THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
MAY 29 2018
SC Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

R. Keith Kelly, Circuit Court Judge

Case No.: 2017-CP-42-02834

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

v.

Bank of America National Association ....Respondent.

INITIAL BRIEF OF APPELLANT

MIKE KELLY LAW GROUP, LLC
Brad D. Hewett
bhewett@mklawgroup.com
D. Michael Kelly
mkelly@mklawgroup.com
Jamie N. Smith
jsmith@mklawgroup.com
500 Taylor Street
Post Office Box 8113
Columbia, South Carolina 29202
(803) 726-0123
(803) 252-7145
Attorneys for Appellant

TABLE OF CONTENTS

Table of Authorities 3

Statement of Issues on Appeal 6

Statement of the Case 6

Statement of the Facts 8

Standard of Review 11

Arguments 12

I. THIS COURT SHOULD ABOLISH THE COMMON LAW RULE EXCEPTING FRAUD-BASED ACTIONS FROM SOUTH CAROLINA'S SURVIVAL STATUTE. 12

II. THE DOCTRINE OF RES JUDICATA DOES NOT BAR A STATE COURT ACTION CHALLENGING EXISTING PRECEDENT WHEN CLAIMS RELATED TO THAT ACTION WERE ADJUDICATED IN A FEDERAL COURT LACKING THE JURISDICTION TO CERTIFY ISSUES OF STATE PRECEDENT OR CHANGE CONTROLLING STATE LAW. 19

III. THE LOWER COURT ERRED IN CONCLUDING THAT APPELLANT'S CLAIMS ARE TIME-BARRED. 22

Conclusion 27

TABLE OF AUTHORITIES

CASES

Bennett v. Spartanburg Ry., Gas & Elec. Co., 97 S.C. 27, 81 S.E. 189, 189 (1914)........12

Brailsford v. Brailsford, 380 S.C. 443, 669 S.E.2d 342 (S.C. App., 2008).......................15

Brewer v. Graydon, 233 S.C. 124, 103 S.E.2d 767 (1958)...14

Brouwer v. Sisters of Charity Providence Hosps., 409 S.C. 514, 763 S.E.2d 200 (2014)..11

Burgess v. American Cancer Soc., South Carolina Div., Inc., 300 S.C. 182, 386 S.E.2d 798 (S.C. App., 1989)...23

Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938) 19, 20

Faircloth v. Finesod, 938 F.2d 513 (4th Cir. 1991) 16

Ferguson v. Charleston Lincoln Mercury, Inc., 349 S.C. 558, 564 S.E.2d 94 (2002)...14, 15

Hausman v. Hausman, 199 S.W.3d 38 (Tex. App. 2006)..25

Hooper v. Ebenezer Sr. Services and Rehabilitation Center, 386 S.C. 108, 687 S.E.2d 29 (S.C. 2009)...25

Jandera v. Lakefield Farmers' Union, 150 Minn. 476, 185 N.W. 656 (1921)...................18

Judy v. Judy, 393 S.C. 160, 712 S.E.2d 408 (2011)..19, 20, 21

Layne v. Int'l Bhd. of Elec. Workers, (AFL-CIO), Local No. 382, 271 S.C. 346, 247 S.E.2d 346 (1978)..14, 15

Mattison v. Palmetto State Life Ins. Co. 197 S.C. 256, 15 S.E.2d 117 (1941)...12, 13, 14, 15, 16, 19, 27

Micheletti v. Moidel, 94 Colo. 587, 32 P.2d 266 (1934)...18

Plum Creek Dev. Co. v. City of Conway, 334 S.C. 30, 512 S.E.2d 106 (1999) 19

Pye v. Aycock, 325 S.C. 426, 480 S.E.2d 455 (S.C. App.1997) 21

Rodriguez v. Superior Court, 176 Cal. App. 4th 1461 (2009) 25

Rydde v. Morris, 381 S.C. 643, 675 S.E.2d 431 (2009) 11, 12

Sealy v. Dodge, 289 S.C. 543, 347 S.E.2d 504 (1986) 19

Spence v. Spence, 368 S.C. 106, 628 S.E.2d 869 (2006). 12

St. Luke's Magic Valley Reg'l Med. Ctr. v. Luciani, 154 Idaho 37, 293 P.3d 661 (2013) 18

RULES

Rule 201, SCACR 7, 11

Rule 244(a), SCACR 7, 20

Rule 12(b)(6), SCRCP 6, 11

STATUTES AND REGULATIONS

S.C. Code § 419 (1932) 13

S.C. Code Ann. § 15-1-40 (1976) 14

S.C. Code Ann. § 15-5-90 (1976) 7, 12, 13, 15, 20, 27

OTHER AUTHORITIES

54 C.J.S. Limitations of Actions § 115 (2005) 25

Restatement (Second) of Judgments § 28 (1982) 20, 21

The True Link Report on Elder Financial Abuse 2015, TRUE LINK, January 2015 (https://truelink-wordpress-assets.s3.amazonaws.com/wp-content/uploads/True-Link-Report-On-Elder-Financial-Abuse- 012815.pdf) 17, 18

STATEMENT OF ISSUES ON APPEAL

I. WHETHER THIS COURT SHOULD ABOLISH THE COMMON LAW RULE EXCEPTING FRAUD-BASED ACTIONS FROM SOUTH CAROLINA'S SURVIVAL STATUTE.

II. WHETHER THE DOCTRINE OF RES JUDICATA BARS A STATE COURT ACTION CHALLENGING EXISTING PRECEDENT WHEN CLAIMS RELATED TO THAT ACTION WERE ADJUDICATED IN A FEDERAL COURT WHICH LACKED THE JURISDICTION TO CERTIFY ISSUES OF STATE PRECEDENT OR CHANGE CONTROLLING STATE LAW.

III. WHETHER THE LOWER COURT ERRED IN CONCLUDING THAT APPELLANT'S CLAIMS ARE TIME-BARRED.

STATEMENT OF THE CASE

This case arose from fraudulent charges made by of Bank of America National Association ("BANA") against the account of John and Jane Hughes. Appellant Phillip Francis Luke Hughes filed the current survival action on behalf of the Estate of Jane K. Hughes on August 15, 2017, alleging fraud and other fraud-based causes of action. On December 21, 2017, BANA filed a Motion to Dismiss pursuant to SCRCP Rule 12(b)(6).

Prior to initiating the present action, Appellant filed an action in the Spartanburg County Court of Common Pleas in 2015 based upon the same transactions and occurrences that establish his claim for relief in the current action. Appellant's 2015 Complaint was filed as a putative class action law suit against BANA for violation of the Truth in Lending Act, fraud, fraudulent concealment, breach of contract, and breach of contract accompanied by fraudulent acts. BANA removed the 2015 action to federal court, and filed a motion to dismiss in lieu of an answer. Before the District Court decided BANA's motion, Hughes stipulated to the dismissal, without prejudice,

of all claims against BANA *except* breach of contract and violation of TILA. The District Court ultimately dismissed the breach of contract and TILA claims as untimely, and the Fourth Circuit Court of Appeals upheld that decision.

Appellant dismissed the fraud-based claims pending in the 2015 federal action and re-filed those claims in his 2017 Complaint because the District Court lacked jurisdiction to decide a key issue related to those claims: whether existing precedent excluding fraud from the South Carolina survival statute should be overturned. The question is one left to the State to decide but, because case law provides controlling precedent on the issue, the question could not be certified back to the South Carolina Supreme Court under Rule 244(a), SCACR. (See, February 22, 2018 Hearing Tr. at 11:1-25)

Respondent moved to dismiss Appellant's 2017 Complaint under the doctrines of *res judicata* and collateral estoppel, and the common law exception of fraud from S.C. Code Ann. § 15-5-90 (1976), South Carolina's survival statute. The Honorable R. Keith Kelly heard arguments by Appellant and Respondent on February 22, 2018 and subsequently granted Respondent's motion, finding the actions barred by res judicata, the statute of limitations, and S.C. Code Ann. § 15-5-90. Order of March 20, 2018. Appellant filed a timely Notice of Appeal on March 27, 2018 pursuant to Rule 201, SCACR, challenging the lower court's dismissal of the fraud-based claims alleged in Appellant's 2017 Complaint. See, Notice of Appeal. On March 29, 2018, Respondent filed a Motion for Sanctions against counsel for Appellant, seeking more than $70,000.00 in attorneys' fees for the filing of the 2017 Complaint, which resulted in a dismissal prior to any discovery and after a single hearing.

STATEMENT OF THE FACTS

On June 13, 2006, Mr. and Mrs. Hughes opened a line of credit from BANA in the amount of $120,000.00, secured by a mortgage ("Mortgage") on their Spartanburg County homestead. The line of credit is governed by a document entitled "Bank of America Maximizer Agreement and Disclosure Statement" ("Agreement") signed by both borrowers on June 13, 2006. Compl. ¶ 7. At the same time, Mr. and Mrs. Hughes signed an acknowledgement and authorization ("Authorization") which allowed BANA to automatically draft loan payments from the Hughes's BANA bank account. Compl. ¶ 8.

During the meeting to complete the Mortgage transaction, BANA presented Mr. and Mrs. Hughes with a document entitled "Optional Line Protection Plan Addendum ("Addendum")." As stated on the form, the "Line Protection Plan only provides protection on the variable portion of your credit line" and "This Product is Optional." If elected, the Line Protection Plan allowed the cancellation of all or some monthly loan payments in the event of disability, accidental death, or involuntary unemployment. The Agreement explicitly stated that the borrowers "must specifically request" the Line Protection Plan. Compl. ¶ 10. Mr. and Mrs. Hughes both signed a two-page document captioned "OPTIONAL LINE PROTECTION PLAN ADDENDUM ("ADDENDUM")" which stated that BANA provided them with information on the Line Protection Plan. Jane and John Hughes designated their election to decline the purportedly optional Line Protection Plain by clearly and conspicuously checking a box next to the "DECLINE to purchase any Protection on this Credit Line" option. Compl. ¶ 11 .

In June 2006, John Hughes was age 86. Compl. ¶ 12. He died on October 22, 2008, and left his estate to his wife, Jane K. Hughes. Compl. ¶ 13. Mrs. Hughes was age 85 in June 2006 and underwent major heart surgery, suffered from dementia, and experienced vision impairments,

including cataracts and eye surgery, from June 2006 until her death. Mrs. Hughes also suffered a broken hip after June 2006 that required hospitalization and extensive rehabilitation at White Oak Manor Nursing Home in Spartanburg, South Carolina. Mrs. Hughes was diagnosed with impaired cognition and mobility, atypical psychosis, confusion, blindness, renal insufficiency, heart failure, and was noted to lack decisional capacity in the years subsequent to June 2006. Compl. ¶ 12.

Over six years after Mr. Hughes's death, on or around March 17, 2015, BANA sent a boilerplate form cancellation notice addressed to Mr. and Mrs. Hughes, informing them that "The Line Protection Plan would be cancelled on September 30, 2015," and that "You're no longer being charged for the Protection Plan as of April 1, 2015." The notice also indicated that John P. Hughes was a "protected" borrower. Compl. ¶ 15. Although Mr. and Mrs. Hughes never elected to purchase any "Protection Plan," BANA sent a second letter dated March 25, 2015, stating that John Hughes had selected "6 month, Involuntary Unemployment, Disability, Accidental Death and Hospitalization" protection at a monthly rate of 9.5% of the Hughes' Minimum Monthly Payment. Compl. ¶ 17.

In response to inquiry from a family member of Mrs. Hughes, BANA stated in a May 6, 2015 letter that "The Line Protection Plan (Plan) addendum for your Bank of America loan ending in 4699 is enclosed, per your request, and enclosed an eight-page document entitled "OPTIONAL LINE PROTECTION PLAN ADDENDUM ("ADDENDUM")." Compl. ¶ 18. The eight-page "ADDENDUM" provided by BANA in May 2015 is not the two page "ADDENDUM" signed by Mr. and Mrs. Hughes in 2006, and does not contain or provide for signatures or a place for election or rejection of the "protection." Compl. ¶ 18. In any event, BANA did not provide the eight-page addendum to Mr. or Mrs. Hughes before May 2015, nor did the Line Protection Plan premium

appear on the mortgage finance charge disclosed to Mr. and Mrs. Hughes in 2006. Compl. ¶ 19, 20.

Before March 2015, BANA did not provide any statement, notice, or communication of any sort to Mrs. Hughes revealing that BANA believed that the Hughes's had elected any "Protection Plan" or that an amount was being charged to them for such a plan. Compl. ¶ 21. To date, BANA has been unable to provide any documentation that Mr. or Mrs. Hughes ever elected or agreed to pay for any "Protective Plan" coverage of any sort. Compl. ¶ 22.

However, despite having declined to purchase the Line Protection Plan, BANA withdrew a monthly charge of $28.40 from the Hughes's BANA joint checking account for several years. This charge was ambiguously listed as "Ad Insurance Des:XXXXXX4374 ID: 6 R# XXXXXXX1070 Indn:Hughes Sr, John P Co ID:XXXXXX4660 Ppd" and appeared amid numerous other monthly charges. Compl. ¶ 23. Notably, all other charges from BANA or its subsidiaries appearing on the Hughes's bank statements during the relevant period were clearly designated as transactions with "Bank of America" or "BkofAmerica" and other insurance transactions were clearly identified with the name of the charging company (i.e., "Patrons Mutual," "Travelers Insur"). Compl. ¶ 24. None of the numbers in the Line Protection Plan transaction description were related to the Hughes's BANA mortgage or line of credit. Compl. ¶ 25.

As neither Mr. nor Mrs. Hughes had elected Line Protection Plan coverage or had received any notice that BANA had issued such a plan to them, they were not expecting to be charged for any such service and they did not have any reason to expect that "Ad Insurance Des:XXXXXX4374 ID: R# XXXXXXX1070 Indn:Hughes Sr, John P Co ID:XXXXXX4660 Ppd" was a BANA charge generally or a "Line Protection Plan" charge specifically until receiving the March 2015 BANA notices. Compl. ¶ 26. Upon receiving notice of Mr. Hughes's death, on

May 6, 2015, BANA declined coverage under the Line Protection Plan on the grounds that "[t]he death was the result of disease or treatment of disease or any medical treatment (and/or was not for the treatment of an accidental injury)." Compl. ¶ 27. BANA refused to refund the payments drawn during Mr. Hughes's lifetime and has been unable to produce any documentation supporting that Mr. Hughes elected to enroll in the Line Protection Plan. Compl. ¶ 22, 28.

On June 3, 2015, Jane K. Hughes passed away, and Appellant was subsequently named as personal representative of her estate. Compl. ¶ 29. Appellant filed a prior action in this Court in 2015 based upon the facts and transaction set forth above. The 2015 Complaint was filed as a putative class action law suit against BANA for violation of the Truth in Lending Act, fraud, fraudulent concealment, breach of contract, and breach of contract accompanied by fraudulent acts. BANA removed the action to federal court under federal question and diversity jurisdiction, and filed a motion to dismiss in lieu of an answer. Prior to the District Court's decision on the motion, Appellant stipulated to the dismissal, without prejudice, of all claims against BANA *except* breach of contract and violation of TILA. Appellant refiled his fraud-based claims in state court due to the District Court's lack of jurisdiction to hear a key issue essential to those claims, and to allow this Court to revisit the survivability of fraud claims in South Carolina.

STANDARD OF REVIEW

This is an appeal, made pursuant to Rule 201, SCACR, from an Order of Dismissal issued by the lower court based on the trial judge's grant of Respondent BANA's Rule 12(b)(6) Motion to Dismiss.

"On appeal from the dismissal of a case pursuant to Rule 12(b)(6), an appellate court applies the same standard of review as the trial court." <u>Brouwer v. Sisters of Charity Providence Hosps.</u>, 409 S.C. 514, 519, 763 S.E.2d 200, 202 (2014) (citing <u>Rydde v. Morris</u>, 381 S.C. 643,

646, 675 S.E.2d 431, 433 (2009)). "That standard requires the Court to construe the complaint in a light most favorable to the nonmovant and determine if the facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff to relief on any theory of the case." Id. Furthermore, the court should not dismiss a complaint merely because the court doubts that the plaintiff will prevail in the action. Spence v. Spence, 368 S.C. 106, 116-117, 628 S.E.2d 869, 874 (2006).

ARGUMENT

I. THIS COURT SHOULD ABOLISH THE COMMON LAW RULE EXCEPTING FRAUD-BASED ACTIONS FROM SOUTH CAROLINA'S SURVIVAL STATUTE.

The South Carolina survival statute allows for the survival of ***any and all*** injuries to the person or personal property. The trial court dismissed Appellant's fraud-based claims, in part, based upon a court-created exception to the South Carolina survival statute which excludes fraud as a surviving cause of action. Appellant challenges this antiquated and arbitrary exception to the survival statute and, for the reasons set forth below, asks this court to reconsider precedent to better reflect the rights of persons in a modern society.

A. Scope of the South Carolina Survival Statute

i. Mattison v. Palmetto State Life Ins. Co.

South Carolina's survival statute provides that "[c]auses 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 the death of a party, whether the claim is on behalf of or against the deceased, ". . . any law or rule to the contrary notwithstanding." S.C. Code Ann. § 15-5-90 (1976) (emphasis supplied). The statute, enacted in 1905, allows for the survival of certain claims that were historically barred by a claimant's death. Bennett v. Spartanburg Ry., Gas & Elec. Co., 97 S.C. 27, 81 S.E. 189, 189 (1914). South Carolina's survival statute has remained intact, and

the language essentially unchanged, from 1905 to present. The courts have relied and still rely upon early judicial interpretations of the statutory language and legislative intent in answering contemporary questions regarding the survivability of actions under the act.

South Carolina first addressed the question of whether fraud survives the death of a party under the survivability statute in Mattison v. Palmetto State Life Ins. Co., 197 S.C. 256, 15 S.E.2d 117 (1941). In Mattison, the estate brought an action against Palmetto State Life Insurance Company for perpetrating a fraudulent scheme intended to cheat the deceased of his rights under an insurance contract. Id. The South Carolina Supreme Court granted certiorari to hear the case on several questions, the relevant question being whether the cause of action of fraud survived. Id.

In determining whether the fraud claim survived, the Mattison Court reviewed the survival statute to assess whether fraud fell within the scope of the statutory language. At that time, the applicable statute read:[1]

> 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.

1932 Code § 419 (emphasis added).

The Mattison Court succinctly opined that fraud did not fall within the scope of the statutory language, and therefore the Legislature did not intend that claims of fraud survive death. The Mattison Court further provided that:

> It is readily seen that under the above quoted Section, there are 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*.

[1] The current survival statute is codified at S.C. Code Ann § 15-5-90, and the language is nearly identical to the 1932 Code with only some minor changes in punctuation.

> And it is just as readily seen that respondent's second cause of action does not come within either of the instances where a cause of action survives.

Mattison at 256, 15 S.E.2d at 119 (original emphasis replaced).

While the Mattison court asserted that the survival statute must be liberally interpreted, the court failed to do exactly that. Instead, the court narrowly interpreted the statute and, in doing so, failed to explain why fraud does not constitute injury to personal property. In fact, there is no discussion in Mattison regarding the elements of fraud or why pecuniary loss caused by fraud is not an injury to personal property. This omission is relevant because the money taken by BANA from Jane Hughes was personal property.[2] Once Jane Hughes died, interest in her personal property, including her financial holdings, transferred to her Estate. Thus, Mattison's principle that fraud does not survive the death of a party in South Carolina is internally inconsistent.

ii. Fraud as an "exception" to the South Carolina Survival Statute

Since Mattison, and contrary to its narrow view of survivability, the South Carolina Supreme Court has consistently *broadly* interpreted the survival statute. See, e.g., Ferguson v. Charleston Lincoln Mercury, Inc., 349 S.C. 558, 564, 564 S.E.2d 94, 97 (2002) ("[T]he statute's language is broad and ostensibly appears to include almost every conceivable cause of action."); Layne v. Int'l Bhd. of Elec. Workers, (AFL-CIO), Local No. 382, 271 S.C. 346, 352, 247 S.E.2d 346, 349 (1978) ("[I]t is the general rule that any cause of action which could have been brought by the deceased in his lifetime survives to his representative under the Survival Act."); Brewer v. Graydon, 233 S.C. 124, 128, 103 S.E.2d 767, 769 (1958) ("the Survival Statute must be liberally construed"). These later South Carolina opinions create a tension with Mattison's holding—that fraud falls outside the scope of the statute—by implying that fraud ostensibly falls within the

[2] S.C. Code Ann. § 15-1-40 (1976) provides that "[t]he words 'personal property,' as used in this Title, include *money*, goods, chattels, things in action and evidences of debt." (emphasis added).

purview of the survival statute, and would survive but for the *exception* created by Mattison. See, Ferguson at 564, 564 S.E.2d at 96 ("The general survivability statute has a wide ambit that includes all causes of action not covered by specific exceptions."); Brailsford v. Brailsford, 380 S.C. 443, 449, 669 S.E.2d 342, 345 (S.C. App., 2008) (Upholding a dismissal of a fraud-based action upon "[a]pplying this State's longstanding exception to the survivability statute for fraud."); Layne Workers at 352, 247 S.E.2d at 349 (Identifying fraud as an "exception" to the general rule of survivability).

A review of the interpretation of the survival statute by South Carolina courts, as it pertains to fraud, reveals decades of precedent founded in error. The most recent South Carolina Supreme Court opinion relying upon the Mattison-created exception, Ferguson, strongly implies that fraud falls within the scope of the survival statute, but is excluded as a result of the Mattison opinion. See, Ferguson at 564, 564 S.E.2d at 96. The Mattison opinion, however, states in no uncertain terms that fraud "does not come within either of the instances where a cause of action survives" under the statute. Mattison at 256, 15 S.E.2d at 119. Bizarrely, Mattison serves as the foundation upon which the Ferguson opinion rests, yet the language of the Ferguson opinion directly contradicts that of Mattison.

Whether a cause of action for fraud is a common law exception to the survivability statute or whether it falls outside the scope of the statute's language is an important distinction. The survival statute, currently and when Mattison was decided, expressly provides that causes of action that fall within the scope of the statute survive, "any law or rule to the contrary notwithstanding." Id.; S.C. Code Ann § 15-5-90 (1976). Over the years, the Mattison court's interpretation of the survival statute as not extending to actions of fraud has evolved into a common law rule excepting

fraud. The result of that evolution is a "law or rule to the contrary" that is untenable under the plain language of the survival statute.

Despite this irreconcilable disconnect, the South Carolina Supreme Court has yet to revisit the Mattison rationale for the fraud "exception." Indeed, there has been no discussion by South Carolina courts since 1941 on *why* fraud should be excepted from the survival statute; rather, opinions simply offer that fraud *is* excepted based upon the Mattison opinion. Appellant, therefore, invites this Court to reexamine this question of survivability and to determine viability of the 1941 Mattison analysis in 2018.

B. Public Policy

i. Clear evidence of mindset defeats policy reasons for exception.

Perhaps the only attempt at explanation for South Carolina's fraud exception comes from the Fourth Circuit opinion in Faircloth v. Finesod, 938 F.2d 513, 517 (4th Cir. 1991). The plaintiff in Faircloth challenged the fraud exception to the South Carolina survival statute as violating the Equal Protection Clause, and the South Carolina District Court agreed. On appeal, the Fourth Circuit, applying a minimum scrutiny standard, supplied its "feasible attempt for [the] legislative distinction":

> [F]raud is a tort that 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. . . . [A] legislature could rationally conclude that the difficulty and potential unfairness of proving the state of mind of a dead party to a fraudulent transaction justified excepting fraud from the survival statute.

Faircloth at 517.

Assuming that the rationale proffered by the Fourth Circuit in Faircloth is, in fact, the underlying basis for the common law fraud exclusion, as a matter of public policy, the common law exclusion should be overturned or, at the very least, excepted in those circumstances where

the state of mind of the deceased party is readily identifiable, as in the current case, where Jane and John Hughes expressly declined, through an executed document, to enroll in a program offered by BANA. The instant case, where the policy supporting the exclusion is defeated, in consideration with the additional policy reasons set forth below, cries for a reevaluation of the fraud exclusion to the survival statute.

ii. Elderly fraud victims and public policy.

Public policy should not enable the abuse of elderly and otherwise vulnerable citizens of South Carolina. Jane Hughes was 85 years old when Defendant began withdrawing the fraudulent, unauthorized charges from her account and suffered from dementia and vision impairments in the following years until her death. Studies show that elderly persons, like Jane Hughes, are highly susceptible to being defrauded.

According to a 2015 study by True Link Financial, approximately 36.9% of American seniors are victims of financial abuse in any five-year span. *The True Link Report on Elder Financial Abuse 2015*, TRUE LINK, January 2015 at 11 (https://truelink-wordpress-assets.s3.amazonaws.com/wp-content/uploads/True-Link-Report-On-Elder-Financial-Abuse-012815.pdf). Fraud and financial abuse costs our seniors an estimated total of $36.48 billion annually. *Id.* Of this, approximately $16.99 billion is lost to financial exploitation, which is defined as "when misleading or confusing language is used – *often combined with social pressure and tactics that take advantage of cognitive decline and memory loss* – to obtain a senior's consent to take his or her money." *Id.* at 1. Not surprisingly, the vulnerability of seniors to fraud is in part due to the loss of cognitive functions of these individuals. *Id.* at 19. True Link's research shows that conditions such as dementia and Alzheimer's disease increase vulnerability to fraud, and an individual with a below-average memory is 78% more likely to be a victim of fraud. *Id.*

Notably, as much financial exploitation is accomplished through deception that does not quite rise to a criminal level, only a civil remedy is available. *Id.* at 5. The reality is that the time to identify, investigate, report, and prosecute civil offenses now, unlike in 1941, often takes many years and exceeds the lifetime of the victims. The speed and complexity of today's financial transactions, exacerbated by sophisticated technology, furthers fraud in ways not conceivable in 1941. Thus, the impact of the Mattison holding is now much more adverse to those most likely to fall victim to fraud than in 1941.

In sum, the public policy impact of South Carolina's survivability statute is long overdue for review in light of electronic phishing, data mining, electronic databases, and targeted advertising, and Appellant asks this Court to initiate that reevaluation.

iii. Survivability of fraud in other jurisdictions.

Further supporting the issue at hand is that the majority of states allow the survival of fraud claims. Indeed, South Carolina is one of only seven (7) states that do not allow a fraud action to survive; the others being Alabama, Arkansas, Massachusetts, Texas, Vermont, and Wisconsin.

The general consensus among states that have offered policy considerations for the survival of fraud actions is that any action which lessens the value of an estate should survive, as the modern trend is to remove obstructions to the free transfer of property and rights and interests therein. See, e.g., Jandera v. Lakefield Farmers' Union, 150 Minn. 476, 479, 185 N.W. 656, 658 (1921); Micheletti v. Moidel, 94 Colo. 587, 591, 32 P.2d 266, 267 (1934); St. Luke's Magic Valley Reg'l Med. Ctr. v. Luciani, 154 Idaho 37, 41, 293 P.3d 661, 665 (2013).

In light of the policy considerations put forth by South Carolina's sister states regarding the impact of survivability on property rights, Appellant would urge this court to examine the question of whether excepting fraud from the South Carolina survival statute violates public policy.

II. THE DOCTRINE OF RES JUDICATA DOES NOT BAR A STATE COURT ACTION CHALLENGING EXISTING PRECEDENT WHEN CLAIMS RELATED TO THAT ACTION WERE ADJUDICATED IN A FEDERAL COURT LACKING THE JURISDICTION TO CERTIFY ISSUES OF STATE PRECEDENT OR CHANGE CONTROLLING STATE LAW.

Appellant does not dispute the lower court's determination that the present action is based upon the same transaction and occurrence as matters previously adjudicated by the District Court. However, because the District Court lacked jurisdiction to either overturn Mattison or certify the question of whether fraud survives to the South Carolina Supreme Court, the fraud-based claims presented in the current action are not barred under the doctrine of *res judicata.*

Res judicata prohibits a party from bringing a claim against a second party when that claim has already been, or could have been, litigated. In order to establish that a claim should be barred by *res judicata,* Respondent must show that the current claim involves 1) the same parties; 2) the same subject matter; and 3) an issue previously adjudicated in another suit. Sealy v. Dodge, 289 S.C. 543, 347 S.E.2d 504 (1986). Because Appellant's fraud-based claims (fraud, breach of contract accompanied by a fraudulent act, and fraudulent concealment) were voluntarily dismissed without prejudice in the District Court proceeding, these claims were not previously adjudicated and thus do not meet the third element of *res judicata.*

Appellant acknowledges that *res judicata* can also serve to bar "any issues which might have been raised in the former suit." Judy v. Judy, 393 S.C. 160, 712 S.E.2d 408, 414 (2011) (citing Plum Creek Dev. Co. v. City of Conway, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999)). However, the issue of whether fraud should continue to be exempted from the survival statue could *not* be adjudicated in the prior lawsuit. Respondent removed the action to federal court based on federal question jurisdiction over the TILA claim, and diversity jurisdiction over Appellant's state law remaining claims. Under the Erie doctrine, the District Court must apply South Carolina

substantive law in deciding state law issues. See, Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938). Due to the existing South Carolina precedent surrounding the issue of the survivability of fraud, the federal court would be required to apply that precedent and dismiss Appellant's claims of fraud. Likewise, under Rule 244(a), SCACR, the District Court could not certify the question of survivability back to the South Carolina Supreme Court, as the scope of certification extends only to questions of law for which there is no controlling precedent. See, Rule 244(a), SCACR.

Consequently, the District Court lacked any jurisdictional mechanism under which it might decide Appellant's challenge to the fraud exception to survivability. Requiring Appellant to pursue his fraud-based claims in the federal court, therefore, would inevitably lead to dismissal of the claims pursuant to S.C. Code Ann § 15-5-90, and the state court's interpretation thereof, to exclude fraud without the opportunity to have a central issue decided in this case. Appellant seeks reexamination of this interpretation for reasons set forth in Section I, *infra,* which can only be accomplished by pursuing the fraud-based claims in state court. Because the issue of survivability could not have been raised in the prior proceeding in any meaningful capacity, Appellant's fraud-based claims are not barred by the doctrine of *res judicata.*

South Carolina takes the position that "*res judicata* is not "an 'ironclad' bar to a later lawsuit." Judy at 167, 712 S.E.2d at 412. Likewise, South Carolina has adopted the Restatement (Second) of Judgments Section 28, which provides exceptions to circumstances in which *res judicata* typically would apply. Specifically, Section 28 outlines factors under which a new determination of an issue is warranted, including differences in the quality or extensiveness of the procedures followed in the two courts or by factors relating to the allocation of jurisdiction between them; or there is a clear and convincing need for a new determination of the issue because of the adverse impact of the determination on the public interest or interests of persons not themselves

party in the initial action; or because the party sought to be precluded, as a result of the conduct of his adversary or other special circumstances, did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action. Pye v. Aycock, 325 S.C. 426, 437-38, 480 S.E.2d 455, 460-61 (S.C. App.1997).

The circumstances of the current action, even if barred by traditional principles of *res judicata*, survive under Section 28 of the Restatement (Second) of Judgments. As set forth in the survivability argument, *infra*, the issue of the survivability of fraud is one that directly impacts public interest as well as persons not party to the initial action. Appellant, in fact, originally sought to pursue the initial lawsuit as a class action so as to protect the interests of similarly situated parties. Appellant additionally did not have adequate opportunity to fully adjudicate the issue of the survivability of fraud in the initial action, because the District Court was not the proper forum for deciding that issue. Notably, Section 28 specifically addresses the fact that state and federal courts may retain exclusive jurisdiction over particular issues and provides direction in instances where an initial case is heard in federal court, and a subsequent action is heard in state court. See, Restatement (Second) of Judgments § 28 (1982), cmt. e.

Accordingly, the doctrine of *res judicata* does not bar the lower court from hearing Appellant's fraud-based claims, as the issues brought before the court through those claims were neither ruled upon by the District Court, nor could they have been. As such, Appellant respectfully asks this Court to reverse the lower court's finding that *res judicata* acts to bar the fraud-based claims set forth in Appellant's 2017 complaint.

III. THE LOWER COURT ERRED IN CONCLUDING THAT APPELLANT'S CLAIMS ARE TIME-BARRED.

Finally, the lower court, in error, opined that Appellant's fraud-based claims are barred by the statute of limitations and that equitable tolling did not apply to Jane Hughes. A review of the Order on Motion to Dismiss demonstrates the lower court's failure to view the facts as set forth in the complaint, or derive inferences therefrom, in the light most favorable to the non-moving party. Accordingly, Appellant asks this court to review the matter, *de novo*, and apply the appropriate standard of review in finding that Appellant's claims are not time-barred.

A. Statute of Limitations

In its discussion of the issue of whether Appellant's claims are barred by frauds three-year statute of limitations, the lower court relied upon a single fact within the complaint—that the alleged deductions from the bank account of Jane and John Hughes began in June 2006. Order of March 20, 2018 at 9. In essence, the trial court determined that a single deduction from a bank account, without considering any additional facts alleged in the complaint, constitutes sufficient notice to put Mr. and Mrs. Hughes on notice of an invasion of their rights. Id. The court did *not* consider—in rendering a decision regarding the statute of limitations, in its statement of facts alleged, or at any point in its written opinion—facts alleged in the complaint which tend to negate the lower court's finding of fact, including:

- As of June 2006, Jane Hughes was 85 years old and John Hughes was 86 years old. (Compl. ¶ 12).
- Mrs. Hughes, from June 2006 until her death, underwent major heart surgery, suffered from dementia, and experienced vision impairments and cataracts, which ultimately required surgery. Mrs. Hughes additionally suffered a broken hip that required hospitalization and extensive rehabilitation, and was diagnosed with impaired cognition and mobility, atypical psychosis, confusion, blindness, renal insufficiency, and heart failure, and she was noted to lack decisional capacity in the years leading up to her death. (Compl. ¶ 12).

- The Line Protection Plan premium did not appear on the mortgage finance charge disclosed to Mr. and Mrs. Hughes in 2006. (Compl. ¶ 20). In fact, before March 2015, BANA did not provide any statement, notice, or communication of any sort to Mrs. Hughes revealing that BANA believed that the Hughes's had elected any "Protection Plan" or that an amount was to or was being charged to them for such a plan. (Compl. ¶ 21).

- The charges surreptitiously made to the Hughes account by Respondent were ambiguously listed and appeared amid numerous other monthly charges. (Compl. ¶ 23). All other charges from BANA or its subsidiaries appearing on the Hughes's bank statements during the relevant period were clearly designated as transactions with "Bank of America" or "BkofAmerica" and other insurance transactions were clearly identified with the name of the charging company. (Compl. ¶ 24).

The statute of limitation for claims of fraud does not accrue until the complaining party has knowledge of fraud itself or knowledge of sufficient facts to put a party on inquiry. See, Burgess v. American Cancer Soc., South Carolina Div., Inc., 300 S.C. 182, 386 S.E.2d 798, 789 (S.C. App., 1989). The discovery rule requires this Court to examine when Appellant's cause of action accrued; this issue of fact was improperly examined by the lower court and decided at the pleadings stage. Appellant asserts that, viewing the facts as alleged in the pleadings in the light most favorable to the non-moving party, the statute of limitations began to run in March 2015 upon receiving a notice from BANA of charges to Jane Hughes' account for an unselected, optional mortgage service. Accordingly, the trial court erred in determining that Appellant's fraud-based causes of action began to accrue in June 2006.

B. Equitable Tolling

Even if the lower court properly determined that Appellant's claims are barred by the statute of limitations, it erred in finding that equitable tolling does not apply in this case. Viewing the facts and drawing all inferences in the light most favorable to the Appellant, the statute of limitations should be equitably tolled until March 2015 when Mrs. Hughes received a notice from BANA regarding the cancellation of a service that she expressly declined.

First, the lower court's Order suggests that, under the doctrine of *res judicata,* Appellant is barred from asserting the doctrine of equitable tolling in relation to its fraud-based claims brought in state court, because the District Court determined that other claims raised by Appellant in a prior suit were not tolled under the federal application of the doctrine. Order of March 20, 2018 at 5. As set forth in Section II, *infra*, *res judicata* does not bar Appellant from bringing his fraud-based claims in state court. Likewise, *res judicata* does not prevent Appellant from asserting that, based on South Carolina's standard of application of the doctrine of equitable tolling, Appellant's claims should be equitably tolled. The District Court never ruled on any issue pertaining to Appellant's fraud-based claims; it certainly did not determine whether, under state law, equitable tolling would serve to toll the statute of limitations on those fraud-based claims.

Nor does the issue of whether Appellant's fraud-based claims should be equitably tolled constitute an action that could have been litigated before the District Court. Because those claims, under existing precedent, do not survive death, Appellant lacked standing to raise an equitable tolling argument before the District Court as it might pertain to the claims of fraud. In order for Appellant to seek a determination on the issue of equitable tolling, the Court must first revisit the issue of the survivability of fraud, and find in Appellant's favor. Because the District Court could not make a determination on the survivability issue, the lower court erred in finding that District Court's Order nonetheless serves as an adjudication of the issue of whether Appellant's fraud-based claims are time-barred.

Moreover, the federal standard applied by the District Court in determining whether Appellant's breach of contract and TILA causes of action should be equitably tolled is not the standard applied by South Carolina Courts. The District Court applied a single federal test that allows for the application of equitable tolling where "(1) the party pleading the statute of

limitations fraudulently concealed the facts that are the basis of the plaintiff's claims; (2) the plaintiff failed to discover those facts within the statutory period, despite (3) the exercise of due diligence." Order of February 13, 2017 at 4. South Carolina's stance on equitable tolling, however, is more lenient than that of the federal courts and, in order to determine whether Appellant's fraud-based state law claims are tolled, the lower court should have—but did not—review the facts of this case under that more lenient standard.

In South Carolina, the parameters used by sister states and federal courts to decide on the doctrine's application "do not constitute an exclusive list of circumstances that justify the application of equitable tolling." Hooper v. Ebenezer Sr. Services and Rehabilitation Center, 386 S.C. 108, 113, 687 S.E.2d 29, 32 (S.C. 2009). Instead, equitable tolling may be applied where it is justified under all circumstances of a case, typically when a plaintiff does not file within the statute of limitations due to "an extraordinary event beyond his or her control." *Id.* Rather than applying the tests for the application of equitable tolling adopted in other jurisdictions, our state holds that "'[i]n order to serve the ends of justice where technical forfeitures would unjustifiably prevent a trial on the merits, the doctrine of equitable tolling may be applied to toll the running of the statute of limitations.'" Id., quoting 54 C.J.S. Limitations of Actions § 115 (2005). "Equitable tolling is judicially created; it stems from the judiciary's inherent power to formulate rules of procedure where justice demands it." Id., quoting Rodriguez v. Superior Court, 176 Cal. App. 4th 1461 (2009). "The equitable power of a court is not bound by cast-iron rules but exists to do fairness and is flexible and adaptable to particular exigencies so that relief will be granted when, in view of all the circumstances, to deny it would permit one party to suffer a gross wrong at the hands of the other." Id., quoting Hausman v. Hausman, 199 S.W.3d 38, 42 (Tex. App. 2006).

Although the lower court cited to the "extraordinary circumstances" language in the

Hooper opinion, it went on to summarily find that "because Plaintiff's parents received actual monthly notice of the charges being deducted from their account from 2006 to 2015, Plaintiff's allegations on the face of the complaint make clear that nothing was hidden from him. Plaintiff also does not plead that BANA engaged in conduct that prevented his parents from filing suit during the appropriate time period. Accordingly, the scarcely used doctrine of equitable tolling is not appropriate for this case." Order of March 20, 2018 at 9-10.

The assertions in the order below that "nothing was hidden" from John and Jane Hughes, that Appellant did not plead that BANA engaged in any conduct that prohibited John or Jane Hughes from filing suit, and that the charges were not hidden, demonstrate the lower court's failure to view all of the facts alleged in the complaint. The allegations in the case at hand are that BANA—an international financial institution—deceived and defrauded a frail, elderly couple by surreptitiously charging them for a product they expressly declined. The charges against their account for these services continued after the death of John Hughes and while Jane Hughes suffered debilitating ailments, including dementia, vision impairments resulting in surgery, heart problems resulting in surgery, and a broken hip that required hospitalization and extensive rehabilitative care. BANA withdrew these charges even though the couple expressly denied the Line Protection Plan service, failed to report the charges on the couple's finance statement (as required under the Truth in Lending Act), and withdrew the monthly fee "under the confusing and non-descript transaction . . . with the intention that the Hughes' not identify the true nature of the transaction." Compl. ¶ 38. Surely, death and dementia, constitute "extraordinary circumstances beyond [one's] control" so as to justify equitable tolling under Hooper; this is especially so when viewed in combination with Respondent's surreptitious, illegal activities and position as a fiduciary.

The trial court, by failing to take into account any of the facts favorable to Appellant in its determination of the equitable tolling issue, concluded that, as a matter-of-fact, Jane Hughes was put on notice of the charges against her account by Respondent. Order of March 20, 2018 at 9. Not only does the lower court's order fail to apply the appropriate standard of review and improperly determine an issue of fact for the jury, it furthers the agenda of those seeking to perpetrate fraud against the elderly. As discussed in Section I(B), *infra*, elderly individuals are highly susceptible to fraud, in part due to their inevitable cognitive decline. The lower court's finding that equitable tolling is not warranted where an elderly victim, suffering from dementia and impaired vision, fails to notice a nominal and non-descript monthly draft on her bank statement, essentially offers potential fraudsters not only another reason to target those most in need of the state's protection, but also a viable method of doing so without penalty.

CONCLUSION

In sum, Appellant has raised timely claims for fraud in a forum appropriate to address the issue of whether fraud-based claims should survive under South Carolina's survival statute, codified at S.C. Code Ann § 15-5-90. The lower court erred by finding that Appellant's claims are barred by the statute of limitations and the doctrine of *res judicata*, and further erred by failing to apply the appropriate standard of review and consequently refusing to apply equitable tolling in extraordinary circumstances. Finally, though the lower court's determination that fraud does not survive death follows South Carolina's existing precedent, Appellant urges this Court to reconsider the exception in light of public policy concerns arising since the 1941 Mattison opinion.

Respectfully Submitted,

MIKE KELLY LAW GROUP, LLC

By:

Brad D. Hewett
bhewett@mklawgroup.com
D. Michael Kelly
mkelly@mklawgroup.com
Jamie N. Smith
jsmith@mklawgroup.com
500 Taylor Street
Post Office Box 8113
Columbia, South Carolina 29202
(803) 726-0123
(803) 252-7145

Attorneys for Appellant

May 29, 2018

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
MAY 29 2018
SC Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

R. Keith Kelly, Circuit Court Judge

Case No.: 2017-CP-42-02834

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

v.

Bank of America National Association...Respondents.

PROOF OF SERVICE

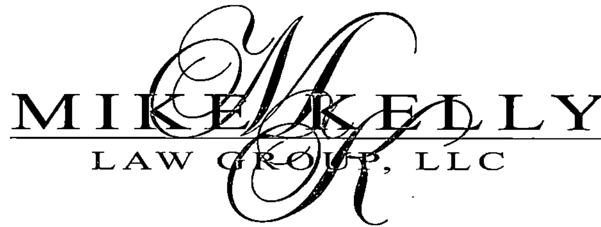
I certify that I have served the Initial Brief of Appellant upon counsel of record for the Respondent by causing them to be deposited in the United States Mail, postage prepaid, on May 29, 2018, addressed to Robert A. Muckenfuss, 201 N. Tryon Street, Suite 3000, Charlotte, NC 28202 and Elizabeth M.Z. Timmermans, 434 Fayetteville St. Suite 2600, Raleigh, NC 27601.

May 29, 2018

MIKE KELLY LAW GROUP, LLC

By:

Brad D. Hewett
bhewett@mklawgroup.com
D. Michael Kelly
mkelly@mklawgroup.com
Jamie N. Smith
jsmith@mklawgroup.com
500 Taylor Street
Post Office Box 8113
Columbia, South Carolina 29202
(803) 726-0123
(803) 252-7145
Attorneys for Appellant



Columbia Office
500 Taylor Street
Columbia, SC 29201

Mailing Address
PO Box 8113
Columbia, SC 29202

Telephone 803.726.0123
Toll-Free 866.692.0123
Fax 803.252.7145

E-mail bhewett@mklawgroup.com

May 29, 2018

RECEIVED
MAY 29 2018
SC Court of Appeals

The Honorable Jenny A. Kitchings
SC Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: Phillip Francis Luke Hughes, on behalf of the Estate of Jane K. Hughes, Appellant vs. Bank of America National Association, Respondent
Appellate Case No.: 2018-000568

Dear Ms. Kitchings:

I enclose herewith for filing with the Court an Initial Brief of Appellant and Appellant's Designation of Matter to be Included in the Record on Appeal regarding the referenced matter.

Sincerely,

Brad D. Hewett
Attorney

BDH/mkm
Enclosure
cc: Robert A. Muckensuff, Esquire
Elizabeth Timmermans, Esquire