

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

The Honorable R. Keith Kelly, Circuit Court Judge

Case No.: 2017-CP-42-02834
(Appellate Case No. 2018-000568)

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Dec 01 2020

SC Court of Appeals

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

v.

Bank of America, N.A.....Respondent.

**RESPONDENT BANK OF AMERICA, N.A.’S RESPONSE TO APPELLANT’S
MOTION TO ARGUE AGAINST PRECEDENT**

Respondent Bank of America, N.A. (“Respondent”) submits this brief in response to the Motion to Argue Against Precedent (the “Motion”) filed by Appellant Phillip Francis Luke Hughes, on behalf of the Estate of Jane K. Hughes (“Appellant”).

INTRODUCTION

On August 15, 2017, Appellant, on behalf of his mother’s estate, filed a lawsuit against Respondent, alleging that Respondent assessed fraudulent charges to his mother’s banking account from 2006 to 2015. (*See R.* pp. 17–30.) On March 20, 2018, the Court of Common Pleas of South Carolina dismissed Appellant’s complaint on three independent grounds. (*See R.* pp. 1–11.) The lower court held that, because the United States District Court for the District of South Carolina (the “District Court”) previously dismissed Appellant’s allegations, the doctrine of res judicata barred all of Appellant’s claims against Respondent. (*See R.* pp. 4–6.) The lower court also held that all of Appellant’s claims were time-barred. (*See R.* pp. 8–10.) Finally, the lower court

dismissed Appellant's suit because the South Carolina Supreme Court has repeatedly held that fraud-based claims do not survive a person's death. (*See* R. pp. 6–8.) Appellant filed a notice of appeal on March 27, 2018, and oral argument is scheduled for December 7, 2020. (*See* R. pp. 281–82.)

On November 16, 2020, Appellant filed the Motion requesting to present oral argument that this Court should abolish long-standing precedent that excepts fraud-related actions from South Carolina's survival statute. In pursuit of his Motion, Appellant seeks to argue against precedent from the South Carolina Supreme Court dating back to 1941—precedent reaffirmed by this Court in 2008—in order to pursue fraud-based claims on behalf of his mother's estate.

Respondent respectfully requests that the Court deny Appellant's Motion for three reasons. First, Appellant's Motion asks this Court to violate the South Carolina Constitution and overrule long-standing precedent from the South Carolina Supreme Court, which clearly establishes that fraud-related claims do not survive death. Second, absent en banc review, this Court lacks authority to overrule its own precedent from 2008 affirming the fraud exception to the survival rule. Third, because Appellant's claims are independently barred by the doctrine of res judicata and the statute of limitations, this case is not appropriate for the extraordinary relief requested by Appellant's Motion.

ARGUMENT

I. This Court Lacks Constitutional Authority to Overrule South Carolina Supreme Court Precedent

Appellant asks for leave to present oral argument that this Court should overturn binding Supreme Court precedent, which would require the Court of Appeals to exceed its constitutional authority. Accordingly, Appellant's Motion should be denied.

The South Carolina Constitution provides that the “decisions of the Supreme Court shall bind the Court of Appeals as precedents.” S.C. CONST. art. V, § 9 (1985). Thus, where the South Carolina Supreme Court has made the law unmistakably clear, “[the Court of Appeals] has ‘no authority to overrule Supreme Court precedent.’” *Caldwell v. Wiquist*, 402 S.C. 565, 570, 741 S.E.2d 583, 586 (S.C. Ct. App. 2013) (quoting *Blyth v. Marcus*, 322 S.C. 150, 155 n.1, 470 S.E.2d 389, 392 n.1 (S.C. Ct. App. 1996)); *Shea vs. State Dept. of Mental Retardation*, 279 S.C. 604, 608, 310 S.E.2d 819, 821 (S.C. Ct. App. 1983), *overruled on other grounds by McCall by Andrews v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (S.C. 1985).

As a result, this Court has consistently rejected appellants’ efforts to overturn South Carolina Supreme Court precedent. *See, e.g., Caldwell*, 402 S.C. at 570 n.1, 741 S.E.2d at 586 n.1 (denying appellant’s motion to argue that “a line of [South Carolina Supreme Court] cases should be overruled”); *Duval v. Heritage Life Ins. Co.*, 339 S.C. 616, 620, 529 S.E.2d 566, 569 (S.C. Ct. App. 2000) (rejecting appellant’s argument against South Carolina Supreme Court precedent); *Johnston v. Pittman*, 298 S.C. 390, 393, n.1, 380 S.E.2d 850, 852, n.1 (S.C. Ct. App. 1989) (rejecting appellant’s argument against South Carolina Supreme Court precedent despite the fact that “[t]he weight of [authority in other jurisdictions] . . . seem[ed] to be changing”); *M & T Chems., Inc. v. Baker Indus., Inc.*, 296 S.C. 103, 106, 370 S.E.2d 886, 888 (S.C. Ct. App. 1988) (rejecting appellant’s argument for a change in the common law of South Carolina concerning “a matter long thought to have been settled as the law of this state”).

Appellant’s proposed oral argument would seek a reversal of a long line of South Carolina Supreme Court precedent that fraud-based claims do not survive death. *Ferguson v. Charleston Lincoln Mercury, Inc.*, 349 S.C. 558, 563, 564 S.E.2d 94, 97 (S.C. 2002) (“South Carolina case law has continued to recognize a common law exception [to the survivability statute] regarding

causes of action for fraud and deceit.”); *Pamplico Bank & Tr. Co. v. Prossser*, 259 S.C. 621, 625, 193 S.E.2d 539, 540 (S.C. 1972); *Brewer v. Graydon*, 233 S.C. 124, 128, 103 S.E.2d 767, 769 (S.C. 1958); *Mattison v. Palmetto State Life Ins. Co.*, 197 S.C. 256, 15 S.E.2d 117, 119 (S.C. 1941).

Accordingly, Appellant’s proposed Motion is futile because this Court does not have the constitutional authority to overturn well-established Supreme Court precedent. On this basis alone, Appellant’s Motion should be denied.

II. This Court Lacks Authority to Overrule its Own Precedent Absent En Banc Review

Appellant’s Motion also requests leave to argue that this Court should overturn its own precedent, which is not permitted absent en banc review. Accordingly, Appellant’s motion should be denied.

“[The Court of Appeals] sitting as a three judge panel, lacks authority to rule against prior published [Court of Appeals] precedent without en banc review.” *Mr. T v. Ms. T*, 378 S.C. 127, 140 n. 3, 662 S.E.2d 413, 420 n.3 (S.C. Ct. App. 2008) (denying appellant’s motion to argue against South Carolina Court of Appeals precedent). Consistent with the long-standing Supreme Court authority, this Court has likewise held that fraud-related claims do not survive a person’s death. *See Brailsford v. Brailsford*, 380 S.C. 443, 449–50, 669 S.E.2d 342, 345 (S.C. Ct. App. 2008). Accordingly, absent en banc review, the South Carolina Court of Appeals cannot overrule its own precedent established in *Brailsford*.

The Court may sit en banc only upon: “(1) petition by a party filed in accordance with rules promulgated by the Supreme Court if the petition is granted by six judges of the Court; or (2) its own motion agreed to by six judges of the court.” S.C. Code Ann. § 14-8-90(a) (1976). Appellant has failed to file a petition for en banc review in accordance with the South Carolina

Appellate Court Rules, which provide that if a party desires for a matter to be heard initially en banc, the suggestion shall be made in writing and filed not later than twenty days prior to the hearing date. Rule 219(b), SCACR. With oral argument scheduled for December 7, 2020, Appellant has failed to timely file a motion suggesting en banc review.

Nor is this matter appropriate for en banc review. Rule 219(a) of the South Carolina Appellate Court Rules states “a hearing . . . en banc is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance.” Rule 219(a), SCACR. Here, the controlling law is clear, and en banc review is not necessary to maintain uniformity in this Court or to consider a question of exceptional importance. Even if the matter at hand involved a question of exceptional importance, however, this Court cannot overturn South Carolina Supreme Court precedent, whether hearing oral argument by panel or en banc.

Because this Court cannot overrule its own precedent absent en banc review, which has not been requested by Respondent in accordance with the appellate rules and is not appropriate here, Appellant’s Motion should be denied.

III. Appellant’s Claims Are Independently Barred by the Doctrine of Res Judicata and the Statute of Limitations

This Court should also deny Appellant’s Motion because regardless of his success in arguing against binding precedent, his claims against Respondent are independently barred based on the doctrine of res judicata and the statute of limitations. Thus, this is not an appropriate case to consider Appellant’s extraordinary request for relief.

The lower court held that all of Appellant’s claims were barred by the doctrine of res judicata. (*See* R. pp. 4–6.) Indeed, Appellant’s complaint “involves the same parties and is based on the same transaction, same occurrence, and same issues . . . that were previously litigated and

adjudicated by the District Court,” and the claims are barred. (R. p. 4.) Moreover, the lower court held that all of Appellant’s claims were barred by the three-year statute of limitations set by statute and common law for each of Appellant’s claims. (See R. pp. 8–10.)

In light of these independent grounds on which Appellant’s claims are barred, in addition to the fraud exception to the survival statute, this case is not appropriate to consider the merits of Appellant’s arguments against precedent. Therefore, Appellant’s Motion should be denied on this additional basis.

CONCLUSION

Based on the foregoing, Respondent respectfully requests that the Court deny Appellant’s Motion to Argue Against Precedent.

Respectfully submitted, November 30, 2020.

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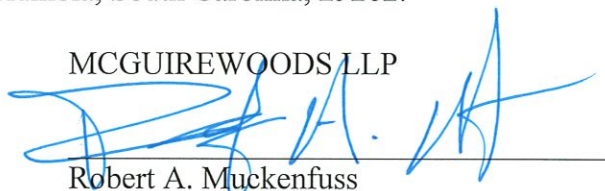
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Bank of America, N.A..... Respondent.

PROOF OF SERVICE

I certify that I have served Respondent's Response to Appellant's Motion to Argue Against Precedent by causing it to be deposited in the United States Mail, postage prepaid, on November 30, 2020, addressed to Brad D. Hewitt, D. Michael Kelly, and Jamie N. Smith, 1523 Huger Street, Suite A, Post Office Box 8113, Columbia, South Carolina, 29202.

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November 30, 2020

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FEDERAL EXPRESS MAIL

The Honorable Jenny Abbott Kitchens
Clerk of Court, SC Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: ***Phillip Francis Luke Hughes, on behalf of the Estate of Jane K. Hughes vs. Bank of America National Association***
Spartanburg County Case Number: 2017-CP-42-02834
Court of Appeals Number: 2018-000568

Dear Ms. Kitchens:

Enclosed, please find the original and six (6) copies of Respondent Bank of America, N.A.'s Response to Appellant's Motion to Argue against Precedent in connection with the above-referenced Court of Appeals case number 2018-000568.

By copy of this letter, I am serving counsel of record for the Appellant via regular mail and electronic mail with a copy of Respondent Bank of America, N.A.'s Response to Appellant's Motion to Argue against Precedent.

I have enclosed a self-addressed stamped envelope for the returned filed copies. Should you require any additional information, please do not hesitate to contact our office. Thank you in advance for your kind consideration in this matter.

Sincerely,
McGuireWoods LLP

Antoine L. Robinson

Antoine L. Robinson, NCCP
Sr. Litigation Paralegal

Enclosures

cc: D. Michael Kelly, Esq. (*via regular mail and email*)
Brad D. Hewett, Esq. (*via regular mail and email*)
Jamie N. Smith, Esq. (*via regular mail and email*)