

Appeal No. SD38892

**In The
Missouri Court of Appeals
Southern District**

LOGAN YANDELL
Plaintiff/Appellant

vs.

KANAKUK HERITAGE, INC., et al.
Defendants/Respondents

Appeal from the Circuit Court of
Christian County, Missouri
Case No. 23CT-CC00088

APPELLANT'S BRIEF

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JURISDICTIONAL STATEMENT

This case involves a civil action asserting claims for fraudulent inducement and conspiracy to fraudulently induce a settlement. This case was originally filed in the Circuit Court of Taney County, Missouri. The case was transferred by Order granting a change of venue to the Circuit Court of Christian County, Missouri. The trial court entered its Judgment on January 17, 2025. Appellant filed a Notice of Appeal to this Court on February 19, 2025.

This matter is not within the exclusive jurisdiction of the Supreme Court as provided in Article V, Section 3 of the Missouri Constitution. In addition, Christian County is within the jurisdiction of this Court. Therefore, this Court has jurisdiction over this appeal.

STATEMENT OF FACTS

I. The Parties

Defendant/Respondent Kanakuk Ministries operates various Christian camps for children, offering day, summer, and overnight camp programs. (D321 p. 1 ¶ 1; App. A17). Defendant/Respondent Joe White (“Defendant White”) has served as President of Kanakuk Heritage, Inc. and Kanakuk Ministries and is currently the Chief Executive Officer of Kanakuk Ministries. (D321 p. 1 ¶ 2; App. A17). Defendants/Respondents Kanakuk Heritage, Inc., Kanakuk Ministries, and Joe White are collectively referred to as the Kanakuk Defendants.

Plaintiff/Appellant Logan Yandell (“Plaintiff”) attended various Kanakuk summer camps from ages 7 to 17, between 2002 and 2011. (D321 p. 2 ¶ 3; App. A18). Plaintiff’s parents are Gregory and Christa Yandell. (D321 p. 2 ¶ 4; App. A18). Plaintiff’s parents held a close and personal relationship with the Kanakuk Defendants, including Defendant White. (D321 p. 46 ¶ 89-90; D293 p. 37-38 ¶ 89-91; App. A62, A121-122).

During his time attending Kanakuk camps, Plaintiff was sexually abused by Peter Newman (“Newman”), a former employee of Kanakuk Ministries. (D321 p. 2 ¶ 5, p. 3 ¶ 9; D293 p. 2-3 ¶ 3; App. A18, A19; A86-A87). Newman worked for the Kanakuk Defendants from 1995 until 2009. (D321 p. 2 ¶ 5; App. A18).

On September 14, 2009, the Prosecuting Attorney of Taney County, Missouri, charged Newman with four felony counts involving sexual offenses against minors. The charges included statutory sodomy, sexual misconduct by indecent exposure, and enticement of a child, with

incidents occurring between 2004 and 2008. (D321 p. 2 ¶ 6; App. A18). On November 17, 2009, the Prosecuting Attorney of Taney County, Missouri, charged Newman with an additional five felony counts involving sexual offenses against minors. (D321 p. 12-13 ¶ 25; App. A28-A29). Newman pleaded guilty on February 18, 2010, and was sentenced to two life terms plus 30 years on June 9, 2010. (D321 p. 14 ¶ 30, p. 15 ¶ 34; App. A30, A31).

The Kanakuk Defendants are insured by Defendant/Respondent ACE American Insurance Company (“Defendant ACE”). (D293 p. 1 ¶ 1; App. A85). Defendant Ace was the insurance carrier that issued a policy to the Kanakuk Defendants from 2004 to 2008, under which Defendant Ace and the Kanakuk Defendants negotiated and ultimately reached a settlement with Plaintiff in December 2010 to settle Plaintiff’s claims against the Kanakuk Defendants resulting from Newman’s sexual misconduct towards Plaintiff. (D321 p. 31-32 ¶ 61).

Plaintiff’s Second Amended Petition in this action seeks damages against all Defendants for fraud (Count I) and civil conspiracy (Count II). (D202 p. 4-16; D293 p. 1-2 ¶ 2; App. A85-A86).

II. Facts Related to the Kanakuk Defendants' Motion for Summary Judgment¹

On September 14, 2009, Defendant White informed Kanakuk families, including Plaintiff's family, that the Taney County, Missouri Prosecutor had filed a felony complaint against Newman. (D321 p. 3 ¶ 7; App. A19). In response to receiving this news, Gregory Yandell asked Plaintiff whether Newman had ever acted inappropriately with him, and Plaintiff confessed he had in fact been abused by Newman. (D321 p. 3 ¶ 8-9; App. A19). Gregory Yandell investigated whether the Kanakuk Defendants had prior knowledge of Newman's sexual misconduct by asking Defendant White. (D321 p. 4-5 ¶ 13, p. 54 ¶ 105; App. A20-A21, A70). Gregory Yandell called Defendant White on his cell phone from his garage to inform him that Plaintiff was a victim. (D321 p. 3 ¶ 10; App. A19). Gregory Yandell testified that:

“So I called Joe and I told Joe, I said, hey, Logan has admitted tonight that he was a victim of Pete and sexual molestation. And I almost immediately asked Joe, I said, ‘Joe, did you ever have any concerns about Pete being inappropriate with kids? Was there every any red flags? Did you guys ever see anything that caused you concern about Pete not being around children? Had he ever had an incident or any type of situation that was, you know, inappropriate or sexual misconduct with kids?’ And Joe told me unequivocally, ‘No, we’ve never seen anything. We’ve never – nothing has ever been on our radar with Pete.’”

¹ Many of the facts involved in this case are cited in relation to both the Kanakuk Defendants' Motion for Summary Judgment and Defendant ACE's Motion for Summary Judgment. Where appropriate, citation will be to the facts from both motions.

(D321 p. 4 ¶ 11; D293 p. 15 ¶ 22; App. A20, A99; *see also* D321 p. 54 ¶ 105; D293 p. 20 ¶ 34; App. A70, A104). Plaintiff's parents reasonably relied on Defendants' representations regarding facts concerning prior knowledge of inappropriate conduct by Newman. (D321 p. 46 ¶ 91; D293 p. 38-39 ¶ 93-94; App. A62, A122-A123). The representations made by Defendants leading up to, and at the time of, the settlement agreement with Plaintiff were material to Plaintiff's decision to settle his claims against the Kanakuk Defendants. (D293 p. 39 ¶ 95; App. A123).

Defendant White "does not recall either way" regarding conversations with Plaintiff's parents about the prior inappropriate conduct by Newman. (D321 p. 54 ¶ 106; D293 p. 21 ¶ 35; App. A70, A105). The Kanakuk Defendants had prior knowledge of Newman's sexual misconduct. (D293 p. 21-23 ¶ 37-42; App. A105-A107).

Consequently, Defendant Joe White knew his representations to Plaintiff's parents regarding prior knowledge of inappropriate behavior by Newman were false. (D293 p. 23 ¶ 43; App. A107).

Gregory and Christa Yandell allege that Defendant White's statements during this phone conversation in September 2009 were false. (D321 p. 4 ¶ 12; App. A20). From September 2009 until December 2021, they chose not to further investigate Newman, did not follow the press or media coverage of his prosecution, and did not read any articles about him. (D321 p. 4-5 ¶ 13, p. 6 ¶ 15, p. 41 ¶ 82; App. A20-A21, A22, A57). Rather, Gregory and Christa Yandell went directly to the source, Defendant White, to determine the information they needed regarding Newman's actions and the Kanakuk Defendants' knowledge, hence additional sources were not needed. (D321 p. 4-5 ¶ 13, p. 6 ¶ 15, p. 41

¶ 82, p. 46 ¶ 91; App. A20-A21, A22, A57, A62). Plaintiff's parents did not follow the press or media coverage of Newman's prosecution and did not attend the sentencing hearing because they trusted Defendant White. (D321 p. 6-12 ¶ 15-24, p. 15-18 ¶ 33-40, p. 47 ¶ 93; App. A22-A28, A31-A35, A63). Further, the media coverage was local to Taney County, Missouri, while Plaintiff and his parents lived in Nashville, Tennessee. (D321 p. 18-19 ¶ 40; App. A34-A35). Additionally, Gregory and Christa Yandell were prioritizing their son, who was completely out of control with his trauma, with his PTSD, and his emotional state. (D321 p. 6 ¶ 15, p. 15 ¶ 33; App. A22, A31).

Defendant White kept the Yandell family informed with regular updates on Newman's criminal proceedings, including but not limited to additional charges filed against Newman, relevant hearing dates, and a link to Case.net for ongoing case updates. (D321 p. 13-14 ¶ 26-28; App. A29-A30).

Plaintiff's parents held a close and personal relationship with the Kanakuk Defendants, and particularly Defendant White. (D321 p. 46 ¶ 89-90; D293 p. 37-38 ¶ 89-91; App. A62, A121-122). Joe White admits that Plaintiff's parents trusted him and put faith in him and in Kanakuk. (D293 p. 38 ¶ 91; App. A122). Defendant ACE acknowledged that campers, like Plaintiff and his parents, had very close connections with the Kanakuk Defendants, including Defendant Joe White. (D293 p. 38 ¶ 92; App. A122).

The Taney County Times featured an article on September 30, 2009, titled "Sexual misconduct investigation continues – Parent says Kamp warned about Newman in 2006." (D321 p. 6 ¶ 16; App. A22). The article

included information regarding Newman's inappropriate behavior and a claim by a parent of another camper that she had informed the Kanakuk Defendants in 2006 of potential misconduct by Newman. (D321 p. 7-10 ¶ 17, 19-20; App. A23-A26).

Plaintiff did not become aware that the Kanakuk Defendants had prior knowledge of Newman's misconduct until 2021. (D321 p. 7-8 ¶ 18; D293 p. 39-40 ¶ 96; App. A23-A24, A123-A124).

Newman's sentencing hearing was held on June 9, 2010, before Judge Mark E. Orr in the Circuit Court of Taney County, Missouri. (D321 p. 15 ¶ 34; App. A31). Defendant White offered to cover the Yandell family's travel and lodging arrangements in Branson, Missouri, so they could attend Newman's sentencing hearing. (D321 p. 14-15 ¶ 31; App. A30-A31). However, despite their gratitude for Defendant White's offer, the Yandell family chose not to attend the hearing. (D321 p. 15 ¶ 32-33; App. A31).

During the sentencing hearing, Prosecutor Jeff Merrell referenced an agreement signed by Newman in October of 2003 that placed him on probation with Kanakuk Defendants due to some "questionable conduct involving underaged boys." (D321 p. 16 ¶ 35; App. A32). The Taney County Times published an article following the hearing which referenced the 2003 probation agreement and the Kanakuk Defendants' prior knowledge. (D321 p. 16-18 ¶ 37-38; App. A32-A34).

Since 2010 or 2011, several victims of Newman have filed lawsuits against the Kanakuk Defendants alleging that the Kanakuk Defendants were aware of Newman's sexual misconduct with children.

(D321 p. 19-20 ¶ 41-42, p. 24-31 ¶ 53-60; D293 p. 6-8; App. A35-A36, A40-A47; A90-A92).

Defendant Ace was the insurance carrier that issued a policy to the Kanakuk Defendants from 2004 to 2008. (D293 p. 1 ¶ 1; D321 p. 31-32 ¶ 61; App. A47-A48, A85). As a result of those policies, Defendant Ace and the Kanakuk Defendants negotiated and ultimately reached a settlement with Plaintiff in December 2010 to settle Plaintiff's claims against the Kanakuk Defendants resulting from Newman's sexual misconduct towards Plaintiff. (D321 p. 31-32 ¶ 61; D293 p. 10-11 ¶ 13; App. A47-A48, A94-A95). The December 2010 settlement included a release and was approved by the Sumner County Circuit Court, Tennessee. (D293 p. 11-12 ¶ 14-17; App. A95-A96).

Defendant White informed the Yandell family about the insurance company and encouraged them to speak with Defendant Ace to "get as much money as they could because that's what it was there for." (D321 p. 32 ¶ 62; App. A48). Defendant White further pressured Greg Yandell during negotiations to work out a settlement quickly. (D321 p. 32 ¶ 62; App. A48).

In December 2009, Vicki Morgan arranged an initial call with Mr. White, Gregory Yandell, and Marilyn Cannon, who worked for Defendant ACE as a Liability Specialist. (D321 p. 32-33 ¶ 63-64; D293 p. 40 ¶ 100; App. A48-A49, A124). Between May 11, 2010, and June 21, 2010, negotiations between ACE and Plaintiff's parents continued. (D293 p. 16 ¶ 24; App. A100). Both during settlement negotiations, and after Plaintiff's claim was settled (but not yet court approved), ACE continued to authorize and empower its insureds, the Kanakuk

Defendants, by having them communicate with claimants, and potential claimants, regarding settlement. (D293 p. 19 ¶ 32; App. A103).

Defendant ACE, through its claim specialist Cannon, stated that it was “seeking [Kanakuk’s] compliance with the policy requirement” as it tasked the Kanakuk Defendants with providing claimant information so that Defendant ACE could “move all claims towards resolution in a timely fashion”. (D293 p. 19-20 ¶ 33; App. A103-A104).

During the settlement negotiations, Greg Yandell was discussing settlement amounts with Defendant White, was pressured by Defendant White to reach a settlement, and felt like he was working with both Defendant White and Marilyn Cannon. (D321 p. 33 ¶ 65; App. A49). During the negotiations, Defendant ACE was aware that the Kanakuk Defendants were communicating with Plaintiff’s parents. (D321 p. 33-34 ¶ 66; App. A50). Defendant White advised Gregory and Christa Yandell to inform him if they felt the insurance company was not offering enough money, to try to get as much as they could in settlement, and that Defendant White was speaking on behalf of Defendant ACE. (D321 p. 34-35 ¶ 68; App. A50-A51).

Gregory Yandell testified that if he knew the facts that the Kanakuk Defendants withheld, he would have hired someone with the expertise to assist with the negotiations, but he did not do so because he relied on Defendant White’s representations regarding the Kanakuk Defendants’ lack of prior knowledge. (D321 p. 35-36 ¶ 69; App. A51-A52). The parties eventually reached a court approved settlement for \$250,000 (“2010 Settlement”). (D321 p. 36-39 ¶ 70-78; App. A52-A55).

Plaintiff's parents negotiated with Defendant ACE and Marilyn Cannon based on the representations made by Defendant White. (D321 p. 50 ¶ 96; App. A66). Plaintiff's father was pressured by Defendant White to settle Plaintiff's claims during the time that negotiations were occurring between Plaintiff's parents and Defendant ACE. (D321 p. 32 ¶ 62, p. 51 ¶ 100; App. A48, A67). Defendant White participated in the settlement negotiations. (D321 p. 32-35 ¶ 63, 65-68, p. 52-53 ¶ 101-102, p. 54-55 ¶ 107).

Plaintiff filed the instant action on November 17, 2022, asserting fraud against the Kanakuk Defendants and Defendant Ace (collectively, "Defendants"). (D321 p. 39 ¶ 79; D293 p. 40 ¶ 97; App. A55, A124). Plaintiff's First Amended Petition was filed on May 11, 2023, and his Second Amended Petition was filed effective July 15, 2024. (D293 p. 40 ¶ 98-99; App. A124). Plaintiff's First Amended Petition alleges that Defendants falsely misrepresented and concealed their knowledge of Newman's prior sexual misconduct. (D321 p. 40 ¶ 80; App. A56). Plaintiff's First Amended Petition and Second Amended Petition both allege that Defendants actively concealed facts regarding Newman's sexual misconduct from Plaintiff and his parents, including the following facts:

- a. As early as 1999, Newman was swimming and four-wheeling nude with young boys,
- b. Cunningham sent Newman a letter warning him to stop sleeping alone with children on July 6, 2001,
- c. In 2003, Newman was swimming and playing basketball nude with young boys,

d. In 2003, a parent suspected and reported Newman of exhibiting unusual/sexual behavior toward her son at a father-son retreat after witnessing her son throw away his jeans after the retreat and proclaiming “I never want to see Pete again,”

e. Cunningham told Kanakuk Defendants to terminate Newman as early as 2003,

f. In 2006, knew Newman was making late night calls and texts to a camper,

g. As early as 2006, that Newman was “ministering” to children in his hot tub on a nightly basis, and

h. In 2006, a female camper reported to Kanakuk Defendants that she had witnessed Newman’s inappropriate behavior with a boy camper.

(D321 p. 40-41 ¶ 81; App. A56-A57). Plaintiff and his parents learned of the facts a. through h. in December 2021. (D321 p. 41 ¶ 82; App. A57).

The facts outlined in a. through h. above are facts that Plaintiff and his parents are now aware of, believe they should have known during settlement negotiations, and believe the settlement process would have been different if they had known, potentially resulting in either no settlement or a higher settlement amount. (D321 p. 42 ¶ 84; App. A58). Plaintiff seeks damages for “bodily injury damages in an amount equal to the difference between the settlement amount of the agreement and what could have reasonably been recovered by way of judgment or settlement, but for Defendants’ fraud.” (D321 p. 42 ¶ 85; App. A58).

In June 2010, during ongoing settlement negotiations between Plaintiff and Defendant Ace, the Kanakuk Defendants drafted a message to be sent to approximately 8,000 parents that have kids attending camp that summer but was ultimately not sent out (“Draft June 2010 Letter”). (D321 p. 44 ¶ 88; D293 p. 8 ¶ 10; App. A60, A92).

The Draft June 2010 Letter contained admissions by the Kanakuk Defendants concerning their prior knowledge of inappropriate conduct by Pete Newman. (D321 p. 43 ¶ 87; D293 p. 8 ¶ 10; App. A59, A92). The Draft June 2010 Letter stated, in part:

Several years ago, we became aware of situations in which Pete Newman engaged in immature and inappropriate behavior, including skinny dipping and playing basketball in the buff. His actions were clear violations of the policies and standards of behavior in place at Kanakuk. At the time we believed his behavior was driven by immaturity and incredibly bad judgment, nothing else. We certainly did not believe Pete would engage in the criminal and abusive behavior he now has admitted.

(D321 p. 43-44 ¶ 87; D332 p. 3-4; App. A60). The Draft June 2010 Letter was ultimately not sent out. (D321 p. 44 ¶ 88; App. A60).

Plaintiff's Second Amended Petition was filed effective July 15, 2024, and added a claim for civil conspiracy against Defendants. (D321 p. 43 ¶ 86). Paragraph 45 of the Second Amended Petition alleges:

In response to the threats and “strong[] recommendations” made by Defendant ACE and Cannon, the Kanakuk Defendants agreed to not send the proposed June 17, 2010, letter to Kanakuk families, and consequently, conspired with Defendant ACE to conceal the information concerning Defendants knowledge of Newman's prior sexual misconduct.

(D321 p. 43 ¶ 87).

III. Additional Facts Related to Defendant ACE's Motion for Summary Judgment

Plaintiff asserts claims of fraud and civil conspiracy against all Defendants, including Defendant ACE. (D293 p. 1-2 ¶ 2; App. A85-A86). Plaintiff's fraud claim arises out of the September 2009 phone conversation between Defendant White and Plaintiff's parents, as well as Defendants' agreement not to send the Draft June 2010 Letter and to conceal the Kanakuk Defendants' prior knowledge of Newman's sexual misconduct. (D293 p. 1-2 ¶ 2; App. A85-A86).

Defendant ACE was not a party to the September 2009 phone call and did not communicate with Plaintiff or his parents prior to that call. (D293 p. 5 ¶ 5; App. A89). Defendant ACE knew of claims against the Kanakuk Defendants resulting from Newman's sexual misconduct no later than April 6, 2009, and knew of Plaintiff's claim no later than August 4, 2009. (D293 p. 5 ¶ 5, p. 14 ¶ 18-19; App. A89, A98). Defendant ACE was aware that the Kanakuk Defendants, including Defendant White, were communicating with Plaintiff's parents during the settlement negotiations, and either authorized or empowered them to make representations bearing on the settlement. (D293 p. 5-6 ¶ 5; App. A89-A90).

ACE's claim specialist, Marilyn Cannon, admits that she would not know about information that was out in public. (D293 p. 24 ¶ 45; App. A108). Rather, she testified that she was "only aware of information that was provided directly to [her] from the insured" and that she "just relied on the insured, the claimant families, and employees at the insured location." (D293 p. 24 ¶ 45; App. A108).

The Draft June 2010 Letter, which was scheduled to be sent to 8,000 Kanakuk families on June 18, 2010, admitted the Kanakuk Defendants had prior knowledge of inappropriate conduct by Pete Newman. (D293 p. 21 ¶ 36; App. A105). In response to the Draft June 2010 Letter, Defendant ACE sent a Reservation of Rights Letter to the Kanakuk Defendants. (D293 p. 9-10 ¶ 12; App. A93-A94). The Reservation of Rights letter stated Defendant ACE would potentially deny coverage if the Draft June 2020 Letter was sent. (D293 p. 24-28 ¶ 48-53; App. A108-A112). As a result of Defendant ACE's threats to deny coverage, the Kanakuk Defendants and Defendant ACE agreed that the Draft June 2020 Letter would not be sent or made public, and Defendant ACE would not deny coverage. (D293 p. 28-29 ¶ 54-57; App. A112-A113).

Defendant ACE violated industry claim-handling standards and practices by authorizing representatives of the Kanakuk Defendants to communicate directly with Plaintiff's parents during the investigation and negotiation of the Yandell Claim without supervision or control and induced the Kanakuk Defendants to agree to withhold material facts from actual or potential claimants (including Plaintiff's parents) concerning prior inappropriate conduct by Newman. (D293 p. 29-30 ¶ 58-60; App. A113-A114).

Ace admits their insureds have the right to talk to claimants and tell them the truth about what is occurring, and Defendant ACE should not restrict an insured from telling the truth. (D293 p. 30-31 ¶ 61-66; App. A114-A115).

The Kanakuk Defendants and Defendant ACE benefited and/or avoided exposure to greater liability from Defendant White's

misrepresentations and the subsequent agreement between Defendant ACE and the Kanakuk Defendants to conceal facts regarding prior knowledge of Newman's inappropriate conduct. (D293 p. 35-37 ¶ 80-84; App. A119-A121). Defendant ACE was in active negotiations with Plaintiff's parents when Defendant ACE received the Draft June 2010 Letter. (D293 p. 37 ¶ 85; App. A121). Prior to seeing the Draft June 2010 Letter, Defendant ACE had only offered \$30,150 to resolve Plaintiff's claims. (D293 p. 37 ¶ 88; App. A121). Defendant ACE offered \$250,000 to Plaintiff's parents to settle less than a week after ACE received the Draft June 2010 Letter. (D293 p. 37 ¶ 86-87; App. A121).

IV. Procedural History

Plaintiff filed this action on November 17, 2022, in the Circuit Court of Taney County, Missouri. (D191 p. 51-53). A change of judge was grant on January 9, 2023, and the case was transferred to the Circuit Court of Christian County by Order dated April 25, 2023. (D191 p. 58, 62; D381; D382; D383).

Plaintiff filed a Motion for Leave to File Second Amended Petition for Damages on July 11, 2024. (D191 p. 29; D201; D202). The Motion was granted and Plaintiff's Second Amended Petition was shown as filed on July 15, 2024. (D191 p. 30). Plaintiff's Second Amended Petition alleged claims for fraud against all Defendants in Count I and claims for civil conspiracy against all Defendants in Count II. (D202 p. 4-16).

Kanakuk Defendants' Answer and Affirmative Defenses to Plaintiff's Second Amended Petition for Damages was filed on October 15, 2024. (D228). Defendant ACE American Insurance Company's Answer to

Plaintiff's Second Amended Petition was filed on October 16, 2024. (D229).

Kanakuk Defendants' Motion for Summary Judgment and supporting documents were filed on October 16, 2024. (D246-D274). Plaintiff's Suggestions in Opposition to Kanakuk Defendants' Motion for Summary Judgment and Plaintiff's Response to Kanakuk Defendants' Statement of Uncontroverted Material Facts and Plaintiff's Statement of Additional Uncontroverted Material Facts, with supporting documents, were filed on November 15, 2024. (D292; D321-D337; App. A17-A84). Kanakuk Defendants' Reply Suggestions in Support of Motion for Summary Judgment was filed December 9, 2024. (D351).

Defendant ACE American Insurance Company's Motion for Summary Judgment and supporting documents were filed on October 17, 2024. (D230-D245). Plaintiff's Suggestions in Opposition to Defendant ACE American Insurance Company's Motion for Summary Judgment as well as Plaintiff's Response to Defendant ACE's Statement of Uncontroverted Material Facts and Plaintiff's Statement of Additional Uncontroverted Material Facts, with supporting documents, were filed on November 15, 2024. (D291; D293-D320; App. A85-A127). Defendant ACE American Insurance Company's Responses to Plaintiff's Statement of Additional Uncontroverted Material Facts, its Suggestions in Support of Its Reply to Its Motion for Summary Judgment, and its Statement of Additional Uncontroverted Material Facts were filed on December 9, 2024. (D340-D350; D356; D359). Plaintiff's Sur-Reply in Opposition and Response to Defendant ACE American Insurance

Company's Statement of Additional Uncontroverted Material Facts were filed on December 23, 2024. (D363; D364; App. A128-A133).

The trial court entered its Order on January 17, 2025, setting forth its reasons for granting the Defendants' motions for summary judgment. (D191 p. 48; D377; App. A4-A16). On the same day the trial court entered its Order, January 17, 2025, the trial court entered its Judgment granting "Defendants' motions for summary judgment because Plaintiff's claims are time-barred and because he cannot establish actionable fraud or civil conspiracy against these Defendants." (D191 p. 48; D378 p. 1; App. A3). Plaintiff filed his Notice of Appeal to this Court on February 19, 2025. (D191 p. 50; D379).

POINTS RELIED ON

I. The trial court erred in finding that nothing in the record supports the claim that the portion of Joe White's statement where he said, "No, we've never seen anything", was false or misleading, because that finding is not proper as a matter of law, in that the issue of whether that statement was false or misleading was not raised in Defendants' motions for summary judgment, the Defendants' motions for summary judgment all assumed the false or misleading nature of Joe White's statement, and a reasonable inference from that statement and the context in which it was made does not limit it to a claim that no Kanakuk employee witnessed sexual misconduct committed by Newman.

Altidor v. Broadfield, 576 S.W.3d 272 (Mo. App. E.D. 2019)

Beal v. Kan. City Southern Ry. Co., 527 S.W.3d 883 (Mo. App. W.D. 2017)

Bozarth v. Bozarth, 613 S.W.3d 868 (Mo. App. W.D. 2020)

Dilley v. Valentine, 401 S.W.3d 544 (Mo. App. W.D. 2013)

Rule 74.04

II. The trial court erred in finding that Plaintiff did not have a right to rely on Defendant White's representations and granting summary judgment in favor of Defendants, because Defendants are not entitled to judgment as a matter of law, in that the trial court found Plaintiff was not entitled to rely on Defendant White's representations based on different facts than argued by the Kanakuk Defendants, Missouri law

establishes that Plaintiff was entitled to rely on the distinct and specific representations made by Defendant White regardless of media reports or the sentencing hearing, and the alleged disclosures in November 2010 relied upon by the Kanakuk Defendants do not address Defendant White's knowledge in September 2009.

Beal v. Kan. City Southern Ry. Co., 527 S.W.3d 883 (Mo. App. W.D. 2017)

Dilley v. Valentine, 401 S.W.3d 544 (Mo. App. W.D. 2013)

Iota Management Corp. v. Boulevard Inv. Co., 731 S.W.2d 399 (Mo. App. E.D. 1987)

Rule 74.04

III. The trial court erred in finding Plaintiff's claims are barred by the statute of limitations in § 516.120(5) and granting summary judgment in favor of Defendants, because genuine issues of material fact exist regarding when Plaintiff's claims accrued, in that Plaintiff presented evidence that he did not discover the fraud until December 2021, Plaintiff and his parents did not follow the prosecution of Newman or the media coverage because they trusted Defendant White, were dealing with emotional and psychological consequences of Newman's abuse of Plaintiff, and lived in Nashville, Tennessee, Defendant White made distinct and specific representations upon which Plaintiff was entitled to rely, and Plaintiff was excused from exercising due diligence because of the relationship of trust that existed with Defendant White.

Boland v. St. Luke's Health Sys., 588 S.W.3d 879 (Mo. banc 2019)

Dean v. Noble, 477 S.W.3d 197 (Mo. App. W.D. 2015)

Ellison v. Fry, 437 S.W.3d 762 (Mo. banc 2014)

Thomas v. Grant Thornton LLP, 478 S.W.3d 440 (Mo. App. W.D. 2015)

§ 516.120 RSMo

Rule 74.04

IV. The trial court erred in finding no agency relationship existed between Defendant White and Defendant ACE and granting Defendant ACE's Motion for Summary Judgment, because genuine issues of material fact exist regarding whether an agency relationship existed, in that the trial court improperly limited its consideration to the facts existing before September 2009 and Plaintiff presented evidence that Defendant White participated in settlement negotiations with the knowledge, consent, and at the direction of Defendant ACE, and the Kanakuk Defendants and Defendant ACE agreed to conceal the information in the Draft June 2010 Letter in furtherance of Defendant White's September 2009 fraudulent misrepresentations.

Bar Plan v. Cooper, 290 S.W.3d 788 (Mo. App. E.D. 2009)

Lynch v. Helm Plumbing & Elec. Contrs., 108 S.W.3d 657 (Mo. App. W.D. 2002)

V. The trial court erred in granting summary judgment in favor of Defendants based on its finding Plaintiff's civil conspiracy claims

cannot be maintained because the court found Defendants are not guilty of fraud, because genuine issues of material fact exist regarding whether Defendants conspired to fraudulently misrepresent or conceal information, in that the trial court improperly granted summary judgment regarding Plaintiff's fraud claims and Plaintiff presented evidence that Defendant ACE convinced the Kanakuk Defendants not to send the Draft June 2010 Letter, and Defendant White made distinct and specific representations rather than stay silent when asked about the Kanakuk Defendants' prior knowledge of Newman's sexual misconduct.

Grisamore v. State Farm Mut. Auto. Ins. Co., 306 S.W.3d 570 (Mo. App. W.D. 2010)

John Knox Vill. v. Fortis Constr. Co., 449 S.W.3d 68 (Mo. App. W.D. 2014)

Vickers v. Progressive Cas. Ins. Co., 979 S.W.2d 200 (Mo. App. 1998)

Western Blue Print Co., LLC v. Roberts, 367 S.W.3d 7 (Mo. banc 2012)

VI. The trial court erred in granting summary judgment in favor of Defendants, because Defendants are not entitled to judgment as a matter of law, in that Missouri law allows a party to a settlement to pursue a claim that the party was fraudulently induced to agree to the settlement without requiring that party to seek to have the settlement set aside and regardless of the language in the settlement releasing claims.

Andes v. Albano, 853 S.W.2d 936 (Mo. banc 1993)

Hess v. Chase Manhattan Bank, USA, N.A., 220 S.W.3d 758 (Mo. banc 2007)

Roth v. La Societe Anonyme Turbomeca Fr., 120 S.W.3d 764 (Mo. App. W.D. 2003)

Wagner v. Uffman, 885 S.W.2d 783 (Mo. App. E.D. 1994)

VII. The trial court erred in granting summary judgment in favor of Defendants, because Defendants are not entitled to judgment as a matter of law, in that the Tennessee judgment does not preclude Plaintiff from pursuing a claim for fraudulently inducing the underlying settlement, and the facts underlying Plaintiff's fraud and civil conspiracy claims are different than the facts underlying Plaintiff's 2009 claim against the Kanakuk Defendants.

Bachman v. Bachman, 997 S.W.2d 23 (Mo. App. E.D. 1999)

Boehlein v. Crawford, 605 S.W.3d 135 (Mo. App. E.D. 2020)

Twehous Excavating Co. v. L.L. Lewis Invs., L.L.C., 295 S.W.3d 542 (Mo. App. W.D. 2009)

Walker v. Walker, 954 S.W.2d 425 (Mo. App. W.D. 1997)

VIII. The trial court erred in granting summary judgment in favor of Defendants, because genuine issues of material fact exist regarding Defendant White's intent to induce Plaintiff to settle, in that the fact that the representations were made before negotiations started does not

negate intent and Plaintiff presented evidence that disclosing the Kanakuk Defendants' prior knowledge of Newman's sexual misconduct could expose Defendants to greater liability, Defendants eventually agreed and conspired to conceal that knowledge, Defendants were concerned about lawsuits in 2009, and Defendant White pressured Plaintiff's father to settle Plaintiff's claims.

Altidor v. Broadfield, 576 S.W.3d 272 (Mo. App. E.D. 2019)

Beal v. Kan. City Southern Ry. Co., 527 S.W.3d 883 (Mo. App. W.D. 2017)

IX. The trial court erred in granting summary judgment in favor of Defendants, because Defendants are not entitled to judgment as a matter of law regarding Plaintiff's fraudulent concealment claims, in that the trial court did not address Plaintiff's fraudulent concealment claims and Defendants all had a duty to disclose the information in the Draft June 2010 Letter as a result of Defendant White's prior fraudulent misrepresentations concerning the Kanakuk Defendants' prior knowledge of Newman's sexual misconduct.

Grisamore v. State Farm Mut. Auto. Ins. Co., 306 S.W.3d 570 (Mo. App. W.D. 2010)

Tietjens v. General Motors Corp., 418 S.W.2d 75 (Mo. 1967)

Vickers v. Progressive Cas. Ins. Co., 979 S.W.2d 200 (Mo. App. 1998)

Wild v. TWA, 14 S.W.3d 166 (Mo. App. W.D. 2000)

ARGUMENT SUMMARY

This is an appeal from the trial court's Order and Judgment which granted summary judgment in favor of the Kanakuk Defendants and Defendant ACE on January 17, 2025. (D377; D378; App. A3-A16).

The motions for summary judgment filed by the Kanakuk Defendants and Defendant ACE both raised multiple grounds upon which Defendants claim entitlement to summary judgment.

The Kanakuk Defendants' Motion for Summary Judgment alleges multiple grounds for summary judgment on Plaintiff's claim. The Kanakuk Defendants argue: (1) the Tennessee judgment approving the 2010 Settlement is entitled to full faith and credit; (2) Plaintiff's claims are time-barred; (3) no evidence exists that the Kanakuk Defendants intended to influence Plaintiff to settle the underlying claims; (4) the Kanakuk Defendants had no duty to disclose the allegedly concealed information; (5) the 2010 settlement bars Plaintiff's claims; and (6) Plaintiff's conspiracy claim fails because the underlying unlawful act, Plaintiff's fraud claim, fails. (D246 p. 1-2; D247 p. 2-6).

Defendant ACE's Motion for Summary Judgment also alleges multiple grounds for summary judgment. Defendant ACE argues: (1) Plaintiff's claims are barred by the statute of limitations; (2) Plaintiff's agency theory is factually impossible; (3) Defendant ACE had no duty to disclose the allegedly concealed information; (4) there is no evidence Defendant ACE and the Kanakuk Defendants had any contact regarding Plaintiff's claim prior to the Kanakuk Defendants' misrepresentations; and (5) Plaintiff's claims were released by the 2010 settlement. (D245 p. 2-5).

The trial court's Order granted summary judgment on multiple grounds, some of which were not raised in the Defendants' motions. The trial court found: (1) there is no evidence the portion of Defendant White's statement, "No, we've never seen anything", was false or misleading even though this issue was not raised by Defendants' motions; (2) Plaintiff did not have a right to rely on Defendant White's statement based on an argument that was not raised in Defendants' motions; (3) Plaintiff's fraud claim is barred by the statute of limitations in § 516.120(5); (4) Plaintiff cannot establish Defendant White was acting as an agent for Defendant ACE; and (5) Plaintiff cannot prevail on his civil conspiracy claims because summary judgment was granted on the underlying fraud claims.

Point I addresses the impropriety of the trial court's factual finding on an argument not raised by Defendants' motions for summary judgment and which fails to recognize the reasonable inferences in favor of Plaintiff. Point II addresses the impropriety of the trial court's grant of summary judgment based on the issue of reliance and an argument not raised by the motions for summary judgment.

Point III addresses the error in the trial court's grant of summary judgment based on the statute of limitations. Point IV addresses the trial court's improper determination regarding Defendant White's agency for Defendant ACE. Point V addresses the trial court's improper grant of summary judgment on Plaintiff's civil conspiracy claims.

While not addressed by the trial court, Plaintiff will address the additional arguments Defendants asserted in support of their Motions for Summary Judgment to show that summary judgment is not proper

on any basis. Point VI addresses Defendants' arguments that Plaintiff's claims are barred by the 2010 Settlement. Point VII addresses the argument that Plaintiff's claims are barred by the Tennessee judgment. Point VIII addresses the Kanakuk Defendants' arguments that Defendant White could not have intended to influence Plaintiff and his parents to settle Plaintiff's claim. Finally, Point IX addresses Defendants' arguments that they did not have any duty to disclose the information in the Draft June 2010 Letter.

ARGUMENT

I. The Trial Court Improperly Found Defendant White's Representation Was Not False or Misleading

The trial court erred in finding that nothing in the record supports the claim that Defendant White's statement, "No, we've never seen anything", was false or misleading, because that finding is not proper as a matter of law, in that the issue of whether that statement was false or misleading was not raised in Defendants' motions for summary judgment, the Defendants' motions for summary judgment all assumed the false or misleading nature of Defendant White's statement, and a reasonable inference from that statement and the context in which it was made does not limit it to a claim that no Kanakuk employee witnessed sexual misconduct committed by Newman.

A. Standard of Review and Preservation

Appellate review of a trial court's decision on a motion for summary judgment is "essentially de novo." The propriety of summary judgment is purely an issue of law. In determining whether summary judgment was proper, the appellate courts apply the same criteria as the trial court. Summary judgment is appropriate where "there is no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law." Rule 74.04(c)(6). On appeal from the grant of summary judgment, the record below is reviewed 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.

Beal v. Kan. City Southern Ry. Co., 527 S.W.3d 883, 885 (Mo. App. W.D. 2017) (brackets, citations, and internal quotation marks omitted). "To be entitled to summary judgment here, Defendants must show that they are entitled to judgment as a matter of law on every viable theory

pled by Plaintiffs.” *Altidor v. Broadfield*, 576 S.W.3d 272, 278 (Mo. App. E.D. 2019). “And we can only affirm the summary judgment on a ground that was actually raised in the motion and supported by the summary judgment record.” *Altidor*, 576 S.W.3d at 282.

This issue has been preserved for review by this Court. Summary judgment requirements are mandatory and noncompliance with Rule 74.04 is not subject to waiver by the parties. *See Bozarth v. Bozarth*, 613 S.W.3d 868, 872 (Mo. App. W.D. 2020). Plaintiff properly responded to the motions for summary judgment. (D291; D293-D320; D292; D321-D337). The trial court’s grant of summary judgment on a basis not raised in Defendants’ motions is not an error relating to the form or language of the judgment. Therefore, neither a motion for new trial nor a motion to amend the judgment was necessary to preserve this issue for appellate review. Rule 78.07(b).

B. The Motions for Summary Judgment and the Trial Court’s Rulings

Under Rule 74.04, a party is only entitled to summary judgment on a basis raised in the party’s motion for summary judgment. In this case, the Defendants’ motions for summary judgment did not question the fraudulent nature of the representations Plaintiff alleges were made by Defendant White. Despite the issue not being raised by Defendants’ motions, the trial court began its analysis by incorrectly finding a portion of Defendant White’s statement was not false. Such finding is improper and should be reversed so that the law of the case doctrine does not limit Plaintiff’s claims on remand.

The motions for summary judgment filed by the Kanakuk Defendants and Defendant ACE both raised multiple grounds upon which Defendants claim entitlement to summary judgment. (D245 p. 2-5; D246 p. 1-2; D247 p. 2-6). However, neither motion questioned the fraudulent nature of the misrepresentations Plaintiff alleges were made by Defendant White. In fact, the Kanakuk Defendants' Motion for Summary Judgment acknowledges that the alleged statements are fraudulent, stating:

Plaintiff's Seconded Amended Petition for Damages alleges fraud (Count I) and civil conspiracy (Count II) based on *fraudulent statements and omissions allegedly made by Kanakuk Defendants* over thirteen years ago and prior to parties' execution of a settlement agreement intended to dispose of all known and [sic] unknown claims.

(D246 p. 1) (emphasis added). Similarly, Defendant ACE's Motion for Summary Judgment also acknowledges that the alleged statements involve misrepresentations, stating:

This lawsuit arises from a September 2009 phone conversation between Joe White, President of Kanakuk, and Plaintiff's parents in which *Joe White allegedly misrepresented Kanakuk's knowledge* of an employee's history of sexual abuse.

(D245 p. 1) (footnote omitted; emphasis added).

Despite the lack of any argument by Defendants on this issue, the trial court started its summary judgment analysis by addressing whether the representations Plaintiff alleges could support a fraud claim. The trial court stated:

A Representation (of Fact)

As a general rule, to be actionable, a party must prove that the (mis)representation was a state of fact. [Quote and citation omitted]. Plaintiff has offered only the following statement(s):

“No, we’ve never seen anything. We’ve never – nothing has ever been on our radar with Pete.” – Joe White, September 2009

Considering the nature and circumstances of the phone call, the Court views this statement in two parts and interprets them given their plain and ordinary meaning: that (1) Joe (or others working for Kanakuk) never witnessed any sexual misconduct committed by Pete Newman; and (2) that Pete Newman was never “on the radar” at Kanakuk.”

In reviewing Plaintiff’s Second Amended Petition and their response to the summary judgment motions, Plaintiff has never pled or asserted that Joe White or anyone at Kanakuk ever witnessed sexual misconduct committed by Pete Newman. There is nothing in the record to support that the first part of Mr. White’s statement was false or misleading. Plaintiff’s entire case, then, rests on the second part of the statement: that Pete Newman was “not on our radar.” Merriam Webster defines being “on someone’s radar (screen)” as: being something someone is at all considering or thinking about. While subjective and, perhaps, difficult to prove, this Court found no clear guidance in Missouri law that “on our radar” was a statement of opinion or a statement of fact. The Court will proceed with its analysis assuming that it is a statement of fact.

(D377 p. 6-7; App. A9-A10).

As discussed below, the trial court’s finding that the first portion of Defendant White’s statement was not false or misleading is improper. That issue was not raised by Defendants in their motions for summary judgment and the trial court’s finding ignores the context in which Defendant White’s statement was made. Further, as discussed in the remaining Points Relied On, Defendants are not entitled to summary

judgment. Therefore, this finding by the trial court should be reversed so that the doctrine of law of the case does not limit Plaintiff's ability to pursue his claims on remand.

C. The Trial Court Improperly Interpreted Defendant White's Statement as a Matter of Law

Summary judgment is only proper when the summary judgment record shows that there is no genuine dispute regarding any material fact and the moving party is entitled to judgment as a matter of law. A party is not entitled to judgment as a matter of law on a basis not raised in a motion for summary judgment. In this case, the trial court issued rulings and granted summary judgment based on arguments not raised in the motions for summary judgment filed by the Kanakuk Defendants and Defendant ACE.

Missouri law is clear that summary judgment should only be granted on a basis raised in the motion for summary judgment. Rule 74.04 provides: "A motion for summary judgment shall summarily state the legal basis for the motion." Rule 74.04(c)(1). Additionally, "Movant shall file a separate legal memorandum explaining why summary judgment should be granted." Rule 74.04(c)(1). "Summary judgment may only be granted on a basis that the movant identifies in its motion for summary judgment." *Beal*, 527 S.W.3d at 886.

The movant is required to set forth the specific basis for summary judgment and list specific references to the record to support that basis so the opposing party, the trial court, and the appellate court are apprised of the movant's claim of entitlement to summary judgment.

Dilley v. Valentine, 401 S.W.3d 544, 550 (Mo. App. W.D. 2013). “The movant bears the burden of establishing both a legal right to judgment and the absence of any genuine issue of material fact required to support the claimed right to judgment.” *Dilley*, 401 S.W.3d at 550 (citation and internal quotation marks omitted). Compliance with Rule 74.04 is mandatory and failure to comply warrants reversal of the grant of summary judgment. *Dilley*, 401 S.W.3d at 550.

In this case, the trial court granted both Kanakuk Defendants’ Motion for Summary Judgment and Defendant ACE American Insurance Company’s Motion for Summary Judgment. (D230; D246; D377 p. 13; D378 p. 1; App. A3, A16). As discussed regarding Point II below, the trial court granted summary judgment, in part, based on an argument not raised in either motion. Additionally, the trial court made factual findings regarding an issue that was not raised in either motion. In addressing Defendant White’s representation, “No, we’ve never seen anything. We’ve never – nothing has ever been on our radar with Pete”, the trial court found: “There is nothing in the record to support that the first part of Mr. White’s statement was false or misleading.” (D377 p. 7; App. A10). That finding is improper because “the court erroneously went beyond the grounds asserted in Respondents’ motion[s].” *Beal*, 527 S.W.3d at 888.

Neither the Kanakuk Defendants’ Motion for Summary Judgment nor Defendant ACE’s Motion for Summary Judgment argued that “[t]here is nothing in the record to support that the first part of Mr. White’s statement was false or misleading.” Defendants never argued that the alleged representations by Defendant White were not false or

misleading. The trial court went beyond the issues raised by Defendants and made a factual finding, which should have been reserved for a jury, that is not supported by either the arguments raised by Defendants or the summary judgment facts. “The fundamental defect in the circuit court’s ruling is that it granted summary judgment on grounds which were not raised in the Respondents’ motion.” *Beal*, 527 S.W.3d at 885.

The trial court finding regarding the alleged representation by Defendant White also ignores the context in which the representation was made and fails to give Plaintiff the benefit of all reasonable inferences. Gregory Yandell testified regarding the call with Defendant White, which was on speakerphone and included Christa Yandell, stating:

“So I called Joe and I told Joe, I said, hey, Logan has admitted tonight that he was a victim of Pete and sexual molestation. And I almost immediately asked Joe, I said, ‘Joe, did you ever have any concerns about Pete being inappropriate with kids? Was there ever any red flags? Did you guys ever see anything that caused you concern about Pete not being around children? Had he ever had an incident or any type of situation that was, you know, inappropriate or sexual misconduct with kids?’ And Joe told me unequivocally, ‘No, we’ve never seen anything. We’ve never – nothing has ever been on our radar with Pete.’”

(D321 p. 4 ¶ 11, p. 54 ¶ 105; D293 p. 15 ¶ 22; App. A20, A70, A99).

Defendant White’s representations were made in response to specific questions from Plaintiff’s parents and must be interpreted in the context of those questions and the overall conversation.

Gregory Yandell asked whether the Kanakuk Defendants ever had any concerns about Newman being inappropriate with kids, were there

ever any red flags, did they ever see anything concerning, and had there been any incidents of inappropriate or sexual misconduct. (D321 p. 4 ¶ 11, p. 54 ¶ 105; D293 p. 15 ¶ 22; App. A20, A70, A99). In response to those questions, Defendant White stated: “No, we’ve never seen anything. We’ve never – nothing has ever been on our radar with Pete.” (D321 p. 4 ¶ 11, p. 54 ¶ 105; D293 p. 15 ¶ 22; App. A20, A70, A99).

Defendant White’s response, both sentences, must be considered together and in the context of the questions asked. “Seen” is the past participle of “see”. <https://www.merriam-webster.com/dictionary/seen>, last visited June 11, 2025. “See”, of course, has many definitions, including: “to perceive or detect as if by sight”, “to be aware of”, “to imagine as a possibility”, “to come to know”, and “to have experience of”. <https://www.merriam-webster.com/dictionary/see>, last visited June 11, 2025. “See” can also mean “to perceive (things) mentally; discern; understand”, “to be cognizant of; recognize”, and “to penetrate to the true nature of; comprehend; detect”. <https://www.dictionary.com/browse/see>, last visited June 11, 2025. Consequently, Defendant White’s statement, “No, we’ve never seen anything” is not simply a statement that the Kanakuk Defendants never *witnessed* Newman sexually abuse a camper. It means the Kanakuk Defendants were never *aware* of “anything” related to Newman’s sexual misconduct.

This is especially true when the two sentences are considered together. The definition of “radar” includes “range of notice” <https://www.merriam-webster.com/dictionary/radar>, last visited June 11, 2025, and “a means or sense of awareness or perception”. <https://www.dictionary.com/browse/radar>, last visited June 11, 2025.

Defendant White statement: “No, we’ve never seen anything. We’ve never – nothing has ever been on our radar with Pete” (D321 p. 4 ¶ 11, p. 54 ¶ 105; D293 p. 15 ¶ 22; App. A20, A70, A99), is a representation by Defendant White that the Kanakuk Defendants were never aware of anything related to Newman’s sexual misconduct. Defendant White simply made the same representation in two different ways.

Giving Plaintiff the benefit of all reasonable inferences, Defendant White’s statement, “No, we’ve never seen anything”, is not limited to a representation that no Kanakuk employee *witnessed* Newman’s sexual misconduct. Instead, it was a statement that the Kanakuk Defendants were not aware of, had not imagined the possibility of, and had not come to know of Newman’s sexual misconduct.

“The law of the case applies to determinations of law and determinations of fact; it applies to all matters that might have been, but were not, raised in the appeal.” *State ex rel. Woodland Lakes Trusteeship, Inc. v. Frawley*, 554 S.W.3d 886, 891 (Mo. App. E.D. 2018). The trial court’s finding regarding the first sentence of Defendant White’s statement improperly went beyond the issues raised by Defendants’ motions for summary judgment and interpreted that statement too narrowly. The trial court’s finding regarding the misrepresentation by Defendant White should be reversed so that Plaintiff is not limited by that finding on remand. That finding is improper because “the court erroneously went beyond the grounds asserted in Respondents’ motion[s]”, *Beal*, 527 S.W.3d at 888, and the court interpreted Defendant White’s statement too narrowly.

II. The Trial Court Improperly Found Plaintiff Did Not Have a Right to Rely on Defendant White's Representations

The trial court erred in finding that Plaintiff did not have a right to rely on Defendant White's representations and granting summary judgment in favor of Defendants, because Defendants are not entitled to judgment as a matter of law, in that the trial court found Plaintiff was not entitled to rely on Defendant White's representations based on different facts than argued by the Kanakuk Defendants, Missouri law establishes that Plaintiff was entitled to rely on the distinct and specific representations made by Defendant White regardless of media reports or the sentencing hearing, and the alleged disclosures in November 2010 relied upon by the Kanakuk Defendants do not address Defendant White's knowledge in September 2009.

A. Standard of Review and Preservation

The standard of review is the same as stated regarding Point I. This issue was preserved as stated regarding Point I. Additionally, Plaintiff specifically argued that Defendants are not entitled to summary judgment based on the alleged disclosures in November 2010. (D292 p. 14-17).

B. The Motions for Summary Judgment and the Trial Court's Rulings

Under Rule 74.04, a party is only entitled to summary judgment on a basis raised in the party's motion for summary judgment. In this case, Defendant ACE's Motion for Summary Judgment did not question Plaintiff's right to rely on the representation made by Defendant White. The Kanakuk Defendants' only argument addressing reliance was based solely on disputed disclosures allegedly made to Plaintiff one weekend in November 2010. In contrast, the trial court found Defendants are entitled to summary judgment because Plaintiff had no right to rely on Defendant White's statements based on information available at Newman's sentencing hearing and in news reports prior to the 2010 Settlement. Such ruling improperly goes beyond the issues raised by the motions for summary judgment. Further, neither set of facts show Defendants are entitled to summary judgment.

The motions for summary judgment filed by the Kanakuk Defendants and Defendant ACE both raised multiple grounds upon which Defendants claim entitlement to summary judgment. (D245 p. 2-5; D246 p. 1-2; D247 p. 2-6). The only argument by either the Kanakuk Defendants or Defendant ACE regarding reliance was one paragraph in the Kanakuk Defendant suggestions, which argued:

Moreover, the record refutes elements 5 [speaker's intent], 6 [hearer's ignorance of falsity], 7 [hearer's reliance], 8 [right to rely], and 9 [consequent and proximate injury], as Mr. White informed Plaintiff about Newman's inappropriate behavior before any settlement negotiations began. Both Plaintiff and John Doe I, another victim of Newman, testified that they spent a weekend at Joe White's house in Branson in November 2010, where they

discussed their abuse by Newman. Mr. White disclosed that it might become public knowledge that Newman engaged in inappropriate behavior, but that it was “boys being boys.” During this conversation, John Doe I asked Mr. White about Newman’s nude activities, including four-wheeling, streaking, and skinny dipping. Mr. White did not deny these actions, referring to them as “guy play.” Although Plaintiff does not recall the specifics of this discussion, he has no reason to doubt John Doe I’s account.

(D247 p. 26-27) (underlining in original, record citations removed).

Despite the limited argument by Defendants regarding reliance, the trial court found Defendants were entitled to summary judgment but based its ruling regarding reliance on different facts than argued by the Kanakuk Defendants. The trial court’s Order states:

The misdeeds of Pete Newman were published in a variety of public media outlets. Plaintiff, and his parents, were aware of and affirmatively participated in the criminal proceedings against Mr. Newman by filing victim impact statements. Mr. Newman was sentenced on seven counts of sexual misconduct involving young boys who attended camp at Kanakuk and will remain in prison for the rest of his natural life. At the public sentencing in February of 2010, the prosecuting attorney mentioned that Kanakuk was aware of inappropriate acts committed by Pete Newman. Plaintiff finalized his settlement in December of 2010. After reaching his settlement, Plaintiff then presented same for the consideration of a Tennessee Judge where he (through his parents) affirmatively represented that the settlement was fair and reasonable. From 2009 through 2010, Pete Newman’s conduct was published in print media, on television, and on social media. One such article, published by the Taney County Times in June of 2010, was titled “Former camp director receives multiple sentences – Kanakuk Kamp officials knew of inappropriate behavior since 2003”. KSOF pp37-38. The Yandells had ready and easy access to contradictory information about Pete Newman’s misconduct and Kanakuk’s knowledge thereof prior to reaching a settlement in late 2010.

In order to establish his claim, Plaintiff must prove that he had a right to rely on the statement(s) of Joe White when entering into a settlement in December of 2010. On this record, the Court finds that Defendants have established facts negating this element of Plaintiff's claim and that they are entitled to judgment as a matter of law on Count 1. In an abundance of caution, the Court will continue its inquiry.

(D377 p. 8-9; App. A11-A12).

As discussed below, the trial court's summary judgment in favor of Defendants on the basis that Plaintiff did not have the right to rely on Defendant White's representation is improper. The facts relied upon by the trial court are not the same facts relied upon in the Kanakuk Defendants' argument. Further, neither set of facts show that Defendants are entitled to judgment as a matter of law and Missouri law shows that Plaintiff did have a right to rely on the distinct and specific representations made by Defendant White. Therefore, the grant of summary judgment in favor of Defendants on Plaintiff's fraud claim should be reversed.

C. The Trial Court Improperly Relied On Facts Not Argued by Defendants and Which Do Not Show Defendants Are Entitled to Judgment as a Matter of Law

Summary judgment is only proper when the summary judgment record shows that there is no genuine dispute regarding any material fact and the moving party is entitled to judgment as a matter of law. A party is not entitled to judgment as a matter of law on a basis not raised in a motion for summary judgment. In this case, the trial court granted summary judgment based on an argument not raised in the motions for summary judgment.

The only argument made by either Defendant ACE or the Kanakuk Defendants regarding Plaintiff's right to rely on Defendant White's fraudulent representations was in one paragraph in the Kanakuk Defendants' suggestions, which is quoted above. (D247 p. 26-27). "A motion for summary judgment shall summarily state the legal basis for the motion." Rule 74.04(c)(1). Additionally, "Movant shall file a separate legal memorandum explaining why summary judgment should be granted." Rule 74.04(c)(1). "Summary judgment may only be granted on a basis that the movant identifies in its motion for summary judgment." *Beal*, 527 S.W.3d at 886. Compliance with Rule 74.04 is mandatory and failure to comply warrants reversal of the grant of summary judgment. *Dilley*, 401 S.W.3d at 550.

The trial court went beyond the arguments raised in Defendants' motions for summary and granted the motions on a basis not raised by Defendants. "The fundamental defect in the circuit court's ruling is that it granted summary judgment on grounds which were not raised in the Respondents' motion." *Beal*, 527 S.W.3d at 885. Additionally, it is clear that Plaintiff did have a right to rely on Defendant White's distinct and specific representations. Therefore, it is clear Defendants are not entitled to summary judgment on Plaintiff's fraud claims.

The Kanakuk Defendants argued only that alleged disclosures that occurred one weekend in November 2010 negated Plaintiff's right to rely on Defendant White's representations. (D247 p. 26-27). The only time the trial court mentioned that weekend was in its discussion of the statute of limitations. (D377 p. 9; App. A12) ("the record suggest that Plaintiff *may have* overheard contradictory information prior to

settlement when he spent a weekend at Joe White’s home in August [sic] of 2010.”). In contrast, the trial court discussed Newman’s sentencing hearing and a June 2010 Taney County Times article in concluding that “The Yandells had ready and easy access to contradictory information about Pete Newman’s misconduct and Kanakuk’s knowledge thereof prior to reaching a settlement in late 2010.” (D377 p. 8-9; App. A11-A12).

The trial court found Plaintiff did not have a right to rely on Defendant White’s representations based on different facts than relied upon by the Kanakuk Defendants. “The fundamental defect in the circuit court’s ruling is that it granted summary judgment on grounds which were not raised in the Respondents’ motion.” *Beal*, 527 S.W.3d at 885. Summary judgment based on an argument not raised by Defendants is improper and should be reversed.

Further, the availability of contradictory information at the sentencing hearing and in a news article does not negate Plaintiff’s right to rely on Defendant White’s distinct and specific representations. Gregory Yandell asked whether the Kanakuk Defendants ever had any concerns about Newman being inappropriate with kids, were there ever any red flags, did they ever see anything concerning, and had there been any incidents of inappropriate or sexual misconduct. (D321 p. 4 ¶ 11, p. 54 ¶ 105; D293 p. 15 ¶ 22; App. A20, A70, A99). In response to those specific questions, Defendant White stated: “No, we’ve never seen anything. We’ve never – nothing has ever been on our radar with Pete.” (D321 p. 4 ¶ 11, p. 54 ¶ 105; D293 p. 15 ¶ 22; App. A20, A70, A99). Defendant White’s response is a distinct and specific representation

regarding the Kanakuk Defendants' prior knowledge of Newman's sexual misconduct. Under Missouri law, Plaintiff was entitled to rely on that specific misrepresentation.

A plaintiff that has an opportunity to investigate, or even conducts an investigation, still has a right to rely on distinct and specific representations of fact.

The fact that one makes an independent investigation does not necessarily show that he relies on the information gained from the investigation rather than the representations made by the other party. In addition, if the one making the investigation makes only a partial investigation and relies on the misrepresentations as well as the investigation he may maintain an action for fraud.

Iota Management Corp. v. Boulevard Inv. Co., 731 S.W.2d 399, 413 (Mo. App. E.D. 1987) (citations omitted). Under Missouri law, the opportunity to investigate does not bar the right of reliance in an action for fraud. *Iota Management Corp.*, 731 S.W.2d at 413. Further, "notice and means of knowledge have no application where distinct and positive representations of fact have been made." *Iota Management Corp.*, 731 S.W.2d at 413 (citations and internal quotation marks omitted).

"The right to rely on a representation is ordinarily a question of fact for the trier of fact." (D377 p. 7; App. A10) (quoting *Kratky v. Musil*, 969 S.W.2d 371, 376 (Mo. App. W.D. 1998)). The facts in the summary judgment record show that a question of fact exists and Defendants are not entitled to judgment as a matter of law on this issue.

From September 2009 until December 2021, Plaintiff's parents, Gregory and Christa Yandell, chose not to further investigate Newman, did not follow the press or media coverage of his prosecution, and did

not read any articles about him, because they went directly to the source, Defendant White, to determine the information they needed regarding Newman's actions and the Kanakuk Defendants' knowledge. (D321 p. 4-5 ¶ 13, p. 6 ¶ 15, p. 41 ¶ 82; App. A20-A21, A22, A57). Plaintiff's parents did not follow the press or media coverage of Newman's prosecution and did not attend the sentencing hearing because they trusted Defendant White and because Plaintiff was completely out of control with his trauma, with his PTSD, and his emotional state. (D321 p. 6-12 ¶ 15-24, p. 15-18 ¶ 33-40, p. 47 ¶ 93; D293 p. 6 ¶ 8; App. A22-A28, A31-A35, A63, A90).

The fact that the criminal prosecution of Newman and the media coverage of that prosecution, all of which occurred in and around Taney County, Missouri, exposed information that contradicted Defendant White's representations does not mean that Plaintiff and his parents did not have the right to rely on those representations.

When distinct and specific representations have been made and are to be acted upon, the representee has the right to rely on the representation even if the parties stand on equal footing or have equal knowledge or means of information relating to the subject matter of the representation.

Iota Management Corp., 731 S.W.2d at 413. Plaintiff and his parents were in Tennessee. (D321 p. 18-19 ¶ 40; App. A34-A35). Plaintiff and his parents were dealing with the emotional and psychological impact of Newman's actions on their lives. (D321 p. 15 ¶ 33; App. A31). They asked a person they trusted, a person that was in the best position to know, what prior knowledge the Kanakuk Defendants had regarding Newman's sexual misconduct. Defendant White made distinct and

specific representations regarding that knowledge. Plaintiff and his parents had a right to rely on those representations.

D. The Alleged Disclosures In November 2010 Do Not Show Defendants Are Entitled to Judgment as a Matter of Law

In contrast to the trial court's reasoning, the Kanakuk Defendants argued that alleged disclosures to Plaintiff in November 2010 negated his right to rely on Defendant White's September 2009 fraudulent representations. That argument fails for two reasons. First, the alleged disclosures did not address the Kanakuk Defendants prior knowledge of Newman's sexual misconduct, only Defendant White's knowledge in November 2010. Second, genuine issues of material fact exist regarding what information was disclosed in November 2010. Consequently, Defendants have not shown that they are entitled to judgment as a matter of law regarding Plaintiff's fraud claims.

The Kanakuk Defendants argued briefly that Plaintiff's right to rely was refuted because "Mr. White informed Plaintiff about Newman's inappropriate behavior before any settlement negotiations began." (D247 p. 26) (underlining omitted). As an initial matter, Defendants' argument misstates the timing. The settlement negotiations began in December 2009, nearly a year before the alleged disclosure. (D321 p. 32-33 ¶ 63; D248 p. 17 Heading VII; D293 p. 16 ¶ 24; App. A100). Consequently, contrary to Defendants' claim, the alleged disclosure did not occur before negotiations began.

More importantly, the information Defendant White allegedly disclosed in November 2010 is irrelevant to Plaintiff's claims. Plaintiff's claim is that Defendant White, in September 2009, falsely and

fraudulently told Plaintiff's parents that the Kanakuk Defendants did not have any prior knowledge of Newman's sexual misconduct. (D321 p. 54 ¶ 105, p. 55 ¶ 108; App. A70, A71). The disclosures that Defendant White allegedly made in November 2010 were: (1) it might become public knowledge that Newman engaged in inappropriate behavior (D321 p. 22 ¶ 49; App. A38); (2) Defendant White did not deny knowing that Newman was four-wheeling in the nude, streaking, and skinny dipping with other boys (D321 p. 23 ¶ 50; App. A39); and (3) Plaintiff asked Defendant White if those things occurred. (D321 p. 23-24 ¶ 51; App. A39-A40). Nothing in those alleged disclosures indicates *when* Defendant White learned the information he was disclosing.

Newman was charged on September 14, 2009, with four felony counts involving sexual offenses against minors. (D321 p. 1 ¶ 6; App. A18). Newman was charged with an additional five felony counts involving sexual offenses against minors on November 17, 2009. (D321 p. 12-13 ¶ 25; App. A28-A29). All of those charges were filed a year or more before the weekend at Defendant White's house in November 2010. Newman pled guilty in February 2010 and was sentenced in June 2010, months before the weekend at Defendant White's house. (D321 p. 14 ¶ 30, p. 15 ¶ 34; App. A30, A31).

The fact that Defendant White knew of Newman's sexual misconduct in November 2010 is not surprising; it was after Newman was charged, pled guilty, and was sentenced. That knowledge is irrelevant to Plaintiff's claims. Nothing in the alleged disclosures that occurred in November 2010 indicate that Defendant White and the Kanakuk Defendants had knowledge of Newman's sexual misconduct prior to

September 2009. As a result, the statements Defendant White allegedly made in November 2010 do not negate Plaintiff's right to rely on Defendant White's fraudulent misrepresentation in September 2009 that the Kanakuk Defendants did not have any prior knowledge of Newman's sexual misconduct.

Finally, genuine issues of material fact exist regarding the conversations that occurred during the weekend Plaintiff spent at Defendant White's house. Plaintiff testified that he did not remember the conversations John Doe I described, that John Doe I's recollection is different than Plaintiff's recollection, that John Doe I was not present when Plaintiff spoke with Defendant White, and that John Doe I's experience was not Plaintiff's experience. (D321 p. 23-24 ¶ 50-52; App. A39-A40).

Defendants are not entitled to summary judgment on Plaintiff's fraud claims on the basis that Plaintiff did not have the right to rely on Defendant White's representations. The trial court granted summary judgment based on arguments not raised by Defendants. The trial court's grant of summary judgment on that basis is improper because "the court erroneously went beyond the grounds asserted in Respondents' motion[s]." *Beal*, 527 S.W.3d at 888. Further, Defendants' arguments do not show that they are entitled to judgment as a matter of law. Therefore, this Court should reverse and remand for a trial on the merits.

III. The Trial Court Improperly Found Plaintiff's Claims Are Barred by the Statute of Limitations

The trial court erred in finding Plaintiff's claims are barred by the statute of limitations in § 516.120(5) and granting summary judgment in favor of Defendants, because genuine issues of material fact exist regarding when Plaintiff's claims accrued, in that Plaintiff presented evidence that he did not discover the fraud until December 2021, Plaintiff and his parents did not follow the prosecution of Newman or the media coverage because they trusted Defendant White, were dealing with emotional and psychological consequences of Newman's abuse of Plaintiff, and lived in Nashville, Tennessee, Defendant White made distinct and specific representations upon which Plaintiff was entitled to rely, and Plaintiff was excused from exercising due diligence because of the relationship of trust that existed with Defendant White.

A. Standard of Review and Preservation

The standard of review is the same as stated regarding Point I.

This issue was preserved for review by this Court. Plaintiff properly responded to the motions for summary judgment. (D291; D293-D320; D292; D321-D337). Further, Plaintiff specifically argued that Defendants are not entitled to summary judgment based on the statute of limitations. (D291 p. 5-15; D292 p. 2-12).

B. Genuine Issues of Material Fact Exist Regarding Whether the Statute of Limitations Bars Plaintiff's Claims

Contrary to the trial court's holding and the Defendants' arguments, the uncontroverted material facts do not show that Plaintiff's claims are barred by the statute of limitations. Plaintiff and his parents were not required to investigate every media report and lawsuit involving the Kanakuk Defendants to determine if the Kanakuk Defendants had committed fraud. Instead, Plaintiff and his parents reasonably relied on the fraudulent misrepresentations by Defendant White. At most, genuine issues of material fact exist regarding whether Plaintiff and his parents exercised reasonable diligence.

A party is entitled to summary judgment only if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Rule 74.04(c)(6) ("If the motion, the response, the reply and the sur-reply show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law, the court shall enter summary judgment forthwith."). In the present case, the Kanakuk Defendants have not established that they are entitled to judgment as a matter of law and fact questions exist regarding whether Plaintiff and his parents exercised reasonable diligence.

The trial court ruled that Plaintiff's claims are barred by the statute of limitations because Plaintiff had the means to discover Defendants' fraud more than five years before he filed this action. The trial court based that holding on media coverage and information presented at Newman's sentencing hearing. The trial court's Order states:

Statute of Limitations

Plaintiff's case was first filed on November 17, 2022 and his case rests on the statement(s) of Joe White from September of 2009. According to the Second Amended Petition, Joe White misrepresented his knowledge of prior bad acts of Mr. Newman before a settlement was reached in late 2010. While Plaintiff alleges that he discovered "the falsity of" Joe White's [statement] in 2021, the record suggests that Plaintiff may have overheard contradictory information prior to settlement when he spent a weekend at Joe White's home in August of 2010. More importantly, the public sentencing hearing – which the Yandells were personally invited to attend – and regional media coverage both included specific references to Kanakuk having prior knowledge of Pete Newman's misconduct involving young boys. As referenced above, the Taney County Times published an article in June of 2010 titled "Former camp director receives multiple sentences – Kanakuk Kamp officials knew of inappropriate behavior since 2003". KSOF III37-38.

To be timely filed, a fraud claim must be brought within five (5) years from the date the cause of action accrued. §516.120(5) RSMo. Fraud accrues the date the facts constituting the fraud were discovered or "with reasonable diligence, could have been discovered." Boland v. Saint Luke's Health Sys., 588 S.W.3d 879, 882 (Mo. banc 2019). Between the public sentencing, the media coverage, and the civil claims being brought on behalf of other young victims, Plaintiff had the means to discover the alleged fraud before November of 2017 (five years before this action was filed). Judgment in favor of all Defendants is appropriate because these claims are time-barred.

(D377 p. 9-10; App. A12-A13). The trial court's holding is wrong because genuine issues of material exist regarding whether due diligence required Plaintiff to investigate the information available through Newman's sentencing hearing or local media coverage of that event.

As an initial matter, Plaintiff is asserting claims for fraudulent misrepresentation/concealment and civil conspiracy. (D202 p. 4-16). While the fraudulent misrepresentations and underlying settlement related to sexual abuse, Plaintiff's claims against Defendants are not for sexual abuse. Consequently, Defendant ACE's discussions regarding the statute of limitations for sexual abuse claims are irrelevant. (D245 p. 2-3, 11-14).

The statute of limitations is an affirmative defense, and, as such, the burden of proof rests with Defendants, not Plaintiff. Rule 55.08; *Cordes v. Williams*, 201 S.W.3d 122, 139 (Mo. App. W.D. 2006). As recognized by the trial court, the statute of limitations applicable to Plaintiff's claims is found in § 516.120(5) RSMo. Under that section, one of the actions that must be brought within five years is “[a]n 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.” § 516.120(5) RSMo.

Thus, a claim for fraud must be brought within five years from the date the cause of action accrued, i.e., the date the facts constituting the fraud were discovered or, with reasonable diligence, could have been discovered, but no longer than ten years after they occurred.

Boland v. St. Luke's Health Sys., 588 S.W.3d 879, 882 (Mo. banc 2019).

Under this statute, all fraud claims must be brought within five years from when the cause of action accrues, which is either when the fraud is discovered or at the end of 10 years after the fraud takes place, whichever occurs first.

Ellison v. Fry, 437 S.W.3d 762, 769 (Mo. banc 2014). “If the fraud is not discovered within ten years, then the cause of action is barred, in any event, after fifteen years of its commission.” *Dean v. Noble*, 477 S.W.3d 197, 204 (Mo. App. W.D. 2015).

Defendant White fraudulently misrepresented to Plaintiff’s parents that the Kanakuk Defendants had no prior knowledge of inappropriate conduct by Newman in September 2009. (D321 p. 4 ¶ 11, p. 54 ¶ 105, p. 55 ¶ 108; D293 p. 15 ¶ 22, p. 23 ¶ 43; App. A20, A70, A71, A99, A107). Plaintiff and his parents first learned that the Kanakuk Defendants had prior knowledge of Newman’s sexual misconduct when they came across an article titled “They Aren’t Who You Think They Are” by Nancy French” in late 2021. (D321 p. 41 ¶ 82; D293 p. 39-40 ¶ 96; App. A57, A123-A124). Consequently, Plaintiff’s claims are timely under the statute of limitations for fraud claims.

Under § 516.120(5), Plaintiff’s claim accrued in September 2019, ten years after the fraud took place because Plaintiff and his parents had not yet discovered the fraud. Plaintiff then had five years, or until September 2024, to file his claims against Defendants. Plaintiff’s initial petition was filed on November 17, 2022. (D321 p. 39 ¶ 79; D293 p. 40 ¶ 97; App. A55, A124). Plaintiff’s First Amended Petition for Damages was filed on May 11, 2023. (D321 p. 40 ¶ 80; D293 p. 40 ¶ 98; App. A56, A124). Plaintiff’s Second Amended Petition was filed effective July 15, 2024. (D321 p. 43 ¶ 86; D293 p. 40 ¶ 99; App. A59, A124). All of Plaintiff’s claims and petitions were filed within the five-year statute of limitations contained in § 516.120(5).

Defendants' assertion that the statute of limitations bars Plaintiff's claims involves a multistep argument. First, Defendants argue that the facts showing their fraud were either reported in public forums, covered in news articles, or raised in public lawsuits prior to 2018. (D247 p. 16; D245 p. 2). Second, Defendants argue Plaintiff was under a duty to discover, and could have discovered, that information. (D247 p. 14, 22; D245 p. 2). These arguments fail for multiple reasons.

As an initial matter, nothing in the cases relied upon by the Defendants suggest that Plaintiff had a continuing duty, after being fraudulently induced to settle his claim against the Kanakuk Defendants, to search public records for information showing that Defendant White lied.

In *Boland v. St. Luke's Health Sys.*, 588 S.W.3d 879 (Mo. banc 2019), the Court found the statute of limitations barred the plaintiffs' claims because the plaintiffs had filed earlier actions that included the same allegations more than five years before they filed their latest claims. As the Court explained, "everything Appellants know now, they knew in 2011 when they filed the last of their wrongful death petitions. They knew of Respondents' fraudulent conduct because it was set forth in those petitions[.]" *Boland*, 588 S.W.3d at 884. Consequently, "the five-year statute of limitations in section 516.120(5) prevents them from asserting those fraudulent concealment claims in October 2016." *Boland*, 588 S.W.3d at 884-85. Nothing in that case suggests that the plaintiffs' claims would have been barred if someone else had filed fraud claims in 2011.

In *Thomas v. Grant Thornton LLP*, 478 S.W.3d 440 (Mo. App. W.D. 2015), the Court found that the plaintiffs' claims that tax advice given them was fraudulent "accrued when and where they received the notices of deficiency" from the IRS. *Thomas*, 478 S.W.3d at 446.

The notices of deficiency alerted the Thomases to the facts giving rise to their fraud claim. Upon receipt of the detailed notices of deficiency, the Thomases actually discovered that the tax schemes were not legitimate tax avoidance strategies as allegedly represented by Grant Thornton.

Thomas, 478 S.W.3d at 446 (footnote omitted). Again, nothing in *Thomas* indicates that someone else having notice of the fraud would have put the plaintiffs on notice. The information regarding the fraud was sent directly to the plaintiffs, triggering the running of the statute of limitations.

Nothing in Defendants' allegedly uncontroverted materials facts indicates that Plaintiff was directly given notice before December 2019 that Defendant White's statements fraudulently misrepresented the Kanakuk Defendants' prior knowledge of Newman's sexual misconduct. Instead, Defendants are arguing that Plaintiff should have read various newspaper articles, attended a particular court hearing, or discovered the contents of lawsuits filed by other plaintiffs. Defendants have not cited any authorities that required Plaintiff to monitor newspaper articles, attend court hearings, or research court cases filed against Defendants. Defendant ACE's own employee, Marilyn Cannon, who was the adjuster handling these claims, states that she would not know about information that was out in the public unless provided directly to her. (D293 p. 6-7 ¶ 9, p. 24 ¶ 45; App. A108).

Defendants rely on cases such as *Boland* and *Thomas* for the proposition that Plaintiff was required to exercise reasonable diligence to discover the Kanakuk Defendants' fraud. (D247 p. 14; D245 p. 9).

Those cases state:

Thus, a claim for fraud must be brought within five years from the date the cause of action accrued, i.e., the date the facts constituting the fraud were discovered or, with reasonable diligence, could have been discovered, but no longer than ten years after they occurred.

Boland, 588 S.W.3d at 882. "A cause of action for fraud accrues at the time the defrauded party discovered or in the exercise of due diligence should have discovered the fraud." *Thomas*, 478 S.W.3d at 445 (citations and internal quotation marks omitted). It is a fact question whether Plaintiff exercised "reasonable diligence" or "due diligence". Defendants are not entitled to summary judgment because a genuine dispute exists regarding whether Plaintiff and his parents exercised reasonable diligence and Defendants have not shown that they are entitled to judgment as a matter of law.

Under Defendants' theory, every party that settles a claim would be required to spend the next ten years searching every media report or lawsuit involving the other party to the settlement to determine if there was any information indicating that the other party committed fraud. That would not "reasonable diligence", that would be obsession. Once a settlement is reached, the parties are entitled to rely on that settlement until they have reason to know that the other party committed fraud.

Plaintiff's parents held a close and personal relationship with the Kanakuk Defendants, including Defendant Joe White. (D321 p. 46 ¶ 89-

90; D293 p. 37-38 ¶ 89-90; App. A62, A121-A122). Defendant White admits that Plaintiff's parents trusted him and put faith in him, and similarly, trusted and put faith in Kanakuk. (D321 p. 50 ¶ 98; D293 p. 38 ¶ 91; App. A66, A122). The Kanakuk Defendants admit that campers and their families, like Plaintiff, looked up to Defendant White, and that it was reasonable for them to trust Defendant White. (D321 p. 50 ¶ 97; App. A66).

Defendant ACE acknowledged that campers, like Plaintiff and his parents, had very close connections with the Kanakuk Defendants, including Defendant White. (D293 p. 38 ¶ 92; D321 p. 50 ¶ 99; App. A66, A122). Plaintiff's parents reasonably relied on Defendants' representations regarding facts concerning prior knowledge of inappropriate conduct by Newman. (D321 p. 46-47 ¶ 91-92; D293 p. 38-39 ¶ 93-94; App. A62-A63, A122-A123). The representations made by Defendants leading up to, and at the time of, the settlement agreement with Plaintiff were material to Plaintiff's decision to settle his claims against the Kanakuk Defendants. (D321 p. 49-50 ¶ 95; D293 p. 39 ¶ 95; App. A65-A66, A123).

As a result of the fraudulent misrepresentations by Defendant White, Plaintiff's parents did not follow the press or media coverage of Newman's prosecution and did not attend the sentencing hearing because they trusted Defendant White. (D321 p. 6-12 ¶ 15-24, p. 15-19 ¶ 33-40, p. 20-21 ¶ 44, p. 47 ¶ 93; D293 p. 6 ¶ 8, p. 38-39 ¶ 93; App. A22-A28, A31-A35, A36-A37, A63, A90, A122-A123). Further, Plaintiff and his parents were in Tennessee. (D321 p. 18-19 ¶ 40; App. A34-A35). They were also dealing with the emotional and psychological impact of

Newman's actions on their lives. (D321 p. 15 ¶ 33; App. A31). A jury question exists regarding whether Plaintiff and his parents exercised due diligence.

Additionally, the rule that a party has a duty to make inquiry to discover facts surrounding the fraud does not apply when the defendant's fraud induces the plaintiff not to inquire.

When parties stand on equal footing and have an equal opportunity for discerning the truth or falsity of a representation, the representation generally is not actionable. "If one ... neglects means of information within easy reach, he should suffer the consequences." *Universal C.I.T. Credit Corporation v. Tatro*, 416 S.W.2d 696, 703 (Mo. App. 1967) (quoting *Cantley v. Plattner*, 228 Mo. App. 411, 67 S.W.2d 125, 130 (Mo. App. 1934)). This rule, however, does not apply in cases such as this one in which a party makes distinct and specific representations for the purpose of inducing the other party to act upon them. *Id.*

Premium Fin. Specialists, Inc. v. Hullin, 90 S.W.3d 110, 115 (Mo. App. W.D. 2002); *Deutsche Bank Nat'l Trust Co. v. Luna*, 655 S.W.3d 820, 830 (Mo. App. W.D. 2022) (explaining that "[w]hen distinct and specific representations have been made and are to be acted upon, the representee has the right to rely on the representation even if the parties stand on equal footing or have equal knowledge or means of information relating to the subject matter of the representation."). Defendants made distinct and specific representations to Plaintiff and his parents with the intention of inducing them to settle their claims against the Kanakuk Defendants.

Consequently, there was no reason for Plaintiff or his parents to investigate further after Defendant White fraudulently misrepresented to them that the Kanakuk Defendants did not have any prior

knowledge of Newman's sexual misconduct. Plaintiff and his parents exercised reasonable diligence in relying on Defendant White's statements.

Further, Plaintiff and his parents were excused from exercising due diligence to discover facts surrounding the fraud because of their relationship of trust and confidence with Defendant White.

“The failure to use ordinary diligence to discover the fraud may be excused where there exists some relation of trust and confidence ... between the party committing the fraud and the party who is affected by it, rendering it the duty of the former to disclose to the latter the true state of the transaction, and when it appears that it was through confidence in the party who committed the fraud that the other was prevented from discovering it.”

Larabee v. Eichler, 271 S.W.3d 542, 547 (Mo. banc 2008) (quoting *Thompson v. Lyons*, 281 Mo. 430, 220 S.W. 942 (1920)).

In *Larabee*, the Missouri Supreme Court declined to treat good-faith buyers as knowing facts that appeared in real-estate records for purposes of determining when a fraud claim against the sellers accrued, explaining:

Because “the recording laws do not make for the registration of fraud,” they do not operate to provide constructive notice to a good faith purchaser relative to the seller. The statute of limitations did not start running against the Larabees until they obtained actual notice of the fraud.

Larabee, 271 S.W.3d at 547.

Thus, because of their relationship with Defendant White, Plaintiff's parents' alleged failure to use ordinary diligence to discover the fraud is excused and it was reasonable, for someone in their position, to not

become aware of the fraud until December 2021 when they came across the French article.

Genuine issues of material fact exist regarding whether Plaintiff, in the exercise of reasonable diligence, should have discovered Defendants' fraud sooner. As a result, that issue presents a question for a jury.

Normally, the running of the statute is a question of law for the court to decide. However, when contradictory or different conclusions may be drawn from the evidence as to whether the statute of limitations has run, it is a question fact for the jury to decide.

Heidbreder v. Tambke, 284 S.W.3d 740, 746 (Mo. App. W.D. 2009) (citations and internal quotation marks omitted). Genuine issues of material fact exist such that Defendants have not shown that Plaintiff's claims are barred by the statute of limitations or that Defendants are entitled to judgment as a matter of law. The trial court erred in granting summary judgment based on the statute of limitations and this Court should reverse the trial court's Judgment and remand for a trial on the merits.

IV. The Trial Court Erred in Finding Defendant ACE Was Not Responsible for the Fraudulent Representations by the Kanakuk Defendants

The trial court erred in finding no agency relationship existed between Defendant White and Defendant ACE and granting Defendant ACE's Motion for Summary Judgment, because genuine issues of material fact exist regarding whether an agency relationship existed, in that the trial court improperly limited its consideration to the facts existing before September 2009 and Plaintiff presented evidence that Defendant White participated in settlement negotiations with the knowledge, consent, and at the direction of Defendant ACE, and the Kanakuk Defendants and Defendant ACE agreed to conceal the information in the Draft June 2010 Letter in furtherance of Defendant White's September 2009 fraudulent misrepresentations.

A. Standard of Review and Preservation

The standard of review is the same as stated regarding Point I.

This issue was preserved for review by this Court. Plaintiff properly responded to Defendant ACE's Motion for Summary Judgment. (D291; D293-D320). Further, Plaintiff specifically argued that the Kanakuk Defendants acted as agents for Defendant ACE. (D291 p. 20-26).

B. Genuine Issues of Material Fact Exist Regarding Whether Defendant White Was Acting as Agent for Defendant ACE

While Defendant ACE did not directly make any fraudulent representations to Plaintiff or his parents, the Kanakuk Defendants did. Further, the Kanakuk Defendants, including Defendant White, acted as agents for Defendant ACE during the settlement negotiations with Plaintiff's parents. Defendant ACE and the Kanakuk Defendants conspired to conceal the truth regarding the Kanakuk Defendants' prior knowledge of Newman's sexual misconduct. Therefore, Defendant ACE is liable for Defendant White's fraudulent misrepresentations that occurred before settlement negotiations began because Defendant ACE conspired to conceal the truth in furtherance of that initial fraudulent misrepresentation.

The trial court improperly limited its consideration of facts to those that existed prior to Defendant White's September 2009 fraudulent misrepresentations in finding that Defendant ACE is entitled to summary judgment. The trial court held:

There is no evidence that ACE vested Mr. White with any power to speak or act on its behalf. There is no evidence that ACE had any control over Mr. White's acts before or during the alleged phone call. There is no evidence that Mr. White was acting as a fiduciary of ACE and there is no evidence that ACE requested Mr. White to speak or act in any particular manner prior to or during the phone call. There is no evidence of any communication between ACE and Plaintiff (or his parents) in advance of the alleged phone call and there was no mention of ACE during the call. In fact, Plaintiff did not know who insured Mr. White or Kanakuk when they filed their original claim. On this record, Plaintiff cannot establish agency between Mr. White and ACE and his fraud claim against ACE must be dismissed.

(D377 p. 12; App. A15) (footnote omitted). The actions of Defendant ACE and the Kanakuk Defendants following the September 2009 fraud show that Defendant ACE ratified the fraudulent representations and took actions to further the fraudulent representations and actively conceal the truth.

The existence of an agency relationship presents a question of fact.

The existence of an agency relationship requires an assessment of the facts of each case and, for that reason, is regarded as a question of fact to be determined by the jury when, from the evidence adduced on the question, there may be a fair difference of opinion as to the existence of the relationship.

Bar Plan v. Cooper, 290 S.W.3d 788, 791 (Mo. App. E.D. 2009) (citation and internal quotation marks omitted). “A principal is responsible for the acts and agreements of her agent, but only if the agent acts with actual authority—which may be express or implied—or with apparent authority.” *Lynch v. Helm Plumbing & Elec. Contrs.*, 108 S.W.3d 657, 660 (Mo. App. W.D. 2002).

To establish a principal-agent relationship, Respondents had to show that (1) [principal] consented, expressly or impliedly, to [the agent’s] acting on [the principal’s] behalf, and (2) [the agent] was subject to [the principal’s] control. The principal must intend that the agent acts for him, and the agent must intend to accept the authority and act on it. The authority may be actual or apparent.

Bar Plan, 290 S.W.3d at 792 (citations omitted).

Actual authority consists of a principal telling his agent expressly what to do and of implied powers that go along with authority expressly granted. Apparent authority exists where a principal’s manifestations to a third party have created a reasonable belief in the third party that an agent is acting for the principal, or where the principal is fully aware that another is acting as his agent but does nothing to correct the misconception. To determine the

existence and scope of apparent authority, the focus is on a third person.

Bar Plan, 290 S.W.3d at 792 (citations and internal quotation marks omitted). “Generally, any conduct by the principal which, if reasonably interpreted, would cause a third person to believe that the principal consents to the acts of the agent is sufficient to create apparent authority.” *Lynch*, 108 S.W.3d at 660.

The summary judgment facts support a finding that Defendant White and the Kanakuk Defendants had either actual or apparent authority to provide information to Plaintiff’s parents in relation to their settlement negotiations with Defendant ACE. The initial phone call between Plaintiff’s father and Defendant ACE included Defendant White. (D293 p. 40 ¶ 100; App. A124). Defendant ACE knew of the relationship between Plaintiff’s parents and Defendant White and that Defendant White was communicating with Plaintiff’s parents during the settlement negotiations. (D293 p. 18-19 ¶ 29-31, p. 38 ¶ 92; App. A102-A103, A122). Defendant ACE even had discussions regarding what Defendant White should tell Plaintiff’s parents. (D293 p. 18-19 ¶ 29-31; App. A102-A103). These facts show that either Defendant ACE authorized Defendant White to act on Defendant ACE’s behalf in communicating information to Plaintiff’s parents or Plaintiff’s parents were reasonable in believing Defendant ACE had done so.

Defendant ACE knew of potential claims against the Kanakuk Defendants arising from Newman’s sexual misconduct, including Plaintiff’s claim, prior to September 2009. (D293 p. 14 ¶ 18-19; App. A98). Specifically, Defendant ACE knew of claims against the Kanakuk

Defendants resulting from Newman's sexual misconduct no later than April 6, 2009, and knew of Plaintiff's claim no later than August 4, 2009. (D293 p. 5 ¶ 5, p. 14 ¶ 18-19; App. A89, A98). In September 2009, Plaintiff's parents asked Defendant White whether Defendants knew of prior inappropriate conduct by Newman. (D293 p. 15 ¶ 22; App. A99). In response, Defendant White represented to Plaintiff's parents that the Kanakuk Defendants had no prior knowledge of inappropriate conduct by Newman. (D293 p. 20 ¶ 34; App. A104).

Plaintiff's parents held a close and personal relationship with the Kanakuk Defendants, including Defendant White. (D293 p. 37-38 ¶ 89-90; App. A121-A122). Defendant White admits that Plaintiff's parents trusted him and put faith in him, and similarly, trusted and put faith in Kanakuk. (D293 p. 38 ¶ 91; App. A122). Defendant ACE acknowledged that campers, like Plaintiff and his parents, had very close connections with the Kanakuk Defendants, including Defendant White. (D293 p. 38 ¶ 92; App. A122). Plaintiff's parents reasonably relied on Defendants' representations regarding facts concerning prior knowledge of inappropriate conduct by Newman. (D293 p. 38-39 ¶ 93-94; App. A122-A123). The representations made by Defendants leading up to, and at the time of, the settlement agreement with Plaintiff were material to Plaintiff's decision to settle his claims against the Kanakuk Defendants. (D293 p. 39 ¶ 95; App. A123).

In December 2009, Vicki Morgan arranged an initial call with Defendant White, Gregory Yandell, and Marilyn Cannon, who was Defendant ACE's Liability Specialist. (D293 p. 40 ¶ 100; App. A124). Between May 11, 2010, and June 21, 2010, negotiations between ACE

and Plaintiff's parents continued. (D293 p. 16 ¶ 24; App. A100). Defendant ACE admits that it was aware that its insureds, the Kanakuk Defendants, were communicating with Plaintiff's parents about settlement. (D293 p. 16 ¶ 25, p. 19 ¶ 31; App. A100, A103). Defendant ACE had specific discussions with the Kanakuk Defendants regarding information to provide to Plaintiff's parents and how the Kanakuk Defendants should respond to Plaintiff's parents "about dollar amounts and numbers". (D293 p. 16 ¶ 26, p. 18-19 ¶ 29; App. A100, A102-A103).

Defendant White told Plaintiff's parents that he was speaking on behalf of Defendant ACE. (D293 p. 17 ¶ 27; App. A101). Plaintiff's father testified that while negotiations were ongoing, he felt pressured by White to work out a settlement fairly quickly. (D293 p. 17 ¶ 28; App. A101). Both during settlement negotiations, and after Plaintiff's claim was settled (but not yet court approved), ACE continued to authorize and empower the Kanakuk Defendants by having them communicate with claimants, and potential claimants, regarding settlement. (D293 p. 19 ¶ 32; App. A103). Defendant ACE stated that it was "seeking [Kanakuk's] compliance with the policy requirement" as it tasked the Kanakuk Defendants with providing claimant information so that ACE could "move all claims towards resolution in a timely fashion". (D293 p. 19-20 ¶ 33; App. A103-A104).

Defendant ACE violated industry claim-handling standards and practices, including § 375.930 *et seq.*, by authorizing the Kanakuk Defendants to communicate directly with Plaintiff's parents during the investigation, authorizing the Kanakuk Defendants to negotiate

regarding the Yandell Claim without supervision or control, and inducing the Kanakuk Defendants to agree to withhold material facts from actual or potential claimants (including Plaintiff's parents) concerning prior inappropriate conduct by Newman. (D293 p. 29-30 ¶ 58-60; App. A113-A114). Section 375.1007 specifically provides, in relevant part, that “[a]ny of the following acts by an insurer, if committed in violation of section 375.1005, constitutes an improper claims practice: (1) Misrepresenting to claimants and insureds relevant facts...” § 375.1007(1) RSMo.

The Kanakuk Defendants and Defendant ACE benefited or avoided exposure to greater liability as a result of Defendant White's misrepresentations and the subsequent agreement between Defendant ACE and the Kanakuk Defendants to conceal facts regarding prior knowledge of Newman's inappropriate conduct. (D293 p. 35-37 ¶ 80-84; App. A119-A121). Defendant ACE was in active negotiations with Plaintiff's parents when Defendant ACE received the Draft June 2010 Letter. (D293 p. 37 ¶ 85; App. A121). Defendant ACE offered \$250,000 to Plaintiff's parents to settle less than a week after the Draft June 2010 Letter. (D293 p. 37 ¶ 86-87; App. A121). Prior to ACE receiving the Draft June 2010 Letter, ACE had only offered Plaintiff \$30,150 despite acknowledging to Kanakuk that Plaintiff “had the most serious offence of abuse” and that the “case did have that 6 figure value.” (D293 p. 15-16 ¶ 23, p. 34 ¶ 79; App. A99-A100, A118).

These facts support a finding that the Kanakuk Defendants, and specifically Defendant White, had actual or apparent authority from

Defendant ACE to provide information to Plaintiff's parents in an effort to convince them to settle Plaintiff's claim.

Actual authority consists of a principal telling his agent expressly what to do and of implied powers that go along with authority expressly granted. Apparent authority exists where a principal's manifestations to a third party have created a reasonable belief in the third party that an agent is acting for the principal, or where the principal is fully aware that another is acting as his agent but does nothing to correct the misconception.

Bar Plan, 290 S.W.3d at 792 (citations and internal quotation marks omitted). The Kanakuk Defendants and Defendant ACE had conversations where Defendant ACE told the Kanakuk Defendants what to tell Plaintiff's parents. When the Kanakuk Defendants decided to send the Draft June 2010 Letter, Defendant ACE convinced the Kanakuk Defendants not to do so. Defendant ACE had control over the information that the Kanakuk Defendants provided to Plaintiff's parents. The Kanakuk Defendants, and specifically Defendant White, were acting with either actual or apparent authority when Defendant White provided information to Plaintiff's parents as part of Defendants' efforts to convince Plaintiff's parents to settle his claim.

Because the facts support a finding that the Kanakuk Defendants were acting as agents for Defendant ACE, Defendant ACE is liable for the Kanakuk Defendants' fraudulent misrepresentations and concealments that included the failure to disclose the Draft June 2010 Letter. Defendant ACE has not shown that it is entitled to judgment as a matter of law and the trial court erred in granting summary judgment in favor of Defendant ACE. This Court should reverse the trial court's Judgment and remand for a trial on the merits.

V. The Trial Court Erred In Finding Plaintiff Cannot Establish His Civil Conspiracy Claims

The trial court erred in granting summary judgment in favor of Defendants based on its finding Plaintiff's civil conspiracy claims cannot be maintained because the court found Defendants are not guilty of fraud, because genuine issues of material fact exist regarding whether Defendants conspired to fraudulently misrepresent or conceal information, in that the trial court improperly granted summary judgment regarding Plaintiff's fraud claims and Plaintiff presented evidence that Defendant ACE convinced the Kanakuk Defendants not to send the Draft June 2010 Letter, and Defendant White made distinct and specific representations rather than stay silent when asked about the Kanakuk Defendants' prior knowledge of Newman's sexual misconduct.

A. Standard of Review and Preservation

The standard of review is the same as stated regarding Point I.

This issue was preserved for review by this Court. Plaintiff properly responded to the motions for summary judgment. (D291; D293-D320; D292; D321-D337). Further, Plaintiff specifically argued that summary judgment is not proper regarding Plaintiff's civil conspiracy claims. (D291 p. 26-31; D292 p. 20-23).

B. Genuine Issues of Material Fact Exist Regarding Plaintiff's Civil Conspiracy Claims

The summary judgment facts also support Plaintiff's claim that Defendant ACE and the Kanakuk Defendants conspired and agreed to fraudulently misrepresent and fraudulently conceal information regarding the Kanakuk Defendants' prior knowledge of Newman's sexual misconduct. It was improper for Defendants to agree and conspire to not send the Draft June 2010 Letter or otherwise conceal Defendants' prior knowledge after Defendant White fraudulently misrepresented that knowledge. This is especially true since Defendant White was acting as the agent for Defendant ACE in providing information to Plaintiff's parents to further settlement negotiations.

The trial court granted summary judgment on Plaintiff's civil conspiracy claims simply because the court also granted summary judgment on Plaintiff's underlying fraud claims. The trial court mistakenly believed that both parties must be guilty of fraud in order for a civil conspiracy to exist. The trial court held:

Civil Conspiracy (as to ACE)

Plaintiff claims that Kanakuk and ACE conspired to commit fraud. The civil conspiracy claim against ACE is being dismissed because the Court is dismissing the underlying claim of fraud against ACE.

Although civil conspiracy has its own elements that must be proven, it is not a separate and distinct action. Rather, it acts to hold the conspirators jointly and severally liable for the underlying act. Cent. [Trust] & Inv. Co. v. Signalpoint Asset Mgmt., LLC, 422 S.W.312, 324 (Mo. 2014). Since the only effect of a claim of civil conspiracy is to hold multiple defendants jointly and severally liable for the underlying fraud, Plaintiff's claim of

civil conspiracy cannot be extended to a party that cannot also be held liable for the underlying fraud. Summary Judgment on Count 2 of the Second Amended Petition against ACE is appropriate.

Civil Conspiracy (as to Kanakuk)

Because the Court has found that Plaintiff cannot maintain his fraud claim on this record, Plaintiff cannot maintain an independent action for Civil Conspiracy as against the remaining Defendants: Joe White, Kanakuk Heritage, Inc. and Kanakuk Ministries. Summary Judgment on Count 2 of the Second Amended Petition against the remaining Defendants is appropriate.

(D377 p. 12-13; App. A15-A16) (emphasis in original). As discussed with respect to Plaintiff's other Points, summary judgment on Plaintiff's fraud claims was improper. Additionally, Defendant ACE does not have to be guilty of fraud to be liable for the Kanakuk Defendants' fraud under a theory of civil conspiracy. Therefore, the trial court erred in granting summary judgment on Plaintiff's civil conspiracy claims.

Count II of the Second Amended Petition seeks recovery based on a theory of civil conspiracy.

A "civil conspiracy" is an agreement or understanding between persons to do an unlawful act, or to use unlawful means to do a lawful act. A civil conspiracy claim seeks to hold the conspirators jointly and severally liable for the underlying act. To establish a civil conspiracy, [a plaintiff must] show: (1) two or more persons; (2) with an unlawful objective; (3) after a meeting of the minds; (4) committed at least one act in furtherance of the conspiracy; and (5) [the plaintiff] was thereby damaged. Evidence of a civil conspiracy may be circumstantial.

John Knox Vill. v. Fortis Constr. Co., 449 S.W.3d 68, 78 (Mo. App. W.D. 2014) (citations and internal quotation marks omitted).

Although civil conspiracy has its own elements that must be proven, it is not a separate and distinct action. Rather, it acts to

hold the conspirators jointly and severally liable for the underlying act. The gist of the action is not the conspiracy, but the wrong done by acts in furtherance of the conspiracy or concerted design resulting in damage to plaintiff.

Western Blue Print Co., LLC v. Roberts, 367 S.W.3d 7, 22 (Mo. banc 2012) (citations and internal quotation marks omitted).

The term unlawful, as it relates to civil conspiracy, is not limited to conduct that is criminally liable, but rather may include individuals associating for the purpose of causing or inducing a breach of contract or business expectancy.

Western Blue Print Co., LLC, 367 S.W.3d at 22 (citation and internal quotation marks omitted).

As discussed regarding Plaintiff's other Points, the trial court's grant of summary judgment regarding Plaintiff's fraud claims must be reversed. Consequently, the trial court's reason for granting summary judgment on Plaintiff's civil conspiracy claims is no longer supported and should be reversed. Further, genuine issues of material fact exist regarding whether Defendant ACE and the Kanakuk Defendants conspired to fraudulently misrepresent or conceal information regarding the Kanakuk Defendants' prior knowledge of Newman's sexual misconduct.

Defendant ACE argues that there was no meeting of the minds between Defendant ACE and the Kanakuk Defendants. (D245 p. 28-32) In this case, the communications between the Kanakuk Defendants and Defendant ACE show that Defendant ACE convinced the Kanakuk Defendants not to send the Draft June 2010 Letter and thereafter agreed not to deny coverage. Specifically, as a result of Defendant ACE's threats to deny coverage, the Kanakuk Defendants and

Defendant ACE agreed that the Draft June 2010 Letter would not be sent or made public and Defendant ACE would not deny coverage. (D293 p. 24-29 ¶ 48-57; App. A108-A113). Such an arrangement was confirmed by Kanakuk's CBO, Don Frank.

Q. Will you, sir, admit that Kanakuk chose not to send out the June letters to approximately 8,000 families because Ace was threatening to deny coverage?

A. I believe so.

...

Q. Sir, you admit that Kanakuk agreed not to send the June letters. True?

A. Correct.

Q. You admit that Ace agreed not to deny coverage under the insurance policies?

A. Yes.

Q. In fact, Ace continued to adjust and settle claims of Newman victims like Logan Yandell?

A. Yes.

(D293 p. 28 ¶ 54, p. 29 ¶ 57; App. A112, A113).

A meeting of the minds occurred.

It is true that Defendants appear to have initially disagreed on how to proceed. However, Defendant ACE's threat to deny coverage convinced the Kanakuk Defendants to change course, resulting in a meeting of the minds to conceal the fact that the Kanakuk Defendants had prior knowledge of Newman's prior sexual misconduct.

Consequently, the Draft June 2010 Letter was not disclosed until the underlying case some thirteen years after it was created. A meeting of the minds is sufficiently shown.

Contrary to Defendants' arguments, the relationship between Defendant ACE and the Kanakuk Defendants, especially regarding the Draft June 2010 Letter, was not an ordinary business relationship. Following the arrest of Newman, the Kanakuk Defendants were going to do the right thing and publicly acknowledge that they did not do enough to protect the children entrusted to their care. By threat of denying coverage, Defendant ACE convinced the Kanakuk Defendants to conceal that information instead. That is not an ordinary business relationship.

The Kanakuk Defendants had the right to tell Plaintiff, his parents, and other campers the truth. (D293 p. 30 ¶ 61; App. A114). Further, it was improper for Defendant ACE to prevent the Kanakuk Defendants from telling claimants the truth about what happened. (D293 p. 30-31 ¶ 62-66; App. A114-A115).

Additionally, Defendant ACE's arguments fail regarding both Defendant White's September 2009 fraudulent misrepresentations and the June 2010 fraudulent nondisclosure. While Defendant ACE may not have initially had a duty to disclose the Kanakuk Defendant's prior knowledge of Newman's sexual misconduct, such a duty arose once Defendant White fraudulently misrepresented the Kanakuk Defendants' prior knowledge and Defendant White began acting as Defendant ACE's agent. Once the fraudulent misrepresentations had been made by Defendant White, Defendant ACE and the Kanakuk Defendants did not have the right to agree and conspire to conceal the Kanakuk Defendants' prior knowledge of Newman's sexual misconduct. Once the Kanakuk Defendants fraudulently misrepresented their prior

knowledge of Newman’s sexual misconduct, any agreement between the Kanakuk Defendants and Defendant ACE to further conceal that knowledge constituted fraudulent concealment in furtherance of the earlier fraudulent misrepresentations.

The fact that Plaintiff was in an adversarial position to Defendants and that Defendant ACE was the insurer for the Kanakuk Defendants does not change this result. “A party, however, may have a right to rely on representation made by an adversarial party when such adversarial party has superior knowledge of the facts.” *Grisamore v. State Farm Mut. Auto. Ins. Co.*, 306 S.W.3d 570, 574 (Mo. App. W.D. 2010). Further, the Court in *Vickers v. Progressive Cas. Ins. Co.*, 979 S.W.2d 200 (Mo. App. 1998), “recognized that a claimant may have a right to rely on representations made by an insurer ‘who is acting in the general course of its business and expertise[.]’” *Grisamore*, 306 S.W.3d at 574 (quoting *Vickers*, 979 S.W.2d at 204). Consequently, Plaintiff had a right to rely on the misrepresentations by Defendant White regarding the Kanakuk Defendants’ prior knowledge of Newman’s misconduct. Defendants, including Defendant White, had superior knowledge not within the fair and reasonable reach of Plaintiff.

Defendants could have remained silent in response to Plaintiff’s question. Defendants could have told the truth, as they intended to do, for example, in the Draft June 2010 Letter. (D293 p. 21 ¶ 36; App. A105). Instead, Defendant White chose to make a knowingly false representation to Plaintiff. (D293 p. 20 ¶ 34; App. A104). Thereafter, all the Defendants agreed and conspired to conceal the information

concerning Defendants' prior knowledge of Newman's sexual misconduct. (D293 p. 24-29 ¶ 48-57; App. A108-A113).

Genuine issues of material fact exist and Defendants are not entitled to summary judgment regarding Plaintiff's civil conspiracy claims. This Court should reverse the trial court's Judgment and remand for a trial on the merits.

VI. The 2010 Settlement Does Not Bar Plaintiff's Claims

The trial court erred in granting summary judgment in favor of Defendants, because Defendants are not entitled to judgment as a matter of law, in that Missouri law allows a party to a settlement to pursue a claim that the party was fraudulently induced to agree to the settlement without requiring that party to seek to have the settlement set aside and regardless of the language in the settlement releasing claims.

A. Standard of Review and Preservation

The standard of review is the same as stated regarding Point I.

This issue was preserved for review by this Court. Plaintiff properly responded to the motions for summary judgment. (D291; D293-D320; D292; D321-D337). Further, Plaintiff specifically argued that neither the 2010 Settlement nor the Tennessee Judgment preclude Plaintiff's claims. (D291 p. 31-36; D292 p. 23-29).

B. The 2010 Settlement Does Not Bar Plaintiff's Claims as a Matter of Law

While the trial court did not reach this issue, Defendants argued that the 2010 Settlement bars Plaintiff's current claims. However, the 2010 Settlement does not bar a claim that Defendants' fraud induced Plaintiff and his parents to agree to the settlement. Plaintiff is not attempting to set aside the settlement. Therefore, Defendants' arguments are misplaced.

It is clear that the 2010 Settlement does not preclude a claim that Defendants fraudulently induced Plaintiff to agree to that settlement. Under well-established Missouri law, "a party may not, by disclaimer or

otherwise, contractually exclude liability for fraud in inducing that contract.” *Hess v. Chase Manhattan Bank, USA, N.A.*, 220 S.W.3d 758, 767 (Mo. banc 2007). Stated another way, “[a] party may not contractually exclude oneself from fraud through the use of general disclaimers.” *Wagner v. Uffman*, 885 S.W.2d 783, 786 (Mo. App. E.D. 1994). This is true because the claim that was the subject of the settlement and the claim that the settlement was induced by fraud constitute different claims.

Plaintiff’s original claims against the Kanakuk Defendants arose because they employed Newman who sexually assaulted Plaintiff. In contrast, Plaintiff’s current, new claims against Defendants arose because Defendants fraudulently misrepresented or fraudulently concealed the Kanakuk Defendants prior knowledge of Newman’s sexual misconduct. If Defendants had told the truth about what they knew and when they knew it, Plaintiff would not have agreed to the 2010 Settlement. If Defendants had refused to answer when asked what they knew, Plaintiff would not have agreed to the 2010 Settlement. Plaintiff’s current claims relate to Defendants’ fraudulent misrepresentations and concealments concerning the Kanakuk Defendants’ prior knowledge. Those claims are different than the claims asserted and settled in 2010.

The Court of Appeals in *Roth v. La Societe Anonyme Turbomeca Fr.*, 120 S.W.3d 764 (Mo. App. W.D. 2003), directly addressed the question of whether a plaintiff that was fraudulently induced to settle the plaintiff’s claim could enforce the settlement and sue for damages resulting from the fraudulent inducement. *Roth*, 120 S.W.3d at 768. The

Court found that a release obtained from a plaintiff through fraudulent inducement was voidable and the plaintiff could enforce the settlement agreement while also maintaining a separate action for fraud. *Roth*, 120 S.W.3d at 774. Plaintiff is asserting the exact type of claim approved by the Court in *Roth*; a separate action for fraud without attempting to set aside the prior settlement.

As the Court in *Roth* recognized, a claim of fraudulent inducement is distinct from the underlying claim that was the subject of the fraudulently induced settlement. Consequently, pursuing a claim for fraudulent inducement does not involve setting aside the fraudulently induced settlement.

We first disagree with the underlying assumption that the releasor would be reneging on the bargain. He would not be reneging because he would not be pursuing the released tort claim, but an independent claim created by the fraud. Second, damages for the fraud are not “inextricably bound” to the nature and extent of the injuries involved in the underlying tort. They are conceptually different. The measure of damages for the fraud is not the nature and extent of the injuries arising from the underlying tort claim, but the nature and extent of the damages caused by fraudulently inducing the plaintiff to enter the release. Thus, the underlying injuries are relevant to the independent fraud claim only to the extent of their effect on the settlement value in light of the true insurance coverage available.

Roth, 120 S.W.3d at 773. Stated more clearly, “A party suing for fraud in the inducement of a release is not suing for the tortious conduct underlying the released claims, but for the contractual damages that he suffered as a result of the subsequent fraud foisted upon him.” *Roth*, 120 S.W.3d at 773.

The claim in *Roth* was for damages resulting from the defendant fraudulently inducing the plaintiff to settle the underlying tort claim. The plaintiff was not attempting to pursue the underlying tort claim. Rather, the plaintiff was pursuing a claim for fraudulent inducement, which is a different claim. The Court recognized that the plaintiff had the option “to enforce [the settlement] and sue independently for the damages resulting from the fraud.” *Roth*, 120 S.W.3d at 772.

Defendants mistakenly argue that Plaintiff released his claim for fraud when the 2010 Settlement was executed. Defendants ignore the fact that the language in the release is irrelevant when the release was fraudulently induced. As the Supreme Court of Missouri has explained, “language that is plain and unambiguous on its face will be given full effect within the context of the agreement as a whole *unless the release is based on fraud*, accident, misrepresentation, mistake, or unfair dealings.” *Andes v. Albano*, 853 S.W.2d 936, 941 (Mo. banc 1993) (emphasis added). Further, the language in the settlement documents “does not negate a pre-contractual duty to speak.” *Hess*, 220 S.W.3d at 767. A party cannot fraudulently induce an opposing party to settle a claim and then rely on the language in the fraudulently induced settlement as a release regarding the fraud in inducing the settlement.

As the Court in *Roth* explained: “A party suing for fraud in the inducement of a release is not suing for the tortious conduct underlying the released claims, but for the contractual damages that he suffered as a result of the subsequent fraud foisted upon him.” *Roth*, 120 S.W.3d at 773. Consequently, the 2010 Settlement does not bar Plaintiff from

pursuing a claim for fraudulent inducement. Defendants have not shown that they are entitled to judgment as a matter of law and the trial court erred in granting summary judgment in their favor. This Court should reverse the trial court's Judgment and remand for a trial on the merits.

VII. The Tennessee Judgment Does Not Bar Plaintiff's Claims

The trial court erred in granting summary judgment in favor of Defendants, because Defendants are not entitled to judgment as a matter of law, in that the Tennessee judgment does not preclude Plaintiff from pursuing a claim for fraudulently inducing the underlying settlement, and the facts underlying Plaintiff's fraud and civil conspiracy claims are different than the facts underlying Plaintiff's 2009 claim against the Kanakuk Defendants.

A. Standard of Review and Preservation

The standard of review is the same as stated regarding Point I.

This issue was preserved for review by this Court. Plaintiff properly responded to the motions for summary judgment. (D291; D293-D320; D292; D321-D337). Further, Plaintiff specifically argued that neither the 2010 Settlement nor the Tennessee Judgment preclude Plaintiff's claims. (D291 p. 31-36; D292 p. 23-29).

B. The Tennessee Judgment Does Not Bar Plaintiff's Claims as a Matter of Law

Again, while the trial court did not reach this issue, Defendants argued that the Tennessee judgment approving the 2010 Settlement bars Plaintiff's current claims. However, the Tennessee judgment does not bar a claim that Defendants' fraud induced Plaintiff and his parents to agree to the underlying settlement. Plaintiff is not attempting to set aside the judgment. Therefore, Defendants' arguments are misplaced.

The Tennessee judgment was an approval of the settlement of the underlying claims that had been asserted in 2010. The Tennessee judgment does not preclude, under either a theory of res judicata nor

claim preclusion, Plaintiff from asserting a claim for fraudulent inducement.

“Traditionally, *res judicata* bars the same parties from relitigating a claim already determined in a prior adjudication (claim preclusion).” *Twehous Excavating Co. v. L.L. Lewis Invs., L.L.C.*, 295 S.W.3d 542, 546 (Mo. App. W.D. 2009). Claim preclusion also prohibits a party from bringing a claim that should have been included in the earlier litigation. *Twehous Excavating Co.*, 295 S.W.3d at 546.

In order for a claim to be barred by *res judicata*, or claim preclusion, the following factors must be met: 1) identity of the thing sued for; 2) identity of the cause of action; 3) identity of the persons and parties to the action, and 4) identity of the quality of the person for or against whom the claim is made.

Walker v. Walker, 954 S.W.2d 425, 428 (Mo. App. W.D. 1997); *Sotirescu v. Sotirescu*, 52 S.W.3d 1, 4 (Mo. App. E.D. 2001).

If a party could have brought claims in the first action, those claims are merged into and barred by the first judgment. To determine whether a claim is barred by a former judgment, the question is whether the claim arises out of the same ‘act, contract or transaction.’ In so determining, a court must look to the factual bases for the claims, not the legal theories. The question then becomes what did the plaintiff know when the first action was initiated. Are there some ultimate facts, unknown or yet-to-occur at the time of the first action that form the basis for a new claim of relief?

Twehous Excavating Co., 295 S.W.3d at 546-47 (citations and internal quotation marks omitted; emphasis added).

Claim preclusion does not apply when there are “new ultimate facts, as opposed to evidentiary details, that form a new claim for relief.”

Boehlein v. Crawford, 605 S.W.3d 135, 142 (Mo. App. E.D. 2020)

(citation and internal quotation marks omitted). “To constitute ‘new’ ultimate facts, those facts that form the basis of a new claim for relief must be unknown to plaintiff or yet-to-occur at the time of the first action.” *Boehlein*, 605 S.W.3d at 142.

Stated another way, claim preclusion only applies when the facts and law relied upon in the second action are the same as the facts and law relied upon in the first action.

Res judicata is also used by Missouri courts in its more limited sense to refer only to claim preclusion which operates as a bar to the reassertion of a cause of action which has previously been adjudicated in a proceeding between the same parties or those in privity with the parties. As so used, “cause of action” does not refer to the form of action in which the claim is asserted but to the underlying facts combined with the law which give a party a right to a remedy of one form or another based thereon.

Bachman v. Bachman, 997 S.W.2d 23, 25 n. 2 (Mo. App. E.D. 1999)

(citations and internal quotation marks omitted).

Plaintiff’s fraud claim involves “new” facts that did not exist at the time of the underlying tort action in Tennessee. Defendants’ fraudulent actions constitute “new” ultimate facts that form the basis of a new claim for relief. Plaintiff could not have pursued an action for fraud related to the Tennessee settlement agreement at the time the Tennessee action was filed because that action to approve the fraudulently induced settlement was the result of Defendants’ fraud. The settlement, and Defendants’ fraudulent representations that induced Plaintiff to agree to the settlement, are “new” ultimate facts. Those “new” ultimate facts form the basis for a “new” claim for relief, i.e., Plaintiff’s claim for fraudulent inducement asserted in this action.

Consequently, there is not “identity of the cause of action” and claim preclusion does not apply. *Walker*, 954 S.W.2d at 428.

As the Court in *Roth* explained: “A party suing for fraud in the inducement of a release is not suing for the tortious conduct underlying the released claims, but for the contractual damages that he suffered as a result of the subsequent fraud foisted upon him.” *Roth*, 120 S.W.3d at 773. Consequently, the Tennessee judgment does not bar Plaintiff from pursuing a claim for fraudulent inducement. Defendants have not shown that they are entitled to judgment as a matter of law and the trial court erred in granting summary judgment in their favor. This Court should reverse the trial court’s Judgment and remand for a trial on the merits.

VIII. Genuine Issues of Material Fact Exist Regarding Whether Defendant White Intended to Induce Plaintiff to Settle

The trial court erred in granting summary judgment in favor of Defendants, because genuine issues of material fact exist regarding Defendant White's intent to induce Plaintiff to settle, in that the fact that the representations were made before negotiations started does not negate intent and Plaintiff presented evidence that disclosing the Kanakuk Defendants' prior knowledge of Newman's sexual misconduct could expose Defendants to greater liability, Defendants eventually agreed and conspired to conceal that knowledge, Defendants were concerned about lawsuits in 2009, and Defendant White pressured Plaintiff's father to settle Plaintiff's claims.

A. Standard of Review and Preservation

The standard of review is the same as stated regarding Point I.

This issue was preserved for review by this Court. Plaintiff properly responded to the motions for summary judgment. (D291; D293-D320; D292; D321-D337). Further, Plaintiff specifically argued that genuine issues of material fact exist regarding whether Defendant White intended to induce Plaintiff to settle. (D292 p. 13-14).

B. Genuine Issues of Material Fact Exist Regarding Defendant White's Intent

While the trial court did not reach this issue either, the Kanakuk Defendants argued that it was impossible for Defendant White to have intended to induce Plaintiff to settle his claims in September 2009. (D247 p. 26). That argument is not supported by either the facts or simple logic.

“To be entitled to summary judgment here, Defendants must show that they are entitled to judgment as a matter of law on every viable theory pled by Plaintiffs.” *Altidor*, 576 S.W.3d at 278.

On appeal from the grant of summary judgment, the record below is reviewed 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.

Beal., 527 S.W.3d at 885 (brackets, citations, and internal quotation marks omitted).

The fact that Defendant White fraudulently misrepresented the Kanakuk Defendants’ prior knowledge of Newman’s sexual misconduct before settlement negotiations began does not establish that Defendant White did not intend his lies to affect any eventual settlement. A reasonable inference from the fact that Defendant White fraudulently misrepresented Defendants’ prior knowledge of Newman’s sexual misconduct is that Defendant White hoped to limit the Kanakuk Defendants’ liability resulting from Newman’s actions or Defendants’ failure to curtail Newman’s activities.

Defendant ACE admitted that disclosing the Kanakuk Defendants’ prior knowledge of Newman’s sexual misconduct could expose the Kanakuk Defendants to greater liability. (D321 p. 60 ¶ 126, p. 64 ¶ 133; App. A76, A80). Defendants’ eventual agreement and conspiracy to conceal the Kanakuk Defendants’ prior knowledge benefited the Kanakuk Defendants. (D321 p. 63-64 ¶ 132; App. A79-A80). Further, the Kanakuk Defendants, including Defendant White, were concerned about lawsuits in 2009. (D321 p. 65-66 ¶ 136; App. A81-A82). Lastly, Plaintiff’s father was pressured by Defendant White to settle Plaintiff’s

claims during the time that negotiations were occurring between Plaintiff's parents and Defendant ACE. (D321 p. 32 ¶ 62, p. 51 ¶ 100; App. A48, A67).

A fraudulent misrepresentation intended to convince an opposing party to settle a matter must be made before the settlement occurs. Such fraudulent misrepresentation can be made before settlement negotiations begin and still be intended to convince an opposing party to settle. In this case, Defendant ACE knew of claims against the Kanakuk Defendants resulting from Newman's sexual misconduct no later than April 6, 2009, and knew of Plaintiff's claim no later than August 4, 2009. The Kanakuk Defendants, including Defendant White, were concerned about lawsuits in 2009. The disclosure of their prior knowledge of Newman's sexual misconduct could have exposed the Kanakuk Defendants to greater liability. The only reasonable inference from Defendant White's fraudulent misrepresentation regarding the Kanakuk Defendants' lack of prior knowledge of Newman's sexual misconduct is that Defendant White intended to convince Plaintiff and his parents to not bring a claim or at the least quickly settle their claims against the Kanakuk Defendants. Consequently, the fact that the fraudulent misrepresentation was made before negotiations started does not negate any element of Plaintiff's claims. Genuine issues of material fact exist regarding Defendant White's intent.

Defendants are not entitled to summary judgment and the trial court erred in granting Defendants' motions. This Court should reverse the trial court's Judgment and remand for a trial on the merits.

IX. Defendants Are Not Entitled to Judgment as a Matter of Law on Plaintiff's Fraudulent Concealment Claims

The trial court erred in granting summary judgment in favor of Defendants, because Defendants are not entitled to judgment as a matter of law regarding Plaintiff's fraudulent concealment claims, in that the trial court did not address Plaintiff's fraudulent concealment claims and Defendants all had a duty to disclose the information in the Draft June 2010 Letter as a result of Defendant White's prior fraudulent misrepresentations concerning the Kanakuk Defendants' prior knowledge of Newman's sexual misconduct.

A. Standard of Review and Preservation

The standard of review is the same as stated regarding Point I.

This issue was preserved for review by this Court. Plaintiff properly responded to the motions for summary judgment. (D291; D293-D320; D292; D321-D337). Further, Plaintiff specifically argued that the Defendants are not entitled to summary judgment regarding Plaintiff's fraudulent concealment claims. (D291 p. 16-20; D292 p. 18-20).

B. Defendants Had a Duty to Disclose the Information Contained in the Draft June 2010 Letter

The trial court did not address Plaintiff's fraudulent concealment claims contained in Count I of the Second Amended Petition. Additionally, the arguments asserted by Defendants do not support summary judgment. Contrary to Defendants' arguments, Defendants did have a duty to disclose the information contained in the Draft June 2010 Letter as a result of Defendant White's prior fraudulent

representations. Therefore, the trial court's Judgment should be reversed as to that portion of Plaintiff's fraud claims.

"To be entitled to summary judgment here, Defendants must show that they are entitled to judgment as a matter of law on every viable theory pled by Plaintiffs." *Altidor*, 576 S.W.3d at 278. Plaintiff's Second Amended Petition asserted a fraudulent concealment claim based on Defendants' concealment of the information contained in the Draft June 2010 Letter. (D202 p. 8-9 ¶ 38-46, p. 10-12 ¶ 60-61). The trial court addressed only Plaintiff's fraudulent representation claims based on Defendant White's September 2009 statements. (D377 p. 6-7; App. A9-A10). The trial court did not discuss Plaintiff's fraudulent concealment claims.

Further, Defendants' arguments do not show that they are entitled to summary judgment on Plaintiff's fraudulent concealment claims. Defendants argue that they did not have a duty to disclose the information contained in the Draft June 2010 Letter. (D247 p. 27-28; D245 p. 15-16). In fact, they did. Defendant White's fraudulent misrepresentations occurring in September 2009 were imputed to all the Kanakuk Defendants. Thereafter, Defendant White and the other Kanakuk Defendants acted as agents for Defendant ACE during the settlement negotiations with Plaintiff's parents. Consequently, all the Defendants had a duty to correct the misrepresentations that Defendant White made.

Defendant White's fraudulent misrepresentations regarding the Kanakuk Defendants' prior knowledge of Newman's sexual misconduct is imputed to the other Kanakuk Defendants. It does not matter that

the parties were in an adversarial position. The normal rule is that adverse parties do not have a duty to disclose information that would weaken their position.

“A party to a law suit is not bound to disclose to his adversary facts which tend to defeat or weaken his own right of recovery and he commits no fraud by remaining silent. So, too, one who is trying to settle litigation, has the right to keep his opinion upon the merits to himself, and is not guilty of fraud in so doing, for in such case the parties are dealing with each other at arm's length and are adversaries.”

Wild v. TWA, 14 S.W.3d 166, 168 (Mo. App. W.D. 2000) (quoting *Andes v. Albano*, 853 S.W.2d 936, 943 (Mo. banc 1993)) (emphasis added).

However, Defendant White did not “remain silent” or “keep his opinion ... to himself”.

“Any fraud perpetrated by the agent on a third party in the course of his employment, and for the benefit of the principal, must be imputed to the principal, whether or not the latter had actual knowledge of it.”

Tietjens v. General Motors Corp., 418 S.W.2d 75, 84 (Mo. 1967) (citation and internal quotation marks omitted). Stated another way, “the principal must respond for any fraud that an agent perpetrates while he is about his master’s business within the scope of his authority[.]”

Tietjens, 418 S.W.2d at 87 (citation and internal quotation marks omitted); *see also Premium Fin. Specialists, Inc.*, 90 S.W.3d at 113-14 (corporation liable for fraud committed by agent within apparent scope of authority).

Consequently, the Kanakuk Defendants had a duty to remedy the fraudulent misrepresentations that had been made by Defendant White. Further, the Kanakuk Defendants were not entitled to any

benefit resulting from those fraudulent misrepresentations. In fact, the Kanakuk Defendants took steps to remedy the fraud that had been committed when they prepared the Draft June 2010 Letter.

Defendant ACE threatened to deny coverage to the Kanakuk Defendants if the Draft June 2010 Letter was sent. As a result of that threat, the Kanakuk Defendants and Defendant ACE agreed and conspired to conceal their prior knowledge of Newman's sexual misconduct rather than remedy the fraudulent misrepresentations that had been made.

While the Kanakuk Defendants may not have initially had a duty to disclose their prior knowledge of Newman's sexual misconduct, such a duty arose once Defendant White fraudulently misrepresented the Kanakuk Defendants' prior knowledge. Likewise, Defendant ACE may not have initially had a duty to disclose information regarding that prior knowledge. However, Defendant ACE did not have the right to threaten the Kanakuk Defendants to prevent the Kanakuk Defendants from disclosing their prior knowledge. Neither did Defendant ACE have the right to agree and conspire with the Kanakuk Defendants to conceal their prior knowledge of Newman's sexual misconduct following fraudulent misrepresentations regarding that knowledge. Once the Kanakuk Defendants fraudulently misrepresented their prior knowledge of Newman's sexual misconduct, any agreement between the Kanakuk Defendants and Defendant ACE to further conceal that knowledge constituted fraudulent concealment in furtherance of the earlier fraudulent misrepresentations.

The fact that Plaintiff was in an adversarial position to the Kanakuk Defendants does not change this result. “A party, however, may have a right to rely on representation made by an adversarial party when such adversarial party has superior knowledge of the facts.” *Grisamore*, 306 S.W.3d at 574. Further, the Court in *Vickers* “recognized that a claimant may have a right to rely on representations made by an insurer ‘who is acting in the general course of its business and expertise[.]’” *Grisamore*, 306 S.W.3d at 574 (quoting *Vickers*, 979 S.W.2d at 204). Consequently, Plaintiff had a right to rely on the misrepresentations by Defendant White regarding the Kanakuk Defendants’ prior knowledge of Newman’s misconduct. The Kanakuk Defendants, including Defendant White, had superior knowledge not within the fair and reasonable reach of Plaintiff.

Likewise, the fact that Defendant ACE was the insurer for the Kanakuk Defendants does not relieve Defendant ACE of liability for the fraudulent misrepresentations and concealments in which it participated. There are exceptions to the general rule that an injured party cannot proceed directly against an insurance company providing liability coverage for an insured that caused the harm. *Grisamore*, 306 S.W.3d at 574. Those exceptions include claims for negligent misrepresentation or fraudulent misrepresentation against the insurance company. *Grisamore*, 306 S.W.3d at 574-75. A claim against an insurance company for negligent or fraudulent misrepresentation “depends not upon the insurance contract but upon the establishment of all the elements of the misrepresentation.” *Grisamore*, 306 S.W.3d at 574-75.

As the Court in *Vickers* explained:

Finally, there are public policy reasons for holding that an insurer has a duty to use reasonable care in making representations to claimants because those claimants are vulnerable and often will rely on an insurer who is acting in the general course of its business and expertise, and will refrain from taking or fail to take certain actions which might be beneficial, such as preserving evidence and/or retaining an attorney.

Vickers, 979 S.W.2d at 204; quoted by *Grisamore*, 306 S.W.3d at 575. In this case, the fraudulent misrepresentations occurred, then Defendant ACE threatened the Kanakuk Defendants if they revealed the truth, and then Defendant ACE conspired and agreed with the Kanakuk Defendants to conceal the truth, furthering the fraudulent misrepresentations. As a result, Plaintiff and his parents agreed to a settlement that they would not have accepted but for Defendants' fraudulent misrepresentations and concealments.

As a result, the Kanakuk Defendants and Defendant ACE's actions in failing to disclose the information contained in the Draft June 2010 Letter constituted a continuation of Defendant White's September 2009 fraudulent misrepresentations. Defendants are all liable for both Defendant White's initial fraudulent misrepresentations and the fraudulent concealment that included the failure to disclose the Draft June 2010 Letter. Defendants have not shown that they are entitled to judgment as a matter of law and the trial court erred in granting summary judgment in their favor. This Court should reverse the trial court's Judgment and remand for a trial on the merits.

CONCLUSION

Genuine issues of material fact exist and the Kanakuk Defendants and Defendant ACE have not shown that they are entitled to judgment as a matter of law. Therefore, this Court should reverse the trial court's grant of summary judgment and the trial court's finding that Defendant White's 2009 statement, "No, we've never seen anything" was not false or misleading. This matter should then be remanded to the trial court for a trial on the merits.

Respectfully Submitted,

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RULE 84.06(c) CERTIFICATE

I certify that this Appellant’s Brief complies with the limitations contained in Supreme Court Rule 84.06(b), that the entire brief contains 23,816 words, and that this Appellant’s Brief and the Appendix to the Appellant’s Brief were served pursuant to Rule 103.08.

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