IN THE

Indiana Supreme Court

Supreme Court Case No. 21S-CT-85

Teresa Blackford

Appellant (Plaintiff below)

–v–

Welborn Clinic

Appellee (Defendant below)

Argued: April 22, 2021 | Decided: August 31, 2021

Appeal from the Vanderburgh Circuit Court
No. 82C01-1804-CT-2434
The Honorable David D. Kiely, Judge

On Petition to Transfer from the Indiana Court of Appeals
No. 19A-CT-2054

Opinion by Justice Goff

Chief Justice Rush and Justices David, Massa, and Slaughter concur.

Goff, Justice.

Statutory limitations of action are "fundamental to a well-ordered judicial system." *See Bd. of Regents of Univ. of State of N. Y. v. Tomanio*, 446 U.S. 478, 487 (1980). The process of discovery and trial, revealing ultimate facts that either help or harm the plaintiff, are "obviously more reliable if the witness or testimony in question is relatively fresh." *Id.* And potential defendants, of course, seek to avoid indefinite liability for past conduct. C. Corman, 1 Limitation of Actions § 1.1, at 5 (1991). Naturally, then, "there comes a point at which the delay of a plaintiff in asserting a claim is sufficiently likely either to impair the accuracy of the fact-finding process or to upset settled expectations that a substantive claim will be barred" regardless of its merit. *Tomanio*, 446 U.S. at 487. At the same time, most courts recognize that certain circumstances may "justify an exception to these strong policies of repose," extending the time in which a plaintiff may file a claim—a process known as "tolling." *Id.* at 487–88.

The circumstances here present us with these competing interests: the plaintiff, having been misinformed of a medical diagnosis by her provider, which dissolved its business more than five years prior to the plaintiff filing her complaint, seeks relief for her injuries on grounds of fraudulent concealment, despite expiration of the applicable limitation period. Because we consider the limitation period at issue a statute of repose (rather than a general statute of limitation or non-claim statute), we conclude that fraudulent concealment may not extend the time in which to file a claim. And even if the limitation period were subject to tolling, the defendant's constructive fraud precludes equitable relief. For these

reasons, we hold that the plaintiff's claim is untimely.[1] As such, we affirm the trial court's order granting summary judgment to the defendant and denying the plaintiff's motion for partial summary judgment.

Facts and Procedural History

In 2003, the Welborn Clinic (or, the Clinic) tested Teresa Blackford for hepatitis, a known cause of a skin condition from which she suffered at the time. Upon completing the test, the Clinic informed Blackford that the results were negative. For the next several years, Blackford continued to receive treatment for her skin condition from the Clinic. But on June 30, 2009, the Clinic, under the Indiana Business Trust Act (IBTA or Act), surrendered its authority to conduct business in the state, effectively terminating its relationship with Blackford.

In 2014, as Blackford's health declined, her new doctor diagnosed her with hepatitis. This diagnosis prompted Blackford to request her medical records from the Clinic, which revealed that she had in fact tested positive for hepatitis in 2003. Though treated for her condition by her new doctor, Blackford had developed cirrhosis of the liver because of the delay in treatment, exposing her to a heightened risk of other medical problems.

Upon discovering the original test results, Blackford, on March 13, 2015, sued for medical malpractice—first with the Indiana Department of Insurance and then in the trial court. At trial, the Clinic moved for summary judgment, arguing that, because Blackford sued more than five years after the Clinic dissolved, the IBTA time-barred her claim. *See* Ind.

[1] The Indiana Trial Lawyers Association (ITLA) raises a separate constitutional claim in its amicus brief, arguing that the Indiana Business Trust Act, as applied to Blackford, violates the Privileges and Immunities Clause and the Open Courts Clause of the Indiana Constitution. ITLA, however, as amicus, could not raise a new claim that the parties failed to raise. ITLA is not a party on appeal. *See* Ind. Appellate Rule 17(A). And it is well established that "[a]n amicus is not permitted to raise new questions but rather must accept the case as it finds it at the time of its petition to intervene." *Indiana Dep't of Transportation v. FMG Indianapolis, LLC*, 167 N.E.3d 321, 333 (Ind. Ct. App. 2021) (citing *Anderson Fed'n of Tchrs., Loc. 519 v. Sch. City of Anderson*, 252 Ind. 558, 254 N.E.2d 329 (1970)).

Code § 23-5-1-11 (2018) (entitling a business trust to "prosecute and defend" all claims filed within a five-year period after the trust surrenders its authority to conduct business). Blackford responded by moving for partial summary judgment on the same issue, asserting that the Clinic fraudulently concealed her test results, thus equitably tolling the IBTA's five-year limitation period. The trial court ruled for the Clinic.

In a divided opinion, the Court of Appeals reversed. *Blackford v. Welborn Clinic*, 150 N.E.3d 687 (Ind. Ct. App. 2020). The majority held (1) that fraudulent concealment may, upon a sufficient showing of facts, toll the IBTA's five-year limitation period; (2) that, as a matter of law, by giving Blackford inaccurate test results in 2003, and by designating no evidence to the contrary, the Clinic fraudulently concealed—passively, if not actively—material medical information; and (3) that, by investigating her condition after termination of the doctor-patient relationship "in a reasonably diligent manner," Blackford filed a timely complaint under the IBTA. *Id.* at 696–97. The dissent, however, would have affirmed the trial court on grounds of Blackford's untimeliness in filing the complaint, reasoning that, while the discovery rule applies to active fraud, passive (or constructive) fraud, as Blackford alleged here, tolls the limitations period only "'until the termination of the physician-patient relationship.'" *Id.* at 697–98 (Brown, J., dissenting) (quoting *Boggs v. Tri-State Radiology, Inc.*, 730 N.E.2d 692, 698 (Ind. 2000)).

We granted the Clinic's petition for transfer, thus vacating the Court of Appeals opinion. *See* Ind. Appellate Rule 58(A).

Standard of Review

A de novo standard of review applies to summary-judgment rulings. *Alldredge v. Good Samaritan Home, Inc.*, 9 N.E.3d 1257, 1259 (Ind. 2014). Under this standard, summary judgment is appropriate "if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Ind. Trial Rule 56(C). Claims asserting a defense based on a statutory limitation period are particularly suitable for summary-

judgment determination. *See City of Marion v. London Witte Grp., LLC*, 169 N.E.3d 382, 390 (Ind. 2021). "When a moving party asserts as an affirmative defense that an action is time-barred, and establishes that the action was commenced beyond the statutory period, the burden shifts to the nonmovant to establish an issue of fact material to a theory that avoids the defense." *Jurich v. John Crane, Inc.*, 824 N.E.2d 777, 780 (Ind. Ct. App. 2005).

Discussion and Decision

On transfer, the Clinic—joined by the Defense Trial Counsel of Indiana as amicus curiae—argues that, by its plain terms, the IBTA "creates a date certain after which all claims against it are barred." Pet. to Trans. at 15. And to recognize an equitable exception for fraud, the Clinic contends, runs contrary to the IBTA's plain language and to its purpose of shielding businesses from the need to defend against stale claims. *Id.* at 15–18. For her part, Blackford, along with amicus curiae the Indiana Trial Lawyers Association, maintains that the Clinic's fraudulent concealment of her test results tolled the IBTA's five-year limitation period. Legislative policy and principles of equity, she insists, prevent a party from exploiting another by fraudulent activity. Resp. to Trans. at 6. Simply put, she asserts, "[f]raud vitiates anything." *Id.*

To resolve this dispute, our decision proceeds in two parts. We first examine the various statutory limitations of action—general statutes of limitation, statutes of repose, and non-claim statutes—to determine whether the IBTA permits equitable tolling. Concluding that it does not, we then ask whether a limited exception applies in cases of fraudulent concealment—a question we likewise answer in the negative on grounds that the Clinic's constructive fraud justifies no equitable relief for Blackford.

I. The IBTA's limitation period is not subject to equitable tolling.

Enacted in 1963, the IBTA expressly recognizes a business trust—an unincorporated association in which one or more trustees engage in professional activities for the profit of its beneficiaries—as a type of organization permitted to conduct business in the state.[2] Act of Mar. 14, 1963, ch. 353, §§ 2, 3, 1963 Ind. Acts 900, 901–02 (codified as amended at I.C. §§ 23-5-1-2, -3). When a business trust withdraws or "surrender[s]" its authority to conduct business, by filing a notice of intent with the secretary of state, the IBTA allows for a five-year winding-up period, during which the trust may "convey and dispose of its property and assets" and "perform any other act or acts pertinent to the liquidation of its business." I.C. § 23-5-1-11(b). As part of this dissolution process, the IBTA "entitle[s]" the trust to "prosecute and defend all suits filed prior to the expiration of [the five-year] period involving causes of action prior to the effective date of such withdrawal." *Id.* The withdrawal "shall have no effect upon any suit filed by or against" the trust before expiration of this period "until such suit has been finally determined or otherwise finally concluded and all judgments, orders, and decrees entered in the suit have been fully executed." *Id.*

The Clinic argues that the IBTA's five-year limitation period is as a statute of repose, creating a firm date "after which all claims are barred," with no option for equitable tolling. Pet. to Trans. at 15, 17. Rather than

[2] The business trust in the United States grew in popularity during the mid- to late-nineteenth century, primarily as a vehicle for avoiding (now largely obsolete) laws precluding corporations from owning real property. John Morley, *The Common Law Corporation: The Power of the Trust in Anglo-American Business History*, 116 Colum. L. Rev. 2145, 2157–63 (2016); Thomas E. Rutledge & Ellisa O. Habbart, *The Uniform Statutory Trust Entity Act: A Review*, 65 Bus. Law. 1055, 1057 (2010). While "the business trust as a gap filler in the menu of organizational forms diminished" by the mid-twentieth century, it survives today and serves a variety of purposes, including for asset securitization and real-estate investment. Rutledge & Habbart, *Uniform Statutory Trust Entity Act*, 65 Bus. Law. at 1057. *See also* John H. Langbein, *The Secret Life of the Trust: The Trust as an Instrument of Commerce*, 107 Yale L.J. 165 (1989) (discussing a variety of commercial trusts).

establishing "a deadline for filing a claim from the occurrence of a tort as a statute of limitations would," the IBTA, the Clinic asserts, "sets a distinct, outside limit as to when any claim involving a business trust which is being dissolved can be filed." Appellee's Br. at 16. Blackford, on the other hand, characterizes the IBTA as a non-claim statute, a type of legislation subject to equitable tolling, including in cases of fraud.

Resolution of this issue first requires us to distinguish between the various statutory limitations of action.

A. The type of statutory limitation determines whether tolling may revive an otherwise untimely claim.

General "statutes of limitation" create "a defense to an action brought after the expiration of the time allowed by law for the bringing of such an action." *Donnella v. Crady*, 135 Ind. App. 60, 63, 185 N.E.2d 623, 625 (1962). This defense acts as a "procedural bar to a remedy" when a plaintiff fails to file a lawsuit within a specific period of time after the injury "accrues" or comes into existence. *Gill v. Evansville Sheet Metal Works, Inc.*, 970 N.E.2d 633, 637 n.4 (Ind. 2012). As such, this category of legislation encourages plaintiffs "to pursue diligent prosecution of known claims." *California Pub. Employees' Ret. Sys. v. ANZ Sec., Inc.*, 137 S. Ct. 2042, 2049 (2017). Principles of equity preclude a party from invoking the statute of limitations as a defense when that party, "by fraud or other misconduct," has prevented the filing of a lawsuit or induced its delay beyond the time permitted by statute. *Donnella*, 135 Ind. App. at 63, 185 N.E.2d at 625. "The time for commencing an action governed by the general statutes of limitation may thus be extended" or tolled. *Id.*

Statutes of repose, in turn, "mark the outer boundaries of substantive legal rights because they limit the time during which a cause of action can arise." *Gill*, 970 N.E.2d at 637 n.4. In other words, "no cause of action exists once the repose period expires." *Id.* This type of legislation acts as a substantive bar to a legal claim "after a specified period of time has run from the occurrence of some event **other than the injury** which gave rise to the claim." *Kissel v. Rosenbaum*, 579 N.E.2d 1322, 1326 (Ind. Ct. App. 1991) (emphasis added). A statute of repose, then, may bar a cause of

action long before it accrues, effectively depriving a claimant of a remedy. *Id.* The reason for this strict prohibition is not necessarily to avoid stale evidence but rather to delineate a specific timeframe "within which the legislature has, for public policy reasons, deemed it appropriate to bring the claim." *Id.* at 1327–28. And by vesting in the defendant a substantive grant of immunity once the period expires, statutes of repose—absent express language to the contrary—supersede or "override" equitable rules of tolling. *Id.* at 1328*; ANZ Sec., Inc.*, 137 S. Ct. at 2051.

A third category of legislation, what courts often refer to as non-claim statutes, creates an enforceable right of action, "unknown to the common law," only if commenced within the prescribed timeframe. *Wawrinchak v. U. S. Steel Corp., Gary Works*, 148 Ind. App. 444, 451, 267 N.E.2d 395, 399 (1971). While "statutes of limitation create defenses that must be pleaded and may be waived," a non-claim statute is self-executing and "imposes a condition precedent to the enforcement of a right of action." *Bahr v. Zahm*, 219 Ind. 297, 302, 37 N.E.2d 942, 944 (1941). So, unless a party files a claim within the prescribed time, "no enforceable right of action is created." *Donnella*, 135 Ind. App. at 63, 185 N.E.2d at 624. Non-claim statutes generally "are not subject to equitable exceptions."[3] *Est. of Decker v. Farm Credit Servs. of Mid-Am., ACA*, 684 N.E.2d 1137, 1139 (Ind. 1997).

With this context in mind, we turn to our analysis of the limitation period at issue under the IBTA.

[3] We acknowledge a potential conflict in our case law on this issue. *Compare Alldredge*, 9 N.E.3d at 1263 (concluding "that neither an ordinary statute of limitation nor a temporal condition precedent [*i.e.*, a non-claim statute] will bar a plaintiff's claim when the delay in filing was due to the tortfeasor's fraud"), *with Donnella*, 135 Ind. App. at 63, 185 N.E.2d at 625 (opining that non-claim statutes are "not extended" even by "fraud or misconduct of the parties"), *and Est. of Decker v. Farm Credit Servs. of Mid-Am., ACA*, 684 N.E.2d 1137, 1139 (Ind. 1997) (citing *Donella* for the proposition that non-claim statutes "are not subject to equitable exceptions"). But because we consider the IBTA's five-year limitation period as a statute of repose, we need not resolve this ostensible tension in precedent.

B. The IBTA's five-year limitation period is a statute of repose, effectively barring Blackford's claim as untimely.

Unlike a non-claim statute, the IBTA created no **new** right of action—*i.e.*, a right of action "unknown to the common law." *Cf. Robertson v. Gene B. Glick Co.*, 960 N.E.2d 179, 184 (Ind. Ct. App. 2011) (concluding that, because "wrongful death is a creature of the legislature" for which "no cause of action existed at common law," the time constraint under the Wrongful Death Act "is not a statute of limitations, but rather, a condition precedent"). To the contrary, long before the IBTA, the common law recognized a right of recovery for claims against a business trust, including those subject to dissolution.[4] *See Hewitt v. Westover*, 86 Ind. App. 505, 511, 516, 158 N.E. 631, 633–34, 635 (1927) (permitting a claim of fraud against the agents and directors of an insolvent company subject to bankruptcy, whether as "a common-law [business] trust or a

[4] Pre-IBTA case law in Indiana, to be sure, is limited. And our courts, during the early-twentieth century, appeared hostile toward the common-law business trust as an organizational device. In one case, our Court of Appeals even questioned their legal validity, suggesting—without formally concluding—that these associations organized simply to "evade the statutes concerning the organization of corporations" or to "escape their liabilities as partners." *McClaren v. Dawes Elec. Sign & Mfg. Co.*, 86 Ind. App. 196, 200, 156 N.E. 584, 585 (1927). But while treating the beneficiaries in that case as partners subject to liability for the trust's obligations, the court still recognized that an unincorporated association may conduct "business under a declaration of trust," depending on the "provisions of the instrument under which [it is] organized." *Id.* And in a separate decision, this Court implicitly acknowledged the validity of a common-law business trust in Indiana, concluding that such an association is "capable of taking and holding title to property" (thus rendering it subject to prosecution for embezzlement). *Ridge v. State*, 192 Ind. 639, 642, 137 N.E. 758, 759 (1923).

corporation").[5] The legislature, of course, enjoys the "power to abrogate or modify common law rights and remedies." *Dague v. Piper Aircraft Corp.*, 275 Ind. 520, 529, 418 N.E.2d 207, 213 (1981). But the IBTA expressly recognizes the enduring application of the state's common law of business trusts for determining the scope of an entity's "power and authority" to conduct business. I.C. § 23-5-1-8. And this power and authority, which a trust may surrender "at any time" when dissolving its business, includes, among other things, "the right to sue and be sued." I.C. §§ 23-5-1-8, -11(a).

To be sure, the IBTA changed the way in which a party could recover against a business trust. Decisions predating the Act held that a common-law business trust, which lacked "any legal existence distinct from [its] members," could sue or be sued not "in the company name" but rather in the name of its trustees only, "unless by the articles [of organization] another mode is authorized." *Farmers' Mut. v. Reser*, 43 Ind. App. 634, 638, 88 N.E. 349, 351 (1909). Under the IBTA, by contrast, the business "trust shall have the right to sue and be sued," whether "in its own name" or in the name of its trustees. I.C. § 23-5-1-8. But this change affected the **procedure** for enforcing an existing right of action; it did not create the right of action itself. *Accord Ellenwine v. Fairley*, 846 N.E.2d 657, 660 (Ind. 2006) (observing that the Medical Malpractice Act "did not create or establish the medical malpractice claim; it only imposed procedural requirements on the prosecution of them"). *See also* Robert C. Brown, *Common Law Trusts as Business Enterprises*, 3 Ind. L.J. 595, 623 (1928) (addressing the "purely procedural" question of how a business trust "may sue or be sued").

[5] While nothing in the *Hewitt* decision suggests that the business there had fully dissolved, courts and commentators recognized the common-law principle that a claimant possessed a right of recovery against a defunct business trust. *See, e.g.*, *Wells v. Mackay Tel.-Cable Co.*, 239 S.W. 1001, 1003, 1006 (Tex. Civ. App. 1921) (holding that, by "well settled" rule, the beneficiaries of a common-law business trust, having "previously been dissolved," were "liable for debts incurred by the trustees in carrying on the business of the company"). *See also* James Hill et al., *A Practical Treatise on the Law Relating to Trustees* 800 (3d Am. ed. 1857) (stating that a trustee of an insolvent or bankrupted business trust "will be responsible to the creditors" of the trust "and he may be . . . proceeded against in the same manner as any other [business entity]").

Beyond the established common-law right of action against a business trust, the language of the IBTA itself offers support for our conclusion. A non-claim statute presents to a potential plaintiff an "offer of an action on condition that it be commenced within the specified time." *Wawrinchak*, 148 Ind. App. at 451, 267 N.E.2d at 399. If the plaintiff fails to accept that offer by filing no action within that time, then "the action and the right of action no longer exist, and the defendant is exempt from liability." *Id.* The IBTA, by contrast, contains no such proposition. Rather than imposing on a potential claimant "a condition precedent to the enforcement of a right of action," *see Decker*, 684 N.E.2d at 1139, the Act instead confers a right and responsibility on the business trust itself, "**entitl[ing]**" that entity to "prosecute and defend all suits filed" against it during the five-year limitation period, I.C. § 23-5-1-11(b) (emphasis added).

Non-claim statutes also typically include language specifying that a claim "shall be barred" or "shall be forever barred" unless the claimant filed suit within a specific timeframe. *See, e.g.*, *Decker*, 684 N.E.2d at 1139 (non-claim statute under which all claims against an estate "shall be barred if not filed within one (1) year after the death of the decedent"); *Wawrinchak*, 148 Ind. App. at 450, 267 N.E.2d at 399 (non-claim statute under which a right to worker's compensation "shall be forever barred" unless the claimant filed suit within two years from the occurrence of an accident or death); *Donnella*, 135 Ind. App. at 62, 185 N.E.2d at 624 (non-claim statute under which all claims against an estate "shall be forever barred" if filed more than six months "after the date of the first published notice to creditors"). The "affirmative nature of the[se] declarations," this Court has recognized, offers evidence of "a legislative intent to not merely withhold the remedy, but to take away the very right of recovery" when the claimant fails "to present his claim as [the] statute provides." *Bahr*, 219 Ind. at 302, 37 N.E.2d at 944 (internal quotations and citations omitted).

The IBTA, by contrast, contains no such affirmative declaration against a potential plaintiff. And the absence of language specifying a permanent bar on an untimely claim suggests leeway for equitable tolling. Comparing the text of the IBTA to the language of the Uniform Statutory Trust Entity Act validates this conclusion. Under that model legislation, designed to "address the legal uncertainty surrounding the common-law

business trust," a claim against a trust "is barred" so long as the claimant received notice of the pending dissolution and "the claim is not received by the specified deadline." Unif. Statutory Trust Entity Act of 2009, pref. n. at 1, § 704.

Having ruled out the IBTA's status as a non-claim statute, we must now decide whether to treat it as a general statute of limitation or as a statute of repose. Our analysis below leads us to classify the Act under the latter category of legislation.

While the IBTA created no new right of action (*i.e.*, a right of action unknown to the common law), the Act clearly defines the timeframe in which that right of action may arise, marking the "outer boundaries" of a claimant's "substantive legal rights." *See Gill*, 970 N.E.2d at 637 n.4. From that view, the IBTA fulfills the purpose of a statute of repose. Indeed, rather than creating a deadline for filing suit based on the occurrence of a tort, as a statute of limitations does, the IBTA bars a legal claim "after a specified period of time has run from the occurrence of some event **other than the injury** which gave rise to the claim." *See Kissel*, 579 N.E.2d at 1326 (emphasis added). That event, of course, is the trust's surrendering of authority to conduct business in the state. And the culmination of the five-year period following this event "implements a legislative decision that as a matter of policy there should be a specific time beyond which a defendant should no longer be subjected to protracted liability." *ANZ Sec., Inc.*, 137 S. Ct. at 2051 (cleaned up).

We find support for this conclusion by looking to Indiana's corporate "survival" statutes. These statutes extend the life of a dissolved business entity "to wind up and liquidate its business and affairs" and to settle any claims filed against it within a two-year period. I.C. §§ 23-1-45-5 to -7. As with a statue of repose, a survival statute "marks the **outer limit** for suits by dissolved firms as well as suits against them." *Sharif v. Int'l Dev. Grp. Co.*, 399 F.3d 857, 860 (7th Cir. 2005) (emphasis added). *See also Michigan Indiana Condo. Ass'n v. Michigan Place, LLC*, 8 N.E.3d 1246, 1251 (Ill. App. Ct. 2014) (emphasizing that the limited "extension to a corporation's life" indicates "a *fixed endpoint* beyond which a corporation ceases to exist" and "may no longer sue or be sued") (citation omitted). A survival statute, in

other words, "indicates a legislative policy to place a definite termination upon corporate existence with respect to dissolution, as well as to protect shareholders, officers, and directors of dissolved corporations from prolonged and uncertain liability." *Indiana Nat. Bank v. Churchman*, 564 N.E.2d 340, 344 (Ind. Ct. App. 1990). And by deferring to this policy, our courts have properly "refused to apply equitable remedies" to expand a potential claimant's limited corridor of relief. *Id.*

Of course, "a survival statute operates to give life to a claim that would otherwise be extinguished by virtue of **corporate** dissolution," *id.* at 342–43 (emphasis added), whereas the IBTA's limitation period applies to an "**unincorporated** business association," I.C. § 23-5-1-2(a) (emphasis added). But the IBTA also entitles the beneficiaries of a business trust "to the same limitation of personal liability extended to stockholders of private corporations." I.C. § 23-5-1-2(a). And if the beneficiaries of a business trust enjoy the same limited liability as corporate shareholders, we see no reason to distinguish these two groups when barring legal claims filed beyond the statutory time limit.

In short, we conclude that the IBTA's five-year limitation period is a statute of repose rather than a general statute of limitation or a condition precedent to filing suit. And because statutes of repose preclude equitable rules of tolling, we hold that Blackford's claim—filed beyond the IBTA's five-year limitation period—is untimely.

II. Even if the IBTA were subject to tolling, the Clinic's constructive fraud precludes equitable relief for Blackford.

While "a statute of repose is **typically** an absolute time limit beyond which liability no longer exists," *Kissel*, 579 N.E.2d at 1328 (emphasis added), we recognize the rare case in which our courts have made an exception, including for instances of fraud. *See, e.g.*, *In re Plummer's Est.*, 141 Ind. App. 142, 151, 219 N.E.2d 917, 922 (1966) (concluding that, "in the absence of fraud or mistake," a party may only attack the validity of a

duly probated will within the six-month time limit specified in the probate code's "statute of repose").[6]

The Clinic argues that, even if an equitable exception were to apply to the IBTA, this case involves only a claim of passive (or constructive) fraud, rather than active fraud. And for this reason, the Clinic asserts, tolling would have ended, at the latest, upon termination of the doctor-patient relationship in June 2009 (when the Clinic dissolved), thus rendering Blackford's lawsuit untimely.

For her part, Blackford acknowledges that the Clinic's actions amounted to passive fraud; she contends, however, that Indiana should formally abolish the distinction between active and passive fraud. Short of that, Blackford asks this Court to recognize an exception in cases where, like here, the patient has no reason to second-guess her medical provider's diagnosis, the patient continues to seek and receive medical care from that provider, and the provider's passive fraud prevented her from discovering its misconduct.

On this issue, we agree with the Clinic.

The doctrine of fraudulent concealment is an equitable remedy that bars a statute-of-limitations defense when the defendant who invokes it prevented the plaintiff from discovering an otherwise valid claim. *Garneau v. Bush*, 838 N.E.2d 1134, 1142 (Ind. Ct. App. 2005). Fraudulent concealment may be active or it may be passive. *Id.* The former category "involves affirmative acts of concealment intended to mislead or hinder the plaintiff from obtaining information concerning the malpractice."

[6] In other cases, our courts have noted the **possibility** of an exception to the otherwise absolute time limits imposed by a statute of repose. *See, e.g.*, *Wenger v. Weldy*, 605 N.E.2d 796, 798 (Ind. Ct. App. 1993) (suggesting, without deciding, that the statute of repose under Indiana's Products Liability Act **may** permit "recommencement of the statute when a product has been reconditioned, altered, or modified to the extent that a 'new' product has been introduced into the stream of commerce"). *But see Estabrook v. Mazak Corp.*, 140 N.E.3d 830, 833–34 (Ind. 2020) (declining to carve out such an exception based on the IPLA's plain language).

Boggs, 730 N.E.2d at 698. Passive fraud, on the other hand, involves "the failure to disclose material information to the patient." *Id.*

The significance of this distinction "lies in the different points in time at which plaintiffs may commence their malpractice actions." *Hughes v. Glaese*, 659 N.E.2d 516, 519 (Ind. 1995). With passive concealment, the physician's "duty to disclose ceases at the termination of the physician-patient relationship," leaving the plaintiff with no remedy if he "fails to exercise due diligence in filing his claim after the equitable grounds cease to be operational as a valid basis for inducing [his] delay." *Id.* With active concealment, by contrast, the tolling period "continues for a reasonable time after the plaintiff discovers the alleged malpractice or discovers information which in the exercise of reasonable diligence would lead to discovery of the malpractice." *Id.* (cleaned up).

Our jurisprudence has long maintained the distinction between active and passive fraud. *See Guy v. Schuldt*, 236 Ind. 101, 109, 138 N.E.2d 891, 895 (1956) (distinguishing active fraud, in which case "the action accrues when the plaintiff first learns of the wrong," from constructive fraud, in which case tolling ends, and the action accrues, when the patient-physician "relationship is terminated"); *Boggs*, 730 N.E.2d at 698 (same). In fact, we've expressly "decline[d] to abolish the distinction" in the past. *Hughes*, 659 N.E.2d at 521. And we refuse to take a different path today. By maintaining the two categories "on the basis of whether the physician's concealment was negligent or purposeful," our "courts can make more appropriate and just determinations as to when defendant physicians should be prevented from asserting the limitations defense." *Id.*

To be sure, *Guy*, *Boggs*, and *Hughes* each involved the two-year statute of limitations under Indiana's Medical Malpractice Act. But we see no reason to collapse the distinction between active and passive fraud in the context of the IBTA's limitation period. Indeed, our jurisprudence has never limited the distinction only to the doctor-patient relationship; rather, it applies to **any** "fiduciary or confidential relationship" where "there exists a duty to disclose material information between the parties." *Hughes*, 659 N.E.2d at 520 (quoting *Guy*, 236 Ind. at 109, 138 N.E.2d at 895). *See, e.g.*, *Malachowski v. Bank One, Indianapolis*, 590 N.E.2d 559, 563 (Ind.

1992) (breach-of-trust claim); *Keesling v. Baker & Daniels*, 571 N.E.2d 562, 565 (Ind. Ct. App. 1991) (legal-malpractice claim). The doctor-patient relationship is only one example. *Hughes*, 659 N.E.2d at 520.

Based on our long-standing distinction between active and passive fraud, which we re-affirm yet again today, we hold that, even if the IBTA's statute of repose were the rare one subject to tolling, that tolling would have ended—and Blackford's claim accrued—at the latest, upon termination of the doctor-patient relationship on June 30, 2009 (when the Clinic surrendered its authority to conduct business). And because Blackford filed suit more than five years later—on March 13, 2015—we consider her claim untimely.

Still, Blackford asks this Court to recognize an exception in cases where, like here, the patient has no reason to second-guess her medical provider's diagnosis, the patient continues to seek and receive medical care from that provider, and the provider's actions prevented her from discovering its misconduct.

While we sympathize with Blackford's unfortunate circumstances, we reject her invitation, which, in effect, amounts to nothing more than a request for us to abolish the distinction between active and passive fraud as it applies to her. What's more, we've rejected a similar argument in the past. In *Hughes*, the plaintiff urged us to base the distinction not on the physician's intent or purpose but rather on whether the concealment or "misrepresentation is of such a nature as to prevent inquiry or to mislead." 659 N.E.2d at 521. "To accept the plaintiff's view," we reasoned in rejecting the plaintiff's argument, "would essentially transform all cases of constructive concealment . . . into cases of active concealment." *Id.* "Virtually all information undisclosed by a physician," we added, "whether resulting from a negligent breach of duty to inform or from an intentional, active misrepresentation, would to some degree be likely to prevent inquiry or to mislead and would therefore satisfy the plaintiff's proposed standard." *Id.*

We also question Blackford's assertion that the Clinic's actions "block[ed her] inquiry into, and treatment of, her hepatitis." Resp. to Trans. at 12. Patients often get second opinions to ensure proper

treatment. *See, e.g.*, *Havens v. Ritchey*, 582 N.E.2d 792, 795 (Ind. 1991) (noting patient's solicitation of a second opinion after primary physician's failure to properly diagnose). And while Blackford had no obligation to seek alternative medical advice, there was certainly nothing that prevented her from investigating her condition before the limitation period ended by requesting her medical records from the Clinic, as our law permits. *See* I.C. § 16-39-1-1(c) ("On written request and reasonable notice, a provider shall supply to a patient the health records possessed by the provider concerning the patient.").[7]

Finally, we note that, by creating an exception here, we risk extending the temporal line even further in future cases that may present similar circumstances, effectively undermining the policies of "fairness and finality" we deem fundamental to our statutory limitations of action. *See Porter Cty. Sheriff Dep't v. Guzorek*, 857 N.E.2d 363, 368 (Ind. 2006).

Conclusion

Because we consider the IBTA's limitation period a statute of repose, we conclude that fraudulent concealment may not extend the time in which to file a claim. And even if the Act's limitation period were subject to tolling, a tortfeasor's constructive fraud precludes equitable relief. For these reasons, we hold that Blackford's claim is untimely. As such, we affirm the trial court's order granting summary judgment to the Clinic and denying Blackford's motion for partial summary judgment.

Rush, C.J., and David, Massa, and Slaughter, JJ., concur.

[7] Some commentators have even suggested "a mixed management of patients' medical records, so as to share responsibilities between the patient and the Medical Practitioner." Catherine Quantin et al., *The Mixed Management of Patients' Medical Records: Responsibility Sharing Between the Patient and the Physician*, 156 Stud. Health Tech. Info. 189 (2010).

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