No. 102P20-1 TWENTY-SIXTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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| CHESTER TAYLOR III, RONDA and BRIAN WARLICK, LORI MENDEZ, LORI MARTINEZ, CRYSTAL PRICE, JEANETTE and ANDREW ALESHIRE, MARQUITA PERRY, WHITNEY WHITESIDE, KIMBERLEY STEPHAN, KEITH PEACOCK, ZELMON MCBRIDE,<br><br>Plaintiffs-Petitioners,<br><br>v.<br><br>BANK OF AMERICA, N.A.,<br><br>Defendant-Respondent. | ) | From Mecklenburg County<br>No. 18-CVS-8266 |

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**RESPONSE TO PETITION FOR DISCRETIONARY REVIEW PRIOR TO DETERMINATION BY THE COURT OF APPEALS**

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

Page(s)

**Cases**

**Statutes**

## INTRODUCTION

Petitioners are borrowers who defaulted on their home-mortgage loans and sought relief from Bank of America in 2009 or 2010 in the form of loan modifications under the now-defunct federal Home Affordable Modification Program (HAMP). For various reasons, the borrowers failed to qualify for HAMP, failed to cure their defaults, and went through foreclosure. At any point in this process, they could have challenged their denials for HAMP modifications, either by filing suit or by asserting it as a defense in their foreclosure actions—as thousands of other borrowers have done in lawsuits brought against every participating mortgage servicer since the inception of HAMP. But Petitioners did not do so. Instead, years after their foreclosures were resolved with finality and the applicable statutes of limitations had expired, their current attorneys found them and advised them they should sue Bank of America for fraud. Petitioners then argued to the Superior Court that the statute of limitations should not begin to run until the moment they retained counsel, since their counsel had come up with the theory of liability asserted in the complaint.

The Superior Court was unpersuaded. After considering roughly 175 pages of briefing and holding a three-hour-long hearing, the Hon. Lisa C. Bell entered an Order ruling "that all Plaintiffs' claims are barred by the applicable statutes of limitation, and further that the claims of all Plaintiffs who were parties to foreclosure proceedings are barred by the doctrines of *res judicata* and collateral estoppel."[1]

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[1] R pp. 664–786, R pp. 655–56. Citations to the Record are to the Record on Appeal filed in the Court of Appeals on 28 February 2020.

Petitioners noticed an appeal to the North Carolina Court of Appeals on 24 October 2019, and their opening brief to that Court is presently due on 1 April. On 6 March, they filed this petition seeking to bypass the Court of Appeals and obtain immediate discretionary review by this Court.

Petitioners argue that immediate review under N.C.G.S. § 7A-31(b) is warranted because "[t]he subject matter of the appeal has significant public interest" and "involves legal principles of major significance to the jurisprudence of the State." (Petition at 7 (citing N.C.G.S. § 7A-31(b)(1)–(2)).) Neither is so.

The asserted "public interest" turns out merely to be the *private* interests of the Petitioners and other plaintiffs represented by the same attorneys. And far from implicating "legal principles of major significance to the jurisprudence of the State," most of the Petitioners' claims aren't even governed by the laws of this State: of the thirteen captioned Petitioners, only Mr. Taylor resides in North Carolina. Even setting that aside, the argument Petitioners seek to make on appeal is that the Superior Court impermissibly engaged in "fact-finding" in ruling their claims time-barred. (Petition at 5). Whatever the merit (or lack of merit) of that argument, it does not implicate any "legal principles of major significance." The Court of Appeals is fully capable of deciding a question as routine as whether a limitations dismissal can be affirmed on the basis of the facts pled in the complaint.

Bank of America thus respectfully submits that the criteria to bypass the Court of Appeals are not satisfied here, and that the Petition for Discretionary Review should be denied.

## BACKGROUND

**A.** ***The Home Affordable Modification Program*** — The U.S. Treasury Department launched HAMP in 2009 "in order to stem the flood of foreclosures that many saw coming" as a result of the ongoing credit crisis.[2] Borrowers could qualify for reduced loan payments under HAMP if they were experiencing genuine economic hardships preventing them staying current on their loans, but not so severe that they would be apt to slide back into default even with the relief.[3] Borrowers were expected to demonstrate their ability to make modified payments for a trial period and submit financial documentation demonstrating their eligibility for the program, after which the trial modification could be made permanent.[4]

It is not true, as Petitioners contend in their brief (without citation), that Bank of America's participation in HAMP was "compelled" by its receipt of financing under the 2008 Troubled Asset Relief Program (TARP) or that it was obliged to "us[e] the billions" in TARP funds to finance HAMP modifications. (Petition at 2–3.) The TARP funds came in 2008, under the Bush administration, while HAMP was not established until the next year, under the Obama administration.[5] Bank of America's decision to

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[2] CONGRESSIONAL OVERSIGHT PANEL, APRIL OVERSIGHT REPORT: EVALUATING PROGRESS ON TARP FORECLOSURE MITIGATION PROGRAMS 9 (Apr. 14, 2010), available at *http: // www.gpo.gov / fdsys / pkg / CPRT-111JPRT55737 / pdf / CPRT - 111JPRT55737.pdf* (the "OVERSIGHT REPORT").

[3] *See* U.S. Dep't of Treasury, Home Affordable Modification Program Guidelines (Mar. 4, 2009), available at *http: // www.treasury.gov / press-center / pressreleases / Documents/modification_program_guidelines.pdf*.

[4] *See id.*

[5] *See supra* n.3.

participate in HAMP was purely voluntary, based on a recognition that both borrower and lender alike are better served by a performing loan than a delinquent one.[6] Bank of America repaid the Treasury Department its entire TARP investment "with interest" and billions of dollars in dividends in late 2009, yet continued participating in HAMP and modifying tens of thousands of loans a year under HAMP until HAMP expired at the end of 2016.[7]

**B. *Prior Litigation***. — The complaint in this case is a boilerplate pleading that Petitioners' counsel and other firms with whom they work have filed and re-filed around the country, with minimal variations beyond names and dates. It has repeatedly been dismissed on limitations and *res judicata* grounds, as the Superior Court did here, and on other grounds, too. The first court to face it dismissed the complaint as time-barred and rejected the argument, also made by Petitioners here, that the statute of limitations was tolled until the plaintiff's attorney advised her to sue, ruling that the plaintiff "was merely ignorant of her rights until she consulted

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[6] *See* Amended and Restated Commitment to Purchase Financial Instrument and Servicer Participation Agreement, available at *https://www.treasury.gov/initiatives/financial-stability/TARP-Programs/housing/mha/Documents_Contracts_Agreements/093010bankofamericahomeloansSPA(incltransmittal)-r.pdf* (HAMP Servicer Participation Agreement).

[7] Press Release, Bank of America Corp., Bank of America to Repay Entire $45 Billion in TARP to U.S. Taxpayers (Nov. 2, 2009), *http://investor.bankofamerica.com/phoenix.zhtml?c=71595&p=irol-newsArticle&ID=1361144#jbid=CURQ4ki7Zh7*; Dealbook: Bank of America Finishes TARP Repayment, N.Y. TIMES (Dec. 10, 2009), *https://dealbook.nytimes.com/2009/12/10/bank-of-america-finishes-tarp-repayment/*; U.S. DEP'T OF TREASURY, MAKING HOME AFFORDABLE: PROGRAM PERFORMANCE REPORT—FOURTH QUARTER 2016, *https://www.treasury.gov/initiatives/financial-stability/reports/Documents/4Q17%20MHA%20Report%20Final.pdf*.

with an attorney, and ignorance of the law does not justify a finding of fraudulent concealment." *Cantrell v. Bank of Am., N.A.*, No. 16-3122, 2017 WL 1246356, at *3 (W.D. Ark. Apr. 3, 2017). The court further held that "she possessed all the facts she needed to enable her to file a lawsuit against BOA alleging many of the same, if not all of the same, causes of action" back in 2011, when she received written notice from the bank on her HAMP application and lost her property to foreclosure. *Id*.

Then, in 2017, several dozen plaintiffs filed a version of the complaint as a mass-joinder lawsuit in the Middle District of Florida. *See Torres v. Bank of Am., N.A.*, No. 17-1534 (M.D. Fla. filed June 27, 2017). Judge Richard A. Lazzara found the numerous plaintiffs' claims improperly joined, severed and dismissed the claims of all except the first-named plaintiffs without prejudice to their being re-filed as separate individual cases, and dismissed the first-named plaintiffs' claims as "barred by the statute of limitations." *Torres*, No. 17-1534, ECF No. 19 (M.D. Fla. Oct. 6, 2017); 2018 WL 573406, at *2 (M.D. Fla. Jan. 26, 2018). In that last ruling, the court again rejected the plaintiffs' claims that the statute of limitations was tolled by virtue of their various allegations of fraud, finding those allegations identical to those made against the bank in a prior lawsuit in 2013 and ruling that "Plaintiffs will not be permitted to keep the statute of limitations suspended by finding new people to repeat the same information that has been available for more than four years." *Torres*, 2018 WL 573406, at *5.

The same attorneys representing the Petitioner borrowers and their co-counsel re-filed the cases severed from *Torres* as 85 separate cases in the Southern and

Middle Districts of Florida. Petitioners suggest that these cases were disposed of "in Plaintiffs' favor," but the opposite is true. Pet. at 6. In fact, 82 of the 85 were dismissed, although it is true that not all of the judges to whom they were assigned rested their dismissals on the same grounds.

Judge Lazzara dismissed "fifteen . . . nearly identical cases" as time-barred on the same ground as *Torres*. *E.g.*, *Clavelo v. Bank of Am., N.A.*, No. 17-2644, 2018 U.S. Dist. LEXIS 178789, at *2 (M.D. Fla. Sept. 13, 2018). Judge Sheri Polster Chappell did the same, finding that "it is 'apparent from the face of the complaint' that the claim is time-barred." *E.g.*, *Paredes v. Bank of Am., N.A.*, No. 17-0593, 2018 WL 1071922, at *4 (M.D. Fla. Feb. 27, 2018).

Then, Judge Steven Merryday dismissed nineteen cases assigned to him upon finding them to be "circuitous but unmistakable attempt[s] to impugn the validity of the foreclosure judgment[s]" entered against the plaintiffs—something it was beyond the jurisdiction of a federal court to do. *E.g.*, *Peralta v. Bank of Am., N.A.*, No. 17-2580, 2018 WL 3548744, at *4 (M.D. Fla. July 24, 2018). Significantly, the court added that, even if the claims were not jurisdictionally barred on this ground, they are "barred by *res judicata*" because they "relate[] logically to Bank of America's claims in the foreclosure action: Bank of America alleged in state court that the plaintiffs defaulted on the mortgage, and the plaintiffs allege in this action that the default resulted from Bank of America's misrepresentation[s]. . . . Because the plaintiffs must have counterclaimed but failed to counterclaim in state court, *res judicata* prevents the plaintiffs' litigating the claim now." *Id*. at *4 n.9.

This led to a cascade of dismissals by numerous judges of most of the remaining *Torres* spinoffs on the same grounds, including *Captain v. Bank of Am., N.A.*, No. 18-60130, 2018 WL 5298538 (S.D. Fla. Oct. 25, 2018), and *Dykes v. Bank of Am., N.A.*, No. 17-62412, 2018 WL 7822305 (S.D. Fla. Oct. 26, 2018)—which Petitioners improperly characterize in their Petition as ruling that "the claim was not barred by the statute of limitations" (Petition at 6) while omitting to mention that they were dismissed as impermissible attempts to relitigate foreclosure judgments.[8]

**C. *The* Taylor *Dismissal*** — The Petitioners filed the instant case in Mecklenburg County Superior Court on 1 May 2018. A 13 March 2019 Amended Complaint is the latest operative pleading. R p. 197. In it, Petitioners alleged that Bank of America fraudulently denied HAMP modifications to qualified borrowers as part of a scheme "specifically designed by BOA to set Plaintiff[s] up for foreclosure."[9]

Petitioners' counsel followed it with a number of nearly identical complaints on behalf of dozens of other plaintiffs, leading to the Chief Justice's designation of them as exceptional civil cases under Rule 2.1 of the General Rules of Practice for the Superior and District Courts and their assignment to Judge Bell.[10] On 21 March 2019, Judge Bell entered a case-management order staying all the cases filed after *Taylor* and designating *Taylor* "as the first case for briefing of Defendants' Motion to

[8] These already-dismissed cases were then refiled in Mecklenburg County as *Captain v. Bank of America, N.A.,* 18-CVS-21433, and *Dykes v. Bank of America, N.A.*, 18-CVS-21432, on 2 November 2018.

[9] *E.g.*, R p. 209 (AC ¶ 41).

[10] R p. 191.

Dismiss and related motions," with the expectation that rulings on the *Taylor* motions would likely carry forward to other nearly identical complaints.[11]

On 11 April 2019, Bank of America moved to dismiss *Taylor* as barred by the statute of limitations and *res judicata*, and for failure to state a claim.[12]

As to the time bar, Bank of America relied on Petitioners' allegations that they were frustrated by the bank's handling and denial of their HAMP applications as far back as 2009, and had foreclosure judgments entered against them between April 2011 and January 2014—all more than four years before filing suit.[13] Based on the well-established principle that the limitations period "begins to run when the plaintiff first becomes aware of facts and circumstances that would enable him to discover" his claims, *Doe v. Roman Catholic Diocese of Charlotte*, 242 N.C. App. 538, 534–44 (2015), Bank of America argued that Petitioners' argument that they were not "on notice of all elements of their causes of action" until retaining their current attorneys was inadequate as a matter of law to toll the statutes of limitations.

As to *res judicata*, Bank of America relied on the equally well-established principle that no foreclosure can occur without an adjudication that there is "a valid debt" and a "right to foreclose." *In re Raynor*, 229 N.C. App. 12, 16 (2013). Thus, Plaintiffs' claims that their debts were "fraudulent" because they were "wrongfully denied [] HAMP modification[s]" to "set [them] up for foreclosure" are claims that

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[11] R pp. 631–32.

[12] *See* R pp. 633.

[13] AC ¶¶ 45, 52, 76, 83, 104, 111, 138, 145, 178, 202, 209, 227, 234, 258, 291, 298; *id.* at ¶¶ 55, 117, 150, 181, 212, 237, 301.

could have been asserted in their foreclosure cases, and cannot be re-litigated now.[14] *See*, *e.g.*, *Espey v. Select Portfolio Servs., Inc.*, 240 N.C. App. 293 (2015) (holding that *res judicata* bars any "collateral attack on an order . . . which authorized defendants to proceed with a foreclosure").

Seeking to shift the Superior Court's attention from these threshold issues, Petitioners filed a cross-motion for summary judgment at the same time Bank of America moved for dismissal.[15] They based the motion on the contention that a 2012 industry-wide settlement between the Department of Justice and the nation's five largest mortgage servicers, including Bank of America, "involve[d] identical issues in fact and law" as the current lawsuit, and thus warranted entry of judgment in Petitioners' favor on *res judicata* grounds.[16] While their "identical issues" claim was wildly off the mark, even if true it would have had the opposite effect from the one Petitioners argued. First, the *res judicata* bar would work *against* Petitioners, not in favor of them, as the parties who were seeking to re-litigate the matter already resolved. Second, Petitioners' conclusory allegations that they were somehow incapable of discovering their claims until 2018 are impossible to square with their simultaneous assertion that a nationwide settlement supposedly involving "identical" claims was a matter of public record back in 2012.[17]

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[14] *E.g.*, AC ¶¶ 41, 53, 329.

[15] R p. 637.

[16] R p. 206, R p. 642, R p. 647.

[17] R p. 695.

The parties exchanged briefs on an agreed briefing schedule. Judge Bell then heard three hours of oral argument on the motions on 27 May 2019.[18] After taking the argument and briefing under consideration, Judge Bell entered an Order on 3 October 2019 granting Bank of America's motion to dismiss and denying Petitioners' summary judgment motion.[19] The Order stated "that all Plaintiffs' claims are barred by the applicable statutes of limitation, and further that the claims of all Plaintiffs who were parties to foreclosure proceedings are barred by the doctrines of *res judicata* and collateral estoppel." Petitioners noticed an appeal to the Court of Appeals on 24 October 2019 and filed the instant Petition on 6 March 2020.[20]

## ARGUMENT

Petitioners' dissatisfaction with Judge Bell's dismissal of their case does not furnish any grounds for bypassing the normal course of appellate review. To the contrary, Petitioners fail to make any showing that either of the prerequisites for review under N.C.G.S. § 7A-31(b)(1) is satisfied.

### I. Suing a large corporation does not make an appeal a matter of "significant public interest."

Petitioners argue that "[t]he subject matter of the appeal has significant public interest" because respondent is "one of the largest banks in our country" and "a multinational company with operations in approximately 35 countries, serving approximately 66 million customers." (Petition at 7). But Petitioners cite no authority

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[18] R pp. 664–786.

[19] R p. 655.

[20] R p. 657.

for the notion that the size of the defendant suffices to make their appeal arguments a matter of "significant public interest," because there is none. What is supposed to be of public interest is the "subject matter of the appeal," not the litigants. N.C.G.S. § 7A-31(b)(1).

The "subject matter of the appeal" here has nothing to do with the size of Bank of America or its customer base, but rather is "[w]hether the Superior Court erred in granting Bank of America's Motion to Dismiss on the basis of Statute of Limitations and *res judicata*/collateral estoppel." (Petition at 12.) Petitioners' claim of error is that Judge Bell "engage[d] in a fact-finding determination" in granting the motion. *Id.* at 5. Petitioners do not explain why there would be "immense public interest" in whether Judge Bell's decision entailed any "fact-finding" or can be affirmed on the basis of the allegations made in the Amended Complaint. (Petition at 7.)

Instead, they declare that "this case has been the subject of much media attention," citing to a 14 June 2013 Reuters report. (Petition at 8.) In fact, that 2013 report had nothing to do with "this case," which Petitioners filed in 2018. The Reuters report concerned an unrelated putative class action filed against Bank of America in Massachusetts federal court, by different parties and different attorneys. *See In re Bank of Am. HAMP Contract Litig.*, No. 10-2193, 2013 WL 4759649 (D. Mass. Sept. 4, 2013) (denying class certification). The mere fact that Petitioners, years later, took filings from that case and repurposed them as ostensible support for their own claims does not retroactively make this lawsuit "the subject" of the 2013 Reuters report. And the "widespread public and interest and media coverage" Petitioners claim *this* case

has received amounts to a lone *Charlotte Observer* article reporting on the filing of their complaint. (Petition at 8 n.2.) (The 2017 Courthouse News Service report Petitioners also cite did not concern this case, either—it was a report on the *Torres* case, in Florida.)

Lastly, Petitioners attempt to support their claim of a "significant public interest" by referencing the "several hundred additional plaintiffs" whose identical complaints "are pending in Superior Court but are currently stayed pending the resolution of this appeal." *Id*. at 8. Petitioners argue that "[u]ntil this appeal is resolved, hundreds of people have no avenue within which to pursue their claims." *Id*. That is true only in the same sense as Abraham Lincoln's account of "the man who murdered both his parents, and then when the sentence was about to be pronounced, pleaded for mercy on the grounds that he was an orphan." All of those "hundreds of people" are represented by Petitioners' counsel, and hundreds of them filed their suits *after* the entry of the *Taylor* Order, knowing full well their cases would be immediately stayed pending this appeal.[21]

What's more, no one forced these parties to file their cases here and hitch their wagons to the outcome of this case—these parties reside all over the country (only a tiny handful are North Carolina residents) and could have chosen their own state or federal courts as the "avenue within which to pursue their claims."[22] This Court should not condone this attempt by Petitioners' counsel to *manufacture* a public

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[21] Counsel have filed 16 additional multi-plaintiff cases in Mecklenburg County since the *Taylor* Order on behalf of 368 plaintiffs and plaintiff couples.

[22] Of these 368 plaintiffs/plaintiff couples, only 9 are North Carolina residents.

interest by citing additional cases that are only stayed as a result of their own strategic decisions.

## II. A routine Rule 12(b)(6) dismissal for failure to state a claim does not "involve legal principles of the highest significance to the State's jurisprudence."

Petitioners next argue, echoing their prior arguments, that "[t]his case involves legal principles of the highest significance to the State's jurisprudence" because they are suing "a large corporation." (Petition at 9.) Again, the size of the defendant is beside the point—what matters is the significance of the "legal principles" involved. N.C.G.S. § 7A-31(b)(2). But the principle involved here—a claim that a "court incorrectly analyzed a statute of limitations issue"—is the stuff of a "routine appeal." *Gonzalez v. Wells Fargo Bank, N.A.*, No. 13-23281, 2015 U.S. Dist. LEXIS 185342, at *10 (S.D. Fla. Mar. 20, 2015). This routine appeal simply does not implicate any "legal principles of major significance to the jurisprudence of the State" that would warrant this Court's intercession.

Notably, most of the Petitioners' claims do not implicate "the jurisprudence of the State" *at all*. Only one of the Petitioners lives in North Carolina and brings claims governed by North Carolina law.[23] The rest live in California, Wisconsin, Arizona, Virginia, and Michigan.[24] The argument petitioners made in the Superior Court that North Carolina's statute of limitations should apply to all of their claims is foreclosed by the State's door-closing statute, which provides that "where a cause of action arose

[23] R p. 17 (AC ¶ 34).

[24] R p. 25 (AC ¶ 65), R p. 33 (AC ¶ 97), R p. 39 (AC ¶ 127), R p. 47 (AC ¶ 160), R p. 55 (AC ¶ 191), R p. 61 (AC ¶ 216), R p. 69 (AC ¶ 248), R p. 76 (AC ¶ 280).

outside of this State and is barred by the laws of the jurisdiction in which it arose, no action may be maintained in the courts of this State." N.C.G.S. § 1-21; *Little v. Stevens*, 267 N.C. 328, 334 (1966). The statutes of limitations and tolling rules of other jurisdictions are of no significance at all "to the jurisprudence of the State." N.C.G.S. § 7A-31(b)(2).

Petitioners next contend that the "major significance" lies in the fact that the dismissal affected their "ability to bring a case and have a chance to be heard in court," which they call "the most fundamental legal right" and "the very backbone of the American justice system." (Petition at 11.) This case implicates nothing so grandiose. The reason Petitioners "were never even given the chance to prove their case in court" is because their complaint failed to get past a Rule 12(b)(6) motion. (Petition at 9.) This case does not implicate the fundamental right to bring a case and be heard in court any more than any other dismissal for failure to state a claim upon which relief can be granted—a basic legal standard that is also part of the "backbone" of our justice system. The Superior Court's dismissal does not "stand[] for [the] dangerous precedent[] that regardless of the allegations in a well-pled complaint, judges are permitted to play fact finder." (*Id*. at 10–11.) It stands only for the unremarkable proposition that judges are allowed and able to apply Rule 12(b)(6).

Petitioners' attack on the merits of Judge Bell's ruling likewise falls short. It amounts to a claim that a case can *never* be dismissed as time-barred at the motion-to-dismiss stage, so long as a complaint includes a boilerplate assertion that the statute was tolled. (*See* Petition at 10.) That is not the case. To the contrary, there is

no question that "[t]he statute of limitations may be raised as a defense by a Rule 12(b)(6) motion to dismiss if it appears on the face of the complaint that such a statute bars the plaintiff's action. It is well-established that once a defendant raises the affirmative defense of the statute of limitations, the burden shifts to the plaintiffs to show their action was filed within the prescribed period." *Laster v. Francis*, 199 N.C. App. 572, 576 (2009) (citations omitted). And in assessing whether plaintiffs have pled their way around a time bar, "the trial court is not required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Id*. at 577 (internal quotation marks and ellipses omitted).

Judge Bell thus did not, in any sense, "inappropriately t[ake] on the role of fact finder" in ruling that Petitioners' conclusory allegations that they could not have discovered their claims until they hired their current attorneys were insufficient as a matter of law to evade the time bar. Nor did Judge Bell take on "the role of fact finder" in finding Petitioners' claims barred by *res judicata* as a matter of law. Petitioners' argument that they could not have asserted their present claims in their foreclosure proceedings because they were not "aware" of them misstates the legal standard. "For purposes of *res judicata*, it is not necessary to ask if the plaintiff knew of his present claim at the time of the former judgment, for it is the existence of the present claim, not party awareness of it, that controls." *Harnett v. Billman*, 800 F.2d 1308, 1313 (4th Cir. 1986) (citing RESTATEMENT (SECOND) OF JUDGMENTS § 24(1) (1982)).

Even if Petitioners had identified an error of law by the Court on either front, they articulate no reason why the normal course of appellate review would be

insufficient to correct it. Cases like this "that do not involve jurisprudence of interest or importance to the state as a whole or [] involving only routine determination of issues of importance only to the litigants involved must have their final resolution at the court of appeals level." Robert Orr, J. (Ret.), *What Exactly Is a "Substantial Constitutional Question" for Purposes of Appeal to the North Carolina Supreme Court?*, 33 CAMPBELL L. REV. 211, 213 (2011) (citing REPORT OF THE COURTS COMMISSION TO THE NORTH CAROLINA GENERAL ASSEMBLY 4 (1967)).

**III. Ultimate certification by this Court is not "nearly certain."**

Apparently recognizing that they raise no issue beyond the capabilities of the Court of Appeals, Petitioners make a fallback argument that this Court may as well take the case now, because "it is nearly certain" that it will have to do so later. (Petition at 11.) That is not at all certain. The criteria for granting certification *after* decision by the Court of Appeals echo the criteria for granting certification *before* decision by the Court of Appeals. If those criteria are not satisfied now, there is no reason to presume the disposition of the Court of Appeals will change that. *Compare* N.C.G.S. § 7A-31(b)(1)–(2) *with id.* § 7A-31(c)(1)–(2).

Respondents therefore respectfully submit that this Court should deny the Petition for Discretionary Review and permit this case to proceed to disposition by the Court of Appeals.

Respectfully submitted this 16th day of March, 2020.

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## CERTIFICATE OF SERVICE

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