No. 102A20-3 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,	)	From Mecklenburg County
Plaintiff,	)	
v.	)	
BANK OF AMERICA, N.A.,	)	
Defendant.	)	

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PLAINTIFFS-APPELLEES' NEW BRIEF

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INDEX

TABLE OF CASES AND AUTHORITIES

Page(s)

Cases

Statutes

Rules

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PLAINTIFFS-APPELLEES'
NEW BRIEF

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ISSUE PRESENTED

I. Whether the Court of Appeals correctly determined that nothing in the Amended Complaint affirmatively bars the case on statute of limitations grounds.

INTRODUCTION

North Carolina law unambiguously ties the accrual of the statute of limitations for fraud to its discovery. *Garland v. Arrowood*, 172 N.C. 591 (1916) (quoting *Pelletier v. Interstate Cooperage Co.*, 158 N.C. 403 (1912)); *see also Latham v. Latham*, 184 N.C. 55 (1922) (stating "we have held in numerous decisions that under this clause an action is barred within 3 years from the discovery of the facts or from the time when they should have been discovered in the exercise of proper diligence").[1] Defendant-Appellant Bank of America ("the Bank" or "BOA") argues that the accrual is instead tied to a plaintiff's knowledge of their injury. The Bank is wrong.

North Carolina General Statute § 1-52 states the statute of limitations for fraud "shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake." The Court of Appeals, consistent with this long-standing statute, correctly held that "there are sufficient facts alleged to suggest Plaintiffs remained unaware of Defendant's alleged fraudulent scheme for many years and that they each suffered a resulting harm." *Taylor v. Bank of Am., N.A.*, No. 2022-NCCOA-912, slip op. (Dec. 29, 2022).

The Bank's misguided approach overcomplicates the case. However, the issue before this Court is very simple and relates to one of the most basic legal rules: Rule 12(b)(6). In this case, the Rule 12(b)(6) Motion raises a simple question—does the

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[1] The Bank starts its brief by citing this Court's decision in *Latham* for the proposition that the statute of limitations for fraud starts to run at the date of the plaintiff's knowledge of their injury. However, the word "injury" never once appears in that decision. *See Latham*, 184 N.C. 55.

complaint *affirmatively disclose* that the plaintiffs' case is barred by the statute of limitations? Unless that answer is "yes," the complaint survives. *Sutton v. Duke*, 277 N.C. 94, 106, 176 S.E.2d 161, 168 (1970).

The Amended Complaint alleges that the Bank defrauded countless families, including the Plaintiffs-Appellees, of the American dream of home ownership—foreclosing on their houses and making them homeless. The Amended Complaint details how 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. 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 all homeowners who contacted their mortgagor, BOA, requesting a modification during a time of financial hardship. (R pp 197–304). Instead of being treated fairly and legally, BOA lied to and misled them as part of a massive, fraudulent scheme that resulted in their being denied the modification that was rightfully theirs—one that would have allowed them to stay in their homes and avoid foreclosure or bankruptcy.

The Court of Appeals correctly determined that the Amended Complaint is sufficient to withstand a 12(b)(6) Motion. *Taylor v. Bank of Am., N.A.*, No. 2022-NCCOA-912, slip op. (Dec. 29, 2022). The Court of Appeals also noted that any decision regarding the statute of limitations should be placed in the hands of a jury because "the appropriate date of discovery of 'alleged fraud or negligence—or whether [the plaintiff] should have discovered it earlier through reasonable diligence—is a question of fact for a jury, not an appellate court.'" *Id.* (quoting *Piles v. Allstate Insurance Co.*, 187 N.C. App. 399, 405, 653 S.E.2d 181, 186 (2007)).

Simply put, Plaintiffs-Appellees' Amended Complaint alleged they did not know about the Bank's fraud at the time of their foreclosures, despite their due diligence. The Court of Appeals was correct—at this stage, that is enough. Thus, the Court of Appeals' decision should be affirmed.

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. Appellees' 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 Bank's fraudulent scheme, a scheme which the Bank purposely hid and repeatedly lied about, at the time of their foreclosure, despite repeated allegations to the contrary. Plaintiffs-Appellees' Amended Complaint and Response to the Motion to Dismiss alleges that they were not aware of BOA's covert, fraudulent scheme and had no reasonable basis to know of or uncover it. (Doc. Ex. p 109). Plaintiffs-Appellees' Amended Complaint 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 case, without any details or explanation, on the grounds that Appellees' claims were barred by the statute of limitations, *res judicata*, and collateral estoppel. (R p 655). Plaintiffs-Appellees 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 improperly 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.

The Bank then appealed that decision to this Court. On 4 November 2022, this Court ruled, on procedural grounds only, that "the Court of Appeals erred by remanding the case to the trial court" and remanded the case back to the Court of Appeals for a de novo review. *Taylor v. Bank of Am.*, N.A., 382 N.C. 677, 678–80 (Nov. 4, 2022). The Court of Appeals issued its opinion on 29 December 2022, this time addressing the statute of limitations issue. The Court of Appeals ruled in favor of the Plaintiffs-Appellees, determining that "Plaintiffs' complaint sufficiently alleged enough information to withstand a motion to dismiss for failure to state a claim" and noting that "there are sufficient facts alleged to suggest Plaintiffs remained unaware of Defendant's alleged fraudulent scheme for many years." No. 2022-NCCOA-912, slip op. (Dec. 29, 2022). Defendant then noticed this appeal on 24 January 2023.

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 implemented a scheme to prevent HAMP applicants from becoming or remaining eligible for permanent HAMP modification. *Id.* The Bank's covert scheme involved numerous acts designed to mislead mortgagors into believing they did not qualify for loan modifications or to deny the applications for modification under false pretenses. (R pp 200-205). The Bank's scheme to mislead applicants included, but was not limited to, the actions listed below, revealed 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 complete and 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 to 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).

Mortgagors who were the victims of the Bank's fraudulent scheme were wrongfully denied the opportunity to modify their mortgages through the HAMP program. Stuck with payments they could not make, the mortgagor victims would default on their mortgage and the Bank would foreclose on them. This was all part of the Bank's scheme. To add insult to injury, the Bank would take money homeowners paid in connection with their modification applications and misapply it, taking both the homeowners money and their homes. (R pp 201–204).

The deliberate nature of the Bank's massive campaign of fraud is beyond dispute. (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 that 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 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. As though all of these lies 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 themselves and their families.

C. OTHER HAMP LAWUITS

The Bank's statements regarding the origin of Plaintiffs-Appellees' Amended Complaint have been and continue to be 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 they 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) as the "first court to address" this issue, 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. In short, it was a different complaint, and while that complaint was judged on its own merits, so should this one. Further, 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— 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 Amended Complaint did here.[2]

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[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

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)).

II. SUMMARY OF THE ARGUMENT

The Amended Complaint makes clear that the Plaintiffs-Appellees did not know of the fraudulent scheme until they consulted with counsel. Taking that allegation as true, which the court must do at this stage, the claims cannot be barred by the statute of limitations.

As the Court of Appeals aptly noted: "[a]t the heart of the underlying matter is whether Plaintiffs' claims are barred by the statute of limitations." No. 2022-NCCOA-912, slip op. (Dec. 29, 2022). Plaintiffs-Appellees' claims are not barred for the following reasons: first, the discovery rule tolls the statute of limitations on Plaintiffs-Appellees' claims. Here, the Plaintiffs-Appellees pleaded that they discovered the fraud at the time they consulted with counsel, alleging, in great detail, that the

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her foreclosure]").

Bank's calculated lies kept them from learning the truth any sooner. This assertion is sufficient to survive a Rule 12(b)(6) motion. *Jennings v. Lindsey*, 69 N.C. App. 710, 318 S.E.2d 318 (1984). As the Court of Appeals put it, "there are sufficient facts alleged to suggest Plaintiffs remained unaware of Defendant's alleged fraudulent scheme for many years." No. 2022-NCCOA-912, slip op. (Dec. 29, 2022). To determine the discovery rule as a matter of law, as the Bank suggests should be done, there must be clear evidence on the face of the complaint that the Plaintiffs-Appellees had both the capacity and opportunity to discover the fraud at an earlier date. *State Farm Fire & Cas. Co. v. Darsie*, 161 N.C. App. 542, 548, 589 S.E.2d 391, 397 (2003). As discussed in detail below, there is no evidence of capacity nor opportunity on the face of the complaint, precluding any possibility that the claim can be dismissed at this stage. Moreover, the North Carolina door closing statute is irrelevant in this case because each state implicated in the Amended Complaint recognizes tolling by either the discovery rule or fraudulent concealment.

Second, a jury – not a judge – should determine whether Plaintiffs-Appellees discovered or should have discovered the fraud more than three years prior to filing. *Feibus & Co. v. Godley Const. Co.*, 301 N.C. 294, 304–05, 271 S.E.2d 385, 392 (1980); *Everts v. Parkinson*, 147 N.C. App. 315, 319, 555 S.E.2d 667, 670 (2001) ("When the evidence is sufficient to support an inference that the limitations period has not expired, the issue should be submitted to the jury").

Finally, because neither the Court of Appeals opinion nor Judge Dillon's dissent addressed the defenses of *res judicata* and collateral estoppel, those issues are not at issue before this Court. If the Court were to nevertheless consider them, they fail to hold water for the reasons below. First, Plaintiffs-Appellees did not and could not have discovered the Bank's fraud at the time of foreclosure because the Bank's own actions prevented discovery of it. As a result, Plaintiffs-Appellees could not raise fraud as a defense because they had no knowledge of it at the time of foreclosure. Second, Plaintiffs-Appellees were each parties to non-judicial foreclosure proceedings. Non-judicial foreclosures are not susceptible to an attack on *res judicata* or collateral estoppel grounds because, by definition, non-judicial foreclosures do not involve a prior proceeding or final judgment on the merits. *See In re Lucks*, 369 N.C. 222, 229, 794 S.E.2d 501, 506-07 (2016). Finally, there is no identity between the prior foreclosures and the fraud allegations because Plaintiffs-Appellees do not seek to re-litigate or re-open foreclosures but instead seek only money damages.

III. THE COURT OF APPEALS WAS CORRECT: THE AMENDED COMPLAINT IS SUFFICIENT TO WITHSTAND A MOTION TO DISMISS.

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 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). "[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). In short, the only determination required at this stage is whether Plaintiffs-Appellees' Amended Complaint, when viewed in the light most favorable to the Plaintiffs, "sufficiently alleged enough information to withstand a motion to dismiss for failure to state a claim." No. 2022-NCCOA-912, slip op. The Court of Appeals correctly held that it did, and that opinion should be affirmed.

A. THE STATUTE OF LIMITATIONS IS TOLLED BY THE DISCOVERY RULE.

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." *See also 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 the Amended Complaint, Plaintiffs-Appellees allege they did not *discover* the Bank's fraud until they consulted with counsel. At the Rule 12(b)(6) stage, this is sufficient.

The Bank relies heavily on the *Christenbury* case for its interpretation of the North Carolina discovery rule. *See Christenbury Eye Ctr., P.A.*, 370 N.C. 1. *Christenbury*, however, is inapposite to the application of the discovery rule in this case. In *Christenbury*, the plaintiff entered into an installment contract whereby the defendants were to pay plaintiff royalty payments of at least $500.00 each year. *Id.* at 3. The plaintiff entered into the contract and was aware of the contract terms which required payment each year. *Id.* Yet, in the fourteen years preceding the filing of the lawsuit, the plaintiff never once received the minimum payment under the contract. *Id.* The opinion notes that "[d]uring this time, plaintiff did not raise any question or concern regarding its rights…" *Id.* The plaintiff argued that his cause of action was tolled because, as an installment contract, a new limitations period should begin upon the failure to make each payment. *Id.* at 4. This Court's analysis of the tolling issue in *Chistenbury* centered on whether the contract at issue should be interpreted as an installment contract; the instant case, of course, does not involve an installment contract. *Id.* at 9. The Court also noted that "[p]laintiff's complaint reveal[ed] that plaintiff had notice of its injury over fourteen years" before filing suit, and in the instant case there is no such revelation in the Amended Complaint. *Id.*

There are several important distinctions between *Christenbury* and this case. First, despite the Bank's argument, Plaintiffs-Appellees have not alleged a cause of action for breach of contract, and Plaintiffs-Appellees did not enter into a contract that guaranteed payment—such that would have put them on notice of their claim.[3] Second, unlike the plaintiff in *Christenbury*, the Plaintiffs-Appellees here repeatedly raised questions about why they were not granted a HAMP modification, but instead of getting answers, they were repeatedly deceived. Finally, there is nothing in the Amended Complaint that reveals Plaintiffs-Appellees had notice of the Bank's fraud, thereby precluding a dismissal at the 12(b)(6) stage.

The Bank's twisted interpretation of *Christenbury* would eviscerate the discovery rule, allowing a defendant who hides its fraudulent conduct long enough to be immune from suit because, according to the Bank, the statute would run from the date of injury. Fortunately for Plaintiffs-Appellees, that is not the law. Longstanding North Carolina law says the statute of limitations runs not from when the fraud was committed nor from when plaintiffs suffered injury but rather "when the aggrieved party discovers the facts constituting the fraud, or when, in the exercise of reasonable diligence, such facts should have been discovered." *Vail v. Vail*, 233 N.C. 109, 115, 63 S.E.2d 202, 207 (1951). The Court of Appeals correctly ruled that the discovery rule tolled the statute of limitations, and therefore, the case survives dismissal.

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[3] Moreover, while the *Christenbury* case does include a claim for fraudulent concealment, that claim is based on the defendant's nonperformance. *See Christenbury* at footnote 3. That is quite different from the facts we have here, where the Plaintiffs-Appellees have alleged the Bank intentionally engaged in activity designed to cover up their fraudulent scheme, including lying and destroying documents.

I. THE DISCOVERY RULE CANNOT BE DETERMINED AS A MATTER OF LAW IN THIS CASE.

In order for the discovery rule to be determined as a matter of law, as the Superior Court did here, the evidence must 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, this Court reversed an order granting a motion to dismiss in *Huss*, 31 N.C. App. at 468, 230 S.E.2d at 163. There, this Court 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 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").

Here, the Court of Appeals correctly determined that the Amended Complaint did not reveal the facts leading to the discovery of the fraud. Instead, the Record makes clear that the Plaintiffs-Appellees were diligent in seeking answers about the reasons for their foreclosure. Plaintiffs-Appellees contacted Bank of America repeatedly. (R pp 209, 218, 226, 233, 241, 249, 255, 266, 273). Each time, they were led to believe their foreclosures were their own fault. The record lacks any event or occurrence that would have reasonably caused the Plaintiffs-Appellees to become aware of the true facts surrounding the fraud until they consulted with their attorneys. The Bank has not—and indeed, cannot —point to a single allegation that affirmatively states when Plaintiffs-Appellees discovered or should have discovered the fraud other than the date they consulted with counsel.

Instead, contrary to North Carolina law, the Bank attempts to tie the running of the statute of limitations to the knowledge of injury—not the discovery of the injury.[4] The Bank argues both that "the clock started running at the time of the foreclosures at the very latest" and that Plaintiffs-Appellees "were on notice of that alleged injury at the time they failed to receive [a HAMP modification]." Defendant-Appellants' Brief at 6, 32. The mere fact that the Bank alleges two different points at which Plaintiffs-Appellees should have had notice of their claims proves that a dispute of fact exists outside the complaint as to when the statute of limitations should have started to run.

Moreover, there is no evidence on the face of the Amended Complaint of Plaintiffs-Appellees' capacity or opportunity to discover the fraud—as required to grant a Motion to Dismiss on statute of limitations grounds. *State Farm Fire & Cas. Co.*, 161 N.C. App. at 548. The Amended Complaint does not reveal whether Plaintiffs-Appellees have access to a television, computer, or internet nor does it reveal whether Plaintiffs/Appellees were aware of any news reports or previously

[4] For this proposition, the Bank cites to the *Latham* case. *See Latham v. Latham*, 184 N.C. 55, 61-62 (1922). Interestingly, the Latham case never once uses the word "injury." *Id.* Instead, the Court in Latham held that the statute of limitations runs in fraud cases "from the discovery of the facts or from the time when they should have been discovered in the exercise of proper diligence or reasonable business prudence." *Id.*

filed litigation about HAMP. Those are all issues which can and should be fleshed out in discovery. However, because they are not present in the Amended Complaint, the Motion to Dismiss cannot be decided as a matter of law. Again, the Court of Appeals was correct because this case is only at the 12(b)(6) stage.

II. PLAINTIFFS-APPELLEES' ASSERTION OF WHEN THEY DISCOVERED THE BANK'S FRAUD IS SUFFICIENT TO ESTABLISH THE DATE FROM WHICH THE STATUTE OF LIMITATIONS BEGAN TO RUN.

The North Carolina Court of Appeals has stated: "[b]ecause fraud is difficult to define, it is likewise difficult to establish with certainty when the statute of limitations on a claim of fraud begins to run." *Jennings v. Lindsey*, 69 N.C. App. 710, 715, 318 S.E.2d 318, 321 (1984). It is precisely because of this difficulty that the allegation in a complaint stating when a plaintiff discovered the existence of the alleged fraud "is sufficient to establish the approximate date from which the statute of limitations began to run on their claims." *Id.* In *Jennings*, the plaintiffs alleged that they did not discover fraud until September 1981, and this Court 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." *Id.*

Similarly, in *Hunter v. Guardian Life Ins. Co. of America*, "plaintiffs allege they only recently discovered the acts of defendants and could not have discovered, with reasonable diligence, such acts until then." *Hunter v. Guardian Life Ins. Co. of Am.*, 162 N.C. App. 477, 486, 593 S.E.2d 595, 601 (2004). The Court of Appeals held that this quite simple "allegation [was] sufficient to withstand a Rule 12(b)(6) motion to dismiss." *Id.*

Likewise, 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.*

Plaintiffs-Appellees have pleaded they discovered the Bank's fraud when they first consulted with counsel in December 2016, January 2017, February 2017, March 2017, and April 2017. (R pp 211, 220, 226, 235, 243, 251, 258, 266, 275). This claim was filed on 1 May 2018, within the three-year statute of limitation (R p 6). See N.C. Gen. Stat. Ann. § 1–52(9). As the Court of Appeals found, that allegation is sufficient to withstand a motion to dismiss on statute of limitations grounds.

In further support, Plaintiffs-Appellees pleaded that the Bank intentionally created an insidious scheme, one with the intent of keeping Plaintiffs-Appellees from discovering it. Plaintiffs-Appellees pleaded that bank representatives blatantly lied to them about needing to be in default to receive a modification in order to keep them from discovering the truth about BOA's fraudulent scheme. (R pp 208, 216, 231, 240, 248, 255, 263). Plaintiffs-Appellees also alleged they were unaware that their trial payments were not being used to satisfy their mortgage obligations—and in fact, that they were not being counted as mortgage payments at all. (R pp 212, 227, 236, 244, 252, 259, 267, 275). This is sufficient at this stage of the litigation, and thus, the Court of Appeals should be summarily affirmed.

III. WHETHER APPELLEES EXERCISED DUE DILIGENCE IS A FACT TO BE RESOLVED BY THE JURY.

Determining "when 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." *Hunter v. Guardian Life Ins. Co. of Am.*, 162 N.C. App. 477, 486, 593 S.E.2d 595, 601 (2004) (quoting *Feibus & Co. v. Godley Constr. Co.*, 301 N.C. 294, 304–05, 271 S.E.2d 385, 392 (1980) and stating "[i]n their complaint, plaintiffs allege they only recently discovered the acts of defendants and could not have discovered, with reasonable diligence, such acts until then. This allegation is sufficient to withstand a Rule 12(b)(6) motion to dismiss"). Put another way, only "[w]hen the facts are admitted or established" is "the determination of the expiration of the statute of limitations [ ] a matter of law." *Calhoun v. Calhoun*, 76 N.C. App. 305, 308, 332 S.E.2d 734, 736 (1985). Furthermore, "it is generally held that when it appears that by reason of the confidence reposed the confiding party is actually deterred from sooner suspecting or discovering the fraud, he is under no duty to make inquiry until something occurs to excite his suspicions." *Vail v. Vail*, 233 N.C. 109, 116-17, 63 S.E.2d 202, 208 (1951) (emphasis added; internal quotation marks omitted).

Like the defendant in *Wells Fargo Bank, N.A. v. Coleman*, 239 N.C. App. 239, 244, 768 S.E.2d 604, 608 (2015), the Bank is arguing that "had [Plaintiffs-Appellees] done any of [the] follow-up diligence, [they] would have discovered the [fraud]." In the *Wells Fargo Bank, N.A.* opinion, this Court noted that mere indications of fraud "do

[ ] not trigger the statute of limitations as a matter of law." *Id.* Wells Fargo, the plaintiff in that case, brought a foreclosure action seeking reformation of the deed on the basis of mutual mistake. *Id.* Wells Fargo argued that its failure to immediately double-check the legal description on the deed was not unreasonable. *Id.* at 246. This Court agreed stating that "[u]nder *Vail* and *Huss*, whether this type of double-checking would be necessary 'in the exercise of due diligence,' and at what point it should have taken place, are factual determinations that cannot be resolved at summary judgment." *Id.* (citing *Huss v. Huss*, 31 N.C.App. 463, 468, 230 S.E.2d 159, 163 (1976); *Vail v. Vail*, 233 N.C. 109, 117, 63 S.E.2d 202, 208 (1951)).[5] The Court made clear that "the running of the limitations period turns on the factual determination of when, in the exercise of due diligence, the party reasonably should have been expected to follow up and ultimately discover the mistake. This is a factual determination that ordinarily must be resolved by a jury." *Id.* at 245. The running of the statute of limitations turns on the *factual determination* of when the Plaintiffs-Appellees should have been expected to follow up and when they would have ultimately discovered the Bank's fraud. *Id.* The Amended Complaint specifically pleaded due diligence, and there is no indication that their search resulted in, or could have resulted in, the discovery of the fraud.

[5] In each of these three cases (*Wells Fargo*, *Huss* and *Vail*), the court reversed the trial court's dismissal based on statute of limitations, holding that a jury should determine the discovery rule issue. It is even more imperative that this Court do the same here, as this case is still at the pleadings stage. *See Huss*, 31 N.C.App. at 468, *Vail*, 233 N.C. at 117.

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;[6] however, on appeal to this Court, the 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.

In this case, Plaintiffs-Appellees all contacted the Bank multiple times. Each time, they were told that the issues with their mortgages, resulting in foreclosure/bankruptcy, were the result of their own failure to pay, failure to return

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[6] 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).

application documents, or ineligibility. The Amended Complaint details all of the assurances that the Bank gave them, assurances on which they relied to their detriment. 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 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. Plaintiffs-Appellees trusted the Bank to hold the loan for their homes and reasonably relied on the Bank's statements to them. Such a relationship caused Plaintiffs-Appellees to have sufficient confidence in the Bank to believe the representations made by its officers. Plaintiffs-Appellees then had no reason to suspect that the Bank would deceptively use this relationship to defraud them.

Here, the Amended Complaint details the Plaintiffs-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. 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 the level of fraud. *See* N.C.G.S. 1–52(9) stating that the claim should not accrue "until the discovery by the aggrieved party of the facts constituting the fraud or mistake."

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 6, 17. Not so. 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.

Interestingly, the Bank also argues Plaintiffs-Appellees should have discovered the fraud because "[e]verything their attorneys base their claims on was 'public record' by 2013." Def. Appellant's Br. p. 49. Not so. In Exhibit 7 to the Amended Complaint, Plaintiffs-Appellees attached the January 27, 2017 SIGTARP Quarterly Report to Congress. (R pp 166–172). The Report, which discloses SIGTARP's investigation results from that quarter, states that Bank of America "has one of the worst track records in HAMP, denying "79% of all who applied for HAMP." *Id.* The fact that Congress was not even aware of the results until January 2017 destroys any argument that the Plaintiffs-Appellees should have or could have been aware as early as 2013.[7]

As the Court of Appeals noted: "[t]he determination of when Plaintiffs became aware of the alleged fraud may also be appropriate to consider at a later procedural stage—but has no bearing at this juncture—as Plaintiffs have sufficiently pleaded a cause of action, treating all pled allegations as true, to survive dismissal pursuant to N.C. R. Civ. P. 12(b)(6)." No. 2022-NCCOA-912, slip op. (Dec. 29, 2022). Any additional determination "is a question of fact for a jury, not an appellate court." *Id.* (citing *Piles v. Allstate Insurance Co.*, 187 N.C. App. 399, 405, 653 S.E.2d 181, 186 (2007); *see Everts v. Parkinson*, 147 N.C. App. 315, 319, 555 S.E.2d 667, 670 (2001)). Because there is a dispute as to when the Plaintiffs-Appellees should have discovered the Bank's fraud, the Court of Appeals correctly determined it should be a jury question.

B. PLAINTIFFS-APPELLEES' CLAIMS ARE ALSO TOLLED BY FRAUDULENT CONCEALMENT.

Although similar in its application to the discovery rule, the principle of fraudulent concealment allows for even greater exceptions to a statute of limitations.

[7] Plaintiffs-Appellees are not arguing that the SigTarp report started the running of the statute of limitations. That Report is evidence of when Congress became aware of the Bank's fraudulent scheme. To the extent additional evidence exists about when Plaintiffs-Appellees became aware, those issues are ripe for determination at the discovery stage of the litigation.

While the discovery rule operates to defer the accrual of a statute of limitations (i.e., delays the time before the limitations clock starts) until the knowledge of wrongdoing is understood by plaintiff, fraudulent concealment tolls the statute of limitations (even after it has begun to accrue for knowledge of wrongdoing) until the cause of action against the particular defendant is fully learned. *See Connor v. Schenck*, 240 N.C. 794, 795, 84 S.E.2d 175, 176 (1954).

Ultimately, like with the discovery rule, whether a defendant's conduct had the effect of concealment or whether the circumstances were sufficient to give the wronged party reasonable notice of the underlying cause of action are questions of fact, not law. *See Ward v. Fogel*, 237 N.C. App. 570, 582, 768 S.E.2d 292, 301 (2014). Therefore, such issues are to be addressed by the fact-finder and should not be dismissed summarily at the pleading stage.

Citing *Christenbury*, the Bank argues that the Amended Complaint "contains no allegations supporting any potential finding that Defendants made representations to induce [Plaintiffs] not to assert rights [] or on which [Plaintiffs] relied when refraining from taking action." Defendant-Appellants' Brief at 46. Contrary to the Bank's argument, Plaintiffs-Appellees have alleged, inter alia, the following facts supporting estoppel by fraudulent concealment: (1) that the Bank used various methods to scramble customer submissions across multiple internal systems so that its employees believed customers' documents had not been submitted and denied their applications as a result (R p 205); (2) that employees were either incentivized to lie to customers (or punished if they failed to lie) about the receipt of documents, the status of their applications, or the steps to qualify for HAMP (R pp 205–206); and (3) that third-party companies and bank managers were complicit in the massive scheme to deliberately neglect, conceal, and delete customer files and payment records, with the specified purpose of denying as many HAMP applications as possible. (R pp 201–205). Although a vast number of homeowners were harmed by this fraudulent scheme, the Bank nevertheless concealed its participation as the cause of the wrongdoing from the public eye for several years. (R pp 166–172). In the end, when the Bank notified Plaintiffs-Appellees that they were not approved for a HAMP modification, it was reasonable for them to assume they simply failed to meet the criteria or failed to follow the proper procedures, instead of assuming wrongdoing on the part of the Bank. It was not until Plaintiffs-Appellees contacted their attorneys about the Bank's misconduct that they became aware of the Bank's fraud and its role in the loss of their homes. (R pp 211, 220, 226, 235, 243, 251, 258, 266, 275). The facts necessary to establish all elements of estoppel by fraudulent concealment were sufficiently alleged in the Amended Complaint.

C. THE NORTH CAROLINA BORROWING STATUTE DOES NOT APPLY.

Under North Carolina choice of law rules, courts should apply "the substantive law of the state where the cause of action accrued and the procedural rules of North Carolina." *Stokes v. Wilson & Redding L. Firm*, 72 N.C. App. 107, 113, 323 S.E.2d 470, 475 (1984). The statute of limitations is a procedural device, and North Carolina's laws regarding the statute of limitations of Plaintiffs' claims govern. *See Sayer v. Henderson*, 225 N.C. 642, 643 (1945) ("The statutes of limitation have been uniformly held by this Court, and so far as we know by other courts, to be governed by the law of the forum").

Applying North Carolina law also, in certain circumstances, involves the application of N.C. Gen. Stat. § 1–21, commonly referred to as the borrowing statute.[8] By its plain language, only when an action "is barred by the laws of the jurisdiction in which it arose" does North Carolina's borrowing statute apply. *Id.* Here, none of the Plaintiffs-Appellees' home states have a statute of limitation shorter or more restrictive than North Carolina's.[9] Therefore, North Carolina's borrowing statute is inapplicable. *See Stokes*, 877 F. Supp. at 993 (stating that "North Carolina borrowing statute was inapplicable . . . where cause of action occurred in Florida and Florida statute of limitations was longer than North Carolina's"). Because none of the Plaintiffs-Appellees' claims are barred by any of the relevant states' laws, the North Carolina borrowing statute does not apply, and the Court of Appeals should be affirmed.

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[8] Defendant-Appellant refers to this law as the "door-closing" statute. Plaintiffs-Appellees refer to this statute as a "borrowing statute" consistent with the majority of North Carolina case law.

[9] *See* Cal. Civ. Proc. Code § 338 (three-year statute of limitations with a discovery rule) *see also* Ariz. Rev. Stat. Ann. § 12-543 (three-year statute of limitations with a discovery rule); Minn. Stat. Ann. § 541.05 (6) (six-year statute of limitations with a discovery rule). Further, while Michigan, which has a six-year statute of limitations, does not recognize a discovery rule, Michigan law provides generous tolling when, like here, the plaintiff pleads fraudulent concealment. *See Korean Am. Scholarship Fund v. Jong Dae Kim*, No. 334373, 2017 WL 4846001, at *2 (Mich. Ct. App. Oct. 26, 2017) (stating "[u]nder MCL 600.5855, the statute of limitations is tolled when a party conceals the fact that the plaintiff has a cause of action"). Indeed, the Supreme Court of Michigan has stated that "MCL 600.5855 provides for essentially unlimited tolling based on discovery when a claim is fraudulently concealed." *Trentadue v. Buckler Lawn Sprinkler*, 479 Mich. 378, 391; 738 N.W.2d 664 (2007).

IV. *RES JUDICATA* AND COLLATERAL ESTOPPEL ARE NOT AT ISSUE ON APPEAL. HOWEVER, EVEN IF THE COURT DECIDES TO ADDRESS THESE DEFENSES, THEY FAIL.

First, neither the Court of Appeals majority opinion nor Judge Dillon's dissent addressed the issues of res judicata and collateral estoppel. *See* No. 2022-NCCOA-912, slip op. (Dec. 29, 2022). As such, these issues are not before this Court. *See* N.C.G.S. § 7A-30(2) (2017); *see also State v. Rankin*, 371 N.C. 885, 895, 821 S.E.2d 787, 796 (2018) (stating that when a case is before the North Carolina Supreme Court based on a dissent at the Court of Appeals, the review is "limited to those questions on which there was division in the intermediate appellate court").

However, if this Court decides to address the issues of *res judicata* and collateral estoppel, those defenses also fail for similar reasons. "The party seeking to assert res judicata has the burden of establishing its elements." *Auto. Grp., LLC v. A-1 Auto Charlotte, LLC*, 230 N.C. App. 443, 446, 750 S.E.2d 562, 565 (2013). "A party must show (1) a final judgment on the merits in an earlier suit, (2) an identity of the causes of action in both the earlier and the later suit, and (3) an identity of the parties or their privies in the two suits in order to prevail on a theory of res judicata." *Id.* Similarly, "[t]he elements of collateral estoppel . . . are as follows: (1) a prior suit resulting in a final judgment on the merits; (2) identical issues involved; (3) the issue was actually litigated in the prior suit and necessary to the judgment; and (4) the issue was actually determined." *Bluebird Corp. v. Aubin*, 188 N.C. App. 671, 678, 657 S.E.2d 55, 61 (quoting *McDonald v. Skeen*, 152 N.C. App. 228, 230, 567 S.E.2d 209, 211, disc. rev. denied, 356 N.C. 437, 571 S.E.2d 222 (2002)).

Plaintiffs-Appellees pleaded throughout the Amended Complaint that they were unaware of the Bank's fraud at the time they faced foreclosure. What is more, Plaintiffs-Appellees pleaded they could not have discovered the Bank's fraud at the time of foreclosure because the Bank purposely concealed it. In short, Plaintiffs-Appellees could not raise a claim of which they were not aware. This is also true in the context of *res judicata*. "[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, 85 S.E.2d 909, 912 (1955); cited for support in *Christian v. Am. Home Assur. Co.*, 577 P.2d 899, 905 (Okla. 1977) (quoting *Gaither* for the proposition that "[w]here plaintiff's omission of an item of his cause of action was brought about by defendant's fraud, deception or wrongful concealment, the former judgment has been held not to be a bar to suit on the omitted part of the claim"). Plaintiffs-Appellees pleaded facts establishing they had no "reasonable opportunity" to pursue their fraud claims at the time of foreclosure because they had no actual or constructive knowledge of fraud. Plaintiffs-Appellees could not have discovered the fraud because the Bank's nefarious scheme was intentionally designed to keep them in the dark.

Most importantly, Plaintiffs-Appellees pleaded that they were unaware of the Bank's fraudulent scheme at the time of foreclosure, and they had no reason not to believe the Bank's lies before they consulted with counsel. (R pp 211, 220, 226, 235, 243, 251, 258, 266, 275). The issue here is not whether there were facts supporting the fraud available at the time Plaintiffs-Appellees lost their homes. Instead, the key issue is whether the facts supporting the fraud could have been discovered. Plaintiffs-Appellees have asserted time and time again that they could not. Plaintiffs-Appellees have not found a single case and the Bank has not pointed to a single case in North Carolina where a fraud action is barred by *res judicata* when the plaintiff was unaware of the fraud during the pendency of the foreclosure.

Moreover, unlike in judicial foreclosures, in non-judicial foreclosures, there is no "final judgment on the merits in an earlier suit." *See Auto. Grp., LLC*, 230 N.C. App. at 446, 750 S.E.2d at 565. Neither is there "a prior suit resulting in a final judgment on the merits." *Bluebird Corp.*, 188 N.C. App. at 678, 657 S.E.2d at 61. A non-judicial foreclosure, by definition, is not a judicial action. *In re Lucks*, 369 N.C. 222, 229, 794 S.E.2d 501, 506-07 (2016). As a result, "the Rules of Civil Procedure and traditional doctrines of res judicata and collateral estoppel applicable to judicial actions do not apply." *Id.* Simply put, because there was not a prior action where Plaintiffs-Appellees could litigate the issue of fraud, their current actions cannot be dismissed for res judicata or collateral estoppel.

Third, even assuming there were final judgments on the merits (i.e., judicial foreclosures), which there were not, the Bank must also establish "an identity of the causes of action in both the earlier and the later suit." *Id.* The Bank also fails to establish this element. The rationale behind this requirement is to provide finality to previous judgments. Here, there is no identity in the two causes of action. The first cause of action was a foreclosure against Plaintiffs-Appellees. This appeal involves a fraud case brought against Bank of America. In the Amended Complaint, Plaintiffs-

Appellees pleaded a claim for money damages on the basis of fraud perpetrated by the Bank. In contrast, foreclosures litigate the amount contractually owed on a note and transfers title from the mortgagor. *See generally, In re Simpson, P.C.*, 211 N.C. App. 483, 493, 711 S.E.2d 165, 172 (2011). Plaintiffs-Appellees have not asked the Court to relitigate foreclosure actions and do not contend that the foreclosure actions were wrongfully decided. Plaintiffs-Appellees have instead brought a cause of action with an identity clearly separate from the non-judicial foreclosure actions pursued by the Bank. *See Bluebird Corp.*, 188 N.C. App. at 678, 657 S.E.2d at 61.

Finally, res judicata is inapplicable where the performance of an act was sought in one action and a money judgment in the other. *Edwards v. Edwards*, 118 N.C. App. 464, 473, 456 S.E.2d 126, 131 (1995). When the previous matter seeks performance of an act and the current matter seeks a money judgment, "there is no identity of the matters," which is a "prerequisite to the application of the doctrine of *res judicata*." *Shelton v. Fairley*, 72 N.C. App. 1, 8, 323 S.E.2d 410, 416 (1984). In a foreclosure, specific performance is sought. *See Banks v. Hunter*, 251 N.C. App. 528, 534-35, 796 S.E.2d 361, 367 (2017). In the fraud action here, Plaintiffs-Appellees do not seek to overturn the foreclosures, and if they were to receive money damages, the foreclosures would remain intact. There is no dispute that Plaintiffs-Appellees defaulted on their mortgages. However, they were induced to do so by the Bank's fraudulent conduct. This action does not call into question the finality of the foreclosures, and thus, res judicata and collateral estoppel cannot apply.

While the defenses of res judicata and collateral estoppel fail in this case, as discussed above, this appeal is limited to the single issue addressed in Judge Dillon's dissent—statute of limitations.

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 to the Superior Court for further factual findings and conclusions of law.

Respectfully submitted, this the 8 day of May, 2023.

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This is to certify that the undersigned has this date served the foregoing Plaintiffs-Appellees' New Brief upon all other parties to this cause as indicated below by mailing to the opposing party's counsel by depositing said document, enclosed in a post-paid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the USPO for mailing via first class mail and electronic mail:

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