No. COA20-160 TWENTY-SIXTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

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,

Appellants,

v.

BANK OF AMERICA, N.A.,

Appellee.

From Mecklenburg County

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RESPONSE OF APPELLEE BANK OF AMERICA, N.A. TO APPELLANTS' PETITION FOR REHEARING

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INTRODUCTION

Boilerplate recitations that a plaintiff is entitled to toll a statute of limitations because he could not have discovered his claims sooner are not factual allegations. They are legal conclusion couched as factual allegations, which no court is required to accept as true. That is the limited issue presented in Plaintiffs' rehearing petition: whether a complaint this Court accurately described as time-barred "on its face" (Op. p. 1) can survive dismissal merely because Plaintiffs made conclusory assertions that they were entitled to tolling. Plaintiffs insist that conclusory assertions are all they need. The Superior Court and this Court were unpersuaded. The rehearing petition furnishes no grounds for this panel to rule differently.

ARGUMENT

I.

Plaintiffs Do Not Challenge, and Thus Concede, this Court's Threshold Ruling on the Applicable Law.

Only one of the thirteen Plaintiffs is from North Carolina. N.C.G.S. § 1-21 forbids out-of-state plaintiffs from coming here to exploit North Carolina's limitations periods when their lawsuits are barred in their home states. Because of this, Bank of America expended substantial effort briefing the law of Plaintiffs' home states. Plaintiffs expended none, and argue solely "North Carolina law." Pet. p. 8.

Yet they assert no challenge to this Court's determination that their home-state statutes control, limiting their rehearing challenge to an analysis of North Carolina law the Court only undertook "assuming *arguendo* that it applies." Op. p. 5–6. Having elected not to challenge the Court's holding on the applicable law, Plaintiffs abandon

any reconsideration of it. Rehearing can be granted "as to all or fewer than all points suggested in the petition"—not *more* points than suggested in the petition. N.C. R. App. P. 31(c); *see also* N.C. R. App. P. 28(b)(6) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned.").

Regardless, no state's law lets a plaintiff avoid dismissal with nothing more than conclusory allegations miming the legal standard for tolling. *See infra* & Appellee's Br. pp. 14–27.

II.

The Court Properly Held Plaintiffs' Claims Time-Barred.

Plaintiffs are correct that "[t]his case is quite simple." Pet. p. 7. Plaintiffs alleged being repeatedly frustrated applying for loan modifications as far back as 2009 and losing properties to foreclosure by 2014. Despite being on notice of those frustrations and the foreclosure activity, they brought no claims against Bank of America until their current lawyers found them in 2016–17 and told them to sue for fraud. Their attorneys did not base these fraud claims on any new information—they just asserted Plaintiffs were fraud victims based on accusations made in other "identical" lawsuits back to 2011, with boilerplate recitations that Plaintiffs had no way of knowing this until retaining them as counsel. R. pp. 200–07. But the law does not permit plaintiffs with full notice of their injuries to keep a statute of limitations tolled indefinitely until a lawyer finds them, as multiple other courts recognized in holding identical claims time-barred (s*ee* Appellee's Br. p. 8) and as this Court recognized in holding Plaintiffs to their well-established duty to inquire. Op. pp. 7-8.

A. Neither this Court nor the Superior Court did any "fact-finding."

Plaintiffs repeatedly accuse this Court, and the seasoned Superior Court judge, of "inappropriate" and "blatant" "fact-finding." Repeating this charge over and over again does not make it true. Neither Judge Bell's decision nor this Court's rested on any "facts" beyond those Plaintiffs chose to plead. Most pertinently, they alleged:

- receiving trial plans that promised permanent loan modifications if they made trial payments,
- making the trial payments,
- getting "frustrate[d]" by numerous "unnecessar[y]" requests for paperwork they knew they had already supplied, and
- being "wrongfully denied" modifications and sent into foreclosure.

R. pp. 199, 212–13, 221–22, 227–28, 236, 244–45, 252–53, 259–60, 267–68, 275–76.

Whether Plaintiffs' conceded knowledge of these alleged harms and frustrations put them on inquiry notice is a question of law, not a question of fact, which is routinely decided on motions to dismiss. *See Appellee's Br.* p. 15 & n.8; *Christenbury Eye Ctr., P.A. v. Medflow, Inc.*, 370 N.C. 1, 6 (2017) (affirming dismissal because "plaintiff's complaint reveals [when] it had notice of its injury," despite claiming it "could not have been discovered"); *Wilson v. Pershing, LLC*, 253 N.C. App. 643, 654 (2017) (affirming dismissal because plaintiff "fails to allege" inability to discover claims); *Stunzi v. Medlin Motors, Inc.*, 214 N.C. App. 332, 338–41 (2011) (affirming dismissal because "[p]laintiff reasonably should have discovered any fraud"); *Button v. McKnight*, No. COA10-858, 2011 WL 1483433, at *4 (N.C. App. Apr. 19, 2011) (affirming dismissal because plaintiff "should have discovered his injury"); *DePalma v. Roman Catholic Diocese of Raleigh*, No. COA04-206, 2004 WL 2793377, at *4 (N.C.

App. Dec. 7, 2004) (affirming dismissal based on when plaintiff's "injury" was "apparent"); *Thorpe v. DeMent*, 69 N.C. App. 355, 362–63 (N.C. App. 1984) (affirming dismissal because "as a matter of law plaintiffs are charged with the knowledge that a reasonable inquiry would have disclosed"); *In re Will of Evans*, 46 N.C. App. 72, 75–77 (1980) ("where the facts are admitted or established the question of the bar of the applicable statute [of limitations] becomes a question of law"). This case broke no new ground.

Plaintiffs nearly concede the point when they allow that their claims could "perhaps" be disposed of on summary judgment, just not on a motion to dismiss. Pet. p. 8. That is a distinction without a difference in this case: If the legal implication of record facts can be decided as a matter of law on summary judgment, then the legal implication of pleaded facts can be decided as a matter of law on a motion to dismiss. Plaintiffs cannot credibly argue otherwise, given that *they moved for summary judgment in their favor* right after Bank of America moved to dismiss. R. p. 637. Having invited the Superior Court to decide their claims as a matter of law based on their pleadings, they cannot pivot and complain it was improper to do just that.

B. This Court is not obliged to accept conclusory boilerplate as true.

Plaintiffs argued to the Superior Court that all they had to do to survive dismissal was to allege, "I did not know and I could not know. And that's the end of the analysis." R. p. 706. If repeating those nine magic words were all it takes to evade a time bar, no complaint would *ever* be dismissed. Ample precedents of this Court ruling otherwise (*see supra* Part I.A) establish that a rote recitation that one is entitled to tolling is *not* "the end of the analysis." It is just the beginning.

Plaintiffs argue that "the Court must accept [] as true" their allegations about "when they discovered" their claims. Pet. p. 11. That is misplaced because the law hinges *not* on actual discovery, but on when Plaintiffs knew of injuries "trigger[ing] … the duty to investigate." *Doe v. Roman Catholic Diocese of Charlotte*, 242 N.C. App. 538, 543–44 (2015). This Court routinely affirms the dismissal of claims the plaintiffs did not discover, but "should have," because the plaintiffs pled facts putting them on inquiry notice. *E.g.*, *Stunzi*, *Wilson*, *Button*, *DePalma*; *supra*. A "conclusory allegation" that a plaintiff "could not have [] discovered" his claims is not enough to evade dismissal. *Wilson*, *supra*.

Plaintiffs further argue that this Court is obliged to credit the conclusory assertion that the statute of limitations was tolled "until [they] retained counsel in this matter." R pp. 211, 220, 226, 235, 243, 251, 258, 266, 275 (cited in Pet. p. 11). But the Court is not obliged to accept "conclusions of law[] as true," *Izydore v. Alade*, 242 N.C. App. 434, 438 (2015), and an assertion that a statute of limitations is tolled until retaining counsel remains a legal conclusion even if couched as a fact allegation. That legal conclusion has been rejected by every court to consider it—most recently in another case brought by Plaintiffs' counsel using the same boilerplate complaint as here. That court "reject[ed] the notion that a statute of limitations can stay in suspension until one talks to an attorney," because "making the date of legal consultation determinative would abrogate all statutes of limitations." *Salazar v. Bank of Am., N.A.*, No. 18-CA-010252, 2020 Fla. Cir. LEXIS 2275, at *3 (Fla. Cir. Ct. Oct. 21, 2020); *accord* Appellee's Br. pp. 7–8, 20–21 (collecting cases). North Carolina law is consistent. *See Peacock v. Barnes*, 55, S.E. 99, 100 (N.C. 1906) (plaintiff cannot

"extend his right to recover for an indefinite length of time" by delaying investigation).

Plaintiffs misrepresent the landscape by claiming that "at least six federal court judges agreed that [identical] complaints … presented a question of fact." Pet. p. 10. They cite three cases (not six), neglecting to mention that two were thrown out on *res judicata* grounds after earlier rulings dismissing most claims on the merits. *See Morales v. Bank of Am., N.A.*, No. 17-2638, 2018 WL 5024179 (M.D. Fla. Oct. 17, 2018); *Varela-Pietri v. Bank of Am., N.A.*, No. 17-2534, 2018 WL 4208002 (M.D. Fla. Sept. 4, 2018). Only one judge has not yet rejected these claims, compared to sixteen who have dismissed dozens on limitations and *res judicata* grounds and at least one other appellate court affirming that result. *See* Appellee's Br. pp. 6–8. *No* court has accepted Plaintiffs' theory that alleging an inability to discover their claims until consulting their current lawyers "is sufficient to establish the approximate date from which the statute of limitations began to run." Pet. p. 11.

Jennings v. Lindsey, 69 N.C. App. 710 (1984), cited in purported support of this theory, provides no support at all. *Jennings* does not specify what facts the plaintiffs there alleged to support their assertion "that they did not discover the alleged fraud until September 1981" (*id*. at 716), but nothing suggests it was a conclusory allegation like Plaintiffs' here, or a claim that a limitations period is tolled indefinitely until potential litigants are solicited by lawyers. Nor is *Jennings* contrary to this Court's precedent rulings that a "conclusory allegation" that a plaintiff "could not have [] discovered" his claim is insufficient to raise a fact issue. *Wilson*, 253 N.C. App. at 654.

In *Wood v. Carpenter*, 101 U.S. 135, 140–41 (1879), the Supreme Court held: "A

general allegation of ignorance at one time and of knowledge at another are of no effect. If the plaintiff made any particular discovery, it should be stated when it was made, what it was, how it was made, and why it was not made sooner." Plaintiffs do not do this. They claim "ignorance" of their claims while going through foreclosures before 2014 and "knowledge" after retaining their current attorneys in 2016–17 (R. pp. 214, 222, 229, 237, 246, 254, 262, 269), but do not—and cannot—explain how they were prevented from acquiring that knowledge sooner. Instead, they allege facts *precluding* the inference—that their attorneys advised them to sue based on accusations made against the bank in 2011–13. R. pp. 201–04.

The Court's application of these principles was not "fact-finding." The burden of showing their claims are timely rests on Plaintiffs. *Horton v. Carolina Medicorp, Inc.*, 344 N.C. 133, 136 (1996). If they wanted to rest on the theory that a supposed scheme known to their lawyers in 2016 was "secret" in 2014 (Pet. p. 14), despite giving rise to "identical" lawsuits back to 2010 (R. pp. 201–07), it was their burden to allege supporting facts. They alleged none.

The Petition fixates on the panel's statement that "simple research" could have revealed grounds to sue earlier, with Plaintiffs contending that whether they needed "a Google search" or "a mortgage specialist" is "unknown." Pet. pp. 9–10. That actually *isn't* "unknown" given the myriad lawsuits—many *pro se*—against every mortgage servicer over identical grievances years before Plaintiffs'. *See* Appellee's Br. pp. 19, 22. But it's irrelevant either way. The law draws no distinction between claims discoverable with simple effort and those requiring professional advice. If legal advice were needed, Plaintiffs had a duty to seek it. *See*, *e.g.*, *DePalma*, 2004 WL 2793377,

at *4 (plaintiff on notice of injury "could have" consulted a "professional" to discover his cause of action); *accord* Appellee's Br. pp. 20–21 (collecting cases). In either case, Plaintiffs were "charged" with knowledge of all facts the "inquiry would have disclosed." *Thorpe*, 69 N.C. App. at 362–63. It requires no speculation to ascertain those (purported) facts—Plaintiffs allege in the Complaint what they deduced upon inquiry. What they fail to allege—fatally—is why they didn't inquire sooner.

C. Plaintiffs' "policy concerns" are illusory.

Plaintiffs call the panel's decision "dangerous" because it lets banks "defraud customers and face no recourse." Pet. p. 14. It does no such thing. Just because Plaintiffs couldn't plead a valid tolling theory doesn't mean no plaintiff *ever* can. And just because Plaintiffs waited too long to sue doesn't mean the many others who brought timely lawsuits accusing various banks of HAMP fraud lacked legal recourse. *See* Appellee's Br. p. 19.

The public policies at stake cut the other way. Statutes of limitation embody strong policies "to afford security against stale claims," *Estrada v. Burnham*, 316 N.C. 318, 327 (1986), "and to prevent the problems inherent in litigating claims in which evidence has been lost, memories have faded, and witnesses have disappeared." *Christie v. Hartley Constr., Inc.*, 367 N.C. 534, 538 (2014). These concerns are especially salient in a case asserting fraud based on what various customer service representatives told Plaintiffs in phone calls over a decade ago. R. pp. 208, 216, 225, 231, 240, 248, 255, 263, 286.

III.

Plaintiffs' Challenge to the *Res Judicata* Ruling Fails.

In a very narrow challenge to the Court's *res judicata* analysis, Plaintiffs claim their failure to raise their current claims as foreclosure defenses should be excused because (i) they "had no knowledge" of their claims at that time, and (ii) their "attacks on [the] prior judgments … are extrinsic." Pet. pp. 13–14.

The first contention is irrelevant because *res judicata* attaches regardless of a party's awareness of the claim. *See* Appellee's Br. pp. 30–31.

The second contention gets the difference between "extrinsic" and "intrinsic" fraud backwards. Plaintiffs' own case says that a judgment can only be attacked based on fraud "in the procurement of the judgment" itself, not merely "fraud in the cause of action." *Scott v. Farmers Co-Op Exch., Inc.*, 274 N.C. 179, 183 (1968); *see also*, *e.g.*, *Whitworth v. Estate of Whitworth*, No. COA11-989, 2012 WL 3791714, at *8 (N.C. App. Sept. 4, 2012) (extrinsic fraud is "fraud in the management of the cause of action"). Here, Plaintiffs allege "fraud in [Appellee's] application of the HAMP program" (classic intrinsic "fraud in the cause of action"), and expressly disclaimed any claim of extrinsic fraud in the foreclosure process itself. Pet p. 13.

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CERTIFICATE OF COMPLIANCE

Under N.C. R. APP. P. 28(j)(2), the undersigned counsel hereby certifies that this Response contains no more than 2,500 words, inclusive of footnotes and citations, as calculated by the word count in Microsoft Word.

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I hereby certify that the undersigned counsel has this day served the foregoing electronically filed this Response in the above-captioned action on all parties to this cause by depositing the original and/or copy hereof, postage prepaid, in the United States Mail, addressed to the following:

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