, 205 (1886), *overruled by Moragne*, 398 U.S. 375.

118. 654 S.W.2d 904 (Mo. 1983) (en banc).

119. *Id.* at 906-07.

120. *Id.* at 906. Supreme Court of Missouri Judge Welliver did not sit on this case. *Id.* at 912.

121. *Id.* at 908.

plaintiffs for their loss,’ (2) ‘to ensure that tortfeasors pay for the consequences of their actions,’ and (3) ‘to deter harmful conduct which might lead to death.’”<sup>122</sup> The *O’Grady* court, however, stopped short of accepting common law origination for wrongful death causes of action.<sup>123</sup>

In *Beisly v. Perigo*, through a 4-3 majority opinion written by Judge George W. Draper, III, and decided with the assistance of a Special Judge, the Supreme Court of Missouri jumped the precedential hurdle of *Frazee v. Partney* by distinguishing *Beisly* from it.<sup>124</sup> The court held *Frazee* remained good law but was distinguished from this case because, in order to uphold the objectives created in *O’Grady*, fraudulent concealment blocked a defendant’s application of an affirmative defense based on time expiration.<sup>125</sup>

Belinda Beisly was found dead in her home due to gunshot wounds on July 15, 2009.<sup>126</sup> The State filed charges against her husband, Bob Beisly, and Jeremy Maples on February 13, 2013.<sup>127</sup> Belinda’s mother brought a wrongful death claim after the three-year statute of limitations period and argued the statute of limitations should not be enforced due to fraudulent concealment.<sup>128</sup> In this case, the husband purportedly hid his involvement in Belinda’s murder after another man, Maples, killed her.<sup>129</sup> The husband claimed a home invasion occurred, lied to police, destroyed evidence, and denied involvement in Belinda’s death.<sup>130</sup>

The court focused on the common law maxim that “fraud vitiates whatever it touches”<sup>131</sup> as a fundamental tenet that has allowed estoppel to prevent an affirmative defense of the statute of limitations when arising from fraud.<sup>132</sup> The court reasoned the shield of estoppel neither tolled nor created an exception to the statute of limitations; estoppel simply prevented the murderer from

---

122. State *ex rel.* *Beisly v. Perigo*, 469 S.W.3d 434, 439 (Mo. 2015) (en banc) (quoting *O’Grady*, 654 S.W.2d at 909).

123. *O’Grady*, 654 S.W.2d at 908.

124. Ironically, Judge Draper wrote the dissent in *Boland*. *Boland v. St. Luke’s Health Sys., Inc.*, 471 S.W.3d 703, 703 (Mo. 2015) (en banc). Atypically, *O’Grady* was also decided with the assistance of a Special Judge. *O’Grady*, 654 S.W.2d at 906. Supreme Court of Missouri Judge Welliver did not sit on this case. *Id.* at 912.

125. *Beisly*, 469 S.W.3d at 440.

126. *Id.* at 447.

127. *Id.* Maples was charged with first-degree murder. *Id.* at 436. Beisly was charged with aiding and encouraging Maples. *Id.* Charges against Beisly were eventually dropped. Jeff Lehr, *Husband’s Charge Dropped in Vernon County Murder Case*, JOPLIN GLOBE (Mar. 19, 2015), [http://www.joplinglobe.com/news/local\\_news/husband-s-charge-dropped-in-vernon-county-murder-case/article\\_d3cb8199-c033-5efe-b27d-1df52d7dfb6f.html](http://www.joplinglobe.com/news/local_news/husband-s-charge-dropped-in-vernon-county-murder-case/article_d3cb8199-c033-5efe-b27d-1df52d7dfb6f.html).

128. *Beisly*, 469 S.W.3d at 446.

129. *Id.* at 447.

130. *Id.*

131. *Id.* at 442 (quoting *Cox v. Upjohn Co.*, 913 S.W.2d 225, 231 (Tex. Ct. App. 1995)).

132. *Id.*

using the time limitation as a defense.<sup>133</sup> This analysis allowed the court to remain within its constitutional bounds by not creating an exception to a legislatively created statute of limitations.<sup>134</sup> The court then applied Missouri Revised Statutes Section 1.010,<sup>135</sup> the common law reception statute, in an effort to liberally construe and interweave *O'Grady's* instruction<sup>136</sup> into the legislature's intent.<sup>137</sup> The court reasoned that Section 1.010 provides, "all acts of the general assembly, or laws, shall be liberally construed, so as to effectuate the true intent and meaning thereof," and therefore, equitable estoppel should be "interwoven" in order to foil fraudulent concealment.<sup>138</sup>

*Beisly* provided two dissenting opinions. The first discussed why the court should not have decided this case in a manner that contradicted the decision reached on the very same day in *Boland*.<sup>139</sup> Judge Zel M. Fischer admonished the *Beisly* plurality for reaching a 4-3 majority decision only with the assistance of a Special Judge in light of the full "regular" court's decision in *Boland*.<sup>140</sup> In addition, Judge Fischer reasoned *Beisly* should not have been decided at all because it only appeared before the court on a writ of prohibition while *Boland* reached the court through a direct appeal.<sup>141</sup> *Beisly* will now return to the trial court without clear direction; the trial judge must decide whether to apply *Beisly* or *Boland*.<sup>142</sup> Judge Mary Rhodes Russell penned the second dissenting opinion; she authored the majority opinion in *Boland*.<sup>143</sup>

#### IV. INSTANT DECISION

In the instant case, the Supreme Court of Missouri found that the common law maxim of equitable estoppel did not bar the defendant's defense of time limitation when the defendant's fraudulent acts concealed the tortious

---

133. *Id.*

134. *Id.* at 444. The Separation of Powers provision is provided by the Missouri Constitution, Article II, Section I. *Id.* at 443.

135. MO. ANN. STAT. § 1.010 (West 2016). "Section 1.010 expressly provides that 'all acts of the general assembly, or laws, shall be liberally construed, so as to effectuate the true intent and meaning thereof.'" *Beisly*, 469 S.W.3d at 444 (quoting § 1.010.1).

136. *O'Grady* instructed courts "to perceive the import of major legislative innovations and to interweave the new legislative policies with the inherited body of common law principles." *Beisly*, 469 S.W.3d at 444 (quoting *O'Grady v. Brown*, 654 S.W.2d 904, 908 (Mo. 1983) (en banc)).

137. *Id.* at 444.

138. *Id.* (quoting § 1.010.1).

139. *Id.* at 445–46 (Fischer, J., dissenting).

140. *Id.*

141. *Id.* at 446.

142. *Id.*

143. *Id.* at 445; *Boland v. St. Luke's Health Sys., Inc.*, 471 S.W.3d 703, 704–05 (Mo. 2015) (en banc).

nature of the deaths.<sup>144</sup> The court further held that accrual for wrongful death claims began the instant the decedent died as opposed to the moment the cause of action was discovered.<sup>145</sup>

### A. The Majority Opinion

The court declined to follow the more recent, liberal interpretation crafted in *O'Grady v. Brown*<sup>146</sup> and relied on a case from 1952, *Frazee v. Partney*,<sup>147</sup> to determine that accrual for a wrongful death statute began at the moment of death and that statutory interpretation should be strictly construed.<sup>148</sup>

The *Boland* court addressed the issue of delayed accrual and looked to the analysis in *Frazee* to determine when time limitations began to run.<sup>149</sup> The court had to determine if accrual began at the moment of death or at the point the lawsuit could be “effectively commenced.”<sup>150</sup> The court rejected *O'Grady's* holding that “the wrongful death statute was not in derogation of the common law and should be construed ‘with a view to promoting the apparent object of the legislative enactment.’”<sup>151</sup> The court reasoned *O'Grady* did not analyze the statute of limitations and because *Frazee* did, *Frazee* remained controlling precedent.<sup>152</sup> Like in *Frazee*, the *Boland* court held that “despite the harshness of the outcome, the wrongful death claim accrued at the moment of death.”<sup>153</sup>

The *Boland* court then looked at the application of estoppel to bar the defendants the defense of time due to fraudulent concealment.<sup>154</sup> The court reasoned estoppel application equated to a “*de facto* exception to section 537.100 for fraudulent concealment.”<sup>155</sup> The court noted the tragic circumstances of *Boland* created a compelling policy argument, but that a “free-wheeling” method to statutory interpretation “[was] also troubling,” especially when precedent advised a contrary outcome.<sup>156</sup> The *Boland* court again turned to *Frazee* for analysis of statutory interpretation.<sup>157</sup>

The *Boland* court noted Section 537.100, the statute of limitations for wrongful death, contained a “special statute of limitation” that “must carry its

---

144. *Boland*, 471 S.W.3d at 712–13.

145. *Id.* at 710.

146. 654 S.W.3d 904, 911–12 (Mo. 1983) (en banc).

147. 314 S.W.2d 915 (Mo. 1958).

148. *Boland*, 471 S.W.3d at 708–09.

149. *Id.* at 708.

150. *Id.* (citing *Frazee*, 314 S.W.2d at 917).

151. *Id.* at 709 (quoting *O'Grady*, 654 S.W.3d at 908).

152. *Id.* at 715 (Draper, J., dissenting).

153. *Id.* at 708–09 (majority opinion) (citing *Frazee*, 314 S.W.2d at 921).

154. *Id.* at 710.

155. *Id.*

156. *Id.*

157. *Id.* at 711.

own exceptions and [the court] may not engraft others upon it.”<sup>158</sup> Section 537.100 creates a specific time limitation for two reasons,<sup>159</sup> neither of which allows exceptions for fraudulent concealment. Chapter 516 is the general statutes of limitations chapter and does carry a fraudulent concealment exception in Missouri Revised Statutes Section 516.280.<sup>160</sup> The court stated, “The principles of the legislative deference as well as *stare decisis* must be respected.”<sup>161</sup> Like in *Frazee*, the court held in *Boland* that a general exception was not applicable when a special exception was present.<sup>162</sup>

The court then analyzed the legislative intent behind the wrongful death statutory scheme.<sup>163</sup> The court also noted the presumption of legislative action in light of “full awareness and complete knowledge of the present state of the law.”<sup>164</sup> The court reasoned the legislature could have created a fraudulent concealment exception in light of *Frazee* but instead chose to expand the limitation period twice.<sup>165</sup> The court held, “Our function is to interpret the law; it is not to disregard the law as written by the General Assembly.”<sup>166</sup>

### B. The Dissent

In his dissent, Judge Draper, joined by Judge Stith and Judge Teitelman, concurred with the majority’s holding that *Frazee* remained valid precedent.<sup>167</sup> The dissent agreed the cause of action for wrongful death accrued at the decedent’s death<sup>168</sup> and that Section 537.100<sup>169</sup> lacked an overt tolling exception in connection with a tortfeasor’s fraudulent concealment.<sup>170</sup>

Judge Draper stated the majority erred by not applying the doctrine of equitable estoppel to bar the hospital from using the statute of limitations as

---

158. *Id.* (quoting *Frazee*, 314 S.W.2d at 919).

159. MO. REV. STAT. § 537.100 (2000). This statute defines limitation periods and details the two special limitations; one is a tolling provision for defendants who abscond from the state to avoid service, and the other is a one-year savings provision if the Supreme Court of Missouri granted transfer after opinion by the court of appeals in accordance with MO. CONST. art. V, § 10.

160. MO. REV. STAT. § 516.280 (2000).

161. *Boland*, 471 S.W.3d at 711.

162. *Id.*

163. *Id.* at 712–13.

164. *Id.* at 713 (quoting *State v. Rumble*, 680 S.W.2d 939, 942 (Mo. 1984) (en banc)).

165. *Id.* The legislature expanded the wrongful death time limitation “first from one year to two years in 1967, then to three years in 1979.” *Id.*

166. *Id.* at 711 (quoting *Laughlin v. Forgrave*, 432 S.W.2d 308, 314 (Mo. 1968) (en banc)).

167. *Id.* at 713 (Draper, J., dissenting).

168. *Id.*

169. MO. REV. STAT. § 537.100 (2000).

170. *Boland*, 471 S.W.3d at 713 (Draper, J., dissenting).

an affirmative defense, as found in the reasoning of *Beisly*.<sup>171</sup> The dissent contended that the precedent of strict interpretation applied in *Frazee* should not be followed; rather, *stare decisis* demanded that the objectives created in *O'Grady* be allowed to construe the limitations liberally.<sup>172</sup> By applying Section 1.010, the court could interweave the common law maxims of equitable estoppel as a shield to bar the affirmative defense of the statute of limitations due to the defendant's fraudulent concealment.<sup>173</sup>

Finally, the dissent argued the application of equitable estoppel did not engraft a "'*de facto* exception' onto section 537.100" because it did not affect accrual at death for wrongful death claims or toll the statute of limitations.<sup>174</sup> The dissent contended the principal opinion's interpretation of the statute "[led] to an illogical and absurd result" because fraudulent concealment allows tortfeasors to escape liability.<sup>175</sup>

## V. COMMENT

The Supreme Court of Missouri should recognize that the legislature did not originate the field of wrongful death recovery by the passage of the Wrongful Death Act in 1855.<sup>176</sup> In both cases, *Boland* and *Beisly*, the Supreme Court of Missouri should have ruled in favor of wrongful death's common law existence for two reasons: precedent and legislative intent. Because Missouri does not recognize common law existence in wrongful death cases, lower courts are now trapped between two contradictory decisions without clear precedential guidance. Until the dueling decisions are reconciled or one is overruled, lower courts are left in limbo and must choose between the strict and narrow or liberal and broad. The recognition and application of common law would provide judicial stability, flexibility, and strong direction for future wrongful death causes of action.

---

171. *Id.* at 713–14.

172. *Id.* at 715.

173. *Id.* at 718.

174. *Id.* at 719.

175. *Id.*

176. *See James v. Christy*, 18 Mo. 162, 162 (1853).

*A. Precedent*

For the past sixty years, two distinct lines of reasoning have surfaced: a defendant-friendly line and a plaintiff-friendly line.<sup>177</sup> The defendant-friendly line, reflected in *Boland*, is based on the use of strict interpretation and focuses on the “plain language of the legislature.” Regardless of the reason for bringing suit past the legislatively determined time limit, courts must strictly interpret the statute of limitations.<sup>178</sup> This strict interpretation line outright bars claims brought beyond the three-year statute of limitations created by the legislature. Strict interpretation seeks only to extract the objective meaning behind legislative intent.<sup>179</sup>

The plaintiff-friendly line, reflected in *Beisly*, is based on liberal construction standards<sup>180</sup> and considers both policy issues and common law maxims of equity that allow estoppel to bar the statute of limitations defense when necessary.<sup>181</sup> This line, therefore, focuses on unearthing the subjective reasoning behind the late filing of a wrongful death claim and prevents injustice.<sup>182</sup>

Both the *Boland* and *Beisly* courts relied on precedent to determine the proper standard of interpretation. The *Boland* court recognized that *Frazee v. Partney*, a case from over half a century ago, remained good law.<sup>183</sup> Notably, *Frazee* was decided before the critical shift toward the application of common law existence in wrongful death claims.<sup>184</sup> *Frazee* followed a line of cases that strictly interpreted the application of the statute of limitations to wrongful death claims because the statute was theoretically created solely by legislation.<sup>185</sup> The strict interpretation standard served as a restraint on the court’s ability to apply common law maxims to extended statutory deadlines and prevent injustice.<sup>186</sup> On the other hand, *Beisly* relied on modern prece-

---

177. Compare *Boland*, 471 S.W.3d at 713–14 (barring the application of the doctrine of equitable estoppel in wrongful death actions concerning defendant’s use of fraudulent concealment), and *Frazee v. Partney*, 314 S.W.2d 915, 915 (Mo. 1958) (finding that wrongful death statutes do not provide for the tolling of statutes due to fraudulent concealment), with *State ex rel. Beisly v. Perigo*, 469 S.W.3d 434, 436 (Mo. 2015) (en banc) (allowing the doctrine of equitable estoppel to bar the defense of time limitations), and *O’Grady v. Brown*, 654 S.W.3d 904 (Mo. 1983) (en banc) (creating a liberal construction standard for wrongful death causes of action).

178. See Maggs, *supra* note 64, at 167.

179. *Id.*

180. *Beisly*, 469 S.W.3d at 443–44.

181. See Maggs, *supra* note 64, at 167–68.

182. *Id.* at 172.

183. *Boland v. St. Luke’s Health Sys., Inc.*, 471 S.W.3d 703, 708–09 (Mo. 2015) (en banc) (citing *Frazee v. Partney*, 314 S.W.2d 915 (Mo. 1958)).

184. See *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 408–09 (1970).

185. See Doiron, *supra* note 71, at 457–58.

186. See *id.* at 453.

dent, the case of *O'Grady v. Brown*.<sup>187</sup> *O'Grady* applied a liberal interpretation standard in construing a wrongful death cause of action; this allowed the court analytical flexibility.<sup>188</sup>

Neither court, *Boland* nor *Beisly*, overruled *Frazee* as they should have. *Frazee*'s strict interpretation standard directly conflicts with the liberal construction standard of *O'Grady*. The Missouri Court of Appeals for the Western District reasoned that *O'Grady* overruled *Frazee sub silentio*.<sup>189</sup> However, both the *Boland* and *Beisly* courts held that *Frazee* remained good law.<sup>190</sup> The Supreme Court of Missouri "is presumed not to be overruled *sub silentio*," and since *O'Grady* did not expressly overrule *Frazee*, the case remained good law.<sup>191</sup> Both courts distinguished *O'Grady* from *Frazee* because the statutes of limitations were not at issue in *O'Grady*.<sup>192</sup>

Technically, the *Boland* court, despite the harshness, came to the correct conclusion through a strict interpretation analysis because *Frazee* cannot remain good law in the presence of a liberal interpretation analysis. The *Beisly* court's liberal construction must fall if *Frazee* remains good law. *Frazee* requires the court to disregard intentional acts of fraudulent concealment by a defendant when the statute of limitations surpasses the time limit created by the legislature. However, finding common law existence in wrongful death claims would overrule *Frazee* because the "underpinning for the English rule"<sup>193</sup> would be condemned. Common law application would open the door for stare decisis to follow *O'Grady*'s liberal construction standards and allow the court to apply judicially-created common law maxims when justice demands.

### B. Legislative Interpretation

Legislative intent is the key to interpreting complex statutes.<sup>194</sup> In interpreting the wrongful death statute, courts should remember that the purpose of the statute is to provide compensation for the loss of companionship and support from a loved one who would be alive if not for the defendants' ac-

---

187. *State ex rel. Beisly v. Perigo*, 469 S.W.3d 434, 439–40 (Mo. 2015) (en banc) (citing *O'Grady v. Brown*, 654 S.W.2d 904 (Mo. 1983) (en banc)).

188. *O'Grady*, 654 S.W.2d at 904.

189. *Boland v. St. Luke's Health Sys., Inc.*, 471 S.W.3d 703, 709; *Beisly*, 469 S.W.3d at 440. Black's Law Dictionary defines "sub silentio" as, "Under silence; without notice being taken; without being expressly mentioned." *Sub Silentio*, BLACK'S LAW DICTIONARY (10th ed. 2014).

190. *Boland*, 471 S.W.3d at 709; *Beisly*, 469 S.W.3d at 440.

191. *Boland*, 471 S.W.3d at 709.

192. *Id.*; *Beisly*, 469 S.W.3d at 440.

193. *LaFage v. Jani*, 766 A.2d 1066, 1076–80 (N.J. 2001).

194. Michael Sinclair, "Only A Sith Thinks Like That": Llewellyn's "Dueling Canons," *One to Seven*, 50 N.Y.L. SCH. L. REV. 919, 923 (2006).

tions.<sup>195</sup> *Boland*'s decision did not uphold the purpose of the wrongful death act, but the *Beisly* decision did.

The *Boland* court relied on imperfect reasoning to support legislative intent. The *Boland* court determined the legislature could have created a fraudulent concealment exception in light of *Frazee* but instead chose to expand the limitation period.<sup>196</sup> Three reasons disturb this analysis: the timing of the legislative amendments, the presumption of legislative awareness, and the liberal interpretation standard provided by *O'Grady*.

First, the legislature's initial amendment to the wrongful death statute occurred fifteen years after the court decided *Frazee*.<sup>197</sup> Second, the court noted the presumption of legislative action in light of "full awareness and complete knowledge of the present state of the law."<sup>198</sup> Under this reasoning, the legislature would need to be aware of a single case, *Frazee*. Commentators have pointed out that it is illogical to assume that legislature takes notice of every single ruling, and the legislative presumption may be outdated due to the proliferation of judicial decisions.<sup>199</sup> In addition, it is highly unlikely the small handful of plaintiffs denied wrongful death claims would lobby the legislature for change.<sup>200</sup> Lastly, even if the legislature had been aware of *Frazee*, the *O'Grady* decision in 1983 would have caused legislative confusion because *O'Grady* would have trumped strict interpretation standards and allowed a liberal construction to apply common law maxims, such as equitable estoppel, to alleviate the harsh injustice of impossible time limitations.

*Boland* frustrates the very purpose of the wrongful death statute. According to *Boland*, defendants can hide facts surrounding their actions for three years plus one day and never be held accountable for a wrongful death claim through civil proceedings. Judge Cardozo once stressed there was a need to protect the rights of an innocent yet tardy plaintiff.<sup>201</sup> The court cannot rectify the deterrence and compensatory purpose of the wrongful death statute by allowing tortfeasors to escape liability when they hide tortious conduct or evidence.

The *Beisly* court upheld the purpose of the statute but engrafted an exception onto the wrongful death statute of limitations. *Beisly* relied on equitable estoppel to bar the defendant from escaping liability.<sup>202</sup> A basic com-

195. *O'Grady v. Brown*, 654 S.W.2d 904, 908 (Mo. 1983) (en banc) (citing MO. REV. STAT. § 537.090).

196. *Boland*, 471 S.W.3d at 713. In *Boland*, the court noted that subsequent to *Frazee*, the General Assembly twice amended Section 537.100. *Id.* "[F]irst from one year to two years in 1967, then to three years in 1979." *Id.*

197. *Frazee v. Partney*, 314 S.W.2d 915 (Mo. 1958).

198. *Boland*, 471 S.W.3d at 713 (quoting *State v. Rumble*, 680 S.W.2d 939, 942 (Mo. 1984) (en banc)).

199. See, e.g., Kokal, *supra* note 87, at 338 & n.153.

200. Doesburg, *supra* note 66, at 505.

201. *Gaines v. City of New York*, 215 N.Y. 533, 541 (1915).

202. *State ex rel. Beisly v. Perigo*, 469 S.W.3d 434, 440 (Mo. 2015) (en banc).

mon law maxim is that no person should benefit from fraud.<sup>203</sup> This maxim is “deeply rooted in this country’s jurisprudence and older than the country itself.”<sup>204</sup> Equitable estoppel is a judicial creation for obliterating injustice.<sup>205</sup> Equitable estoppel prevents a defendant from using the statute of limitations as an affirmative defense to a claim when fraudulent concealment occurs.<sup>206</sup> It is only invoked when a defendant intentionally takes active steps to camouflage tortious conduct.<sup>207</sup>

The *Beisly* court reasoned the shield of estoppel did not toll or create an exception to the statute of limitations; estoppel simply barred time limitation as a defense.<sup>208</sup> This reasoning presumably allowed the court to remain within Missouri’s constitutional bounds<sup>209</sup> by applying Section 1.010<sup>210</sup> to “interweave” equitable estoppel in order to foil fraudulent concealment.<sup>211</sup> However, the equitable estoppel distinction is “a distinction without a real difference”<sup>212</sup> and does engraft an exception onto the statute that skates past legitimate restrictions.<sup>213</sup> For that reason, *Beisly* must once again fail.

Statutes of limitations are imperfect.<sup>214</sup> They are “artificial constraints” used to restrict a party’s time to sue.<sup>215</sup> Justice Oliver Wendell Holmes once asked, “[W]hat is the justification for depriving a man of his rights, a pure evil as far as it goes, in consequence of the lapse of time?”<sup>216</sup> The function of a statute of limitations is protection for the defendant against stale claims,<sup>217</sup> whereas the function of a wrongful death statute is compensation, accountability, and deterrence. Statutes of limitations promote injustice when applied severely.<sup>218</sup>

Acknowledgement that wrongful death claims originated through common law and were not created entirely through legislation would allow the

203. *Id.*

204. *Id.*

205. See Maggs, *supra* note 64, at 171.

206. *Beisly*, 469 S.W.3d at 440.

207. *Weiss v. Rojanasathit*, 975 S.W.2d 113, 120 (Mo. 1998) (en banc).

208. *Beisly*, 469 S.W.3d at 440–44.

209. *Id.* at 443–44; see MO. CONST. art. II, § 1.

210. MO. ANN. STAT. § 1.010 (West 2016) (providing that “all acts of the general assembly, or laws, shall be liberally construed, so as to effectuate the true intent and meaning thereof”).

211. *Beisly*, 469 S.W.3d at 444.

212. *Id.* at 456.

213. *Id.*

214. Henry G. Miller, *Statute of Limitations: An Immoral Defense?*, 83-APR N.Y. ST. B.J. 24, 29, 31 (2011).

215. *Id.* at 26.

216. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 476 (1897).

217. W. Dudley McCarter, *Missouri Statutes of Limitation*, 54 J. MO. B. 35, 35 (1998).

218. See Miller, *supra* note 214, at 31.

courts to apply estoppel in order to alleviate the harshness and injustice of an arbitrary time limitation and remain within constitutional bounds. The “genius of our common law” has been in creating “ways to provide a remedy for the wrongs that afflict us.”<sup>219</sup> Following the example of Massachusetts’s *Gaudette v. Webb*,<sup>220</sup> common law beginnings would allow a firmer foundation for the court to apply the general exception for fraudulent concealment found in Section 516.280.<sup>221</sup> Common law roots allow the courts to consider the general, rather than special, statute of limitations<sup>222</sup> because the limitation period would become procedural rather than substantive.<sup>223</sup> The limitation should be suspended or disregarded when conditions or circumstances justify expanding a time limitation.<sup>224</sup> Therefore, defendants should not be allowed to use time limitations as a defense against a wrongful death cause of action when they hide actions that cause the death of a loved one.

## VI. CONCLUSION

The Supreme Court of Missouri must act with swiftness and remedy the disharmony created by the dueling decisions. In order to uphold the objectives created in *O’Grady* and to prevent injustice, the court should follow the path unveiled by other jurisdictions and acknowledge that wrongful death claims originated in common law.<sup>225</sup> Missouri’s common law roots of wrongful death causes of action predate the legislative creation of the wrongful death statute and create a stronger basis supporting a liberal interpretation than currently provided by *Beisly*.<sup>226</sup>

*Boland*’s return to the strict interpretation standard moves Missouri back in time,<sup>227</sup> disregards the central compensatory purpose behind the statute,<sup>228</sup> and provides escape from liability by fraudulently concealing tortious conduct.<sup>229</sup> Courts should not lightly overrule decades of precedent, but the burden of wrongful death time limitation reform has clearly fallen upon this court. Hard cases make bad law,<sup>230</sup> but they do not have to. The impact of this bad law should be limited by the court through uncovering Missouri’s common law origins in wrongful death causes of action.

---

219. *Id.* at 30.

220. 284 N.E.2d 222, 229 (Mass. 1972).

221. MO. REV. STAT. § 516.280 (2000).

222. *See Gaudette*, 284 N.E.2d at 229.

223. Doiron, *supra* note 71, at 453.

224. *Id.* at 461.

225. *See, e.g., LaFage v. Jani*, 766 A.2d 1066, 1076–80 (N.J. 2001); Bailey, *supra* note 97, at 953.

226. *See Sheffner*, *supra* note 115, at 198.

227. The strict construction standard was used in *Frazee v. Partne*. 314 S.W.2d 915, 915 (Mo. 1952).

228. *O’Grady*, 654 S.W.3d at 904.

229. *Boland*, 471 S.W.3d at 713.

230. *Id.* (citing *Winterbottom v. Wright* (1842) 152 Eng. Rep. 402 (Exch.)).