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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
The Honorable R. Keith Kelly

Supreme Court Case No. 2021-001339
Appellate Case No. 2018-000568
Case No.: 2017-CP-42-02834

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

v.

Bank of America, National Association…….Respondent.

RESPONDENT'S RETURN TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

Phillip Hughes ("Petitioner") brings his Petition for writ of certiorari (the "Petition"), asking this Court to revive his claims against Bank of America, N.A. ("BANA") that have been dismissed in both federal and state court. Petitioner can only succeed on his Petition if this Court overturns 80 years of its precedent holding that fraud-based claims do not survive death. But even then, Petitioner's claims fail on multiple other grounds: the doctrine of *res judicata* bars every claim, a three-year statute of limitations bars every claim, and the language of the South Carolina Unfair Trade Practices Act (SCUTPA)—prohibiting claims brought in a representative capacity—bars his SCUTPA claim. Thus, even if Petitioner succeeded in convincing this Court to reject its long-standing precedent interpreting South Carolina's survival statute, each claim still fails. As a result, the Petition should be denied.

In 2015, Petitioner sued BANA on behalf of his mother's estate, alleging that BANA had charged his parents beginning in 2006 for an insurance product they had declined, asserting numerous claims, including fraud-based claims (the "Federal Lawsuit"). Petitioner voluntarily dismissed the fraud-based claims, acknowledging that they did not survive the death of his parents under South Carolina's survival statute. The federal court granted BANA's motion to dismiss the remaining claims in 2017, finding them to be time-barred and declining to apply equitable tolling.

During the federal appeal process, Petitioner sued BANA in the South Carolina Court of Common Pleas (the "Circuit Court"), asserting nearly identical factual allegations as the Federal Lawsuit. Petitioner revived certain of the previously dismissed fraud-based claims and asserted new claims based on the same allegations. Petitioner conceded to the Circuit Court that the fraud-based claims were barred by long-standing precedent of this Court but represented that he sought reversal of South Carolina's survivorship law.

The Circuit Court dismissed Petitioner's action on multiple grounds, holding that: (1) the fraud-based claims did not survive the death of Petitioner's parents; (2) a SCUTPA claim cannot be brought in a representative capacity; (3) all of the claims were barred by the doctrine of *res judicata*; and (4) all of the claims were time-barred and were not subject to equitable tolling. The South Carolina Court of Appeals (the "Court of Appeals") affirmed, finding the claims barred by the survival statute.

Petitioner now seeks review by this Court. The Petition should be denied for five independent reasons:

- First, this case does not satisfy any of factors found in Rule 242 of the South Carolina Appellate Court Rules (SCACR). Petitioner does not argue otherwise.
- Second, the Petition improperly requests that this Court overturn 80 years of precedent regarding the survival statute—a job now reserved for the South Carolina Legislature (the "Legislature").
- Third, Petitioner's claims are all barred by the doctrine of *res judicata*.
- Fourth, Petitioner's claims are all barred by the applicable statutes of limitation.
- Fifth, Petitioner's SCUTPA claim cannot be asserted in a representative capacity.

Accordingly, the Petition should be denied.

COUNTER-QUESTIONS PRESENTED

I. Does Petitioner meet the factors contained in Rule 242 of the South Carolina Appellate Court Rules? (No.)

II. Should this Court abolish 80 years of its precedent holding that fraud-based claims do not survive death, a position deemed to be accepted by the Legislature? (No.)

III. Did the Circuit Court err in ruling that the doctrine of *res judicata* bars Petitioner's claims because they arise out of the same transaction and occurrence as the Federal Lawsuit? (No.)

IV. Did the Circuit Court err in ruling that Petitioner's claims are untimely under a three-year statute of limitations? (No.)

V. Did the Circuit Court err in ruling that Petitioner's SCUTPA claim cannot be brought in a representative capacity pursuant to S.C. Code Ann. § 39-5-140(a)? (No.)

STATEMENT OF THE CASE

A. Plaintiffs' Allegations

Petitioner, as personal representative of the estate of his mother, Jane Hughes, alleges that his late parents obtained 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.*) Petitioner claims that on June 13, 2006, BANA presented his parents with policy documentation concerning optional line protection insurance coverage ("LPP") for the line of credit. (R. p. 19, ¶ 11.) The LPP insurance enables borrowers to cancel some or all of the monthly payments on the variable portion of a line credit due to events like disability, accidental death, or involuntary unemployment. (*Id.*) Petitioner claims that his parents declined to purchase the LPP coverage. (*Id.*)

Petitioner claims that "for several years," BANA drafted a monthly charge of $28.40 from his parents' bank account for LPP coverage that was listed on their monthly account statements as "Ad Insurance." (R. p. 21, ¶ 23.) In 2015, John Hughes' estate notified BANA that Mr. Hughes had passed away seven years earlier. (R. p. 22, ¶ 27.) BANA then refunded all LPP premium payments drawn on the Hugheses' account after the death of Mr. Hughes. (R. p. 95, ¶ 30.) In June 2015, Mrs. Hughes also passed away, and Petitioner was named as personal representative of her estate. (R. p. 22, ¶ 29.)

B. The Federal Lawsuit

Following the death of Mrs. Hughes, in November 2015, Petitioner filed a putative class action on behalf of his mother's estate. (R. pp. 74–88.) In a Third Amended Complaint filed in the United States District Court for the District of South Carolina (the "Federal Court"), Petitioner alleged that the LPP charges 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 violations of the federal Truth in Lending Act (TILA). (R. pp. 99–105.)

BANA filed a motion to dismiss all of the claims on multiple grounds, including an argument that the fraud-based claims did not survive Mrs. Hughes' death. Prior to the Federal Court's ruling, Petitioner voluntarily dismissed his claims for 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.)

The Federal Court granted BANA's motion to dismiss the remaining claims, holding that the breach of contract and TILA claims were time-barred. (R. p. 126.) The Federal Court declined to apply equitable tolling because Petitioner alleged 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 United States Court of Appeals for the Fourth Circuit ("Fourth Circuit") affirmed "for the reasons stated by the district court." (R. p. 133.) The Supreme Court of the United States denied certiorari. *Hughes on Behalf of Est. of Hughes v. Bank of Am. Nat. Assn.*, 138 S. Ct. 935, 200 L. Ed. 2d 204 (2018).

C. The State Lawsuit

In 2017, Petitioner sued BANA again, asserting almost identical factual allegations as in the Federal Lawsuit: his parents declined the LPP coverage, and while the charge was listed on their monthly statements, they were unaware of the charges. (R. p. 19, ¶¶ 9–11.) Based on these allegations, Petitioner re-asserted the claims for fraud, fraudulent concealment, breach of contract accompanied by fraudulent acts that he had dismissed from the Federal Lawsuit and also asserted claims for violations of the SCUTPA, breach of fiduciary duty, and conversion. (R. pp. 22–29, ¶¶ 30–70.) Petitioner also asserted a statutory survival cause of action in an effort to enforce the six substantive causes of action. (R. p. 29, ¶¶ 71–74.)

BANA filed a motion to dismiss for failure to state a claim, and the Circuit Court granted BANA's motion on "several grounds": (1) Petitioner's fraud-based claims did not survive the death of his parents; (2) Petitioner's SCUTPA claim could not be asserted in a representative capacity, per S.C. Code Ann. § 39-5-140(a); (3) all of Petitioner's claims were barred by the doctrine of *res judicata*; and (4) all of Petitioner's claims were barred by the applicable statutes of limitations and not subject to equitable tolling. (R. pp. 4–10.) Petitioner appealed. (R. pp. 281–82.)

The Court of Appeals affirmed, finding that the Circuit Court "properly dismissed the action based on the state's fraud statute."[1] *Hughes on Behalf of Est. of Hughes v. Bank of Am. Nat'l Ass'n*, No. 2018-000568, 2021 WL 4449593, at *2 (S.C. Ct. App. Sept. 29, 2021), *reh'g denied* (Oct. 20, 2021). Petitioner filed a Petition for Rehearing, which the Court of Appeals denied, stating it was "unable to discover that any material fact or principle of law has been either

[1] Petitioner concedes that dismissal of the conversion and breach of fiduciary duty claims was proper and thus limited his appeal to "challenging the lower court's dismissal of the fraud-based claims alleged in Appellant's 2017 Complaint." Exhibit 3, Hughes Br. 7. To the extent Petitioner contends those claims are included in his appeal, they fail for all of the reasons discussed herein.

overlooked or disregarded, and hence, there is no basis for granting a rehearing." *See* Exhibit 1, Pet. for Rehearing; Exhibit 2, Order Denying Pet. for Rehearing. This Petition followed.

ARGUMENT

The Petition does not meet the requirements of certiorari review, and each of Petitioner's claims is barred for at least three independent reasons. As a result, BANA respectfully requests that this Court deny the Petition.

I. THE PETITION DOES NOT MEET THE REQUIREMENTS FOR THE EXTRAORDINARY RELIEF OF CERTIORARI REVIEW

The Petition does not satisfy the grounds for certiorari review enumerated by Appellate Rule 242, and Petitioner does not argue otherwise. "A writ of certiorari is an extraordinary form of relief[,] . . . reserved for extraordinary situations or circumstances, and is granted sparingly" only in the absence of other effective relief. *Rowe v. City of W. Columbia*, 334 S.C. 400, 407, 513 S.E.2d 379, 383 (Ct. App. 1999); *see also In re Breast Implant Prod. Liab. Litig.*, 331 S.C. 540, 543 n.2, 503 S.E.2d 445, 447 n.2 (1998) (noting that this Court "will not generally accept matters on a writ of certiorari that can be entertained in the trial court or on appeal").

The factors this Court considers when deciding whether to grant a petition for certiorari include: (1) whether a case involves novel questions of law; (2) whether there was a dissent in the Court of Appeals decision; (3) whether the Court of Appeals decision conflicts with a prior decision of the Supreme Court; (4) whether substantial constitutional issues are involved; (5) whether the decision of the Court of Appeals conflicts with a decision of the Supreme Court of the United States related to federal questions. SCACR, Rule 242.

This case does not present any novel questions of law. To the contrary, Petitioner seeks to abolish 80 years of precedent because he cannot assert a viable claim under existing South Carolina law. *See Mattison v. Palmetto State Life Insurance Co.*, 197 S.C. 256, 15 S.E.2d 117, 119 (1941).

The Court of Appeals unanimously affirmed the Circuit Court's decision, applying precedential case law from this Court. *Hughes on Behalf of Est. of Hughes v. Bank of Am. Nat'l Ass'n*, No. 2018-000568, 2021 WL 4449593 (Ct. App. Sept. 29, 2021), *reh'g denied* (Oct. 20, 2021). This case also does not involve any constitutional issues. *See Faircloth v. Finesod*, 938 F.2d 513, 517 (4th Cir. 1991) (holding that the survival statute is constitutional, stating that "[t]he South Carolina courts have simply construed the statute."). This is particularly true where the Circuit Court dismissed every claim on additional, independent bases: applying the doctrine of *res judicata* and the applicable three-year statutes of limitations to all claims and following the statutory directive barring SCUTPA claims brought in a representative capacity. As to the final prong of Appellate Rule 242, there are no federal questions at issue in Petitioner's claims.

When reviewing a case on a writ of certiorari, this Court must "confine its review to the correction of errors of law only, and will not review the findings of fact of an inferior Court . . . except when such findings are wholly unsupported by the evidence." *S.C. Bd. of Examiners in Optometry v. Cohen*, 256 S.C. 13, 18, 180 S.E.2d 650, 652 (1971); *Laffitte v. Bridgestone Corp.*, 381 S.C. 460, 472, 674 S.E.2d 154, 161 (2009) ("On certiorari, review by the Court is confined to the correction of errors of law."). Here, the dismissal was based on the facts alleged by Petitioner; thus, there were no factual findings "wholly unsupported by the evidence." *Cohen*, 256 S.C. at 18, 180 S.E.2d at 652. Furthermore, the Petition does not identify any arguments that the lower courts failed to consider in reaching their decisions. Rather, the Petition repeats the same unsupported arguments rejected in both federal and state courts. Those arguments should be rejected once again for the reasons set forth below.

Because the Petitioner has failed to establish that he is entitled to the extraordinary relief requested, this Petition should be denied.

II. SOUTH CAROLINA LAW IS CLEAR THAT FRAUD-BASED CLAIMS DO NOT SURVIVE DEATH

The Petition should be denied because it improperly seeks to overturn well-settled South Carolina law. For the past 80 years, this Court has consistently upheld *Mattison*, a case in which this Court interpreted the language of South Carolina's survival statute and held that the Legislature did not intend for fraud-based claims to survive death. 197 S.C. 256, 15 S.E.2d 117, 119 (1941). That decision and its progeny are grounded in sound public policy, and the Legislature has not altered or amended the survival statute since *Mattison*, evidencing its agreement with this Court's interpretation. Furthermore, the issue of whether *Mattison* should be overturned is not a dispositive issue in this case since all of Petitioner's claims are independently barred for multiple other reasons.

a. The law in South Carolina has been clear and unchanged for almost 80 years.

The Petition should be denied because, rather than involving a novel question of law, it asks this Court to abolish 80 years of precedent expressly holding that fraud-based claims *do not* survive 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); *Brewer v. Graydon*, 233 S.C. 124, 128, 103 S.E.2d 767, 769 (1958) ("[A]ctions for . . . fraud and deceit do not survive[.]"); *Ferguson v. Charleston Lincoln Mercury, Inc.*, 349 S.C. 558, 565, 564 S.E.2d 94, 97–98 (2002) ("Allegations of fraud and deceit . . . do not survive the plaintiff's death. Accordingly, we hold that Mr. Ferguson's cause of action did not survive his death."); *Tilley v. Pacesetter Corp.*, 355 S.C. 361, 377, 585 S.E.2d 292, 300 (2003) (noting that claims for fraud and deceit do not survive death under the survival statute); *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."); *Hughey v. Mooney*, 282 S.C. 597, 600, 320 S.E.2d 475, 476 (Ct. App. 1984) ("[T]he cause of action would not have survived her death under the survival statute. This is consistent with the settled law in South Carolina that a cause of action for fraud does not survive.").

The *Mattison* Court analyzed South Carolina's survival statute and held that the Legislature did not intend for fraud-based claims to survive the allegedly defrauded person's death. *Mattison*, 197 S.C. 256, 15 S.E.2d at 119. Specifically, this Court held:

> "While the [survivability statute] is remedial, and a liberal construction should be given to its provisions[,] . . . we must resort, in arriving at the intent of the Legislature to the actual words used in the statute, and the court should not place such judicial construction upon the language used as to effectuate its own conception of right rather than the intent of the Legislature."

Id. (quoting *Claussen v. Bros.*, 148 S.C. 1, 145 S.E. 539, 540 (1928)). The *Mattison* Court further held that, based on the statute's language, "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." *Id.*

In 2002, this Court revisited the survivability statute and reaffirmed *Mattison* in a case involving fraud-based allegations by an estate against a car dealership. *Ferguson*, 349 S.C. at 363–64, 564 S.E.2d at 97–98. The *Ferguson* 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. (finding that claims brought under the Regulation of Manufacturers, Distributors, and Dealers Act did not survive the person's death because the claims were based on fraud and deceit).

Contrary to Petitioner's assertion that this Court has created a common-law exception to the survival statute leading to "decades of precedent founded in error," the *Mattison* Court engaged in statutory interpretation and concluded that fraud-based claims do not fall within the scope of South Carolina's survival statute. *See Mattison*, 197 S.C. 256, 15 S.E.2d at 119; *Faircloth*, 938 F.2d at 517 ("South Carolina courts have simply construed the [survival] statute."). Indeed, this Court's role is to construe statutes enacted by the Legislature: "The responsibility for the justice or wisdom of legislation rests with the Legislature, and it is the province of the courts to construe, not to make, the laws." *Hatchett v. Nationwide Mut. Ins. Co.*, 244 S.C. 425, 431, 137 S.E.2d 608, 611 (1964). "The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature." *Bryant v. State*, 384 S.C. 525, 529, 683 S.E.2d 280, 282 (2009). "All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute." *State v. Sweat*, 386 S.C. 339, 351, 688 S.E.2d 569, 575 (2010) (citation omitted).

Furthermore, it is now clear that the Legislature agrees with the interpretation in *Mattison* as the survival statute remains essentially unchanged. "The Legislature is presumed to be aware of this Court's interpretation of its statutes" and as a result, "[w]hen the Legislature fails over a forty-year period to alter a statute, its inaction is evidence the Legislature agrees with this Court's interpretation." *Wigfall v. Tideland Utilities, Inc.*, 354 S.C. 100, 111, 580 S.E.2d 100, 105 (2003); *see Nationwide Mut. Fire Ins. Co. v. Walls*, 433 S.C. 206, 215, 858 S.E.2d 150, 154 (2021), *reh'g denied* (June 3, 2021) ("[I]n reaching this decision, we find it significant that the General Assembly

has not amended section 38-77-142 since this Court decided *Williams* in 2014"); *York v. Longlands Plantation*, 429 S.C. 570, 576, 840 S.E.2d 544, 547 (2020) (finding the General Assembly's "silence over the past seven decades" important); *Berkebile v. Outen*, 311 S.C. 50, 53, 426 S.E.2d 760, 762 (1993) (finding the fact that "the General Assembly has not provided a statutory modification" is "evidence that the legislature has chosen not to change" the statute).[2]

As a result, to the extent that Petitioner wants to change the survival statute, he should petition the Legislature—not this Court—and his Petition should be denied.

b. This Court's interpretation of the survival statute remains grounded in sound policy.

Petitioner's public policy arguments are irrelevant because amending the scope of the survival statute to encompass fraud-based claims must be done by the Legislature. *See Kubic v. MERSCORP Holdings, Inc.*, 416 S.C. 161, 170, 785 S.E.2d 595, 600 (2016) ("However laudable the interest in protecting the public index may be, our limited role here is discerning legislative intent from the statutory text. If Respondents are dissatisfied with the powers the legislature has outlined for them, that should be taken up with the General Assembly. It is not the province of this Court to legislate or imply remedies not specified by the legislature."). However, even if this Court considers the Petition's policy arguments, there are sound policy reasons for excluding fraud-based claims from South Carolina's survival statute. For example, as the Fourth Circuit explained: "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

[2] *See also Brewer*, 233 S.C. at 127–28, S.E.2d at 768–69 (finding the Legislature did not intend to include claims for slander among those in which the statutory remedy by attachment might be resorted because the statute, which was enacted at a time when it was well-settled law that an attachment could not be issued in an action for slander, did not specifically include claims for slander); *Morse v. Adams*, 2 S.C. 56, 58 (1870) (stating that where the court had ruled the same way for the past sixty years, "[i]t would require circumstances of strong and controlling character to induce us to reverse a rule so long existing . . . which the Legislature, by its silence, and the Bar, by its acquiescence, have approved").

relying) and the perpetrator are especially vital." *Faircloth*, 938 F.2d at 517. 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.*

These principles have been codified in other contexts. For example, 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. Rule 9(b), SCRCP; S.C. Code Ann. § 39-5-140(a); *see also Carver v. Morrow*, 213 S.C. 199, 202–03, 48 S.E.2d 814, 816 (1948) (explaining why claims for libel do not survive death, "A personal action *ex delicto* dies with the person," and "the injured party has no redress whatsoever in the courts, the cause of action being buried along with the decedent.").

These justifications are in force in this case. Contrary to Petitioner's contention that the Hugheses' state of mind is readily identifiable, it would be impossible to prove their state of mind regarding the LPP product and charges without the benefit of their deposition testimony and other personal discovery. The Hugheses—not the Petitioner—were the ones who Petitioner alleged participated in the June 2006 transaction, signed various paperwork, and spoke to BANA employees. Even after the transaction, the Hugheses—and not Petitioner—received the bank statements reflecting the LPP charges each month and yet did nothing. Assuming that Petitioner could identify a fraudulent statement, BANA would be unable to defend itself in the litigation to determine whether Petitioner's parents knew that the statement was false, relied upon the statement, and/or were justified such reliance. Crucial evidence in a fraud case is irretrievably lost when an alleged victim passes away.[3]

[3] Petitioner's argument that overturning precedent to allow fraud-based claims to survive death is necessary to curb financial exploitation of the elderly is a red herring. As Petitioner well knows, other causes of action were available to him after his parents' passing (indeed, Petitioner sued BANA for other causes of action in 2015), but the claims were deemed untimely as opposed to barred by the survival statute.

Because there is sound policy support for this Court's consistent interpretation of the survival statute, BANA respectfully asks this Court to decline certiorari review.

c. The Petition should be denied because all claims fail for other reasons.

The Petition should also be denied because Petitioner's challenge to the survival statute is not dispositive of the case, as all of the claims still fail on multiple other grounds. While the Court of Appeals affirmed dismissal based on the South Carolina survival statute, the Circuit Court dismissed each claim for numerous reasons. As a result, this Court need not even address the issue of the survival statute on appeal. (R. pp. 4–10). *See* Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision, or judgment upon any ground(s) appearing in the Record on Appeal."); Rule 208(b)(2), SCACR ("Respondent's brief may also contain argument asking the court to affirm for any ground appearing on the record as provided by Rule 220(c)); *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (citing *Whiteside v. Cherokee Cty. Sch. Dist. No. One*, 311 S.C. 335, 340, 428 S.E.2d 886, 889 (1993) for the proposition that an "appellate court need not address remaining issues when disposition of prior issue is dispositive"). Here, Petitioner's challenge to the survival statute would have no effect upon the case because Petitioner's claims are independently barred under multiple other grounds, and the Petition should be denied. *See infra* Sections III–V.

* * *

BANA respectfully requests that this Court deny the Petition because this Court's long-standing precedent interpreting South Carolina's survival statute has not been modified by the Legislature and is based on sound policy grounds. Furthermore, Petitioner's claims are independently barred on other grounds, making overturning the long-standing precedent unnecessary to this case.

III. THE CIRCUIT COURT CORRECTLY RULED THAT THE DOCTRINE OF *RES JUDICATA* BARS ALL OF PETITIONER'S CLAIMS

All of Petitioner's claims were or could have been asserted in the prior Federal Lawsuit and are therefore barred by the doctrine of *res judicata*. Therefore, BANA respectfully requests that this Court deny the Petition.

a. *Res judicata* bars all of Petitioner's claims.

The Petition should be denied because the matter at hand is exactly what the doctrine of *res judicata* exists to prevent. The Circuit Court did not err in finding that *res judicata* bars each of Petitioner's claims. (R. p. 5.) Indeed, in Petitioner's brief to the Court of Appeals, Petitioner conceded that he ***"d[id] not dispute the lower court's determination that the present action is based upon the same transaction or occurrence as matters previously adjudicated"*** in Federal Court. *See* Exhibit 3, Hughes Br. 19; Pet. 14–17. This admission alone is dispositive of the case.

"*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 issues in the former suit." *Id.* As Petitioner acknowledges, the third element, requiring adjudication, includes "any issues which might have been raised in the former suit." *Id.*; Pet. 14.

First, there is no dispute that the identity of the parties is identical. In both actions, Petitioner sued BANA in a representative capacity on behalf of his mother's estate. (R. pp. 17, 90.)

Second, Petitioner concedes that the subject matter of the two lawsuits is identical. *See* Exhibit 3, 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."); *see also* Pet. 14 (arguing only that the third element, requiring adjudication is not satisfied). In fact, the Federal Lawsuit and this case overlap so much that the majority of factual allegations are identical. *Compare* R. pp. 17–30 *with* R. pp. 89–106. Both cases allege that in the June 2006 transaction the Hugheses declined to buy LPP, yet were charged monthly for the next nine years. (R. pp. 21, 94–95.)

Third, the subject matter was adjudicated in the Federal Lawsuit. The Federal Court dismissed all of Petitioner's claims with prejudice following full briefing on BANA's Motion to Dismiss. (R. p. 123.) Petitioner appealed to the Fourth Circuit and Supreme Court of the United States and lost. (R. pp. 129–33); *Hughes on Behalf of Est. of Hughes v. Bank of Am. Nat. Assn.*, 138 S. Ct. 935, 200 L. Ed. 2d 204 (2018) (denying petition for writ of certiorari).

Every cause of action contained in the Petition here "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 Petitioner brought and then later voluntarily dismissed identical fraud claims in the Federal Lawsuit, after acknowledging that those claims did not survive under South Carolina law. (R. pp. 120–21.) All of the claims about which Petitioner now seeks certiorari review were available to Petitioner in 2015, and he is not permitted to file multiple lawsuits because he believes this forum may be a better for certain claims. *See, 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. Petitioner's voluntary dismissal of certain claims in the Federal Lawsuit because he expected to lose does not provide an exception to the doctrine of *res judicata*.

Petitioner voluntarily dismissed his fraud-based claims in the Federal Lawsuit because he expected to lose on those claims. Anticipating a loss is not an exception to the doctrine of *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. Int. 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 Int. Found. v. Greenville Cty.*, 401 S.C. at 390, 737 S.E.2d at 509 (finding that none of the enumerated exceptions from the RESTATEMENT (SECOND) OF JUDGMENTS § 26 were applicable to plaintiff's claim, and therefore, the claims were barred).

Petitioner's argument that "formal barriers" existed in the prior lawsuit because the Federal Court did not have subject matter jurisdiction over the fraud-based claims is simply incorrect. Pet. 16–17 (citing RESTATEMENT (SECOND) OF JUDGMENTS § 26(c)). Federal courts can and do hear state fraud claims all the time, and the Federal Court could have heard Petitioner's fraud-based claims in the Federal Lawsuit if Petitioner had not dismissed them. It was Petitioner who decided to bring a TILA claim, providing the Federal Court with federal question subject matter jurisdiction over his TILA claim and supplemental jurisdiction over the remaining 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). Accordingly, there were no "formal barriers" in the first suit that prevented Petitioner "from presenting to a court in one action his entire claim" which would make it "unfair to preclude him from [bringing] a second action" as the exception requires. RESTATEMENT (SECOND) OF JUDGMENTS § 26 cmt. c (1982). That Petitioner dismissed his claims

because he knew he would lose and could not seek a certified question because of binding precedent barring his claims does not create an exception to the doctrine of *res judicata*.

Similarly, Petitioner's reliance on Section 28, Comment (e) of the Second Restatement, which addresses exceptions to issue preclusion, is misguided. The comment explains that a grant of exclusive jurisdiction of a specific issue—like the validity of a patent—could act as an exception to the operation of issue preclusion. RESTATEMENT (SECOND) OF JUDGMENTS § 28 cmt. e (1982). For example, in a case involving a patent license agreement, the state court's decision that the agreement terminated on a particular date would be binding in a subsequent federal action, but the state court's determination as to validity of the patent might not. *Id*. Here, both the Federal Court and the Circuit Court had subject matter jurisdiction to hear Petitioner's fraud-based claims and there is no exclusive jurisdiction relating to Petitioner's claims. Instead, Petitioner preemptively dismissed the claims.

The cases cited by Petitioner in support of his position—*Judy v. Judy* and *Pye v. Aycock*—only underscore BANA's position. In both *Judy* and *Pye*, the Court of Appeals ultimately found that the doctrine of *res judicata* barred the plaintiff from re-litigating claims in the subsequent action. *See Judy v. Judy*, 383 S.C. 1, 8, 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 has jurisdiction to decide the cause of action for waste); *Pye v. Aycock*, 325 S.C. 426, 434–35, 480 S.E.2d 445, 459 (Ct. App. 1997) (affirming the trial court's decision and rejecting application of any of the Restatement's enumerated exceptions).

Petitioner's vague policy justifications—that the Federal Court's decision has an adverse impact on the public interest and therefore does not have binding effect—likewise does not hold water. *See* Pet. 16. "[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) (holding that "[e]ven if a manifest injustice exception were to exist, the application of *res judicata* would not be unjust in this case" because appellant "could have advanced his claims . . . during his control of the prior litigation and thus has already had his day in court.").

In any case, applying *res judicata* would not be unjust here. Petitioner had an opportunity to litigate his fraud claims and simply failed to do so. Moreover, if Petitioner's fraud allegations were the "primary issue" and "the crux of this case" as Petitioner has alleged, he could have pleaded his claims to avoid removal to federal court in the first case. (R. p. 45, lines 5–6.) That is, Petitioner prioritized his federal TILA claim in the Federal Lawsuit. Therefore, he faced removal and adjudication in federal court (all the way to the Supreme Court of the United States). Had Petitioner 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, Petitioner cannot now invoke the interest of justice in trying to get a second bite at the claims he abandoned years ago. This state litigation is an afterthought, pursued only after it became apparent that the Federal Lawsuit had not gone Petitioner's way.

The Petition should be denied because the Circuit Court did not err in finding that the doctrine of *res judicata* barred all of Petitioner's fraud-based claims.

IV. THE CIRCUIT COURT CORRECTLY FOUND THAT ALL OF PETITIONER'S CLAIMS ARE UNTIMELY

A three-year statute of limitations governs all of Petitioner's claims. Yet Petitioner filed his Federal Lawsuit more than *nine years after* the June 2006 transaction, and he filed the State Lawsuit *two years after that*. The Circuit Court correctly ruled that Petitioner's claims are barred

by the statutes of limitations and that equitable tolling "does not apply in this case." (R. pp. 8–10.) Therefore, BANA respectfully requests that this Court deny the Petition.

a. The Circuit Court correctly found that all of Petitioner's claims are time-barred.

The Circuit Court correctly found that Petitioner's 2017 claims—all arising from a transaction that occurred in June 2006—were time-barred. (R. pp. 8–10.) Each of Petitioner's fraud-based claims 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). Petitioner has never disputed this.

Under the discovery rule, these statutes of limitations begin 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, 408–09, 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, 406, 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.").[4]

Under this discovery rule, the Circuit Court found that "[t]he relevant statutes of limitations began to run on Plaintiff's claims when Mrs. Hughes could or should have known, using reasonable diligence, that a cause of action might exist." (R. p. 8.) Applying this rule to the facts of the case, the Circuit Court held: "Because Plaintiff alleged that his parents started receiving payment deductions from their account, and notice of said deductions on each monthly statement,

[4] Notably, Petitioner cites to *Burgess v. Am. Cancer Soc., S.C. Div., Inc.* but omits the quote stating that "reasonable diligence" is required by a plaintiff. *Burgess v. Am. Cancer Soc., S.C. Div., Inc.*, 300 S.C. 182, 185, 386 S.E.2d 798, 799 (Ct. App. 1989) (stating that a cause of action for fraud "does not begin to run until discovery of the fraud itself or of such facts as would have led to the knowledge thereof, *if pursued with reasonable diligence.*" (emphasis added)).

beginning in June 2006, the statute of limitations on their potential claims ran in June 2009." (*Id.* at 9.) Petitioner incorrectly asserts that the Circuit Court "determined that a single deduction from a bank account . . . constitutes sufficient notice to put Mr. and Mrs. Hughes on notice of an invasion of their rights." Pet. 17. Instead, the Circuit Court found that by June 2006, Mr. and Mrs. Hughes "could or should have known . . . that a cause of action might exist" because "both monthly charges being deducted from her account and the monthly bank and/or home equity loan statements identif[ied] those charges." (R. p. 9.) In fact, Petitioner's own allegations make clear that the Hugheses' statements began in June 2006 and, month after month, year after year, showed a monthly withdrawal of $28.40 for "Ad Insurance." (R. p. 21, ¶ 23; pp. 94–95, ¶ 25.)

Similarly, this Court confirmed in a case involving an alleged forged endorsement that the statute of limitations began running when the check is returned to the depositor "with a statement showing that it has been charged to his account" rather than from the time a demand is made by the depositor. *See Citizens & S. Nat. Bank of S.C. v. State Budget & Control Bd.*, 246 S.C. 140, 142–44, 142 S.E.2d 874, 875 (1965). The purpose of bank statements is to assert the existing balance of an account, "it says to [the depositor] in effect: 'This bank owes you this stated balance, and no more.'" *Id.* at 144, 142 S.E.2d at 875; *Gibson*, 383 S.C. at 408, 680 S.E.2d at 783. Citing to *Citizens*, the Court of Appeals agreed that monthly statements reflecting the disputed transactions mean the depositor was, or objectively should have been, aware of the transactions. *Gibson*, 383 S.C. at 408–09, 680 S.E.2d at 783 (dismissing claims as time-barred since the statute of limitations began running upon the plaintiff's receipt of bank statements showing the allegedly unauthorized withdrawals). 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. *Id.* at 409, 680 S.E.2d at 783–84. "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." *Citizens & S. Nat. Bank of S.C.*, 246 S.C. at 144, 142 S.E.2d at 875.

Petitioner himself alleges that his parents received monthly statements for years listing the very charges he now attempts to challenge. Based on these facts, the Circuit Court correctly ruled that the statute of limitations for all of Petitioner's claims expired in the summer of 2009—more than eight years before Petitioner filed the State Lawsuit. (R. pp. 8–9.)

b. The Circuit Court correctly found that equitable tolling should not apply.

The Circuit Court correctly ruled that equitable tolling cannot apply to save Petitioner's untimely claims. (R. p. 9 ("The Court agrees with the findings by the [Federal] Court and the Court of Appeals in the 2015 Federal Action that equitable tolling does not apply in this case.")).

As an initial matter, Petitioner's equitable tolling argument is foreclosed by issue preclusion because the parties here exhaustively litigated equitable tolling in the Federal Lawsuit and the Federal Court directly determined that the facts as alleged could not establish equitable tolling. (R. pp. 126–27, 143–54, 221–22, 257–60.); *Zurcher v. Bilton*, 379 S.C. 132, 135, 666 S.E.2d 224, 226 (2008) ("[W]hen 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."); *Judy*, 383 S.C. at 7, 677 S.E.2d at 217 ("[Issue preclusion] applies to specific issues, regardless of whether the claims in the first and subsequent suits are the same.").

Furthermore, this 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 v. Ebenezer Sr. Servs. & Rehab. Ctr.*, 386 S.C. 108, 117, 687 S.E.2d 29, 33 (2009). "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, 687 S.E.2d at 32; *see also Am.*

Legion Post 15 v. Horry Cty., 381 S.C. 576, 583, 674 S.E.2d 181, 184 (Ct. App. 2009) (emphasizing the need for due diligence before allowing equitable tolling).

Here, Petitioner is unable to establish what—if anything—prevented his parents from timely filing suit. In particular, Petitioner alleges that the monthly charge identified as "Ad Insurance" under the name of John P. Hughes and appeared on the Hugheses' monthly account statements from 2006 to 2015. (R. p. 21, ¶ 23; pp. 94–95, ¶ 25.) Regardless of whether the typeface was small (the same size as all other charges on the bill), or the asserted ambiguity of some of the description, the charge was openly announced, steadily recurring, and appeared under a specific person's name on the bank statements. (R. p. 118). As the Circuit Court found, "the scarcely used doctrine of equitable tolling is not appropriate for this case" because Petitioner's "parents received actual monthly notice of the charges being deducted from their account from 2016 to 2015, Plaintiff's allegations . . . make clear that nothing was hidden from him." (R. p. 9–10.)

Nor can Mrs. Hughes' purported health issues suffice to excuse many years of failing to investigate the charges. Petitioner has never claimed that his mother was incapacitated for the *entire* period between 2006 and her death in 2015. In Federal Court, Petitioner could only state 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 multiple individuals, including the Petitioner. (R. p. 118.). Petitioner makes no allegation that he was ever prevented from seeing the bank statements or inquiring about a recurring $28.40 charge for the "Ad Insurance" listed as connected to their deceased father. Particularly given that Mrs. Hughes' claim now belongs to

Petitioner through her estate, there is no "gross wrong" in refusing to equitable toll the statute of limitations here. *Hooper*, 386 S.C. at 117, 687 S.E.2d at 33.

Thus, the Circuit Court did not "fail[] to take into account any of the facts favorable to Petitioner" as the Petition asserts. Pet. 22. Rather, the Circuit Court correctly adopted the Federal Court's findings that assertions that Mrs. 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. pp. 5, 9.) As the Federal 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 the Circuit Court correctly found that the equitable tolling doctrine does not apply, BANA respectfully requests that this Court deny the Petition.

V. THE CIRCUIT COURT CORRECTLY RULED THAT PETITIONER'S SCUTPA CLAIM CANNOT BE BROUGHT IN A REPRESENTATIVE CAPACITY

It is unclear whether Petitioner is seeking to appeal the Circuit Court's dismissal of his SCUTPA claim. The Petition does not address this claim by name, much less assert any error committed by the Circuit Court.

In the event Petitioner is appealing dismissal of the SCUTPA claim, however, the Petition should be denied because the Circuit Court did not err in finding that Petitioner cannot bring a SCUTPA claim in a representative capacity. (R. p. 6–8.) 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 Section 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(a) (emphasis added). This language is clear,

and courts analyzing the statute have 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 a plaintiff who acts 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) ("[A]n unfair trade practices claim may not be brought in a representative capacity.").

Because the Circuit Court correctly found that Petitioner cannot bring a SCUTPA claim in a representative capacity, BANA respectfully requests that this Court deny the Petition, to the extent this claim is encompassed.

CONCLUSION

For these reasons, BANA requests that this Court deny the Petition for Writ of Certiorari.

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