

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

R. Keith Kelly, Circuit Court Judge

Case No.: 2017-CP-42-02834
(Appeal Tracking No.: 2018-000566)

RECEIVED
SEP 10 2018
SC Court of Appeals

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

v.

Bank of America National Association Respondent.

REPLY 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
Argument in Reply.....	4
I. RESPONDENT’S ARGUMENT IN SUPPORT OF ITS POSITION AGAINST OVERTURNING THE COMMON-LAW FRAUD EXCEPTION TO THE SURVIVAL STATUTE IS UNAVAILING AND MISLEADING.	4
II. RESPONDENT’S ARGUMENT CONCERNING RES JUDICATA IS UNPERSUASIVE.	7
III. RESPONDENT IMPROPERLY RELIES ON UNSUBSTANTIATED AND NEWLY-RAISED FACTUAL ALLEGATIONS TO SUPPORT ITS ARGUMENT AGAINST EQUITABLE TOLLING.	10
Conclusion.....	11

TABLE OF AUTHORITIES

CASES

<u>Faircloth v. Finesod</u> , 938 F.2d 513 (4th Cir. 1991)	5, 6
--	------

OTHER AUTHORITIES

Restatement (Second) of Judgments § 26 (1982)	8, 9
---	------

ARGUMENT IN REPLY

Without restating the issues or arguments which have been thoroughly set forth in his initial brief, and incorporating that brief herein by reference, Appellant Hughes offers the following points of clarification and rebuttal to the arguments raised by Respondent Bank of America National Association (“BANA”).

I. RESPONDENT’S ARGUMENT IN SUPPORT OF ITS POSITION AGAINST OVERTURNING THE COMMON-LAW FRAUD EXCEPTION TO THE SURVIVAL STATUTE IS UNAVAILING AND MISLEADING.

In its Order dismissing Appellant’s underlying complaint, the Spartanburg County Court of Common Pleas held, in part, that “Plaintiff is barred from bringing fraud-related claims on behalf of his deceased mother under . . . South Carolina’s survivability . . . statutes.” (R. p. 6). Appellant challenges this point on appeal, on the ground that principles of statutory interpretation and public policy dictate a reversal of the common law exception to the survival statute that fraud does not survive death. In its responding brief, Respondent BANA argues, in relevant part, that this Court cannot overrule the South Carolina Supreme Court and the fraud exception stems from “South Carolina’s position that a person suing for fraud needs to be alive in order to provide a fair opportunity to investigate that person’s mental state.” BANA Br. at 11. In support of its arguments, however, Respondent misrepresents to this Court both the rulings by the lower court and South Carolina law.

Respondent begins its argument with a misstatement of the lower court’s Order on BANA’s Motion to Dismiss. Specifically, Respondent states, as its first issue on appeal, “Did the Court of Common Pleas correctly rule that it lacks authority to overturn South Carolina Supreme Court precedent on the survivability of fraud. (Yes.)”. BANA Br. at 4. The lower court, however, did not issue a ruling that it lacks authority to overturn Supreme Court precedent *at all*. Respondent

proceeded to set forth its argument regarding the survivability of fraud without reference to this alleged ruling by the Court of Common Pleas, instead simply citing to law in support of its newly raised position regarding the lower court's authority. BANA Br. at 10. BANA's misrepresentation of the lower court's ruling is indicative of Respondent's tendency throughout its brief to bolster its argument with misleading statements.

In a similar fashion, Respondent offers this Court what it purports to be justification by South Carolina's courts and legislature for the fraud-based exception to the survivability statute. Relying on a Fourth Circuit opinion, Respondent represents that the reason fraud does not survive death is due to the fact that the state of mind of a party is especially vital in cases of fraud. BANA Br. at 10-11 (citing Faircloth v. Finesod, 938 F.2d 513, 517 (4th Cir. 1991)). Respondent argues that, because the Hughes' are deceased, "it would in fact be difficult and potentially unfair to prove the Hughes' state of mind . . . without the benefit of their deposition testimony and other personal discovery." Id. at 11. This position is fundamentally flawed.

Respondent's reliance on Faircloth is misplaced. Relying on Faircloth, BANA represents to the Court that it is "South Carolina's position that a person suing for fraud needs to be alive in order to provide a fair opportunity to investigate that person's mental state." BANA Br. at 11. However, South Carolina does not actually take this position, as is evidenced by the language of Faircloth. The plaintiff in Faircloth challenged the fraud exception to the South Carolina survival statute as violating the Equal Protection Clause, and the district court determined that the lack of any explanation by the South Carolina courts of the exception's rationale was sufficient to overcome the presumption of constitutionality of the statute under the "rational basis" standard. Faircloth at 517. The district court stated that it "refuse[d] to speculate as to what considerations may underlie the distinction between fraud and other causes of action"; the Fourth Circuit Court

of Appeals reversed, finding that, on the contrary, a court must make every feasible attempt to discern the reasons for a legislative distinction before declaring that distinction unconstitutional. Id. In other words, the appellate court essentially determined that speculation as to the legislative intent supporting a statute is proper so long as it is reasonable, and subsequently found the fraud exception constitutional since a legislature “could” rationally conclude that the difficulty of proving state of mind of a deceased party justifies the fraud exception to the survival statute. Id.

Respondent extracts the court’s musings in Faircloth as to a possible rationale for the fraud exception and presents them to this Court as “South Carolina’s position” on the matter. BANA Br. at 11. Ironically, the Faircloth opinion actually highlights the fact that South Carolina courts have failed to provide any rationale for the fraud exception, which is precisely why Appellant seeks review of the exception now. And, BANA’s further contention that it would be prejudiced in a suit for fraud because it would be “difficult and potentially unfair to prove the Hughes’ state of mind,” is equally contrived. BANA Br. at 11. As the party bringing suit, Appellant, not Respondent, carries the burden of proving the Hughes’ state of mind. Appellant recognizes that cases may arise in which it is difficult to discern the state of mind of a deceased individual; however, this is not one of those cases. Jane Hughes submitted a signed and dated document to Respondent denying the optional insurance for which she was charged and which forms the basis of this suit; her state of mind and intentions are clear. (R. pp. 31-32). Whether this document sufficiently carries the burden of proof is for a jury—not Respondent—to decide.

Finally, Respondent challenges Appellant’s position that public policy necessitates reconsideration of the fraud exception, so as to curb fraudulent exploitation of the elderly, by stating that parties may simply bring causes of action other than fraud to bring about the same result. However, not all instances of fraud are also breach of contract or violations of the Truth in

Lending Act, and the facts of those cases may not satisfy the elements of any action other than fraud. After all, it would stand to reason that fraud is the most appropriate cause of action available to those who are defrauded. Additionally, actions for fraud allow for the award of punitive damages—a mechanism designed to punish the defendant and deter future conduct. This distinction tends to suggest that a cause of action for fraud, as opposed to causes of action that do not allow for an award of punitive damages, would serve as a more effective deterrent against exploitation of the elderly.

Overall, Respondent's arguments against reconsideration of the fraud exception to the South Carolina survival statute constitute little more than an unconvincing attempt to create rationale for a rule where none exists. This matter is one that is deserving of clarification from this Court in the form of a reversal.

II. RESPONDENT'S ARGUMENT CONCERNING RES JUDICATA IS UNPERSUASIVE.

Respondent next refutes Appellant's argument, that his underlying complaint is not barred by *res judicata*, using similar tactics of manipulating words to better serve its agenda. Pertinently, Respondent takes the position that Appellant has failed to articulate any exception to *res judicata* that would allow his claim to survive, and instead asks the court to create a new exception where "a plaintiff voluntarily dismissed claims from the first action in anticipation of defeat." BANA Br. at 15. BANA's inaccurate summary of Respondent's position makes apparent the fact that either Respondent does not understand the argument set forth in Appellant's initial brief, or else would again present misrepresentations to this Court. Regardless, Appellant offers the following clarification on the matter.

It is Appellant's position that *res judicata* does not bar him from bringing the underlying complaint because the District Court lacked jurisdiction to decide the issue of whether fraud should

survive death, a theory essential to Appellant's fraud-based claims. Hughes Initial Br. at 19-21. Because the District Court could not hear or remand Appellant's argument against the fraud exception, he argues that the third element of *res judicata*—that a claim involves an issue was or could have been previously adjudicated in another suit—is not met. Id. 20. Alternatively, if *res judicata* did bar Appellant's claim, the exceptions provided for in Section 28 of the Restatement (Second) of Judgments would allow Plaintiff's claim to survive, specifically the exceptions providing for a subsequent suit where 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 where 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. Id. at 20-21. Support for the first exception is provided in Appellant's discussion of *res judicata* in Section II of his Initial Brief; the public policy exception ties directly to Appellant's public policy arguments in Section I(b)(ii) of Appellant's Initial Brief. See, Id. at 17-18; 19-21. Respondent's contention, then, that Appellant asked this Court to create a new exception, is clearly false.

Respondent further contends that Appellant failed to argue any of the exceptions to claim splitting provided for in the Restatement (Second) of Judgments § 26. BANA Br. at 15. On the contrary, although Appellant did not cite to Section 26 directly in support of his argument against *res judicata*, his argument mirrors one of the exceptions provided for in the Restatement. Specifically, Section 26 provides that a second action by a plaintiff against a defendant is available when “[t]he plaintiff was unable to rely on a certain theory of the case . . . because of the limitations on the subject matter jurisdiction of the courts . . . and the plaintiff desires in the second action to

rely on that theory.” Restatement (Second) of Judgments § 26(1)(c) (1982). Likewise, Appellant argued that he was unable to have a theory of his case heard—that fraud should survive death—due to limitations on the District Court’s ability to overturn state court precedent or remand the question back to state court. Hughes Initial Br. at 20 (“the District Court lacked any jurisdictional mechanism under which it might decide Appellant’s challenge to the fraud exception to survivability”). Thus, Respondent’s claim not only fails—it lends further support to Appellant’s position that his claims are not barred by *res judicata*.

Respondent further insists that Appellant prioritized his federal court claim in the original lawsuit and, had he simply not proceeded with a cause of action under Truth in Lending Act, he could have avoided removal to federal court. BANA Br. at 17. This argument is no more than a smokescreen, and a party is not required to “prioritize” his theories of recovery. Restatement (Second) of Judgments § 26, relied upon by Respondent to support its argument, operates precisely so that a claimant may pursue all theories of recovery, and in separate jurisdictions if necessary. See, Restatement (Second) of Judgments § 26 (1982), cmt. c (stating that when formal barriers exist to prevent a litigant from presenting to a court in one action his entire claim, including any theories of recovery, it is unfair to prevent him from bringing a second action in which he can present the phases of his claim which he was unable to bring in the first.) Moreover, Appellant brought his original claims in the court of his choice: South Carolina state court. Respondent, not Appellant, removed the claims to federal court; Respondent has simply refiled the claims for fraud in the appropriate jurisdiction. Accordingly, Respondent’s argument is inherently contradictory and must fail.

III. RESPONDENT IMPROPERLY RELIES ON UNSUBSTANTIATED AND NEWLY-RAISED FACTUAL ALLEGATIONS TO SUPPORT ITS ARGUMENT AGAINST EQUITABLE TOLLING.

Finally, although Appellant's Initial Brief thoroughly refutes Respondent's position on the timeliness of Appellant's claims, Appellant is compelled to respond to issues of fact improperly raised by Respondent for the first time on appeal.

In its responding brief, Respondent first suggests that the decedent's health-related issues do not warrant equitable tolling because Appellant did not plead that his deceased mother was incapacitated for the entire period during which BANA stole from her bank account, suggesting that at some unknown point in time she should have caught on to the theft. BANA Br. at 24. Respondent unabashedly victim-blames the deceased for not recognizing that the nondescript charges against her bank account were unauthorized, yet *never refutes that BANA fraudulently withdrew the charges*. Still, when Mrs. Hughes' infirmity began, its duration, and whether it prevented her from discovering the charges against her account, is a question of fact appropriately presented before a jury after engaging in discovery—not for the first time on appeal of a motion to dismiss on the pleadings.

Similarly, Respondent, for the first time, argues that Jane Hughes was “surrounded by family members” who should have inquired about the charges. BANA Br. at 24. Respondent's argument is not derived from the pleadings in this case, was not presented as a matter before the lower court, and constitutes an issue of fact that is not appropriately decided in the context of a 12(b)(6) motion to dismiss, nor as a novel issue raised on appeal. Moreover, this case is brought by the Estate of Jane K. Hughes based on fraud perpetrated against *her* by Respondent. The suggestion that Ms. Hughes' children should have inquired about charges to Mrs. Hughes' account, for a product which her children did not know had been expressly declined until 2015, is bizarre

and untimely. Rather than accepting responsibility for defrauding an elderly woman, BANA is pointing fingers at everyone but itself, including the deceased victim, in an attempt to escape being held accountable for engaging in reprehensible conduct that it does not deny occurred. Respondent cannot, however rely on newly-raised issues at this juncture in its effort to shirk responsibility.

CONCLUSION

For these reasons, as well as those addressed in Appellant's Initial Brief to this Court, the lower court's opinion should be reversed.

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

September 10, 2018