No. 2005-CT-02244-SCT

JANE M. WILBOURN AS TRUSTEE OF THE JAMES G. WILBOURN IRREVOCABLE TRUST, **PLAINTIFF-APPELLANT**

V.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES and WILLIAM J. BYRD, **DEFENDANTS-APPELLEES**

ON APPEAL FROM THE CIRCUIT COURT OF QUITMAN COUNTY, MISSISSIPPI HONORABLE KENNETH L. THOMAS, CIRCUIT JUDGE

SUPPLEMENTAL BRIEF OF APPELLEE THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES IN RESPONSE TO ORDER GRANTING PETITION FOR WRIT OF CERTIORARI

W. WAYNE DRINKWATER, JR. (MBN [redacted]
STEPHEN L. THOMAS (MBN [redacted]
MARGARET OERTLING CUPPLES (MBN [redacted]
JEFFREY R. BLACKWOOD (MBN [redacted]
J. ALEX PURVIS (MBN [redacted]
BRADLEY ARANT ROSE & WHITE LLP
Suite 450, One Jackson Place
188 East Capitol Street
PO Box 1789
Jackson, MS 39215-1789
Telephone: (601) 948-8000
Facsimile: (601) 948-3000

ATTORNEYS FOR DEFENDANT-APPELLEE THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES (n/k/a AXA EQUITABLE LIFE INSURANCE COMPANY)

Other Authorities **Page(s)**

R. App. P. 17(h).

INTRODUCTION

Equitable has submitted extensive briefing on the facts, procedural history, and legal issues in this action, in its brief on the merits in the Court of Appeals, in oral argument before that Court, and in its briefs in response to the motion for rehearing and petition for writ of certiorari ("Petition") filed by Plaintiff-Appellant Jane M. Wilbourn, as Trustee for the James M. Wilbourn Irrevocable Trust (the "Trust"). This supplemental submission is not intended to reiterate that earlier briefing. Instead, Equitable seeks to point out the inconsistencies in arguments advanced by the Trust in support of its claims; to draw the Court's attention to a recent opinion by the Court of Appeals that reiterates the rule of *Stephens v. Equitable*, on facts very similar to those here; and to request the Court to set a briefing schedule so that the parties may address any concerns the Court may have with the opinion of the Court of Appeals.

DISCUSSION

A. Inconsistencies in the Trust's Arguments.

Throughout this litigation, the Trust has responded to Equitable's arguments simply by re-characterizing its claims to avoid the bar of the statute of limitations, to distinguish precedent that does not favor the Trust, and to present each reviewing court with a novel theory or theories that might allow its claims to succeed. For example:

1. In its Complaint, the Trust first claimed that it bought its policy based on representations made by the selling agent, Byrd. R. 10-11 (R.E. 12-13) (Complt. ¶¶ 23-24). According to the Trust, Byrd represented that the Trust's obligation to pay premiums would "vanish" after eight annual payments of $14,300. R. 10 (R.E. 12) (Complt. ¶ 23). The Trust

performance. *E.g.*, R. 13 (R.E. 15) (Complt. ¶ 35) (fraudulent representations by Byrd mischaracterized true nature of policy and induced Trust to purchase policy); R. 14 (R.E. 16) (Complt. ¶¶ 41, 44) (Byrd's representations were "highly misleading" and "wrongfully induced" Trust to buy policy; Byrd "failed to procure the coverage that he represented"); R. 18-19 (R.E. 20-21) (Complt. ¶ 69) (representations about policy were "false" and fraudulent).

In its Motion to Dismiss, R. 91, 92 (Eq. R.E. 004, 005), Equitable pointed out that the express policy language contradicted Byrd's alleged representations so that as a matter of law it was not reasonable for the Trust to rely upon them. Equitable cited cases in support of this well-settled proposition, including *Stephens v. Equitable Life Assurance Society*, 850 So. 2d 78, 84 (Miss. 2003); *Alexander v. City Finance Co.*, No. 3:02CV81, 2004 WL 1638241, at *2 (N.D. Miss. May 4, 2004); and *Ross v. Citifinancial, Inc.*, 344 F.3d 458 (5th Cir. 2003).

2. In responding to Equitable's Motion to Dismiss, the Trust relied on *Myers v. Guardian Life Ins. Co.*, 5 F. Supp. 423, 431 (N.D. Miss. 1998), a pre-*Stephens* case that this Court addressed, and distinguished, in *Stephens*. R. 235-36; *see Stephens*, 850 So. 2d 84-85. The Trust's reliance on *Myers* failed: the trial court recognized that the statute of limitations barred the Trust's claims, and dismissed them. R. 295-96 (R.E. 5-6).

On appeal, the Trust realized that *Myers* was unavailing, and changed its theory, claiming **for the *first time* that Byrd's representations actually were *not* inconsistent with the policy language.** Although the Trust was forced to admit that policy premiums are payable for the life of the insured, rather than only for eight years, the Trust contended that this language was not inconsistent with Byrd's alleged representations because the policy "does not specify that these premiums must come in the form of out-of-pocket outlays" by the Trust. Brief of Appellant 13-

Equitable pointed out that the Trust had not presented this new theory to the trial court. Brief of Appellee 20; *see also* Eq. Resp. to Mtn. for Reh'g (included as Appendix to Equitable's Response to Petition) at 6 & n.9 (comparing Trust's claims in trial court with re-characterization of those claims on appeal). Equitable pointed out that the Trust's new theory was not "filling in a blank", but was instead, simply a collection of strained inferences that could not save the Trust's claims. Brief of Appellee 21-22. Also, the Trust's new argument – the substantial equivalent of "I read it, but I didn't understand it" – was not sufficient to demonstrate due diligence or to support a claim for fraudulent concealment sufficient to toll the statute of limitations. *Id.* at 22 (citing cases, including *Stephens*, 850 So. 2d at 82 (plaintiff will not be heard to complain of an oral misrepresentation the error of which would have been disclosed by reading the contract); and *Mayronne v. Reassure America Life Ins. Co.*, 136 Fed. Appx. 705 (5th Cir. 2005) (where plaintiff could have read his policy and policy's language would have revealed no promise that premium obligation would "vanish", he was not entitled to tolling of statute of limitations)).

3. The Court of Appeals recognized that the statute of limitations bars all of the Trust's claims. *Wilbourn v. Equitable Life Assurance Society*, No. 2005-CA-02244-COA, __ So. 2d __, 2007 WL 2248046 (Miss. Ct. App. Aug. 7, 2007), at *1, ¶ 1. The Court of Appeals affirmed the trial court's order dismissing the case. *Id.*

In its motion for rehearing, the Trust tried another argument for the **first time**. It argued that the policy was ambiguous because two of the sentences on the front page of the policy ("Premiums are payable for life. Policy participates in dividends."), "do not contain any articles." Mtn. for Reh'g. at 3; *see* R. 100 (Eq. R.E. 013). Equitable responded that the quoted

discussed throughout the policy. Moreover, the Trust suggested no other meaning for this language. *See* Eq. Resp. to Mtn. for Reh'g (included as Appendix to Equitable's Response to Petition) at 3. A contract is not ambiguous unless it is susceptible of more than one reasonable interpretation. *E.g.*, *Royer Homes, Inc. v. Chandeleur Homes, Inc.*, 857 So. 2d 748, 751-52 (Miss. 2003).

In addition to this novel theory, the Trust again re-characterized its argument about the method of premium payments. Focusing on a single phrase in the opinion of the Court of Appeals, the Trust claimed that the Court of Appeals had erred by misconstruing the policy language to "require[]" that *every* premium payment be made "out-of-pocket" – when in fact the Court's single use of that phrase was simply a recital of the claims *made by the Trust*. Eq. Resp. to Mtn. for Reh'g (included as Appendix to Equitable's Response to Petition for Writ of Certiorari) at 6-7 (quoting *Wilbourn*, 2007 WL 2248046, at *1, ¶ 1); *cf.* Brief of Appellant 13-14.

4. The Court of Appeals denied the Trust's Motion for Rehearing. In its Petition for Writ of Certiorari to this Court, therefore, the Trust proffered yet another argument. It claimed, again **for the first time**, that *Stephens* was distinguishable, because the Trust "was not in possession of the policy when certain material representations were made by Byrd", *i.e.*, at the time the Trust applied for the policy. Petition at 5-6. In support of this theory, the Trust relied on *Reed v. American Medical Security Group*, 324 F. Supp. 2d 798 (E.D. Miss. 2004) – a case decided nearly three years before briefing was completed in this action, but not cited by the Trust until after the decision of the Court of Appeals. The Trust contended that *Reed* stood for the proposition that the Trust was entitled to rely on Byrd's alleged representations, despite the fact that the policy's plain language contradicts them. The argument is specious: the policy

inconsistent with the Trust's understanding or unsatisfactory in any way. R. 100 (Eq. R.E. 013). Moreover, even the *application* for the policy, which the Trust *did* have at the time the alleged representations were made, warns that premiums are payable "annually" and advises that no statement by an agent can vary the terms of the policy. R. 116-24, 121 (Eq. R.E. 029-37, 034).

In its Response to the Petition, Equitable pointed out once again that the fact that an agent makes representations at the time an insured applies for insurance does not excuse the insured from its obligation to read the policy upon receipt, and does not toll the statute of limitations beyond the date that the insured receives the policy. Response to Petition at 6-7 & n.2 (citing *Liberty Nat'l Life Ins. Co. v. Ingram*, 887 So. 2d 222, 227 (Ala. 2004) (where agent's representations were made in July and policy was delivered on August 1, statute of limitations began to run on August 1); and *O'Bannon v. Guardian Life Ins. Co.*, 331 F. Supp. 2d 476, 477-78 (S.D. Miss. 2004) (granting motion to dismiss claims arising from agent's representations made "prior to, and contemporaneous with" policy purchase; statute began to run on date of purchase)). The Trust does not dispute that it received its policy within "weeks after its purchase". *See* Response to Petition at 6 & n.2.

As these examples demonstrate, the Trust's arguments have been based upon shifting theories in the trial court and the Court of Appeals, in order to avoid the plain language of the policy, which is fatal to those claims. The Trust may present yet another recycled version of its arguments in a supplemental brief pursuant to Miss. R. App. P. 17(h).

This Court, however, properly disfavors an appellant's "switch of horses in the middle of the stream", *Estate of Johnson v. Adkins*, 513 So. 2d 922, 925 (Miss. 1987), and it should not [illegible] such tactics here. *See id.* (quoting *Bailey v. Collins*, 215 Miss. 78, 83, 60 So. 2d

below, and we think the theory of the case as now presented to us on this appeal is not properly before us for review.")).

B. The Recent Decision of the Court of Appeals in *Weathers v. Metropolitan Life* Supports Equitable's Position.

On July 22, 2008, in a unanimous opinion, the Court of Appeals decided *Weathers v. Metropolitan Life Insurance Co.*, No. 2007-CA-01180-COA, __ So. 2d __, 2008 WL 2806666 (Miss. Ct. App. July 22, 2008). Like this case, *Weathers* involved a claim by an insured against the insurance company arising from allegedly false point-of-sale representations by the agent. *Id.* at *1, ¶ 3. The representations were made during the application process; the insured received the policy later. *Id.* at ¶¶ 3-4. Upon giving the policy "a cursory read", the insured had questions about the terms of the policy, which seemed to be inconsistent with the agent's alleged promises. *Id.* at ¶ 4. The insured called the agent, who reassured him. Several years later, the insured received a notice that premiums were due, and again contacted the agent; this time, the agent advised him to call the company, which he did. *Id.* at *1-2, ¶ 5.

Just as in this case, years went by, during which the insured continued to communicate with the company about the policy, which seemed to be performing in ways inconsistent with the agent's initial representations. *Id.* Because the insured did not file suit until 2001, seven years after buying the policy, the trial court held that his claims were time-barred and granted summary judgment for MetLife. *Id.* at *2, ¶ 6.

Weathers, like this case, involves claimed misrepresentations by the agent both before and after the sale of the policy. Just as in this case, the plaintiff in *Weathers* claimed that those representations lulled him into complacence so that he did not file suit sooner; and that the post-

policy and is imputed knowledge of its contents even if he does not read it or review it thoroughly. *Id.* at ¶ 12. Moreover a policyholder is not entitled to rely upon oral representations from an agent, even those made post-sale, where they are inconsistent with the language of the policy itself. *Id.* at ¶¶ 12-13. Where a policyholder "unreasonably relie[s] upon [an agent's] reassurance and fail[s] to exercise due diligence to address his concerns", the policyholder is not entitled to have the statute of limitations tolled. *Id.* at *4, ¶ 14. This Court should reach the same result here.

C. Request for Briefing Schedule.

As discussed above, the Trust's arguments have been unusually fluid. This may be one reason for the divided opinion by the Court of Appeals. It also makes it impossible for Equitable to discern the basis for further review by this Court. When the Trust's argumentative shell-game is reduced to its essentials, there is no basis to distinguish this case from *Stephens* or *Weathers*; but the changing nature of the Trust's arguments means that Equitable may not have had a full and fair opportunity to address one or more of them to this Court's satisfaction. Therefore, to the extent that this Court is concerned about a particular issue or issues, Equitable would welcome the opportunity to provide additional briefing. *See* Miss. R. App. P. 17(h) (providing for additional briefing on the merits of some or all of the issues before the Court, but only upon order of the Court).

CONCLUSION

The Court of Appeals correctly affirmed the trial court's dismissal of the Trust's claims, all of which are barred by the statute of limitations. The Trust has presented no basis for this Court to alter that result: there is no error in the Court of Appeals's application of governing

Court of Appeals, and enter judgment for Equitable on all claims brought against it by the Trust.

RESPECTFULLY SUBMITTED, this the 28th day of July, 2008.

W. WAYNE DRINKWATER, JR. (MBN [redacted])
STEPHEN L. THOMAS (MB[redacted])
MARGARET OERTLING CUPPLES (MBN [redacted])
JEFFREY R. BLACKWOOD (MBN [redacted])
J. ALEX PURVIS (MBN [redacted])
Attorneys for The Equitable Life Assurance Society of The United States (n/k/a AXA Equitable Life Insurance Company)

OF COUNSEL:

Bradley Arant Rose & White LLP
Suite 450, One Jackson Place
188 East Capitol Street
PO Box 1789
Jackson, MS 39215-1789
Telephone: (601) 948-8000
Facsimile: (601) 948-3000

Gerald Jacks, Esq.
Arnold U. Luciano, Esq.
Jacks, Adams & Norquist, P.A.
106 S. Pearman Avenue
P.O. Box 1209
Cleveland, MS 38732-1209
Telephone: (662) 843-6171
Facsimile: (662) 843-6176

correct copy of this document by United States mail, postage prepaid, on the following:

Gerald Jacks, Esq.
Jacks, Adams & Norquist, P.A.
106 S. Pearman Avenue
P.O. Box 1209
Cleveland, MS 38732-1209
Counsel for Defendant-Appellee The Equitable Life Assurance Society of the United States (n/k/a AXA Equitable Life Insurance Company)

Richard E. Wilbourn III, Esq.
Richard Wilbourn & Associates, PLLC
P.O. Box 1278
Madison, MS 39130-1278
Counsel for Plaintiff-Appellant

William Larry Latham
G. Todd Burwell
W. Jeffrey Collier
Latham & Burwell, PLLC
618 Crescent Boulevard, Suite 200
Ridgeland, MS 39157-8864
Counsel for Defendant-Appellee William J. Byrd

The Honorable Kenneth L. Thomas
Circuit Judge, Eleventh Circuit Court District
Post Office Box 548
Cleveland, MS 38732-0548
Trial Court Judge

THIS, the 28th day of July, 2008.

MARGARET GERTLING CUPPLES