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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

J. Cordell Maddox, Jr., Circuit Court Judge

Appellate Case No. 2022-000756

Debi Baker Brookshire ..... Appellant,

v.

Community First Bank, Inc. and Benjamin Hiott,
of which,
Community First Bank, Inc. is..... Respondent.

BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

1. The trial court granted Respondent summary judgment on multiple independent grounds. In affirming the trial court, the Court of Appeals did not need to reach and did not reach several of those rulings, and Appellant does not address them in her Petition or Brief. Those independent rulings not challenged here by Appellant are law of the case and constitute additional sustaining grounds that require affirmance of the trial court's grant of summary judgment to Respondent.

2. The Court of Appeals correctly affirmed the trial court's holding that S.C. Code Ann. § 15-3-110 (2005) does not apply to Appellant's claims against Respondent because Appellant's claims do not involve bank-issued notes circulated as money.

3. The Court of Appeals correctly affirmed the trial court's holding that Appellant's claims against Respondent were barred by the statute of limitations set forth in S.C. Code Ann. § 15-3-530(5) (2005) because there were multiple points more than three years before she filed this action where she knew or should have known a claim against Respondent might exist.

4. The Court of Appeals correctly affirmed the trial court's holding that equitable tolling did not suspend the statute of limitations clock and that Respondent was not estopped from asserting the statute of limitations as a defense because Respondent did not cause Appellant to delay filing her complaint before the statute of limitations expired and the delay was not beyond Appellant's control.

INTRODUCTION AND SUMMARY OF ARGUMENT

On May 25, 2007, Appellant Debi Baker Brookshire ("Brookshire") executed a power of attorney (the "POA") granting Benjamin Hiott ("Hiott") the personal authority to handle virtually all aspects of her financial affairs. With Brookshire's knowledge, Hiott exercised the authority granted by the POA by, among other things, making disbursements from Brookshire's checking

account at Respondent Community First Bank, Inc. ("Community First")[1] during the period from July 12, 2007, until the account was closed on February 23, 2011 (the "Account"). The only relationship between Brookshire and Community First is by virtue of the Account, which is a checking account governed by a contract between Brookshire and Community First.

Brookshire filed suit against Community First and Hiott approximately 3.5 years after the Account was finally closed, asserting six causes of action: breach of fiduciary duty, conversion, negligent supervision, negligence/gross negligence, breach of contract accompanied by fraudulent act, and an accounting. The trial court granted summary judgment to Community First on all of Brookshire's claims, holding in pertinent part that: (1) the POA bars all of Brookshire's claims against Community First; (2) Brookshire's claims are time-barred under the Uniform Commercial Code ("UCC") pursuant to the statute of repose set forth in S.C. Code Ann. § 36-4-406 (2003 & Supp. 2022); (3) Brookshire's claims are time-barred pursuant to the statute of limitations set forth in S.C. Code Ann. § 15-3-530(5); (4) S.C. Code Ann. § 15-3-110 does not apply to this matter; (5) neither equitable tolling nor equitable estoppel apply to save Brookshire's time-barred claims; and (6-11) there is no genuine issue of material fact as to the merits of all six of Brookshire's causes of action, and Community First is entitled to judgment as a matter of law on the merits of those causes of action. (App. pp. 145-146).

Brookshire has only challenged in this Court three of the 11 grounds on which the trial court granted summary judgment to Community First. Two of the remaining eight grounds, which are the law of the case, are fully and completely dispositive of Brookshire's entire case, namely the application of the POA and the UCC's statute of repose. Brookshire has not appealed these

[1] Brookshire improperly refers to Community First in the appellate caption as "Community First Bank." The correct name is Community First Bank, Inc.

rulings to this Court. Further, the trial court awarded summary judgment to Community First on each of Brookshire's six individual causes of action, and Brookshire has failed to appeal any of those individual rulings to this Court. They are also the law of the case. Consequently, even if this Court rules in Brookshire's favor on *any or all* of the three questions Brookshire has chosen to present, the eight unappealed rulings bar *any* affirmative relief to Brookshire whatsoever. In other words, finding in Brookshire's favor does not and cannot change the ultimate result: Brookshire's claims against Community First are fatally barred. For this reason, and the reasons discussed herein, the summary judgment ruling in favor of Community First should be affirmed in full.

COUNTER-STATEMENT OF THE CASE

Brookshire filed her lawsuit against Community First and Hiott on September 8, 2014, based on the premise that disbursements Hiott made from the Account were unauthorized. Community First answered Brookshire's Complaint on October 9, 2014, asserting various defenses and denying that Brookshire was entitled to relief on any of her causes of action, and also asserted offsets and counterclaims for conversion and unjust enrichment. Brookshire answered Community First's counterclaims on November 7, 2014. Community First and Hiott filed motions for summary judgment in October 2016, which the trial court heard on December 13, 2016. The trial court ultimately granted Community First's motion for summary judgment and directed the entry of a final judgment in its favor pursuant to Rule 54(b), SCRCP on September 26, 2017. Brookshire filed a motion to alter or amend the judgment pursuant to Rule 59(e), SCRCP on October 6, 2017, and a hearing was held on December 6, 2017. On March 22, 2019, the trial court issued an order denying Brookshire's Rule 59(e) motion, and Brookshire filed a notice of appeal on April 9, 2019.

The Court of Appeals affirmed the trial court in pertinent part in a unanimous unpublished opinion on April 6, 2022.[2] In that opinion, the Court of Appeals cited longstanding and bedrock South Carolina cases and statutes addressing the statute of limitations provided in S.C. Code Ann. § 15-3-530(5), the discovery rule for triggering the commencement of the statute of limitations, the inapplicability of equitable tolling or equitable estoppel, and the inapplicability of S.C. Code Ann. § 15-3-110. Because its rulings on the issues it addressed were dispositive of Brookshire's appeal, the Court of Appeals did not need to reach and did not reach the remaining arguments on which the trial court granted summary judgment to Community First, *i.e.* (1) that the POA bars all of Brookshire's claims against Community First; (2) that Brookshire's claims are time-barred under the UCC's statute of repose; and (3) that there is no genuine issue of material fact and Community First is entitled to judgment as a matter of law as to all six of Brookshire's causes of action.

Brookshire's petition to the Court of Appeals for rehearing included the same substantive grounds as its Petition to this Court. The Court of Appeals denied the petition for rehearing on May 3, 2022.

COUNTER-STATEMENT OF THE FACTS

Over the course of approximately 3.5 years, a total of $4,057,114.34 was deposited into and thereafter disbursed from the Account. Brookshire has admitted that the POA granted Hiott authority to make all of these disbursements. (App. pp. 24, 26). This critical admission alone demonstrates that summary judgment to Community First was entirely proper and is dispositive of every issue presently before this Court.

[2] The Court of Appeals also reversed the trial court in part, but that reversal is not part of the issues for determination here.

I. Brookshire gave her old friend Hiott a sweeping power of attorney in Hiott's personal capacity only.

Brookshire is a college educated former business owner. (App. p. 312, lines 1-22). She has been handling funds and bank accounts since at least her college days in the early 1970s. (App. p. 403, line 4 – p. 408, line 9). On February 2, 2005, Brookshire executed a Revocable Management Trust Agreement with BB&T acting as trustee. (App. pp. 426-429). BB&T was to manage Brookshire's interest in Baker and Baker Real Estate Developers, LLC ("Baker and Baker"), a real estate development company founded by Brookshire's uncle and father, operated by other members of Brookshire's family (with whom she had recent legal disputes), and of which Brookshire owned approximately 10.8%, which was valued in May 2007 at $2,047,684. (App. pp. 431-432, 434-435, 437-444). In addition to managing the relationship with Baker and Baker, Brookshire directed BB&T to pay certain bills and make certain purchases with the cash portion of her Revocable Trust at BB&T, which was $1,178,437.06 as of May 31, 2007. (App. p. 346, line 22 – p. 347, line 23; 437-444; 446-453). Over the next two years, Brookshire experienced various conflicts with BB&T over her cash management priorities, especially with regard to her desired purchase of a $250,000 motor home and other tax and responsiveness issues. (App. p. 350, line 2 – p. 359, line 4; pp. 455-456). Brookshire revoked her Revocable Trust Agreement with BB&T on May 25, 2007. (App. p. 458).

That same day, Brookshire executed the POA, granting Hiott broad authority to handle her financial affairs. (*See* App. p. 328, line 19 – p. 329, line 11; pp. 460-462). The first sentence of the POA states: "I, Debi Baker Brookshire, residing at 1707 Devine Street, Columbia, SC 29201, hereby appoint Benjamin Lee Hiott of 9 Topsail Lane, Salem, SC 29676, as my Attorney-in-Fact ('Agent')." (App. p. 460). The Topsail Lane address is not an address for Community First and was Hiott's home address. The POA provides that "[m]y Agent shall have **full power and**

authority to act on my behalf. This power and authority shall authorize my Agent to **manage and conduct all of my affairs and to exercise all of my legal rights and powers**." (App. p. 460 (emphases added)). The POA contains a non-exclusive list of the Agent's powers, and includes the powers to "[o]pen, maintain or close bank accounts;" "[c]onduct any business with any banking or financial institution with respect to any of my accounts, including, but not limited to, making deposits and withdrawals;" "[s]ell, exchange, buy[,] invest, or reinvest any assets or property owned by me;" and "[e]nter into binding contracts on my behalf." (App. p. 460). The POA recites that it was signed at "Branch Banking & Trust, Columbia, SC." (App. p. 462). Although not mentioned or even alluded to in the POA, Hiott was employed as a Senior Vice President at Community First during the operative time period. (*See* App. p. 465).

Brookshire and Hiott met in the 1980s and were friendly acquaintances in Columbia in the 1980s and 1990s. During that period, Hiott worked for several banks in the Columbia area. Brookshire was a customer at those banks and interacted with Hiott in the conduct of her banking business, but they also tailgated together at football games and socialized at bars in Columbia or at Hiott's house. (App. p. 316, line 3 – p. 318, line 25). Brookshire testified that her opinion of Hiott was that he was "[h]onorable and nice" and that she knew that "he worked for a bank." (App. p. 316, line 24). After Hiott moved to Oconee County around 2000, however, he and Brookshire did not keep in touch. (App. p. 319, lines 1-9). Around 2007, Brookshire reached out to mutual friends, Ron and Peg Craven, and asked Mr. Craven "to take care of her finances" and "handle all of [her] business." (App. p. 469, line 7 – p. 470, line 16). Mr. Craven is retired from Pillsbury Company where he was employed as a reset merchandiser in grocery stores. (App. p. 468, lines 8-25). The Cravens declined to help Brookshire in that capacity, and Hiott's name was brought up in the conversation as someone to potentially assist Brookshire with her finances. (App. p. 469,

lines 2-13). The Cravens gave Brookshire Hiott's telephone number, and Brookshire thereafter contacted Hiott for the first time in many years. (App. p. 319, line 10 – p. 320, line 13). Brookshire testified that she asked Hiott "if he would be interested in protecting [her] interests" and stated that she was not with Hiott when she executed the POA. (App. p. 322, lines 13-15 – p. 323, line 5). She affirmed her signature on the POA, that she understood that she was transferring her money for Hiott to handle her interests, that she understood what a power of attorney was and how they operated, and that she had previously both served as a power of attorney and had given others a power of attorney. (App. p. 322, line 20 – p. 323, line 22; p. 324, line 16 – p. 327, line 11).

By June 2007, Hiott was performing his duties under the POA, and he signed June 2007 correspondence to Baker and Baker and BB&T as "Benjamin L. Hiott, Power of Attorney." (App. pp. 478, 480-481). Brookshire also signed these communications. (App. pp. 478, 480-481). Over time, Hiott also handled Brookshire's taxes, various insurance matters, and signed residential leases for her. (App. pp. 483-493, 495, 497-500, 502-508). He paid her telephone and utility bills, car payments, storage unit fees, professional fees, insurance bills, medical bills, traffic tickets, childcare bills, and made charitable contributions on her behalf. (*See* App. pp. 510-522). Brookshire estimates that she was having Hiott pay "[m]aybe ten to twenty" monthly bills for her, although she could not provide a comprehensive list of his responsibilities. (App. p. 399, line 12 – p. 402, line 8). Hiott also regularly assisted Brookshire with the two children in the custody of Brookshire and her husband by arranging for their care on weekends and, on at least one occasion, Hiott kept the children for several days at Christmas. (App. p. 362, lines 21-25; p. 471, lines 14-25; p. 472 lines 9-25; p. 473, line 1 – p. 474, line 25; p. 475, line 1 – p. 476, line 26; pp. 524, 526, 528, 530). Hiott further arranged for the storage and maintenance of Brookshire's motor home and was entrusted with personal possession of about $500,000 worth of her jewelry and silver.

(App. p. 330, lines 7-22; p. 334, line 1 – p. 335, line 17; p. 418, line 17 – p. 419, line 23). In short, Brookshire's relationship with Hiott while he held her POA was personal, close, and involved just about all aspects of her life.

II. Pursuant to the POA, Hiott managed Brookshire's financial affairs through a checking Account at Community First.

The primary way that Hiott handled Brookshire's financial affairs and paid her financial obligations was through the Account—a checking account held at Community First from June 2007 until February 23, 2011. (*See* App. p. 533, lines 19-21, 25). It is undisputed that Hiott handled deposits into and withdrawals from the Account, and that Brookshire knew about the Account and understood that Hiott was paying her obligations from it. (App. p. 365, line 4 – p. 366, line 25; p. 367, lines 7-11; p. 368, lines 10-15; p. 369, lines 5-17; pp. 480-481).

It is also undisputed that Community First did not serve as a trustee for Brookshire. There is no documentary or testamentary evidence to support Brookshire's claim that the Account was a trust account. Indeed, Brookshire knows how a trust is created—she created one in February 2005 with BB&T, with BB&T serving as trustee. (App. pp. 426-429). After expressing her dissatisfaction with BB&T's attempts to advise her on various financial matters (App. pp. 455-456, 964, 966-967), among other concerns, Brookshire revoked her trust with BB&T (App. p. 458), and *that very same day* decided to go a different direction with the management of her finances and gave the POA to Hiott. (App. pp. 460-462). Unlike the written affirmation and declaration by BB&T that it was serving as trustee for Brookshire (App. pp. 426-429), Community First has *never* represented in any way that Community First served as her trustee. Unlike with BB&T (App. pp. 427 ¶ F, 443), Community First has never charged her trustee fees. (*See* App. pp. 556-559, 564-567). Unlike with BB&T (App. pp. 426, 443), Brookshire herself is the trustee.

(*See* App. pp. 556, 561, 564, 569, 571). There is no evidence whatsoever that Brookshire and Community First entered into a trust arrangement with Community First serving as trustee.

The Account Agreement—the sole source of the relationship between Brookshire and Community First—clearly and unambiguously states that the Account description is "Business Premium Investment Checking," and the owner/signer of the Account is "Debi Baker Brookshire Trustee." (App. pp. 571-572; more legible copy at App. pp. 260-261). Brookshire contorts the plain language of the Account Agreement to argue that the typed words "Trust Accounts" somehow transforms the disclosed "Business Premium Investment Checking" Account into a trust account with Community First serving as trustee, yet completely fails to mention that the typed words "Trust Accounts" appears under the heading "Ownership of Account." (App. pp. 571-572; more legible copy at App. pp. 260-261). The plain language of the Account Agreement and other Account opening documentation (App. pp. 1010-1024) show exactly what Community First has always maintained: this was a checking account opened in the name of and owned by a trust. (*See* App. p. 1299, line 23 – p. 1300, line 13; p. 1301, line 13 – p. 1306, line 19; p. 1307, line 20 – p. 1311, line 19; p. 1318, line 5 – p. 1319, line 13). Brookshire's monthly Account statements that Community First sent to her show that Brookshire herself was serving as trustee of the trust—not Community First. (*See* App. pp. 556, 561, 564, 569). Brookshire cannot create a trust account (or a genuine issue of material fact that she created a trust account) by assuming she had one. Indeed, Brookshire's own expert testified that Brookshire did not have a "trust account at Community First with the bank serving as a trustee," nor is Brookshire's expert "aware of any agreement where [Community First] undertook any trustee duties for [her]." (App. p. 1334, line 20 – p. 1335, line 2).

Community First mailed monthly statements for Brookshire's Account at Community First to the address where Brookshire was receiving her mail (App. p. 313, line 9 – p. 315, line 23; p. 321, lines 10-19; p. 410, lines 14-15) from the Account's inception in June 2007 until early 2010, when Community First received for the first time in April 2010 a statement addressed to Brookshire in return mail as "unable to forward." (App. p. 539, ¶¶ 17-18). Community First's account management system automatically generates and prints a periodic account statement for each of its more than 25,000 accounts. (App. pp. 535-536, ¶¶ 3, 8). These account statements are routinely, regularly, and automatically compiled, processed, and transmitted for mailing with the United States Postal Service, as detailed in the affidavit of Carol Wilson. (App. pp. 536-538, ¶¶ 9-12). At all times during the Account's existence, Community First followed its normal procedures with regard to the Account statements. (*See* App. p. 538, ¶ 14).[3]

The extensive and undisputed evidence in the record of Community First's *sending* of the monthly Account statements to Brookshire is corroborated by her production of three original statements (November and December 2007 and January 2008) and a photocopy of another original statement (July 2007). (App. pp. 541, 543, ¶¶ 28, 29, 30, 34). Brookshire also testified that she potentially discarded documents regarding Community First and Hiott after 2010. (App. p. 390, line 8 – p. 392, line 18).

Brookshire's former private investigator for a wide variety of matters, Billy Tabor, testified that he received the original July 2007 statement (or copy thereof) directly from Brookshire when she brought him several boxes of documents in or around 2012. (App. p. 578, line 15 – p. 580,

[3] Brookshire speculates with no record citations (because none exist) that Hiott could have manipulated the monthly statement mailings and "easily removed all statements from the mail." Brookshire Brief p. 5. The only evidence in the record is to the contrary. Ms. Wilson testified that "it would have been nearly impossible for Mr. Hiott to access the statements during an individual month, much less on a regular basis." (App. p. 538, ¶ 15).

line 20; p. 583, lines 1-25; pp. 587-597). The original statement (page Giese-CFB 1418) was in one of the boxes, although Brookshire directly gave Mr. Tabor a reprinted copy of the July 2007 statement (page Giese-CFB 1417). (App. p. 583, lines 3-25; pp. 588-589). The boxes Brookshire gave Mr. Tabor were unorganized and contained various items including "bank records," "things about the children," and "personal letters." (App. p. 581, line 7 – p. 582, line 14). Mr. Tabor affirmed that Brookshire also provided him with the original Account statements from November and December 2007 and January 2008. (App. p. 584, lines 5-25; pp. 599-602, 604-605, 607-610).[4] Mr. Tabor thereafter turned all of these documents over to the Giese Law Firm. (App. p. 585, lines 1-7).[5]

Taken together, the undisputed evidence demonstrates that Community First mailed to Brookshire original Account statements in the normal course of the Account's existence from 2007 until early 2010, Brookshire provided at least some original statements to Mr. Tabor along with voluminous other documents in 2012, and that thereafter Mr. Tabor organized the Account statements in some fashion and transmitted them to Brookshire's counsel. The undisputed

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[4] Brookshire states that she received those statements when Hiott returned the motor home to her in the summer of 2010. Brookshire Brief p. 5. Although Brookshire cites the testimony of Ann Gell Hamiter for supposed support, Ms. Hamiter does not actually remember what "paperwork" Hiott brought back in the motor home. (App. p. 1077, lines 21-25). Such speculative testimony is insufficient to raise a genuine issue of material fact to preclude summary judgment. *See Jackson v. Bermuda Sands, Inc.*, 383 S.C. 11, 17, 677 S.E.2d 612, 616 (Ct. App. 2009).

[5] Brookshire's former attorney, Michael Sgobbo, Esq., produced in discovery in 2016 a 2007 "Audit Confirmation" letter sent from J.W. Hunt and Company, LLP to Brookshire regarding the Account, and asking her to "please report any discrepancy by us[ing] the reverse side of this form and returning in t[he] enclosed envelope." (App. p. 612). The Audit Confirmation letter gave the "current balance" for the Account as $392,097.12 and the "balance last statement" for the Account as $296,587.54 on November 30, 2007. *Id.* Despite repeated, specific inquiries into when and how she came into possession of this Audit Confirmation letter (including a written supplemental response made at court order), Brookshire failed to provide any information as to when she received this document, which is dated 2007 and is not found in Community First's files. (App. pp. 614-620).

evidence also shows that Brookshire *never* notified Community First in 2007, 2008, 2009, or early 2010 that she was missing or had failed to receive any Account statements. (App. p. 331, line 8 – p. 332, line 10).

III. Brookshire's relationship with Hiott unraveled no later than mid-2010.

Brookshire testified that by the spring or summer of 2010 at the latest, she had become distrustful of Hiott and believed he was being untruthful with her about her assets, especially regarding the amount of money in the Account. (App. p. 333, lines 13-23; p. 338, line 4 – p. 339, line 14; p. 344, line 10 – p. 345, line 2). On July 19, 2010, she instructed Baker and Baker not to deposit any more funds into the Account. (App. p. 370, line 17 – p. 371, line 20). Over the course of the Account's existence, at least $1,307,706.43 was deposited there from Baker and Baker. (App. pp. 622-623). Brookshire entrusted another friend, Ann Gell Hamiter, with bill paying duties in the spring of 2010 and sought legal advice from Kathleen McDaniel, Esq. beginning in August 2010 due to her concerns about Hiott and the inconsistent information she and Ms. Hamiter were receiving from him. (App. p. 336, line 1 – p. 337, line 18; p. 341, lines 1-17; p. 374, line 3 – p. 375, line 18; p. 398, lines 1-23; p. 633, lines 6-19). As Ms. Hamiter testified, Brookshire "was totally put out" with Hiott in 2010 because Brookshire believed that Hiott "was stealing her money." (App. p. 645, lines 9-17). Ms. McDaniel wrote to Hiott on September 21, 2010:

> It is my understanding that on August 11, 2010, you transferred all of the cash remaining in the trust account, approximately $200,000.00 to Ms. Baker-Brookshire's account at BB&T. I spoke yesterday with Ann Gel Hammiter [sic], Ms. Baker-Brookshire's bookkeeper. Ms. Hammiter [sic] informs me that, when she last spoke to you about one month before the wire out to BB&T, you told her that there was approximately $900,000 remaining in the trust account. There appears to be some serious inconsistencies in this information.

(App. pp. 649-650). Ms. Hamiter testified that Brookshire "was violently upset" and surprised when she received the $200,000 in August 2010 and believed she should have had more money in

the Account. (App. p. 646, line 12 – p. 647, line 16). Consequently, Brookshire had serious, documented concerns about Hiott's behavior with regard to her Account in mid-2010.

In approximately December 2010, counsel for Community First, James Williams, Esq., sent a package of reprinted Account statements to date to Ms. McDaniel, which on their face were printed on November 18, 2010. (App. p. 636, line 1 – p. 637, line 24; pp. 652-731). Ms. McDaniel confirmed that she received the set of reprinted Account statements during her representation of Brookshire and that she sent the package of reprinted Account statements on to Brookshire. (App. p. 639, lines 4-10). Brookshire confirmed that she received this package no later than March or April 2011. (App. p. 383, line 18 – p. 387, line 14). On February 17, 2011, Ms. McDaniel instructed Community First to "close Ms. Baker-Brookshire's account with Community First Bank and prepare a check made out to Debi Baker-Brookshire for *all funds remaining in the account*." (App. p. 733 (emphasis added)). Ms. McDaniel met with Mr. Williams and Hiott on February 22, 2011, and received a Community First Bank "Official Check" for $285,233.34 made out to Debi Baker Brookshire. (App. p. 640, line 5 – p. 641, line 23; pp. 735-738). Both Ms. McDaniel and Brookshire testified that they understood that the $285,233.34 was all the money remaining in the Account as of February 2011. (App. p. 343, lines 3-18; p. 380, line 2 – p. 381, line 5; p. 641, line 3 – p. 642, line 7). Ms. McDaniel ceased representing Brookshire on March 11, 2011. (App. p. 642, lines 19-22). On April 6, 2011, Brookshire revoked the POA. (App. p. 740). Brookshire has not spoken with or directly communicated with Hiott since mid-2010. (App. p. 342, lines 8-23).

IV. The POA authorized all disbursements from Brookshire's Account regardless of her present concerns about the propriety of Hiott's disbursement decisions.

Over the course of the Account's existence from June 2007 until February 2011, a total of $4,057,114.34 was deposited into and withdrawn from the Account. Brookshire initially claimed that essentially *all* of the disbursements from the Account were unauthorized or were allegedly

"stolen or misappropriated." (App. p. 37 ¶ 102, p. 38 ¶ 110). As discovery progressed, Brookshire eventually admitted that she does not dispute that Hiott disbursed $1,865,761.69 from the Account to her or for her benefit in payment of her obligations. (App. p. 388, line 12 – p. 389, line 25; p. 393, line 3 – p. 396, line 10; pp. 742-778; pp. 780-786). These payments represent payments by Hiott for Brookshire's taxes ($564,634.21); her various bills including rent, cable, utilities, daycare, insurance, traffic tickets, and medical bills ($115,488.96); transfers to her accounts at BB&T ($1,020,626.62); and payments to her husband ($51,208.15) among other various payments. (App. pp. 780-786).

Subtracting the undisputed amount leaves $2,191,352.65 that Brookshire still disputes, representing 115 disbursement transactions. (App. pp. 788-791); *see also* Brookshire Brief pp. 3-4. While Brookshire admits that the POA authorized all of these disbursements (App. pp. 24, 26), to the extent Brookshire disputes the propriety of these 115 disbursements, the overall amount is subdivided into three core buckets: (1) $556,977.20, for which uncontroverted documentary evidence shows either no net loss to the Account or that the disbursements were for Brookshire's benefit;[6] (2) $880,855.58 of Community First funds that Hiott deposited into the Account on eight separate occasions, and which Brookshire has confirmed were inappropriate and to which she has no valid claim (App. p. 382, line 14 – p. 383, line 14; p. 922, lines 16-20; p. 924); and (3) the amount remaining in dispute, which after applying the $880,855.58 offset of Community First funds, is, at most, $753,519.87.

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[6] *See* App. pp. 788-791, with the categories of BB&T, CFB (transaction reversals), Community First (credit card), Insurance, Logan Voxx, Car, and the CFB closing withdrawal of $0.01 on February 24, 2011, comprising the disbursements in this category. *See also* App. pp. 793-800, 802-854, 856-882, 884-896, 898-912, 914-919 for relevant backup documentation for such disbursements.

The withdrawals from the Account that, after discovery, were remotely subject to dispute are far less than the total damages originally claimed. As discussed more fully below and as both the trial court and Court of Appeals ruled, Brookshire's claims are fatally time barred. For example, Brookshire's problems are starkly obvious with regard to one category of transactions—disbursements made to Joseph Crosby or made for his benefit or for the benefit of a company he owned.[7] Mr. Crosby was an upstate restaurateur who developed a line of spice rubs and other food products that were sold in local stores, to the United States military, and on QVC. (App. p. 927, line 11 – p. 932, line 18; p. 933, lines 4-23). The only evidence is that in 2007 and 2008, this business was growing rapidly and was poised for great success. (App. p. 939, line 23 – p. 941, line 21). Mr. Crosby testified that his company collapsed during the financial crisis, and he could not repay his debts, including the debt to Brookshire. (App. p. 942, line 3 – p. 946, line 19; p. 947, line 1 – p. 949, line 18; p. 950, lines 5-25). The disbursements to Mr. Crosby represent the largest by amount ($1,053,437.39) and oldest by date (beginning July 12, 2007, and ending December 17, 2008) of the categories of payments that Brookshire could, after discovery, conceivably contest in any way. (*See* App. pp. 788-791). The failure to timely challenge these payments renders Brookshire entirely upside down on her damages theories. (*See* App. p. 1483).

[7] Brookshire has admitted that Hiott's "ability to conduct business with Joseph Crosby, or any other person, was authorized by the POA." Initial Brief, p. 21. Mr. Crosby testified that he understood that the July 12, 2007 $500,000.00 disbursement to him (made on an Official Check of Community First and endorsed by him) was a *loan* to him from Brookshire, as confirmed by the words "Brookshire Loan Advance" on the remitter line of the check. (App. p. 934, line 6 – p. 938, line 14; p. 952). Indeed, Mr. Crosby referred to Brookshire as a sort of "angel investor" in his company. (App. p. 937, lines 7-10). He considered the other advances of Brookshire's funds to be of the same category and nature. (App. p. 939, lines 1-12).

ARGUMENT

I. The existence of multiple additional sustaining grounds requires affirmance by this Court.

The trial court granted summary judgment to Community First on all of Brookshire's six causes of action and on myriad overlapping and equally dispositive grounds. (App. pp. 144-148). Before this Court, Brookshire challenges only three of the 11 grounds on which the trial court granted summary judgment to Community First: (1) S.C. Code Ann. § 15-3-110 (number 4 on the trial court's list); (2) S.C. Code Ann. § 15-3-530(5) (number 3 on the trial court's list); and (3) equitable tolling and equitable estoppel (number 5 on the trial court's list). (Brookshire Brief p. 1; App. p. 145).[8] Brookshire has thus left unchallenged in this Court and unpreserved for review the following rulings, *both* of which independently and thoroughly dispose of *all* of Brookshire's claims:

> (1) Plaintiff's power of attorney to Hiott bars her claims against Community First because there is no genuine issue of material fact that, by the power of attorney, Plaintiff authorized Hiott to take all of the actions he did with regard to Plaintiff's account at Community First, and the law imposes no duty on Community First to monitor or regulate Hiott's activities and decisions undertaken pursuant to the power of attorney.
>
> (2) Plaintiff's claims that Hiott's disbursements from Plaintiff's account at Community First were unauthorized are time barred under the Uniform Commercial Code['s statute of repose set forth in S.C. Code Ann. § 36-4-406] because there is no genuine issue of material fact that Plaintiff failed to timely challenge the disbursements.

(App. p. 145). Brookshire has also left unchallenged the grants of summary judgment on all six of her individual causes of action. (App. pp. 145-146).

The Court of Appeals "affirm[ed] the summary judgment on Brookshire's claims ...." (App. p. 116). The Court of Appeals addressed three issues and held, among other things, that the

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[8] The trial court denied Brookshire's Rule 59(e) motion seeking reconsideration of the summary judgment order. (App. pp. 149-150).

trial court properly concluded that Brookshire's claims were barred by the statute of limitations set forth in S.C. Code Ann. §§ 15-3-530(5), -535. (App. p. 116). Based on its dispositive ruling, the Court of Appeals did not need to address and did not address the remaining independent grounds upon which the trial court granted summary judgment in favor of Community First. (App. pp. 117-118). Brookshire filed a Petition for Rehearing that addressed the three grounds addressed by the Court of Appeals and no others. (App. pp. 122-127). Brookshire's Petition for Writ of Certiorari mirrors those three grounds, as well, as it was required to do. Rule 242(d)(2), SCACR ("Only those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court."). Brookshire, however, failed to raise any argument in her Petition for Rehearing, Petition for Certiorari to this Court, or in her Initial Brief to this Court regarding the eight *other* rulings contained in the order granting summary judgment to Community First on Brookshire's claims. Consequently, those eight rulings are "the law of the case" and constitute independent and dispositive grounds for affirmance. *See Robinson v. Estate of Harris*, 388 S.C. 616, 627 n.8, 698 S.E.2d 214, 220 n.8 (2010) ("The Court of Appeals affirmed the circuit court's order based on section 15-67-90 and Respondent's status as a bona fide purchaser for value without notice. Petitioners, however, failed to raise any arguments in their petition for rehearing or initial brief to this Court regarding the circuit court's ruling as to the doctrine of laches. Accordingly, we find the doctrine of laches is the law of the case and this Court is justified in affirming on that basis."); *Sloan v. Dep't of Transp.*, 365 S.C. 299, 307, 618 S.E.2d 876, 880 (2005) ("The circuit court judge also determined two of the three actions were barred by laches. The Court of Appeals, after holding Sloan did not have standing, specifically declined to address the laches issue. On appeal to this Court, Sloan failed to raise the laches issue. The failure to appeal an alternative ground of

the judgment below will result in affirmance."); *S.C. Tax Comm'n v. Gaston Copper Recycling Corp.*, 316 S.C. 163, 170, 447 S.E.2d 843, 847 (1994) ("This Court will affirm where an appellant fails to appeal the alternative ground of a trial judge's ruling."); *Biales v. Young*, 315 S.C. 166, 168, 432 S.E.2d 482, 484 (1993) ("Failure to argue is an abandonment of the issue and precludes consideration on appeal."); *Lindsay v. Lindsay*, 328 S.C. 329, 338, 491 S.E.2d 583, 587 (Ct. App. 1997) ("It is a fundamental rule of law that an appellate court will affirm a ruling by a lower court if the offended party does not challenge that ruling.").[9]

Indeed, should this Court reverse the Court of Appeals on any or all of the three issues presented by Brookshire (which it should not), it would have no practical effect on the outcome of the case. All of Brookshire's claims are still barred by the POA she gave to Hiott and the UCC's statute of repose. All six of Brookshire's claims fail on the merits as a matter of law. As the granting of summary judgment to Community First on these eight other grounds is the law of the case, an opinion of this Court finding in Brookshire's favor would amount to nothing more than an impermissible advisory opinion. *See, e.g.*, *Booth v. Grissom*, 265 S.C. 190, 192, 217 S.E.2d 223, 224 (1975) ("It is elementary that the courts of this State have no jurisdiction to issue advisory opinions."); *Binkley v. Rabon Creek Watershed Conservation Dist. of Fountain Inn*, 348 S.C. 58, 76 n.36, 558 S.E.2d 902, 911 n.36 (Ct. App. 2001) ("This court will not issue advisory opinions that have no practical effect on the outcome.").[10]

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[9] Brookshire never appealed to the Court of Appeals the trial court's grant of summary judgment on two causes of action: negligence/gross negligence and for an accounting. (App. pp. 6, 146). "[S]hould the appealing party fail to raise all of the grounds upon which a lower court's decision was based, those unappealed findings—whether correct or not—become the law of the case." *Dreher v. S.C. Dep't of Health & Envlt. Control*, 412 S.C. 244, 250, 772 S.E.2d 505, 508 (2015).

[10] At the very least, "an appellate court may affirm the lower court's judgment for any reason appearing in the record on appeal." *I'On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 420-21, 526 S.E.2d 716, 723 (2000). The record on appeal reveals abundant reasons for affirming the

II. The Court of Appeals correctly ruled that S.C. Code Ann. § 15-3-110 does not apply to this matter because Brookshire's claims do not involve bank-issued notes circulated as currency.

South Carolina Code Ann. § 15-3-110 (originally adopted in 1870) states that the chapter setting forth statutes of limitations for various causes of action "shall not affect actions to enforce the payment of bills, notes or other evidences of debt issued by moneyed corporations or issued or put in circulation as money." Brookshire suggested to the trial court and the Court of Appeals that, as a result of Section 15-3-110, no statute of limitations whatsoever applied to the claims she asserted against Community First in this case.

Brookshire argues that the Court of Appeals failed to issue a ruling as to why S.C. Code Ann. § 15-3-110 does not apply to the claims she asserted against Community First. This is incorrect, as the Court of Appeals addressed this issue, holding that "we agree with Community First that this statute applies to bank instruments that are not at issue here." (App. p. 117). The undisputed history of this statute demonstrates that it does not apply to Brookshire's claims, and Brookshire's arguments are also inconsistent with the UCC's statute of repose.

Brookshire focuses on only one aspect of S.C. Code Ann. § 15-3-110 and deems it dispositive: whether Community First would be considered a "moneyed corporation" (it would). But Brookshire ignores the remaining language of the statute limiting its application to actions or claims for "the payment of bills, notes or other evidences of debt issued by moneyed corporations or issued or put in circulation as money." *Id.* Both historical banking practice and cases from other jurisdictions with similar statutes[11] demonstrate that this statute is antiquated and applies

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grant of summary judgment on grounds unaddressed by Brookshire in this Court. (*See* App. pp. 62-77; 90-98).

[11] *See* N.D. Cent. Code Ann. § 28-01-35 (West); S.D. Codified Laws § 15-2-18; Mo. Ann. Stat. § 516.310 (West); Miss. Code Ann. § 15-1-79 (West).

only to bank-specific bills, notes, or actual tangible instruments intended to function as currency, which are no longer circulated and of which there is no evidence of use by Community First here.

In *Butts v. Vicksburg & Meridian R.R. Co.*, 63 Miss. 462 (Miss. 1886), the appellants argued that notes issued by a railroad company were substantially the same as bank notes to which the statute of limitations did not apply. The Supreme Court of Mississippi held that the statutory exception to the statute of limitations did not apply because the railroad-issued notes had ceased to circulate as currency and had ceased to be taken in and reissued by banks. *Id.* at 465. The Court explained why bank notes were excepted from the statute of limitations:

> While the general rule is that statutes of limitation do not apply to bank bills, because they are by the consent of mankind and course of business *considered as money*, and that their date is no evidence of the time when they were issued, as they are being continually returned and reissued by the banks, yet if such bills have ceased to circulate as currency and have ceased to be taken in and reissued by the banks, they no longer have that distinctive character from other contracts which excepts them from the operation of the statutes of limitation.

Id. (emphasis added). In *Quattrochi v. Farmer's & Merchants' Bank*, 89 Mo. App. 500 (Mo. Ct. App. 1901), the Court held that an action against a bank to recover the difference between a balance shown and the balance that was actually due was not within the purview of Missouri's statute excepting actions to enforce bills, notes, and other evidences of debt from the general statute of limitations because the claim did not involve notes circulated as money. *Id.* at 508, 510. Thus, under *Butts* and *Quattrochi*, this type of statute applies only in situations where a moneyed corporation circulated its own bills or notes intended to function as money.

Brookshire is not seeking to enforce any bill, note, or evidence of indebtedness *issued* by Community First that would be *considered as money*. Further, the cases applying this statute all arose in a pre-New Deal economic era where companies, including banks, would circulate their own bills and currency. (*See* App. pp. 1039-1041; 1043-1045). Community First is not issuing

any specialized currency, and Brookshire has made no claim that it has. Thus, this statute simply does not apply to this matter at all.

Further, applying this statue to the modern practice of banking would upend the UCC and decades of established case law. The UCC represents a specific balancing of modern commercial practice and a careful allocation of rights and responsibilities among the parties to commerce. Article 4 of the UCC specifically addresses the timeframe that a bank customer has to challenge disbursements from his or her Account—limiting the maximum timeframe to one year. S.C. Code Ann. § 36-4-406 (2003 & Supp. 2022) as applicable; *see also Sabatino v. Atl. Sav. Bank, F.S.B.*, 314 S.C. 402, 403, 444 S.E.2d 537, 538 (Ct. App. 1994). The statute of repose contained in the UCC,[12] as a more recent and specific statute, prevails over the older and more general provisions of S.C. Code Ann. § 15-3-110. *See Stone v. State (City of Orangeburg)*, 313 S.C. 533, 535, 443 S.E.2d 544, 545 (1994). Further, "[a] statute of limitations is a procedural device that operates as a defense to limit the remedy from an existing cause of action. A statute of repose creates a substantive right in those protected to be free from liability after a legislatively determined period of time." *Capco of Summerville, Inc. v. J.H. Gayle Constr. Co., Inc.*, 368 S.C. 137, 142, 628 S.E.2d 38, 41 (2006). As § 15-3-110 only applies to bar statutes of limitation, it does not affect the UCC statute of repose at S.C. Code Ann. § 36-4-406. The trial court and the Court of Appeals both correctly held that, on the merits of the argument, S.C. Code Ann. § 15-3-110 does not apply to this matter.

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[12] The UCC, as codified at S.C. Code Ann. § 36-4-406, is a statute of repose. *See Peters v. Riggs Nat'l Bank, N.A.*, 942 A.2d 1163, 1168-69 (D.C. 2008); *First Place Computers, Inc. v. Sec. Nat'l Bank of Omaha*, 558 N.W.2d 57, 60 (Neb. 1997) (both holding that § 4-406 is a statute of repose). For the UCC, the General Assembly has provided "a statement of legislative direction to the courts of a tendency to imply an interpretation and construction of the Code sections which is consistent with the case law construction of those sections in other Code jurisdictions." S.C. Code Ann. § 36-1-103, S.C. Reporter's Cmt. (Supp. 2022).

Brookshire also argues that the trial court and the Court of Appeals' rulings on this particular issue are invalid because the trial court's order "relied on unfiled materials not properly before the court for consideration." Brookshire Brief p. 14. Brookshire cites no authority for this position and makes no citations to the voluminous case record. Notwithstanding this failure to substantiate her position, her argument fails on the merits. First, the record reveals that Community First cited case law, statutory law, and scholarly articles in support of its argument on this issue, all of which was briefed to both the trial court and the Court of Appeals. (*See* App. pp. 1291-1293). The trial court had these written materials during the summary judgment hearing on December 13, 2016 (App. pp. 1344-1345, 1357), and had the filed version of these materials during the Rule 59(e) hearing on December 6, 2017. (App. pp. 1286-1345, 1445). Second, there is no requirement to file a memorandum under the South Carolina Rules of Civil Procedure, and there is no dispute that Community First's reply memorandum and attachments were presented to the trial court and were thus appropriately contained in the record on appeal for this case. *See* Rule 210(c), SCACR; App. pp. 1344-1345. Third, Brookshire failed to properly present this issue to the Court of Appeals, as she failed to list this issue in her Statement of Issues on Appeal for the Court of Appeals' consideration. (App. p. 6). *Allen v. Pinnacle Healthcare Sys., LLC*, 394 S.C. 268, 277-78, 715 S.E.2d 362, 367 (Ct. App. 2011) ("Appellants did not include this issue in their statement of issues on appeal. … Therefore, we find this issue is not preserved for our review.").

For all of the above reasons, the Court of Appeals correctly ruled that S.C. Code Ann. § 15-3-110 does not apply to this matter and should be affirmed.

III. The Court of Appeals correctly ruled that Brookshire's claims were barred by the three-year statute of limitations set forth in S.C. Code Ann. § 15-3-530.

As noted by the Court of Appeals, civil actions for "any injury to the person or rights of another" are barred if not filed within three years, which period begins to run when the injured

party "knew or by the exercise of reasonable diligence should have known that he had a cause of action." S.C. Code Ann. §§ 15-3-530, -535. (*See* App. p. 116). The Court of Appeals correctly affirmed the trial court's ruling that Brookshire's claims were barred by this statute of limitations.

A. The Court of Appeals correctly ruled that Brookshire "knew or should have known" a claim might exist against Community First at multiple points more than three years prior to suit.

Brookshire argues that the Court of Appeals erred in finding that a single triggering date for the statute of limitations applies to all of the transactions she challenged in this matter. Brookshire Brief p. 16. The Court of Appeals did not make such a ruling. Rather, it held that "the record shows *multiple points* more than three years before she brought this action when Brookshire knew or should have known she had claims against Community First" (emphasis added). (App. p. 116).

The evidence is undisputed that Brookshire executed the POA on May 25, 2007, granting Hiott the authority to handle virtually all aspects of her financial affairs (App. pp. 460-462) and that, with her knowledge, Hiott was actively and regularly exercising that authority by, among other things, making deposits into and disbursements from the Account at Community First from July 12, 2007, until Brookshire closed the Account on February 23, 2011. Brookshire did not file this suit until September 8, 2014 – over 3.5 years after she closed the Account.

The statute of limitations "runs from the date the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises from the wrongful conduct." *Dean v. Ruscon Corp.*, 321 S.C. 360, 363, 468 S.E.2d 645, 647 (1996). The "exercise of reasonable diligence" means 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." *Id.* at 363-64, 468 S.E.2d at 647. Seeking legal advice, developing a full-blown theory of recovery, or comprehending the full

amount of damages are immaterial to the running of the statute of limitations and the discovery rule. *Id.*, *see also Grillo v. Speedrite Prods., Inc.*, 340 S.C. 498, 503, 532 S.E.2d 1, 3 (Ct. App. 2000); *Gibson v. Bank of Am., N.A.*, 383 S.C. 399, 409-10, 680 S.E.2d 778, 783-84 (Ct. App. 2009) (holding that receipt of bank statements in June 2000 that disclosed account balances placed the account holder "on notice that she had some type of claim for any perceived discrepancy, even if she did not know the precise details behind the discrepancy" and barred lawsuit against bank brought in September 2003).

The Court of Appeals correctly noted that the record shows multiple undisputed events that triggered the statute of limitations more than three years before Brookshire filed suit. (App. p. 116). For example, Brookshire told someone in 2010 that Hiott was "stealing her money." (App. p. 645, lines 9-17). Further, Brookshire hired a lawyer who was provided with copies of Brookshire's Account statements from July 2007 through late 2010 in December 2010, that lawyer wrote Hiott a letter in 2010 complaining about serious inconsistencies and serious matters related to her Account, and Brookshire closed the Account in February 2011 at her lawyer's instruction. (App. pp. 636, line 1- 637, line 24; 639, lines 4-10; 649-650; 652-731; 733).[13] In addition, Brookshire's own expert opined that bank customers have a duty to review their account statements and report discrepancies (or any failure to receive statements) in a timely manner. (App. 957-959).

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[13] *See also Allwin v. Russ Cooper Assocs., Inc.*, 426 S.C. 1, 14, 825 S.E.2d 707, 714 (Ct. App. 2019) (finding that a letter from the plaintiff to the defendant more than three years before suit was filed notifying defendant of plaintiff's retention of legal counsel and advising of "significant deficiencies" in home construction that "have led to significant damage" to the home and asking for investigation and correction by the defendant was ample notice under the discovery rule, and the suit was barred by the statute of limitations).

B. Brookshire's brand new argument on the statute of limitations fails.

Despite the abundant and uncontroverted evidence that each and every transaction from the Account at Community First took place well over three years before Brookshire filed suit (and indeed that the Account was fully and finally closed well over three years before she filed suit), Brookshire argues here that "separate and distinct" statutes of limitations operate with regard to her claims against Hiott on one hand and her claims against Community First on the other hand. Brookshire Brief p. 17. She argues before this Court that the statute of limitations with regard to her claims against Community First is triggered only by "[t]he discovery of the lack of such systems and controls [to catch fraud], in violation of standard banking practice" and that summary judgment to Community First on statute of limitations grounds was therefore improper. *Id.* Brookshire dates such "discovery" as occurring in 2013. *Id.* at 5. She further claims that "the injuries caused by Defendant Hiott and [Community First] are different" and that the alleged "dishonest actions" continued after the Account was closed caused her damage. *Id.* at 16-17. This argument fails for multiple reasons.

1. Brookshire cannot advance this brand new argument before this Court.

This is a brand new argument and is not found in Brookshire's arguments to either the trial court (App. pp. 981-982) or the Court of Appeals (App. pp. 20-22). As a result, Brookshire has failed to preserve this argument for consideration here. *See I'On*, 338 S.C. at 422, 526 S.E.2d at 724 ("[T]he losing party generally must present both his issues *and arguments* to the lower court and obtain a ruling before an appellate court will review those issues *and arguments*.") (emphases added); *Repko v. County of Georgetown*, 424 S.C. 494, 503, 818 S.E.2d 743, 748 (2018) ("An appellate court may not reverse a lower court order based on a legal or factual premise not advanced by the party who lost at the trial court level."); *Dunes W. Golf Club, LLC v. Town of Mt.*

Pleasant, 401 S.C. 280, 302 n.11, 737 S.E.2d 601, 612 n.11 (2013) ("Appellant cannot present this argument for the first time on appeal. ... Appellant may not argue a different position on appeal.").

2. None of Brookshire's claims against Community First can post-date the sole relationship between Brookshire and Community First: the Account.

Second, Brookshire's argument misrepresents the facts (and even her own allegations) underlying her argument and is contrary to the law of this state. Brookshire has not alleged any claims or causes of action that go beyond the actual transfer of the funds in the Account. Her damages claims are for the amount of money she held in the Account, and the root of all of her claims is the Account. (*See generally* App. pp. 154-183, particularly ¶¶ 11, 13, 14, 17, 18, 87, 102, 103, 110, 113, 114, 117, 125, 126, 136, 139, 140). Indeed, it could not be otherwise because the relationship between Brookshire and Community First is defined in the Account Agreement (App. pp. 432-436), and her sole legal relationship with Community First is by virtue of the Account. Under its own terms, the Account Agreement was "terminat[ed]" upon closure of the Account and "tender of the account balance" to the customer, which occurred in February 2011. (App. pp. 574, 733, 735-738).

Brookshire also claims that Community First lacked internal controls and failed to adhere to standard banking practice with regard to Hiott, and that these circumstances mean that *Community First's* discovery of various misconduct by Hiott[14] in 2013 is the triggering event for *Brookshire's* statute of limitations for her own claims against Community First. Brookshire Brief

[14] Brookshire claims that Hiott's actions with regard to Brookshire are similar to or part of the same "scheme" that Hiott allegedly used on other accounts at Community First. Brookshire Brief pp. 4, 5. This is incorrect. There is no evidence in the record that Hiott held a power of attorney for any other account holder at Community First other than Brookshire. There is also no evidence in the record that any other customer of Community First has ever made claims similar to those made by Brookshire. (*See, e.g.* App. p. 1233).

pp. 4-5, 17. South Carolina authority is to the contrary. This Court held in *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 be fairly construed as a notice that any claim the depositor may make in excess of the stated balance would be resisted by the bank. And in view of the situation the depositor's formal demand for a greater sum would be unnecessary to perfect the depositor's cause of action, and likewise to set in motion the Statute of Limitations. If this is not the legal effect of the bank's monthly statement to a depositor, it is not apparent what function the monthly statement performs.

(quoting *Kan. City Title & Trust Co. v. Fourth Nat'l Bank in Wichita, Kan.*, 10 P.2d 896, 901 (Kan. 1932)). The Court of Appeals in *Gibson* applied the *Citizens* decision in a materially similar circumstance to the instant case. In *Gibson*, the bank sent account statements to the account holder that showed a decline in the account balances from February 2000 until June 2000 via multiple withdrawals. *Gibson*, 383 S.C. at 402-403, 680 S.E.2d at 780. The statements were not reviewed until June 2002 by the (now deceased) account holder's personal representative. *Id.* at 404, 680 S.E.2d at 781. In October 2003, the personal representative filed suit against the bank on the theory that a bank employee may have embezzled the account holder's funds or otherwise participated in various unexplained withdrawals. *Id.* The Court of Appeals, following *Citizens*, ruled that the October 2003 suit against the bank was untimely. *Id.* at 409, 680 S.E.2d at 783-784 ("If ... [the account holder] disagreed with the bank's representation of what it owed her as of June 9, [2000,] she was then on notice that she had some type of claim for any perceived discrepancy, even if she did not know the precise details behind the discrepancy."). The account statements *alone* give rise to the running of the statute of limitations as to claims by the account holder against the bank—not the discovery or suspicion of misconduct by the bank's employee.

Brookshire's claim that Community First lacked sufficient institutional controls centers on her allegations about Hiott's stock transactions on Brookshire's behalf, specifically those that

occurred after the Account was closed in February 2011. Brookshire Brief p. 18. This is both untimely and inappropriate, as these stock transfers were not an issue in Brookshire's Complaint and have never been the subject of a motion to amend the Complaint. (App. pp. 1191; 1440, line 10 – 1441, line 10). Consequently, they are improper to be considered on appeal. *See Fraternal Order of Police v. S.C. Dep't of Revenue*, 352 S.C. 420, 435, 574 S.E.2d 717, 725 (2002) ("Generally, claims or defenses not presented in the pleadings will not be considered on appeal."); *Ball v. Canadian Am. Express Co., Inc.*, 314 S.C. 272, 275, 442 S.E.2d 620, 622 (Ct. App. 1994) ("Motions to amend the pleadings to conform to proof may be made *upon motion* of any party ....) (emphasis added).[15]

Brookshire has conceded that Hiott "would be acting within his authority" under the POA in handling stock transactions for Brookshire. Brookshire Brief p. 18. It is undisputed that Hiott did, in fact, purchase and sell stock on Brookshire's behalf. (App. p. 1191). Brookshire, however, misrepresents the evidence in the record for how Hiott effected such transactions. She claims that Hiott was "trading Respondent band [sic] stock" in ways "only available to him because [Community First] lacked institutional controls." Brookshire Brief pp. 13, 18. However, the only evidence in the record shows that a company called Transfer Online, Inc. (a non-party) actually transferred stock from Brookshire. (App. p. 1191). As shown on this form, the owner of Community First Bancorporation stock can effect the transfer of that stock to another party through the transfer agent (Transfer Online, Inc.) without the participation of or input from Community

[15] Even if Brookshire had made a motion to amend the pleadings under Rule 15(b), SCRCP (which she did not), the amendment to include the stock-based claims that post-date the Account closing in February 2011 that she is now asserting would be prejudicial to Community First because Community First would not have had the opportunity in discovery (which closed on September 15, 2016) to fully develop the additional evidence it would need to fully address the new claims. *See Ball*, 297 S.C. at 275, 442 S.E.2d at 622.

First or its holding company, Community First Bancorporation.[16] To the extent that Brookshire argues that she does not have a time-barred claim with regard to her claims about stock transactions after the Account was closed, such a claim would lie against Hiott and, potentially, the third party transfer agent or brokerage company with whom Hiott effected the transfer. It would not lie against Community First, as the evidence in the record shows Community First played no operative role in those stock transactions.

Further, Brookshire cites no actual evidence to support the claim that Community First lacked internal controls or failed to adhere to standard banking practice in any way connected to Brookshire. Indeed, the "evidence" that Brookshire cites in support is nothing but improper speculation. *Beale v. Hardy*, 769 F.2d 213, 214 (4th Cir. 1985) (A party "cannot create a genuine issue of material fact through mere speculation or the building of one inference upon another."); *see also Ennis v. Nat'l Ass'n of Bus. & Educ. Radio, Inc.*, 53 F.3d 55, 62 (4th Cir. 1995) ("Mere unsupported speculation ... is not enough to defeat a summary judgment motion."). (*See* App. p. 1194, lines 17-23) (testimony of Don Jones that he was interested in whether or not certain activities at the bank were permitted or not but he "never did get a legal opinion on it or anything like that"); (App. p. 1197, ¶ 8) (written report of Kenneth Richey that "Hiott was conducting stock transactions on behalf of Brookshire and the Bank" thus creating "a conflict of interest")). Mr. Richey's report is pure speculation, as Mr. Richey testified in his deposition that he did not actually

[16] Brookshire also complains (without record citation) about Hiott's purchase and sale of Community First Bancorporation stock via Brookshire's brokerage account with RBC Capital Markets. Brookshire Brief p. 13. The evidence shows that Hiott purchased stock in Community First Bancorporation for Brookshire through such brokerage account (then known as Ferris Baker Watts) in October 2007. (*See* App. p. 510). Like Transfer Online, Inc., RBC Capital Markets (f/k/a Ferris Baker Watts) is a third party, thus further demonstrating the lack of role that Community First plays with regard to the buying and selling of Community First Bancorporation stock and Hiott's ability to buy and sell such stock outside of the participation of Community First.

know what Hiott's role was in any buying and selling of stock. (App. p. 1335, lines 21-24). Mr. Richey further testified that he has never reviewed any Community First policies and procedures to actually know what they say. (App. p. 1328, lines 7-9). He further could not cite any published industry standard that discusses whether it is appropriate for a bank officer to hold a power of attorney for a bank customer. (App. p. 1332, line 22 – p. 1333, line 2).[17]

3. Brookshire's new argument demonstrates that summary judgment to Community First on the UCC's statute of repose was fully proper.

Brookshire urges the Court to adopt a theory of the statute of limitations grounded in nuisance law and whether a nuisance is abatable or not wherein if the cause of the injury is abatable, each injury gives rise to a new cause of action. Brookshire Brief pp. 16-17. This argument does not help Brookshire. In fact, in asking for each "event" to be treated as "triggering its own statute of limitations" (Brookshire Brief p. 17), Brookshire has argued herself directly into the application of the UCC's statute of repose, the General Assembly's chosen framework governing the banking industry and Community First's relationship with Brookshire.[18] The UCC imposes a strict one-year maximum time limit for a bank customer to discover and report unauthorized signatures on

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[17] This is of no legal consequence, as this Court has squarely rejected the contention that a bank's policy manual creates a duty by the bank to its customer—the manual is for the bank's protection only. *Citizens & S. Nat'l Bank v. Lanford*, 313 S.C. 540, 545, 443 S.E.2d 549, 551 (1994); *see also Coristo v. Twin City Bank*, 520 S.W.2d 218, 221-22 (Ark. 1975) (finding bank policy enacted for "the convenience and protection of the bank, and, as such, may be waived by the bank").

[18] The danger of repeated injuries provides a key public policy for the UCC's statute of repose. "One of the most serious consequences of failure of the customer to comply with the requirements [to review statements] is the opportunity presented to the wrongdoer to repeat his misdeeds. Conversely, one of the best ways to keep down losses in this type of situation is for the customer to promptly examine his statement and notify the bank of an unauthorized signature or alteration so that the bank will be alerted to stop paying further items." S.C. Code Ann. § 36-4-406 (2003), Off. Cmt. 3; § 36-4-406 (Supp. 2022), Off. Cmt. 2.

items. S.C. Code Ann. § 36-4-406 (2003 & Supp. 2022) as applicable;[19] *Sabatino*, 314 S.C. at 404-405, 444 S.E.2d at 538. Further, South Carolina law specifically permits banks and their customers to vary by agreement the timeframe in which a customer must review and report unauthorized signatures or other concerns about transactions on the account. S.C. Code Ann. § 36-4-103(1) (2003); S.C. Code Ann. § 36-4-103(a) & S.C. Reporter's Cmt. (Supp. 2022). Brookshire's Account Agreement with Community First sets the timeframe for her to report unauthorized signatures or other Account errors to Community First as 60 days after Community First sends the monthly statement (App. p. 574), which Brookshire acknowledges. (App. p. 23 n.2). The monthly statements reinforce this timeframe with the monthly reminder to "[p]lease examine immediately and report if incorrect. If no reply is received within **60** days the account will be considered correct." (*See* App. pp. 549, 557, 562, 565) (emphasis in original).

Applying the UCC and Account Agreement here, Community First sent and Brookshire received the July 2007 Account statement in or around early August 2007. (App. pp. 538-539, 542, ¶¶ 14, 16, 17, 32). Brookshire thereafter had 60 days to challenge any transactions on that statement. Even if the agreed-upon 60-day time limit for challenging transactions did not apply (it does), the statutory default deadline required Brookshire to challenge transactions reflected on that statement within one year. Thus, even the default deadline under the UCC statute of repose ran, at the latest, in August ***2008*** for every transaction reflected on the July 2007 statement. The same analysis applies to each and every monthly Account statement that Community First sent to Brookshire. Brookshire was on actual and/or constructive notice[20] of her Account balance and the

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[19] The General Assembly adopted Revised Article 4 of the UCC effective July 1, 2008. Consequently, slightly different rules apply to pre-July 1, 2008 Account statements versus post-July 1, 2008 Account statements. 2008 Act No. 204, § 4.A.

[20] The UCC places the burden on the bank customer—not the bank—to ensure receipt of account statements. S.C. Code Ann. §§ 36-1-201, 36-4-406 (2003), § 36-1-201(36)(A), 36-4-

amount of the withdrawals and deposits that comprised that balance each month, and the corresponding maximum time limitation of one year would thus shift one month at a time. In other words, each monthly Account statement represents a separate timeframe for challenging the Account balance and transactions reflected therein. Brookshire's failure to timely do so with each passing month renders any challenge to the transactions time-barred.

IV. The Court of Appeals correctly ruled that equitable tolling did not suspend the running of the statute of limitations clock and that Community First was not estopped from asserting the statute of limitations as a defense.

Brookshire argues that, in determining that equitable tolling did not suspend the statute of limitations, the Court of Appeals relied on a small portion of her deposition testimony in which she testified that disbursements of $500,000 and $200,000 by Hiott in 2007 were inappropriate to make. Brookshire Brief p. 18. That testimony was certainly relevant to the ruling, but it was not the only evidentiary basis of the ruling.

The record reflects that Brookshire produced in discovery certain original Account statements and a copy of an original Account statement sent to her by Community First. (App. pp. 541-543, ¶¶ 27-35). One of those Account statements was dated July 31, 2007 (sent to Brookshire by Community First shortly after the Account was opened), and reflected a disbursement in the

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406(a) (Supp. 2022) (describing the bank's "sending" of statements to customers as the operative event giving rise to the customer's duty of examination and further defining "send" in part as "to deposit in the mail"). The UCC allocates the risk of loss or interception of bank statements to the bank customer. *Stowell v. Cloquet Co-op Credit Union*, 557 N.W.2d 567, 571-72 (Minn. 1997) (collecting cases). In other words, the bank customer has an affirmative duty to ensure that he or she is receiving account statements, and the customer's claims will be barred if the customer fails to timely discharge this duty. *Id.* at 569-70; *Mesnick v. Hempstead Bank*, 434 N.Y.S.2d 579, 580 (N.Y. Sup. Ct. 1980); *Westport Bank & Trust Co. v. Lodge*, 325 A.2d 222, 223-24 (Conn. 1973); *Terry v. Puget Sound Nat'l Bank*, 492 P.2d 534, 535 (Wash. 1972); *Myrick v. Nat'l Sav. & Trust Co.*, 268 A.2d 526, 528 (D.C. 1970) (all holding the claims are time barred when bank customers fail to timely notify the bank of missing statements regardless of reason). *See also* App. pp. 535-544 (describing Community First's routine sending of statements to Brookshire and Brookshire's production of various original statements in discovery).

amount of $500,000. (App. p. 569). Another Account statement produced by Brookshire was dated November 30, 2007, and reflected a disbursement for $200,000. (App. p. 556). Brookshire testified at her deposition that it would have been inappropriate for Hiott to have made disbursements for any purpose for these amounts. (App. p. 364, lines 5-11). Yet, Brookshire continued to allow Hiott to disburse funds from her Account until 2011. That evidence certainly supports a finding that the statute of limitations should not have been tolled. *See Magnolia N. Prop. Owners' Ass'n v. Heritage Cmtys., Inc.*, 397 S.C. 348, 372, 725 S.E.2d 112,125 (Ct. App. 2012) (emphasizing that plaintiffs must be diligent in all of their endeavors to properly invoke equitable tolling).

The Court of Appeals also did not limit its ruling to this evidence. Instead, it stated that "as noted above, the circumstances gave reasonable notice that a claim might exist." (App. p. 117). Those other circumstances "noted above" are discussed on pages 23-24 above and include Brookshire's knowledge that Hiott was actively exercising the authority under the POA by regularly making disbursements from the Account, telling someone in 2010 that Hiott was stealing from her, hiring a lawyer who reported serious issues and inconsistencies in 2010, and closing the Account in February 2011 at her attorney's direction after receipt and review of a full set of Account statements. This record evidence amply supports the ruling that the circumstances gave reasonable notice that a claim might exist and that no equitable doctrines apply to save these time barred claims.

A. Brookshire faces a heavy burden to show entitlement to equitable tolling or equitable estoppel.

Equitable relief to toll or estop the statute of limitations in South Carolina "should be used sparingly and only when the interests of justice compel its use." *Hooper v. Ebenezer Senior Servs. & Rehab. Ctr.*, 386 S.C. 108, 116, 687 S.E.2d 29, 32 (2009). *Hooper* addresses equitable tolling,

which can apply in situations "where a litigant was prevented from filing suit because of an extraordinary event beyond his or her control," and may be applied only "where it is justified under *all* the circumstances." *Id.* at 115, 687 S.E.2d at 32. The doctrine is *not* applied if the facts and circumstances show that the plaintiff was on notice of potential problems *before* receiving misinformation from a defendant. *Vieira v. Simpson*, No. 2:13-cv-2610, 2015 WL 1299959, *6 (D.S.C. March 23, 2015) (applying *Hooper* and finding that a defendant attorney's provision of misinformation after plaintiffs became "suspicious" "was not an extraordinary event that kept the [plaintiffs] in the dark or prevented them from recognizing any impropriety"). Indeed, believing "that *perhaps* a lawsuit was unnecessary" is not sufficient to meet the plaintiff's burden on equitable tolling. *Id.*; *see also In re Stotz Fredenhagen Indus., Inc.*, 554 B.R. 777, 787 (Bankr. D.S.C. 2016) (applying *Hooper* and holding that "[t]he evidence and allegations of delay, withholding of information, or lack of cooperation by other parties here is not enough. The evidence must also support a finding that these things *caused* the requisite period of delay and also must support a finding that the period of delay was *beyond Plaintiff's control*.") (emphasis in original).

Equitable estoppel focuses on the plaintiff's reasonable reliance on specific conduct of a defendant. "A defendant is estopped to assert the statute of limitations defense against a plaintiff's claim if the *defendant's conduct* has induced the delay that otherwise would give operation to the statute. The conduct may involve inducing the plaintiff either to believe that an amicable adjustment of the claim will be made without suit or to otherwise forbear exercising the right to sue." *Republic Contracting Corp. v. S.C. Dep't of Highways & Pub. Transp.*, 332 S.C. 197, 211,

503 S.E.2d 761, 768 (Ct. App. 1998) (emphasis added).[21] In order to establish equitable estoppel, a plaintiff must present evidence of her "(1) lack of knowledge and of means of knowledge of truth as to facts in question; (2) reliance upon conduct of the party estopped; and (3) prejudicial change in position." *Regions Bank v. Schmauch*, 354 S.C. 648, 675, 582 S.E.2d 432, 446 (Ct. App. 2003). In addition, "[t]o prove equitable estoppel under South Carolina law, the aggrieved party must have 'reasonably relied on the words and conduct of the person to be estopped in allowing the limitations period to expire.'" *Dilmar Oil Co., Inc. v. Fed. Mut. Ins. Co.*, 986 F. Supp. 959, 975 (D.S.C. 1997) (quoting *Dillon County Sch. Dist. No. 2. v. Lewis Sheet Metal Works, Inc.*, 286 S.C. 207, 332 S.E.2d 555, 561 (Ct. App. 1985)). The gravamen of an estoppel showing refers to "lull[ing the plaintiff] into a sense of security, preventing [her] from filing suit before the running of the statute." *Republic Contracting*, 332 S.C. at 211, 503 S.E.2d at 769. However, "if the obstructive behavior occurs *after* the plaintiff's inquiry has reached the point at which he has discovered that he has a claim upon which to found a suit, the defendant's obstructionism has no causal significance, and so is not a ground for estoppel." *Jay E. Hayden Found. v. First Neighbor Bank, N.A.*, 610 F.3d 382, 385 (7th Cir. 2010); *see also Little v. Brown & Williamson Tobacco Corp.*, No. 2:98-1879-23, 2000 WL 33957172, *6 (D.S.C. May 8, 2000) (applying South Carolina law on equitable estoppel and holding that equitable estoppel did not apply because Plaintiff failed to "offer any proof" that he relied on allegedly false statements by tobacco company executives in delaying his suit).

[21] Notably, "settlement negotiations or statements expressing interest in settlement are insufficient to give rise to a claim that a defendant is equitably estopped from asserting the statute of limitations." *Black v. Lexington Sch. Dist. No. 2*, 327 S.C. 55, 63, 488 S.E.2d 327, 331 (1997).

B. Brookshire cannot show entitlement to equitable relief, and the trial court and Court of Appeals properly so found.

Brookshire argues that Community First is estopped from invoking the statute of limitations to bar her claims or that the statute should be equitably tolled for two reasons. First, Brookshire claims that Hiott misrepresented to her the nature and recipient of the $500,000 withdrawal of July 12, 2007. Brookshire claims that her representatives were told that the $500,000 withdrawal in July 2007 was made to purchase annuities for the children then in her custody when in fact the funds were actually sent to Mr. Crosby. Second, Brookshire claims that Community First took "deceitful actions" to hide its alleged culpability including "removing selected records from documents requested by counsel" for Brookshire. Brookshire Brief p. 19.

Brookshire's attempt to wiggle around her statute of limitations problems suffers from multiple flaws. First, and foundationally, Brookshire confuses the legal triggering of the statute of limitations with the level of proof necessary to win a lawsuit. In essence, Brookshire argues that because Hiott and Community First did not (allegedly) provide complete and open pre-suit discovery to her, the statute of limitations does not begin to run until all of her questions are answered. Not so. In South Carolina, "[t]he statute of limitations begins to run when a plaintiff knows or should know of a potential claim against another party, *not when the plaintiff develops a full-blown theory of recovery.*" *Republic Contracting*, 332 S.C. at 208, 503 S.E.2d at 767 (emphasis added). Indeed, "[a] plaintiff is not required to have collected, *before* he files suit, all the evidence he needs in order to win the suit. Otherwise the civil procedure rules would have to authorize precomplaint discovery rather than just pretrial discovery." *Jay E. Hayden*, 610 F.3d at 386; *see also 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" to the statute of limitations inquiry.). As discussed in detail above, in the specific context of a bank account, if a customer "disagreed with

the bank's representation of [the account balance shown in a statement], she was then on notice that she had some type of claim for any perceived discrepancy, even if she did not know the precise details behind the discrepancy." *Gibson*, 383 S.C. at 409, 680 S.E.2d at 783-84.

Second, equitable doctrines do not apply to the UCC's one-year maximum statute of repose. It cannot be tolled, and its running cannot be estopped—even when the result reached may appear harsh. *Peters*, 942 A.2d at 1169 (finding claims for breach of contract, negligence, and statutory violations to be time-barred under the UCC even when the bank customer had died); *Siecinski v. First State Bank of E. Detroit*, 531 N.W.2d 768, 769 (Mich. Ct. App. 1995) (finding claims for breach of contract, negligence, and conversion to be time-barred under the UCC when an account holder suffered a head injury, fell into a coma, and died soon after a woman presented the bank with a forged power of attorney and ultimately withdrew all funds in the account). This is in accord with South Carolina law. *See Langley v. Pierce*, 313 S.C. 401, 404, 438 S.E.2d 242, 244 (1993) ("Statutes of repose are based upon considerations of the economic best interests of the public as a whole and are substantive grants of immunity based upon a legislative balance of the respective rights of potential plaintiffs and defendants struck by determining a time limit beyond which *liability no longer exists*.") (emphasis added); *Capco*, 368 S.C. at 142, 628 S.E.2d at 41 (describing how statutes of repose cannot be tolled or extended "for any reason because to do so would upset the economic balance struck by the legislative body"). Brookshire's failure to challenge disbursements within the applicable UCC time limits renders her claims against Community First completely barred.

Third, the undisputed facts show that Brookshire was on notice "that a claim against another party might exist," *Dean*, 321 S.C. at 363-64, 468 S.E.2d at 647, well before August 2011. *See supra* pp. 23-24; (App. p. 333, lines 13-23; p. 338, line 4 – p. 340, line 16; p. 341, lines 1-22;

p. 343, lines 3-25; p. 344, line 17 – p. 345, line 2; p. 364, lines 5-11; p. 372, line 2 – p. 373, line 24; p. 374, line 3 – p. 375, line 1; p. 376, line 4 – p. 378, line 25; p. 379, lines 2-22; p. 386, line 6 – p. 387, line 12; p. 398, lines 1-21; p. 409, lines 1-25; p. 413, line 15 – p. 414, line 25; p. 416, lines 2-4; p. 417, lines 7-15; p. 632, line 1 – p. 633, line 19; pp. 649-650). Despite all of these concerns, disputes, and contradictory information, no suit was filed for over three more years.

Fourth, Brookshire's reasons for invoking equitable estoppel or equitable tolling are blatantly pretextual given the undisputed facts recited above. She claims that she is entitled to equitable relief because Hiott and Community First allegedly failed to provide her every single piece of paper she wanted to review or otherwise withheld information from her pre-suit. It is undisputed that Community First sent Brookshire monthly Account statements and further provided her attorney with a full set of statements to date no later than March 2011. Under South Carolina law, the receipt of bank statements is wholly sufficient on its own to trigger and begin the statute of limitations. *Gibson*, 383 S.C. at 409, 680 S.E.2d at 783-84; *Sabatino*, 314 S.C. at 404-05, 444 S.E.2d at 538. This is in addition to the legal presumption of bank statement receipt that the UCC imposes on bank customers. *See supra* note 20. Brookshire began seeking additional records and what she called a "full accounting" from Hiott no later than September 21, 2010—almost four years before she filed suit. (App. pp. 649-650).[22] Viewing the evidence in the light most favorable to Brookshire, the simple fact that her attorney began asking for records and a "full accounting" due to "serious inconsistencies" with regard to her Account in September 2010 is

[22] Brookshire failed to define what she means by a "full accounting" as it pertains to Community First. (*See* App. pp. 649-650, *see also* App. pp. 460-461 ("My Agent [defined as Hiott individually] shall provide an accounting for all funds handled and all acts performed as my Agent, if I so request ...")). It is undisputed that Brookshire or her prior counsel was provided with a reprinted set of Account statements in late 2010 or early 2011. (App. p. 383, line 18 – p. 387, line 12; p. 636, line 1 – p. 637, line 24; p. 639, lines 4-10).

uncontroverted evidence that Brookshire was on *actual notice* that she had "a potential claim against another party" at that time. *Republic Contracting*, 332 S.C. at 208, 503 S.E.2d at 767. Brookshire has made no argument or advanced any evidence to show that any failure by Community First to provide her these records or a "full accounting" "lulled" her into a sense of security that her perceived injury would be "righted" absent legal action. *See id.* at 211, 503 S.E.2d at 768-69. Indeed, Community First's alleged failure to provide something she began asking for in September 2010 would *confirm* her need to file suit within the requisite time period.

Brookshire also argues that Hiott's changing story on the recipient of the July 12, 2007 $500,000 disbursement estops Community First from defending on statute of limitations grounds or otherwise tolls the statute. Again, this is pretextual. Brookshire bears the burden of proving her *reasonable reliance* on Community First's words or conduct that *caused* her to file her lawsuit after the statute of limitations had expired. *Dilmar Oil*, 986 F. Supp. at 972-73. Brookshire must do more than suggest some sort of "cover-up"—instead, she must provide an evidentiary link between this alleged "cover-up" and "lulling" her into a sense of security such that she was prevented from filing suit before the statute of limitations expired. *Republic Contracting*, 332 S.C. at 211, 503 S.E.2d at 768-69. Brookshire has cited no evidence to meet this standard. The earliest time that a specific explanation for the July 2007 $500,000 disbursement was given to Brookshire or her representative was when Ms. McDaniel wrote "[a]nnuity for children" and "Lafayette Life Product Single premium annuity" on a copy of Brookshire's July 2007 Account statement that was reprinted on November 18, 2010. (App. p. 638, lines 3-16; p. 652). Ms. McDaniel received this information during her representation of Brookshire, which ended on March 11, 2011. (App. p. 642, lines 19-22). According to Brookshire, Hiott gave *different* stories about the disbursement on several later occasions, naming at various times Lafayette, Nationwide, and Holcombe

Insurance Agency as recipients of these funds for the children's benefit before informing counsel for Community First that the $500,000 was actually used as an investment with Mr. Crosby. (*See* App. pp. 961-962). Counsel for Brookshire was informed of the Crosby investment on July 18, 2013. (App. pp. 961-962).

Brookshire's testimony belies any reasonable, causative reliance on Hiott's changing story. Brookshire testified that there was nothing that Hiott could have spent $500,000 on in July 2007 that would have been appropriate or authorized by her. (App. p. 364, lines 5-11). She testified that the children in her custody were well taken care of financially, did not need life insurance, and that she never directed Hiott to procure an annuity, life insurance policy, or trust for the children. (App. p. 364, lines 5-11; p. 376, line 17 – p. 378, line 25; p. 379, lines 2-22). In other words, Brookshire's unequivocal testimony is that *no matter what, no matter to whom, and no matter why*, the $500,000 disbursement of July 12, 2007, was unauthorized, inappropriate, and wrongful. Thus, Hiott's stories are of no legal consequence, and Brookshire did not actually rely on them to determine whether or not she needed to file suit. To her, the wrongful act is the disbursement of $500,000 itself. By waiting well over three years from March 2011 to file suit, Brookshire simply "slept on [her] rights." *Moates v. Bobb*, 322 S.C. 172, 176, 470 S.E.2d 402, 404 (Ct. App. 1996). The trial court properly granted summary judgment to Community First. *See Schmauch*, 354 S.C. at 675, 582 S.E.2d at 446 ("[S]ummary judgment is proper where there is no evidence of conduct warranting estoppel.").

CONCLUSION

As discussed above, the trial court properly granted summary judgment to Community First, and eight of those dispositive grounds have not been challenged by Brookshire before this Court. Those rulings are the law of the case and require affirmance here. Further, the Court of Appeals' opinion in this matter is grounded in long-established, bedrock South Carolina law. It

should be affirmed in full.

Respectfully submitted,

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