No. 102A20-2 TWENTY-SIXTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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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,	)	
Appellees,	)	From Mecklenburg County
v.	)	
BANK OF AMERICA, N.A.,	)	
Appellant.	)	

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PLAINTIFFS-APPELLEES' NEW BRIEF

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PLAINTIFFS-APPELLEES'

BRIEF

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ISSUES PRESENTED

I. Did the New Court of Appeals Panel address the merits – statute of limitations and res judicata – such that Defendant/Appellant could raise them before this Court?

II. Did the New Panel, in its discretion, correctly remand the case to the trial court for further findings of fact and conclusions so that the Court of Appeals could conduct a meaningful review?

III. Did the Amended Complaint allege facts sufficient to overcome the low bar set by Rule 12(b)(6), assuming this Court chooses to rule on the merits?

INTRODUCTION

The Defendant/Appellant Bank of America ("BOA" or "the Bank") defrauded countless families of the precious American dream of home ownership—foreclosing on their houses and making them homeless. In essence, the Bank collected billions of taxpayer dollars earmarked for mortgage relief while simultaneously charging inflated mortgage sums and illegal homeowner fees, all the while fully intending to cast the vast majority of its paying mortgagors to the curb. As Plaintiffs/Appellees have stated many times before: not since the days of Michael Milken and Jordan Belfort has any entity so blatantly preyed on the financial naivety of lay people in a successful effort to game the system.[1] The Plaintiffs/Appellees in this case, Chester Taylor, Ronda and Bryan Warlick, Lori Mendez, Lori Martinez, Jeanette and Andrew Aleshire, Marquita Perry, Kimberly Stephan, Keith Peacock, and Zelmon McBride are a few of BOA's unsuspecting victims. (R pp 197–304).

In this case, the trial court inappropriately usurped the role of the jury and acted as fact-finder, assuming that the Plaintiffs/Appellees should have known or could have discovered, at the time of their foreclosure, that their foreclosure was caused by the fraud of a multi-national, multi-billion-dollar bank. Unfortunately, that is all we know about the trial court's decision. Plaintiffs/Appellees Chester Taylor and the other Plaintiffs/Appellees simply

[1] This is not mere hyperbole. An Inspector General report to Congress in 2017 revealed that BOA had denied mortgage modification under the federal program described below to a whopping 79 percent of its mortgagors, despite taking $2 billion in federal aid to do just the opposite. (R p 206).

want their day in court—to be heard after the Bank stole their homes and uprooted their lives. The trial court gave no details and stated no rationale. The trial court's decision did not state the grounds for its grant of the motion to dismiss, did not conduct a choice of law analysis, and did not give any basis upon which it granted Defendant/Appellants motion to dismiss. Without those key determinations, the new panel correctly reversed and remanded this decision to the trial court with instructions to make further factual findings and conclusions of law. More importantly, the New Court of Appeals Panel did not address the appeal on the merits, which precluded the Bank from raising the issues of Statute of Limitations and *Res Judicata* before this Court. The Bank's Appellate brief should have been limited to the issue of whether the New Panel had the discretion to order the Superior Court to issue findings of fact and conclusions of law. Plaintiffs/Appellees assert that it did and should therefore the New Court of Appeals Panel's decision should be affirmed. In the event this Court decides to address this appeal on the merits, Plaintiffs/Appellees address those below.

STATEMENT OF THE CASE

Plaintiffs/Appellees filed this case on 1 May 2018 in the Superior Court of the County of Mecklenburg, North Carolina, Case No. 18-CVS-8266, asserting causes of action for fraud, intentional misrepresentation, promissory estoppel, conversion, unjust enrichment, a statutory claim brought under the North Carolina Unfair and Deceptive Trade Practices Act, and a claim for "wanton and reckless conduct," pursuant to section 1D-1 of the North Carolina General Statutes, et seq. Defendant/Appellant, removed the case to the United States

District Court for the Western District of North Carolina. Plaintiffs/Appellees then moved to remand the case to the Superior Court of the County of Mecklenburg, North Carolina. Appellee's Motion to Remand was granted. (11(c) Supp. p 1).

After the case was remanded to the Superior Court of Mecklenburg County, the several hundred other cases against the Bank were designated under Rule 2.1 and consolidated before Judge Bell. The remaining cases not involved in this appeal are currently stayed in Superior Court, pending the resolution of this appeal. (R p 193). Further, after Remand, the Bank filed its Motion to Dismiss the Amended Complaint, primarily alleging that the claims were barred by the statute of limitations, *res judicata*, and collateral estoppel. (R p 633). The Bank's primary argument in support of its Motion is that Plaintiffs/Appellees should have known about the scheme, a scheme which the Bank purposely hid and repeatedly lied about, years earlier. Plaintiffs/Appellees' Amended Complaint and Response to the Motion to Dismiss outlines how they were not aware of BOA's covert scheme and had no reason or means to know or uncover it. (Doc. Ex. p 109). Plaintiffs/Appellee's Response also details how their lack of knowledge of the Bank's fraud was because one of the largest and most profitable companies in the country repeatedly lied to them and destroyed their applications and supporting documents. (Doc. Ex. p 109).

Almost a year and half later, the Superior Court ruled in favor of the Bank, dismissing the cases, without any details or explanation, on the grounds that Appellee's claims were barred by the statute of limitations, *res judicata*, and

collateral estoppel. (R p 655). Plaintiffs/Appellees then appealed that Order to the North Carolina Court of Appeals. On 31 December 2020, the Court of Appeals affirmed the trial court's ruling, upholding the Superior Court's impermissible fact-finding and contradicting established precedent of the North Carolina Supreme Court.

On 2 February 2021, Plaintiffs/Appellees filed a Petition for Rehearing. That Petition was granted by the North Carolina Court of Appeals (Carpenter, Dillon, Jackson, JJ) on 10 March 2021. The case was reheard on the briefs without oral arguments, and on 5 October 2021, the new panel issued its opinion, reversing and remanding the case for further findings of fact and conclusions of law, determining that the Superior Court failed to make findings sufficient for the Panel to determine the reasons behind the decision. That opinion did not address the merits of the arguments pertaining to the statute of limitations or res judicata issues. Defendant/Appellants filed its Notice of Appeal on 8 November 2021.

STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

Review in this Court is proper pursuant to N.C.G.S. § 7A-30 based on the dissent in the Court of Appeals.

STATEMENT OF THE FACTS

A. The Fraudulent Scheme

Around 2008, following one of the worst economic downturns in U.S. History, a housing crisis unfolded as mortgages became increasingly unaffordable. (R pp 198–199). Housing loan defaults were rampant, threatening

the viability of several major banks, including Bank of America. (R pp 198–199). Because the economy could not withstand bank insolvency, the federal government implemented the Troubled Assets Relief Program through which Congress appropriated over $200 billion in tax dollars paid by citizens across the country, including Appellants. BOA's share of this funding totaled $45 billion, with an additional $100 billion in future commitments. (R pp 198–199).

The fraud at issue involved the Home Affordable Modification Program ("HAMP"), implemented in March 2009. *Id.* HAMP provided for mortgage "modifications" in the form of lower short-term interest rates that became long-term loans for mortgagors who made timely monthly payments called "Trial Payments". (R pp 200-201).

The federal funds BOA sought under HAMP were not an unrestricted gift from the U.S. Government. There were strings attached—namely, a commitment to modify mortgage terms to prevent homeowners from defaulting on loans and losing their homes. Thus, the Bank was contractually compelled to use "reasonable efforts" to "effectuate any modification of a mortgage loan under the Program." *Id.*

The Bank knew the loan modifications would cost the company millions of dollars, so instead of using the billions in federal funding it received to help homeowners out of financial difficulty — as it promised to do — the Bank opted to prevent HAMP applicants from becoming or remaining eligible for permanent HAMP modification. *Id.* The Bank's covert scheme involved numerous acts that misled mortgagors into believing they did not qualify for loan modifications or

had failed to follow required procedures, thus surreptitiously yielding a legitimate foreclosure. (R pp 200-205). By way of example only, the Bank engaged in the following activities, each of which has been confirmed by the sworn testimony of former BOA employees:

- BOA instructed its employees to shred numerous paper applications;
- BOA ordered its employees to tell applicants their submissions lacked required documents and were thus incomplete (even when BOA knew the required documents were present and the applications were valid);
- BOA directed its employees to perform "blitzes" in which all claims older than 60 days were denied simply because BOA had negligently failed to act on them for over two months; a single review team would deny 600 to 1,500 applications at a time;
- BOA had its employees falsify electronic records to suggest applicants had failed to take all required steps, thereby ensuring application denial;
- BOA insisted its employees offer modifications with illegal terms, including interest rates higher than the law allows, despite BOA's receipt of federal funds to do precisely the opposite.
- BOA mandated its personnel tell customers they must be in default for a prolonged period of time to qualify for HAMP, thereby ensuring Trial Payments were untimely and applications were denied.
- BOA converted consumers' Trial Payments into BOA assets rather than applying them against the consumers' mortgage obligations.

(R pp 201–204).

After directing homeowners into its fraudulent scheme, the Bank then foreclosed on mortgagors whose HAMP applications were denied as a result of any of the above actions. After all, the fraudulent scheme was designed to take the money homeowners paid as they thought their applications were being seriously evaluated, then foreclosing on the mortgagors and taking their homes after taking their money. (R pp 201–204).

It is beyond dispute that the Bank's massive campaign of fraud was deliberate. (R pp 200–204). One ex-BOA employee testified the Bank gave its employees foreclosure quotas to ensure the company would oust as many customers as possible from their homes. (R p 206). Another ex-BOA employee testified that employees who refused to participate in the scheme –those who actually approved fair mortgage modifications—were disciplined or fired. (R p 202). The federal government created HAMP to ensure homeowner protection. However, at the height of the program, BOA was denying protection to four out of five applicants. (R p 206).

B. The Unwitting Victims

Chester Taylor and the other Plaintiffs/Appellees are a group of homeowners whose HAMP applications were wrongfully denied, resulting in foreclosure, short sale and/or bankruptcy. (R pp 197–304). Each of the Plaintiffs/Appellees had mortgages with the Bank. After experiencing hardship, due in part to the state of the economy, Plaintiffs/Appellees contacted the Bank, requesting a HAMP modification. Starting with that conversation, Plaintiffs/Appellees were then deceived by a series of lies by Bank employees.

First, Bank employees told Plaintiffs/Appellees they needed to intentionally miss payments on their mortgages because default was required for HAMP. This was false. Second, after sending in their HAMP applications on numerous occasions, Bank employees told Plaintiffs/Appellees that the applications were lost, missing, or incomplete. This was also false. Third, bank employees told Plaintiffs/Appellees they were approved to make Trial Payments. Again: false. And as though all of that were not enough, Plaintiffs/Appellees were impermissibly and unknowingly charged inspection fees while they were still living in their homes.

Given the complex, sophisticated, and deliberately covert nature of the Bank's labyrinth of lies, Plaintiffs/Appellees neither suspected nor had reason to suspect the Bank's wrongdoing. They relied on the Bank's misrepresentations and lies, to the detriment of them and their families.

C. Other HAMP Lawsuits

Defendant/Appellant's statements regarding the origin of Plaintiffs/Appellee's Complaint are false and misleading. Multiple federal judges across the Middle and Southern Districts of Florida ruled in Plaintiffs' favor at the motion to dismiss stage on the same issues raised here: statute of limitations and *res judicata*. For example, in *Captain v. Bank of America, N.A.*, Defendant's Motion to Dismiss was denied in its entirety. 0:18-cv-60130-CMA, ECF No. 22 (S.D. Fla. March 6, 2018). The court ruled that the claim was not barred by the statute of limitations. *Id.* In *Dykes v. Bank of America, N.A.*, 0:17-cv-62412-WPD, ECF No. 30 (S.D. Fla. April 26, 2018), the court also rejected each of the

Bank's arguments that the claim was barred by the statute of limitations. Specifically, the court held that the case was not time-barred, and the court determined the operative complaint sufficiently alleged facts to support the fraud claim. *Id.* Those two cases were ultimately dismissed, without prejudice, because the federal court ruled it lacked subject matter jurisdiction. The Florida cases that have been dismissed, without prejudice, due to lack of federal jurisdiction have since been refiled in this Court. *See Captain v. Bank of America N.A.*, 0:18-cv-60130-CMA, ECF No. 104 (S.D. Fla. October 25, 2018); *Dykes v. Bank of America*, N.A., 17-cv-62412-WPD, ECF No. 64 (S.D. Fla. October 26, 2018); *Brexendorf v. Bank of America*, N.A., 6:17-cv-2065, ECF No. 89 (M.D. Fla. January 24, 2019).

Further, Defendant/Appellant continues to point to *Torres v. Bank of America*, N.A., 8-17-cv-01534-RAL-TBM (M.D. Fla. 2017), but again, fails to highlight the substantial differences in the operative Complaint in this case and the complaint in *Torres*. Most notably, the *Torres* operative complaint failed to allege tolling of the statute of limitations and did not even mention the application of the discovery rule. *Id.* The *Torres* complaint did not allege that the plaintiffs were unaware of the fraud until seeing attorney advertisements, did not allege fraudulent concealment, and did not allege plaintiffs' inability to discover the fraud. While it is true that Judges Lazzara and Chappell dismissed the few cases before them on statute of limitations grounds, those complaints – unlike the operative complaint here – significantly, failed to plead any tolling by fraudulent concealment or the discovery rule. More importantly, at least six

other federal judges in the Middle and Southern Districts of Florida ruled in favor of the plaintiffs on statute of limitations grounds at the Motion to Dismiss stage. Five of those six judges based their rulings on complaints that affirmatively alleged tolling via the discovery rule, as the Complaint did here.[2]

ARGUMENT

I. STANDARD OF REVIEW

Dismissals granted under Rule 12(b)(6) are reviewed *de novo*. *Christenbury Eye Ctr., P.A. v. Medflow, Inc.*, 370 N.C. 1, 5 (2017). Dismissal is only proper if the complaint reveals no law that supports the claim or discloses facts that defeat the claim. *Id.* (quoting *Arnesen v. Rivers Edge Golf Club & Plantation, Inc.*, 368 N.C. 440, 448 (2015)).

[2] *See Zenteno et al v. Bank of America, N.A.*, 8:17-cv-02591-WFJ-TGW, ECF Nos. 40, 44; *Varela-Pietri and Bonilla v. Bank of America*, N.A., 8:17-cv-2534-T-23TGW (2017), ECF No. 13 (Judge Merryday denying motion to dismiss on statute of limitations grounds); *Morales v. Bank of America, N.A.*, Case No. 8:17-cv-2638-T-33CPT, 2018 WL 2215445, ECF No. 37 (Judge Covington denying motion to dismiss, in part, stating that the "statute of limitations has not run with respect to the HAMP Eligibility, HAMP Approval or Supporting Documents claims"); *Captain v. Bank of America, N.A.*, 0:18-cv-60130-CMA, ECF Nos. 22, 28, (denying motion to dismiss in its entirety, ECF No. 22); *Dykes v. Bank of America, N.A.*, 0:17-cv-62412-WPD, ECF No. 30 (denying motion to dismiss, CM/ECF No. 30); and *Brexendorf v. Bank of America, N.A.*, 6:17-cv-02065-RBD, (denying motion to dismiss, in part, stating "it is not apparent from the face of the Second Amended Complaint that Brexendorf should have discovered the facts giving rise to the Fraud Claim [at the time of her foreclosure]").

II. SUMMARY OF THE ARGUMENT

When Plaintiffs/Appellees first appealed the ruling of the Superior Court, they focused on one central question: when did Plaintiffs/Appellees know that they lost their home as a result of Bank of America's fraudulent scheme? Plaintiffs/Appellees alleged they did not know and reasonably could not know of the fraudulent scheme until they consulted with counsel. Further, contrary to argument of the Bank, the injury to the Plaintiffs/Appellees was the fraudulent concealment of the Bank's deceptive HAMP practices, not their foreclosures. Taking these allegations as true, which the Superior Court must, the claims cannot be barred by the statute of limitations or *res judicata*. However, following the New Court of Appeals Panel's ruling, another question is presented: did the New Panel's ruling address the merits? If not, this appeal should be limited to the issue of whether the New Panel, in its discretion, properly reversed and remanded, ordering the Superior Court to state findings of fact and conclusions of law upon which a proper review could be conducted.

However, even if this Court believes that the New Panel's decision did address the merits – and that the merits should be addressed now – Plaintiffs/Appellees Amended Complaint was sufficient to withstand the low bar set for a 12(b)(6) Motion.

III. BECAUSE THE NEW COURT OF APPEALS PANEL'S RULING DID NOT MAKE A DETERMINATION ON THE MERITS, THE ISSUES OF STATUTE OF LIMITATIONS AND RES JUDICATA ARE NOT BEFORE THIS COURT.

The New Court of Appeals ("COA") Panel, upon the rehearing of the case, reversed and remanded the Superior Court's Order, dismissing Plaintiffs' Complaint and instructing the Superior Court to determine "further factual findings and conclusions of law in accordance with this opinion." *See* 5 October 2021 COA Opinion at 7. In doing so, the New COA Panel's decision made the original COA Panel's decision null and void. Further, the New COA Panel reversed the Superior Court's Order, not upon merits of the issues presented, but upon the COA's discretionary determination that additional findings of fact and conclusions of law were necessary in order to properly decide the case on appeal.

Judge Dillon's dissent, which allowed this appeal under NC Appellate Rules of Procedure 14, apparently disagreed with the need for additional factual findings and conclusions and stated "my vote continues to be to affirm the order of the trial court." *See* 5 October 2021, Dillon, J., Dissenting Opinion. The Dissent then goes on to "write separately to address the statute of limitations issue." *Id.* However, the Panel never decided the issue of statute of limitations, meaning Judge Dillon's dissenting opinion was not based on the decision of the majority.

Because the decision of the majority of the New COA Panel remanded the case to the Superior Court for additional findings of fact and conclusions of law,

that is the only issue properly raised on this appeal. The majority never reached the merits of the statutes of limitations or *res judicata*. However, the issue of the merits was included in the Defendant/Appellant's Notice of Appeal, which appears to raise the question of the whether the second panel appropriately reversed the Superior Court. As stated, the New Panel's ruling – which is the operative COA decision – did not rule on the merits but remanded for findings of fact and conclusions of law. Moreover, in the "Issues Presented" section of Defendant/Appellant's brief submitted, the Defendant/Appellant now pivots on the issue and appears to, instead, raise the question of the appropriateness of the second panel vacating the first panel's opinion and granting a rehearing. That decision was never appealed. Therefore, any issue regarding the merits is not properly on appeal before the Court and should not be addressed further.

IV. THE COURT OF APPEALS, IN ITS DISCRETION, MAY ORDER FINDINGS OF FACT AND CONCLUSIONS OF LAW FROM THE SUPERIOR COURT.

The Court of Appeals has broad discretion in its review. In its Opinion, the Court of Appeals outlined its reasoning behind their determination that findings of the trial court were necessary in its review: "[t]here is no indication that the trial court did a choice of law analysis, that it considered facts only within the amended complaint, or that it was appropriate to consider Plaintiffs' claims together when the underlying facts established a failed class action based on "so many individual factual questions." *See* 5 October 2021 COA Opinion at 3. Defendant/Appellant is correct that Plaintiffs/Appellees did not request additional findings of fact pursuant to North Carolina Rule 52(a)(2). The parties'

roles in the application of Rule 52(a)(2) is not the issue here. Instead, the Court of Appeals, of its own initiative, ordered that further findings of the trial court were necessary to determine if the trial court's order was in error. This was a clear discretionary decision by the Court of Appeals panel requesting further factual findings and conclusions of law for their benefit, and the Court of Appeals has broad discretion to make such a determination.

The Court of Appeals determined that without findings, it could not determine whether Judge Bell did, in fact, usurp the role of the jury and engaged in improper fact finding, as Plaintiffs/Appellees have unwaveringly asserted throughout prior briefing. Plaintiffs/Appellees have contended from their first brief on this matter that the Motion to Dismiss should have been denied based upon the facts of the case detailed in the pleadings. Plaintiffs/Appellees have continued to argue that Defendant/Appellant attempted to convert the Motion to Dismiss into a bench trial by repeatedly citing to evidence outside of the Amended Complaint. *See* Plaintiffs' Response at p. 13. Because this case is at the pleadings stage, the findings must not include facts outside the four corners of the amended complaint. *See Jackson/Hill Aviation, Inc. v. Town of Ocean Isle Beach*, 251 N.C. App. 771, 775. By granting the Motion to Dismiss, the Superior Court allowed it and proceeded to conduct an inappropriate fact-finding expedition by determining when the Plaintiffs/Appellees knew or should have known about the fraud. As the Trial Court's Opinion notes: 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 Plaintiffs/Appellees stands in direct opposition to the evidence cited by Defendant/Appellant. However, the Superior Court 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.

If this Court agrees with the New Court of Appeals panel that the Superior Court should make findings of fact – such that appellate courts can make an assessment of the Superior Court's rulings – then it should affirm the Panel's decision and remand the case to the Superior Court. However, if this Court finds that the issue of the merits is properly on appeal and findings of fact are not needed to make a determination on the merits, Petitioners/Appellants must still succeed on the merits for the reasons detailed below.

V. PLAINTIFFS'/APPELLEES' CLAIMS ARE NOT BARRED BY THE STATUTE OF LIMITATIONS OR RES JUDICATA.

Plaintiffs/Appellees properly pleaded they did not know nor reasonably could have known of the Bank's fraud at the time of their foreclosure. Specifically, Plaintiffs/Appellees pleaded they did not discover the fraud until they met with counsel. To survive at the 12(b)(6) stage, this is sufficient. Moreover, it should be the jury, and not the trial court judge, who determines

the sufficiency of said pleading. Similarly, only the most cynical of litigants would suggest that a claim which has not even accrued is somehow barred by *res judicata*.

A. *Plaintiffs'/Appellees' Amended Complaint was sufficient to survive a 12(b)(6) Motion to Dismiss.*

"In general a cause or right of action accrues, so as to start the running of the statute of limitations, as soon as the right to institute and maintain a suit arises." *Pierson v. Buyher*, 330 N.C. 182, 186, 409 S.E.2d 903, 905 (1991). However, pursuant to section 1–52(9) of the North Carolina General Statutes, the three-year statute of limitations for an action alleging claims for fraud "shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake." Contrary to the Bank's contention that the foreclosure started the running of the statute of limitations, Plaintiffs'/Appellees' claims did not begin to accrue until they discovered their alleged injury, which Plaintiffs/Appellees have repeatedly noted was the fraudulent concealment of the Bank's HAMP practices, not their foreclosures.

Moreover, unlike other claims founded in tort, fraud claims are tolled by the discovery rule. Pursuant to section 1–52(9), the discovery rule for fraud claims in North Carolina runs from the "discovery ... of the facts constituting the fraud or mistake." *State Farm Fire & Cas. Co. v. Darsie*, 161 N.C. App. 542, 547, 589 S.E.2d 391, 396 (2003). North Carolina law expressly ties the accrual of a cause of action for fraud to a plaintiff's actual or constructive discovery of her cause of action, not the mere occurrence of fraud. *Nash v. Motorola Commc'ns &*

Elecs., Inc., 96 N.C. App. 329, 331, 385 S.E.2d 537, 538 (1989), *aff'd*, 328 N.C. 267, 400 S.E.2d 36 (1991) (citing *Rothmans Tobacco Co. v. Liggett Group, Inc.*, 770 F.2d 1246, 1249 (4th Cir. 1985)). Knowledge of one's damages is not enough. The plaintiff must have reason to know or suspect that the damages are the product of wrongdoing. *Id.*

In deciding the Rule 12(b)(6) motion, the trial court was required to 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). In making this determination, the trial court was required to "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). "[T]he complaint is to be liberally construed, and the trial court should not dismiss the complaint unless it appears beyond doubt that [the] plaintiff could prove no set of facts in support of his claim which would entitle him to relief." *State ex rel. Cooper v. Ridgeway Brands Mfg., LLC*, 362 N.C. 431, 444, 666 S.E.2d 107, 116 (2008) (quoting *Meyer v. Walls*, 347 N.C. 97, 111–12, 489 S.E.2d 880, 888 (1997)). A dismissal based on the statute of limitations is proper when, and only when, all the facts necessary to establish the limitation are alleged or admitted, construing the non-movant's pleadings liberally in his favor and giving him the benefit of all relevant inferences of fact to be drawn therefrom. *Reidsville v. Burton*, 269 N.C. 206, 152 S.E.2d 147 (1967).

For example, in *Feibus & Co.*, the plaintiffs brought a cause of action for fraud against a contractor for property damage caused by improper installation

of a drainage pipe. 301 N.C. at 305, 271 S.E.2d at 392. The trial court granted a directed verdict based on the statute of limitations;[3] however, on appeal to the Supreme Court of North Carolina, the Supreme Court noted that the statute of limitation began to run: "at the time of discovery regardless of the length of time between the fraudulent act or mistake and plaintiff's discovery of it." *Id.* The Court went on to note that "[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." *Id.* Finally, the Court reversed and remanded the case, holding that:

> Plaintiff offered proof that the subject of the alleged fraud, the drainage pipe, was buried deep in the ground and had never been inspected by plaintiff because of defendants' assurances that it was well constructed and "nothing to worry about," and that the damage caused by the drainage system was not apparent until the cave-in. While we express no opinion as to whether this evidence, by itself, would be sufficient to require an ultimate finding in plaintiff's favor, we do consider it sufficient to create an issue of fact for the jury and to overcome a motion for directed verdict.

Id.

The facts here are quite similar to *Feibus*. In this case, Plaintiffs/Appellees all contacted the Bank multiple times. Each time, they were told that the issues with their mortgages were the result of their own failure to pay, failure to return application documents, or ineligibility. The Amended Complaint details all of the

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[3] The standard of review for a motion for a directed verdict is the same as that for a motion to dismiss. *See State v. Burrus*, 344 N.C. 79, 93, 472 S.E.2d 867, 876 (1996); *State v. Ingle*, 336 N.C. 617, 630, 445 S.E.2d 880, 886 (1994) ("it is well settled that a motion to dismiss and a motion for a directed verdict have the same effect"), cert. denied, 514 U.S. 1020, 131 L.Ed.2d 222 (1995).

assurances that the Bank gave them, assurances on which they reasonably relied. It was because of those assurances that Plaintiffs/Appellees had no reason to suspect that one of the largest Banks in the country systematically lied to their them, destroyed their applications and supporting documentation, and withheld valuable information.

Similarly, in *N.C. Nat'l. Bank v. Carter*, 71 N.C. App. 118, 124, 322 S.E.2d 180, 184 (1984), a case involving a fraudulent and inaccurate deed, the Court of Appeals determined that when the plaintiff should have discovered the fraud was a decision for the jury. There, the Court of Appeals noted that the plaintiff and defendant had a "long and satisfactory" business relationship and that the plaintiff "had sufficient confidence in [defendant] to believe the representations made by its bank officers." *Id.* Further, the Court noted that there were no events or occurrences that would have reasonably caused the plaintiff to become aware of the true facts regarding the fraud until the property was surveyed. *Id.* The same is true in this case. Appellees trusted the Bank to hold the loan for their homes. Such a relationship caused Appellees to have sufficient confidence in the Bank to believe the representations made by its officers. Appellees then had no reason to suspect that the Bank would deceptively use this relationship to defraud them.

Here, the Amended Complaint details the Appellees' diligence in seeking answers. For example, Appellees tried repeatedly to contact the Bank for answers. (R pp 209, 218, 226, 233, 241, 249, 255, 266, 273). Moreover, Plaintiffs/Appellees explicitly alleged that they had no reason to suspect

nefarious practices by their own bank until consulting with counsel. (R p 200). The idea that the Bank would defraud its own customers is not something many people would expect. And more importantly, nothing in the Amended Complaint suggests Plaintiffs/Appellees would have held a different belief. In fact, it is entirely possible that Plaintiffs/Appellees believed that they failed to qualify for a loan modification because they failed to submit all required paperwork, a belief that would not have risen to fraud.

Notably, as mentioned above, the Bank's Brief tries to reframe the issues so that the injury in question is the foreclosure. *See* Defendant/Appellants' Brief at 26. Not so. The Plaintiffs/Appellees have made clear all along that their injury was the fraudulent concealment of the Bank's deceptive HAMP practices. *See* Counts I-III of the Amended Complaint. As such, any argument that the Statute of Limitations should have run from the date of foreclosure is misleading. The statute of limitations should have started running at the time Plaintiffs' discovered their injury: "fraud in the discharge of [the Bank's] loan servicing activities." *Id.*

Plaintiffs/Appellees' Amended Complaint is sufficient to survive a 12(b)(6) Motion. They alleged when they discovered the fraud and those dates are less than three years before the Amended Complaint was filed. Given that the Superior Court had the obligation to construe Appellees' assertions as true – and in the light most favorable to them – the Motion to Dismiss should have been denied.

B. The Superior Court made a reversible error by usurping the role of the jury.

When a plaintiff should have, in the exercise of reasonable care and due diligence, discovered the fraud is a question of fact to be resolved by a jury. *Feibus & Co.*, 301 N.C. at 304–05, 271 S.E.2d at 392; *see also Huss v. Huss*, 31 N.C. App. 463, 468, 230 S.E.2d 159, 163 (1976) (stating "[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"). "This is particularly true when the evidence is inconclusive or conflicting." *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 386 (2007).

The Superior Court determined, as a matter of law, that the discovery rule did not toll the claims. That determination requires the evidence to show "without conflict that the claimant had both the *capacity and opportunity to discover the fraud*." *State Farm Fire & Cas. Co.*, 161 N.C. App. at 548, 589 S.E.2d at 397 (emphasis added). For example, the North Carolina Court of Appeals reversed an order granting a motion to dismiss in *Huss*, 31 N.C. App. at 468, 230 S.E.2d at 163. The Court of Appeals held that the pleadings did not disclose sufficient facts to establish as a matter of law that the respondent failed to exercise due diligence. *Id.* The Court of Appeals noted that because the pleadings did not reveal the facts leading to the discovery of the fraud, the court could not speculate on the facts surrounding the discovery nor judge the likelihood of the plaintiff's success. *Id.*; *see also Vail v. Vail*, 233 N.C. 109, 115, 63 S.E.2d 202, 207

(1951) (concluding "that the evidence, measured by the applicable rules of law, is sufficient to sustain, though not necessary to impel, a finding of all the essential elements of fraud. That makes it a prima facie case for the jury").

For example, in *Jennings v. Lindsey*, the plaintiffs alleged that they did not discover fraud until September 1981, and the Court of Appeals noted that the defendants' assertion to the contrary "merely creates a conflict that, in the procedural context of this case, must be resolved in plaintiffs' favor." 69 N.C. App. 710, 716. (N.C. Ct. App. 1984). Similarly, in *BDM Investments*, the court held that the plaintiff's allegations that they "could not have discovered and did not discover the fraud . . . until well after March 1, 2007" constituted "disputed evidence." *BDM Investments v. Lenhil, Inc.*, No. 11 CVS 449, 2012 WL 194383, at *12 (N.C. Super. Jan. 18, 2012), *aff'd*, 826 S.E.2d 746 (N.C. Ct. App. 2019). The court noted that the statute of limitations issue "may ultimately have to be revisited on summary judgment," which is precisely the course of action the trial court should have taken in this instance. *Id.*

The Amended Complaint details when the Plaintiff/Appellees discovered their injury (the fraudulent concealment of the Bank's deceptive HAMP practices). Therefore, by determining some earlier date was when they should have discovered it, the Superior Court incorrectly placed themselves in the role of a juror, thereby making a reversible error.

i. Plaintiffs'/Appellees' Claims are not barred by res judicata.

Plaintiffs/Appellees have continued to assert – and it bears repeating here – two primary points with regard to the application of the doctrine of *res judicata*. First, 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"). In other words, 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).

The Bank committed fraud. It lied to customers like Plaintiffs/Appellees about the status of their HAMP applications, instructed them to default on their mortgage loans, and destroyed or deleted HAMP applications. Most importantly,

this fraud was extrinsic in nature because it prevented Plaintiffs/Appellees from ever previously presenting their cases.

Additionally, Plaintiffs/Appellees initially 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). Plaintiffs/Appellees did not and could not discover their claims before the time of the state court foreclosures because of the Bank's own fraudulent conduct that has been outlined thoroughly in prior briefing and reiterated in this Response. Accepting these allegations as true, as is required for a motion to dismiss, *res judicata* cannot and should not act as a bar to a fraud claim which was intentionally concealed.

VI. CONCLUSION

For the reasons stated herein, Plaintiffs/Appellees respectfully request that the Court of Appeals' decision be affirmed, thereby reversing the decision of the Superior Court and remanding the case for further factual findings and conclusions of law. Should this Court decide the issues on the merits, the Superior Court's should still be reversed for the reasons stated above. Plaintiffs/Appellees further request all other relief to which they are entitled.

This 29th day of March 2022.

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**N.C. R. App. P. 33(b) Certification: I certify that all the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

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