

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM SPARTANBURG COUNTY S.C. SUPREME COURT
Court of Common Pleas
The Honorable R. Keith Kelly, Circuit Court Judge

Appellate Case No. 2021-001339

Phillip Francis Luke Hughes, on behalf of the Estate of Jane K. Hughes,
Petitioner,

v.

Bank of America, National Association,
Respondent.

BRIEF OF RESPONDENT BANK OF AMERICA, NATIONAL ASSOCIATION

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INTRODUCTION

Petitioner makes an extraordinary request of this Court. In his opening brief, he asks the Court to abandon 80 years of its statutory precedent based on Petitioner's view of a better public policy. But the Court has repeatedly recognized such policy concerns are properly directed to the Legislature, not the courts—and the Legislature has seen fit to leave this Court's interpretation of South Carolina law in place for close to a century. Should the Court reach the merits of the claims at issue, it should reject that extraordinary request and retain its longstanding and legislatively sanctioned precedent. But, in fact, the Court need not and should not reach the merits of Petitioner's claims, because they plainly falter at the outset on principles of both claim preclusion and limitations. The Court should apply those well-established doctrines and, consistent with the several federal and state courts that have already decided these issues, affirm the decision below.

This is the second case in which Petitioner Philip Francis Luke Hughes (Hughes) has sued Respondent Bank of America, National Association (BANA) for the same alleged misconduct on behalf of his mother's estate. Hughes' claims center on his assertion that BANA wrongly charged his parents for insurance coverage they purportedly declined. A federal district court already held that Hughes' claims based on those allegations failed because they were untimely, and that this was not the rare case that justified equitable tolling. A federal court of appeals affirmed, and the United States Supreme Court denied further review.

Apparently dissatisfied with the result in federal court, Hughes seeks another bite of the apple in this case, reasserting the same allegations in South Carolina court. He raises several fraud-based state-law claims that he also pleaded in the federal action, but then voluntarily dismissed before the federal court could rule on BANA's motion to dismiss. Because those claims are ones he could have and did raise in the previous action against BANA, *res judicata* precludes him from relitigating them here. The Circuit Court correctly dismissed his claims on that basis. The Circuit

Court also ruled that, as the federal court decided, Hughes' fraud claims were all subject to a three-year statute of limitations that had expired and this was not the exceptional case that warrants equitable tolling. Both those procedural bars defeat Hughes' appeal at the outset.

Yet Hughes focuses most of his argument on an issue that will only salvage his claims if the Court *not only* overturns the lower court's correct procedural rulings but *also* discards its own consistent, 80-year-old reading of South Carolina's survival statute. Since 1941, this Court has interpreted that statute—which partially abrogates the common-law rule that torts do not survive a party's death—to exclude certain claims, including those based on fraud or deceit. And the Legislature has ratified that interpretation by re-enacting the statute without disturbing the operative text. Hughes now asks this Court to ignore both its own rule of stare decisis and the Legislature's plain intent to exclude fraud from the survival statute's scope. If this Court even reaches this issue—and it need not—it should reject that invitation and adhere to its longstanding interpretation of the statute.

Nothing in Hughes' appeal warrants reversing the correct conclusion that multiple state and federal courts have reached: he lacks any viable claim against BANA. This Court should affirm.

ISSUES PRESENTED

1. Did the Circuit Court correctly hold that the claims Hughes re-asserts here after litigating them in federal court are barred by res judicata?
2. Did the Circuit Court correctly hold that Hughes' claims, filed many years after the statute of limitations ran, are untimely and do not warrant equitable tolling?
3. Should this Court adhere to its 80-year-old interpretation of South Carolina's survival statute, consistent with the Legislature's intent and principles of stare decisis?

STATEMENT OF THE CASE

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Hughes' Parents Obtain A Line Of Credit From BANA And Are Charged For Line Protection Insurance.

In June 2006, Hughes' late parents John and Jane Hughes obtained a \$120,000.00 line of credit from BANA secured by a mortgage on their South Carolina home. (R. p. 20, ¶ 7.) Hughes alleges that while meeting to complete this transaction, BANA offered his parents optional line protection insurance (LPP). (R. p. 21, ¶ 9.) LPP coverage allows borrowers to cancel monthly loan payments if they experience disability, accidental death, or involuntary unemployment. (R. p. 21, ¶ 9.) BANA presented John and Jane with an "Optional Line Protection Plan Addendum" but, according to Hughes, John and Jane declined to purchase LPP. (R. p. 21, ¶ 11.)

Hughes claims that BANA nevertheless charged his parents for LPP "for several years," (R. p. 23, ¶ 23), "beginning on or about June 2006." (R. p. 96, ¶ 25.) Over those several years, BANA withdrew the \$28.40 monthly charge from John and Jane's joint checking account. (R. p. 96, ¶ 25.) Those transactions appeared on their bank statements as "Ad Insurance Des:XXXXXX:4374 ID: 6 R# XXXXXXXX1070 Indn:Hughes Sr, John P Co ID:XXXXXX4660 Ppd." (R. pp. 96-97, ¶ 25); (*see* R. p. 120.)

John died in October 2008, leaving his estate to Jane. (R. p. 22, ¶ 13.) In March 2015, BANA sent a letter stating that John and Jane's LPP coverage would be cancelled that September and they would not be charged as of April 1 of that year. (R. p. 22, ¶ 14.) When BANA was informed that John had died in 2008, BANA refunded all payments for LPP coverage withdrawn from the joint account after John's death. (R. p. 97, ¶ 30.)

Jane then died in June 2015, and Hughes was named as her estate's personal representative. (R. p. 24, ¶ 29.)

B. Hughes Sues BANA In Federal Court Based On Allegedly Wrongful Insurance Charges—And Loses At Every Level.

In 2015, Hughes filed a putative class action against BANA on behalf of Jane’s estate in state court, and BANA removed to the United States District Court for the District of South Carolina. (R. pp. 76-90.) Hughes alleged that by charging his parents for LPP, BANA had engaged in fraud, fraudulent concealment, breach of contract, breach of contract accompanied by fraudulent acts, breach of the duty of good faith and fair dealing, and violations of the federal Truth in Lending Act (TILA). (R. pp. 101-07.) BANA moved to dismiss all the claims. Before the federal district court could rule on BANA’s motion, however, Hughes voluntarily dismissed his claims for fraud, fraudulent concealment, and breach of contract accompanied by fraudulent acts. (R. pp. 122-23.) As Hughes conceded, “controlling precedent”—namely, this Court’s longstanding precedent announced in *Mattison v. Palmetto State Life Ins. Co.*, 197 S.C. 256, 15 S.E.2d 117, 119 (1941)—would have “bar[red] recovery for [those] claims by virtue of Jane Hughes’ death.” (R. p. 122.)

The federal district court granted BANA’s motion to dismiss Hughes’ other claims as untimely. (R. p. 129.) The court observed that Hughes did not dispute that his claims were filed outside the limitations periods. (R. p. 128.) And it rejected Hughes’ request for equitable tolling because he could not establish that his parents failed to discover the relevant facts despite exercising due diligence. (R. p. 128) (citing *Am. Legion Post 15 v. Horry Cnty.*, 381 S.C. 576, 582, 674 S.E.2d 181, 184 (Ct. App. 2009)). The court reasoned that because the disputed LPP charge “appeared on [John and Jane’s] monthly checking account statements from 2006 to 2015,” yet they failed to assert any claim against BANA before Jane’s death, Hughes could not argue that they had exercised due diligence in pursuing those claims. (R. p. 128.) It further reasoned that

Jane’s alleged health conditions did not change this conclusion. (R. p. 128.) To hold otherwise, the court noted, “would mean statutes of limitations are inconsequential.” (R. p. 129.)

The United States Court of Appeals for the Fourth Circuit affirmed. The Fourth Circuit emphasized that courts should invoke equitable tolling only rarely and only when the plaintiff has shown that she failed to discover the relevant facts despite exercising due diligence. (R. pp. 134.) Applying these standards and upon review of the briefs and record, the court affirmed “for the reasons stated by the district court.” (R. p. 135.)

The United States Supreme Court denied certiorari. *Hughes on Behalf of Est. of Hughes v. Bank of Am. Nat’l Ass’n*, 138 S. Ct. 935 (2018).

II. THE PRESENT CONTROVERSY

In 2017, while the Fourth Circuit appeal was pending, Hughes sued BANA again in state court. (R. pp. 19-32.) Hughes’ state action alleged the same facts as his federal suit: that his parents declined LPP coverage but were charged for it from 2006 to 2015 without their knowledge. (R. p. 21, ¶¶ 9-11.) Hughes again asserted the claims of fraud, fraudulent concealment, and breach of contract accompanied by fraudulent acts that he had dismissed in his federal action. (R. pp. 24-27.) He also added claims under the South Carolina Unfair Trade Practices Act (SCUTPA), for breach of fiduciary duty, and for conversion, along with a survival cause of action under S.C. Code Ann. § 15-5-90 meant to help him enforce the substantive claims. (R. pp. 27-31.)

The Circuit Court dismissed the action on several grounds. The court first held that Hughes’ claims were barred by the doctrine of res judicata. (R. p. 6.) It observed that Hughes’ state action involved the same parties and “identical” subject matter as the previous federal suit—namely, “BANA’s allegedly wrongful charging of [Hughes’] parents for the LPP product.” (R. pp. 6-7.) Because the federal court had already rejected Hughes’ claims related to the LPP coverage, the Circuit Court held that those claims remained barred here. (R. p. 7.) That Hughes’

claims were not identical in the federal and state actions, the court determined, did not allow him to avoid res judicata because “[a]ll of [his] claims were equally available, and within the scope and purview of [the federal] suit.” (R. p. 8.) Hughes had raised the exact same fraud-based claims in the federal action but chose to dismiss them. (R. p. 8.) The Circuit Court thus held that those claims, along with the others, were barred. (R. p. 8.)

The Circuit Court also held that neither South Carolina’s survival statute nor SCUTPA allowed Hughes to pursue fraud-based claims on behalf of Jane’s estate. (R. p. 8.) As the court observed, this Court has consistently, and as recently as 2002, held that the survival statute does not encompass fraud-related claims. (R. pp. 8-9) (citing *Mattison*, 197 S.C. 256, 15 S.E.2d at 119; *Ferguson v. Charleston Lincoln Mercury, Inc.*, 349 S.C. 558, 564 S.E.2d 94 (2002)). And SCUTPA does not allow unfair trade practices claims to be brought in a representative capacity. (R. p. 10) (citing *Wogan v. Kunze*, 366 S.C. 583, 623 S.E.2d 107 (Ct. App. 2005), *aff’d as modified*, 379 S.C. 581, 666 S.E.2d 901 (2008)). Based on these longstanding precedents, the Circuit Court held that Hughes’ claims for fraud, fraudulent concealment, breach of contract accompanied by fraudulent acts, and violation of SCUTPA “did not survive the death of [his] parents.” (R. p. 10.)

Finally, the Circuit Court held that each of Hughes’ claims were subject to three-year statutes of limitations periods that had expired. (R. p. 10.) As the court explained, the statutes of limitations began to run on those claims when the payments were first deducted from Jane and John’s account in June 2006. (R. p. 11.) At that point, Hughes’ parents knew or reasonably should have known that a claim might exist. (R. pp. 10-11.) For the same reason, equitable tolling did not apply. (R. p. 11.) Jane had “actual notice” of the charges because they were deducted from her account and listed on bank statements. (R. p. 11.) By Hughes’ own allegations, “nothing was hidden.” (R. p. 12.)

Hughes appealed only as to the dismissal of his fraud-based claims, and the Court of Appeals affirmed. (R. pp. 283-84); *Hughes on behalf of Est. of Hughes v. Bank of Am. Nat'l Ass'n*, Op. No. 2021-UP-341, 2021 WL 4449593, at *1 (S.C. Ct. App. filed Sept. 29, 2021), *reh'g denied* (Oct. 20, 2021). The Court of Appeals held that the Circuit Court properly dismissed the action because South Carolina's survival statute does not cover fraud-related claims. *Hughes*, 2021 WL 4449593, at *2. The court declined to reach the res judicata and statute of limitations issues. *Id.*

After the Court of Appeals denied Hughes' subsequent Petition for Rehearing, this Court granted certiorari.

STANDARD OF REVIEW

“In reviewing a motion to dismiss, this Court applies the same standard of review as the trial court” and views the alleged facts in the light most favorable to the plaintiff. *Carolina Park Assocs., LLC v. Marino*, 400 S.C. 1, 6, 732 S.E.2d 876, 878 (2012). “Questions of statutory interpretation are questions of law” that this Court reviews de novo. *State v. Whitner*, 399 S.C. 547, 552, 732 S.E.2d 861, 863 (2012).

ARGUMENT

As multiple federal and state courts have held, Hughes' fraud claims against BANA fail on several fronts. Before any question about the scope of South Carolina's survival statute arises, res judicata precludes Hughes' effort to relitigate the very claims he asserted in his initial federal action. That issue should decide this appeal. And if it does not, then the untimeliness of Hughes' claims should. Hughes did not pursue those claims here until over eight years after his parents knew or reasonably should have known that they were being charged for LPP coverage. Because those charges appeared on his parents' bank statements, they objectively could have known of the facts giving rise to their claims—yet they exercised no diligence in pursuing them. That lack of diligence both renders their claims untimely and defeats Hughes' request for equitable tolling.

Only if this Court resolves these issues against BANA—contrary to the rulings of several federal and state courts—does the survival statute’s scope even become an issue. And there, this Court should again reject Hughes’ effort to overturn clear, longstanding precedent. It would be especially inappropriate for the Court to abandon its 80-year-old reading of the survival statute because the Legislature has ratified the Court’s longstanding interpretation. It is not this Court’s role to now upend that settled interpretation of legislative intent. This Court should reject Hughes’ appeal and affirm.

I. RES JUDICATA AND STATUTES OF LIMITATIONS BAR HUGHES’ ACTION AT THE OUTSET.

This Court can and should decide this case on the straightforward grounds that Hughes’ fraud claims are barred by res judicata and are untimely. The Circuit Court correctly held that both defeated Hughes’ successive action, and this Court “may affirm the lower court’s decision for any reason appearing in the record.” *Dreher v. S.C. Dep’t of Health & Env’t Control*, 412 S.C. 244, 250, 772 S.E.2d 505, 508 (2015); see Rule 220(b)-(c), SCACR. Moreover, even though the Court of Appeals did not pass on those issues (because it did not need to), the arguments were raised below, Hughes raised them in his Petition For A Writ Of Certiorari, this Court granted certiorari to review the issues raised by that Petition, and Hughes fully briefed res judicata and timeliness in his opening brief. There is no reason to address whether Hughes’ fraud-based claims remain viable under the survival statute when they cannot overcome either of these procedural hurdles—much less both.

A. Hughes Already Litigated His Fraud-Based Claims.

Hughes cannot escape the preclusive effect of his earlier federal action. Res judicata’s “fundamental purpose . . . is to ensure that ‘no one should be twice sued for the same cause of action.’” *Judy v. Judy*, 393 S.C. 160, 173, 712 S.E.2d 408, 414 (2011) (quoting *First Nat’l Bank*

of *Greenville v. U.S. Fid. & Guar. Co.*, 207 S.C. 15, 24, 35 S.E.2d 47, 56 (1945)). The doctrine thus bars a subsequent suit between the same parties when the successive action arises out of the same transaction or occurrence that was the subject of a prior action. See *Sub-Zero Freezer Co. v. R.J. Clarkson Co.*, 308 S.C. 188, 190, 417 S.E.2d 569, 571 (1992). As this Court long ago recognized, “[a] claim which is in its nature entire cannot be split up into several causes of action, and if suit is brought for a part only of the items constituting an entire claim,” that suit bars any subsequent suit based on the same claim. *Floyd v. Am. Employers’ Ins. Co. of Bos., Mass.*, 187 S.C. 344, 350, 197 S.E. 385, 387 (1938); see also Restatement (Second) of Judgments § 24, cmt. a (1982) (describing a “claim” as “coterminous with the transaction” that “is the basis of the litigative unit or entity”). Res judicata applies to a second suit when (1) the parties are identical, (2) the subject matter is the same, and (3) the issues were adjudicated or might have been raised in the former suit. See *Plum Creek Dev. Co., Inc. v. City of Conway*, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999). Each requirement is met here, and Hughes’ arguments to the contrary are unpersuasive.

Hughes concedes that the federal action he lost at the motion to dismiss stage involved the same parties and the same subject matter as his state suit. Petr.’s Br. 16. Rightly so. Both actions were brought by Hughes against BANA. And the key factual allegations raised in the two actions are identical. They all center on the assertion that Hughes’ parents declined LPP coverage, but BANA charged them for it anyways. (*Compare* R. pp. 19-32 *with* R. pp. 91-108); see *Sub-Zero Freezer*, 308 S.C. at 192, 417 S.E.2d at 571 (affirming that res judicata barred causes of action that all arose out of same transactions). Both actions thus involve the same claim—that is, the same asserted transaction involving BANA charging Hughes’ parents for LPP coverage.

As to the final requirement that the same issues have been previously adjudicated, Hughes acknowledges that *res judicata* bars relitigating all issues that were or *could have been* raised in the former suit. *See Plum Creek*, 334 S.C. at 34, 512 S.E.2d at 109; Petr.’s Br. 16. That concession is fatal: Hughes *did* raise the same fraud-based causes of action in federal court that he raises here. He just voluntarily dismissed them before the court could decide them. *Supra* at 4. In other words, Hughes chose to split his own claim, contrary to the “firmly established” maxim that “[a] party may not split up his demand or prosecute it piecemeal or present only a portion of the grounds upon which relief is sought, and leave the rest for a second suit.” *Floyd*, 187 S.C. at 352, 197 S.E. at 388; *see also Judy*, 393 S.C. at 173, 712 S.E.2d at 415 (“[I]n violation of the doctrine of *res judicata*, [the plaintiff] attempted to ‘split’ his cause of action for waste by pursuing and procuring another remedy in circuit court for an identical claim.”).

Hughes contends that the issues presented in this case could not have been raised in the federal case because, in his view, he lacked a “meaningful” opportunity to litigate those issues in federal court. Petr.’s Br. 17. Relying on an exception to *res judicata* discussed in § 26 of the Restatement (Second) of Judgments (1982) (Restatement), he contends that the federal district court “lacked any jurisdictional mechanism” to overturn this Court’s interpretation of its survival statute. *Id.* According to Hughes, this limitation allows Hughes to split his claim between two cases—forcing BANA to litigate the same action to judgment at every level of the judiciary in two different cases based on the same allegations. But that is not how jurisdiction or *res judicata* works.

The federal court had subject matter jurisdiction to decide Hughes’ fraud claims because *Hughes* pled a federal TILA claim, giving the court federal question jurisdiction over that claim and supplemental jurisdiction over the related fraud-based state-law claims. *See* 28 U.S.C. §§ 1331, 1367. That the federal court would have applied South Carolina’s longstanding precedent

to decide the state-law claims does not reflect any “limitations on the subject matter jurisdiction of the courts” as discussed by the Restatement § 26(1)(c), cmt. c. *See Judy*, 393 S.C. at 169, 712 S.E.2d at 413 (because initial court had subject matter jurisdiction over claim, § 26(1)(c) exception to res judicata did not apply).

Nor can Hughes show any “formal barrier” of the sort discussed in Restatement § 26. The comments to that section discuss, for example, how a transaction might support liability under both state and federal antitrust laws, but because federal courts have “exclusive jurisdiction” over federal antitrust laws, a state antitrust action will not bar a later federal one. Restatement § 26, cmt. c(1) and Illustration 2. Hughes does not show how any similar form of “exclusive jurisdiction” was at play when he brought his initial suit alleging state and federal causes of action and BANA properly removed it to federal court. *Contra* Petr.’s Br. 18.

Hughes does assert that the federal district court could not have certified under Rule 244(a), SCACR the issues he raises here because that rule permits certification only for questions on which there is no controlling precedent. Petr.’s Br. 17. But Hughes devotes much of his brief to (wrongly) arguing that this Court has inconsistently described the scope of the survival statute as applied to fraud and, in fact, he asked the federal district court to certify to this Court “whether the fraud claims belonging to the Estate of Jane Hughes survive” based on the same incorrect arguments. (R. pp. 159-65.) But Hughes never gave the federal court a chance to address that certification request. Instead, he chose to voluntarily dismiss his fraud-based claims (and only those claims) while continuing to litigate his non-fraud claims through every level of the federal judiciary. In any event, the primary barrier to Hughes’ fraud-based claims was not the scope of the survival statute, but his own failure to timely pursue those claims.

Contrary to Hughes' assertion, his arguments also find no support from Restatement § 28. Section 28 concerns issue preclusion, not *res judicata* (*i.e.*, claim preclusion). Although Hughes discusses the two doctrines interchangeably, they are distinct. *See Pye v. Aycock*, 325 S.C. 426, 435, 480 S.E.2d 455, 459 (Ct. App. 1997). Issue preclusion arises when a second action is based on a different claim than the first. *Id.* The doctrine precludes litigation “of only those *issues* ‘actually and necessarily litigated and determined in the first suit,’” and thus looks to whether a party “had a full and fair opportunity to litigate the relevant *issue* effectively in the prior action.” *Id.* (emphases added); *see also Judy v. Judy*, 383 S.C. 1, 7, 677 S.E.2d 213, 217 (Ct. App. 2009) (“Collateral estoppel applies to specific issues, regardless of whether the claims in the first and subsequent suits are the same.”). *Res judicata*, by contrast, bars a second suit between the same parties based on the same *claim*—that is, the same occurrence or transaction—thus “promot[ing] judicial economy and avoid[ing] the harassment of relitigation.” *Plum Creek*, 334 S.C. at 34, 512 S.E.2d at 109 (quoting J. Flanagan, *South Carolina Civil Procedure* p. 642 (1996)).

The requirements and exceptions for each doctrine differ, and Hughes cannot rely on issue preclusion's requirements and exceptions to escape *res judicata*. So, for example, although Hughes *did* have the opportunity to litigate his time-barred fraud claims in federal court, even if he had not, the *issue preclusion* standard of a “full and fair opportunity to litigate” has no bearing on whether *res judicata* applies. Likewise, even if any minimal differences between the equitable tolling standards in state and federal court might affect whether the federal courts' rejection of equitable tolling is *issue preclusive* of the same issue here, they are irrelevant to whether *res judicata* bars Hughes' request to relitigate his state-law causes of action.

In the same vein, although “the potential adverse impact on the public interest has been recognized as a reason to depart from the doctrine of collateral estoppel,” Hughes identifies no

“binding authority recognizing a comparable exception for res judicata.” *S.C. Pub. Int. Found. v. Greenville Cnty.*, 401 S.C. 377, 390-91, 737 S.E.2d 502, 509 (Ct. App. 2013). Instead, res judicata itself “is a doctrine founded upon the objective of preserving and protecting the public interest.” *Id.* at 391, 509. Thus, although Hughes asserts that applying res judicata to his successive action would somehow hurt the public interest, it is Hughes’ proposed exception that would undermine the public’s interest in judicial economy and finality of judgments.

The procedural history of this case starkly exemplifies that harm. Hughes abandoned his fraud causes of action when he anticipated an adverse ruling on them. *Supra* at 4. He then pursued his other claims all the way to the United States Supreme Court. *Supra* at 4-5. Having failed there, he now tries to resurrect his abandoned fraud claims in what he hopes will be a more favorable forum. Meanwhile, BANA has been forced to keep defending itself against the same causes of action based on the same subject matter, despite defeating that claim in the first action. This scenario is exactly what res judicata is meant to prevent. *See* Restatement § 26 cmt. a (“A main purpose of the general rule [against claim splitting] is to protect the defendant from being harassed by repetitive actions based on the same claim.”).

This Court should reject Hughes’ request to create a novel exception to the straightforward doctrine of res judicata. Res judicata bars Hughes’ action and this Court should thus affirm.

B. Hughes’ Claims Are Untimely And Do Not Warrant Equitable Tolling.

This Court may also affirm on the procedural ground that Hughes’ fraud claims are untimely and equitable tolling should not apply. Hughes acknowledges that his fraud-based claims are subject to a three-year limitations period, as were the state-law claims he raised in his initial suit. *See* Petr.’s Br. 19; *see also* S.C. Code Ann. § 15-3-530(7). The Circuit Court correctly held (like the federal court before it) that Hughes’ claims are untimely and do not present the rare case

that justifies equitable tolling. The objective lack of due diligence by Hughes and his parents cements this conclusion for both timeliness and tolling.

1. Hughes' claims are time-barred.

The limitations periods for Hughes' claims began to run when "the facts and circumstances . . . would [have] put a person of common knowledge and experience on notice that some claim against another party might exist." *Gibson v. Bank of Am., N.A.*, 383 S.C. 399, 406, 680 S.E.2d 778, 782 (Ct. App. 2009). This discovery rule, by looking to "a person of common knowledge and experience," presents an objective standard—not one tied to the plaintiff's special circumstances. *Id.* "A party cannot escape the application of this rule by claiming ignorance of existing facts and circumstances," because the limitations period begins to run "if such facts and circumstances could have been known to the party through the exercise of ordinary care and reasonable diligence." *Burgess v. Am. Cancer Soc., S.C. Div., Inc.*, 300 S.C. 182, 185, 386 S.E.2d 798, 799 (Ct. App. 1989); *see Dean v. Ruscon Corp.*, 321 S.C. 360, 363-64, 468 S.E.2d 645, 647 (1996) ("We have interpreted the 'exercise of reasonable diligence' to mean that the injured party must act with some promptness where the facts and circumstances of an injury place a reasonable person of common knowledge and experience on notice that a claim against another party might exist.").

The Circuit Court correctly applied this objective standard to Hughes' allegations that, beginning in June 2006 and continuing "for several years," BANA withdrew \$28.40 monthly from his parents' account. (R. p. 23, ¶ 23.) According to Hughes' own allegations, this monthly charge appeared on John and Jane's bank statements. (R. p. 23, ¶ 23.) Hughes even submitted with his federal complaint a copy of a 2009 bank statement reflecting that charge. (R. p. 120.) The only reasonable inference that could be drawn from these allegations was that Jane either knew or

reasonably should have known about the charges in June 2006. *See Gibson*, 383 S.C. at 407-08, 680 S.E.2d at 783 (“Even when the evidence is viewed in the light most favorable to Gibson and Mitchell, there is only one reasonable inference as to when they knew or should have known that they had a claim against BOA—when Mitchell received the June 9 statement.”).

A bank statement reflecting a purportedly fraudulent charge or withdrawal objectively puts a reasonable person of common knowledge and experience on notice. *See Citizens & S. Nat’l Bank of S.C. v. State Budget & Control Bd.*, 246 S.C. 140, 144, 142 S.E.2d 874, 875 (1965) (“[W]here the bank renders a statement to the depositor showing him the status of his checking account, it says to him in effect: ‘This bank owes you this stated balance, and no more.’ Such statement may fairly be construed as a notice that any claim the depositor may make in excess of the stated balance would be resisted by the bank.”). Such actual or constructive notice triggers the limitations period—even if the plaintiff is elderly or in ill health. *See Gibson*, 383 S.C. at 407, 680 S.E.2d at 783 (holding that limitations period began to run against 92-year-old when she received bank statements). The Circuit Court did not make and did not have to make factual findings to reach this conclusion—it was the only reasonable conclusion to draw from the factual allegations in Hughes’ complaint.

Hughes’ only response is to suggest that Jane subjectively lacked actual knowledge of the LPP charges until 2015. Petr.’s Br. 20. Although Hughes does not allege that Jane did not receive or was unable to review the bank statements for nine years from 2006 to 2015, he implies that she must not have understood them because of her age, alleged health issues, and the charges’ purportedly “ambiguous” notation. “But the statutory period of limitations begins to run when a person *could or should have known*, through the exercise of reasonable diligence, that a cause of

action might exist in his or her favor, rather than when a person obtains actual knowledge.” *Burgess*, 300 S.C. at 186, 386 S.E.2d at 800 (emphasis in original).

Hughes’ contentions do not overcome the objective notice the statements gave Jane when they repeatedly listed charges plainly described as “Ad Insurance” and referencing her deceased husband. Hughes does not explain what Jane thought the charges were for or why they could not put her on notice that a charge for “Ad Insurance” was being withdrawn from her account, such that she could have sought more information about that charge. Indeed, Hughes does not offer any authorized charge, unrelated to LPP coverage, that Jane could reasonably have thought those notations reflected. Although Hughes alludes to his general allegations that Jane was in her 80s and suffered from various ailments “from June 2006 until her death,” he does not directly tie any of those alleged health concerns to her ability to review her bank statements or identify any authority supporting a special accrual rule for older persons. Petr.’s Br. 20.

That the bank statements did not expressly relate the charges to “LPP coverage” also does not negate the notice they gave Jane that she was being charged for some form of “Ad Insurance” related to her husband, such that she (or her husband before his death) could have inquired further about that charge. Reasonable diligence simply means acting when “the facts and circumstances of an injury would put a person *of common knowledge and experience* on notice that *some right* of his has been invaded or that *some claim* against another party might exist.” *Gibson*, 383 S.C. at 406, 680 S.E.2d at 782 (emphasis added). The limitations period “begins to run from this point and not when advice of counsel is sought or a full-blown theory developed.” *Id.*; see *Dean*, 321 S.C. at 364, 468 S.E.2d at 647 (“[T]he fact that the injured party may not comprehend the full extent of the damage is immaterial.”). Again, Hughes does not suggest that the “Ad Insurance” charges were somehow disguised or linked to some other charge his parents had authorized. By

Hughes' own allegations, Jane received statements reflecting that she was being charged for insurance coverage she now asserts she declined—she simply failed to inquire about what that insurance coverage was or why she was paying for it. The limitations period for Hughes' claims thus began to run when Jane received bank statements in 2006 reflecting the LPP charges—over a decade before Hughes brought this case.

2. This is not the exceptional case that merits equitable tolling.

Hughes cannot rely on equitable tolling to save his untimely claims for essentially the same reasons. Equitable tolling is appropriate only if the plaintiff exercised reasonable diligence. Hughes and his parents did not.

Hughes relies on this Court's decision in *Hooper v. Ebenezer Senior Services and Rehabilitation Center*, 386 S.C. 108, 687 S.E.2d 29 (2009), to argue that equitable tolling applies “where it is justified under all the circumstances” of a case, including when a plaintiff's claim is untimely because of “an extraordinary event beyond his or her control.” *Id.* at 116-17, 33. But *Hooper* is no help to him. In that case, the defendant failed to properly list its registered agent for service as required by state law, thereby impeding the plaintiff's pursuit of service. *Id.* at 118, 34. The plaintiff still “diligently pursued service” by serving the agent that was listed. *Id.* This Court held it would be inequitable to subject her claims to dismissal for untimeliness. *Id.* In so doing, the *Hooper* Court emphasized that equitable tolling “should be used sparingly,” *id.* at 117, 33, and applied equitable tolling only because the plaintiff had exercised “reasonable and due diligence.” *Id.* at 119, 34.

Hughes pled no allegations showing similar reasonable diligence on his parents' part. The only alleged charges at issue were made while his father was alive, *supra* at 3, yet the complaint lacks any allegations showing that John exercised due diligence or that some extraordinary

circumstances prevented him from asking about the charges. Nor do Hughes' vague allegations about his mother's health problems show extraordinary circumstances that warrant tolling, including because nothing suggests she was fully incapacitated or could not inquire about her bank statements during the entire limitations period.

Moreover, Hughes' own submissions reflect that Jane had family support in overseeing her bank account to which they also had access. As of 2009, both Hughes and a Jane Hughes Warner also had control over the account. *See* (R. pp. 119-20) (listing Phillip L. Hughes and Jane Hughes Warner on joint account statement). Hughes made no allegations that BANA prevented him or Warner from viewing the bank statements or asking about a recurring \$28.40 charge for "Ad Insurance" listed as connected to his deceased father. Particularly given that Jane's claim now belongs to Hughes through her estate, there is no "gross wrong" in refusing to equitably toll the statute of limitations here. *Hooper*, 386 S.C. at 117, 687 S.E.2d at 33. Equity in fact counsels against tolling, as applying the doctrine under these facts would discourage the due diligence the law requires.

II. THE COURT SHOULD ADHERE TO ITS LONGSTANDING INTERPRETATION OF THE SURVIVAL STATUTE.

Because Hughes cannot overcome these threshold *res judicata* and untimeliness barriers that defeat his claims at the outset, this Court need not reach his request to revisit the scope of the survival statute to which he devotes the bulk of his opening brief. If the Court does reach that question, however, the Court should adhere to its longstanding and legislatively ratified reading of the survival statute and affirm the decision below.

A. It Is "Permanently Settled" That The Survival Statute Excludes Fraud-Based Claims, And It Should Remain So.

Hughes asks this Court to overturn its 80-year-old interpretation of the survival statute—one that the Legislature has ratified by decades of inaction. But "[t]he cardinal rule of statutory

interpretation is to ascertain and effectuate the intention of the legislature.” *Sloan v. Hardee*, 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007); *see State v. Sweat*, 386 S.C. 339, 350, 688 S.E.2d 569, 575 (2010) (“All rules of statutory construction are subservient to the one that the legislative intent must prevail.”). And “[l]egislative intent, once determined [by this Court], is permanently settled absent subsequent action by the General Assembly to effect a change in the statutory law.” *Wehle v. S.C. Ret. Sys.*, 363 S.C. 394, 403, 611 S.E.2d 240, 244 (2005) (per curiam) (citation omitted).

The Legislature enacted South Carolina’s survival statute in 1905 to “partially abrogate[]” the common law rule that no tort actions survived the plaintiff’s death and to solve problems presented by an earlier, 1892 survival statute that preserved only causes of action for injuries to real estate. *Ferguson*, 349 S.C. at 564, 564 S.E.2d at 97; *see Fisher ex rel. Shaw-Baker v. Huckabee*, 415 S.C. 171, 177, 781 S.E.2d 156, 159 (Ct. App. 2015), *affirmed as modified*, *Fisher on behalf of Est. of Shaw-Baker v. Huckabee*, 422 S.C. 234, 811 S.E.2d 739 (2018). After this Court held that, under that earlier provision, an action for injuries suffered by a decedent killed in a train accident did not survive, the Legislature enacted an expanded statute addressing such “personal injuries.” *Fisher*, 415 S.C. at 177, 781 S.E.2d at 159; *see In re Estate of Mayo*, 60 S.C. 401, 413-14, 38 S.E. 634, 637-38 (1901). Since that time, the “statute has survived with little change,” including through one 1976 amendment. *Ferguson*, 349 S.C. at 564, 564 S.E.2d at 97.

It provides:

Causes of action for and in respect to any and all injuries and trespasses to and upon real estate and any and all injuries to the person or to personal property shall survive both to and against the personal or real representative, as the case may be, of a deceased person and the legal representative of an insolvent person or a defunct or insolvent corporation, any law or rule to the contrary notwithstanding.

S.C. Code Ann. § 15-5-90.

This Court determined that the expanded statute continued to exclude fraud from its scope over 80 years ago in *Mattison v. Palmetto State Life Insurance Co.*, 197 S.C. 256, 15 S.E.2d 117 (1941).¹ The plaintiff in *Mattison*, as administratrix of an estate, alleged that the defendant had defrauded the estate's decedent before his death by taking away and cancelling his insurance policy. *Id.* at 117-18. The plaintiff alleged that the decedent "was damaged [by this fraud] in actual and punitive damages." *Id.* The defendant demurred, arguing that the fraud claim did not survive the decedent. *Id.* at 118. This Court agreed.

The Court emphasized that, in deciding this issue, it was evaluating "the actual words used in the statute" to "arriv[e] at the intent of the Legislature." *Id.* at 119 (quoting *Claussen v. Brothers*, 148 S.C. 1, 4, 145 S.E. 539, 540 (1928)). The Court explained that it was not its role to "place such judicial construction upon the language used [in the statute] as to effectuate its own conception of right rather than the intent of the Legislature." *Id.* The Court was simply interpreting the statute's terms to determine whether the *Legislature* intended to include fraud within the provision's scope. *See Faircloth v. Finesod*, 938 F.2d 513, 517 (4th Cir. 1991) ("The South Carolina courts have simply construed the statute.").

In this Court's view, the statute's plain language did not include the plaintiff's fraud claim. *Mattison*, 197 S.C. 256, 15 S.E.2d at 119. As the Court explained, the survival statute lays out

¹ In 1941, the statute was basically identical to its current form and stated:

"Survival of Right of Action.-Causes of action for and in respect to any and all injuries and trespasses to and upon real estate and any and all injuries to the person or to personal property, shall survive both to and against the personal or real representative (as the case may be) of the deceased persons, and the legal representatives of insolvent persons, and defunct or insolvent corporations, any law or rule to the contrary notwithstanding."

Mattison, 197 S.C. 256, 15 S.E.2d at 119.

“but two instances wherein a cause of action survives: (1) For and in respect to any and all injuries and trespasses to and upon real estate, and (2) any and all *injuries to the person* or to personal property.” *Id.* (emphasis in original). To this Court, it was “readily seen that [the plaintiff’s fraud claim did] not come within either of the instances where a cause of action survives.”² *Id.* Put differently, this Court did not view fraud actions as asserting direct injury to the decedent’s physical person or property. See *Page v. Lewis*, 203 S.C. 190, 26 S.E.2d 569, 570 (1943) (“The causes of action ... enumerated [in the statute] are tort actions for wrongs to the person or property of another.”). Injuries caused by fraud were different from the kind the statute was enacted to address—injuries, for example, like those suffered by someone killed in a railroad accident. The Court viewed fraud actions as instead involving a kind of intangible, personal injury outside the statute’s scope. Although fraud might involve a loss of money, the actual injury was not to that money—it was to the person’s nonphysical being or character. And this Court was not alone in that view. South Carolina federal courts of the time similarly held that fraud did not cause the requisite injury “to real estate, to the person, or to personal property” and thus was not covered by the survival statute. *Halsey v. Minnesota-S.C. Land & Timber Co.*, 54 F.2d 933, 935 (E.D.S.C. 1932).

² This reasoning was consistent with an earlier decision by this Court, *Bemis v. Waters*, 170 S.C. 432, 170 S.E. 475 (1933). The plaintiffs there claimed they had been deprived, through fraudulent acts, of a “right to inherit” property from their mother; this Court held such a right did not exist. The Court went on to observe in dicta, however, that even if the plaintiffs had brought a fraud suit “in tort as one belonging to [their mother],” it was clear “under the wording of [the survival statute]” that “there was [not] such damage to, or trespass upon, the real property of [the mother] as would justify the holding that there was a survival of the cause of action sued upon.” *Id.* at 438, 476-77; see *Hughey v. Mooney*, 282 S.C. 597, 600, 320 S.E.2d 475, 476 (Ct. App. 1984) (noting that *Bemis*’s conclusion was “consistent with the settled law in South Carolina that a cause of action for fraud does not survive”).

This reasoning—setting injuries caused by fraud apart from physical injuries to person or property—is also apparent in other contemporaneous decisions by this Court interpreting the survival statute’s application to other intangible injuries. In *Carver v. Morrow*, decided just a few years after *Mattison*, this Court interpreted the survival statute to also exclude tort actions for libel or slander. 213 S.C. 199, 203, 48 S.E.2d 814, 816 (1948). Referring again to the statute’s text, the *Carver* decision “noted that the General Assembly was careful in not including actions for injury to character.” *Id.* “[N]o matter how serious may be the consequences and the damages suffered by reason of” an injury to character, “the cause of action [is] buried along with the decedent.” *Id.* Because fraud, like libel and slander, does not involve the kind of concrete physical harm the statute speaks to—such as a trespass on land or a physical assault against a person—this Court held in *Mattison* that it falls outside the statute’s terms.

This Court has consistently adhered to this interpretation since *Mattison*. *See, e.g., Brewer v. Graydon*, 233 S.C. 124, 128, 103 S.E.2d 767, 769 (1958) (“[A]ctions for . . . fraud and deceit do not survive[.]”); *Pamlico Bank & Tr. Co. v. Prosser*, 259 S.C. 621, 625, 193 S.E.2d 539, 540 (1972) (plaintiff conceded “that the action for fraud and deceit pending in the Court of Common Pleas did not survive” under *Mattison*); *Ferguson*, 349 S.C. at 565, 564 S.E.2d at 97-98 (“Allegations of such fraud and deceit . . . do not survive the plaintiff’s death.”); *Tilley v. Pacesetter Corp.*, 355 S.C. 361, 377, 585 S.E.2d 292, 300 (2003) (same). For over 80 years, then, this Court’s reading of the survival statute has been clear.

The doctrine of stare decisis demands the Court retain that interpretation here. “Stare decisis exists to insure a quality of justice which results from certainty and stability.” *State v. One Coin-Operated Video Game Mach.*, 321 S.C. 176, 181, 467 S.E.2d 443, 446 (1996) (citation omitted). This Court adheres to stare decisis because “[i]t is manifestly in the public interest that

the law remain permanently settled.” *Powers v. Powers*, 239 S.C. 423, 427, 123 S.E.2d 646, 647 (1962). The public interest behind stare decisis is especially strong when this Court construes statutes, “for if any change in the statutory law is desired, the General Assembly may readily accomplish it.” *Id.*; see *One Coin-Operated Video Game*, 321 S.C. at 181, 467 S.E.2d at 446 (“Because we are adhering to our earlier interpretation of a statute, the General Assembly is free to correct any misinterpretation on our part.”).

This appeal is “a particularly appropriate situation in which to invoke the doctrine of stare decisis.” *One Coin-Operated Video Game*, 321 S.C. at 181, 467 S.E.2d at 446. Despite the clarity and longevity of this Court’s interpretation of the survival statute, the Legislature has not amended the survival statute since *Mattison* to address any concerns about the Court’s interpretation. To the contrary, in 1976 (at which point this Court had decided not just *Mattison* but also *Brewer* and *Pamplico*), the Legislature *reenacted* the provision with only minor, non-substantive changes. Compare *supra* at 19 and 20, n.1.

The Legislature’s refusal over an 80-year period to change the statute to address this Court’s interpretation is powerful evidence that the Legislature agrees with that interpretation—and a compelling reason for this Court not to revisit it. “The Legislature is presumed to be aware of this Court’s interpretation of its statutes.” *Wigfall v. Tideland Utilities, Inc.*, 354 S.C. 100, 111, 580 S.E.2d 100, 105 (2003). The Legislature’s reenactment and ratification thus confirms that the survival statute does not include fraud. And until the Legislature takes action, the issue remains “permanently settled.” *Wehle*, 363 S.C. at 403, 611 S.E.2d at 244; see *id.* at 402, 244 (“[T]he matter of legislative intent is not a moving target.”); *Hatchett v. Nationwide Mut. Ins. Co.*, 244 S.C. 425, 431-32, 137 S.E.2d 608, 611 (1964) (“[I]t is the province of the courts to construe, not

to make, the laws.”). If it reaches the question, this Court should affirm the Court of Appeals’ correct application of its longstanding interpretation.

B. Hughes Provides No Persuasive Reason To Disregard The Legislature’s Intent To Exclude Fraud From The Survival Statute.

Hughes ignores legislative intent and stare decisis in urging this Court to overturn *Mattison*. And his reasons for rejecting this Court’s interpretation of the survival statute are unavailing.

1. This Court’s decisions are coherent and consistent.

Hughes argues that this Court’s decisions are inconsistent in their repeated adherence to the rule that fraud falls outside the survival statute’s scope. In his view, the Court’s more recent description of *Mattison*’s rule as a “common law exception” to the survival statute, *Ferguson*, 349 S.C. at 564, 564 S.E.2d at 97, “directly contradicts” the *Mattison* Court’s explanation that it was interpreting the statute’s text. Petr.’s Br. 11. But that does not follow. References to the fraud carve-out as an “exception” to the survival statute reflect the historical reality that the statute effected only a *partial* abrogation of the common law rule against survival of any tort claims. *Ferguson*, 349 S.C. at 564, 564 S.E.2d at 97. Because the survival statute allows most, but only most, tort claims to survive, the claims to which the statute does not apply (and thus the common law rule against survival still does) are fairly described as “common law exceptions.” Fraud claims fall into this category.

This Court’s consistent conclusion that fraud is an “exception” to the change the statute enacted does not mean that the Court’s statutory interpretation has become some kind of “law or rule” that runs contrary to the statute’s language. *Contra* Petr.’s Br. 11. To the contrary: because the Legislature has not amended the statute in the decades since *Mattison*, the Legislature views the fraud “exception” as part of the statute’s terms rather than something outside of it. This context also explains why this Court treats the survival statute as simultaneously broad but including

exceptions. *See Ferguson*, 349 S.C. at 564, 564 S.E.2d at 97. The language may “include *almost* every conceivable cause of action,” but just almost—as *Mattison* held, its plain terms do not include actions for fraud or deceit. *Id.* (emphasis added).

2. Public policy supports this Court’s longstanding interpretation.

Hughes’ appeal to public policy fares no better. Because the Legislature has made the policy choice to exclude fraud from the survival statute, this Court’s duty is to enforce that choice, not evaluate it. *See Kubic v. MERSCORP Holdings, Inc.*, 416 S.C. 161, 170, 785 S.E.2d 595, 600 (2016). But even if it were appropriate for this Court to reevaluate the policy choice the Legislature has maintained for more than 80 years, Hughes fails to show that the Legislature chose unwisely.

Fraud claims are different from other tort claims. Proving fraud “requires a special quality of proof, and the states of mind of the victim (*e.g.*, whether he knew the statement was false, relied upon it, and was justified in so relying) and the perpetrator are especially vital.” *Faircloth*, 938 F.2d at 517. A legislature can thus reasonably conclude, as South Carolina’s did, “that the difficulty and potential unfairness of proving the state of mind of a dead party to a[n allegedly] fraudulent transaction justified excepting fraud from the survival statute.” *Id.*

The same considerations are reflected in the Legislature’s decisions to treat fraud differently in other contexts. SCUTPA, for example, does not allow an estate to bring a claim for an unfair or deceptive act (another reason Hughes’ SCUTPA claim failed). S.C. Code Ann. § 39-5-140(a). And South Carolina Rule of Civil Procedure 9(b) requires pleading fraud with particularity. It is perfectly sensible that the Legislature, having treated fraud differently in these contexts, also set it apart from most other tort claims covered by the survival statute.

Hughes does not dispute that fraud claims generally present these concerns—instead, he argues that his case is special. Petr.’s Br. 12. In Hughes’ view, the single document he attached

to his complaint reflecting that his parents, at one point, checked a box declining LPP coverage means there is no dispute about his parents' state of mind and "no evidence contrary to th[at] document." *Id.* But Hughes' complaint was dismissed on a motion to dismiss (as was his previous federal complaint). There has been no opportunity for BANA to submit any contrary evidence.

Procedural posture aside, this action is, in fact, exactly the kind that raises the special concerns surrounding fraud. Hughes' parents, not him, were the ones who signed the relevant paperwork, met with BANA employees, and were charged for LPP coverage. Even if Hughes could identify a fraudulent statement that was made to his parents—and he has not—BANA would be unable to examine whether Hughes' parents knew that statement was false or actually (and justifiably) relied on it. Evidence central to Hughes' fraud-based claims disappeared when his parents died. Precluding such claims from the survival statute thus makes perfect sense here.

Contrary to Hughes' assertion, maintaining this legislatively sanctioned rule will not harm elderly persons. Although fraud claims may not be available if not pursued before a person's death, other civil remedies remain available for related misconduct. For example, TILA provides civil remedies if finance charges are not timely disclosed or approved. 15 U.S.C. § 1640. And non-statutory tort claims including breach of contract and breach of the duty of good faith and fair dealing are available to personal representatives. Hughes pursued a TILA claim and other tort claims as the personal representative of his mother's estate in the previous federal action. (R. pp. 99-107); (*see* R. pp. 30-31) (alleging claims for breach of fiduciary duty and conversion). He merely did so in an untimely fashion. Plaintiffs (and their personal representatives) who act with the required reasonable diligence will not encounter such problems.

Finally, Hughes asserts that South Carolina's law runs contrary to the "general consensus" that tort actions should survive. Petr.'s Br. 15. Yet the "modern" decisions he cites (two of them

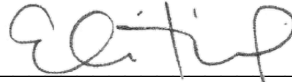
pre-dating *Mattison*) reflect that other States, just like South Carolina, maintain various exceptions to the general rule of survivability. *Jandera v. Lakefield Farmers' Union*, 150 Minn. 476, 479, 185 N.W. 656, 658 (1921) (causes of action involving injury to the person do not survive in Minnesota); *Micheletti v. Moidel*, 94 Colo. 587, 591, 32 P.2d 266, 267 (1934) (Colorado survival statute excludes slander and libel actions); *St. Luke's Magic Valley Reg'l Med. Ctr. v. Luciani*, 154 Idaho 37, 41, 293 P.3d 661, 665 (2013) (acknowledging that most courts do not allow assignment of legal malpractice claims). The various approaches to the survival of tort claims provides no basis to disregard the approach of this State's Legislature. *See Bemis*, 170 S.C. at 436, 170 S.E. at 476 ("The wording of the different [state survival] statutes has caused different constructions by the courts, and it is therefore necessary to keep clearly in mind what actions will survive under the wording of our statute."). None of Hughes' policy arguments overcomes the conclusion that this Court's interpretation of that statute should stand.

CONCLUSION

For the foregoing reasons, this Court should affirm.

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Respectfully submitted,



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