



**IN THE MISSOURI COURT OF APPEALS  
WESTERN DISTRICT**

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

v. )

**SAINT LUKE'S HEALTH SYSTEM,  
INC.; SAINT LUKE'S HOSPITAL OF  
CHILLICOTHE f/k/a THE GRAND  
RIVER HEALTH SYSTEM  
CORPORATION d/b/a HEDRICK  
MEDICAL CENTER; and  
COMMUNITY HEALTH GROUP f/k/a  
HEALTH MIDWEST,** )  
)  
)  
**Respondents.** )

**WD80928 (Consolidated with  
WD80930, WD80932, WD80933,  
and WD80942)**

**OPINION FILED:  
June 19, 2018**

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

**Before Division IV: Mark D. Pfeiffer, Chief Judge, and  
Anthony Rex Gabbert and Edward R. Ardini, Jr., Judges**

This appeal addresses the peculiar circumstance in which deceit by a tortfeasor is discovered *before* such intentional deceit has harmed the victims of the tortfeasor's wrongdoing. The question before this court is what impact this scenario has on principles of res judicata and

any applicable statute of limitations. As the learned jurist, Judge Richard Posner, once noted: “Damages are for people who have been harmed. You cannot seek an award of damages for a fraud, therefore, *before* the fraud has harmed you . . .” *Midwest Commerce Banking Co. v. Elkhart City Centre*, 4 F.3d 521, 526 (7<sup>th</sup> Cir. 1993) (emphasis added).

### **Current Procedural History and Summary of Our Ruling**

In this consolidated appeal, Ms. Sally Boland, Ms. Sherri Lynn Harper, Mr. David C. Gann, Ms. Jennirae Littrell, and Ms. Helen Pittman (collectively, “Appellants”) appeal from the ruling of the Circuit Court of Livingston County, Missouri (“trial court”), granting summary judgment in favor of Saint Luke’s Health Systems, Inc., Saint Luke’s Hospital of Chillicothe, and Community Health Group (collectively, “Hospital”) in five separate actions for fraud. We reverse and remand for further proceedings consistent with our ruling today.

### **The First Lawsuits**

The history of litigation between the parties commenced with Appellants’ 2010-11 lawsuits (“First Lawsuits”). Between October 2010 and January 2011, Appellants filed five separate (though essentially identical) petitions against Hospital, “arguing they were entitled to damages under Missouri’s wrongful death statute, section 537.080.” *Boland v. Saint Luke’s Health System, Inc.*, 471 S.W.3d 703, 707 (Mo. banc 2015) (“*Boland I*”). More specifically, the First Lawsuits alleged that Hospital was vicariously liable when, in 2002, its employee intentionally killed relatives of Appellants,<sup>1</sup> for whom each of the Appellants was a statutorily authorized person entitled to pursue a wrongful death claim against Hospital. Hospital filed motions for judgment

---

<sup>1</sup> The First Lawsuits alleged that a respiratory therapist employed by Hospital intentionally administered a lethal overdose of succinylcholine or insulin or other medication that resulted in each of the five deaths related to the First Lawsuits.

on the pleadings, arguing Appellants' claims were time-barred by section 537.100's<sup>2</sup> three-year statute of limitations for wrongful death claims, which accrued upon the decedents' deaths in 2002.

Appellants responded to the motions by invoking longstanding Missouri precedent, *Howell v. Murphy*, 844 S.W.2d 42 (Mo. App. W.D. 1992), which declared that fraudulent concealment by the defendant of material facts supporting a wrongful death cause of action equitably tolled "the limitation set forth in § 537.100 . . . until the plaintiffs could, by reasonable diligence, ascertain that they had an action." *Id.* at 47.<sup>3</sup>

The trial court granted Hospital's motions for judgment on the pleadings. After accepting transfer from this court, the Missouri Supreme Court affirmed the trial court's judgments. The Supreme Court held in *Boland I* that "*Howell* is in error" and its rationale for equitable tolling of the section 537.100 statute of limitations "should no longer be followed." *Boland I*, 471 S.W.3d at 709. Instead, the court noted that wrongful death claims accrue at death, and fraudulent concealment does not toll or trigger an exception to the three-year statute of limitations. *Id.* at 705. Though the *Boland I* court concluded that Appellants were without a remedy for *wrongful death* claims, the court expressly noted that it was not commenting on whether Appellants possessed "*other viable remedies at law.*" *Id.* at 713 (emphasis added).

### **The Second Lawsuits**

In October 2016, Appellants filed new petitions asserting other remedies at law against Hospital ("Second Lawsuits"). These petitions alleged that *after* the death of the relevant decedents, Hospital was vicariously liable when its employees fraudulently misrepresented the

---

<sup>2</sup> All statutory citations are to the REVISED STATUTES OF MISSOURI 2000, as updated.

<sup>3</sup> "Where the same or an analogous issue was decided in an earlier case, such case stands as authoritative precedent unless and until it is overruled." *State v. Chase*, 490 S.W.3d 771, 774 (Mo. App. W.D. 2016) (internal quotation marks omitted).

true nature of the 2002 deaths in an intentional effort to mislead Appellants and prevent the timely filing of wrongful death claims.<sup>4</sup>

Hospital filed motions for summary judgment based on principles of res judicata, or claim preclusion, and the five-year statute of limitations for fraud. The trial court sustained the motions. This consolidated appeal follows.

### **The Harm<sup>5</sup>**

Prior to the Missouri Supreme Court's ruling in *Boland I* and *State ex rel. Beisly v. Perigo*, 469 S.W.3d 434 (Mo. banc 2015), controlling case precedent from this Court declared that, in wrongful death claims, fraudulent conduct by the wrongdoer in concealing the evidence necessary to assert a wrongful death claim equitably tolled the statute of limitations period for asserting a claim for damages under the wrongful death statute. *Howell*, 844 S.W.2d at 47. Hence, though Appellants in the present case had previously asserted wrongful death claims in excess of the three years prescribed by the statute of limitations for such claims, § 537.100, they relied upon the *Howell* precedent to assert: the fraudulent conduct of Hospital had concealed the evidence necessary to pursue the wrongful death claims; Hospital could not benefit from its fraudulent concealment; and the statute of limitations period had thus been equitably tolled.

In *Boland I*, however, our Supreme Court opined that “*Howell* is in error” and its rationale for equitable tolling of the section 537.100 statute of limitations “should no longer be followed.” *Boland I*, 471 S.W.3d at 709. Thus, the majority opinion<sup>6</sup> of the Supreme Court declared that since

---

<sup>4</sup> In the Second Lawsuits, plaintiffs alleged that “[Hospital] informed and instructed Hospital employees and agents to tell the families of [the decedents] that their deaths were ‘natural’ rather than due to wrongful and tortious misconduct [by Hospital’s employee].”

<sup>5</sup> On appeal from the grant of summary judgment, we review the record in the light most favorable to the party against whom summary judgment was entered, and we accord that party the benefit of all reasonable inferences from the record. *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993).

<sup>6</sup> *Boland I* was decided on a 4-3 vote of the seven-member Supreme Court of Missouri.

Appellants had filed their claims for wrongful death *after* three years from the death of the relevant decedents, their *wrongful death* claims were barred by section 537.100. Specifically, in *Boland I* the court stated:

Without commenting on whether the plaintiffs have *other viable remedies at law*, the conclusion that the plaintiffs are without a remedy for *wrongful death* is a difficult one.<sup>7</sup> . . . The judgments [dismissing plaintiffs' wrongful death claims] of the trial courts are affirmed.

471 S.W.3d at 713 (emphasis added).

Conversely, on the same day that the Supreme Court handed down its ruling in *Boland I*, the Supreme Court also handed down its ruling in *State ex rel. Beisly v. Perigo*. In *Beisly*, as in *Boland I*, the deaths of the decedents were known more than three years from the filing of the wrongful death claims; but due to the fraudulent misconduct of the tortfeasors, the true nature of the wrongful deaths could not be ascertained within the section 537.100 statute of limitations period. *Beisly*, 469 S.W.3d at 436. Again, the Supreme Court concluded that the legal principle enunciated in *Howell*, that the section 537.100 statute of limitations period could be equitably tolled, should no longer be followed. *Id.* at 440. However, the majority opinion<sup>8</sup> of the Missouri Supreme Court further stated:

Equitable estoppel does not toll the running of the statute. Rather, it forecloses the wrongdoer, who concealed his or her actions fraudulently, from asserting the defense. . . .

This Court holds the application of common law maxims precluding one from benefitting from his or her own fraud and application of the doctrine of equitable estoppel bars [tortfeasor] from asserting the statute of limitations as a defense to [plaintiff's] cause of action [for damages under Missouri's wrongful death

---

<sup>7</sup> Of some relevance, in the Supreme Court's original hand down of *Boland I*, the Court stated that the effect of its ruling "leaves the plaintiffs without a remedy." However, on its own motion, the Court modified the majority opinion to state, as quoted, that it was not commenting on the availability of "other viable remedies at law" and was only concluding that plaintiffs were "without a remedy for wrongful death."

<sup>8</sup> *State ex rel. Beisly v. Perigo*, 469 S.W.3d 434 (Mo. banc 2015), was decided on 4-3 vote of the seven-member Supreme Court of Missouri. Of note, the composition of the members of the panels in *Boland I* and *Beisly* were different.

statute]. . . . This Court cannot fathom that the legislature's intent when enacting the wrongful death statute of limitations was to permit tortfeasors to evade liability for causing wrongful deaths so long as the tortfeasor could conceal their wrongdoing until the statute of limitations expired . . . .

*Id.* at 444-45.

In the First Lawsuits filed by Appellants, all of the claims for damages under Missouri's wrongful death statute were filed more than three years after the relevant decedents' deaths. In all of the wrongful death cases, Appellants asserted equitable estoppel principles by alleging that the tortfeasors had fraudulently concealed the true nature of the wrongful deaths of the decedents and were, thus, barred from relying upon the wrongful death statute of limitations as a defense. In other words, the procedural scenario was identical to the scenario of *Beisly*, and hence, one might assume that the doctrine of equitable estoppel would apply, as in *Beisly*, to permit Appellants to pursue their wrongful death claims. As Appellants discovered, however, *Boland I* concluded just the opposite—that is, that their wrongful death claims were barred by the section 537.100 statute of limitations.

Though the simultaneous hand downs of *Beisly* and *Boland I* have caused some confusion as to the current state of the law regarding section 537.100 and the related doctrine of equitable estoppel, two things are certain from the ruling in *Boland I*. First, as of the issuance of the final mandate in *Boland I*, though inconsistent with the Supreme Court's simultaneous ruling in *Beisly*, Appellants no longer have any viable remedy for the assertion of claims under Missouri's *wrongful death statute*. Second, our Missouri Supreme Court has expressly noted that nothing in *Boland I* is designed to comment on whether Appellants possessed any *other viable remedies* outside of wrongful death claims.

*Boland I* both abrogated the equitable tolling precedent of *Howell* and reached a result opposite the Supreme Court's *Beisly* ruling. Though *Boland I* and *Beisly* are contradictory, one of these two rulings has specifically spoken to Appellants and barred them from pursuing wrongful death claims. Hence, though this appears to be a case of first *and* last impression due to the unusual precedential scenario presented, the Supreme Court's ruling in *Boland I* established "the harm" to Appellants resulting from the fraudulent misconduct of Hospital: they are now barred from pursuing their wrongful death claims.<sup>9</sup>

So, much like a legal malpractice lawsuit wherein a lawyer has forfeited his client's right to pursue a remedy due to the lawyer's failure to file a lawsuit within the applicable statute of limitations period, thereby extinguishing his client's ability to pursue the underlying claim, Hospital's post-death fraudulent conduct prevented Appellants from pursuing claims for wrongful death. Appellants are now asserting claims for damages that are *not* based upon Missouri's wrongful death statute; instead, they are now seeking a common law remedy for fraud. Stated another way, in the First Lawsuits, the allegations in the petitions focused on relief arising from acts of Hospital *before* the death of Appellants' family member decedents (*i.e.*, wrongful death); in the Second Lawsuits, the allegations in the petitions focus on relief arising from acts of Hospital that occurred *after* the death of Appellants' family member decedents (*i.e.*, fraud).

---

<sup>9</sup> The majority rule in American jurisprudence is that misrepresentation resulting in the loss of a cause of action will support an action for fraud. Griffin, Anno., *Fraud and Deceit: Liability in Damages for Preventing Bringing of Action Before Its Being Barred by Statute of Limitations*, 33 A.L.R.3d § 2, 1077, 1082 (1970). For example, in *Beeck v. Kapalis*, the court held that, "A person who fraudulently causes a plaintiff to lose an otherwise valid cause of action is liable for damages when the plaintiff's claim is barred by the statute of limitations." 302 N.W.2d 90, 94 (Iowa 1981).

### Standard of Review

Appellate review of a trial court's grant of summary judgment is essentially *de novo*. *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993). We review the record below "in the light most favorable to the party against whom summary judgment was entered, and that party is entitled to the benefit of all reasonable inferences from the record." *Goerlitz v. City of Maryville*, 333 S.W.3d 450, 453 (Mo. banc 2011) (citation omitted).

### Res Judicata

The trial court's res judicata analysis is flawed because a "[p]laintiff's claim for the wrongful death of his [relevant family member] is unquestionably a separate and independent cause of action from his claim for his own injuries." *Chamberlain v. Mo.-Ark. Coach Lines, Inc.*, 189 S.W.2d 538, 540 (Mo. 1945). Here, the First Lawsuits each related to a claim for the wrongful death of a decedent, whereas the Second Lawsuits each related to a separate and independent cause of action for each of the Appellants for their damages caused by the fraudulent actions of Hospital *after* the relevant decedent's death. Importantly, Appellants' legal injury was not complete until after the Supreme Court's ruling in *Boland I*. For, in Missouri, "[f]ailing to establish damages defeats a fraud claim." *Fetick v. Am. Cyanamid Co.*, 38 S.W.3d 415, 418 (Mo. banc 2001).<sup>10</sup>

Hence, Appellants' claims for fraudulent misrepresentation did not become a ripe controversy until the Supreme Court issued its opinion in *Boland I*, which abrogated the equitable tolling analysis of *Howell v. Murphy* and refused to apply principles of equitable estoppel as

---

<sup>10</sup> As Hospital's counsel admitted at oral argument, had the wrongful death section 537.100 statute of limitation been equitably tolled under the authority of *Howell v. Murphy*, 844 S.W.2d 42 (Mo. App. W.D. 1992), or had Hospital been equitably estopped from asserting the statute of limitation defense pursuant to *State ex rel. Beisly v. Perigo*, 469 S.W.3d 434 (Mo. banc 2015), Hospital would argue that any attempts by Appellants to pursue claims for fraudulent misrepresentation would be subject to dismissal on the basis that Appellants would *not* have been able to establish that they *had suffered any damage as a result of the alleged misrepresentation*.



announced in the Supreme Court’s simultaneous ruling in *State ex rel. Beisly v. Perigo*.<sup>11</sup> Thus, since Appellants’ current fraud claims did not even ripen into a complete legal injury capable of being pursued until after the *Boland I* ruling, the trial court’s conclusion that such claims in the Second Lawsuits are barred under res judicata or claim preclusion principles is erroneous and reversed. See *Finley v. St. John’s Mercy Med. Ctr.*, 958 S.W.2d 593, 595-96 (Mo. App. E.D. 1998) (Res judicata and the related topic of claim splitting does not apply to a cause of action that did not exist or had not accrued at the time the first cause of action was prosecuted.).

### **Statute of Limitations**

We must next determine whether the applicable statute of limitations expired before Appellants initiated the Second Lawsuits. The statute of limitations for a fraud-based claim is five years. § 516.120(5). On this, the parties agree. The core of the parties’ dispute, and essential to the resolution of this issue, is when the statute of limitations *began* to run on Appellants’ claims. Hospital argues, and the trial court found, that the statute of limitations was triggered no later than the filing of the First Lawsuits, which were filed in 2010 and 2011. Hospital’s theory is founded on a belief that, under section 516.120(5), the statute of limitations began to run when Appellants became aware of the alleged post-death fraudulent conduct by Hospital.<sup>12</sup> Appellants counter that the Missouri Supreme Court’s decision in *Boland I* triggered the running of the statute of

---

<sup>11</sup> Though “[t]he Missouri Supreme Court has recognized a general rule that a change in the law by judicial decision is to be given retroactive effect,” *Demi v. Sheehan Pipeline Constr.*, 452 S.W.3d 211, 214 (Mo. App. E.D. 2014), the court has also recognized exceptions to that rule, including where “the parties have relied on the state of the decisional law as it existed prior to the change,” such that in that instance, the courts would “apply the law prospectively only in order to avoid injustice and unfairness.” *Id.* at 215.

<sup>12</sup> As discussed earlier in this opinion, the petitions filed in the First Lawsuits contain allegations of post-death fraud by Hospital for the purpose of tolling the statute of limitations in the wrongful death action. We agree that this establishes that Appellants were aware of Hospital’s post-death fraudulent conduct more than five years prior to the filing of the lawsuit in the present case. However, as we explain in today’s ruling, this is not the relevant test to determine whether the present lawsuit is time-barred.

limitations because, prior to that decision, there was no actionable cause of action for the fraud alleged against Hospital in this case. We agree with Appellants.

Our analysis must begin by addressing a misunderstanding of section 516.120(5) shared by both Hospital and the trial court, namely, that section 516.120(5) is to be mutually exclusive to and to be interpreted independently of the generally applicable accrual requirements of section 516.100. This view is wrong. Section 516.120(5) does not operate in isolation and does not, as Hospital seems to argue, supplant the generally applicable accrual requirements of section 516.100, which provides that a “cause of action shall not be deemed to accrue when the wrong is done or the technical breach of contract or duty occurs, but when damage resulting therefrom is sustained and is capable of ascertainment.” Rather, section 516.120(5) works in *pari materia* with section 516.100. The Missouri Supreme Court in *Rippe v. Sutter* discussed the interplay between section 516.100 and section 516.120(5):

Section 516.100 provides in part that *for the purposes of applying the provisions of Section 516.120* “the cause of action shall not be deemed to accrue when the wrong is done or the technical breach of . . . duty occurs, but when the damage . . . therefrom is sustained and is capable of ascertainment . . . .”<sup>13</sup> The general rule, however, is that a statute of limitations begins [sic] to run when the cause of action accrues, and that “accrual” occurs at the time when a breach of duty has occurred or wrong sustained as will give the right to the injured party to bring and maintain an action. *The aforementioned statute does not change the general rule that “when an injury is complete as a legal injury at the time of the act, the period of limitation will at once commence; [and] if the action is of a nature to be maintained without proof of actual damage, the period of limitation will begin to run from the time the act is done without regard to any actual damage, . . . but . . . when the act which gives the cause of action is not legally injurious until certain consequences occur, then the period of limitation will take date from the consequential injury . . . the injurious consequences or resulting damages which bring about the accrual of the*

---

<sup>13</sup> In pertinent part, section 516.100 states: “Civil actions . . . can only be commenced within the periods prescribed in the following sections, after the causes of action shall have accrued; *provided*, that for purposes of sections 516.100 to 516.370, the cause of action shall *not* be deemed to accrue *when the wrong is done . . . but when the damage resulting therefrom is sustained and is capable of ascertainment . . .*” (Emphasis added.) The “provided that” phrase makes clear that section 516.100 *qualifies* the limitations rules stated in later sections, including section 516.120(5), and those later sections do not “stand alone.”

*cause of action are the indispensable elements of the injury itself, and not mere aggravating circumstances enhancing a legal injury already inflicted, . . . and . . . the resulting damage is sustained and is capable of ascertainment within the contemplation of the statute whenever it is such that it can be discovered or made known.”*

*Rippe v. Sutter*, 292 S.W.2d 86, 90 (Mo. 1956) (emphasis added). As the *Rippe* court makes clear, a cause of action must first accrue under section 516.100 and only then is section 516.120(5) relevant (in the context of a fraud action) by *delaying* the accrual date if the aggrieved party has not yet discovered the “conduct constituting the fraud.”<sup>14</sup>

Reading sections 516.100 and 516.120(5) together, a cause of action for fraud does not accrue, and the statute of limitations for a fraud claim does not begin to run, until two separate conditions are satisfied: (1) “the damage resulting therefrom is sustained and is capable of ascertainment” (§ 516.100); *and* (2) “discovery by the aggrieved party, at any time within ten years, of the facts constituting the fraud” (§ 516.120(5)). Only when *both* of those conditions are met does the five-year limitations period begin to run.<sup>15</sup>

“To determine whether a statute of limitation bars recovery, it is necessary to establish when the cause of action accrued.” *Boland I*, 471 S.W.3d at 710. “A cause of action accrues, and the limitation period begins to run, when the right to sue arises.” *Id.* As previously stated, the general rule found in section 516.100 explains that a “cause of action shall not be deemed to accrue when the wrong is done or the technical breach of contract or duty occurs, but *when the damage*

---

<sup>14</sup> In other words, section 516.120(5) is designed to increase, not decrease, the limitations period to the benefit of the victim of fraud. Specifically, section 516.120(5) states: “Within five years: . . . (5) an action for relief on the ground of fraud, the cause of action in such case to be deemed *not* to have accrued until the discovery by the aggrieved party, at any time within ten years, of the facts constituting the fraud.” (Emphasis added.)

<sup>15</sup> As we explain in the remainder of our ruling today, since Appellants’ present causes of action did not accrue under section 516.100 until damages were sustained and capable of ascertainment and because this occurred after Hospital’s post-death fraudulent conduct was discovered, section 516.120(5) does not operate to bar Appellants’ claims in the Second Lawsuits.

*resulting therefrom is sustained and is capable of ascertainment.*”<sup>16</sup> § 516.100 (emphasis added).

As a result, in determining when a cause of action accrued, the focus is not on when the wrongful act occurs but rather when damage caused by the wrongful act is sustained and capable of ascertainment by the victim.

The gravamen of Appellants’ claims is that Hospital, following the deaths of its patients, engaged in fraudulent conduct calculated to conceal the circumstances surrounding those deaths and preclude the bringing of wrongful death actions against Hospital. The statute of limitations began to run on Appellants’ suits when Appellants could first successfully maintain their causes of action. *See English ex rel. Davis v. Hershewe*, 312 S.W.3d 402, 408 (Mo. App. S.D. 2010). “When the *fact of damage* becomes capable of ascertainment, the statute of limitations is put in motion. The test is when the plaintiff could have first successfully maintained the action.” *Murray v. Fleischaker*, 949 S.W.2d 203, 206 (Mo. App. S.D. 1997) (citation omitted) (internal quotation marks omitted). Since proof of actual damages is an essential element of a fraud action, *Fiordelisi v. Mt. Pleasant, LLC*, 254 S.W.3d 120, 128 (Mo. App. E.D. 2008), Appellants were not able to “successfully maintain [their] cause[s] of action” until damages were actually sustained. *See also Fetick v. Am. Cyanamid Co.*, 38 S.W.3d 415, 418 (Mo. banc 2001) (“Failing to establish damages defeats a fraud claim.”). Therefore, whether Appellants’ claims are time-barred is determined by whether the damages sustained by Appellants as a result of Hospital’s alleged post-death fraudulent conduct occurred more than five years prior to the filing of its petition in this lawsuit.

Prior to *Boland I*, the most recent Missouri appellate decision declared that the alleged fraudulent conduct by Hospital following the deaths equitably tolled the running of the statute of

---

<sup>16</sup> “Damage is sustained and capable of ascertainment for purposes of statute of limitations when it can be discovered or made known, even though the amount of damage is unascertained.” *Murray v. Fleischaker*, 949 S.W.2d 203, 206 (Mo. App. S.D. 1997).

limitations on the original wrongful death suit. *See Howell v. Murphy*, 844 S.W.2d 42 (Mo. App. W.D. 1992). Indeed, under the holding in *Howell*, which had stood as good law for nearly a quarter of a century, Appellants’ original wrongful death lawsuits would not have been time-barred, and Hospital’s alleged post-death fraudulent conduct would not have proximately caused any damage to Appellants. *See State v. Chase*, 490 S.W.3d 771, 774 (Mo. App. W.D. 2016) (“Where the same or an analogous issue was decided in an earlier case, such case stands as authoritative precedent unless and until it is overruled”).

It was not until the Missouri Supreme Court decided *Boland I*, overruling *Howell* because *Howell* had been decided “in error” and holding that Hospital’s alleged fraudulent post-death conduct had succeeded in time-barring the original wrongful death claim, that Boland suffered damage. *See Chem. Workers Basic Union, Local No. 1744 v. Arnold Sav. Bank*, 411 S.W.2d 159, 163 (Mo. banc 1966) (“[W]hen the act is not legally injurious until certain consequences occur, then the period of limitations runs from the date of consequential injury.”). *See also Rippe*, 292 S.W.2d at 91 (holding that in a wrongful institution and maintenance of suits claim, plaintiff had no cause of action against defendant until and unless the defendant’s conduct resulted in damage to plaintiff). Prior to *Boland I*, the damages alleged by Appellants in their suits would have been speculative and may never have materialized. *See Roberts v. BJC Health Sys.*, 391 S.W.3d 433, 438 (Mo. banc 2013) (holding damages were an essential element of plaintiffs’ claim and “potential damages” was insufficient to defeat summary judgment).<sup>17</sup>

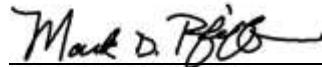
---

<sup>17</sup> While Hospital seems to suggest that any expectation that *Boland I* could have been decided in Appellants’ favor was unreasonable based on precedent relied upon by the Supreme Court in deciding *Boland I*, such a view disregards *Howell* and, more importantly, ignores that *Beisly*, decided the same day as *Boland I*, would have allowed Appellants’ wrongful death suits to proceed. Against this backdrop, if Appellants had brought the present claims in the original wrongful death lawsuits as alternative theories, those claims would have clearly been premature and properly dismissed by the trial court. *See, e.g., Eddleman v. Dowd*, 648 S.W.2d 632, 633 (Mo. App. E.D. 1983) (dismissing legal malpractice case, noting that “[s]o long as [the] underlying lawsuit remains pending, plaintiff cannot show Dowd’s professional negligence proximately caused damage.”); *Bray v. Brooks*, 41 S.W.3d 7, 15 (Mo. App.

Because we conclude that Appellants’ present causes of action for fraud (the Second Lawsuits) accrued after *Boland I* was decided in 2015 and the Second Lawsuits were filed in 2016—well within the five-year statute of limitations for the filing of fraud claims—the Second Lawsuits are not time-barred. The trial court’s ruling to the contrary is erroneous.

### **Conclusion**

Because the trial court erred in concluding that the Second Lawsuits filed by Appellants were time-barred or barred under the doctrine of res judicata, the summary judgment in favor of Hospital is reversed, and the case is remanded to the trial court for further proceedings consistent with this opinion.



---

Mark D. Pfeiffer, Judge

Anthony Rex Gabbert and Edward R. Ardini, Jr., Judges, concur.

---

W.D. 2001) (“Because in this case, damages have not yet accrued, and may never accrue in the future, the cause of action for negligence was filed prematurely.”); *Cain v. Hershewe*, 760 S.W.2d 146, 149 (Mo. App. S.D. 1988) (concluding plaintiff could not presently prove any damages flowing from the alleged professional negligence because the underlying suit was still pending, rendering the present claims premature).