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

Appellate Case No. 2018-000568

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

v.

Bank of America National Association ..... Respondent.

FINAL BRIEF OF RESPONDENT

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INTRODUCTION

For nine years, from 2006 into 2015, Bank of America, N.A. ("BANA") charged the Hughes family $28.40 per month for an optional insurance product. Each charge appeared on the Hughes' monthly bank statements, listed as "Ad Insurance" and under the name of John P. Hughes. Mr. Hughes died in 2008, and his wife Jane Hughes passed away in 2015. After learning of their passing, BANA refunded all of the charges made after Mr. Hughes' death.

In 2015, the Hughes' son, Phillip Hughes ("Plaintiff"), sued BANA on behalf of his mother's estate. Plaintiff alleged that his parents had declined the insurance product in 2006 but were charged anyway and brought claims under the Truth in Lending Act ("TILA") and for fraud, fraudulent concealment, breach of contract accompanied by fraudulent acts, and breach of duty of good faith and fair dealing. Plaintiff eventually voluntarily dismissed the fraud claims, acknowledging that such claims were barred in South Carolina because they did not survive the death of his parents. The United States District Court for the District of South Carolina granted BANA's motion to dismiss on February 13, 2017. The court ruled that all of Plaintiff's claims were barred by the applicable three-year statutes of limitations. Noting that the insurance charges appeared on Ms. Hughes' monthly statements from 2006 to 2015, the court held that equitable tolling did not apply because "any argument they failed to discover the purported wrongdoing by Defendant…is bereft of any merit." The Fourth Circuit Court affirmed. The Supreme Court of the United States denied Plaintiff's petition for *writ of certiorari*.

Not happy with the first result, Plaintiff again sued BANA in 2017 in South Carolina Circuit Court. His factual allegations were nearly identical to the federal lawsuit that had been previously dismissed, but this time he brought the fraud-based claims that he had previously voluntarily dismissed out of the federal case: fraud, fraudulent concealment, breach of contract

accompanied by fraudulent acts, and violation of the South Carolina Unfair Trade Practices Act (SCUTPA).

At the hearing on BANA's motion to dismiss, Plaintiff's counsel admitted that his claims should be dismissed and confessed that his only reason for bringing the identical lawsuit in state court was to seek reversal of South Carolina's well established survivorship law. Judge R. Keith Kelly dismissed Plaintiff's action on multiple grounds, holding that: (1) Plaintiff's fraud-related claims did not survive the death of Plaintiff's parents; (2) Plaintiff's SCUTPA claim was not allowed in a representative capacity; (3) the doctrine of *res judicata* barred all of Plaintiff's claims; and (4) all of Plaintiff's claims were barred by the applicable statute of limitations and were not subject to equitable tolling.

On appeal, Plaintiff focuses his brief on the non-survivability of fraud and on *res judicata*. He first asks this Court to reverse 80 years of precedent from the South Carolina Supreme Court, which held in 1941 that fraud claims do not survive the death of the allegedly defrauded person. (Hughes Br. 12–19.) He then asks this Court to craft a brand-new exception to *res judicata* so that he can litigate now, in state court, claims he dismissed from federal court three years ago. (Hughes Br. 19–22.)

Plaintiff is incorrect on both points. First, Plaintiff conceded in the 2015 federal lawsuit and then again in the lower court that "controlling binding precedent" precluded him from bringing fraud claims on behalf of his deceased mother. In fact, he voluntarily dismissed his fraud claims from the federal suit because he knew that they were prohibited by South Carolina's survivability statute. And, even if this Court were inclined to overrule almost 80 years of well-established law, this Court cannot overrule South Carolina Supreme Court precedent. The Constitution leaves that prerogative exclusively to the South Carolina Supreme Court.

Second, the Court of Common Pleas correctly ruled that *res judicata*, or claim preclusion, bars Plaintiff's claims. After all, Plaintiff "does not dispute the lower court's determination that the present action is based upon the same transaction and occurrence as matters previously adjudicated" in federal court.

And, to the extent that South Carolina recognizes limited exceptions to *res judicata*, Plaintiff does not even argue that any of these exceptions apply here. Instead, he asks this Court to create a new exception: that *res judicata* does not apply where a plaintiff voluntarily dismissed claims from the first action in anticipation of defeat. This is not a sufficient basis for ignoring a doctrine that serves vital public interests beyond any "individual judge's ad hoc determination of the equities" in a particular case. Having strategically set aside certain state claims to pursue federal claims in federal court, Plaintiff cannot now invoke the interest of justice in trying to get a second chance at the claims he abandoned years ago.

Moreover, even if Plaintiff's claims were not excluded by South Carolina's survivability statute and *res judicata*, they would fail for the additional reason that they are just as untimely as the 2015 lawsuit was. The new claims here are subject to a three-year statute of limitations. Because Plaintiff's 2017 complaint is at least eight years too late—the charges began in 2006—he seeks the benefit of equitable tolling.

Plaintiff's argument fails. Equitable tolling is foreclosed by issue preclusion. In the 2015 action, the District Court decided that the "rarely" used doctrine did not apply. Because the charges appeared on the Hughes' monthly statements, the District Court found the idea of equitable tolling "bereft of any merit," and the Fourth Circuit agreed. Plaintiff cannot retread the same equitable tolling argument that has been rejected in his prior litigation.

And, even apart from issue preclusion, equitable tolling does not apply. The Court of Common Pleas simply agreed with the federal courts that the facts as alleged here do not support equitable tolling.

The Court of Common Pleas should be affirmed.

STATEMENT OF THE ISSUES ON APPEAL

I. 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.)

II. Did the Court of Common Pleas correctly rule that South Carolina's unfair and deceptive practices statute bars suits in a representative capacity? (Yes.)

III. Did the Court of Common Pleas correctly rule that *res judicata* bars Plaintiff from litigating claims he concedes arise out of the same transaction and occurrence as his prior federal action? (Yes.)

IV. Did the Court of Common Pleas correctly rule that Plaintiff's claims, filed in 2017 but based on conduct that began in 2006, were untimely? (Yes.)

a. Are Plaintiff's claims untimely because issue preclusion bars reconsideration of equitable tolling? (Yes.)

b. Are Plaintiff's claims untimely regardless of the earlier litigation because equitable tolling does not apply when the charges made against the Plaintiff account were announced on monthly statements for years on end? (Yes.)

STATEMENT OF THE CASE

Plaintiff, as personal representative of the estate of his mother, Jane Hughes ("Ms. Hughes"), alleges that his late parents opened a $120,000 line of credit from BANA on June 13, 2006. (R. p. 18, ¶ 7.) The line of credit was secured by a mortgage on their Spartanburg, South Carolina home. (*Id.*) In conjunction with the transaction, his parents signed a mortgage; an agreement and disclosure statement governing the line of credit; and an acknowledgement and authorization permitting BANA to automatically draft payments from their account. (R. pp. 18–19, ¶¶ 7–8.)

Plaintiff claims that on June 13, 2006, BANA also presented his parents with policy documentation concerning optional line protection insurance coverage ("LPP"). (R p. 19, ¶ 11.) The optional LPP is a type of insurance that enables borrowers to cancel some or all of the monthly payments on the variable portion of a credit line due to events like disability, accidental death, or involuntary unemployment. (*Id.*) Plaintiff claims that his parents declined to purchase LPP coverage when they received the $120,000 line of credit. (*Id.*)

Plaintiff claims that "for several years," BANA drafted a monthly charge of $28.40 from his parents' account for LPP coverage, and that only his father (John Hughes, Sr.) received LPP coverage. (R. p. 21, ¶ 23.) The $28.40 fee was listed on his parents' monthly account statements. (*Id.*)

In 2015, John Hughes' estate notified BANA that Mr. Hughes had passed away seven years earlier. (R. p. 22, ¶ 27.) BANA refunded all LPP premium payments drawn on the Hughes' account after the death of John Hughes. (R. p. 95, ¶ 30.) In June 2015, Ms. Hughes passed away, and Hughes was named personal representative of her estate. (R. p. 22, ¶ 29.)

Following the death of Ms. Hughes, Plaintiff filed a class action Complaint in state court in South Carolina in November 2015 (the "2015 Lawsuit"). (R. pp. 74–75.) BANA timely removed the action to the United States District Court for the District of South Carolina under federal question jurisdiction. Plaintiff amended his complaint in the 2015 Lawsuit three times. (R. p. 90.)

In his Third Amended Complaint, Plaintiff alleged that BANA's charging for the LPP, when the Plaintiff allegedly declined coverage, amounted to fraud, fraudulent concealment, breach of contract, breach of contract accompanied by fraudulent acts, breach of the duty of good faith and fair dealing, and a violation of the TILA. (R. pp. 99–105.) Plaintiff also sought to represent

a class of "BANA customers who, without the customer's express and informed written consent, were enrolled in and charged for a protection plan insurance products referred variously as 'Borrower's Protection Plan,' 'Line Protection Plan,' or other similar monikers." (R. p. 97–98, ¶ 43.)

BANA filed a motion to dismiss all of the claims for failure to state a claim. After the motion to dismiss was fully briefed, but prior to the District Court's ruling on the motion, Plaintiff voluntarily dismissed his fraud-based claims (fraud, fraudulent concealment, and breach of contract accompanied by fraudulent acts), admitting that "there is controlling precedent that may bar recovery for these particular claims by virtue of Jane Hughes' death." (R. p. 120.)

In February 2017, the District Court granted BANA's motion to dismiss the remaining claims. It held that Plaintiff's remaining breach of contract and TILA claims were time-barred and that Plaintiff could not rely on the doctrine of equitable tolling to save the untimely claims. (R. p. 126.) The court further stated that "[t]he charge for the mortgage insurance appeared on the Hughes' monthly checking account statements from 2006 to 2015, thus any argument they failed to discover the purported wrongdoing by Defendant during this period of time, although they exercised due diligence, is bereft of any merit." (*Id.*)

The Fourth Circuit affirmed the District Court's ruling "for the reasons stated by the district court." (R. p. 129.) Three months later, Plaintiff filed a Petition for Writ of Certiorari in the Supreme Court of the United States. The Supreme Court denied certiorari. *See Estate of Hughes v. Bank of Am. Nat. Assn.*, 138 S. Ct. 935 (U.S. Jan. 22, 2018).

Meanwhile, Plaintiff sued BANA again. Asserting almost identical factual allegations as in the 2015 Lawsuit, Plaintiff again claimed that although his parents paid for the LPP coverage offered by BANA, and for nearly a decade received monthly statements reflecting these payments,

his parents were unaware of the LPP charge and had actually declined the loan protection coverage at the time they obtained the line of credit in 2006. (R. p. 19, ¶¶ 9–11.) Based on these allegations, Plaintiff asserted claims for fraud, fraudulent concealment, breach of contract accompanied by fraudulent acts, violation of the SCUTPA, breach of fiduciary duty, and conversion. (R. pp. 22–29, ¶¶ 30–70.) He also asserted a statutory survival cause of action in an effort to enforce the six substantive causes of actions. (R. p. 29, ¶¶ 71–74.)

BANA filed a motion to dismiss for failure to state a claim, and the Court of Common Pleas granted BANA's motion on "several grounds." (R. p. 4.) In particular, the court held that (1) Plaintiff's fraud-related claims did not survive the death of Plaintiff's parents; (2) Plaintiff's claim based on South Carolina's unfair trade practices act was not allowed in a representative capacity; (3) all of Plaintiff's claims were barred by the doctrine of *res judicata*; and (4) all of Plaintiff's claims were barred by the applicable statute of limitations and not subject to equitable tolling. (R. pp. 4–10.) This appeal followed.

STANDARD OF REVIEW

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. *Rydde v. Morris*, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009) (citing *Williams v. Condon*, 347 S.C. 227, 233, 553 S.E.2d 496, 500 (Ct. App. 2001)). That standard requires the court to construe the complaint in a light most favorable to the non-movant 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.* To survive a 12(b)(6) motion, the plaintiff must set forth "ultimate facts"– i.e., facts that state more than a mere legal conclusion – "showing he is entitled to relief." *Watts v. Metro Sec. Agency*, 346 S.C. 235, 238, 550 S.E.2d 869, 870 (Ct. App. 2001).

In addition, when analyzing a Rule 12(b)(6) motion to dismiss, the court may consider "documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007); *see Doe v. Bishop of Charleston*, 407 S.C. 128, 134 n.2, 754 S.E.2d 494, 497 n.2 (2014) (recognizing a court may take judicial notice of publicly filed court documents and consider them when ruling on a Rule 12(b)(6) motion to dismiss).

ARGUMENT

I. PLAINTIFF'S FRAUD-BASED CLAIMS FAIL BECAUSE THEY DO NOT SURVIVE THE DEATH OF THE ALLEGEDLY DEFRAUDED PERSON[1]

A. The law in South Carolina has been clear on this point for almost 80 years.

Plaintiff concedes that "there is controlling binding precedent on the primary issues in this case, which are the fraud based claims." (R. p. 43, lines 14–17.) Indeed, the law in South Carolina has been clear on this point for almost 80 years: fraud-related claims *do not* survive the person's death. *Mattison v. Palmetto State Life Ins. Co.*, 197 S.C. 256, 15 S.E.2d 117, 119 (1941) (holding that a cause of action for fraud did not survive the death of a person who was allegedly defrauded by an apparent cancellation of an insurance policy).

Accordingly, in bringing fraud-related claims on behalf of his deceased mother, Plaintiff runs afoul of South Carolina's survivability statute. Although the survivability statute generally allows causes of action for personal injuries to survive the death of the person, the South Carolina

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[1] The only claims at issue on appeal are Hughes' fraud-based claims. Although Hughes' Complaint also includes a breach of fiduciary duty and a conversion claim (R. pp. 28–29, ¶¶ 62–70), counsel for Hughes conceded these claims at the hearing below, and he does not raise them again on appeal. (R. p. 45, lines 1–6, p. 47, lines 12–16 ("So I think I would tend to agree that the conversion claim, the breach of fiduciary duty claims are probably foreclosed and that we would forego those claims"); R. p. 45, lines 1–6 (admitting that these claims "may be barred by [issue preclusion] and res judicata").

Supreme Court has expressly ruled that fraud-related claims *do not* survive the person's death. *Mattison*, 197 S.C. 256, 15 S.E.2d at 119 ("[It] is just as readily seen that respondent's second cause of action [for fraud] does not come within either of the instances where a cause of action survives."); *see also Brailsford v. Brailsford*, 380 S.C. 443, 449, 669 S.E.2d 342, 345 (Ct. App. 2008) ("South Carolina . . . has long recognized several exceptions to the survivability of a claim, including an exception for fraud.").

The South Carolina Supreme Court decision in *Ferguson v. Charleston Lincoln Mercury, Inc.*, 349 S.C. 558, 563–64, 564 S.E.2d 94, 97 (2002) is instructive. In *Ferguson*, the court analyzed the survivability of fraud and fraudulent concealment-based allegations brought by an estate against a car dealership. The court held:

> The essence of Mr. Ferguson's allegation was that [the defendant] CLM included an improper fee in the purchase price and concealed the fee through fraudulent and deceptive actions. Whether Mr. Ferguson labeled CLM's actions as unfair, misleading, or deceptive is irrelevant. At the core of Mr. Ferguson's complaint was the allegation that CLM misled him into paying more for the car than he should have paid, and concealed the overcharge either through intentionally deceptive actions or through grossly negligent disclosure practices. Allegations of such fraud and deceit are exempted from the general survival statute and do not survive the Plaintiff's death. Accordingly, we hold that Mr. Ferguson's cause of action did not survive his death.

Id., 349 S.C. at 563–64, 564 S.E.2d at 97–98 (finding that claims brought under the Regulation of Manufacturers, Distributors, and Dealers Act were exempted because they were based on fraud and deceit).

Here, much like in *Ferguson*, Plaintiff alleges that BANA "made false and material representations" relating to the LPP coverage or "in the alternative, Defendant BANA intentionally concealed the material facts that it enrolled Plaintiffs in [the LPP]." (R. pp. 22–23, ¶¶ 31, 37.) Plaintiff asserts that "[d]ue to the fraudulent nature of BANA's actions," he is entitled to damages, including punitive damages. (R. pp. 23–25, 27–28, ¶¶ 35, 42, 51, 60, 61.) Plaintiff's allegations

relating to fraud and deceit, including his action under SCUTPA, are "exempted from the general survival statute and do not survive the Plaintiff's death." *Ferguson*, 349 S.C. at 563–64, 564 S.E.2d at 97–98. Accordingly, the Court of Common Pleas' finding that all of Plaintiff's claims based on fraud and deceit—fraud, fraudulent concealment, breach of contract accompanied by fraudulent acts, and violation of SCUTPA claims—did not survive the death of Ms. Hughes should be affirmed.

B. This Court cannot overrule the South Carolina Supreme Court.

The "decisions of the Supreme Court shall bind the Court of Appeals as precedents." S.C. CONST. art. V, § 9. Therefore, the Courts of Appeals "may not overrule supreme court precedent." *Campbell v. Robinson*, 398 S.C. 12, 18, 726 S.E.2d 221, 225 (Ct. App. 2012); *see also Caldwell v. Wiquist*, 402 S.C. 565, 570, 741 S.E.2d 583, 586 (Ct. App. 2013) ("Initially, we note that Wiquist asserts that the *Yates* line of cases should be overruled. This court has no authority to overrule Supreme Court precedent."). Therefore, even if this Court were inclined to overrule almost 80 years of precedent from the state Supreme Court, the Constitution leaves that prerogative to the South Carolina Supreme Court.

C. It is perfectly proper that fraud claims do not survive.

There are good reasons why fraud claims do not survive the death of the allegedly defrauded person. In particular, "fraud 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." *Faircloth v. Finesod*, 938 F.2d 513, 517 (4th Cir. 1991). Thus, "the difficulty and potential unfairness of proving the state of mind of a dead party to a fraudulent transaction justifie[s] excepting fraud from the survival statute." *Id.*

The South Carolina legislature codifies these principles in other contexts: Rule 9(b) of the South Carolina Rules of Civil Procedure requires fraud to be pled more particularly than other claims, and the SCUTPA prohibits claims under the Act from being brought in a representative capacity.

These justifications are in force here. Contrary to Plaintiff's argument that "the state of mind of [Mr. and Ms. Hughes] is readily identifiable," it would in fact be difficult and potentially unfair to prove the Hughes' state of mind regarding the LPP charges without the benefit of their deposition testimony and other personal discovery. Mr. and Mrs. Hughes—not the current plaintiff—were the ones who attended the June 2006 transaction, signed various paperwork, and spoke to BANA employees. Even after the transaction, Mr. Hughes lived for more than two years, during which time he received statements listing the $28.40 charge by his name. Later, Ms. Hughes received the statements reflecting the insurance charge for many years. Because both are gone, no one knows whether they saw or understood those charges, or what they thought. There is no inherent injustice in 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. Crucial evidence in a fraud case is lost when an alleged victim passes away.

Further, Plaintiff's argument that civil remedies are necessary to curb financial exploitation of the elderly is likewise inapt here. (Hughes Br. 18.) As Plaintiff well knows, openly charging someone for a product they have allegedly declined to buy could yield a variety of causes of action apart from fraud and its special rules. Indeed, Plaintiff sued BANA for a handful of those other causes of action in 2015. On the facts alleged in this case, South Carolina law on survivability simply did not put the plaintiffs out of court. Bringing their claims years beyond the statute of limitations did.

II. PLAINTIFF'S SCUTPA CLAIM FAILS FOR THE ADDITIONAL REASON THAT IT CANNOT BE BROUGHT IN A REPRESENTATIVE CAPACITY

Plaintiff conceded at the hearing on BANA's Motion to Dismiss that "[i]f there's a case on point where once you die, your unfair trade claim dies with you, I would again concede the point that there's controlling precedent." (R. p. 47, lines 12–21.) In fact, the plain language of the SCUTPA statute itself does not allow for a representative of an estate to maintain an action under the Act, as Plaintiff attempts to do here.

SCUTPA clearly states:"[a]ny person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of an unfair or deceptive method, act or practice declared unlawful by § 39-5-20 may bring an action individually, *but not in a representative capacity*, to recover actual damages." S.C. Code Ann. § 39-5-140 (emphasis added).

Applying this statutory language, courts analyzing South Carolina law have therefore precluded estate representatives from maintaining claims under SCUTPA. *See Faircloth v. Jackie Fine Arts, Inc.*, 682 F. Supp. 837, 845 (D.S.C. 1988), *aff'd in part, rev'd in part on other grounds*, *Faircloth v. Finesod*, 938 F.2d 513 (4th Cir. 1991) ("[T]he language of the statute precludes the bringing of a SCUTPA action by an appellant who acts in a representative capacity."). It is clear that "an unfair trade practices claim may not be brought in a representative capacity." *Wogan v. Kunze,* 366 S.C. 583, 609, 623 S.E.2d 107, 121 (Ct. App. 2005), *aff'd as modified*, 379 S.C. 581, 666 S.E.2d 901 (2008). Because Plaintiff affirmatively alleges that he is bringing this action as the "Personal Representative of the Estate of Jane K. Hughes" (R. p. 17, ¶ 1), his claim under the SCUTPA fails, and the lower court's ruling on this point should be affirmed.

III. *RES JUDICATA* BARS ALL OF PLAINTIFF'S CLAIMS

A. Every element of *res judicata* exists here.

The Court of Common Pleas also correctly ruled that *res judicata*, or claim preclusion, bars each of Plaintiff's claims. (R. p. 5.) After all, Plaintiff "does not dispute the lower court's determination that the present action is based upon the same transaction and occurrence as matters previously adjudicated" in federal court. (Hughes Br. 19.)

"*Res judicata* bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties." *Plum Creek Dev. Co., Inc. v. City of Conway*, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999). *Res judicata* has three elements: (1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit." *Plum Creek Dev. Co.*, 334 S.C. at 34, 512 S.E.2d at 109. The third element, requiring adjudication, includes "any issues which might have been raised in the former suit." *Id.*

The matter at hand is exactly what the doctrine of *res judicata* exists to prevent.

First, there is no dispute that the identity of the parties is identical. In both actions, Plaintiff sued BANA in a representative capacity on behalf of his mother's estate. (*See* R. pp. 17, 89.)

Second, as Plaintiff concedes, the subject matter of the two lawsuits is also identical. (*See* Hughes Br. 19 ("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.")) In fact, the 2015 Lawsuit and this case overlap so much that the majority of the factual allegations are identical. *Compare* R. pp. 17–34 *with* R. pp. 89–106. Both cases allege that in a June 2006 transaction, Mr. and Mrs. Hughes declined to buy an insurance product,

yet were charged for it anyway, monthly, for the next nine years. All of the claims made, in 2015 and now, are offshoots of this same subject matter.

Third, that subject matter was adjudicated in the 2015 Lawsuit. The District Court dismissed all of Plaintiff's claims with prejudice following full briefing on BANA's Motion to Dismiss. (R. p. 123.) Plaintiff appealed and lost. *See Hughes, on behalf of Estate of Hughes v. Bank of Am. Nat'l Ass'n*, 697 F. App'x 191, 193 (4th Cir. 2017); *see also* R. pp. 129–30. Then he filed a certiorari petition and it was denied. *See In re Estate of Hughes v. Bank of Am. Nat'l Ass'n*, No. 17-884, 2018 WL 491558, at *1 (U.S. Jan. 22, 2018).

Every cause of action in this case "might have been raised in the former suit." *Plum Creek Dev. Co.*, 334 S.C. at 34, 512 S.E.2d at 109. The factual allegations are the same. And Plaintiff *did* bring several fraud claims in 2015, but voluntarily dismissed them after acknowledging that those claims did not survive under South Carolina law. (R. pp. 120–21.) The claims here were perfectly available to Plaintiff in 2015, and he should not be able to split them simply because he believes this forum will be a better one on the merits than the federal court was. *E.g.*, *Sub-Zero Freezer Co. v. R.J. Clarkson Co.*, 308 S.C. 188, 192, 417 S.E.2d 569, 571 (1992) ("All of Clarkson's claims arise out of the distributorship or the settlement agreement. The claims were either litigated in the prior actions or could have been so litigated. Thus, the trial court properly held that Clarkson's claims were barred by *res judicata* and entered judgment in favor of Sub-Zero.").

B. Plaintiff's voluntary dismissal of claims in the first suit because he expected to lose them should not provide him a second try.

Plaintiff voluntarily dismissed his fraud claims in the 2015 Lawsuit because he expected to lose. This does not justify departing from *res judicata*, which exists because "public interest

requires an end to litigation and no one should be sued twice for the same cause of action." *S.C. Pub. Interest Found. v. Greenville Cty.*, 401 S.C. 377, 391, 737 S.E.2d 502, 509 (Ct. App. 2013).

South Carolina recognizes limited exceptions to circumstances in which *res judicata* typically would govern, none of which apply here. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 26 (1982) (enumerating six different "exceptions" to *res judicata*); *S.C. Pub. Interest Found.*, 401 S.C. at 390, 737 S.E.2d at 509 (finding that none of the enumerated exceptions from the Restatement (Second) § 26 were applicable to the plaintiff's claim, and therefore, the claims were barred by *res judicata*).

The law has enumerated exceptions to *res judicata.* They occur when either: (a–b) the parties or the court in the first suit agreed that the plaintiff could bring a second suit; (c) the first court had limited subject matter jurisdiction to entertain a particular theory or certain remedy; (d) the first judgment was plainly inconsistent with a statutory or constitutional scheme; (e) continuing or recurrent wrong cases where the plaintiff may sue from time to time for damages to-date; and (f) clear and convincing showings of an "extraordinary reason" such as related to "personal liberty" or the failure of the first case to produce a coherent disposition. RESTATEMENT (SECOND) OF JUDGMENTS § 26.

Plaintiff does not even argue that any of these exceptions apply here. (*See* Hughes Br. 20.) Instead, he asks this Court to create a new exception: that *res judicata* does not apply where a plaintiff voluntarily dismissed claims from the first action in anticipation of defeat.

The closest existing exception to Plaintiff's argument occurs when the first court lacks subject matter jurisdiction over the issue. But federal courts can and do hear state fraud claims all the time, and indeed, the District Court could have heard the Plaintiff's fraud-based claims in the 2015 Lawsuit. In fact, Plaintiff decided to bring a TILA claim in the 2015 Lawsuit, providing the

federal court with subject matter jurisdiction over his claims. (R. pp. 99–101; 28 U.S.C. §1367(a) (district courts have supplemental jurisdiction over claims arising out of the same case or controversy as the federal claim)). That Plaintiff later decided on his own to dismiss his claims because he thought he would lose and would not be able to obtain a certified question does not bring him within this exception.

Similarly, Plaintiff's reliance on Section 28, Comment (e) of the Restatement, which addresses exceptions to issue preclusion, is misguided. The example illustrated by Comment (e) is telling—the Restatement explains that a determination in a state court on a patent license agreement may not be held binding in a subsequent federal court action for patent infringement if the grant of exclusive jurisdiction in patent infringement cases to the federal district courts is construed to require otherwise. Again, that is not the case here. Undisputedly, both the District Court and the Court of Common Pleas have equal subject matter jurisdiction to hear Plaintiff's fraud claims. Instead, Plaintiff preemptively dismissed them, expecting defeat.

The cases cited by Plaintiff in support of his position—*Judy v. Judy* and *Pye v. Aycock*—only underscore BANA's position. In both *Judy* and *Pye*, the court ultimately found that the doctrine of *res judicata* barred the plaintiff from re-litigating his claims in the subsequent action. *See Judy v. Judy*, 383 S.C. 1, 7, 677 S.E.2d 213, 217 (Ct. App. 2009), *aff'd*, 393 S.C. 160, 712 S.E.2d 408 (2011) (rejecting the plaintiff's argument that *res judicata* did not apply, where the probate court in the first action did have jurisdiction to decide the cause of action for waste); *Pye v. Aycock*, 325 S.C. 426, 433, 480 S.E.2d 455, 458 (Ct. App. 1997) (affirming the trial court's decision finding that the plaintiff was barred by the doctrine of *res judicata* and rejecting the plaintiff's argument that any of the Restatement's enumerated exceptions applied).

Plaintiff's vague policy justification—that the District Court's decision has an adverse impact on the public interest and therefore does not have binding effect—likewise does not hold water. "[T]he doctrine of *res judicata* serves vital public interests beyond any individual judge's ad hoc determination of the equities in a particular case. There is simply no principle of law or equity which sanctions the rejection... of the salutary principle of *res judicata*." *Griswold v. Cty. of Hillsborough*, 598 F.3d 1289, 1294 (11th Cir. 2010) (internal quotations omitted).

In any case, applying *res judicata* would not be unjust here. Plaintiff had an opportunity to litigate his fraud claims and simply failed to do so. Moreover, if Plaintiff's fraud allegations were the "primary issue" and "the crux of this case," as he now alleges, he could have structured this litigation to avoid removal to federal court in the first case. (R. p. 45, lines 5-6.) That is, Plaintiff prioritized his federal TILA claim in the 2015 Lawsuit. Therefore, he faced removal and adjudication in federal court (all the way to the Supreme Court of the United States). Had Plaintiff not pleaded a federal claim, he could have litigated the fraud exception in state court the first time around.

But having strategically set aside certain state claims to pursue federal claims in federal court, Plaintiff cannot now invoke the interest of justice in trying to get a second bite at the claims he abandoned years ago. This litigation is an afterthought, pursued only after it became apparent that the District Court and Fourth Circuit had not gone Plaintiff's way in the first case.

IV. PLAINTIFF'S CLAIMS ARE ALL UNTIMELY

Even if Plaintiff's claims were not excluded by South Carolina's survivability statute and *res judicata*, they would be barred by the applicable statute of limitations. A three-year statute of limitations governs all of Plaintiff's claims here. Yet Plaintiff filed his *first* complaint more than nine years after the charges he challenges began, and the current Complaint two years after that.

Because the statutes of limitation have long expired, Plaintiff's claims can only be timely if the doctrine of equitable tolling saves them. But there are two independent reasons why equitable tolling cannot apply here: first, Plaintiff litigated that issue and lost in the 2015 Federal Lawsuit; and second, regardless, equitable tolling cannot apply on the undisputed facts and pleadings in this case.

A. All of Plaintiff's claims are beyond their limitations period.

The Court of Common Pleas correctly found that Plaintiff's 2017 claims—all arising from a transaction that occurred in 2006—are time-barred by many years. (R. pp. 8–10.)

Each cause of action remaining here has a three-year statute of limitations: (1) fraud (S.C. Code Ann. § 15-3-530(7); (2) fraudulent concealment (*id.*); (3) breach of contract accompanied by a fraudulent act (§ 15-3-530(1)); and (4) violation of the SCUTPA (§ 39-5-150). Plaintiff has never disputed this.

Under the discovery rule, these statutes of limitation began to run when "the person knew or by the exercise of reasonable diligence should have known that he had a cause of action." S.C. Code Ann. § 15-3-535;, *Mitchell v. Holler*, 311 S.C. 406, 408–9, 429 S.E.2d 793, 795 (1993) (articulating the "discovery rule"). "The standard . . . is objective rather than subjective." *Gibson v. Bank of America, N.A.*, 383 S.C. 399, 405-06, 680 S.E.2d 778, 782 (Ct. App. 2009) (adding that the statute begins running when "the facts and circumstances . . . would have put a person of common knowledge and experience on notice that some claim against another party might exist.").

Here, these statutes of limitation began running in 2006. Plaintiff alleges that his parents declined to purchase the LPP when they opened their line of credit from BANA on June 13, 2006. Nonetheless, he alleges, BANA withdrew a monthly charge of $28.40 from their account "for several years," beginning "on or about June 2006." (R. p. 21, ¶ 23; R. pp. 94–95, ¶ 25.) Thus,

reasonable notice of the alleged wrongdoing occurred when the first charge appeared on her monthly statement in June 2006. (R. pp. 94–95, ¶ 25 (alleging that the monthly LPP charges were withdrawn from the Plaintiff's account beginning "on or about June 2006" as reflected in their monthly bank and/or home equity loan statements sent to their address.))

The Court of Appeals' 2009 decision in *Gibson* is instructive. 383 S.C. 399, 407–08, 680 S.E.2d 778, 783 (Ct. App. 2009). In *Gibson*, the estate of an elderly woman sued a bank, claiming that it had improperly allowed withdrawals from her bank account. However, at least some monthly statements sent to the decedent reflected the withdrawals. Thus, this Court held that she was, or objectively should have been, aware of the withdrawals. This Court found the lawsuit time barred.

As the *Gibson* Court observed, the purpose of bank statements is to assert the existing balance of an account, saying "in effect: 'this bank owes you this stated balance, and no more.'" *Id.* at 408. Therefore, even if a person does "not know the precise details behind the discrepancy," the statement provides notice and an opportunity for the account holder to inquire about any charge listed. "If this is not the legal effect of the bank's monthly statement to its depositor, it is not apparent what function the monthly statement performs." *Id.* at 408.

Like in *Gibson*, Hughes' parents received monthly statements listing the charges they now attempt to challenge. Those statements began in June 2006 and steadily continued, month after month, year after year, all showing a monthly withdrawal of $28.40. The statute of limitations for all of Plaintiff's claims expired three years later, in the summer of 2009—more than six years before Plaintiff filed his first complaint. (R. pp. 8–9.)

B. Equitable tolling is foreclosed by issue preclusion.

The parties here exhaustively litigated equitable tolling in the 2015 Lawsuit. Plaintiff lost. Issue preclusion, also known as collateral estoppel, bars his attempt to re-litigate that issue now.

Under the doctrine of issue preclusion, "when an issue has been actually litigated and determined by a valid and final judgment, the determination is conclusive in a subsequent action whether on the same or a different claim." *Zurcher v. Bilton*, 379 S.C. 132, 135, 666 S.E.2d 224, 226 (2008). "[Issue preclusion] applies to specific issues, regardless of whether the claims in the first and subsequent suits are the same." *Judy*, 383 S.C. at 7, 677 S.E.2d at 217. Issue preclusion applies when "the issue in the present lawsuit was (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment." *Carolina Renewal, Inc. v. S.C. Dep't of Transp.*, 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009).

Each element of issue preclusion is satisfied here. First, the issue was "actually litigated" in the 2015 Lawsuit. *Carolina Renewal*, 385 S.C. at 554, 684 S.E.2d at 782. The parties fully briefed the dispositive issues of timeliness and equitable tolling with regard to Plaintiff's LPP coverage allegations. (R. pp. 134–35, 208–09, 255–56.) In reviewing the parties' briefing on BANA's motion to dismiss, the District Court explicitly recognized that "Defendant argues all of Plaintiffs' claims are time barred and equitable tolling is inapplicable....Plaintiffs maintain their claims have been equitably tolled." (R. p. 125; R. p. 126 (adding that "Plaintiffs rely on the doctrine of equitable tolling to argue their claims are timely")). On appeal, both parties again briefed equitable tolling and its applicability. *See In re Estate of Hughes v. Bank of Am. Nat'l Ass'n*, 2017 WL 1739795, at *13–33 (4th Cir. 2017); *In re Estate of Hughes v. Bank of Am. Nat'l Ass'n*, 2017 WL 1206484, at *13–35 (4th Cir. 2017).

Second, the federal courts "directly determined" the issue "in the prior action." *Carolina*

Renewal, 385 S.C. at 554, 684 S.E.2d at 782. The District Court directly determined that the facts as alleged could not establish equitable tolling. (R. pp. 126–27; R. p. 46, lines 18–20 (Plaintiff's counsel conceding that the Federal Court "looked into" equitable tolling.)) The District Court reasoned that Plaintiff's allegations regarding Ms. Hughes' poor health, though unfortunate, were insufficient to show that the parties had exercised due diligence, noting that the LPP charges appeared on the Hughes' monthly checking statements sent to the Hughes' address for nine years. (*Id.*)

On appeal, the Fourth Circuit again ruled that equitable tolling could not apply here. After setting out the standard for equitable tolling, the Fourth Circuit opined that "with these standards in mind, we have reviewed the briefs and the record before us and conclude that the district court did not err in granting the motion to dismiss." *Hughes*, 697 F. App'x 191, 192-93 (4th Cir. 2017).

Third, the prior finding of no equitable tolling was "necessary to support the prior judgment." *Carolina Renewal*, 385 S.C. at 554, 684 S.E.2d at 782. In fact, the absence of equitable tolling is the express reason for the dismissal of Plaintiff's 2015 Lawsuit. (R. pp. 125–27 (granting BANA's motion to dismiss on the basis that the plaintiffs' claims were barred by the statute of limitations and were not entitled to equitable tolling, specifically observing that Plaintiff "rel[ied] on the doctrine of equitable tolling to argue [his] claims are timely" and rejecting that argument)).

Plaintiff cannot evade issue preclusion by arguing that the federal law of equitable tolling differs from that in South Carolina. (Hughes Br. 24–25.) Plaintiff theorizes that South Carolina offers a more "lenient" equitable tolling doctrine than the federal courts. (*Id.*) That is not correct. There is no meaningful difference between South Carolina and federal law on this issue, and indeed, the District Court of South Carolina cited to and considered both federal and state law in

ruling on equitable tolling. (R. p. 126.)

Both the federal courts and South Carolina recognize that equitable tolling is a matter of judicial discretion and that it is rarely proper. Both place the burden on the plaintiff. *Hooper v. Ebenezer Sr. Servs. & Rehab. Ctr.*, 386 S.C. 108, 115, 687 S.E.2d 29, 32 (2009) (holding that the plaintiff "bears the burden of establishing sufficient facts to justify its use"); *CVLR Performance Horses, Inc. v. Wynne*, 792 F.3d 469, 476 (4th Cir. 2015) (noting that the plaintiff must carry "a considerable burden to demonstrate that it applies").

Both federal and South Carolina courts also require "a compelling basis for awarding such relief," such that the doctrine is used "sparingly" to avoid "a gross wrong." *Hooper*, 386 S.C. at 115, 687 S.E.2d at 32–33; *Kuusk v. Holder*, 732 F.3d 302, 306 (4th Cir. 2013) (doctrine applies "only sparingly"); *Harris v. Hutchinson*, 209 F.3d 325, 330 (4th Cir. 2000) (requiring "gross injustice").

These cases show that equitable tolling is no different in federal court than in South Carolina. In fact, South Carolina cases have explicitly embraced the federal standard. *See, e.g.*, *Pelzer v. State*, 662 S.E.2d 618, 621 (S.C. Ct. App. 2008) (quoting and agreeing with the Fourth Circuit's equitable tolling description in *Harris*, 209 F.3d at 330, and calling it "particularly illuminating"). Both federal and state law recognize that the equitable tolling doctrine is sparingly applied, and only in extraordinary circumstances that overcome diligence by the plaintiff. *Id.*

Likewise, the fact that Plaintiff's causes of action in this suit are different from the 2015 Lawsuit does not change the outcome. "[Issue preclusion] applies to specific issues, regardless of whether the claims in the first and subsequent suits are the same." *Judy*, 383 S.C. at 7, 677 S.E.2d at 217. And, the statute of limitations period is the same for Plaintiff's existing claims as

his prior breach of contract claim in the 2015 Lawsuit: three years. As such, because the District Court determined that Plaintiff's claims were time-barred in 2015, his 2017 claims are likewise barred and should be dismissed.[2]

C. Even apart from issue preclusion, Plaintiff cannot meet the requirements of equitable tolling.

Even independently from the bar of issue preclusion, the court below correctly ruled that equitable tolling cannot apply here. (R. p. 9 ("The Court agrees with the findings of the District Court and the Court of Appeals in the 2015 Federal Action that equitable tolling does not apply in this case.")).

The South Carolina Supreme Court has maintained that "equitable tolling is a doctrine that should be used sparingly and only when the interests of justice compel its use." *Hooper*, 386 S.C. at 117, 687 S.E.2d at 32. "It has been observed that equitable tolling typically applies in cases where a litigant was prevented from filing suit because of an extraordinary event beyond his or her control." *Id.* at 116. *See also Am. Legion Post 15 v. Horry Cty.*, 381 S.C. 576, 582, 674 S.E.2d 181, 184 (Ct. App. 2009) (emphasizing the need for due diligence before allowing for equitable tolling).

Plaintiff cannot satisfy the "sparingly" used equitable tolling doctrine. In particular, Plaintiff alleges that the charge for the insurance appeared on monthly checking account statements from 2006 to 2015. (R. pp. 94–95, ¶ 25.) The monthly charge was called "Ad

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[2] As discussed above, Plaintiff relies on 28 Comment e of the RESTATEMENT (SECOND) OF JUDGMENTS § 28 (1982) to argue that his fraud claims are not barred by *res judicata*. But Comment e—which applies to circumstances in which the first court lacks subject matter jurisdiction to decide a particular issue—does not help him here either. *See id.* There is no dispute that the District Court had subject matter jurisdiction to hear all of Hughes' claims and make a determination on the applicable statutes of limitations and equitable tolling issues, as it did.

Insurance." (R. p. 21, ¶ 23.) It recurred at $28.40 per month, and it was listed by the name of John P. Hughes, Sr. on the statement—a clear red flag to Mr. Hughes during his lifetime and to his decedents after 2008. Regardless of whether the typeface was small (the same size as all other charges on the bill), or the asserted ambiguity of some of its description, the charge was openly announced, steadily recurring, and appeared under a specific person's name on the bank statements. As the Court of Common Pleas found, there can be no "extraordinary event" stopping the Hugheses from bringing their claim when they "received actual monthly notice of the charges being deducted from their account from 2006 to 2015." (R. p. 9.) "Nothing was hidden." *Id.*

Nor can Ms. Hughes' health issues suffice to excuse many years of failing to investigate the charges. Although he has been litigating this issue for years now, through multiple complaints, Plaintiff has never claimed that his mother was incapacitated for the *entire* period between 2006 and her death in 2015. In federal court, Plaintiff could state only that "as of 2012" her condition was poor. *See In re Estate of Hughes v. Bank of Am. Nat'l Ass'n*, 2017 WL 1739795, at *22 (4th Cir. 2017).

Moreover, in view of the equitable nature of the tolling doctrine, it appears that Mrs. Hughes shared her bank account during the relevant time with her children, including the current plaintiff. Plaintiff makes no allegation that he or his sister were ever stopped from seeing the bank statements or inquiring about a recurring $28.40 charge for "Ad Insurance" listed as connected to their deceased father. It appears that Ms. Hughes was surrounded by family members whose capacity has never been questioned and who were named on the bank account from which the charges occurred. Particularly given that her claim now belongs to those same family members through her estate, there is no "gross wrong" in refusing to equitably toll the statute of limitations here. *Hooper*, 386 S.C. at 115, 687 S.E.2d at 32–33.

Thus, as the Court of Common Pleas observed, assertions that Ms. Hughes suffered health issues, although unfortunate, are simply insufficient to satisfy the due diligence requirement of the equitable tolling doctrine—which is to be employed only in "extraordinary" circumstances. (R. p. 5.) As the District Court explained, "[f]or the Court to adopt Plaintiffs' position [that] their claims are entitled to equitable tolling would mean statutes of limitations are inconsequential. And, of course, that is not so." (R. p. 127.)

Because all of Plaintiff's claims are untimely, and the equitable tolling doctrine does not apply, this Court can affirm on this ground alone.

CONCLUSION

For these reasons, this Court should affirm the Court of Common Pleas' dismissal of Plaintiff's Complaint with prejudice.

Respectfully submitted, September 11, 2018

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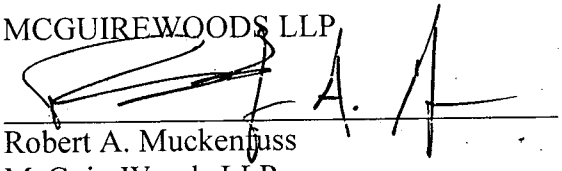
By: 

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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

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

v.

Bank of America National Association .....Respondent.

CERTIFICATE OF RESPONDENT

I certify that the Final Brief of Respondent complies with Rule 211(b) of the South Carolina Rules of Civil Procedure.

September 11, 2018

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