CORRECTED 5/18/21

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

LONA LEANN GROSSHART,	)	
	)	
Appellant,	)	
v.	)	**WD83672**
	)	
	)	**OPINION FILED:**
KANSAS CITY POWER & LIGHT COMPANY,	)	**April 13, 2021**
	)	
	)	
Respondent.	)	

Appeal from the Circuit Court of Cole County, Missouri
The Honorable Patricia S. Joyce, Judge

Before Division Three: Karen King Mitchell, Presiding Judge, and Thomas H. Newton and Anthony Rex Gabbert, Judges

Lona Grosshart appeals from the judgment dismissing, with prejudice, her claims of fraudulent concealment, strict liability, and negligence arising from alleged exposure to heavy metals released by Kansas City Power & Light Company's coal-fired electric power plant near La Cygne, Kansas. Grosshart raises three points on appeal. She argues that the motion court erred in dismissing her claims because (1) the Kansas statute of repose is not substantive and, thus, does not bar her claims; (2) she stated claims for negligence and strict liability in that she adequately alleged facts demonstrating a causal connection between her Missouri exposure to the power plant's environmental releases and her injuries; and (3) she stated a claim for

fraudulent concealment in that she adequately alleged that KCP&L owed a duty to inform her that the power plant was releasing heavy metals into the environment.

Finding that dismissal of Grosshart's strict liability and negligence claims arising out of her Kansas exposure at the farm and her fraudulent concealment claim was appropriate, we affirm the motion court's rulings on those claims. Finding that dismissal of Grosshart's strict liability and negligence claims arising from her alleged 2016 Missouri exposure was inappropriate, we reverse the court's ruling on those claims and remand for further proceedings consistent with this opinion.

Background[1]

Born in 1966, Grosshart was raised on a family farm near Pleasanton, Kansas, located approximately four miles south-southwest of the power plant. While living on the farm, Grosshart consumed, bathed in, and otherwise used water from a well drilled into a shallow alluvial aquifer below the farm and downstream from the power plant.

Unit I of the power plant began operating in 1973, and Unit II began operating in 1977. Beginning in approximately 1973, KCP&L placed byproducts of the coal-firing process in settling ponds, at least one of which was not designed, constructed, or monitored by a professional engineer. Grosshart alleges that the power plant has been releasing heavy metals into the environment for more than forty years.

Grosshart left the farm in 1986 and subsequently lived in Manhattan, Kansas; Keystone, Colorado; Butler, Missouri; Springfield, Missouri; Branson, Missouri; Hollywood, Florida; New York, New York; and the Los Angeles, California area. After 1986, Grosshart "often returned to

[1] "At this stage in the proceedings, we take as true all facts alleged in [Grosshart's] operative petition." *Hill v. Freedman*, 608 S.W.3d 650, 652 n.1 (Mo. App. W.D. 2020). The background information presented here comes from Grosshart's amended petition, the operative pleading in this case.

visit her father at the [f]arm," but she does not identify when those subsequent visits to the farm occurred or that she was exposed to heavy metals from the power plant during those visits. Grosshart's mother moved to Butler, Missouri, in 1986, and Grosshart often visited her there, too.

Butler's water supply is obtained from sources that include the Marais des Cygnes River and its tributary Miami Creek. The shallow alluvial aquifer below the farm feeds into the Marais des Cygnes River, which continues east into Missouri where it feeds into Miami Creek. Heavy metals from the power plant also are present in Butler's water supply, which is the source of the water Grosshart consumed and used while there.

In 2012, Grosshart's health declined dramatically; she developed debilitating fatigue and other symptoms that left her bedridden and unable to work. She consulted a number of medical professionals, but none were able to provide a comprehensive diagnosis of her condition or identify its cause. In December 2013, Grosshart underwent testing that revealed severe heavy metal toxicity, including a toxic level of cadmium, in her body. In October 2014, Grosshart obtained soil and well water samples from the farm and submitted them to professional laboratories for analysis. The results showed high levels of many of the same heavy metals that were present in her body.

In February 2016, Grosshart submitted a hair sample for heavy metal testing. The results showed that Grosshart's cadmium level was within normal range. After Grosshart's father died in early 2016, she spent a total of about nine weeks living with her mother in Butler. In June 2016, at the five-week mark of her visit, Grosshart submitted another hair sample for testing. Those results showed that her cadmium level was nearly ten times higher than it had been in February 2016 and more than three times higher than the upper range of the reference interval for cadmium—the level expected to be present in a healthy person. In October 2016, after her

nine-week stay in Butler, she submitted a third hair sample for testing. The results of the third test showed that her cadmium level was more than thirty-two times higher than it had been in February 2016 and more than ten times higher than the upper range of the reference interval.

On July 10, 2016, Grosshart's mother spoke with a contractor working at the power plant. He explained that KCP&L knew the power plant emitted heavy metals that settled on the surrounding land and water, but KCP&L did not test for the presence of heavy metals in the environment. The contractor also explained that the heavy metals that settled in the soil on or near the farm or in the aquifer below the farm would have migrated into the Marais des Cygnes River. Grosshart's mother relayed this information to Grosshart who shared it with her doctors.

Following a March 2017 biopsy of her salivary glands, Grosshart was diagnosed with Sjögren's Syndrome, a chronic and incurable autoimmune disease caused by environmental toxicity.[2] Among other things, Grosshart alleged,

> In diagnosing Grosshart with Sjögren's Syndrome in March 2017, Grosshart's doctor expressed the opinion that she developed the disease in response to environmental toxicity, *i.e.*, her exposure to the heavy metals and related contaminants found at the [f]arm and in Butler, Missouri. This was the first time any medical professional had told Grosshart that her heavy metal toxicity was the direct cause of a recognized medical condition.
>
> . . . . .
>
> Grosshart has . . . been exposed to and has ingested and retained heavy metals and other chemical contaminants when drinking and bathing in the water supplied to her mother's home in Butler, Missouri.

Grosshart's doctors believe her elevated cadmium levels are directly related to her time living at the farm and her extended stay in Butler; Grosshart is not aware of any other source of her exposure to cadmium. High levels of cadmium are associated with chronic fatigue, which is one of Grosshart's symptoms.

[2] Grosshart's diagnosis was made in California where she resided at the time.

KCP&L did not inform Grosshart that the power plant was releasing heavy metals into the surrounding environment.

Grosshart filed her initial petition on July 10, 2018, and her amended petition on October 11, 2018, alleging fraudulent concealment (Count I), strict liability (Count II), and negligence (Count III). With respect to each count, Grosshart requested compensatory and punitive damages, costs, and "all other relief the Court deems just and proper."

KCP&L filed a motion to dismiss and suggestions in support, arguing that (1) Kansas substantive law applies and Grosshart's claims are barred by the Kansas statute of repose; (2) Grosshart fails to state a claim for fraudulent concealment because she does not sufficiently allege that KCP&L had a duty to disclose; and (3) Grosshart fails to state claims for strict liability and negligence because she does not sufficiently allege causation with respect to her claimed exposure through the Butler, Missouri, public water supply system.[3] Grosshart filed suggestions in opposition, and KCP&L filed a reply. The motion court held a brief hearing[4] and then issued an order and judgment granting KCP&L's motion for the reasons stated therein and dismissing Grosshart's amended petition with prejudice.

This appeal follows.

Standard of Review

All three points on appeal challenge the propriety of the motion court's dismissal of Grosshart's claims for failure to state a claim on which relief can be granted. "We review 'the grant of a motion to dismiss *de novo* and will affirm the dismissal on any meritorious ground stated

[3] KCP&L did not move for dismissal of Grosshart's strict liability and negligence claims for failure to adequately plead any other elements of those causes of action.

[4] The record on appeal does not contain a transcript of the hearing and the docket sheet suggests that there is no transcript.

in the motion.'" *Hill v. Freedman*, 608 S.W.3d 650, 654 (Mo. App. W.D. 2020) (quoting *Mosby v. Precythe*, 570 S.W.3d 635, 637 (Mo. App. W.D. 2019)).

"A motion to dismiss for failure to state a claim on which relief can be granted is an attack on the plaintiff's pleadings." *Id.* (quoting *R.M.A. by Appleberry v. Blue Springs R-IV Sch. Dist.*, 568 S.W.3d 420, 424 (Mo. banc 2019)). "Such a motion is only a test of the sufficiency of the plaintiff's petition." *Id.* (quoting *R.M.A.*, 568 S.W.3d at 424). "When considering whether a petition fails to state a claim upon which relief can be granted, [we] must accept all properly pleaded facts as true, giving the pleadings their broadest intendment, and construe all allegations favorably to the pleader." *Id*. (quoting *R.M.A.*, 568 S.W.3d at 424). "The [c]ourt does not weigh the factual allegations to determine whether they are credible or persuasive." *Id.* (quoting *R.M.A.*, 568 S.W.3d at 424). "Instead, [we] review[] the petition to determine if the facts alleged meet the elements of a recognized cause of action . . . ." *Id.* (quoting *R.M.A.*, 568 S.W.3d at 424). "In order to withstand the motion [to dismiss], the petition must invoke 'substantive principles of law entitling plaintiff to relief and . . . ultimate facts informing the defendant of that which plaintiff will attempt to establish at trial.'" *Id.* (quoting *State ex rel. Henley v. Bickel*, 285 S.W.3d 327, 329-30 (Mo. banc 2009)). "If the petition sets forth any set of facts that, if proven, would entitle the plaintiffs to relief, then the petition states a claim." *Id.* (quoting *Lynch v. Lynch*, 260 S.W.3d 834, 836 (Mo. banc 2008)).

Analysis

Grosshart raises three points on appeal. She argues that the motion court erred in dismissing her petition because (1) the Kansas statute of repose, found in § 60-513(b) of the Kansas Statutes (2018),[5] is not substantive and, thus, does not bar her claims; (2) she states claims for

[5] In pertinent part, § 60-513 states that an action for personal injury

negligence and strict liability in that she adequately alleges facts demonstrating a causal connection between her Missouri exposure to KCP&L's environmental releases and her injuries; and (3) she states a claim for fraudulent concealment in that she adequately alleges that KCP&L owed a duty to inform her of the power plant's releases.

As to Grosshart's first point—the Kansas statute of repose is not substantive and, thus, does not bar her claims—there are two related issues on which the parties agree. First, Kansas substantive law governs Grosshart's claims against KCP&L. Missouri follows the Restatement (Second) of Conflict of Laws, which states, in pertinent part,

> In an action for a personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless, with respect to the particular issue, some other state has a more significant relationship . . . to the occurrence and the parties, in which event the local law of the other state will be applied.

Restatement (Second) of Conflict of Laws § 146; *see Rider v. The Young Men's Christian Ass'n of Greater Kansas City*, 460 S.W.3d 378, 388 (Mo. App. W.D. 2015) ("When a conflict of law exists, Missouri evaluates which law should govern according to the Restatement (Second) of Conflicts of Laws."); *Wilson v. Image Flooring, LLC*, 400 S.W.3d 386, 397 (Mo. App. W.D. 2013) (applying Restatement (Second) of Conflict of Laws § 146 to determine which state's law governs in a negligence action). As the location of the power plant and the location of the vast majority of Grosshart's alleged exposure, Kansas is both the place of the alleged injury and the state with the most significant relationship with the case.

> shall not be deemed to have accrued until the act giving rise to the cause of action first causes substantial injury, or, if the fact of injury is not reasonably ascertainable until some time after the initial act, then the period of limitation shall not commence until the fact of injury becomes reasonably ascertainable to the injured party, but in no event shall an action be commenced more than 10 years beyond the time of the act giving rise to the cause of action.

§ 60-513(a) and (b).

Second, Missouri procedural law applies to Grosshart's claims. Missouri courts generally apply Missouri law to procedural questions even if another state's substantive law governs the underlying claim. "Regardless of which state's law governs the substantive issues involved in this case, . . . procedural questions are determined by the state law where the action is brought." *Kissinger v. Am. Family Mut. Ins. Co.*, 563 S.W.3d 765, 775 (Mo. App. W.D. 2018) (quoting *Williams v. Silvola*, 234 S.W.3d 396, 399 (Mo. App. W.D. 2007)); *see Brizendine v. Bartlett Grain Co., LP*, 477 S.W.3d 710, 714 (Mo. App. W.D. 2015) (finding Missouri law governed all procedural issues even though Kansas law determined the question of negligence because the alleged tort occurred in Kansas).

Turning to Grosshart's first point, she argues that her claims are not time barred by the Kansas statute of repose in § 60-513(b) because it is a procedural statute and, as such, should not be applied by this court.[6] Generally, Missouri courts consider statutes of repose to be substantive. In *Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 825 (Mo. banc 1991), the Court rejected several constitutional challenges to § 516.097, a ten-year statute of repose that shielded persons who provided architectural, engineering, and construction services from liability for defective or unsafe conditions involving improvements to real property.[7] In doing so, the Court recognized the

[6] Grosshart also raises a related issue—the applicability of Missouri's borrowing statute, § 516.190. In relevant part, that statute states, "Whenever a cause of action has been fully barred by the laws of the state . . . in which it originated, said bar shall be a complete defense to any action thereon, brought in any of the courts of this state." "The term 'originated' as used in Missouri's borrowing statute is synonymous with the term 'accrued.'" *Thomas v. Grant Thornton LLP*, 478 S.W.3d 440, 444 (Mo. App. W.D. 2015). "A cause of action accrues when and originates where damages are sustained and are capable of ascertainment." *Id.* at 445 (quoting *Day v. DeVries & Assocs., P.C.*, 98 S.W.3d 92, 95 (Mo. App. W.D. 2003)). Grosshart claims that her cause of action originated in California because she resided there when her damages became capable of ascertainment. KCP&L disputes Grosshart's claim that her cause of action originated in California. In view of our ruling on the Kansas statute of repose, we need not and do not address the applicability of § 516.190.

[7] The relevant version of § 516.097.1 stated,

> Any action to recover damages for personal injury, property damage or wrongful death arising out of a defective or unsafe condition of any improvement to real property, including any action for contribution or indemnity for damages sustained on account of the defect or unsafe condition, shall be commenced within ten years of the date on which any such improvement is completed.

"basic difference" between statutes of limitation and statutes of repose and characterized the statute at issue there—§ 516.097—as a substantive statute of repose.

> A statute of limitation[] allows the cause of action to accrue and then cuts off the claim if suit is not filed within a certain period of time. A statute of repose eliminates the cause of action altogether after a certain period of time following a specified event; in this instance, the completion of construction. More importantly, the cause of action is eliminated before the plaintiffs' injury and thus before plaintiffs' cause of action accrues. If the constitution places a limitation on the legislature that prohibits it from eliminating a potential cause of action before it arises, such a provision would prohibit the legislature from changing the substantive law in any way that adversely affects any potential litigant. It is obvious that neither the United States Constitution nor the Missouri Constitution purports to contain any such limitation.

Id. at 834.

Likewise, in *Ambers-Phillips v. SSM DePaul Health Center*, 459 S.W.3d 901, 906 (Mo. banc 2015), the Court described § 516.105[8] as a "classic example of a statute of repose" because it provided that "no suit could be brought more than 10 years after the foreign object was left in the body, without regard to whether the negligent act had at that point been discovered." The Court further explained the "philosophical and conceptual differences between statutes of limitation[] and statutes of repose" by noting that the

> main thrust [of statutes of limitation] is to encourage the plaintiff to "pursu[e] his rights diligently" . . . [b]ut a statute of repose is a judgment that defendants should "be free from liability after the legislatively determined period of time, beyond which the liability will no longer exist and will not be tolled for any reason."

Id. at 907-08 (quoting *CTS Corp. v. Waldburger*, 573 U.S. 1, 9 (2014)). "The primary consideration underlying a statute of repose is 'fairness to a defendant,' the belief that there comes a time when the defendant 'ought to be secure in his reasonable expectation that the slate has been wiped clean of ancient obligations . . . .'" *Id.* at 908 n.7 (quoting *R.A.C. v. P.J.S, Jr.*, 927 A.2d 97,

[8] The relevant version of § 516.105 stated, in pertinent part, "In no event shall any action for damages for malpractice, error, or mistake be commenced after the expiration of ten years from the date of the act of neglect complained of . . . ."

105 (N.J. 2007)). In view of the differences between statutes of limitation and statutes of repose, the Court deemed precedent involving statutes of limitation "not persuasive" authority when ruling on a statute of repose. *Id.* at 810 n.8.

Grosshart points out that the Court in *Ambers-Phillips* did not expressly analyze whether § 516.105 is substantive or procedural. While that is true, the Court articulated the differences between statutes of limitation and statutes of repose and concluded that § 516.105 is a "classic example of a statute of repose." *Ambers-Phillips,* 459 S.W.3d at 906. The *Ambers-Phillips* Court also referred to the ten-year statute of repose at issue in *Blaske* as part of "the substantive statutory law" of Missouri. *Id.* at 910. And the key language of § 60-513(b) ("in no event shall an action be commenced more than 10 years beyond the time of the act giving rise to the cause of action") is strikingly similar to the statute of repose at issue in *Ambers-Phillips* ("In no event shall any action for damages for malpractice . . . be commenced after the expiration of ten years from the date of the act of neglect complained of . . . .").

Despite the Court's clear characterization of statutes of repose as substantive in *Blaske* and *Amber-Phillips,* Grosshart urges us to take a different approach—and conclude that the Kansas statute of repose is procedural—for two reasons. First, Grosshart argues that there is authority in Missouri that supports treating statutes of repose as procedural. Grosshart points to *Hansen v. Sears, Roebuck & Company*, 574 F. Supp. 641, 643 (E.D. Mo. 1983), where, before *Blaske* and *Amber-Phillips,* the federal court attempted to predict whether Missouri would treat a statute of repose as procedural or substantive. In concluding that the Court would treat a statute of repose as procedural, the *Hansen* court cited *Carwood Realty Company v. Gangol,* 232 S.W.2d 399, 401 (Mo. 1950) for the proposition that a statute of repose "simply precludes the bringing of an action to enforce rights, it affects the remedy only." *Id.* First, we note that "federal case law interpreting

a Missouri statute is not binding on this court's interpretation of that statute." *Baker v. Century Fin. Grp., Inc.*, 554 S.W.3d 426, 436 (Mo. App. W.D. 2018). This is particularly true when subsequent decisions from our Supreme Court reach a different conclusion. But on this issue we disagree with the *Hansen* court because *Carwood*, the Missouri authority on which *Hansen* purported to rely, is distinguishable.

The issue in *Carwood* was whether a statute that created a defense by restricting the period within which a claim could be asserted also created an affirmative right that could be a basis of a plea for affirmative relief. 232 S.W.2d at 401. In 1912, the Development Corporation of St. Louis executed a note secured by a deed of trust on property. *Id.* at 400. The deed of trust was transferred several times over the next eighteen years with Carwood claiming that it received the property by quitclaim deed in 1931. *Id.* In 1940, the original deed of trust was foreclosed upon and the property was purchased and conveyed several times until it was eventually sold to the defendants. *Id.* at 401. Carwood brought an action to cancel the trustee's deed held by the defendants and to quiet title, claiming that the obligation secured by the original deed of trust was barred by the statute of repose. *Id.* at 400. In ruling against Carwood, the Court found that the statute did not create a substantive right that could be the "basis for a plea for affirmative relief"; rather, the statute provided a defense. *Id.* at 401. The Court did not analyze the nature of the defensive right created by the statute. KCP&L does not assert that § 60-513(b) provides a basis for affirmative relief, instead raising § 60-513(b) as a defense to Grosshart's claims. Therefore, *Carwood* does not reflect an inconsistency in our Supreme Court's approach to statutes of repose and *Hansen* does not support a finding that § 60-513(b) is procedural in the present context.

Grosshart also relies on an opinion issued by the Supreme Court shortly before *Blaske*. *R.W. Gast v. Shell Oil Company*, 819 S.W.2d 367, 368 (Mo. banc 1991) involved a wrongful death

suit by the parents of a gas station cashier who was shot during a robbery. The parents sued the contractor who converted a service bay at the gas station into a cashier's room. *Id.* The parents cited § 516.097 in support of their argument for expanded contractor liability for negligent construction. *Id.* at 371. But, citing the Missouri rule that a general contractor is not liable to persons with whom he did not contract after the owner accepts a structure, the Court affirmed a directed verdict for the contractor. *Id.* at 370-71. In response to the parents' argument regarding § 516.097, the Court stated, "It suffices to say that statutes of limitation[] are procedural enactments which are not designed to impose or to define the scope of substantive liability." *Id.* at 371. The question of whether § 516.097 is substantive or procedural was not directly before the Court in *R.W. Gast*. And there is nothing in *R.W. Gast* to suggest that the Court's use of the "statutes of limitation[]" language in that case was a conscious attempt to technically define § 516.097 as a statute of limitation rather than a statute of repose. In light of the context in which the Court addressed § 516.097 in *R.W. Gast* and the Court's nearly contemporaneous description of § 516.097 in *Blaske* as a substantive statute of repose, we do not find Grosshart's reliance on *R.W. Gast* persuasive.

Second, Grosshart also urges us to take a different approach than that reflected in *Blaske* and *Amber-Phillips* because those cases are inconsistent with the general criteria adopted by the Court in *Hess v. Chase Manhattan Bank, USA, N.A.*, 220 S.W.3d 758 (Mo. banc 2007) for determining whether a statute is procedural or substantive. In *Hess*, the Court held that an amendment to the Missouri Merchandising Practices Act that expanded the class of parties eligible to bring suit for unlawful practices in real estate sales was procedural because it "prescribes a method of enforcing rights." *Id.* at 770 (quoting *Wilkes v. Mo. Hwy. & Transp. Comm'n*, 762 S.W.2d 27, 28 (Mo. banc 1988)). The Court explained, "[p]rocedural law prescribes a method of

enforcing rights or obtaining redress for their invasion; substantive law creates, defines and regulates rights." *Id.* at 769 (quoting *Wilkes*, 762 S.W.2d at 28). "The distinction is that 'substantive law relates to the rights and duties giving rise to the cause of action, while procedural law is the machinery used for carrying on the suit.'" *Id.* (quoting *State v. Jaco*, 156 S.W.3d 775, 781 (Mo. banc 2005)).

But the Court decided *Hess*, which did not involve a statute of repose, eight years before *Ambers-Phillips*, yet the Court did not mention *Hess* in *Ambers-Phillips*, presumably because the Court did not find *Hess* applicable to the issues in the latter case. Moreover, if the *Hess* framework were applied to § 60-513(b), that statute would be considered substantive because it "defines and regulates rights." *Hess*, 220 S.W.3d at 769 (quoting *Wilkes*, 762 S.W.2d at 28). It provides a date certain based on an act of the defendant after which the defendant will be shielded from liability, even if the plaintiff's cause of action has not yet accrued and, thus, it "relates to the rights and duties giving rise to [or terminating] the cause of action." *Id.* (quoting *Jaco*, 156 S.W.3d at 781). Therefore, *Hess* does not support a finding that § 60-513(b) is procedural.[9]

Based on *Blaske* and *Amber-Phillips*, we conclude that Missouri characterizes statutes of repose as substantive. But no Missouri court has addressed the precise issue presented here—whether Missouri would treat a foreign statute of repose like § 60-513(b) as substantive or procedural for choice-of-law purposes. In addressing this issue, we consider relevant decisions from federal and other state courts.

[9] Grosshart also argues that Missouri would consider § 60-513(b) to be procedural because the court in *Stark v. Mercantile Bank, N.A.*, 33 P.3d 609 (Kan. Ct. App. 2000) applied that statute retroactively and, under Missouri law, only procedural statutes may be applied retroactively. But Grosshart's reliance on *Stark* is misplaced because the court there expressly applied § 60-513(b) prospectively. *Id.* at 614 ("In addition, we do not believe defendants seek an impermissible retroactive application of the statute of repose to wrongful conduct predating its enactment. Rather, they seek prospective application of the statute to a lawsuit filed many years later."). Thus, *Stark* does not support a finding that § 60-513(b) is procedural.

Most courts that have addressed the nature of a statute of repose in a choice-of-law context have concluded that the statute retains its substantive character. "The general weight of authority accepts the characterization of statutes of repose as substantive provisions in a choice[-]of[-]law context." *Fields v. Legacy Health Sys.*, 413 F.3d 943, 952 n.8 (9th Cir. 2005). A good example of the analysis adopted by these courts is *Olawole v. ActioNet, Inc.*, 258 F. Supp. 3d 694, 704 (E.D. Va. 2017). In *Olawole* the court noted that "Virginia's choice-of-law rules recognize three limitation statutes: (1) 'statutes of repose,' (2) 'procedural' or 'pure' statutes of limitation, and (3) 'substantive' or 'special' statutes of limitation."

> First, a statute of repose run[s] from some legislatively selected point in time which is unrelated to the accrual of any cause of action and reflect[s] a legislative policy determination that a time should come beyond which a potential defendant will be immune from liability for his past acts and omissions. Second, a procedural statute of limitation[] merely . . . time-restrict[s] the assertion of a remedy and furnish[es] an affirmative defense [that is] waived if not pleaded. Last, a substantive statute of limitation[] is ordinarily contained in statutes [that] create a new right, and thus become[s] [an] element[] of that newly-created right, restricting its availability. Indeed, [c]ompliance with a . . . [substantive] statute is a condition precedent to maintenance of a claim.

Id. (internal quotations and citations omitted). Thus, Virginia and other jurisdictions that adopt the majority view would find a foreign statute of repose to retain its substantive character but limit the circumstances under which a foreign statute of limitation remains procedural in the choice-of-law context, finding statutes of limitation to be substantive if included in the statute that creates the cause of action. *See also Castillo v. Cessna Aircraft Co.*, 712 F. Supp. 2d 1306, 1311 (S.D. Fla. 2010) ("[S]tatutes of repose are considered 'substantive' for choice[-]of[-]law purposes pursuant to Florida law."); *Richardson v. Se. Conf.*, MDL No. 2492, 2020 WL 1515730, *8 (N.D. Ill. March 30, 2020) ("Under Indiana's choice-of-law rules . . . statutes of repose are substantive in nature."); *Rice v. Dow Chem. Co.*, 875 P.2d 1213, 1217 (Wash. 1994) ("We hold that statutes of repose . . . raise a conflict of substantive law."); *Boudreau v. Baughman*, 368 S.E.2d

849, 857 (N.C. 1988) ("We hold that statutes of repose are treated as substantive provisions for choice[-]of[-]law purposes.").[10]

Grosshart argues that § 60-513(b) should be treated as procedural because her claims for negligence, strict liability, and fraudulent concealment are common law claims and, thus, the Kansas statute of repose is not part of a statute creating the asserted rights. Thus, she advocates the converse of the Virginia choice-of-law rule. Rather than a statute of limitations losing its procedural nature if the limitation is part of the statute creating the cause of action, she argues that a statute of repose should retain its substantive nature only where the limitation on the right is part of the statute creating the cause of action. In support of her position, she points to cases from Connecticut and Alabama that take the minority view that, although statutes of repose are generally considered substantive, in a choice-of-law situation, they should be treated as procedural unless the limitation is part of the statute creating the cause of action. Courts that have taken this view generally hold that statutes of repose are indistinguishable from statutes of limitation and are guided by the forum state's policy for treating statutes of limitation as procedural.

In *Baxter v. Sturm, Ruger and Co., Inc.*, 644 A.2d 1297, 1297 (Conn. 1994), the question presented was whether Connecticut law would consider an Oregon statute of repose substantive or procedural for choice-of-law purposes. The court began its analysis by concluding that "statutes of repose . . . are indistinguishable from statutes of limitation for purposes of choice[-]of[-]law characterization." *Id.* at 1298. The court then applied the rules developed for statutes of limitation to decide "whether reasons of policy support characterizing a repose statute as procedural or

[10] The Missouri Supreme Court has held that foreign statutes of limitation lose their procedural nature when the statute creating the cause of action also imposes limitations on the remedy. *Toomies v. Continental Oil Co*., 402 S.W.2d 321, 323 (Mo. 1966) (holding that the Kansas statute of limitations applied to an action in Missouri where the statute creating the remedy also imposed limitations, because the limitation became a condition precedent to the right of action).

substantive for choice[-]of[-]law purposes." *Id.* at 1300. "[S]tatutes of repose, like statutes of limitation, are neither substantive nor procedural per se for choice[-]of[-]law purposes. In any given case, the characterization of the applicable statute of repose depends on the nature of the underlying right that forms the basis of the lawsuit." *Id.* at 1302. Ultimately, the court concluded that the Oregon statute of repose was properly considered procedural for choice-of-law purposes under Connecticut law. *Id.*; *see also, Etheredge v. Genie Indus., Inc.*, 632 So.2d 1324, 1327 (Ala. 1994) (concluding that North Carolina's statute of repose is a procedural statute of limitation because it is not so "inextricably bound up in [a] statute creating the right that it is deemed a portion of the substantive right itself.") (emphasis omitted) (quoting *Cofer v. Ensor*, 473 So.2d 984, 987 (Ala. 1985). Thus, it appears that courts applying the minority view treat a statute of repose as indistinguishable from a statute of limitation and find that a statute of repose loses its substantive character if it is not integral to the statute creating the underlying right. Grosshart urges us to adopt the approach reflected in *Baxter* and *Etheredge* and conclude that, in the choice-of-law context, § 60-513(b) loses its substantive nature because it is not "inextricably bound up" in a statute that forms the basis of her lawsuit. *Etheredge*, 632 So.2d at 1327.

We find the majority view to be well-reasoned and more in line with the "philosophical and conceptual differences between statutes of limitation[] and statutes of repose" recognized by our Supreme Court in *Blaske* and *Amber-Phillips*. *Amber-Phillips*, 459 S.W.3d at 907-08 (a statute of repose frees a defendant from liability "after the legislatively determined period of time, beyond which the liability will no longer exist and will not be tolled for any reason") (quoting *CTS Corp.*, 573 U.S. at 9). The majority view treats statutes of repose as substantive because the time limitation runs from the defendant's last act giving rise to the claim, not, as in the case of a statute of limitation, from the time of the injury or discovery of the injury. As such, "'The repose serves

as an unyielding and absolute barrier that prevents a plaintiff's right of action even before his cause of action may accrue.'" *Boudreau*, 368 S.E.2d at 857 (N.C. 1988) (quoting *Black v. Littlejohn*, 325 S.E.2d 469, 475 (N.C. 1985)). For this reason, a statute of repose is "a substantive definition of rights rather than a procedural limitation on the remedy used to enforce rights." *Id*. Because a statute of repose makes the commencement of an action within a specific period a condition precedent to relief, "the limitation period is considered to be tied up with the underlying right" and the overwhelming weight of authority accepts the characterization of statutes of repose as substantive in a choice-of-law context. *Id.* (quoting *Chartener v. Kice*, 270 F. Supp. 432, 436 (E.D.N.Y. 1967)). Thus, we conclude that § 60-513(b) is substantive for choice-of-law purposes because it is "a substantive definition of rights" that is part of the underlying cause of action.

Moreover, when analyzing whether the law of another state is substantive or procedural, our courts consider the other state's interpretation of its own statute, *Noe v. U.S. Fid. & Guar. Co.*, 406 S.W.2d 666, 668 (Mo. 1966), and the Kansas Supreme Court has determined that § 60-513(b) is substantive. *See Harding v. K.C. Wall Prods., Inc.*, 831 P.2d 958, 968 (Kan. 1992) (holding that § 60-513(b) is a substantive statute of repose because it relieves defendants of liability for long-past claims, regardless of whether the claims have actually accrued). Thus, our conclusion that § 60-513(b) is substantive for choice-of-law purposes is consistent with Kansas law.

Accordingly, § 60-513(b) is part of Kansas substantive law that governs Grosshart's claims. Having found that § 60-513(b) applies and, therefore, bars any claim not commenced within ten years of the act giving rise to the injury, we must determine whether Grosshart's petition, read broadly and construed favorably to her, alleges any act by KCP&L in the last ten years that gave rise to her injury.

A fair reading of Grosshart's petition suggests that the alleged releases from the power plant began in 1973 and were continuing in October 2018, when she filed her amended petition. This would include releases during the ten-year period before she filed her petition. Grosshart claims that heavy metals released from the power plant contaminated the water supply at the farm. However, Grosshart moved from the farm in 1986 and, while she claims to have visited the farm over the years, she does not identify the dates she was at the farm after 1986. Grosshart also claims that some of the heavy metals released by the power plant have contaminated the public water supply system in Butler, Missouri, and that she lived in Butler at some point and made "frequent" trips there. However, she does not identify specific dates she was in Butler other than a nine-week period in 2016. Taking as true Grosshart's alleged facts, only her claim of injurious exposure in 2016 raises the possibility of an act by KCP&L within ten years before she filed her petition. Again, reading Grosshart's petition broadly and construing all inferences in her favor, her allegations regarding the 2016 Missouri exposure allow for a reasonable inference that KCP&L took some action within the ten-year window preceding the filing of her petition in 2018 to cause the 2016 Missouri exposure. Thus, Grosshart's claims based on the 2016 Missouri exposure are not barred by § 60-513(b). None of Grosshart's other claims support a reasonable inference that KCP&L's actions in the ten years preceding the petition caused injury.

Accordingly, Point I is granted as to Grosshart's claims arising from her alleged Kansas exposure but denied as to her claims arising from her alleged 2016 Missouri exposure. Having found that § 60-513(b) does not bar Grosshart's claims based on her alleged 2016 Missouri exposure, we address her remaining points as they pertain to that claim.

For her second point, Grosshart contends that the motion court erred in dismissing her claims for strict liability and negligence because she adequately alleged facts demonstrating a

causal connection between her 2016 Missouri exposure to the power plant's alleged environmental releases and her injuries. We agree.

"Missouri is a fact pleading state." *R.M.A.*, 568 S.W.3d at 425. "But the facts that must be pleaded are the ultimate facts, not evidentiary facts." *Id.* "The plaintiff has to plead ultimate facts, not conclusions, which, if true, support each and every proof element of his claim." *Doyle v. Crane*, 200 S.W.3d 581, 590 (Mo. App. W.D. 2006).

In its motion to dismiss, KCP&L challenged only the causation element of Grosshart's strict liability and negligence claims. Regarding causation, Grosshart pleaded,

> Butler, Missouri's water supply is obtained from sources including the Marais des Cygnes River and Miami Creek, a tributary of the Marais des Cygnes River.
>
> The shallow alluvial aquifer below the [f]arm feeds into the Marais des Cygnes River and continues east into Missouri where it feeds into Miami Creek.
>
> [U]pon information and belief, the heavy metals emitted from the [p]ower [p]lant are also present in Butler's water supply, which is the source of the water Grosshart drank, bathed in, and otherwise used during her many visits to Butler between 1986 and the present.

Grosshart also pleaded that, in 2016, she spent nine weeks living with her mother in Butler. Around the same time, Grosshart submitted three hair samples for heavy metal testing, and her reported cadmium levels increased significantly with each test. Grosshart's doctors believed that her elevated cadmium levels are directly related to her extended stay in Butler in 2016 and her visits to the farm. In March 2017, Grosshart was diagnosed with Sjögren's Syndrome, a chronic and incurable autoimmune disease caused by environmental toxicity. Grosshart further pleaded,

> In diagnosing Grosshart with Sjögren's Syndrome in March 2017, Grosshart's doctor expressed the opinion that [Grosshart] developed the disease in response to environmental toxicity, *i.e.*, her exposure to the heavy metals and related contaminants found at the [f]arm and in Butler, Missouri.

> Grosshart has likewise been exposed to and has ingested and retained heavy metals and other chemical contaminants when drinking water and bathing in water supplied to her mother's home in Butler, Missouri.

Because Grosshart alleged that she developed Sjögren's Syndrome in response to exposure to heavy metals, that she was exposed to heavy metals from Butler's public water supply in 2016, and that heavy metals from the power plant are present in Butler's water supply, Grosshart pleaded facts sufficient to satisfy the causation element of her strict liability and negligence claims.

Point II is granted with respect to Grosshart's strict liability and negligence claims arising from her alleged 2016 Missouri exposure.[11]

For her third point, Grosshart contends that the motion court erred in dismissing her claim for fraudulent concealment because she adequately alleged that KCP&L owed a duty to inform her that the power plant was releasing heavy metals into the environment. Under Kansas law, "[a] party has a duty to disclose material facts if the party 'knows that the other is about to enter into the transaction under mistake as to such facts, and that the other, because of relationship between them, the customs in trade, or other objective circumstances, would reasonably expect disclosure of such facts.'" *OMI Holdings, Inc. v. Howell*, 918 P.2d 1274, 1300-01 (Kan. 1996) (quoting *Boegel v. Co. Nat'l Bank of Denver*, 857 P.2d 1362, 1365 (Kan. Ct. App. 1993)).

Grosshart's contention that the motion court erred in dismissing her fraudulent concealment claim fails because she did not allege that, in 2016 when she was visiting her mother in Butler, KCP&L knew she was about to enter into a transaction under mistaken facts or that because of a relationship between KCP&L and Grosshart, the customs in trade, or other objective

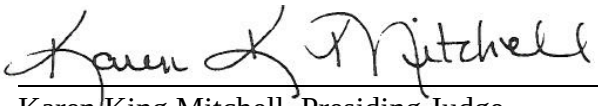
[11] As discussed *supra*, Grosshart's Kansas claims are barred by § 60-513(b).

circumstances, Grosshart would reasonably expect disclosure by KCP&L. Thus, she failed to adequately allege a claim for fraudulent concealment under Kansas law.[12]

Accordingly, Point III is denied.[13]

Conclusion

Finding that dismissal of Grosshart's strict liability and negligence claims arising out of her Kansas exposure at the farm and her fraudulent concealment claim was appropriate, we affirm the motion court's rulings on those claims. Finding that dismissal of Grosshart's strict liability and negligence claims arising from her alleged 2016 Missouri exposure was inappropriate, we reverse the court's ruling on those claims and remand for further proceedings consistent with this opinion.



Karen King Mitchell, Presiding Judge

Thomas H. Newton and Anthony Rex Gabbert, Judges, concur.

[12] Under the facts of this case, we decline Grosshart's invitation to impose an equitable duty to disclose on KCP&L based on *Tetuan v. A.H. Robins Co.*, 738 P.2d 1210, 1215 (Kan. 1987), a case involving a claim of fraud against the manufacturer of the Dalkon Shield intrauterine contraceptive device.

[13] Moreover, a fair reading of Grosshart's petition indicates that her fraudulent concealment claim arises from her alleged exposure while living on the farm. As discussed, *supra*, claims based on Grosshart's alleged exposure at the farm are barred by § 60-513(b).