SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

Civil Division

Estate of ROBERT E. WONE, by KATHERINE E. WONE, as Personal Representative, *Plaintiff*, v. JOSEPH R. PRICE, VICTOR J. ZABORSKY, and DYLAN M. WARD, *Defendants*.	Civil Action No. 008315-08 The Honorable Brook Hedge Next Court Event: February 14, 2011 Deadline for Discovery Requests

PLAINTIFF'S MOTION FOR LEAVE TO FILE SUR-REPLY IN OPPOSITION TO DEFENDANTS' JOINT MOTION TO DISMISS OR FOR SUMMARY JUDGMENT AS TO COUNTS ONE, THREE, AND FOUR

Plaintiff Estate of Robert E. Wone, through its attorneys, hereby moves this Court for leave to file a sur-reply in response to Defendants' Reply Memorandum in Support of Defendants' Joint Motion to Dismiss or, in the alternative, for Summary Judgment. In support of this motion, Plaintiff states:

1. On October 5, 2010, Defendants filed a Motion to Dismiss Counts One, Three, and Four of Plaintiff's Complaint, or in the alternative, for Partial Summary Judgment.

2. On October 22, 2010, Plaintiff filed its Memorandum of Points and Authorities in Opposition to Defendants' Motion.

3. On November 2, 2010—without first seeking Plaintiff's consent or leave of Court—Defendants filed a "Reply Memorandum of Points and Authorities in Support of Motion to Dismiss Counts One, Three and Four, or in the alternative, Motion for Partial Summary Judgment."

4. Defendants' reply memorandum includes various factual and legal errors, including false assertions regarding what Mrs. Wone knew and when she knew it. Because the Court has not yet scheduled oral argument on Defendants' motion, a sur-reply brief may be Plaintiff's only opportunity to correct the inaccuracies in Defendants' reply brief.

5. The District of Columbia Superior Court Rules of Civil Procedure do not allow parties to submit reply briefs or sur-reply briefs as of right; accordingly, this Motion for Leave is necessary if Plaintiff is to file its sur-reply.

WHEREFORE, Plaintiff Estate of Robert E. Wone respectfully requests that this Court grant leave for Plaintiff to file the sur-reply attached hereto as Exhibit A and the accompanying Affidavit of Katherine E. Wone.

Respectfully submitted,

/s/ Benjamin J. Razi

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November 8, 2010

RULE 12-I CERTIFICATE

I hereby certify that I sought Defendants' consent to this Motion for Leave by email to Defendants' counsel on November 8, 2010. Defendants' counsel would not consent.

/s/ Benjamin J. Razi
Benjamin J. Razi

CERTIFICATE OF SERVICE

I hereby certify that on November 8, 2010, I caused a copy of the foregoing Motion for Leave to be served via CaseFileXpress on the following counsel:

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SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

Civil Division

Estate of ROBERT E. WONE, by KATHERINE E. WONE, as Personal Representative, *Plaintiff*, v. JOSEPH R. PRICE, VICTOR J. ZABORSKY, and DYLAN M. WARD, *Defendants*.	Civil Action No. 008315-08 The Honorable Brook Hedge Next Court Event: February 14, 2011 Deadline for Discovery Requests

PROPOSED ORDER

Upon consideration of Plaintiff's Motion for Leave to File a Sur-Reply in Opposition to Defendants' Joint Motion to Dismiss Counts One, Three, and Four of Plaintiff's Complaint, or, in the alternative, for Partial Summary Judgment, it is by the Court this ___ day of _____ 2010, hereby ORDERED that:

1. The Motion for Leave to File a Sur-Reply is GRANTED, and

2. Exhibit A to Plaintiff's Motion for Leave shall be filed as Plaintiff Estate of Robert E. Wone's Sur-Reply in Opposition to Defendants' Joint Motion to Dismiss.

_____
JUDGE BROOK HEDGE

Exhibit A

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

Civil Division

Estate of ROBERT E. WONE, by KATHERINE E. WONE, as Personal Representative, *Plaintiff*, v. JOSEPH R. PRICE, VICTOR J. ZABORSKY, and DYLAN M. WARD, *Defendants*.	Civil Action No. 008315-08 The Honorable Brook Hedge Next Court Event: February 14, 2011 Deadline for Discovery Requests

PLAINTIFF'S SUR-REPLY IN OPPOSITION TO DEFENDANTS' JOINT MOTION TO DISMISS OR FOR SUMMARY JUDGMENT AS TO COUNTS ONE, THREE, AND FOUR

On November 2, 2010—without first seeking Plaintiff's consent or leave of Court—Defendants filed a 15-page, 30-footnote reply brief, trying to explain why their motion for partial dismissal or summary judgment should not be denied. In this sur-reply, we will not repeat each of the arguments set forth in Plaintiff's opposition, which demonstrated why Defendants' motion is meritless. Instead, in the event the Court elects not to hear oral argument on Defendants' motion, this brief is intended to correct the most egregious errors in Defendants' reply, namely:

1. Defendants' gross mis-reading of *Estate of Chappelle v. Sanders*, 442 A.2d 157 (D.C. 1982), and its applicability here;

2. Defendants' erroneous claim that, in every murder case, irrespective of fraudulent concealment, the statute of limitations for wrongful death claims begins to run on the date of the murder; and

3. Defendants' false assertion that there are no disputed issues of material fact—an assertion predicated on misstatements regarding when Mrs. Wone learned of Defendants' wrongdoing.

As explained more fully below, Defendants' arguments on each of these points are fundamentally flawed. Their motion should be denied.

I. DEFENDANTS DISTORT THE *CHAPPELLE* DECISION AND MISCONSTRUE D.C. LAW.

Defendants contend that *Estate of Chappelle v. Sanders* is "plainly dispositive" (Defs.' Reply at 3), and that Mrs. Wone's wrongful death claim against them is barred by the statute of limitations, notwithstanding their acts of fraudulent concealment. 442 A.2d 157 (D.C. 1982). Although Defendants would have the Court believe that the Court of Appeals has "expressly and unambiguously" held that the statute of limitations for wrongful death begins to run—without exception—when the plaintiff learns of the victim's death, this is decidedly not the law. Defendants' argument is based on a distorted reading of *Chappelle*, which, by its own terms, provides for a case-by-case, fact-based inquiry rather than a broad legal rule of universal application. *See id.* at 159. Because the facts of this case are starkly different from those in *Chappelle*, that decision does not control here.

The wrongful death in *Chappelle* stemmed from a two-car accident resulting in the death of a passenger (Nan Chappelle) in one of the vehicles. The injured driver of the car in which Chappelle was a passenger witnessed the entire accident; took down the license plate number of the car whose driver had been at fault; and used this information to identify Retta Sanders as the car's owner. *Id.* at 157-58. The injured driver then filed a timely lawsuit against Retta Sanders. *Id.* at 157 n.2. In discovery, the injured driver learned that Theophilus Sanders, Jr., had been driving Retta Sanders's car at the time of the accident, and added Theophilus Sanders, Jr. as a defendant. *Id.*

Estate of Chappelle involved a subsequent suit by the estate of the deceased passenger (Nan Chappelle). *Id.* at 157. Instead of suing within the limitations period like the injured driver did, the Chappelle estate sued more than three years after the car accident. *Id.* The estate claimed that it was prevented from filing suit earlier because of Retta and Theophilus Sanders' alleged concealment of their identities. *Id.* The statute of limitations was not tolled "[i]n the circumstances" presented in *Chappelle*, however, because, within the limitations period, the estate "was well aware not only of the existence of wrongful death and survival claims, but also of Retta Sanders' identity as" one of the liable parties. *Id.* at 159 (emphasis added). In other words, the Sanders' alleged concealment of their identities was insufficient to toll the statute of limitations because, like the injured driver did, the Chappelle estate "could have filed a timely claim against Retta Sanders and amended it as pretrial discovery revealed the identity of any other liable parties." *Id.* at 159.

Contrary to Defendants' over-reading of the decision, *Chappelle* does not hold that if a tortfeasor's identity is concealed, the statute of limitations is never tolled. As the Court of Appeals has explained, *Chappelle* held that a "defendant's concealment merely of his identity does not toll the statute of limitations." *Diamond v. Davis*, 680 A.2d 364, 380 n.14 (D.C. 1996) (emphasis added).

In this case, Mrs. Wone alleges that Defendants lied about their involvement with Robert Wone's murder—not that they lied about their identities—and that they concealed the facts forming the basis of her claim against Defendants by altering and orchestrating the crime scene, destroying evidence, and delaying the call to 9-1-1. *See* First Am. Compl. at ¶¶ 24-42. The scope of a defendant's concealment is a critical factual issue and cannot be swept aside by

treating *Chappelle* as a rigid rule that takes no account of the underlying facts. The Court of Appeals made this plain in *Diamond*:

> In *Estate of Chappelle*, the concealment of the mere identity of the defendant did not amount to concealment of wrongdoing on the part of the defendant. In *Fitzgerald* and *Richards*, however, [two cases in which the D.C. Circuit found the statute of limitations to have been tolled,] not only were the defendants' identities concealed, but the fact of their participation in the wrongdoing as well.

680 A.2d at 380 n.14.

Likewise, Mrs. Wone has alleged that Defendants concealed "the fact of their participation in the wrongdoing" by, among other things, lying to her about their conduct. The statute of limitations was thus tolled during Defendants' continuing fraudulent concealment of their participation in the wrongdoing that led to Robert Wone's death. *See, e.g.*, *Emmett v. E. Dispensary and Cas. Hosp.*, 396 F.2d 931, 938 (D.C. Cir. 1967) (even though defendants did not conceal that decedent died while under defendants' medical care, statute of limitations was tolled by hospital's "refusal to release . . . information so material in character that knowledge of a basis for, or intelligent prosecution of, the cause of action was precluded").

II. FRAUDULENT CONCEALMENT TOLLS THE STATUTE OF LIMITATIONS IN UNSOLVED MURDER CASES.

The D.C. cases cited above and in Mrs. Wone's Opposition amply demonstrate that, in light of their fraudulent concealment of the bases for Mrs. Wone's claims, Defendants are not permitted to hide behind the statute of limitations. And, although the D.C. courts apparently have not yet addressed the unique statute of limitations issues that arise in unsolved murder cases involving fraudulent concealment, numerous other courts around the country have done so. Those courts have held repeatedly that the statute of limitations for wrongful death is tolled where the defendant conceals his involvement in the victim's murder and/or its cover-up. *See* Pl.

Opp. at 11-13 (collecting authority). Remarkably, Defendants' verbose reply brief does not cite a single murder case that reaches a different result.[1]

Defendants would have this Court establish a different rule in D.C.—namely, that the fraudulent concealment doctrine is inapplicable in wrongful death cases involving unsolved murders. *See* Defs.' Reply at 2 ("The statute of limitations . . . begins to run when the plaintiff learns of the wrongful death itself."). Under Defendants' proposed rule, it would not matter if a murderer destroyed every shred of evidence connecting him to the murder, moved the victim's body, and fabricated an airtight alibi. Prospective plaintiffs would still be expected to file suit within a year of death. Unquestionably, Defendants' proposed rule would be good for anyone who wrongfully kills another person in D.C., guaranteeing the perpetrator a windfall as long as he can hide his involvement for 365 days. It would, of course, be horrible policy for the District—which averages between 150-250 murders per year[2] and has a high unsolved murder rate.[3] Nothing in the cases warrants such an unfair result.

III. GENUINE ISSUES OF MATERIAL FACT PRECLUDE SUMMARY JUDGMENT.

As the parties seeking summary judgment, Defendants "ha[ve] the burden of demonstrating the absence of any genuine issue of material fact." *Allen v. Yates*, 870 A.2d 39, 44 (D.C. 2005); *see also* D.C. R. Civ. P. 56(c). In an effort to shirk their summary judgment

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[1] Defendants claim falsely that Mrs. Wone's opposition "misstated the holding" of *Gomez v. City of Torrance*, 311 Fed. Appx. 967 (9th Cir. 2009). *See* Defs.' Reply at 2 n.1. In *Gomez*, the Ninth Circuit held that the statute of limitations was tolled where the defendant concealed evidence supporting the plaintiffs' wrongful death claim—the proposition for which Mrs. Wone cited the case.

[2] *See* "District Crime Data At a Glance," available at www.mpd.dc.gov.

[3] *See, e.g.*, Bill Myers and Emily Babay, Percentage of D.C.-area Unsolved Homicides Growing, *Washington Examiner*, June 7, 2010.

burden, Defendants claim that "Plaintiff's Opposition has not raised or otherwise alleged any dispute of material fact." Defs.' Reply at 7. Nothing could be further from the truth.

In fact, Plaintiff's Opposition brief explained that there are disputed issues of material fact regarding the scope of Defendants' fraudulent concealment. *See* Pl. Opp. at 19. And more disputed issues of material fact are revealed in Defendants' reply brief. For instance, Defendants claim in their reply that Mrs. Wone knew "in 2006" about "the utter lack of evidence of an intruder; the fact that Robert Wone was incapacitated at the time of the stabbing . . . ; and the evidence indicating that Defendants altered and staged the crime scene after Robert Wone was murdered." Defs.' Reply at 8. Defendants' contention that Mrs. Wone knew these facts "in 2006" is false and is a hotly disputed issue of material fact. Contrary to Defendants' assertions, Mrs. Wone did not learn this information until 2008, when the government brought obstruction of justice and related charges against Defendants. *See* Affidavit of Katherine Wone ¶ 4. This disputed issue of material fact is alone sufficient to defeat Defendants' summary judgment motion. *See, e.g., Klock v. Miller & Long Co.*, 763 A.2d 1147, 1150 (D.C. 2000) ("The moving party bears the burden of establishing . . . the absence of a material factual dispute . . . . Any doubts about the existence of a factual dispute must be resolved in favor of the non-moving party.") (internal citations omitted).

Moreover, Mrs. Wone has alleged that Defendants lied to her in face-to-face discussions when they deflected responsibility for Robert Wone's murder onto an unknown "intruder." *See* First Am. Compl ¶ 16; *see also* Affidavit of Katherine Wone ¶ 3. Defendants—as far as we are aware—have never admitted that their statements to Mrs. Wone were lies. In a fraudulent concealment case, whether Defendants lied to Mrs. Wone about their involvement in her husband's death is critical to determining whether she should have known she had a cause of

action against Defendants. *See, e.g.*, *Fred Ezra Co. v. Psychiatric Inst. of Wash.*, 687 A.2d 587, 593 (D.C. 1996) (statute of limitations tolled where defendants "assur[ed]" plaintiff that they were not in breach of agreement; plaintiff could not "be faulted for believing that [defendants] had made truthful statements."). This disputed issue of material fact provides another basis for denying Defendants' motion. *See id.* (trial court erred by "not consider[ing] the genuine material issues of fact raised by [plaintiff] that need to be resolved to determine whether, given [plaintiff's] claim of fraudulent concealment, [plaintiff] exercised due diligence in identifying potential causes of action"); *see also Drake v. McNair*, 993 A.2d 607, 617 (D.C. 2010) ("What constitutes acting reasonably under the circumstances . . . is a highly factual analysis, which takes into account the conduct and misrepresentations of the defendant . . . and the reasonableness of the plaintiff's reliance on defendant's conduct and misrepresentations.") (emphasis added).

Contrary to Defendants' false assertions, what Mrs. Wone knew in 2006 was what her then-friends—the Defendants—told her about the crime: that they were not involved and that an unknown outsider committed the crime. First Am. Compl. ¶ 16; *see also* Affidavit of Katherine Wone ¶ 3. Because of her and Robert's friendship with Defendants, she believed their explanation. It was not until 2008—when the police released evidence demonstrating that Defendants had lied to her—that Mrs. Wone learned she had a cause of action against Defendants. First Am. Comp. ¶ 20; *see also* Affidavit of Katherine Wone ¶¶ 4-5. Now, Defendants claim that, notwithstanding their lies to Mrs. Wone in 2006 and thereafter about their involvement in her husband's murder, she should have known she had a claim against them the day her husband was killed. Far from being an undisputed question, this is an essential jury question. *See, e.g.*, *Ehrenhaft v. Malcolm Price, Inc.*, 483 A.2d 1192, 1204 (D.C. 1984) ("[W]e

cannot decide as a matter of law that appellant knew or should have known of the alleged defects for more than three years at the time the complaint was filed, which would thereby make his claims untimely. This is a question to be decided by the trier of fact."); *Byers v. Burleson*, 713 F.2d 856, 861 (D.C. Cir. 1983) ("Summary judgment is not appropriate . . . if there is a genuine issue of material fact as to when, through the exercise of due diligence, the plaintiff knew or should have known of her injury."); *Burns v. Bell*, 409 A.2d 614, 617 (D.C. 1979) ("Thus the determination of when appellant should have reasonably discovered her injury under the instant circumstances is, in our view, a question of fact and should have been submitted to the trier of fact.").

Finally, Defendants' reply sidesteps altogether the effect of their Fifth Amendment invocations on their attempt to hide behind the statute of limitations. In advance of trial, if Defendants persist in refusing to answer questions regarding their fraudulent concealment based on self-incrimination concerns, Mrs. Wone will seek a variety of relief under Superior Court Rule 37, including relief relating to Defendants' statute of limitations defense. This relief will include an order precluding Defendants from offering evidence on the date Mrs. Wone had inquiry notice of Defendants' involvement in her husband's murder, *see, e.g.*, *SEC v. Cymaticolor Corp.*, 106 F.R.D. 545, 550 (S.D.N.Y. 1985) (plaintiff SEC was "entitled to an order of preclusion" where defendant "asserted his fifth amendment privilege regarding basic aspects of the case—his defenses and denials"), as well as adverse inference jury instructions, *see, e.g.*, *Baxter v. Plamigiano*, 425 U.S. 308, 318 (1976) ("[T]he Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them . . . ."). Under these circumstances, where the effect of

Defendants' refusal to testify on the key issues has not yet been litigated and resolved by the Court, summary resolution of the inquiry notice question is premature and unwarranted.

CONCLUSION

For the reasons explained above and in Mrs. Wone's Opposition brief, Defendants' motion should be denied.

Respectfully submitted,

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November 8, 2010

ATTACHMENT:

AFFIDAVIT OF KATHERINE E. WONE

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

Civil Division

Estate of ROBERT E. WONE, by KATHERINE E. WONE, as Personal Representative, *Plaintiff,* v. JOSEPH R. PRICE, VICTOR J. ZABORSKY, and DYLAN M. WARD, *Defendants.*	Civil Action No. 008315-08 The Honorable Brook Hedge Next Court Event: February 14, 2011 Deadline for Discovery Requests

AFFIDAVIT OF KATHERINE E. WONE

Katherine E. Wone, being first duly sworn, deposes and states as follows:

1. I am the Personal Representative of the estate of my deceased husband, Robert E. Wone, who was murdered on August 2, 2006 while he was an overnight guest at the home of Defendants Joseph Price, Victor Zaborsky, and Dylan Ward, located at 1509 Swann Street, NW, in Washington, D.C.

2. At the time of Robert's murder in August 2006, my husband and I were good friends with the Defendants, particularly Defendant Price. Robert and Defendant Price had known each other since the early 1990s, when they were students at William & Mary. In 2003, Defendants Price and Zaborsky attended our wedding. A year later, all three Defendants hosted Robert's 30th birthday party.

3. Days after Robert's murder, a group of family and friends gathered at my home in Oakton, Virginia to mourn Robert's death. The Defendants joined this gathering. During their visit, I asked the Defendants how Robert was killed. In response, Defendant Price

said that he and Defendants Zaborsky and Ward did not know how Robert was murdered, but that they believed an unknown intruder had entered their home and killed Robert. At the time, I believed the Defendants were telling me the truth. In fact, I asked Defendant Price to serve as a pallbearer at Robert's funeral and he did so on August 8, 2006. In the months and years that followed, Defendant Price reiterated repeatedly that he and Defendants Zaborsky and Ward had absolutely nothing to do with Robert's death.

4. In Defendants' reply brief in support of their motion for partial dismissal or summary judgment, Defendants assert that "in 2006" I knew about "the utter lack of evidence of an intruder," that Robert "was incapacitated at the time of the stabbing," and of "the evidence indicating that Defendants altered and staged the crime scene after Robert Wone was murdered." These assertions are false. I did not learn these and other key facts until 2008, when the government initiated obstruction of justice and related charges against the Defendants. The facts supporting the criminal charges against the Defendants were set forth in an affidavit filed in support of the request for a warrant for Defendant Ward's arrest ("MPD Affidavit").

5. Upon learning the facts set forth in the MPD Affidavit, I realized that the Defendants had been lying to me about what they knew and their involvement in Robert's death.

6. Shortly thereafter, I instructed my attorneys to file this civil lawsuit against the Defendants.

FURTHER YOUR AFFIANT SAYETH NAUGHT

[SIGNATURE CONTAINED ON NEXT PAGE]

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, recollection, and belief.

Katherine E. Wone

SWORN TO AND SUBSCRIBED BEFORE ME, this the 8th day of November, 2010.

Notary Public

My Commission Expires:

Jeanette S. Mukta
Notary Public, District of Columbia
My Commission Expires 4/30/2014