No. COA20-160 TWENTY-SIXTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

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CHESTER TAYLOR III, JEANETTE and ANDREW ALESHIRE, LORI MARTINEZ, ZELMON MCBRIDE, LORI MENDEZ, KEITH PEACOCK, MARQUITA PERRY, KIMBERLY STEPHAN, RONDA and BRIAN WARLICK,	)	From Mecklenburg County
Appellants,	)	
v.	)	
BANK OF AMERICA, N.A.,	)	
Appellee.	)	

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PETITION FOR REHEARING

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NORTH CAROLINA COURT OF APPEALS

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CHESTER TAYLOR III, JEANETTE and ANDREW ALESHIRE, LORI MARTINEZ, ZELMON MCBRIDE, LORI MENDEZ, KEITH PEACOCK, MARQUITA PERRY, KIMBERLY STEPHAN, RONDA and BRIAN WARLICK,	)	From Mecklenburg County
Appellants,	)	
v.	)	
BANK OF AMERICA, N.A.,	)	
Appellee.	)	

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PETITION FOR REHEARING

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TO THE HONORABLE COURT OF APPEALS:

Petitioners/Appellants, pursuant to Rule 31 of the North Carolina Rules of Appellate Procedure, respectfully petition the North Carolina Court of Appeals for rehearing of the appeal with respect to specifically and concisely identified portions of the Court's decision filed on 31 December 2020 in this cause as discussed herein. The issue for which Petitioners/Appellants seek rehearing is the Court's decision to engage in impermissible fact-finding and subsequent conclusion that Petitioners/Appellants should have discovered the fraud

perpetrated by Defendant/Appellee, Bank of America, by a date other than the one clearly identified in the Amended Complaint. The Opinion, authored by Judge Young, upheld the Superior Court's impermissible fact-finding when construing a Motion to Dismiss, conflicting with established precedent of the North Carolina Court of Appeals and the North Carolina Supreme Court.

In accordance with Rule 31(a) of the North Carolina Rules of Appellate Procedure, this Petition is filed within fifteen (15) days of the issuance of the Court's mandate and is supported by the Rule 31 Certificates of Attorneys William K. Goldfarb and Terry D. Horne. These attorneys have carefully examined the appeal, the Opinion, and the authorities cited in the decision, and have certified that they believe the Court of Appeals' decision to be in error on the points specifically and concisely identified herein and in their Certificates.

POINTS OF LAW THE COURT OVERLOOKED OR MISAPPREHENDED

I. The Opinion Improperly Allowed the Superior Court to Engage in Fact-Finding.

A. Whether a reasonable investigation would have revealed Petitioners'/Appellants' Claim is an inquiry appropriately left for a jury.

This case is quite simple. Petitioners/Appellants alleged in their Amended Complaint and argued that they were not aware of the Bank's fraud at the time of their foreclosures, and this allegation must be accepted as true. *CommScope Credit Union v. Butler & Burke, LLP*, 369 N.C. 48, 51 (2016). Unfortunately, the Superior Court, followed by the Court of Appeals, violated a long-standing and well-established principle when deciding a Motion to Dismiss – that all facts should be read in the light most favorable to plaintiffs. *Id.* Indeed, at this stage "all contravening assertions in the movant's pleadings are taken as false." *Id.*

Petitioners/Appellants argued in Response to the Bank's Motion to Dismiss that the Defendant/Appellee was trying to convert a motion to dismiss into a bench trial by repeatedly citing to evidence outside of the Amended Complaint. *See* Plaintiffs' Response at p. 13. However, the Superior Court allowed it and conducted its own inappropriate fact-finding expedition by seeking to determine when the Petitioners/Appellants knew or should have known about the fraud.

The Opinion correctly states that "[w]hether the plaintiff in the exercise of due diligence should have discovered the facts more than three years prior to the institution of the action is ordinarily for the jury when the evidence is not

conclusive or is conflicting." Opinion at 6, citing *Huss v. Huss*, 31 N.C. App. 463, 468, 230 S.E.2d 159, 163 (1976) (emphasis added) (reversing ruling granting summary judgment). The Court of Appeals failed to recognize, however, that this proposition is even more strongly applied in the context of a motion to dismiss: for the discovery rule to be determined as a matter of law at dismissal, the evidence must be clear and show "without conflict that the claimant had both the capacity and opportunity to discover the fraud." *State Farm Fire & Cas. Co. v. Darsie*, 161 N.C. App. 542, 548 (2003). The Bank has argued – and the Court of Appeals accepted – that Petitioners/Appellants should have affirmatively plead their diligence. Motion to Dismiss at 16. This is not true. North Carolina law makes clear that the opposite is true – only when the pleadings affirmatively allege a failure to exercise due diligence can a motion to dismiss be granted on statute of limitations grounds. *See Huss v. Huss*, 31 N.C. App. 463, 468, 230 S.E.2d 159, 163 (1976). Put another way, unless the pleadings unequivocally demonstrate when the Plaintiffs discovered or should have discovered the fraud, dismissal at the pleading stage is inappropriate. No such demonstration is present in the pleadings here. The Court of Appeals contended that because all the applications were denied by 2014, that should have been enough. *See* Opinion at 5. But again – it's a factual inquiry – how many phone calls to the Bank was adequate to trigger notice? How many "lost" applications were sufficient to trigger notice? Those are questions for a jury – or perhaps enough to decide the case on a motion for summary judgment – but they are certainly

not sufficient for a determination at the Motion to Dismiss stage.

The Opinion stated: "[i]t is clear, from the face of the complaint, that plaintiffs knew something was wrong with their applications at the time. It is likewise clear that, had plaintiffs engaged in some simple research, they would have heard about the ongoing litigation involving defendant's business practices." Opinion at 7. None of these assertions are clear, and in making this determination, the Court of Appeals made two primary errors. First, the Court of Appeals notably defied the long-standing principle that a jury is ordinarily the party responsible for determining if and when a person discovered or should have discovered the facts constituting alleged fraud. *Forbis v. Neal*, 361 N.C. 519, 524 (2007); *see also Hunter v. Guardian Life Ins. Co. of Am.*, 162 N.C. App. 477, 486 (2004) (stating "[w]hen plaintiff should, in the exercise of reasonable care and due diligence, have discovered the fraud is a question of fact to be resolved by the jury"). "This is particularly true when the evidence is inconclusive or conflicting." *Id.* There can be no doubt that the evidence presented by the Petitioners/Appellants conflicts with—indeed, stands in direct opposition to—the evidence cited by the Defendant/Appellee. However, the Superior Court, followed by the Court of Appeals, chose to take the Bank's position as truth, and in doing so, made a reversible error. *CommScope Credit Union*, 369 N.C. at 51.

Second, the Opinion failed to analyze or address how or where, on the face of the Amended Complaint, Petitioners/Appellants identify what they knew was wrong with their application at the time. Instead, Petitioners/Appellants very

clearly stated that they were not aware of anything wrong with their applications at the time referenced in the Amended Complaint. (R pp 211, 220, 226, 235, 243, 251, 258, 266, 275). There is also nothing in the Amended Complaint to suggest that simple research would have led them to understand the Bank's wrongdoing. Whether a Google search would have yielded answers or whether the Petitioners/Appellants would have needed to meet with a mortgage specialist is unknown at this stage in the litigation. And more importantly, that is not for the trial court or Court of Appeals to determine. It should be left to a jury. *Hunter*, 162 N.C. App. at 486.

What's more – as Petitioners/Appellants pointed out in their Response to the Motion to Dismiss – at least six federal court judges agreed that complaints asserting substantively similar allegations as those here presented a question of fact for the jury on the specific issue of when plaintiffs discovered or should have discovered the Bank's fraud. *See e.g.*, *Morales v. Bank of America, N.A.,* Case No. 8:17-cv-2638-T-33CPT, 2018 WL 2215445, at *3 (M.D. Fla. May 15, 2018) (slip opinion) (stating "BOA has not shown that Plaintiffs knew, or should have known, that the statements were false regarding HAMP's eligibility requirements or their HAMP approval"); *Varela-Pietri and Bonilla v. Bank of America*, N.A., 8:17-cv-2534-T-23TGW (2017); *Zenteno et al v. Bank of America, N.A.*, 8:17-cv-02591-WFJ-TGW, ECF No. 40 (M.D. Fla. October 31, 2018) (proceeding to trial in June 2021). Petitioners/Appellants are hard-pressed to offer better evidence that reasonable minds could differ as to when they were

aware of their fraud claim.

B. The allegations of the Amended Complaint were sufficient to toll the statute of limitations.

In deciding a motion to dismiss in North Carolina, the Court must accept all allegations of the complaint as true. *CommScope Credit Union v. Butler & Burke, LLP*, 369 N.C. 48, 51 (2016). The Court's inquiry is limited to evaluating the sufficiency of the complaint. *Julian v. Wells Fargo Bank, N.A.*, 2012 WL 1857611, at *4 (N.C. Super. May 22, 2012). Petitioners/Appellants alleged very clearly and precisely when they discovered that their failure to receive a modification was due to the Bank's fraudulent conduct. (R pp 211, 220, 226, 235, 243, 251, 258, 266, 275). Once again, the Court must accept this as true. Instead of accepting that statement as true, however, the Opinion stated that nothing precluded Petitioners/Appellants from taking prompt action in 2014 or some time before 2017. *See* Opinion at 8. This is the equivalent of a fact-finding expedition where the Court of Appeals, in blatant disregard of the face of the Amended Complaint, very literally decided for themselves when they thought Petitioners/Appellants should have known about the fraud. This is impermissible.

Moreover, the allegation in the Amended Complaint that states the date the Petitioners/Appellants discovered the fraud (R pp 211, 220, 226, 235, 243, 251, 258, 266, 275) "is sufficient to establish the approximate date from which the statute of limitations began to run on their claims." *Jennings v. Lindsey*, 69 N.C. App. 710, 716 (1984). In *Jennings*, the plaintiff alleged that they did not

discover the fraud at issue until September of 1981. *Id.* The Court of Appeals in that case unequivocally ruled that simple allegation was enough. Indeed, the Court then stated that the defendants' "unsupported assertion to the contrary merely creates a conflict that, in the procedural context of this case, must be resolved in plaintiffs' favor." *Id.* The Amended Complaint clearly states when the Petitioners/Appellants discovered the fraudulent behavior of the Bank, and this allegation – at this stage in the litigation – must be accepted as true. *Id.*

Finally, in the Amended Complaint, Petitioners/Appellants grouped several claimants together for the purposes of judicial efficiency. These are individual claimants with individual facts. Yet, the Superior Court, followed by the Court of Appeals threw out all claims in one fell swoop without regard to their individual differences. The Court of Appeals failed to consider the different number of phone calls, different number of applications, different number of TPP payments made, and different pleaded dates of first possible discovery. In other words, the Court of Appeals failed to conduct any analysis of the individual claims. The Court of Appeal's decision to dismiss all the claims, even though Petitioners/Appellants asserted specific, and different, dates for each Petitioner/Appellant was improper. This is a plaintiff-specific, fact-based question to be answered down the road and not on a Motion to Dismiss.

II. The Opinion Failed to Consider the Extrinsic Nature of the Fraud and the Fact that The Bank's Fraud Made Discovery of Petitioners'/Appellants' Claims Impossible Prior to Their State Court Foreclosure Proceedings.

In addressing the issue of res judicata, the Opinion never addresses two

important points. First, Petitioners/Appellants have repeatedly pointed out that North Carolina case law allows attacks on prior judgments when the attacks are extrinsic. *See Stokley v. Stokley*, 30 N.C. App. 351, 355 (1976) (stating that "[t]he final judgment of a court having jurisdiction over persons and subject matter can be attacked in equity after the time of appeal or other direct attack has expired only if the alleged fraud is extrinsic rather than intrinsic"). Intrinsic fraud describes fraud that "aris[es] within the proceeding itself and concern[s] some matter necessarily under the consideration of the court upon the merits. *Scott v. Farmers Co-op. Exch., Inc.*, 274 N.C. 179, 182, 161 S.E.2d 473, 476 (1968). On the other hand, extrinsic fraud involves fraudulent acts that are collateral to the action and prevent a plaintiff from obtaining information to adequately litigate a case. *Stokley*, 30 N.C. App. at 355 (stating "[i]f an unsuccessful party to an action has been prevented from fully participating therein there has been no true adversary proceeding, and the judgment is open to attack at any time"). Put another way, extrinsic fraud prevents a party from being able to present his case. *See Horne v. Edwards*, 215 N.C. 622, 3 S.E.2d 1, 4 (1939). That is precisely what happened here. Petitioners/Appellants have continued to assert—but it bears repeating here—that the Bank committed fraud in its application of the HAMP program—it lied to Petitioners/Appellants about the status of the HAMP applications, instructed them to default on their mortgage loans, and destroyed or deleted Petitioners'/Appellants' HAMP applications. Petitioners/Appellants, have not, however, ever alleged that the Bank committed intrinsic fraud in

foreclosing on their properties. The Bank's very actions are extrinsic and prevented Petitioners'/Appellants' from defending against foreclosure actions.

Second, with regard to the res judicata argument, the Opinion failed to consider the crucial point that Petitioners/Appellants adequately pleaded and have repeatedly argued that they could not bring their claim of fraud in the foreclosure proceedings because the Bank's own actions prevented its discovery. "[W]here the owner of the cause of action had no knowledge or means of knowledge of the item, the judgment in the first action does not ordinarily bar a subsequent action for the omitted item." *Gaither Corp. v. Skinner*, 241 N.C. 532, 536 (1955). Petitioners/Appellants have continuously pleaded and argued that they did not and could discovery their fraud claims because of the Bank's intentional fraudulent conduct before and/or at the time of the state court foreclosures. Accepting these allegations as true, as is required for a motion to dismiss, *res judicata* cannot act as a bar to a fraud claim intentionally concealed by the Bank.

III. Policy Concerns Weigh in Favor of Reversing the Superior Court's Decision Because it Effectively Allows Mortgagors to Defraud Customers and Face No Recourse if They Successfully Keep the Fraud Secret.

The Opinion effectively determined that the Bank is immune from suit simply because it was able to successfully hide systemic and institutionalized fraud for many years. This is a dangerous precedent. Indeed, with the current state of the economy and the pending Covid-19 crisis, many experts predict another mortgage crisis in the near future. Allowing the Court of Appeal's

decision to stand indicates to mortgagors going forward that so long as they successfully foreclose on mortgagees, they are free to commit fraud in the process, so long as they conceal the fraud. Mortgagees, on the other hand, can call their banks and conduct their own research as to why they are wrongfully facing foreclosure, but unless they successfully uncover the covert scheme enacted by large, multi-billion dollar banks, the court system will offer them no remedy. This is a frightening result.

CONCLUSION

At bottom, this case is still in the pleadings stage. The Amended Complaint is sufficient to withstand a motion to dismiss, and the Petitioners/Appellants should, at the very least, be permitted to proceed to discovery. As such, the Court misapprehended the law and previous authority in North Carolina, and Petitioners/Appellants respectfully request that this request for rehearing be granted.

This 4th day of February 2021.

/s/ William C. Robinson
Robinson Elliott & Smith
William C. Robinson, NC Bar No. 17584
Dorothy M. Gooding, NC Bar No. 46058
800 East Blvd.
Charlotte, NC 28203

Robert F. Orr, NC Bar No. 6798
3434 Edwards Mill Road
Suite 112-372
Raleigh, North Carolina 27612

Aylstock, Witkin, Kreis & Overholtz, PLLC
Samantha Katen
Justin Witkin (*pro hac vice*)
Chelsie Warner (*pro hac vice*)
Caitlyn Miller (*pro hac vice*)
Daniel Thornburgh (*pro hac vice*)
17 East Main Street, Suite 200
Pensacola, FL 32502

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he/she served a copy of the foregoing Petition for Rehearing on counsel of record in this action by depositing a copy, contained in a first-class postage-paid wrapper, into a depository under the exclusive care and custody of the United States Postal Service, addressed as follows:

MCGUIREWOODS LLP
Bradley R. Kutrow State
Bar No. 13851
bkutrow@mcguirewoods.com
Caroline E. Keen
State Bar No. 50809
ckeen@mcguirewoods.com
(704) 343-2049
201 North Tryon Street, Ste. 3000
Charlotte, NC 28202

GOODWIN PROCTOR LLP
Keith E. Levenberg
kelevenberg@goodwinlaw.com
1900 N. Street, Northwest
Washington, D.C. 20036
Admitted Pro Hac Vice

James McGarry
jmcgarry@goodwinlaw.com
100 Northern Avenue
Boston, MA 02210
Admitted Pro Hac Vice

No. COA20-160 TWENTY-SIXTH DISTRICT

NORTH CAROLINA COURT OF APPEALS
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CHESTER TAYLOR III, JEANETTE and ANDREW ALESHIRE, LORI MARTINEZ, ZELMON MCBRIDE, LORI MENDEZ, KEITH PEACOCK, MARQUITA PERRY, KIMBERLY STEPHAN, RONDA and BRIAN WARLICK,	)	From Mecklenburg County
PETITIONER-APPELLANT,	)	
v.	)	
BANK OF AMERICA, N.A.,	)	
RESPONDENT-APPELLEE.	)	

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APPENDIX INDEX

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STATE OF NORTH CAROLINA COUNTY OF MECKLENBURG	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 18-CVS-8266
CHESTER TAYLOR III, RONDA and BRIAN WARLICK, LORI MENDEZ, LORI MARTINEZ, CRYSTAL PRICE, JEANETTE and ANDREW ALESHIRE, MARQUITA PERRY, WHITNEY WHITESIDE, KIMBERLY STEPHAN, KEITH PEACOCK, ZELMON MCBRIDE, Plaintiffs, v. BANK OF AMERICA, N.A., Defendant.	**CERTIFICATE OF WILLIAM GOLDFARB, ESQ, IN SUPPORT OF PETITION FOR REHEARING PURSUANT TO N.C. R. APP. P. 31(a)**

Pursuant to the provisions of Rule 31(a) of the North Carolina Rules of Appellate Procedure, the undersigned respectfully submits this Certificate in support of the Petition of Appellants for rehearing of the Decision and Opinion of this Honorable Court:

1. I am a graduate of NC State University and the Campbell University School of Law. I have been actively engaged in the practice of law for almost 30 years. During my practice I have focused my work almost entirely to civil litigation with an emphasis on Plaintiffs' claims. In that capacity I have filed hundreds of Complaints in the Superior Court Division including Complaints that involve issues of damage that have been caused and concealed by fraudulent acts. In recent years my case load has typically involved

complex litigation and these cases are often referred to my office from experienced lawyers including litigators.

2. I regularly participate in educational programs and in leadership at the NC Advocates for Justice. I have held offices within that organization and I regularly teach continuing education on topics related to civil practice.

3. I founded and run the Law Offices of William K. Goldfarb in Monroe and in that role, I have litigated cases throughout the state. I have managed and trained associate attorneys on many topics including but not limited to issues involving the statute of limitations, tolling, fraud and concealment. My State Bar number is #18194 and my license is active.

4. I have no personal interest in the subject matter of the instant Appeal, and I have not been counsel for any party involved in the action.

5. I have had an opportunity to carefully review the Appeal including the Opinion of This Honorable Court as well as the authorities. In my professional opinion, it is my sincere belief that the Decision of this Honorable Court is in error in its affirmation of the Trial Court's dismissal. Specifically, the Court's decision to engage in impermissible fact-finding and its ultimate conclusion that Petitioners/Appellants should have discovered the fraud perpetrated by Defendant/Appellee, Bank of America, by a date other than the one clearly pled in Plaintiff's Amended Complaint is outside of NC law and practice. Additionally, it is my opinion

that the allegations pled in the Amended Complaint were sufficient to toll the statute of limitations and thus bar dismissal.

6. In a motion to dismiss, the Court must accept all allegations of the Complaint as true. *CommScope Credit Union v. Butler & Burke, LLP*, 369 N.C. 48, 51 (2016). The Court's role is limited to evaluating the sufficiency of the Complaint as opposed to a Rule 56 Motion or a trial where each side typically tenders supportive and often competing facts. Here the Court substituted the Defendant's mere assertions in place of the well pled and specific facts of the Amended Complaint—the only facts properly before the Court.

7. For instance, the Court wrote that "It is likewise clear that, had plaintiffs engaged in some simple research, they would have heard about the ongoing litigation involving defendant's business practices." Opinion at 7. The Complaint does not allege that simple research would have revealed the ongoing litigation involving the Bank's Business practices. The Court assumed that each Plaintiff knows how to perform research regarding out of state litigation, that such research is simple and that each Plaintiff had access to the internet and a computer. Further the Court consideration of facts drawn from outside the Complaint defies the well-known and established principal that a jury is ordinarily the party responsible for determining if and when a person discovered or should have discovered the facts constituting alleged fraud. *Forbis v. Neal*, 361 N.C. 519, 524 (2007).

8. Had the Court accepted as true the allegations of the Amended Complaint, the Court would have had to conclude that the allegations were sufficient to toll the statute and to thus reverse the dismissal from the Trial Court.

This 4th Day of February.

William K. Goldfarb

No. COA20-160 TWENTY-SIXTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

****

CHESTER TAYLOR III, JEANETTE and ANDREW ALESHIRE, LORI MARTINEZ, ZELMON MCBRIDE, LORI MENDEZ, KEITH PEACOCK, MARQUITA PERRY, KIMBERLY STEPHAN, RONDA and BRIAN WARLICK,	)	From Mecklenburg County
Appellants,	)	
v.	)	
BANK OF AMERICA, N.A.,	)	
Appellee.	)	

****

CERTIFICATE OF TERRY D. HORNE IN SUPPORT OF PETITION FOR REHEARING PURSUANT TO N.C. R. APP. P. 31(a)

****

TO THE HONORABLE COURT OF APPEALS:

Pursuant to the provisions of Rule 31(a) of the North Carolina Rules of Appellate Procedure, the undersigned respectfully submits this Certificate in support of the petition of Petitioners/Appellants, Chester Taylor, et.al., for rehearing of the Decision filed 31 December 2020.

1. My name is Terry D. Horne and I am in an attorney in Charlotte. I have practiced law since 1985. I graduated from The University of North

Carolina at Chapel Hill in 1981 and from the Wake Forest School of Law in 1985. My license is active and has been active since 1985. My bar number is: 12986.

2. I presently am a founding partner at Stiles, Byrum & Horne. At SBH, I focus my practice entirely within the realm of civil litigation. I am a member of the NC State Bar (1985), The United States Supreme Court Bar (2011) and the Federal Bars of the Middle and Western Districts. I primarily represent individuals and corporations in defense of various tort and contract claims in State Court. In that role, I have drafted thousands of pleadings, tried cases throughout the state and litigated cases in our appellate courts including this Honorable Court. I am a member of and actively participate with the North Carolina Association of Defense Attorneys, DRI, the International Association of Defense Counsel as well as our state and local bar. I was mentored by excellent and well credentialed lawyers and I have trained and mentored many young associates that have become fine attorneys.
3. I am familiar with the issues relevant to the instant action including 12(b) standards, fraud, tolling issues and motions to dismiss.
4. I certify that I am a member of this State Bar, engaged in and licensed to practice law at all times from 1985 through this date, that I have no interest in the subject of the action, and have not been counsel for any party to the action. I further certify that I have carefully examined the

appeal and the authorities cited in the Decision filed 31 September 2020 (the "Decision"), and that I consider the Decision in error on the specific holding that the claim was barred by the statute of limitations and/or res judicata at the Motion to Dismiss stage.

5. After reviewing the record in this case, it is my opinion that the Amended Complaint filed by the Petitioners/Appellants alleged that they did not discover and could not have discovered the Bank's fraud until they contacted their attorneys and that Bank of America fraudulently concealed any evidence of their fraudulent actions. It is my opinion that this allegation and the Amended Complaint in this case should have survived a 12(b)(6) Motion.

6. On a Rule 12(b)(6) Motion, a trial court should determine "whether, as a matter of law, the allegations of the complaint . . . are sufficient to state a claim upon which relief may be granted." *Harris v. NCNB Nat'l Bank*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987). Moreover, it is well-established that the trial court must "take all well-pleaded allegations of the complaint . . . as true." *Sutton v. Duke*, 277 N.C. 94, 98, 176 S.E.2d 161, 163 (1970). A dismissal based on the statute of limitations at the Motion to Dismiss stage is rare and should not have occurred here.

7. As the Petitioners/Appellants point out throughout their briefing and this Petition, the Court of Appeals misapprehended the law because there is nothing in the Amended Complaint to suggest that they knew of any

fraudulent actions at any point prior to the time specifically alleged. Contrary to the 31 December 2020 Decision, there is also no evidence in the Complaint to suggest how Petitioners/Appellants could have discovered the fraud sooner.

8. Further, with respect to the *res judicata* argument, the Court of Appeals incorrectly assumed by way of its final holding, as only a fact-finder should, that the Petitioners/Appellants should have known about the fraud by the time of the foreclosures they faced.

9. It is my respectful opinion that the Court of Appeals, as this Petition suggests, incorrectly acted as a fact-finder, and in doing so, incorrectly applied binding North Carolina precedent.

10. With respect to these points specifically and concisely identified within the Decision filed 31 December 2020, it is the opinion of the undersigned that the Court has misapprehended the law and the previous authority in North Carolina.

Respectfully submitted this 4th day of February, 2021

/s/ Terry D, Horne
NC Bar No. 12986
Stiles, Byrum & Horne, LLP
The Arlington
325 Arlington Ave.
Suite 650
Charlotte, NC 28203