Court of Appeals
of the State of Georgia

ATLANTA, March 29, 2013

The Court of Appeals hereby passes the following order:

A12A2162. RAI v. REID et al.

There being an equal division of the judges of this court when sitting as a body in connection with the consideration of this case, it is ordered that this case be immediately TRANSFERRED to the Supreme Court of Georgia in accordance with Art. VI, Sec. V, Par. V of the Constitution of the State of Georgia.

On dispositive issues, the judges of this court are equally divided as follows: Those voting to affirm the judgment: Ellington, C. J., Barnes, P. J., Phipps, P. J., Doyle, P. J., Miller and McFadden, JJ. Those voting to affirm the judgment in part and to reverse the judgment in part: Andrews, P. J., Dillard, Boggs, Ray, Branch and McMillian, JJ.

Court of Appeals of the State of Georgia
Clerk's Office, Atlanta, 03/29/2013
I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.
Witness my signature and the seal of said court hereto affixed the day and year last above written.

Kelly K. O. Lamar, *Clerk.*

March 29, 2013

In the Court of Appeals of Georgia

A12A2162. RAI v. REID et al.

MCFADDEN, Judge.

Chiman Rai had his daughter-in-law murdered. He now appeals from a $2.5 million wrongful death judgment in favor of his granddaughter and from a $100,000 judgment for pain and suffering in favor of his daughter-in-law's estate. Having fraudulently concealed his criminal conduct for a number of years, appellant now claims the protection of the statute of limitation. His fraudulent concealment did not toll the statute, he argues, because he did not conceal the fact of the murder – only the fact that he is himself a murderer.

As to the wrongful death judgment, the appellant's argument is unavailing. The

trial court reposed that cause of action in appellant's granddaughter, rather than appellant's son; and the statute was tolled because of her minority. The trial court's decision to so repose the claim, as well as her fact-finding incident to that decision, were proper exercises of her equitable jurisdiction.

As to the judgment for pain and suffering, however, it is true that there is Georgia case law so distinguishing between fraudulent concealment of an act and fraudulent concealment of participation in an act. But we find that case law distinguishable because appellant's fraudulent concealment of his identity is part of the gravamen of the plaintiff's claim. So the statute of limitation was tolled as to that judgment as well.

Appellant also argues that the trial court erred by allowing the plaintiff to read to the jury the testimony of two out-of-state witnesses from his murder trial. But that testimony was admissible pursuant to former OCGA § 24-3-10 (now OCGA § 24-8-804 (b) (1)), which sets out an exception to the hearsay rule for unavailable witnesses. Finally, we find no reversible error in the jury instructions.

1. *Facts.*

Sparkle Reid and Rajeeve Rai, appellant's son, married when their daughter was five months old. On April 26, 2000, within a month of the wedding, Reid-Rai was murdered in their apartment in the presence of their daughter. Rajeeve Rai was

at work at the time.

Ms. Reid-Rai's father, Bennet Reid, and his wife took custody of the child, who has lived with them ever since. The Reids have adopted the child. Rajeeve Rai dropped out of his child's life; he never challenged the adoption nor the termination of his parental rights pursuant to the adoption.

The crime went into cold case status until 2004 when, while investigating an unrelated matter, the police spoke to a woman who said she had been at Reid-Rai's apartment at the time of the murder and who identified the hired killers. That information led to appellant's co-conspirators, Willie Fred Evans and Herbert Green, both of Jackson, Mississippi, and eventually to appellant himself. Appellant was convicted of Reid-Rai's murder in Fulton Superior Court. His motion for new trial is pending.

On September 18, 2008, within two years after learning of appellant's involvement in Sparkle Reid-Rai's murder, Reid filed a complaint and amended complaint asserting claims both as the minor child's next friend and as the administrator of Reid-Rai's estate. Reid sought damages for the value of Reid-Rai's life in the former capacity and for her pain and suffering in the latter. The case was tried before a jury, and the trial court entered judgment on the jury's verdict, awarding $2.5 million to the child for Reid-Rai's wrongful death and $100,000 to Bennett Reid

as the administrator of the estate for Reid-Rai's pain and suffering. This appeal follows.

2. *The statute of limitation does not bar the wrongful death claim.*

It is true that the two-year statute of limitation is applicable to wrongful death claims. *Miles v. Ashland Chemical Co.*, 261 Ga. 726, (410 SE2d 290) (1991). But here the right to pursue the wrongful death claim was vested in appellant's minor grandchild, so the minority tolling provision of OCGA § 9-3-90 (a) tolled the statute of limitation.

(a) *The trial court properly reposed standing to pursue the wrongful death claim in appellant's minor grandchild.*

The trial court properly exercised her equitable power to repose authority to bring the wrongful death action in appellant's grandchild, rather than his son. The Georgia wrongful death statute, OCGA § 51-4-2 (a), provides: "The surviving spouse or, if there is no surviving spouse, a child or children, either minor or sui juris, may recover for the homicide of the spouse or parent the full value of the life of the decedent, as shown by the evidence." Even when there is a surviving spouse, in some circumstances, the right to pursue a wrongful death claim may lie with the child. It is within the equitable authority of the superior court to permit the prosecution of a child's claim in order to protect the child's interests when the surviving spouse

refuses to do so. *Brown v. Liberty Oil & Refining Corp.*, 261 Ga. 214, 215 (2) (403 SE2d 806) (1991).

Discussing that authority, in language on point to the present case, our Supreme Court has explained that, under the wrongful death statute, a minor child has

> a cause of action for damages for the alleged wrongful death of her mother. Although the statute says the deceased's surviving spouse must bring the action, both [the Supreme] Court and the Court of Appeals have allowed other persons acting in a representative capacity to maintain a wrongful death action on behalf of a minor child where the surviving spouse declines to pursue the claim. Here, the minor child's father . . . failed to [bring a wrongful death action on the child's behalf] prior to the expiration of the two-year statute of limitations. . . . [T]he surviving spouse who has abandoned his children should have no greater right to defeat their potential entitlement than were he dead.

(Citations omitted.) *Blackmon v. Tenet Healthsystem Spalding*, 284 Ga. 369, 370-371 (1) (667 SE2d 348) (2008).

The trial court found that since Reid-Rai's murder in 2000, Rajeeve Rai had little meaningful contact with his child; that his parental rights have been formally terminated; and that he never sought to challenge the child's adoption. Evidence supports the trial court's findings, and the findings support the trial court's exercise of its equitable powers to permit the child to prosecute the wrongful death claim.

(b) *The trial court did not err by resolving certain disputed facts when*

ruling on appellant's motion to dismiss the wrongful death claim.

Appellant contends that the trial court erred by resolving factual disputes pursuant to her determination that the child had standing to pursue the wrongful death claim. Specifically, he argues that the trial court erred by finding that Rajeeve Rai had abandoned the child. That issue, he argues, should have been submitted to the jury.

But he concedes, as he must, that the trial court's decision that the child had standing to pursue the wrongful death claim was an exercise of her equitable powers. See *Brown*, supra, 261 Ga. at 215-216 (holding it is within the equity powers of superior court to permit prosecution of wrongful death claim by guardian of minor children where surviving spouse refuses to do so). See also *Blackmon*, supra, 284 Ga. at 369 (state court should have transferred case to superior court to rule on motion for partial summary judgment, which argued that the plaintiff was not the proper party to bring the action, because identifying the proper party involved the exercise of equitable power to allow an exception to the wrongful death statute standing scheme). "[T]here is no right to a jury trial on claims that lie in equity." *A&D Asphalt Co. v. Carroll & Carroll of Macon*, 247 Ga. App. 77, 79 (1) (2000). Because the trial court was resolving an issue in equity, it had the authority to find the facts without the intervention of a jury. *Page v. Wheale*, 259 Ga. 597, 598 (2) (385 SE2d 402) (1989). See also *Frantz v. Piccadilly Place Condo. Assn.*, 278 Ga. 103, 107 (6) (2004)

("Whether to call for special verdicts from a jury to resolve factual disputes in an equity case is entirely in the trial court's discretion."); *Cawthon v. Douglas County*, 248 Ga. 760, 761-762 (1) (286 SE2d 30) (1982).

(c) *The statute of limitation on the wrongful death claim was tolled because of the child plaintiff's minority.*

Under the minority tolling provision of OCGA § 9-3-90 (a), "[m]inors . . . shall be entitled to the same time after their disability is removed to bring an action as is prescribed for other persons." In *DeKalb Med. Ctr. v. Hawkins*, 288 Ga. App. 840, 847-848 (2) (c) (655 SE2d 823) (2007), we held that "the minority tolling provision of OCGA § 9-3-90 (a) applies to a wrongful death action brought by a minor for the death of a parent when the action is not based upon medical malpractice." Given this holding and our holding in Division 2 (a) that the trial court did not err in concluding that the child had standing to pursue the wrongful death claim, the two-year statute of limitation applicable to wrongful death cases was tolled, and her action is not time-barred.

Appellant argues that, because the statute of limitation had run while the wrongful death claim was still vested in Rajeeve Rai, it was not tolled due to the child's minority. This argument rests on two unwarranted assumptions. First, it rests on the assumption that Rajeeve Rai had not abandoned his child prior to the running

of the statute of limitation, but the trial court made no such finding.

Second, it rests on the assumption that the statute of limitations was not tolled until the moment when the superior court transferred authority to bring the claim. That is not the law. *Blackmon v. Tenet Healthsystem Spalding*, supra. In *Blackmon* "the minor child's father ... had no intention of bringing a wrongful death claim on the child's behalf and in fact failed to do so prior to the expiration of the two-year statute of limitations," and our Supreme Court remanded so that the superior court could decide whether "to make an exception to the wrongful death statute and authorize [the child's guardian] to pursue the wrongful death claim on the minor child's behalf." 284 Ga. at 371.

3. *The statute of limitation does not bar the estate's pain and suffering claim because appellant committed fraud by which the plaintiff was debarred or deterred from bringing an action.*

The complaint was filed outside the two-year statute of limitation for personal injury actions. OCGA § 9-3-33. The statute of limitation was not tolled by OCGA § 9-3-99, which tolls the period of limitation "with respect to any cause of action in tort that may be brought by the victim of an alleged crime" -- but only for six years; this action was filed more than six years after the murder. We turn therefore to OCGA § 9-3-96, which tolls the statute in cases of fraud.

(a) *OCGA § 9-3-96, which tolls the statute of limitation in cases of fraud, is controlling.*

OCGA § 9-3-96 provides, "[i]f the defendant or those under whom he claims are guilty of a fraud by which the plaintiff has been debarred or deterred from bringing an action, the period of limitation shall run only from the time of the plaintiff's discovery of the fraud." The Supreme Court of Georgia has held that to establish tolling under the statute, a "plaintiff must prove that: (1) the defendant committed actual fraud; (2) the fraud concealed the cause of action from the plaintiff; and (3) the plaintiff exercised reasonable diligence to discover his cause of action despite his failure to do so within the statute of limitation." *Daniel v. Amicalola Elec. Membership Corp.*, 289 Ga. 437, 445 (5) (b) (711 SE2d 709) (2011).

In addressing the kind of fraud that will toll the statute of limitation, our Supreme Court has held that "where the gravamen of [an] action is other than actual fraud, . . there must be a separate independent actual fraud involving moral turpitude which debars and deters the plaintiff from bringing his action." *Shipman v. Horizon Corp.*, 245 Ga. 808, 809 (267 SE2d 244) (1980). But where "actual fraud is the gravamen of the action . . , the statute of limitations is tolled until the fraud is discovered or by reasonable diligence should have been discovered. No other independent fraudulent act is required to toll the statute." Id. The concealment of a

material fact, such as appellant's identity, in order to deceive and mislead can constitute fraud. OCGA § 51-6-2 (a).

Applying those principles, we find that actual fraud is part of the gravamen of the plaintiff's action in this case, so the statute of limitation was tolled until the fraud was discovered -- when appellant was identified as the murderer. We so find because the appellant did not merely commit his crime then remain silent hoping not to be apprehended by the police. He structured his criminal conduct to conceal his identity behind layers of co-conspirators: he conspired with Green, Evans and others to have Reid-Rai murdered; he entered the conspiracy in order to conceal his identity and to avoid detection; and he was successful in that his concealment of his identity deterred the plaintiff from bringing the action. Contrary to Judge McMillian's dissent, the appellant's Fifth Amendment right to remain silent does not enter into the analysis. He had no right to murder his daughter-in-law. He had no right to do any of the acts that were a part of his conspiracy to murder her. His efforts to structure his crime so as to conceal his identity were among those acts and are therefore part of the gravamen of the plaintiff's claim.

(b) *Our decision in Stewart v. Warner is not controlling.*

The appellant relies on *Stewart v. Warner*, 257 Ga. App. 322 (571 SE2d 189) (2002), in which we concluded that precedent from our Supreme Court and from this

court required us to hold that the statute was not tolled as to burglars who had stolen the plaintiffs' "life savings in the approximate amount of $23,000[, which t]hey were going to use . . . to pay for an eye operation for their minor child." 257 Ga. App. at 322. We find *Stewart* to be distinguishable. Moreover we question its soundness.

(i) *Stewart is distinguishable.*

Because the gravamen of the plaintiff's claim includes fraud, this case is not controlled by *Stewart v. Warner*. The appellant cites *Stewart* for the proposition that the liable party's concealment of his identity is not a fraud that tolls the statute of limitation. But in *Stewart* the plaintiffs' action to recover damages for the defendants' theft of their personal property was not based on wrongful conduct involving actual fraud. 257 Ga. App. at 322-323. Rather, the fraud on which the *Stewart* plaintiffs relied occurred after the theft that formed the basis of their cause of action; it consisted of defendants' threats against those to whom they had admitted their guilt and denial of their involvement to others. Here, the appellant's entire scheme to have Reid-Rai murdered was designed from the outset to conceal his identity. The appellant did not simply attempt to cover his tracks after the murder. From the beginning, he conspired with Green, Evans and others so that he would be hidden behind layers of co-conspirators from the actual killing of Reid-Rai. Even when the police learned the name of the actual killer, they did not learn of appellant's

involvement until more than two years later.

Therefore we need not reach the issues that we found to be controlling in *Stewart*. Since fraud is part of the gravamen of the plaintiff's cause of action, the plaintiff was not required to "prove that defendant[] engaged in a species of fraud that concealed 'the existence of a cause of action.'"*Stewart*, supra, 257 Ga. App. at 323.

"Whether [the plaintiff] presented sufficient proof to suggest that he had been debarred or deterred from filing suit earlier so as to toll the statute of limitation under OCGA § 9-3-96 was an issue of fact which the [factfinder] implicitly resolved" in his favor. *Chambers v. Green*, 245 Ga. App. 814, 816 (539 SE2d 181) (2000). The evidence did not demand a finding to the contrary. Id.

(ii) *The soundness of Stewart is questionable.*

Moreover we question the holding of *Stewart*, supra, 257 Ga. App. at 322. We think *Stewart* misreads the phrase "existence of a cause of action" as that phrase is used in OCGA § 9-3-96. *Stewart* finds § 9-3-96 inapplicable because the statute required the plaintiffs to "prove that defendants engaged in a species of fraud that concealed 'the existence of a cause of action.' " Id. at 323.

In support of that holding, *Stewart* cited, without analysis, to seven cases: *Jim Walter Corp. v. Ward*, 245 Ga. 355, 357 (265 SE2d 7) (1980); *Mobley v. Faircloth*, 174 Ga. 808, 811 (164 SE 195) (1932); *Gropper v. Sto Corp.*, 250 Ga. App. 820, 824

(3) (552 SE2d 118) (2001); *McClung Surveying v. Worl*, 247 Ga. App. 322, 324 (1) (541 SE2d 703) (2000); *Charter Peachford Behavioral Health System v. Kohout*, 233 Ga. App. 452, 458 (504 SE2d 514) (1998); *Jahannes v. Mitchell*, 220 Ga. App. 102, 105 (3) (469 SE2d 255) (1996); and *Hahne v. Wylly*, 199 Ga. App. 811, 812 (1) (406 SE2d 94) (1991). Id. at n. 4. It is true that all of those cases describe the statute as applicable to fraud that conceals the "cause of action." But the language of the statute specifies "fraud by which the plaintiff has been debarred or deterred from bringing an action." None of those cases stand for the proposition that fraud that -- in fact -- "debarred or deterred" a plaintiff "from bringing [the] action," falls outside the reach of the tolling statute if the information fraudulently concealed cannot fit into the formal category of an element of "the cause of action."

For example in *Jim Walter Corp. v. Ward,* 245 Ga. at 355 -- which presented the converse of the present case: fraud in the marketplace where the parties were known, but the misconduct hidden -- the applicability of the statute was not at issue, only the accuracy of the jury charge on the statute. See also *Daniel*, supra, 289 Ga. at 445 (5) (b) (speaking of "concealing the cause of action," but holding that there was no merit to the argument that the statute was tolled on a trespass claim by a trespasser's subsequently-broken promise not to repeat the trespass).

In reading into the expression "cause of action" a requirement beyond the

statutory requirement that the fraud "debarred or deterred [the plaintiff] from bringing an action," OCGA § 9-3-96, we fell into a linguistic error that Bryan Garner warns against in his *A Dictionary of Modern Legal Usage* (1995). His entry under the heading "cause of action; right of action; ground of action" warns

> [t]hese terms "should not be confused. . . . They are not interchangeable." *Swankowski v. Diethelm,* 129 NE2d 182, 184 (Ohio App. 1953). *Cause of action* [can mean:] (1) a group of operative facts, such as a harmful act, giving rise to one or more rights of action; or (2) a legal theory of a lawsuit. Writers on civil procedure prefer that the term be confined to sense (1). The acceptance of sense (2) by some courts actually caused the drafters of the Federal Rules of Civil Procedure to avoid the term altogether. See Fleming James, *Civil Procedure* § 2.11 R 87 (1965).

A Dictionary of Modern Legal Usage at 140.

A few years before we decided *Stewart*, the Supreme Court of Florida decided a case factually on point and controlled by Georgia law. Finding OCGA § 9-3-96 to be controlling, that court held,

> [i]n Georgia, a cause of action for wrongful death accrues at death and has a two-year limitations period. See *Miles v. Ashland Chemical Co.*, 261 Ga. 726, 410 S.E.2d 290 (1991). However, a Georgia statute expressly tolls the statute of limitations for fraudulent concealment by providing that when a defendant is guilty of "fraud by which the plaintiff has been debarred or deterred from bringing an action, the

> period of limitation shall run only from the time of the plaintiff's discovery of the fraud." OCGA § 9-3-96 (1982); see *Shipman v. Horizon Corp.*, 245 Ga. 808 (267 SE2d 244) (1980); *Brown v. Brown*, 209 Ga. 620 (75 SE2d 13) (1953).
>
> Thus, the jury's finding of fraudulent concealment in this case tolls Georgia's two-year statute of limitations for filing a wrongful death action so that the period of limitation actually began to run from the time of petitioner's discovery of the fraud in 1990. The filing of the action for wrongful death on December 23, 1991, was within the statutory limitations period of the State of Georgia.

Fulton County Administrator v. Sullivan, 753 So.2d 549, 552 -553 (Fla.1999). We find the reasoning of the Florida Supreme Court persuasive.

Because *Stewart* does not affect the outcome of this case, it is unnecessary to overrule it.

4. *The trial court did not err by admitting testimony from the criminal trial.*

Appellant argues that the trial court erred by admitting hearsay when it allowed the plaintiff to read into the record the testimony of co-conspirators Green and Evans from appellant's murder trial. The applicable exception to the hearsay rule is former OCGA § 24-3-10, which provided that,

> [t]he testimony of a witness . . . inaccessible for any cause which was given under oath on a former trial upon substantially the same issue and between substantially the same parties may be proved by anyone who

> heard it and who professes to remember the substance of the entire testimony as to the particular matter about which he testifies.

(We observe that the statute has been replaced, effective January 1, 2013, with OCGA § 24-4-804 (b) (1).) "This exception to the hearsay rule requires that the proponent show that (1) the declarant is unavailable as a witness at trial; (2) the testimony was given under oath at a hearing or other proceeding; and (3) the parties and issues are substantially similar." (Citation omitted.) *Pope v. Fields*, 273 Ga. 6, 7-8 (1) (a) (536 SE2d 740) (2000). Appellant argues that the witnesses were not unavailable and that the issues in the criminal trial and the instant case were not substantially the same.

The Georgia Supreme Court has held that "an out-of-state witness is deemed unavailable for purposes of admitting the witness's prior testimony." (Citations omitted.) *Bragg v. State*, 279 Ga. 156, 157 (2) (611 SE2d 17) (2005). Appellant does not dispute that Green and Evans were out-of-state witnesses. Therefore, they were unavailable for purposes of the statute, and the first condition for the admissibility of their prior testimony was satisfied.

The requirement of substantial similarity "is fulfilled if the party against whom the former testimony is offered is the same and the previous proceeding provided an adequate opportunity for cross-examination." (Citation omitted.) *Pope*, 273 Ga. at 8 (1) (a). "[T]he parties and the issues both can properly be viewed as substantially the

same wherever the party against whom the former testimony is now offered had the opportunity, at the former trial, to cross examine the witness fully as to the matter in issue at the second trial. [Cit.]" *Prater v. State*, 148 Ga. App. 831, 836 (5) (A) (253 SE2d 223) (1979). Such is the case here. The party against whom the testimony of Green and Evans was offered in both proceedings – appellant – was the same. He argues that in the criminal trial, he did not cross-examine these witnesses about Reid-Rai's pain and suffering and the issues of fraud and tolling. But as appellant concedes, "these two witnesses provided the only link between . . . [appellant] and Sparkle's murder." In other words, the testimony was offered to show that appellant was a participant in the murder, not to support the claims of pain and suffering, fraud and tolling, and appellant does not contend that he was denied an adequate opportunity to cross-examine these witnesses on this issue in his criminal trial.

5. *The appellant has not shown reversible error in the jury instructions.*

Appellant argues that the trial court erred by charging the jury that it could not consider his statute of limitation defense to the wrongful death claim because the court had already determined that the statute of limitation did not bar that claim. Because the trial court correctly ruled on summary judgment that the statute of limitation did not bar the wrongful death claim, her instruction to the jury that it should not consider the issue was correct.

As for appellant's challenge to the jury instructions regarding the tolling of the statute of limitation on the pain and suffering claim, we likewise find no reversible error. The trial court charged that, in order to toll the statute on this claim, the jury had to find that the appellant was guilty of a fraud by which the plaintiff was debarred or deterred from bringing an action; that the fraud had to be actual fraud involving moral turpitude that could not have been discovered by the exercise of ordinary care; that absent a duty to disclose, the fraud had to be something more than a mere failure to disclose; and that the plaintiff had the burden to prove tolling by a preponderance of the evidence.

The appellant argues that the court included certain language that may have confused the jury into determining that he had a duty to disclose the murder to the plaintiff. Specifically, he challenges the portion of the charge where the trial court instructed the jury that a plaintiff must prove that "the defendant concealed information by an intentional act, something more than a mere failure with fraudulent intent to disclose such conduct, unless there is on the party committing such a [wrong] a duty to make the disclosure thereof *by reason of facts and circumstances*." He argues that the italicized phrase enabled the jurors to determine from the perspective of their moral and religious views that the appellant had a duty to disclose his conduct to the plaintiff when, in fact, he had no such legal duty.

"It is a fundamental rule in Georgia that jury instructions must be read and considered as a whole in determining whether the charge contained error." (Citations omitted.) *Ray v. Ford Motor Co*., 237 Ga. App. 316, 320 (2) (514 SE2d 227) (1999). Under that rule

> charge as a whole substantially covered the issues to be decided by the jury, we will not disturb a verdict supported by the evidence simply because the charge could have been clearer or more precise. Applying those principles here, we do not believe that the trial court erred when it provided the jury with a minimal amount of information regarding [a duty to disclose] within the general charge on [the fraud that tolls the statute of limitation]. Under the circumstances, the instruction was harmless. No undue emphasis was placed on [a duty to disclose] and it is unreasonable to believe that jurors would be misled by the provision of basic information regarding [this duty] within the context of [determining whether the appellant committed fraud that tolled the statute.]

Lee v. Swain, 291 Ga. 799, 800 (2) (a) (733 SE2d 726) (2012).

Appellant argues also that the court erred by refusing to charge the jury that the plaintiff's ignorance of the fact of who killed Reid-Rai did not, in and of itself, toll the statute. In reviewing a trial court's refusal to give a requested jury instruction, "we must look to the jury charge as a whole, and if the jury charge as a whole accurately and fully apprised the jury of the law to be applied in its deliberations, then the

refusal to give an additional instruction, even if that additional instruction were accurate, does not amount to error." (Citation omitted.) *Harrison v. State*, 309 Ga. App. 454, 457 (2) (a) (711 SE2d 35) (2011). Here, the trial court instructed the jury that it was the plaintiff's burden to prove that the defendant committed an act of actual fraud involving moral turpitude that debarred him from bringing the action. This fully apprised the jury of the law to apply in its deliberations, and the refusal to give the appellant's additional instruction was not error.

Finally appellant argues that the trial court should have instructed the jury that the statute of limitation began running when, in the exercise of reasonable diligence, the plaintiff should have discovered the fraud, not simply that the statute began running when the plaintiff discovered the fraud. But there was no evidence supporting the requested portion of the charge; the appellant presented no evidence that the plaintiff, in the exercise of diligence, should have discovered the fraud before he actually discovered the fraud. "[I]t is not error to refuse to give a charge which is not supported by the evidence." (Citation omitted.) *Russell v. Superior K-9 Serv.*, 242 Ga. App. 896, 898 (3) (531 SE2d 770) (2000). And the court instructed the jury that only fraud that could not have been discovered by the exercise of ordinary care tolled the statute. Again, the appellant has not shown reversible error.

I am authorized to state that Ellington, C. J., Barnes, P. J., Phipps, P. J., and

Miller, J., concur. Doyle, P. J., concurs in Divisions 1, 2, 4, and 5 and concurs in judgment only as to Division 3.

The vote of this court is tied 6 to 6 and this case is hereby transferred to the Supreme Court of Georgia. Those voting to affirm the judgment: Ellington, C. J., Barnes, P.J., Phipps, P. J., Doyle, P. J., Miller and McFadden, JJ. Those voting to affirm the judgment in part and to reverse the judgment in part: Andrews, P. J., Dillard, Boggs, Ray, Branch and McMillian, JJ.

In the Court of Appeals of Georgia

A12A2162. RAI v. REID et al.

MCMILLIAN, Judge, concurring in part and dissenting in part.

I concur specially and in judgment only as to Divisions 2 and 4, dissent as to Division 3, and concur specially in part and dissent in part as to Division 5.[1] As to Division 2, although I do not agree with all that is said, I concur in the majority's conclusions that the trial court properly granted Bennett Reid the right to assert a wrongful death claim on behalf of Sparkle Reid-Rai's daughter and that the trial court correctly held as a matter of law that the limitation period on that claim was tolled by the child's minority. Therefore, I also agree that the trial court did not err in

[1] Division 1 consists of a factual recitation that requires neither concurrence nor dissent.

instructing the jury that the tolling of the wrongful death claim was not an issue for their consideration (Division 5). And I further agree that the trial court did not err in admitting testimony given at Rai's criminal trial by witnesses who were unavailable at the trial in this case (Division 4). I respectfully dissent, however, to the majority's conclusion in Division 3 that the limitation period for Reid's claim of pain and suffering could be tolled under OCGA § 9-3-96 without proof of a separate, independent actual fraud. I also disagree with the majority's conclusion in Division 5 that the trial court properly instructed the jury on the issue of tolling on the pain and suffering claim because I do not believe that the issue should have been submitted to the jury under the facts of this case.

1. With regard to the wrongful death claim, although OCGA § 51-4-2 (a) gives the surviving spouse the right to bring the claim, the trial court properly exercised its equitable powers to determine that Ricky Rai had declined to pursue the claim, and thus that Reid, as the child's representative, could pursue the claim on the child's behalf. See *Blackmon v. Tenet Healthsystem Spalding, Inc.*, 284 Ga. 369, 371 (667 SE2d 348) (2008); *Brown v. Liberty Oil & Refining Corp.*, 261 Ga. 214, 215-216 (2) (403 SE2d 806) (1991); *Emory University v. Dorsey*, 207 Ga. App. 808, 809 (2) (429 SE2d 307) (1993). Because our Supreme Court has found that "the wrongful death statute gives [a] minor child a cause of action for damages for the alleged wrongful

death of her mother," *Blackmon*, 284 Ga. at 370, I believe that the child in this case had a claim for wrongful death along with her father, and thus her claim was tolled due to her minority from the time of her mother's death. The issue of abandonment by the father only goes to whether the minor child can maintain the claim, rather than the father/surviving spouse. Accordingly, I concur in the majority's affirmance of the $2.5 million judgment entered in favor of the minor child.

2. Turning to the issue of the estate's claim for pain and suffering, I respectfully disagree with the majority's conclusion that fraud tolls that claim under *Shipman v. Horizon Corp.*, 245 Ga. 808 (267 Ga. App. 244) (1980) and OCGA § 9-3-96.

"As an exception to the statute of limitations, O.C.G.A. § 9–3–96 . . . should be strictly construed." (Citations omitted.) *Curlee v. Mock Enterprises, Inc.*, 173 Ga. App. 594, 597 (2) (327 SE2d 736) (1985). Under Georgia law, "[a]ctual fraud which tolls the statute [of limitation] arises in two entirely different circumstances," which must be distinguished in order to properly analyze this case. *Shipman v. Horizon Corp.*, 245 Ga. 808 (267 SE2d 244) (1980).

> The first circumstance is where the actual fraud is the gravamen of the action. In such cases the statute of limitations is tolled until the fraud is discovered or by reasonable diligence should have been discovered. No other independent fraudulent act is required to toll the statute. Silence

> is treated as a continuation of the original actual fraud . . . .

(Citation omitted.) Id.

> The second circumstance is where the gravamen of the action is other than actual fraud, such as constructive fraud, negligence, breach of contract, etc. In such cases there must be a separate independent actual fraud involving moral turpitude which debars and deters the plaintiff from bringing his action. However, in these circumstances, silence concerning the underlying action cannot be a continuation of an original actual fraud because there is none. Thus, in this type case we find the statement that "mere silence" is not sufficient to toll the statute unless there is a duty to make a disclosure because of a relationship of trust and confidence between the parties.

Id. at 809. See also OCGA § 9-3-96.[2] Accordingly, in this second circumstance, "[c]oncealment of the cause of action must be by positive affirmative act . . . ." (Citations omitted.) *Fed. Ins. Co. v. Westside Supply Co.*, 264 Ga. App. 240, 243-244 (2) (590 SE2d 224) (2003).

The majority determined that Reid's claim for pain and suffering fits under the first circumstance, finding that fraud is part of the gravamen of Reid's claim based on allegations in the amended complaint that Rai initiated a conspiracy to murder

---

[2] OCGA § 9-3-96 provides: "If the defendant or those under whom he claims are guilty of a fraud by which the plaintiff has been debarred or deterred from bringing an action, the period of limitation shall run only from the time of the plaintiff's discovery of the fraud."

Sparkle Reid-Rai and to fraudulently conceal that conspiracy and Rai's identity and his participation in it. But the evidence in this case does not support any allegation of a conspiracy to fraudulently conceal Rai's identity within the meaning of the statute. Instead, the evidence establishes a murder-for-hire plot, which Rai and the others did not want known. The evidence indicates that Rai went to his business associate Herbert Green's store in mid-April 2000, stating that he was having problems with Sparkle Reid and that he needed her killed. After unsuccessfully approaching one man, Green spoke with Willie Fred Evans, who, in turn, located Cleveland Clark, who apparently agreed to commit the murder for $10,000, and Rai agreed to that price. Rai furnished a note with an Atlanta address and the name "Sparkle," and sent Green to Rai's banker to obtain the $10,000 for the murder, which was ultimately passed down the line to the other participants.

Reid has not pointed to any evidence supporting fraud as a gravamen of the claim – only that the murder-for-hire plot included layers of participants because Rai, and in turn Green and Evans, chose not to commit the crime directly. Thus, the record contains no evidence of a particularized conspiracy involving actual fraud to conceal Rai's, or anyone else's, identity or participation. Although a reasonable inference arises that no one involved, including Rai, wanted to be apprehended by police, that motivation, standing alone, does not support Reid's claim of fraudulent concealment.

Indeed, such motivation could be inferred in almost all crimes.

Moreover, it is virtually impossible to envision a confidential relationship or a duty that would require someone to disclose his identity as a murderer. To the contrary, Rai had a constitutional right to remain silent, which he exercised in his deposition in the case. See *Baxter v. Fairfield Financial Svcs., Inc.*, 307 Ga. App. 286 (704 SE2d 423) (2011) ("A party can be held liable for fraudulently concealing a material fact only if the party has a duty to disclose or communicate the fact.") (footnote citation and punctuation omitted). Thus, the majority's finding that actual fraud is part of the gravamen of Reid's claim is not supported by the record or the law. Accordingly, I conclude that the estate's claim for pain and suffering arises from the act of murder, not from actual fraud or concealment, thereby placing the claim under the second *Shipman* circumstance, "where the gravamen of the action is other than actual fraud."[3]

This Court has previously analyzed when a claim based on a criminal act may be tolled under OCGA § 9-3-96 in *Stewart v. Warner*, 257 Ga. App. 322 (571 SE2d 189) (2002). In that case, the Warners brought suit against Bryan Stewart and Jamie Thornton to recover damages for the theft or conversion of personal property taken

[3]The trial court, in fact, instructed the jury on the law applicable to claims not involving fraud.

during the burglary of their home in 1993. Stewart, Thornton and another man were involved in the burglary, but the crime remained unsolved until 1997, when an informant told the Georgia Bureau of Investigation that Stewart had admitted his involvement along with Thornton and the other man. The informant said she had not previously told anyone about Stewart's admission because he threatened to burn her house down. The jury found that Stewart's fraud tolled the statute of limitation and awarded the Warners $22,000 in damages. *Stewart*, 257 Ga. App. at 322.

In reversing the judgment, this Court determined that in order to establish tolling under OCGA § 9-3-96, a plaintiff must prove that the defendant "engaged in a species of fraud that concealed 'the existence of a cause of action.'" (Footnote citations omitted.) Id. at 323. The Court concluded that "the defendants' concealment of their identities as the parties liable, by making threats against those to whom they had admitted their guilt or by denying their involvement to others, does not constitute concealment of the existence of the cause of action to avoid the running of the statute of limitation." (Footnote citation omitted.) Id.

I agree with the majority that the reasoning in *Stewart* is questionable, although I do not think the majority goes far enough because I would advocate overruling *Stewart*. The language "existence of the cause of action," upon which the *Stewart* decision turns, is merely a choice of phrase first used by the Georgia Supreme Court

in 1932 in discussing the law of tolling. *Mobley v. Faircloth*, 174 Ga. 808 (164 SE 195) (1932). *Mobley*, however, does not limit the nature of the fraud required to toll the limitation period to fraud that conceals the *existence* of a cause of action.[4] Indeed, prior to *Mobley,* the Supreme Court had defined the requisite fraud much more broadly, noting that "[i]f the fraud alleged cuts plaintiff off from suing, precludes him, or hinders him, shuts him out, or excludes him, then it debars, and the statute is suspended. . . ." *Printup v. Alexander & Wright*, 69 Ga. 553, 557 (3) (1882). And the *Mobley* case did not turn on a distinction between the concealment of the existence of a cause of action and the concealment of other information. Instead, the court was considering the issue of whether the statute of limitation in an action against the directors of a bank for making excessive loans was tolled simply because the directors remained continuously in control of the bank's affairs during the limitation period. *Mobley*, 174 Ga. at 808, 811. Moreover, until *Stewart*, none of the other decisions adopting the phrase "existence of a cause of action" specifically turned upon a distinction between concealing the existence of a cause of action as opposed to any other information, such as identity of the potential defendant, that would deter or debar a plaintiff from his action. See cases cited at *Stewart*, 257 Ga. App. at 323, n.

[4] The cases cited for this proposition certainly contain no such limitation. *Maxwell v. Walsh*, 117 Ga. 467 (43 SE 704) (1903); *Anderson v. Foster*, 112 Ga. 270 (37 SE 426) (1900).

4.

Accordingly, the *Stewart* decision erred in relying on this turn of phrase to reverse the judgment in favor of the Warners. Instead, the Court should have employed the *Shipman* analysis for claims not involving actual fraud, which required the Warners to show something other than mere silence to support their claim of tolling. Because the Warners established at least one affirmative act by Stewart involving moral turpitude to conceal his participation in the crime – threatening to burn the informant's house down if she told anyone – the jury's finding of fraudulent concealment should have been affirmed. Thus, because the *Stewart* decision employs the wrong analysis in considering the tolling issue and because it reaches the wrong result under the facts in that case, I would overrule it.

This case, however, reflects no evidence of actual fraud because in this case Reid failed to show anything other than mere silence by Rai with regard to his participation in the crime.[5] Accordingly, the trial court erred in denying Rai's motion

[5] Although Reid points to a police surveillance video in which Rai supposedly told Green to tell the police that Green did not know anything about the crime, the appellate record does not contain a copy of this videotape nor any transcript of its contents. Thus, the appellee has failed to substantiate the existence of this alleged statement for purposes of appeal. The record reflects, however, that the jury asked to have the video replayed during their deliberations, and they may have improperly relied upon it in determining that the limitations period on the pain and suffering claim was tolled.

for directed verdict on this ground and in submitting the issue of the tolling of the limitation period the claim of pain and suffering to the jury. Thus, I am reluctantly compelled by the applicable law to conclude that the $100,000 judgment in favor of Reid for pain and suffering should be reversed.[6]

In reaching this conclusion, I am aware of the unfairness inherent in allowing a participant in a murder plot to avoid civil consequences merely by laying low and keeping quiet. But Georgia law has made no specific provision for this circumstance in the civil law as it has in the criminal law. See OCGA § 17-3-2 (2) (tolling the limitation period for criminal prosecution during the period "the person committing the crime is unknown or the crime is unknown."). This Court is bound by the current statutory law and the decisions of our Supreme Court, and it is up to the legislature rather than the courts to determine whether to enact a similar tolling provision in civil cases.

I am authorized to state the Presiding Judge Andrews, Judge Dillard, Judge Boggs, Judge Ray and Judge Branch join in this opinion.

---

[6] I also disagree with the majority that the decision of the Florida Supreme Court in *Fulton County Administrator v. Sullivan*, 753 So.2d 549, 552-553 (Fla. 1999), is persuasive authority for a different result. In that case, the court relied upon what was apparently a special finding by the jury of fraudulent concealment to toll the Georgia statute of limitation; the Court made no analysis of the issue under the *Shipman* factors. The jury in this case made no special finding on the issue, and, in any event, the evidence would not have supported such a finding.