

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

CASE NO. 08-MD-01928-MIDDLEBROOKS/JOHNSON

**IN RE: TRASYLOL PRODUCTS
LIABILITY LITIGATION - MDL-1928**

This Document Relates To:

**SUMMERLIN V. BAYER
CORPORATION, ET AL.,
Case No. 08-80903**

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

THIS CAUSE comes before the Court upon Defendants' (hereinafter, collectively, "Bayer's") Motion for Summary Judgment ("Motion") (DE 2815), filed on November 25, 2009. Plaintiff filed a Response (DE 3143), to which Bayer replied (DE 3149). A hearing on the Motion was held before this Court on February 10, 2010. The Court has reviewed the pertinent parts of the record and is advised in the premises. For the reasons stated below, Bayer's Motion shall be granted as to all Counts.

I. Background

A. Plaintiff's First Amended Complaint (DE 3143-1)

Frances Summerlin underwent Coronary Artery Bypass Graft ("CABG") surgery in Alabama on March 16, 2006. (DE 3143 at 3.) She was administered Trasylol, a drug intended to decrease perioperative blood loss and the need for blood transfusion in patients undergoing cardiopulmonary

bypass in the course of CABG surgery. Frances Summerlin began experiencing medical complications soon after her open heart surgery, including renal failure. She died on March 26, 2006. On April 24, 2008, Plaintiff Melvin E. Summerlin, Executor of the Estate of Frances Summerlin, became aware that his wife received Trasylol during her surgery. (DE 3143 at 3.) Plaintiff filed this action against Bayer, based on the sale and marketing of the drug Trasylol, on May 12, 2008, in the Southern District of Alabama. The case was transferred to this MDL on August 15, 2008.

The following facts were alleged in Plaintiff's First Amended Complaint. On January 26, 2006, the New England Journal of Medicine published an article by Dr. Mangano reporting an association of Trasylol with, among other things, serious renal toxicity. (DE 3143-1 at ¶ 19.) Within two weeks of the publication of Dr. Mangano's research, high-level managers at Bayer contacted Dr. Walker to conduct a study to determine whether Trasylol was as safe as its alternatives. (DE 3143-1 at ¶ 22.) This became known as the "i3 Study." (DE 3143-1 at ¶ 22.) Meanwhile, the FDA stated that it would hold an advisory meeting on Trasylol. (DE 3143-1 at ¶ 23.) In July 2006, members of Bayer's upper management met with FDA officials; no one informed the FDA officials of the i3 Study at that meeting. (DE 3143-1 at ¶ 31.) The FDA Advisory Committee met on September 21, 2006 to discuss its findings regarding the safety of Trasylol and determine whether the warning on Trasylol needed to be changed. (DE 3143-1 at ¶ 41.) No one from Bayer mentioned the i3 Study or the preliminary report of the i3 Study's findings that Bayer received on or before September 14, 2006. (DE 3143-1 at ¶ 41.) After reviewing what it considered to be all of the available data on the safety of Trasylol, the 19-member advisory panel recommended to the FDA that Bayer did not need to strengthen a warning to doctors about the drug. (DE 3143-1 at ¶ 42.) On or about September 26,

2006, Dr. Walker told Bayer that the preliminary report had implications for public health and insisted that it be given to the FDA. (DE 3143-1 at ¶ 43.) Bayer disclosed the preliminary report to the FDA on September 27, 2006. (DE 3143-1 at ¶ 44.) In December 2006, Bayer revised the WARNING section of the label for Trasylol to include a specific statement that use of Trasylol creates an increased risk of renal dysfunction and renal failure. (DE 3143-1 at ¶ 46.) Bayer suspended worldwide marketing of Trasylol on November 5, 2007. (DE 3143-1 at ¶ 48.)

Plaintiff's First Amended Complaint includes the following counts: (I) wrongful death on theory of negligence/wantonness; (II) wrongful death on theory of product liability under Alabama's Extended Manufacturer's Liability Doctrine (AEMLD); (III) breach of express and implied warranties; and (IV) fraudulent concealment/estoppel. (DE 3143-1 at ¶¶ 53-80.)

In Count I, Plaintiff alleges that Bayer acted "negligently and/or wantonly" in "designing, testing, manufacturing, licensing, packaging, promoting, advertising, selling and/or distributing Trasylol," in warning of the risks of Trasylol use, and in conducting pre-clinical testing and post-marketing surveillance of Trasylol, and that Plaintiff's intestate died as a result. (DE 3143-1 at ¶¶ 53-59.)

In Count II, Plaintiff alleges that Trasylol "is defective in design and failure to warn" and that the defects "were a direct and proximate cause of the death of Frances Summerlin." (DE 3143-1 at ¶¶ 60-69.)

In Count III, Plaintiff alleges that Bayer, through its advertising and promotional materials, "expressly and impliedly warranted that Trasylol was safe for the use for which it were intended"; that Bayer "breached these express and implied warranties because Trasylol was unsafe in light of the risk of life-threatening side effects associated with its use"; and that "Frances Summerlin relied

to her detriment” on the alleged warranties and died as a result of the alleged breach. (DE 3143-1 at ¶¶ 70-75.)

In Count IV, Plaintiff alleges that Bayer “suppressed and/or concealed” its knowledge “of [the] hazards [of Trasylol use] and the risks associated with administering Trasylol to the public, including the Plaintiff.” (DE 3143-1 at ¶ 79.) Specifically, Plaintiff alleges that Bayer misrepresented and suppressed the findings from its own study that supported Dr. Mangano’s findings that Trasylol increased a patient’s risk of kidney failure, kidney damage, stroke and/or death. (DE 3143-1 at ¶ 79.) As a result of that alleged concealment, Plaintiff has suffered harm. (DE 3143-1 at ¶ 80.) It should be noted that Count IV is not brought on behalf of the decedent, but is a claim for fraud on Plaintiff himself.

Furthermore, because Bayer has fraudulently concealed or suppressed information regarding the dangers or risks of Trasylol, Plaintiff argues that “[t]he Court should hold that the applicable statute of limitations was tolled for the duration of the concealment” and find that Bayer is “estopped from asserting any statute of limitations as a defense to this action.” (DE 3143-1 at ¶ 80.)

B. Bayer’s Motion for Summary Judgment (DE 2815)

Bayer moves for summary judgment on all of Plaintiff’s claims. Bayer argues that Plaintiff cannot sustain his wrongful death claims because they were not brought within two years after the death, as required by the Alabama Wrongful Death Act, which has no discovery rule or equitable tolling.¹ (DE 2815 at 1.) Bayer argues that Plaintiff’s breach of warranty claims fail as a matter of

¹ According to Bayer, Alabama substantive law governs in this diversity case. (DE 2815 at 4.) The Court agrees, and Plaintiff does not argue for the application of another state’s laws.

law because Alabama does not recognize a general implied warranty of product safety, and Plaintiff does not allege and cannot prove that an express warranty was made to him by any defendant. (DE 2815 at 1.) Bayer asserts that Plaintiff's fraud claim fails because there is no evidence that would allow a jury to conclude that either he or the decedent relied on a statement made by any defendant in electing to undergo heart surgery. (DE 2815 at 1.)

More specifically, Bayer argues that Counts I (wrongful death on theory of negligence) and II (wrongful death on theory of product liability), brought pursuant to the Alabama Wrongful Death Act, ALA. CODE § 6-5-410, are time-barred.² (DE 2815 at 4.) Under that Act, wrongful death claims must be commenced within two years from and after the death of the testator or intestate; Plaintiff filed his claims two years and two months after the death of the decedent. (DE 2815 at 4.) Bayer argues that this is a firm limitation, not subject to any equitable extension or tolling. (DE 2815 at 5.) The time limitation is a part of the substantive cause of action, which expires after two years of the death of the decedent. (DE 2815 at 5.) According to Bayer, Plaintiff's claims accrued on March 26, 2006, when Frances Summerlin died. Because Plaintiff did not file suit until May 12, 2008, his wrongful death claims are time-barred pursuant to ALA. CODE § 6-5-410(d).

In regards to Count III as it relates to breach of implied warranty, Bayer argues that under Alabama law, the implied warranty of merchantability "is one of commercial fitness and suitability, and a private right of action is afforded only where the user or consumer is injured by the breach of that warranty." (DE 2815 at 6.) According to Bayer, Alabama law provides no general implied

² According to Bayer, the Alabama Wrongful Death Act is the only vehicle by which these claims could be brought because under Alabama law, tort claims that were not filed before the death of a decedent do not survive in favor of the estate or personal representative. (DE 2815 at 4.)

warranty cause of action for alleged injuries from a pharmaceutical product. (DE 2815 at 6.) According to Bayer, Plaintiff claims that Frances Summerlin was injured because Trasylol was unreasonably dangerous, not because Trasylol was unsuitable or commercially unfit. (DE 2815 at 7.) Therefore, Bayer argues that Plaintiff does not have a viable cause of action under Alabama law for breach of the implied warranty of merchantability. (DE 2815 at 7.)

In regards to Count III as it relates to breach of express warranty, Bayer argues that Plaintiff cannot establish the existence of an express warranty relating to Trasylol. (DE 2815 at 7.) According to Bayer, under Alabama law, an express warranty is defined as an “affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain,” or a “description of the goods which is made part of the basis of the bargain.” ALA. CODE § 7-2-313(1). Bayer asserts that there is no evidence of any “affirmation,” “promise,” or “description” made to Plaintiff by Bayer in relation to Trasylol, nor any evidence that any affirmation, etc., by Bayer formed “the basis of the bargain” for the use of Trasylol in Frances Summerlin’s surgery. (DE 2815 at 7-8.)

Finally, in regards to Count IV, Bayer argues that Plaintiff cannot establish the elements of fraudulent concealment under Alabama law.³ (DE 2815 at 9.) According to Bayer, Plaintiff’s fraudulent concealment claim fails because there is no evidence that Plaintiff acted in reliance on a concealment or suppression by Bayer. (DE 2815 at 10.)

Indeed, the evidence shows to the contrary. First, as noted above, plaintiff did not know

³ According to Bayer, to sustain a claim for fraudulent concealment under Alabama law, ALA. CODE § 6-5-102, a plaintiff must produce substantial evidence establishing: (1) a duty on the part of the defendant to disclose; (2) the defendant’s suppression of material facts; (3) the defendant’s knowledge of the facts and their materiality; (4) action by the plaintiff in reliance on the suppression; and (5) damages resulting from the reliance action. (DE 2815 at 9-10.)

until long after the decedent's surgery that Trasylol had been used in the surgery. As a result, he could not have taken action in connection with his wife's surgery in reliance on representations or omissions concerning Trasylol. Second, the only instance of purported concealment that plaintiff alleges—the failure to disclose preliminary results from the observational study conducted by i3 Drug Safety—did not occur until September 2006, six months after the decedent's surgery and death. To support a claim for fraudulent concealment, plaintiff must establish concealment of 'an existing, material fact.' The facts surrounding the preliminary results of the i3 study did not exist at the time of Mrs. Summerlin's surgery and cannot support the fraudulent concealment claim.

(DE 2815 at 10 (internal citations omitted).)

Bayer notes that Count IV purports to state a claim for fraud on Plaintiff himself because tort claims that were not filed before the decedent's death do not survive under Alabama law, ALA. CODE § 6-5-462. (DE 2815 at 9.) Therefore, the claim for fraudulent concealment can not be brought on behalf of Frances Summerlin, the decedent. (DE 2815 at 9.)

C. Plaintiff's Response to Bayer's Motion for Summary Judgment (DE 3143)

In a "Counterstatement of Facts," Plaintiff mentions the following. Prior to her heart surgery, Frances Summerlin discussed the risks and benefits of her surgery with her surgeon, Dr. Ronson. (DE 3143 at 2.) Plaintiff testified that he was involved in all of his wife's medical care and decision-making and discussed the risks and benefits with his wife after discussing the same with Dr. Ronson. (DE 3143 at 2.) Plaintiff and Plaintiff's decedent relied upon the information provided to them by Dr. Ronson to make an informed decision regarding the surgery. (DE 3143 at 2.)

Dr. Ronson testified that he selects medications to be utilized during surgery where the benefits of the medications outweigh the risks known to be associated with them. (DE 3143 at 3.) He further testified that he learns of the risks associated with a particular drug from the package insert for the medication as well as conferences. (DE 3143 at 3.) Dr. Ronson testified that after

reading publications disclosing significant risks associated with Trasylol, which were published after Plaintiff's decedent's surgery, he ceased using the drug. (DE 3143 at 3.)

According to Plaintiff, Bayer's argument that Plaintiff can not rely on Bayer's concealment of the i3 Study in support of his fraud claim belies the fact that such concealment is just "one in a long and tragic series of events where Bayer affirmatively withheld pertinent data critical of its drug Trasylol." (DE 3143 at 4.) Plaintiff sets out a "few examples of Bayer's efforts to conceal the dangers of Trasylol dating back to the turn of the century." (DE 3143 at 4.)

In regards to Counts I and II, Plaintiff argues that his wrongful death claims are not barred by the limitations period for bringing these claims because: 1) the limitations period is extended by Bayer's fraudulent concealment and suppression, and 2) a factual question exists as to whether Bayer is estopped from asserting a limitations defense. (DE 3143 at 12.) According to Plaintiff, Bayer's argument regarding the limitations period under Alabama's Wrongful Death Act is absurd: it would be unjust to relieve Bayer from liability for causing death by defrauding the public regarding the dangers of Trasylol for a sufficient period of time beyond the limitations period. (DE 3143 at 12, 16.)

While the Defendants cite several cases on the time period by which a wrongful death action should be filed under Alabama law, none of the cases cited by Bayer give any guidance or indicia of how an Alabama Court may reconcile the concern that a drug company, whose product caused death, may be rewarded by concealing material information concerning the drug for a sufficient period of time, in an attempt to bar an otherwise meritorious wrongful death claim. However, an examination of cases in Alabama certainly suggests that Alabama has not created an absolute bar to a wrongful death claim sufficient for summary judgment, where the Defendants' fraudulent conduct prevented the identification of that cause of action.

(DE 3143 at 13.) Plaintiff argues that this is a case where the Alabama Supreme Court would not determine that, under an appropriate pleading, a claim of fraudulent concealment would not affect

the two year limitations period for claims of wrongful death under § 6-5-410(d). (DE 3143 at 15.)

In addition to arguing what the Alabama Supreme Court *would* determine, Plaintiff cites to the decisions of other states that have analyzed wrongful death statutes similar to that of Alabama. (DE 3143 at 15-18.) While the Minnesota Supreme Court held that the limitations period should not be tolled under a discovery rule, it extended it as a result of the defendants' fraudulent concealment of facts underlying the cause of action. (DE 3143 at 15-16.) Similarly, while the North Dakota Supreme Court held that the state's wrongful death statute did not have a discovery rule attached to it, a defendant's fraudulent concealment of information regarding the claim would extend the limitations period and estop a defendant from asserting the affirmative defense of statute of limitations. (DE 3143 at 17.)

Finally, Plaintiff argues that Alabama has recognized that estoppel would bar a defendant who has acted fraudulently from relying upon the statute of limitations as a defense. (DE 3143 at 19.) "In applying estoppel as a bar to the affirmative defense of statute of limitations, the issue of whether or not there is sufficient evidence to present a jury question on estoppel is based upon a 'scintilla of evidence' standard." (DE 3143 at 19.) Plaintiff argues that the issue of estoppel should be presented as a jury question. (DE 3143 at 20.)

In regards to Count III, Plaintiff responds that the issue of whether or not any implied or express warranties were breached is a question of fact for the jury, precluding summary judgment on these claims. (DE 3143 at 20, 22.) "Trasylol contained insufficient warnings regarding the risks of its use As a result of these risks . . . Trasylol was not fit for its intended purpose. The significant risk and danger of Trasylol, in fact, made i[t] unfit for the purpose for which it was used." (DE 3143 at 21.)

Finally, Plaintiff responds to Bayer's argument that Plaintiff cannot meet the element of reliance in establishing a fraudulent concealment claim (Count IV).

Plaintiff and his decedent, to their detriment, relied upon the truthful information provided to them by Dr. Ronson regarding the risks of her surgery. Plaintiff and his decedent reasonably relied upon the risk/benefit analysis provided by Dr. Ronson based upon the truth of the information available to him. . . . [I]t is abundantly clear that Dr. Ronson relied upon the information provided to him as a physician regarding Trasylol. . . . Mrs. Summerlin and Dr. Ronson relied upon the truth of the information Bayer decided to make available at the time Bayer fraudulently concealed studies and information from physicians, patients and the general public [S]uch information was clearly concealed from Dr. Ronson who after obtaining the suppressed information, ceased utilization of the drug during his heart surgeries. To Plaintiff's detriment, such information was concealed and/or suppressed at the time of Mrs. Summerlin's surgery on March 16, 2006.

(DE 3143 at 24-26.) Plaintiff argues that under Alabama law, as conceded by Bayer, it is not necessary to prove that a misrepresentation was made directly to the person who claims to have been injured. (DE 3143 at 26.) Plaintiff states that his and the decedent's reliance on the misinformation is a question for the jury and thus precludes summary judgment. (DE 3143 at 27.)

D. Bayer's Reply in Support of Motion for Summary Judgment (DE 3149)

In regards to Counts I and II, Bayer states that Plaintiff fails to rebut its showing that the two-year limitations period for wrongful death claims under Alabama law is not subject to any provision intended to suspend the running of a limitations period. (DE 3149 at 2.) Bayer argues that this Court is bound to apply existing Alabama law and can not make a ruling that is grounded in speculation that the Alabama Supreme Court *may* change the law in the future to allow wrongful death claims to be tolled by evidence of fraudulent concealment. (DE 3149 at 2.) According to Bayer, decisions from other states, applying other states' statutes of limitations, are irrelevant to this Case because they do not involve Alabama law, and Plaintiff cites to no Alabama cases that rely on those decisions

or endorse their reasoning. (DE 3149 at 3.) Furthermore, Plaintiff may not recast “tolling” as “estoppel.” (DE 3149 at 4.)

In regards to Count III, Bayer argues that Plaintiff has not identified any questions of disputed fact that bear on his warranty claims. (DE 3149 at 4.) As for the implied warranty claim, Bayer states that Plaintiff does not counter its showing that Alabama law does not recognize implied warranty claims for injuries allegedly caused by a prescription drug. (DE 3149 at 5.) As for the express warranty claim, Bayer asserts that Plaintiff has not carried its burden of establishing the existence of an express warranty. (DE 3149 at 5.)

In regards to Count IV, Bayer states that “the only allegations of purported concealment in plaintiff’s complaint are the allegations relating to the two-week delay in disclosing to the FDA the preliminary results of the i3 study in September 2006.” According to Bayer, Plaintiff “does not dispute that showing, and thus concedes that there is no allegation of any representation or concealment by defendants on which plaintiff or anyone else could have relied in making decisions concerning Mrs. Summerlin’s surgery.” (DE 3149 at 5.) According to Bayer, the fraudulent concealment claim fails as a matter of law for that reason, and “plaintiff’s arguments about third-party reliance . . . are an irrelevant distraction.” (DE 3149 at 6.)

E. The Material, Uncontested Facts

- The decedent in this action, Frances Summerlin, was a citizen of Alabama at the time of her death. She underwent surgery in Birmingham, Alabama on March 16, 2006 and died on March 26, 2006.
- The decedent was administered Trasylol during the surgery. Plaintiff did not learn

about this fact until April 24, 2008.

- Plaintiff did not file this action until more than 2 years after the decedent's death: Plaintiff filed the original complaint on May 12, 2008 in the Southern District of Alabama.
- During Plaintiff's deposition, he was asked "Did you or your wife ever see any warranty or language guaranteeing that Trasylol would work?" Plaintiff responded "No."

II. Legal Standard

Summary judgment is appropriate when "there is no genuine issue as to any material fact" and "the movant is entitled to judgment as a matter of law."⁴ FED. R. CIV. P. 56(c). The purpose of summary judgment is to "isolate and dispose of factually unsupported claims or defenses." *Celotex v. Catrett*, 477 U.S. 317, 323-24 (1986). In considering a motion for summary judgment, the trial court "must consider all the evidence in the light most favorable to the non-moving party," and "resolve all reasonable doubts in favor of the non-moving party." *Earley v. Champion Int'l Corp.*, 907 F.2d 1077, 1080 (11th Cir. 1990) (internal citations omitted).

The party seeking summary judgment "always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings,

⁴ According to the Supreme Court, "As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Furthermore, "Summary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Id.*

depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex*, 477 U.S. at 323 (citing FED. R. CIV. P. 56(c)). The movant can meet this burden by presenting evidence showing there is no dispute of material fact, or by pointing out to the district court that the nonmoving party has failed to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof. *Celotex*, 477 U.S. at 322-23.

Once the moving party has met its burden, the non-moving party bears the burden of coming forward with evidence of each essential element of its claim, such that a reasonable jury could find in its favor. *See Earley*, 907 F.2d at 1080 (11th Cir. 1990). Rule 56(e) "requires the nonmoving party to go beyond the pleadings and by [its] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex*, 477 U.S. 324. "The mere existence of a scintilla of evidence in support of the [non-movant's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-movant]."⁵ *Anderson v. Liberty Lobby*, 477 U.S. 242, 252 (1986). The failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial and requires the court to grant the motion for summary judgment. *Celotex*, 477 U.S. at 322-23.

⁵ According to the *Anderson* court, "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson*, 477 U.S. at 249-50 (internal citations omitted).

III. Analysis

A. Counts I and II: Wrongful Death

Alabama's wrongful death statute provides that wrongful death actions "must be commenced within two years from and after the death of the testator or intestate."⁶ ALA. CODE § 6-5-410(d) (1975). The Supreme Court of Alabama has repeatedly held that Alabama's wrongful death statute is a statute of creation, and therefore, its two-year limitations period is not subject to any tolling provisions. *E.g.*, *Ogle v. Gordon*, 706 So. 2d 707, 708 (Ala. 1997); *Cofer v. Ensor*, 473 So. 2d 984, 992 (Ala. 1985) ("It is well-settled that the limitations period found in § 6-5-410(d) is a *statute of creation*, and not subject to tolling provisions because it is 'of the essence of the cause of action.'").

The *Cofer* court described the difference between a limitations period that is a technical statute of limitations and one that is a statute of creation.

This Court has recognized the general rule that a distinction exists between a true statute of limitations and a statute which creates a new right of action with an express restriction on the time within which an action may be brought to enforce the right. . . . [W]here a prescriptive period is contained within the statutory grant of a cause of action, it is a statute of creation, and the period is deemed a portion of the substantive right itself, not subject to tolling provisions. On the other hand, where the prescriptive period comes from without the statute, it is a statute of limitations, to which the tolling provisions apply.

473 So. 2d at 987 (internal citations omitted). Because the two-year period is deemed a portion of the substantive right itself, the plaintiff has the burden of affirmatively showing that his action was

⁶ Alabama's wrongful death statute states, in pertinent part: "A personal representative may commence an action and recover such damages as the jury may assess in a court of competent jurisdiction within the State of Alabama, and not elsewhere, for the wrongful act, omission, or negligence of any person, persons, or corporation, his or their servants or agents, whereby the death of his testator or intestate was caused, provided the testator or intestate could have commenced an action for such wrongful act, omission, or negligence if it had not caused death." ALA. CODE § 6-5-410(a) (1975). *See also Cofer v. Ensor*, 473 So. 2d 984, 995 ("There can be only one action for wrongful death.").

commenced within the two-year period. *Cofer*, 473 So. 2d at 992. “The two-year period is not a limitation against the remedy only, because after two years the cause of action expires.” *Ex parte FMC Corp.*, 599 So. 2d 592, 594 (Ala. 1992) (internal citations omitted).

The two-year limitations period is not subject to tolling despite the possibility that its application may result in an “unjust” outcome for the plaintiff. *See, e.g., Cofer*, 473 So. 2d at 985, 995 (“Robin Cofer gave birth to a baby boy on February 10, 1980. . . . At the time she gave birth, Cofer was 16 years old and married. Later that year . . . Cofer obtained a divorce, and therefore, she never reached the age of 18 while she was married, nor was she ever otherwise freed of the disabilities of non-age. On December 22, 1982, the day before her nineteenth birthday, Cofer brought an action against her doctor She also added a claim for the wrongful death of her minor son.”) (affirming trial court’s decision that plaintiff’s wrongful death claim was time-barred because the action was filed two years and ten and a half months after the alleged wrongful death of her child).

Plaintiff cites to cases in support of the argument that “Alabama has not created an absolute bar to a wrongful death claim sufficient for summary judgment, where the Defendants’ fraudulent conduct prevented the identification of that cause of action.” (DE 3143 at 13.) However, the cited cases, *Johnson v. Brookwood Med. Cent.* and *Lowe v. East End Mem. Hosp. & Health Ctrs.*, do not support equitable tolling of the wrongful death claims.

In *Johnson*, the plaintiff did not argue that the trial court erred in applying the two-year limitations period in § 6-5-410 to his claim for wrongful death. 946 So. 2d 849, 853 (Ala. 2006). Instead, the plaintiff asserted that his action consisted of two separate claims: a wrongful death claim and a claim for fraudulent concealment or suppression of a cause of action. *Id.* The plaintiff argued

that the trial court erred in applying § 6-5-410 to his fraudulent concealment claim and concluding that his entire action was time-barred. *Id.* According to the *Johnson* court,

Assuming for the sake of argument that Alabama recognizes a separate cause of action for fraudulent concealment of a wrongful-death claim, Johnson's argument nevertheless fails. His contention that he presented such a claim to the circuit court is unsupported by the record. In its final form, Johnson's complaint consisted of only one 'count,' which contained claims . . . alleging wrongful death. Within that 'count,' Johnson also asserted that [defendants] had suppressed the 'true cause of Lydia Darnell's death.' At no point . . . did Johnson contend that this alleged suppression created a cause of action separate from his wrongful-death claim arising from alleged medical malpractice.

Id. The *Johnson* court held that the wrongful death claim was time-barred under § 6-5-410; it affirmed the trial court's dismissal of the "fraudulent concealment or suppression of a cause of action" claim because it was not presented to that court. *Id.* at 853-54.

Similarly, in *Lowe*, the plaintiff did not contest the fact that his action for wrongful death was time-barred. 477 So. 2d 339, 340 (Ala. 1985). Rather, plaintiff argued that he had a viable cause of action for fraud independent of the wrongful death claim because the defendant "suppressed facts relating to the death of Mrs. Lowe and misrepresented facts as to the involvement of the defendant hospital in Mrs. Lowe's care. As a result of the allegedly misleading statements in the letter, plaintiff contends, he was caused to lose his cause of action under Code 1975, § 6-5-410." *Id.* at 340-41. The plaintiff argued that his fraud claim, not the wrongful death claim, was tolled. *Id.* at 341. The *Lowe* court held that "Although plaintiff's theory is novel, we pretermitt discussion of it inasmuch as any viable action for fraud would be negated by plaintiff's failure to adequately plead or support this cause of action in the present case." *Id.*

In this Case, unlike the plaintiffs in *Johnson* and *Lowe*, Plaintiff *does* argue that the statute of limitations for the wrongful death claims should be tolled due to Bayer's fraudulent concealment

of the dangers of Trasyolol.⁷ The cited cases do not support equitable tolling of the wrongful death claims.

Plaintiff also cites to cases in support of the argument that “Alabama has recognized that estoppel would bar a Defendant who has acted fraudulently from relying upon the statute of limitations as a defense.” (DE 3143 at 19.) However, the cited cases, *City of Birmingham v. Cochrane Roofing & Metal Co., Inc.* and *Mason v. Mobile County*, do not involve wrongful death claims and do not support the conclusion that Bayer should be estopped from raising the statute of limitations as a defense to Plaintiff’s wrongful death claims.⁸ Both cases hold that if a defendant either “fraudulently or innocently represents to the plaintiff that he will remedy a problem, and relying on these representations the plaintiff is induced not to file a lawsuit or take any action, the defendant may be estopped from raising the statute of limitations as a defense.” *Cochrane Roofing*, 547 So. 2d 1159, 1167 (Ala. 1989) (citing *Mason*, 410 So. 2d 19 (Ala. 1982)). These cases are inapposite to Plaintiff’s argument: there is no allegation or evidence that Bayer induced Plaintiff not to sue by promising to remedy a problem.

In regards to Counts I and II, there is no genuine issue as to any material fact. Frances Summerlin died on March 26, 2006. Plaintiff did not file this action until more than 2 years after the decedent’s death: Plaintiff filed the original complaint on May 12, 2008. The wrongful death claims can only be brought under Alabama’s wrongful death statute, which provides that they must be commenced within two years from and after the death of the decedent. The Alabama Supreme

⁷ In Section III.C., the Court will consider Plaintiff’s argument that he has a separate claim for fraudulent concealment pursuant to *Johnson* and *Lowe*.

⁸ Furthermore, the plaintiff has the burden of *affirmatively* showing that his wrongful death claims were commenced within the two-year period. *Cofer*, 473 So. 2d at 992.

Court has clearly stated that the two-year limitation is not subject to equitable tolling for any reason. Because Plaintiff filed his wrongful death claims after the two-year period for bringing these claims expired, summary judgment shall be entered in favor of Bayer on Counts I and II.

B. Count III: Breach of Express and Implied Warranties

Under Alabama law, express warranties are created as follows:

(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

ALA. CODE § 7-2-313 (1975).

Bayer has met its initial burden on summary judgment by pointing out to this Court that Plaintiff has failed to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof. According to Bayer, Plaintiff did not present evidence of any “affirmation of fact,” “promise,” or “description of the goods” made to Plaintiff by any defendant in relation to Trasylol, nor evidence that any such affirmation or promise or description formed the “basis of the bargain” for the use of Trasylol in Mrs. Summerlin’s surgery. Bayer cited to Plaintiff’s deposition, during which he was asked whether he or his wife ever saw any warranty or language guaranteeing that Trasylol would work. Plaintiff’s response was “No.” (DE 2815-3 at 4.)

On the other hand, Plaintiff, as the non-moving party, has not met the burden of coming forward with evidence of each essential element of the express warranty claim, such that a reasonable jury could find in Plaintiff’s favor. Despite arguing that “questions of fact exist on the warranty claims which would preclude the granting of summary judgment,” Plaintiff does not

identify any questions of disputed fact that bear on the express warranty claim. Plaintiff does not specify any purported express warranty. Therefore, summary judgment shall be entered in favor of Bayer on Count III as it relates to breach of any express warranty.

Plaintiff also makes an implied warranty of merchantability claim under Alabama's version of the U.C.C. Accordingly, Plaintiff must prove: (1) the existence of the warranty; (2) a breach of that warranty; and (3) damages proximately resulting from that breach." *Bodie v. Purdue Pharma Co.*, 236 F. App'x 511, 522 (11th Cir. 2007). Under Alabama law, "[A] warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to the goods of that kind." ALA. CODE § 7-2-314 (1975). The statute further provides that "Goods to be merchantable must be at least such as: Are fit for the ordinary purposes for which such goods are used." § 7-2-314(2)(c).

Alabama courts have recognized a clear distinction between causes of action arising under tort law and those arising under the U.C.C. as adopted in Alabama. *E.g., Shell v. Union Oil Co.*, 489 So. 2d 569 (Ala. 1986) ("The implied warranty mandated by this section of the U.C.C. is one of *commercial* fitness and suitability, and a private right of action is afforded only where the user or consumer is injured by the breach of *that* warranty. That is to say, the U.C.C. does not impose upon the seller the broader obligation to warrant against health hazards inherent in the use of that product when the warranty of commercial fitness has been complied with. Those injured by the use of or contact with such a product, under these circumstances, must find their remedy outside the warranty remedies afforded by the U.C.C."). *See also McClain v. Metabolife Int'l, Inc.*, 193 F. Supp. 2d 1252, 1258 (N.D. Ala. 2002) (summarizing the *Shell* decision as holding that "the U.C.C. is concerned

with product *quality*, while products liability law (viz., the AEMLD⁹) is concerned with product *safety*.”) (emphasis in original). *But see Allen v. Delchamps, Inc.*, 624 So. 2d 1065 (Ala. 1993) (“These two standards [AEMLD and implied warranty of merchantability] ‘go hand-in-hand,’ at least as applied to food products, ‘for it is apparent that a food product is defective or unreasonably dangerous if it is unmerchantable or unfit for human consumption.’”) (internal citations omitted).

In *Shell*, the plaintiff came into contact with a naphtha product, supplied by the defendants, which contained benzene, a carcinogen known to cause leukemia. 489 So. 2d at 570. The plaintiff claimed that defendants breached the implied warranty of merchantability. According to the *Shell* court,

Plaintiff’s implied warranty of merchantability theory, as we understand it, is to the effect that, because the substance supplied by Defendants caused cancer, it could not be ‘fit for the ordinary purposes for which such goods are used’; that is, because this is a cancer-causing substance, it is unreasonably dangerous, and, therefore, cannot be merchantable.

Id. at 571. The Alabama Supreme Court affirmed the trial court’s decision that the defendants were entitled to summary judgment on the implied warranty of merchantability claim because the plaintiff’s argument ignored the distinction between a cause of action arising under AEMLD and one for breach of the implied warranty of merchantability. *Id.* at 571-72. “Whether this product was unreasonably dangerous, therefore, is not a question properly addressed in an action brought under the provisions of the U.C.C. That question could properly be raised in an action brought under Alabama’s Extended Manufacturer’s Liability Doctrine . . . but not in this U.C.C. action for breach

⁹ As previously discussed, AEMLD is the acronym for Alabama’s Extended Manufacturer’s Liability Doctrine. Under the AEMLD, “a manufacturer, or supplier, or seller, who markets a product not reasonably safe when applied to its intended use in the usual and customary manner, constitutes negligence as a Matter of law.” *Casrell v. Altec Indus., Inc.*, 335 So. 2d 128, 132 (Ala. 1976).

of warranty.” *Id.* at 571 (noting that the product was fit for the ordinary purposes for which such goods are used because it performed the job it was intended to do, and the manufacturers’ warnings were in keeping with their knowledge of its inherent dangers).

The parties disagree on whether *Bodie* and *Metabolife*, two cases interpreting Alabama’s law on the implied warranty of merchantability as it applies to medications, support a finding of summary judgment in favor of Bayer on this claim. In *Bodie*, the Eleventh Circuit affirmed the district court’s grant of summary judgment in favor of the defendant, finding that the plaintiff did not have a viable cause of action under Alabama law for breach of the implied warranty of merchantability. 236 F. App’x at 524. The court’s reasoning was as follows:

Bodie alleged that Purdue breached the implied warranty of merchantability because OxyContin was ‘not of merchantable quality,’ was ‘unsafe’ and was ‘unreasonably dangerous [,] thereby causing injury to plaintiff.’ The evidence suggests, however, that OxyContin was, in fact, fit for its intended use as an analgesic treatment for chronic pain Bodie has offered scant evidence as to how OxyContin was not fit for its intended use; in effect his U.C.C. breach of warranty claim—based on the general allegation that the drug was ‘unsafe’ and ‘dangerous’—is akin to the type of claim that the Alabama Supreme Court refused to recognize in *Shell*. As in *Shell*, there was no ‘implied warranty of merchantability in the sense that [Purdue] promised [Bodie] that he would not be injured by his use or contact with their product.’ In fact, Purdue provided warnings with respect to OxyContin’s addictive qualities, and the product was fit for its intended pharmacological purpose of treating pain.

Id. (internal citations omitted). Similarly, in *Metabolife*, the court granted the defendant’s motion for summary judgment on the plaintiffs’ claims for breach of the implied warranty of merchantability and fitness for a particular purpose. 193 F. Supp. 2d at 1258. The court’s reasoning was as follows:

Plaintiffs do not contend that Metabolife 356 was not fit for the purpose for which it was sold, i.e. weight loss. The essence of their claim is that Metabolife 356 is unreasonably dangerous, and lacked minimally appropriate warnings of the product’s latent dangers. Plaintiffs’ warranty claims are not so much ‘subsumed’ by the AEMLD as they are simply inapposite and non-responsive to Plaintiffs’ alleged injuries and claims.

Id.

Plaintiff's claim for breach of implied warranty very much resembles the unsuccessful claims made in *Shell*, *Bodie*, and *Metabolife*. The First Amended Complaint alleges that Bayer "impliedly warranted that Trasylol was safe for the use for which it were intended, namely as a means to reduce perioperative bleeding in patients undergoing cardiac surgery." (DE 3143-1 at ¶ 72.) The First Amended Complaint further alleges that Bayer breached the implied warranty "because Trasylol was unsafe in light of the risk of life-threatening side effects associated with its use, including, but not limited to, renal failure." (DE 3143-1 at ¶ 73.) In response to Bayer's argument that Plaintiff's claims do not concern Trasylol's commercial fitness and suitability and instead relate to its unreasonable danger, Plaintiff asserts that "The significant risk and danger of Trasylol, in fact, made i[t] unfit for the purpose for which it was used." (DE 3143 at 21.) Plaintiff attempts to distinguish *Metabolife* from the facts of this Case by stating that "Plaintiff does in fact, contend that Defendants breached implied and express warranties making the drug unfit for its intended purpose." (DE 3143 at 22.) But this is exactly the type of claim that was rejected in *Bodie* and *Shell*.¹⁰ In these cases, the plaintiffs unsuccessfully argued that the products in question were not merchantable because they were unreasonably dangerous. As in *Bodie* and *Shell*, Plaintiff does *not* argue that Trasylol was not fit for its intended use in reducing perioperative bleeding in patients undergoing cardiac surgery;

¹⁰ Plaintiff also argues that the facts of *Shell* and *Bodie* are distinguishable from the facts presented here. Plaintiff's argument relies largely on the fact that the product in *Shell* came with warnings that adequately described its inherent dangers, and the physician in *Bodie* "testified that he was aware what the propensity of Oxycontin to producing addiction and that there was a specific black box warning to that effect." (DE 3143 at 21-22.) Regardless of the fact that Plaintiff has not submitted any evidence regarding the warnings contained in Trasylol's package insert at the time of Mrs. Summerlin's surgery, the Court does not believe that the holdings of *Shell* and *Bodie* hinged on the presence of warnings in those cases. It should also be noted that Alabama courts have recognized claims for negligent failure to warn.

Plaintiff provides no evidence suggesting that Trasylol did not successfully reduce perioperative bleeding. Instead, Plaintiff argues that Trasylol was commercially unfit because it was unreasonably dangerous (in causing renal failure, etc.). Therefore, summary judgment shall be entered in the favor of Bayer on Count III as it relates to breach of any implied warranty.

C. Count IV: Fraudulent Concealment

To sustain a claim for fraudulent concealment or suppression under Alabama law, a plaintiff must establish: “(1) a duty on the part of the defendant to disclose; (2) the defendant’s suppression of material facts; (3) the defendant’s knowledge of the facts and their materiality; (4) action by the plaintiff in reliance on the suppression; and (5) damages resulting from the reliance action.”¹¹ *E.g.*, *Holton v. Blue Cross & Blue Shield of S.C.*, 56 F. Supp. 2d 1338, 1344 (M.D. Ala. 1999). Whether a plaintiff has reasonably relied on a defendant’s misrepresentation is usually a question of fact. *McIver v. Bondy’s Ford, Inc.*, 963 So. 2d 136, 142-43 (Ala. Civ. App. 2007). Actual damages must be suffered as a proximate result of the reliance action. *Hardy v. Blue Cross & Blue Shield of Ala.*, 585 So. 2d 29, 32 (Ala. 1991). Damages may be awarded only where they are reasonably certain and may not be based upon speculation. *Wheelan v. Sessions*, 50 F. Supp. 2d 1168, 1175 (M.D. Ala. 1999) (internal quotations and citations omitted).

In Alabama, a plaintiff is not always required to prove that a misrepresentation was made directly to him, so long as his injuries resulted from the misrepresentation. *E.g.*, *Ex parte DaimlerChrysler Corp.*, 952 So. 2d 1082, 1090-91 (Ala. 2006). However, the injured party must

¹¹ Under ALA. CODE § 6-5-102, “Suppression of a material fact which the party is under an obligation to communicate constitutes fraud. The obligation to communicate may arise from the confidential relations of the parties or from the particular circumstances of the case.”

prove reliance on the alleged misrepresentation. *Id.*

A deceased's unfiled tort claims do not survive the death of the putative plaintiff. *E.g.*, *Bassie v. OBGYN Assocs. of Nw. Ala., P.C.*, 828 So. 2d 280, 282 (Ala. 2002) (citing ALA. CODE § 6-5-462¹² (1975)); *Bates v. L&N Employees Credit Union*, 374 So. 2d 323, 324 (Ala. 1979) ("The present action sounds in tort and no action having been filed before the death of the allegedly defrauded party, it does not survive in favor of his personal representative.").

As opposed to the rest of the claims in the First Amended Complaint, Plaintiff alleges the fraudulent concealment claim only on his behalf.¹³ Accordingly,

Defendants had a duty to disclose to Plaintiff and the public the hazards associated with administering Trasylol during surgery. Defendants nevertheless intentionally suppressed and/or concealed their knowledge of these hazards and the risks associated with administering Trasylol to the public, including the Plaintiff. . . . As a proximate result of Defendants' suppression and/or concealment of their knowledge of this information related to Trasylol, Plaintiff has suffered harm.

(DE 3143-1 at ¶¶ 76-80.) However, Plaintiff's Response to Bayer's Motion for Summary Judgment discusses both Plaintiff's and Plaintiff's decedent's reliance on the alleged misinformation provided by Bayer. Accordingly,

Plaintiff and his decedent, to their detriment relied upon the truthful information provided

¹² Under ALA. CODE § 6-5-462, "In all proceedings not of an equitable nature, all claims upon which an action has been filed and all claims upon which no action has been filed on a contract, express or implied, and all personal claims upon which an action has been filed, except for injuries to the reputation, survive in favor of and against personal representatives; and all personal claims upon which no action has been filed survive against the personal representatives of a deceased tort-feasor."

¹³ Under Count I, Plaintiff alleges "As a direct and proximate cause of Defendants' negligent and/or wanton acts and/or omissions, Plaintiff's intestate died." Under Count II, Plaintiff alleges "The defects in the Trasylol administered to Frances Summerlin were a direct and proximate cause of the death of Frances Summerlin." Under Count III, Plaintiff alleges "Frances Summerlin relied to her detriment on Defendants' express and implied warranties."

to them by Dr. Ronson regarding the risks of her heart surgery. . . . Mrs. Summerlin, as evidenced by her consent to surgery, relied upon the risk benefit analysis performed by Dr. Ronson in deciding to undergo heart surgery on March 16, 2006, including the risks of medications like Trasylol that may be used. . . . To Plaintiff's detriment, such information was concealed and/or suppressed at the time of Mrs. Summerlin's surgery on March 16, 2006. . . . Hence, both Plaintiff and Plaintiff's decedent's reliance of the misinformation is a question for the jury precluding summary judgment.

(DE 3143 at 24-27.) A fraudulent concealment claim on behalf of Mrs. Summerlin is barred because it was not filed before her death. Further, it is not styled as a wrongful death claim. Even if it were, it would be time-barred for the same reason that Counts I and II are time-barred.

In its briefs, Bayer argued that *Plaintiff's* fraudulent concealment claim fails as a matter of law because there is "no evidence that plaintiff acted in reliance on a concealment or suppression by any defendant." (DE 2815 at 10.) According to Bayer, Plaintiff could not have relied on any concealment by Bayer because first, Plaintiff did not know Trasylol had been used in decedent's surgery until after the surgery and second, the only instance of purported concealment alleged (the i3 Study) did not occur until after the decedent's surgery. (DE 2815 at 10.) Plaintiff responded that, under Alabama law, misrepresentation does not have to be made directly to the person who claims to have been injured. (DE 3143 at 26.) Plaintiff also provided evidence of acts of concealment taking place before Mrs. Summerlin's surgery.¹⁴

¹⁴ For example, according to Plaintiff, Bayer awarded Dr. David Kress, a CV Surgeon at St. Luke's Medical Senter, a grant to perform a retrospective study on Trasylol. (DE 3143 at 4-5; DE 3143-7 at BAY04627748.) On March 21, 2003, Diana Isom of Bayer Corporation, Scientific Affairs, emailed Dawn Bradway and Artyom Sedrakyan about the preliminary data from Dr. Kress's study. Accordingly,

[T]hey didn't see a difference in occurrence of atrial fibrillation with any of the doses of aprotinin vs no aprotinin. . . . What they did find with the greater than 600 ml group was that the incidence of renal failure . . . was significantly higher than control and also the half and full dose aprotinin. So that, sort of set off a red flag with them. . . . [T]hey don't think they will be able to show, with the St Luke's database, that aprotinin decreases the incidence of atrial fibrillation.

However, at the hearing on this Motion, Bayer shifted its focus from arguing that Plaintiff is not able to show reliance on Bayer's suppression of material facts to arguing that Plaintiff has no independent claim for fraud: a claim for fraud requires damages resulting from the reliance on the fraud, and in this Case, the only damages alleged relate to Frances Summerlin's death. Therefore, this claim is subsumed by the wrongful death statute, which prescribes a fixed two-year statute of limitations, as discussed in Section III.A.

In response, Plaintiff did not argue that he suffered damages independent of the wrongful death. Instead, Plaintiff argued that: (1) ALA. CODE § 6-2-3¹⁵ acts as a savings clause for the

(DE 3143-7 at BAY05253848.) On April 4, 2003, Isom emailed Sedrakyan, stating that the group there is more hung up on what they think is a renal failure concern with aprotinin at doses higher than half dose. What it amounts to is this. They have 30 cases of what they are defining as renal failure . . . and they want to look more closely at these cases before doing anything else. . . . Right now, it looks like they are seriously considering going to half dose aprotinin due to this renal concern or going to some sort of wt based dosing regimen [W]e still want to try and get them to complete the protocol as is.

(DE 3143-7 at BAY05253845-6.) On April 10, 2003 Isom emailed Sedrakyan that "Dr. Kress is not on board with continuing with the current proposal as it stands and feels the answer to the proposal question has already been shown in the preliminary analysis of their database." (DE 3143-7 at BAY05253843.)

Plaintiff cites to "Draft #7 of Final Report," dated November 20, 2003, titled "What is the Effect of Aprotinin (Trasylol) on the Incidence of Selected Outcomes after CABG," which was co-authored by Dr. Kress. (DE 3143-7 at BAY05426839-46.) Accordingly,

The study findings suggest abandonment of the use of a higher than full dose aprotinin regimen in the CABG population because of the 3.1 times higher risk of the development of postoperative renal failure. In practical terms, aprotinin should be discontinued in CABG patients once the full-dose has been administered, whether in the OR or ICU. (DE 3143-7 at BAY05426842.)

In response to Plaintiff's requests for admission, Bayer admits that "BPC first referenced Dr. David C. Kress's research in an FDA submission in BPC's November 9, 2006 submission to the FDA." (DE 3143-8 at 81.)

¹⁵ ALA. CODE § 6-2-3, sets forth how a fraud claim is accrued: "In actions seeking relief on the ground of fraud where the statute has created a bar, the claim must not be considered as having accrued until discovery by the aggrieved party of the fact constituting the fraud, after which he must have two years within which to prosecute his action."

wrongful death claim where fraud has been properly alleged; and (2) Plaintiff has an independent claim for fraudulent concealment, similar to the one alleged in *Johnson* and *Lowe*.¹⁶

As to Plaintiff's first argument, this Court has already concluded, in Section III.A. of this Order, that the statute of limitations for wrongful death is deemed a portion of the substantive right itself and is not subject to tolling. Invocation of § 6-2-3 does not change this determination.¹⁷

As to Plaintiff's second argument, even if this Court were to assume that Alabama would recognize a separate cause of action for fraudulent concealment of a wrongful death claim,¹⁸ whereby a plaintiff loses his wrongful death claim due to a defendant's fraud, Plaintiff does not prevail on this claim on summary judgment. As the Alabama Supreme Court held in *Johnson*,¹⁹ it appears that Summerlin's allegation of fraudulent concealment is nothing more than an attempt to evade the

¹⁶ *Johnson* and *Lowe* were also discussed in Section III.A. of this Order.

¹⁷ Further, § 6-2-3 applies to actions seeking relief on the ground of fraud, setting forth how a fraud claim is accrued. The Plaintiff's wrongful death claim seeks relief on the ground of wrongful death, § 6-5-410, whereby "A personal representative may commence an action . . . for the wrongful act, omission, or negligence . . . whereby the death of his testator or intestate was caused."

¹⁸ Although the Supreme Court of Alabama has not expressly rejected a separate cause of action for the fraudulent concealment of a wrongful death claim, neither has it expressly held that such a cause of action exists. See *Johnson*, 946 So. 2d 849; *Lowe*, 477 So. 2d 339. The Plaintiff has not cited to any Alabama case where a plaintiff was granted relief on this claim.

¹⁹ In *Johnson*, the plaintiff asked decedent's hospital and treating physician why decedent had died and claimed that the decedent's hospital and treating physician suppressed the true cause of decedent's death, thereby fraudulently concealing that the plaintiff had a cause of action for wrongful death. 946 So. 2d at 853. According to the Court, "Assuming for the sake of argument that Alabama recognizes a separate cause of action for fraudulent concealment of a wrongful-death claim, Johnson's argument fails. . . . Based on our review of the record, it appears Johnson's allegation of fraudulent concealment was nothing more than an attempt to impermissibly bootstrap his wrongful-death claim into the six-month discovery period for asserting actions under the Alabama Medical Liability Act." *Id.*

statute of limitations for his wrongful death claims. Further, the facts of this Case are drastically different from the ones presented in *Johnson* and *Lowe*.²⁰ Here, Plaintiff has had no contact with Bayer or its representatives. Plaintiff has not even alleged, much less shown, that Bayer knew about Frances Summerlin's death or suppressed facts relating to its involvement in her death after the death occurred. Instead, Plaintiff alleged that Bayer suppressed its knowledge of Trasylol's risks.²¹ Therefore, even if this Court were to assume that Alabama would recognize a separate cause of action for fraudulent concealment of a wrongful death claim, the facts of *Johnson* and *Lowe* stand in the way of Plaintiff prevailing on summary judgment. Bayer is entitled to judgment as a matter of law on Count IV.

²⁰ In *Lowe*, the plaintiff argued that although his action for wrongful death was time-barred, he had a viable cause of action for fraud because "subsequent to, and independent of, the alleged negligent acts of the defendant, the defendant, through a letter written by hospital officer Ralph Clark in 1981, suppressed facts relating to the death of Mrs. Lowe and misrepresented facts as to the involvement of defendant hospital in Mrs. Lowe's care. As a result of the allegedly misleading statements in the letter, plaintiff contends, he was caused to lose his cause of action under Code 1975, § 6-5-410. Furthermore, plaintiff argues that his fraud claim is tolled by Code 1975, § 6-2-3." 477 So. 2d at 340-41. According to the Court, "Although plaintiff's theory is novel, we pretermitt discussion of it inasmuch as any viable action for fraud would be negated by plaintiff's failure to adequately plead or support this cause of action in the present case." *Id.* at 341.

²¹ The pertinent fraudulent concealment allegations in Plaintiff's First Amended Complaint are as follows:

Defendants had a duty to disclose to Plaintiff and the public the hazards associated with administering Trasylol during surgery. Defendants nevertheless intentionally suppressed and/or concealed their knowledge of these hazards and the risks associated with administering Trasylol to the public, including the Plaintiff. Defendants intentionally misrepresented results of their own study as well as suppressed findings from its own study that supported Dr. Mangano's findings that Trasylol increased a patient's risk for kidney failure, kidney damage, stroke and/or death. As a proximate result of Defendants' suppression and/or concealment of their knowledge of this information related to Trasylol, Plaintiff has suffered harm.

(DE 3143-1 at ¶¶ 78-80.)

IV. Conclusion

Accordingly, it is hereby

ORDERED AND ADJUDGED that Bayer's Motion for Summary Judgment (DE 2815) is
GRANTED as to all Counts in Plaintiff's First Amended Complaint.

DONE AND ORDERED in Chambers at West Palm Beach, Florida, this 12 day of
February, 2010.

A handwritten signature in black ink, appearing to read 'Donald M. Middlebrooks', written over a horizontal line.

DONALD M. MIDDLEBROOKS
UNITED STATES DISTRICT JUDGE

Copies to: Counsel of Record