THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
Case No.: 2017-CP-42-02834

R. Keith Kelly
Circuit Court Judge

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

v.

Bank of America National Association,
Respondent

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on October 20, 2021.

QUESTIONS PRESENTED

1. Should this Court abolish the common law rule excepting fraud-based actions from South Carolina's survival statute?

2. Did the circuit court err in finding that the doctrine of res judicata barred Petitioner's claims?

3. Did the circuit court err in concluding that Petitioner's claims are time barred?

STATEMENT OF THE CASE

This case arose from fraudulent charges made by Respondent against the bank account of John and Jane Hughes. On June 13, 2006, Mr. and Mrs. Hughes opened a line of credit from Respondent 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. (R. p. 18, ¶ 7). At the same time, Mr. and Mrs. Hughes signed an acknowledgement and authorization ("Authorization") which allowed Respondent to automatically draft loan payments from the Hughes's bank account with Respondent. (R. p. 18, ¶ 8).

During the meeting to complete the Mortgage transaction, Respondent presented Mr. and Mrs. Hughes with a document entitled "Optional Line Protection Plan Addendum ("Addendum")." 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. (R. p. 19,

¶ 10). Mr. and Mrs. Hughes both signed a two-page document captioned "OPTIONAL LINE PROTECTION PLAN ADDENDUM ("ADDENDUM")" which stated that Respondent provided them with information on the Line Protection Plan. Jane and John Hughes designated their election to decline the optional Line Protection Plain by clearly and conspicuously checking a box next to the "DECLINE to purchase any Protection on this Credit Line" option. (R. p. 19, ¶ 11).

In June 2006, John Hughes was age 86. (R. p. 19, ¶ 12). He died on October 22, 2008, and left his estate to his wife, Jane K. Hughes. (R. p. 20, ¶ 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 suffered a broken hip after June 2006 that required hospitalization and extensive rehabilitation at a skilled nursing facility and also suffered from impaired cognition, atypical psychosis, confusion, blindness, renal insufficiency, heart failure, and a lack of decisional capacity in the years subsequent to June 2006. (R. pp. 19-20, ¶ 12).

Over six years after Mr. Hughes's death, on or around March 17, 2015, Respondent 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." Although Mr. and Mrs. Hughes never elected to purchase any "Protection Plan," Respondent 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. (R. p. 20, ¶ 17).

In response to an inquiry from a family member of Mrs. Hughes, Respondent 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")." (R. pp. 20, ¶ 18). The eight-page "ADDENDUM" provided by Respondent 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." (R. pp. 20-21, ¶ 18). Respondent 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. (R. p. 21, ¶¶ 19, 20). To date, Respondent has been unable to provide any documentation that Mr. or Mrs. Hughes ever elected or agreed to pay for any "Protection Plan" coverage of any sort. (R. p. 21, ¶ 22).

Thus, although the Hughes unequivocally declined to purchase the Line Protection Plan, Respondent withdrew a monthly charge of $28.40 from their 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. (R. p. 21, ¶ 23). Notably, all other charges from Respondent 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"). (R. p. 21, ¶ 24). Further, none of the numbers in the Line Protection Plan transaction description were related to the Hughes's mortgage or line of credit. (R. p. 21, ¶ 25).

As neither Mr. nor Mrs. Hughes had elected Line Protection Plan coverage or had received any notice that Respondent 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 charge by Respondent generally or a "Line Protection Plan" charge specifically until receiving the March 2015 notices from Respondent. (R. p. 22, ¶ 26). Adding insult to the Hughes' injury, upon receiving notice of Mr. Hughes's death, on May 6, 2015, Respondent 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)." (R. p. 22, ¶ 27). Respondent has also refused to refund the payments drawn during Mr. Hughes's lifetime despite being unable to produce any documentation supporting the purported election to enroll in the Line Protection Plan. (R. p. 22, ¶ 28).

On June 3, 2015, Jane K. Hughes passed away, and Petitioner Phillip Francis Luke Hughes was subsequently named as personal representative of her estate. (R. p. 22, ¶ 29). Petitioner 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, Respondent filed a Motion to Dismiss pursuant to SCRCP Rule 12(b)(6).

Prior to initiating the present action, Petitioner filed a putative class action lawsuit in 2015 against Respondent for violation of the Truth in Lending Act, fraud, fraudulent concealment, breach of contract, and breach of contract accompanied by fraudulent acts. Respondent removed the 2015 action to federal court and filed a motion to dismiss in lieu of an answer. Before the District Court decided Respondent's motion, Petitioner stipulated to the dismissal, without prejudice, of all claims against Respondent *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.

Petitioner 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 South Carolina Rules of Appellate Practice, Rule 244(a). (R. p. 44, lines 1-25).

Respondent moved to dismiss Petitioner'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 circuit court granted Respondent's motion, finding the actions barred by *res judicata*, the statute of limitations, and S.C. Code Ann. § 15-5-90. (R. pp. 1-11). Petitioner filed a timely Notice of Appeal on March 27, 2018, challenging the circuit court's dismissal of the fraud-based claims alleged in Petitioner's 2017 Complaint. (R. pp. 281-282). On March 29, 2018, Respondent filed a Motion for Sanctions against counsel for Petitioner, 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.

After oral argument, the Court of Appeals affirmed the circuit court's ruling dismissing Petitioner's action based on the state's fraud statute. The Court of Appeals declined to address the circuit court's rulings that Petitioner's claims were barred by *res judicata* and the statute of limitations. The Court of Appeals denied Petitioner's Petition for Rehearing in an Order dated October 20, 2021. Petitioner seeks a Writ of Certiorari to review that decision.

ARGUMENTS

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

The Court should grant this Petition for Writ of Certiorari because Petitioner's fraud-based claims were dismissed, in part, based upon a court-created exception to the South Carolina survival statute which excludes fraud as a surviving cause of action. Petitioner requests the Court abolish this arbitrary exception as it is in direct conflict with the survival statute and serves no public purpose in situations, as here, where fraud is targeted at elderly citizens. To the contrary, the exception provides an *incentive* to prey on elderly South Carolina citizens because they are less likely to be able to obtain relief for the frauds inflicted upon them.

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*. 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).

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[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.

Despite the instruction by the *Mattison* Court to liberally interpret the survival statute, courts have mistakenly given narrow interpretation to 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 Respondent from Jane Hughes constitutes 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.

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 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.");

[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).

Brailsford v. Brailsford, 380 S.C. 443, 449, 669 S.E.2d 342, 345 (Ct. 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 survival 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. Petitioner, therefore, invites this Court to reexamine this question of the survivability of fraud, determine the viability of the 1941 *Mattison* analysis, and to extinguish the wrongly created exception so as to reconcile the common law with the survival statute.

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 Respondent. 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. Such a review is especially needed as current technology is fraught with traps for even those with the keenest senses and familiarity with that technology.

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 Respondent began withdrawing the fraudulent, unauthorized charges from her account and she 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 (http://documents.truelinkfinancial.com/True-Link-Report-On-Elder-Financial-Abuse-012815.pdf.) Fraud and financial abuse cost 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, much financial exploitation is accomplished through deception that does not quite rise to a criminal level, leaving only a civil remedy 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, well known to fraudsters, often 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 survival statute is long overdue for review in light of electronic phishing, data mining, electronic databases, and targeted advertising, and Petitioner asks this Court to initiate that reevaluation.

iii. Survivability of fraud in other jurisdictions.

South Carolina appears to be 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).

With the vast majority of states allowing a fraud action to survive death, and to reconcile South Carolina common law with a survival statute that does not prohibit Petitioner's claims, Petitioner respectfully requests this Court to abolish the common law rule excepting fraud-based actions from South Carolina's survival statute.

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.

The District Court lacked jurisdiction to either overturn *Mattison* or certify the question of whether fraud survives to the South Carolina Supreme Court, thus 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 Petitioner'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*.

Petitioner 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 statute 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 Petitioner's remaining state law 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 Petitioner's claims of fraud. Likewise, under South Carolina Appellate Court Rule 244(a), 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,* SCACR 244(a).

Consequently, the District Court lacked any jurisdictional mechanism under which it might decide Petitioner's challenge to the fraud exception to survivability. Requiring Petitioner 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. Because the issue of survivability could not have been raised in the prior proceeding in any meaningful capacity, Petitioner'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; 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 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 (Ct. App. 1997).

Restatement (Second) of Judgments § 26 provides that an 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). Section 26 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.)

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. Petitioner, in fact, originally sought to pursue the initial lawsuit as a class action so as to protect the interests of similarly situated parties. Petitioner 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 Petitioner'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, Petitioner respectfully asks this Court to reverse the circuit court's finding that *res judicata* acts to bar the fraud-based claims.

III. THE CIRCUIT COURT ERRED IN CONCLUDING THAT PETITIONER'S CLAIMS ARE TIME-BARRED.

Finally, the circuit court, in error, opined that Petitioner'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 Respondent's Motion to Dismiss demonstrates the circuit court's failure to view the facts as set forth in the complaint, or derive inferences therefrom, in the light most favorable to Petitioner as the non-moving party. Accordingly, Petitioner asks this Court to review the matter, *de novo*, and apply the appropriate standard of review in finding that Petitioner's claims are not time-barred.

A. Statute of Limitations

In its discussion of the issue of whether Petitioner's claims are barred by fraud's three-year statute of limitations, the circuit 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. (R. p. 9). In essence, the circuit 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 circuit 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 court's finding of fact, including:

- As of June 2006, Jane Hughes was 85 years old and John Hughes was 86 years old. (R. p. 19, ¶ 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, atypical psychosis, confusion, blindness, renal insufficiency, and heart failure, and was noted to lack decisional capacity in the years leading up to her death. (R. pp. 19-20, ¶ 12).

- The Line Protection Plan premium did not appear on the mortgage finance charge disclosed to Mr. and Mrs. Hughes in 2006. (R. p. 21, ¶ 20). Before March 2015, Respondent did not provide any statement, notice, or communication of any sort to Mrs. Hughes revealing that Respondent 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. (R. p. 21, ¶ 21).

- The charges surreptitiously made to the Hughes account by Respondent were ambiguously listed and appeared amid numerous other monthly charges. (R. p. 21, ¶ 23). All other charges from Respondent 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. (R. p. 21, ¶ 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 notice. *See, Burgess v. American Cancer Soc., South Carolina Div., Inc.,* 300 S.C. 182, 386 S.E.2d 798, 789 (Ct. App. 1989). The discovery rule requires this Court to examine when Petitioner's cause of action accrued; this issue of fact was improperly examined by the circuit court and decided at the pleadings stage. Viewing the facts as alleged in the pleadings in the light most favorable to Petitioner, the statute of limitations began to run in March 2015 upon receiving a notice from Respondent of charges to Jane Hughes' account for an unselected, optional mortgage service. Accordingly, the circuit court erred in determining that Petitioner's fraud-based causes of action began to accrue in June 2006.

B. Equitable Tolling

Even if the circuit court properly determined that Petitioner'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 Petitioner, the statute of limitations should be equitably tolled until March 2015 when Mrs. Hughes received a notice from Respondent regarding the cancellation of a service that she expressly declined.

First, the circuit court's Order suggests that, under the doctrine of *res judicata,* Petitioner is barred from asserting the doctrine of equitable tolling in relation to the fraud-based claims brought in state court, because the District Court determined that other claims raised by Petitioner in a prior suit were not tolled under the federal application of the doctrine. (R. p. 5). As set forth in Section II, *infra*, however, *res judicata* does not bar Petitioner from bringing his fraud-based claims in state court. Likewise, *res judicata* does not prevent Petitioner from asserting that, based on South Carolina's standard of application of the doctrine of equitable tolling, Petitioner's claims should be equitably tolled. The District Court never ruled on any issue pertaining to Petitioner'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 Petitioner'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, Petitioner lacked standing to raise an equitable tolling argument before the District Court as it might pertain to the claims of fraud. In order for Petitioner 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 Petitioner's favor. Because the District Court could not make a determination on the survivability issue, the circuit court erred in finding that the

District Court's Order nonetheless serves as an adjudication of the issue of whether Petitioner's fraud-based claims are time-barred.

The federal standard applied by the District Court in determining whether Petitioner'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." (R. p. 15). South Carolina's stance on equitable tolling, however, is more lenient than that of the federal courts and, in order to determine whether Petitioner's fraud-based state law claims are tolled, the circuit 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 circuit court cited to the "extraordinary circumstances" language in *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.

(R. pp. 9-10). The assertions in the circuit court's opinion demonstrate the court's failure to view all of the facts alleged in the complaint. The allegations are that Respondent—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. Respondent initiated and maintained 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." (R. pp. 23-24, ¶ 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.

In sum, the circuit court, by failing to take into account any of the facts favorable to Petitioner 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. (R. p. 9). The circuit court failed to apply the appropriate standard of review and improperly determined an issue of fact for the jury. The circuit 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

Based on the foregoing, Petitioner requests the Court grant the Petition for a Writ of Certiorari and abolish the common law rule wrongly excepting fraud-based actions from the survival statute. Further, Petitioner requests the Court reverse the circuit court's rulings that Petitioner's claims are barred by *res judicata* and the statute of limitations.

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November 16, 2021

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.

PROOF OF SERVICE

The undersigned, attorneys in this matter for the Appellant, certify that we have this 16th day of November 2021, served copies of the PETITION FOR A WRIT OF CERTIORARI upon counsel of record for the Respondent by causing them to be deposited in the United States mail, first class postage paid addressed to Robert A. Muckenfuss/Elizabeth M.Z. Timmermans, 201 N. Tryon Street, Suite 3000, Charlotte, NC 28202 and 434 Fayetteville St. Suite 2600, Raleigh, NC 27601.

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