IN THE SUPREME COURT OF MISSISSIPPI

NO. 2006-CA-01105

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA and PRUCO LIFE INSURANCE COMPANY

Appellants/Defendants

vs.

PATTY STEWART, SALLY STEWART HESTER, GILES STEWART, and LARRY STEWART, Individually and as Co-Executors of the Estate of Edsel Stewart; and LARRY STEWART and GILES STEWART as Co-Trustees of THE STEWART FAMILY LIFE INSURANCE TRUST

Appellees/Plaintiffs

MOTION FOR REHEARING

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for Appellees/Plaintiffs certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualifications or recusal.

Appellants/Defendants:

Pruco Life Insurance Company

The Prudential Insurance Company of America

Prudential Financial, Inc.

Appellees/Plaintiffs:

Patty Stewart, Individually and as Co-Executor of the Estate of Edsel Stewart

Sally Stewart Hester, Individually and as Co-Executor of the Estate of Edsel Stewart

Larry Stewart, Individually and as Co-Executor of the Estate of Edsel Stewart and as Co-Trustee of The Stewart Family Life Insurance Trust

The Stewart Family Life Insurance Trust

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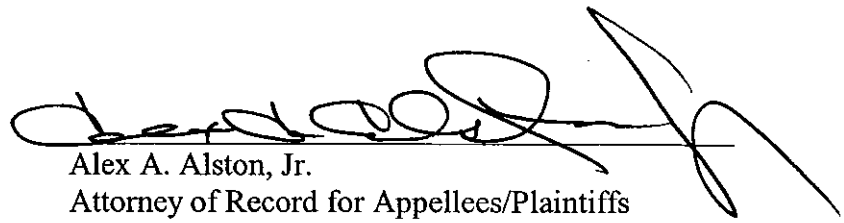

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A thousand years or more before the birth of Christ, the Immortal Homer wrote these words: "Bold is the task when subjects grow too wise to inform their monarch where his error lies." That was true in the days of Homer, and it is no less true today.

STATEMENT OF THE ISSUES

This Court made several clear factual errors on points that are crucial to its decision:

- In discussing whether Edsel Stewart's $20,000 check was for an insurance premium, this Court emphasizes that the word "fee," rather than "premium," appeared on the memo line of the $20,000 check. (Opinion at 3.) The Opinion does not reveal how the word "fee" came to appear on the memo line of the check. Prudential's agent, James Bateman, wrote it there, a fact that is undisputed. (Tr. 1531.)
- This Court concluded that Edsel Stewart's application referred to an annual premium of $100,000 (Opinion at 4), allegedly incompatible with Prudential's "counteroffer" of a $105,000 premium. In fact, the illustration provided to Stewart by Prudential as part of the application packet shows a premium of $105,000, precisely the premium shown on the Prudential policy. (Ex. P-1; Tr. 1514-16.) This fact is crucial because it demonstrates that the offer from Stewart was an offer to pay as high as $105,000 as an annual premium.
- Prudential has led this Court to believe that September 9 was the date on which Larry first signed the Prudential form stating, "I BELIEVE THIS CONTRACT MEETS MY INSURANCE NEEDS AND FINANCIAL OBJECTIVES." (Ex. P-20.) In fact, the record reveals that Larry first signed this document accepting the insurance on August 31, 1999, and that a technical error by Bateman made it

necessary to reaffirm the statement on September 10, 1999. (Tr. 172-73; Ex. P-6 pp. 0172-0173.)

- This Court makes a factual finding that James Bateman was an independent broker. (Opinion at 2.) During the time this transaction occurred, in 1999, Mississippi's soliciting agent statute was still in effect. MISS. CODE ANN. § 83-17-9 ("*Repealed by* Laws 2001, Ch. 510, § 34, eff. January 1, 2002"). Pursuant to that statute, Bateman was, as a matter of law, the agent of Prudential because, as this Court states, Bateman took this application for insurance. (Opinion at 2-3.)
- This Court concludes that Bateman conducted estate planning for Edsel Stewart, even though Bateman never submitted an itemized bill for the alleged services (Opinion at 2-3, Tr. 1532-33), and Dr. Stewart had a specialist in estate and tax law, attorney Bill Dossett, conducting his estate planning during the period when Bateman claims to have conducted estate planning. (Tr. 156-57.) Moreover, Bateman did not possess the necessary licenses and qualifications to allow him to be an investment adviser representative. (Tr. 827, Exs. P-25, P-26, P-70.)

STATEMENT OF THE CASE

This is a Motion for Rehearing filed in accordance with Rule 40, MISSISSIPPI RULES OF APPELLATE PROCEDURE, not only to correct errors in this Court's Opinion of September 27, 2007, but hopefully to protect our public from the nullification of the jury system as we know it.

STATEMENT OF FACTS

Dr. Edsel Stewart went to his death knowing he had an insurance policy on his life with

Prudential for One Million Dollars. As early as August 19, 1999, Prudential had determined the risk and offered Dr. Stewart a million-dollar policy under "Rating Class H" at an annual premium of $105,000. (Ex. P-36 p. 3 of 12 pages, as shown:) (Page 3 attached as Exhibit "A".)

THE PRUDENTIAL August 19, 1999

Contract Description

All ledger statements that make up this illustration are based upon the Contract, Riders and Supplemental Benefits shown below:

Proposed Insured: Dr. Edsel Stewart Male age 73 Select Preferred with Ratings
$1,000,000 Variable Universal Life Type A Death Benefit

Initial Annual Premium Outlay $105,000.00

Underwriting Class

* * *

The Underwriting Class for the Proposed Insured includes the following Rating(s):

* Rating Class H based on additional risk exposure incurred by Pruco Life for rated preexisting health conditions.

After considering all the risk factors,[1] the offer was made by Prudential's underwriting officer, Tim Juneau (Tr. 1210, 1215, 1217, 1228-30. Exs. P-55, P-61, P-65 (Offer S/P H)).

At that rating Dr. Stewart and Larry Stewart were pleased to sign the Prudential Application on August 23, 1999. A few days later Dr. Stewart was visiting his daughter in Starkville but insisted he had to get home by Tuesday, August 31, 1999, since that was the appointed day he would complete the signing of all Prudential documents and pay the agent the

[1] In addition to being furnished medical records, the Prudential underwriter knew Dr. Stewart's age, sex, purpose of insurance, marital status, children, occupation, hobbies, and avocations, whether he was a smoker or even drank alcoholic beverages. (Tr. 1228-30.)

initial premium. That he did. He met with the agent, and he and Larry accepted the Prudential offer, signed numerous documents,[2] and gave the insurance agent a check for the initial premium of $20,000. (Ex. P-3.) On that date Larry also signed one last document that stated in bold letters:

> I BELIEVE THIS CONTRACT MEETS MY INSURANCE NEEDS AND FINANCIAL OBJECTIVES.
>
> Dated 8/31/99 and signed by Larry Stewart.

(Ex. P-6 p. 0176). (Ex. P-6 p. 0176 attached as Exhibit "B".) At this point, Prudential had made an offer, it had been accepted by Plaintiffs, and consideration paid. Under our law, the question of whether a contract has been formed has always been a jury question. *Andrew Jackson Life Ins. Co. v. Williams*, 566 So. 2d 1172, 1176 (Miss. 1990).

The next day, September 1, 1999, Dr. Stewart suffered a stroke. Larry and his family did all they could to care for Dr. Stewart, but unfortunately he died over a month and a half later on October 19, 1999. No doubt, Prudential will claim that these facts are much too simplistic. It argued defensively that there are facts contradicting each of the elements of offer, acceptance, and consideration, and put on a massive, though unsuccessful, defense. This Court, however, held that no defense was even necessary, that the trial court should have rendered a J.N.O.V.

The Opinion of this Court is so very wrong. It is obvious that the Court "overlooked or misapprehended" the facts presented. One of the most glaring errors was its finding that Larry signed the "Supplement to Application" on September 10, 1999, only after Dr. Stewart "had a stroke and was now in a coma." (Opinion at 4, ¶ 4.) No one denies that Larry signed this

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[2] Dollar Cost Averaging (Ex. P-52); Asset Allocation Programs (Ex. P-33); and Illustration Certificate (Ex. P-32); Supplement to Application (Ex. P-6 p. 0176). Dr. Stewart and Larry were also furnished a Prospectus about the size of a Jackson telephone directory which explained in detail the provisions of the policy (Ex. P-4; Tr. 914).

document on August 31, 1999, when the contract was consummated. Counsel implores the Court to look at the contract produced by Prudential in discovery. (Ex. P-6 p. 0127, a copy of which is attached as Ex. A.) Within that document is the signed so-called "Supplement to the Application," which states, "THIS CONTRACT MEETS MY INSURANCE NEEDS," and is signed by Larry on August 31, 1999, the date the contract was consummated and on a date on which Dr. Stewart was in splendid health.

The confusion of this Court is that a similar "Supplement to the Application" was sent by James Bateman to Larry Stewart on September 9 with a note telling Larry he (Bateman) had missed one signature and requested him to, "Please sign and fax to the above fax number. I look forward to delivering the policy next week." Larry signed, as the Court noted, on September 10, 1999, and did as Bateman requested. (Ex. P-20.) The insurance agent sent this to Larry because he had failed to fill in the small space provided for the policy number. Otherwise, it was identical.

Larry was on the witness stand for almost an entire day with most of that time on cross-examination. He was asked legions of questions concerning technical aspects of insurance, and he performed remarkably well for a layman. The Court in its Opinion attempts to latch onto any comment which it thought might be an admission against the plaintiffs' interests. For example, on page 9, the Court asserted, "He (Larry) also understood that after the issuance of the policy, there was a process for acceptance, which included delivery, to be completed before the policy would be effective." (Opinion at 9, ¶ 15, last sentence.) Surely the Court is mistaken or, as the rule said, "misapprehended" this testimony. I have gone back and read the entire transcript and find no such testimony. Larry testified time and time again that there was no requirement for delivery. (Tr. 589, 660.) Both Mr. Pickett (Tr. 832-33) and Professor Wood (Tr. 916-17)

testified that there was no requirement for delivery. Furthermore, under our law, in the absence of an agreement brought home and agreed to by the insured, the acceptance of the offer for insurance, when communicated to the insured, consummates the contract without an actual delivery of the contract. *Mutual Life Ins. Co. v. Shoemake*, 89 So. 154 (1921). *See, Pre-Paid Legal Services, Inc. v. Battle*, 873 So. 2d 79, 83 (Miss. 2004).

But perhaps the most grievous error is the Court's pronouncement that the policy issued was nothing but a counteroffer and, since it was not accepted, there was no contract and therefore nothing for the jury to consider. (Opinion at 4, fn. 4, 9-11.) The Court erroneously found the original offer had a premium of $100,000 and that the policy issued to plaintiff showed a premium of $105,000. The problem here is that everyone knew the first offer of Prudential was a million dollar policy with a premium of $105,000. Attached to the Application (Ex. P-1) (Ex. P-36) is the document dated April 19, 1999, which in specific words spells out the annual premium to be $105,000. (Ex. P-36, p. 3 of 12.):

Initial Annual Premium Outlay $105,000

(Ex. P-36, p. 3 of 12 as produced by Prudential.) All parties knew that the "minimum initial premium outlay regardless of mode" was $10,308.15. (Ex. P-36, p. 10 of 12, first ¶.) The $105,000 premium number is set forth twenty-seven (27) times in these initial papers. (Ex. P-36, pp. 4-5 of 12.) Larry Stewart knew the annual premium was to be $105,000. (Tr. 55.) The expert, George Pickett, who has been in the insurance business for over forty years, stated, from reviewing the documents, that the annual premium would be that set out in the illustration – $105,000. (Tr. 812-13), and that offer of $105,000 was accepted by Plaintiffs. (Tr. 814-15.) This annual premium of $105,000 offer was confirmed by Professor Clint Wood, who testified that the annual premium was as stated in the illustration (Tr. 912), being $105,000, (Ex. P-36),

and that there was no material change from the application and the policy issued (Tr. 925.) The offer extended by the chief underwriter of Prudential was unquestionably Select Preferred H, which converts to a fee of $105,000 on a million dollar policy. Although this was the number quoted time and time again by Prudential to plaintiffs and accepted by plaintiffs, the Court held that since $105,000 was stated in the policy and not $100,000, the policy "constituted a counteroffer." (Opinion at 10.) Again, this was a hotly contested issue. Plaintiffs felt strongly that by documents and testimony they had proven that there was no difference between the offer and the policy issued, much less a material difference. Prudential disagreed and put on its proof. Under any circumstances, doesn't this at least constitute a jury issue? How can this Court substitute its opinion for that of the jury when the issue was presented to the jury by substantial facts on both sides. The jurors are there for something. This Court has always shown great deference to the jury's fact-finding. Is the Court telling us now that a factual determination by a jury is immaterial?

Turning now to the Facts section (¶¶ 2-9) of the Opinion, and reviewing each paragraph sequentially, it is astonishing the number of times this Court either "overlooked or misapprehended" the testimony and the documents.

¶ 2 The Court begins this paragraph by stating that Dr. Stewart retained Bateman "to handle estate planning." That indeed was the testimony of Mr. Bateman, but it overlooks the testimony of Larry (Tr. 543) and John White (Tr. 754), Dr. Stewart's lawyer, both of whom testified that Mr. Bateman was employed only to obtain insurance. Perhaps this is not material, but it is illustrative of this Court simply choosing Prudential's side on conflicting facts. Why would this Court substitute its opinion for the opinion of the Jury? At least the jury had the opportunity to view the witnesses and to assess their credibility. This Court saw only cold

transcripts and documents and did not even desire oral argument.

¶ 3 The Court here states that plaintiffs contend that by August 19, 1999, Prudential "communicated an offer." The contention of plaintiffs is that an offer was extended on numerous occasions, from as early as August 19, 1999, through the time the offer was accepted on August 31, 1999. (Brief of Appellees, pp 3-4.) The offer was clear and precise that Dr. Stewart would be insured under the Prudential Policy at a rating of Select Preferred Class H. To support an implication suggesting that the premium payment of $20,000 was a fee only and not a premium payment, the Court states the exact words of Prudential, "Only Dr. Stewart and Bateman were present when the $20,000 check, dated August 31, 1999, from the bank account of Dr. and Mrs. Edsel Stewart, indicating for a "fee," was tendered to JMB Financial Group." It is true that Dr. Stewart and Bateman were the only two people present. Unfortunately, Dr. Stewart was dead within two months and, of course, could not testify at trial. Does the Court completely overlook and disregard the testimony of family, friends, and his lawyer who testified without contradiction that Dr. Stewart told them that on August 31 he was closing the deal and paying the agent a $20,000 premium, and after he had paid it, he told Larry about the payment. (Tr. 767, 885, 769, 756, 555, 563, 564, 883-89.) Can this appellate court simply ignore this testimony, which is a textbook example of the state-of-mind exception to the hearsay rule? (MISS. R. EVID. 803(3).) The jury certainly thought it important in finding that it was a premium payment paid on the date the final documents consummating this contract were signed. Is the Court assuming that all these witnesses are simply lying, and substituting its opinion for the opinion of the jury? Furthermore, because of the arthritic condition of Dr. Stewart's hand, Bateman was the one who made out the check and inserted the word "fee." On cross-examination, Bateman could not furnish one scrap of paper to evidence two years of estate

planning, any contract, invoice, billing or anything to show work for a $20,000 estate planning fee.

¶ 4 The Court was simply wrong in finding that Larry signed the Prudential Document entitled "Supplement to Application" after Dr. Stewart was in a coma. Larry signed the original document on August 31, 1999, when Dr. Stewart was in the same health as stated in the application. (Ex. P-6 p. 1076.)

¶ 5 The Court here again assumes that the annual premium of $105,000 instead of $100,000 constituted a material difference. There is no difference. The original papers showed explicitly that the annual premium was $105,000. Prudential offered Select Preferred Class H, which, under its guidelines for a one million dollar policy, computes to be an annual premium of $105,000. The Court then quotes delivery instructions given to Bateman. None of the plaintiffs knew anything about any instructions on delivery given to Mr. Bateman. The Court even emphasized these instructions with italics. Neither Dr. Stewart nor Larry saw any document that even mentioned delivery. None of the documents signed by them even used the word, "delivery." To even imply that plaintiffs were responsible for secret instructions given to Bateman is wrong.

¶ 6 Here, again, the Court is quoting material that plaintiffs have never seen concerning delivery. The testimony of all of the plaintiffs' witnesses was that the contract was consummated on August 31, 1999, when the final papers were signed and the $20,000 check was given to Mr. Bateman.

¶ 7 The Court is again casting aspersions on Larry for not telling Bateman, before September 22, 1999, that his dad was in a coma. Of course, he didn't. Why would one call any insurance agent when one is using all one's strength to nurse a family member back to

health. Anyway, why did it matter? Dr. Stewart had told Larry the contract was consummated on August 31, 1999, and Larry knew it was a "done deal." Again, the Court tries to find an admission made by Larry to support its opinion and states that Larry agreed on cross-examination that an "insurance company considering issuing insurance on an individual would be interested in knowing whether or not the individual was in a coma." Of course, Larry agreed with this. There would be no other truthful answer. Dr. Stewart and Larry gave Prudential all medical information and certainly would have stated in any application that Dr. Stewart was in a coma if this were true. But the fact is that he was not in a coma at either the time the offer was made or at the time the contract was consummated and the premium paid. His health was as stated in the application. Under our law, it matters not if one dies only one minute after an insurance contract is consummated. This is what insurance is about. The insurance company is gambling that you will live many more years. Unfortunately in this case, Dr. Stewart had a stroke the day after the contract was completed, and died over one and a half months later.

¶¶ 8-9 These paragraphs deal with correspondence between plaintiffs and Prudential. The Court simply says that plaintiffs "assert" that Prudential signed a return receipt for its initial letter. At least plaintiffs might have been given the benefit of this allegedly disputed fact when it produced in evidence the Airborne Express Way Bill with signed and acknowledged return receipt. (Ex. P-66.) The Court then suggests that Larry failed to promptly provide documentation that he represented the legal interests of the decedent. The fact is that this was only one more excuse for Prudential not to respond to any request of plaintiffs. The Trust was the applicant and beneficiary. Prudential had in its hands a copy of the Trust Agreement as early as August 1999 showing Larry as Trustee and that he had complete authority to act for the trust. (Ex. P-54.) Any demand for letters of administration was just another excuse

for failure to communicate.

Tragic mistakes have been made in the understanding and analysis of the facts of this case. Counsel implores the Court to reexamine the record so that simple justice can be served and the rule of law upheld.

This Court totally collapsed the jury verdict in this case, finding that, "the trial court erred in denying the Defendants' Motion for J.N.O.V." (Opinion at 11.) In essence, the Court held that the jurors serving on this case were not reasonable or fairminded and were incapable of reaching an impartial judgment. This is wrong. In reaching this result, the Court "overlooked or misapprehended" [Rule 40, MISSISSIPPI RULES OF APPELLATE PROCEDURE] the facts presented and, with this misapprehension, accordingly misapplied the law to the facts.

SUMMARY OF ARGUMENT

This Court in its Opinion committed a grave wrong. In overturning a jury verdict on conflicting facts, not only did it violate the established practice and rule of law in this state, but it violated the protection afforded all citizens under the Seventh Amendment to the Constitution of the United States and Section 31 of the Constitution of the State of Mississippi which declares that "the right of trial by jury shall remain inviolate . . . ."

The Court overlooked or misapprehended the facts and reached a decision that wreaks havoc with the jury system as we know it. On conflicting facts, this Court simply nullified the solemn decision of the jury. This Court substituted its opinion for that of a sworn jury that listened to the witnesses and looked at the evidence for two weeks and spent approximately four hours before rendering its unanimous opinion on the liability portion of the trial in favor of plaintiffs.

There was substantial evidence for the jury to find that an offer was made by Prudential, accepted by plaintiffs, and consideration paid. The Opinion in this case does not even attempt to show why any of these issues were not proven, and it further attempts to justify its opinion by declaring the policy issued to be a counteroffer. This is wrong on both the facts and the law.

Plaintiffs implore this Court to reconsider its obvious mistaken conclusions and to reinstate the verdict of the jury.

ARGUMENT

With all deference to this Court, which I have respected and defended for over forty-three years in my practice, and before whom I have argued scores of cases, I have never been as sad and disappointed as I am today as I write this motion. I am not disappointed because I failed in a position which I took for my client, for as a professional I understand that anyone actively practicing in this business will sometimes win and sometimes lose, but my sadness stems from the Opinion here rendered by this Court that is so basically wrong on both the facts and the law and which completely abrogates findings of jurors solemnly made on contested facts, which I have long believed and taught to be sacrosanct. Of course, I am also saddened by the position in which this leaves my clients, not only to have a jury verdict taken from them after a herculean effort,[3] but the imposition of costs now imposed on them by this Court. I am also disappointed in myself in not being a sufficiently skillful advocate for this Court not to understand the issues before this Court.

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[3] The plaintiffs actually tried this case twice. Because of jury misconduct, the first trial was declared a mistrial as plaintiffs were putting on their last witness. Counsel agreed to this mistrial so this error would not impact a possible verdict on appeal. This case has been horribly expensive for plaintiffs, and now, according to this Opinion, they are saddled with Prudential's costs.

I.

The Court Substituted Its Opinion for that of the Jury in Holding that the Policy Issued Was a Counteroffer.

This lawyer was shocked to learn from the Court's Opinion that "[t]he only possible conclusion from the evidence is that an initial offer was made when the proposed insured submitted an application, and the proposed insurer produced in response a policy, which differed in terms, and thus constituted a counteroffer." (Opinion ¶ 19, first sentence, emphasis added.)

Well, another possible conclusion was the one unanimously reached by the jury after listening to evidence and witnesses for two weeks and, unlike this Court, was able to evaluate and weigh the truthfulness of the testimony. Why is this Court's "conclusion" superior to the "conclusion" of this jury under conflicting testimony? In truth, what has happened, my esteemed Court, in reaching its "conclusion," commandeered the jury's role as fact finder and replaced the jury's verdict with a verdict of its own. Surely that is not the way our system was designed to work.

The Court seems to have forgotten, although they gave lip service to it in its Opinion (Opinion at 8), that an offer can go both ways, either from the insurer or from the insured. *Andrew Jackson Life Ins. Co. v. Williams*, 566 So. 1172, 1177-78 (Miss. 1990). In this case, there was substantial evidence that the initial offer was made by the insurer, Prudential. The very idea of insuring Dr. Stewart, then 73, was a problem. The agent, Bateman, looked around, as this Court noted, at several insurers (Opinion at 3), and finally Prudential submitted an offer. It would insure Dr. Stewart at a "Rating Class H based on additional risk exposure incurred by Pruco Life rated preexisting health conditions." (Ex. P-36 p. 3 attached as Ex. "A".) This was brought home and offered to both the applicant and owner, Larry, and the insured, Dr. Stewart. (Ex. P-6 p. 0192; Ex. P-32; Ex. P-34; Ex. P-36; P-39 p. 0240 (Aug. 24, 1999 "Billed premium

$105,000, Select Preferred Table H); Ex. P-55; Ex. P-61; Ex. P-63; Ex. P-64; Ex. P-65 (Offer S/P H); Tr. 554, 555, 811, 813, 814, 815, 909, 912.) There was no question that all parties knew the details of the offer – the length of time was for the lifetime of Dr. Stewart, the amount of life insurance was one million dollars, the stated premium was $105,000, and the minimum amount to put the policy in force was $10,308.15. (Tr. 909.)

There is also substantial evidence that this offer was accepted by the plaintiffs on August 31, 1999, by signing all additional documents requested and by the payment of the first premium. (Tr. 912, 814.) Furthermore, on August 31, 1999, Larry Stewart, trustee and applicant, signed the Prudential document certifying that "this contract meets my insurance needs ...." (Ex. P-6 p. 0176.) Payment of a premium and completion of application papers have always been sufficient to meet the requisite issue of acceptance. *Andrew Jackson Life Ins. Co. v. Williams*, 560 So. 2d 1172, 1177 (Miss. 1990). The general law on "offer and acceptance in this state has long accepted the principle that an acceptance may be implied from the actions of the offeree." *Old Equity Life Ins. Co. v. Jones*, 217 So. 2d 648, 649 (Miss. 1969). *Fanning v. C.I.T. Corp.*, 192 So. 41, 43 (Miss. 1939). *Edwards v. Wurster Oil Co.*, 688 So. 2d 772 (Miss. 1997). But here the facts are much stronger. The applicant, Larry, signed a Prudential document certifying that the "contract meets my insurance needs." (Ex. "B" attached hereto.) It is difficult to imagine a stronger acceptance than these words. Perhaps Larry could have written it in blood and put a black ribbon on it. But even if there could be any doubt, isn't that a jury question?

The last requisite is consideration. It is undisputed that a $20,000 check was paid to Bateman on August 31, 1999, when the final papers were signed on that date. Bateman was Prudential's agent, as testified by Larry (Tr. 544), Mr. Pickett (Tr. 816-17), and Professor Wood (Tr. 919), and even by Bateman himself (Tr. 1513-14).

Prudential attempted to convince the jury that the $20,000 was for estate planning work and was not a premium. The jury very properly found that it was an insurance premium. Family, friends, Dr. Stewart's lawyer, and his son and trustee Larry all testified that the payment was the first premium payment for the Prudential policy (Tr. 767, 885, 769, 756, 555, 563, 564, 883-89.) The payment was made when he was consummating the contract and when he and the trustee Larry were signing the final papers. It was Bateman who inserted the word "fee" on the check. Bateman could produce not one scrap of paper to show any evidence of the so-called estate planning. He had no invoice, contract or other evidence to justify a fee. He had never taken any fee from Dr. Stewart. On that very day, Dr. Stewart had signed a Dollar Cost Averaging document that required a payment of money, and that's what he paid, which was part of his life insurance program. (Tr. 917-18.) Furthermore, since Bateman was not properly licensed, it would have been illegal for him to give investment or planning advice and to charge a fee for that service. (Tr. 827, Exs. P-25, P-26, P-70.) Plaintiffs feel that the proof was overwhelming that the $20,000 check was for the first premium on this Prudential policy. Under any circumstances, it was a jury question, and the jury had no hesitation in unanimously finding that the check was payment of a premium.

The contract was consummated and in existence on August 31, 1999. If Prudential later sent a policy different from that contract which was made, plaintiffs could have sued and prevailed. But for some reason this Court held in its Opinion that the policy sent down to Mississippi was nothing but a counteroffer and the parties would have to start all over again because the policy said the premium was $105,000, not $100,000, and therefore that constituted a material change and a counteroffer. The substantial facts differ fundamentally from the scenario set up by the Court. More often than not, a contract is entered into between the parties,

and the written contract is submitted at a later time. If the written words are not as agreed, it is not a counteroffer. It is more akin to a breach of contract. As of August 31, 1999, an offer had been made and accepted and consideration paid. The jury also had before it documents showing that the Prudential contract was issued on that date. (Ex. P-29.) Further, plaintiffs' experts, after review of all documents and evidence, testified that the contract was consummated on August 31, 1999, and coverage began on that date. Professor Wood summarized:

> A. Coverage began on August 31st, 1999.
>
> Q. Could you tell the jury why?
>
> A. There was a meeting of the minds as of that date. There was a full understanding between the parties involving this life insurance coverage between Prudential Life Insurance Company and Dr. Edsel Stewart and the Stewart Family Trust that the life to be insured was Dr. Edsel Stewart. The length of time of the insurance was for his entire lifetime. The amount of life insurance involved was one million dollars. And the premium, the annual premium for that policy was stated at premium table H and stated was the minimum initial premium which would put coverage in force. And the minimum initial premium was $10,308.15.
>
> Everyone understood that and so when the consideration, the check of August 31st, 1999, was put into Jim Bateman's hands, which is just like putting it into Prudential's hands, there was –
>
> [Objection omitted.]
>
> Q. (Mr. Alston, continuing) You may answer the question.
>
> A. Consideration was paid on that date, August 31st, 1999 and therefore there was full agreement and coverage.

Q. Did the records show what the consideration was, how much he paid?

A. Yes, sir. He paid 20 thousand dollars; Dr. Edsel Stewart did.

However, looking at the Court's adoption of the Prudential scenario setting up a counteroffer, the facts as suggested by this Court are dead wrong. Even if it is assumed that Prudential on one paper had set out and offered $100,000 as the annual premium and on other papers offered the sum of $105,000, and the applicant accepted and paid the consideration that covered the minimum initial premium (Ex. P-36 p. 0023), how could a later contract evidencing an annual fee of $105,000 constitute a counteroffer? Isn't the alleged counteroffer the same as offered by Prudential in numerous documents? To call this a counteroffer is wrong.

Furthermore, there are numerous offering papers evidencing the $105,000 offer and the $100,000 offer. Isn't it for the jury to make a determination of which it will consider? *Thurman v. Farmers Mut. Fire Ins. Co.*, 102 Miss. 77, 58 So. 777 (Miss. 1912). In its wisdom, the jury found that there was no counteroffer. On these conflicting facts, can the Court simply ignore the mass of evidence showing the offer to be at an annual premium of $105,000? Furthermore, on these conflicting facts, isn't it a jury question whether the contract "differed materially" from the offer? To hold otherwise would simply strip the jury of its fact-finding prerogative and responsibility. The experts who testified on this point stated unequivocally that there was no "material change." (Tr. 922-26.)

The only case cited by the Court for this astonishing decision that the policy constituted a counteroffer and therefore there was nothing for the jury to consider is *Interstate Life & Accident Ins. Co. v. Flanagan*, 284 So. 2d 33 (Miss. 1973). Here, the facts are completely inapposite. In *Interstate Life*, the insured had originally purchased a policy that provided for double indemnity benefits. Seven years later she converted this policy to a regular permanent life policy that did

not contain double indemnity benefits, and the insured made approximately seven payments under the new policy. The insured claimed he was entitled to double indemnity because the application attached to the earlier policy contained this provision. Of course, the new policy was a counteroffer which the insured readily accepted and paid the premium for about five months. No one would disagree that the new policy was materially different and that it was delivered and accepted by the insured. These facts are a far cry from those before this Court.

An attempt to logically set up this Court's ultimate decision can easily be shown to fail on all points. This Court held that the only possible conclusion from the evidence was:

(1) An "initial offer was made when the proposed insured submitted an application." (Plaintiffs have already shown the massive evidence to support their position that the initial offer was made when Prudential agreed to insure Dr. Stewart at a rating of Select Preferred H at a premium of $105,000.)

and

(2) "[T]he proposed insurer produced in response a policy." (Plaintiffs have already shown by more than substantial evidence that the policy was formed and consummated on August 31, 1999, before the insured sent a policy to Mississippi. The response or acceptance to the Prudential offer, as shown by a mountain of evidence, was signing all the additional Prudential documents and paying the first premium.)

and

(3) The policy produced "differed in terms." (The evidence was overwhelming that the offer from Prudential in the sum of $105,000 was identical to that accepted by Plaintiffs.)

SO, THEREFORE:

The Court concluded that the policy ultimately issued was a counteroffer.

This conclusion, which is contrary to the jury verdict, defies logic, the facts, and the law. If the Court's analysis fails in any one of these steps, the conclusion must fail. Indeed, the Court's analysis fails because there is substantial evidence contradicting the Court's finding on each of these steps. But, *a fortiori*, under our law the Court must consider the evidence in the light most favorable to the party opposing the Motion for J.N.O.V. and must be given the benefit of all reasonable inferences that can reasonably be drawn from the evidence. *Graham v. Walker*, 924 So. 2d 557, 560-61 (Miss. App. 2005); *General Tire & Rubber Co. v. Darnell*, 221 So. 2d 104, 105 (Miss. 1969); *Weathersby Chevrolet v. Redd Pest Control*, 778 So. 2d 130, 132-33 (Miss. 2001).

In doing so, this Court must see its error or misapprehension and must reinstate the Jury Verdict.

II.

Unless this Court is Prepared to Abrogate the Fundamental Principles of Jury Trials and Do Violence to our Citizens' Constitutional Right to Trial by Jury, this Court must Reinstate the Jury Verdict.

What is most disturbing about this Opinion is that it substitutes this Court's obviously preferred resolution of disputed fact issues for those of the trial jury. The Court essentially has declared Larry Stewart and his witnesses to be not worthy of belief and then substituted its appellate judgment for that of the jury. The Court has commandeered the jury's role as a fact finder and discarded the jury verdict for the plaintiffs. This does irreparable harm to the civil jury system. Furthermore, unlike the jury, this Court lacks constitutional authority to weigh conflicting evidence.

The Seventh Amendment provides that no fact tried by a jury may be "reexamined" by another court. The same constitutional rule may be even more strictly followed in Mississippi under its constitution. Section 31 of the Constitution of the State of Mississippi declares that "the right of trial by jury shall remain inviolate." As far back as 1821, our Court held that the essential right of trial by jury may not be disturbed unless the rights to the jury would be literally transferred to the court in contravention of our sacred constitution. *Williams Yellow Pine Co. v. Henley*, 125 So. 552, 553 (1930). The right of trial by jury cannot be denied directly, and for that reason cannot be denied indirectly. It cannot be denied in part and it cannot be abridged. If an appellate court would decide a case on what the appellate court would have found, it would be "an abridgment of the constitutional right of trial by jury." *Williams*, 125 So. 552, 553.

Our Court has taken these constitutional provisions seriously and has rightfully placed meaningful restrictions on the granting of a J.N.O.V. so as not to violate the valuable constitutional right of trial by jury. For example, in considering a J.N.O.V., the Court must "look only to the sufficiency, and not the weight of the evidence." *Poole Ex. Rel. Poole v. Avana*, 908 So. 2d 716, 726 (Miss. 2005). When determining whether the evidence was sufficient, the critical inquiry is whether the evidence is of such quality that reasonable and fair-minded jurors in the exercise of fair and impartial judgment might reach different conclusions." *Poole*, 908 So. 2d 716, 726.

As this Court has held numerous times, this Court is not in a position to evaluate or weigh the truth or falsity of the witnesses who testified as is the jury. Only the jury is in a position to judge the demeanor or bearing of a witness, his tone of voice, and his attitude and appearance. The jury not only has the right but the duty to determine the truth or falsity of the witnesses, "but also the right to evaluate what portions of the testimony of any witness it will

accept or reject ...." *Travelers Indemnity Co. v. Rawson*, 222 So. 2d 131, 133 (Miss. 1969). Furthermore, our Court has always held that in deciding on a J.N.O.V., the Court "will consider the evidence in the light most favorable to the appellee, giving that party the benefit of all favorable inferences that may be reasonably drawn from the evidence. *E.g.*, *Booker Ex. Rel. Lloyds of London v. Pettey*, 770 So. 2d 39, 41 (Miss. 2000). The Court has always given great deference to the trial judge's determination of whether a jury issue was tendered and, likewise, substantial deference must be accorded the 'jury's' fact-finding because of its position – unlike this Court's – to evaluate and weigh the truthfulness of a witness' testimony." *Andrew Jackson Life Ins. Co. v. Williams*, 566 So. 2d 1172, 1176 (Miss. 1990).

The issue presented to this Court is whether, under the constitutional standards set forth above, reasonable and fair-minded jurors might have reached the conclusion that the jurors unanimously reached in this case. In other words, could a reasonable juror "have properly found that formation of a contract was sufficiently proved." *Andrew Jackson*, 566 So. 2d 1172, 1179.

That question in this case, regardless of how viewed, must be answered with a resounding "yes." No doubt, conflicting evidence was presented, enabling fair-minded jurors to reach different conclusions. Accordingly, this Court's holding that a J.N.O.V. should have been granted in favor of Prudential was not only improper but unconstitutional.

The decision in this case does injustice to our precious constitutional right of trial by jury. Plaintiffs implore this Court to reinstate the verdict of this jury.

III.

Even if the Application Were an Offer, There was a Jury Issue as to the Formation of a Contract Because the Annual Premium Quoted in the

Application Documents Was the Same as the Premium Set Forth by Prudential in the Policy.

Even if this Court's factual finding is correct – that the application was the offer – there is still a jury issue as to the existence of the contract. Stewart applied for a policy with an annual premium as high as $105,000. Prudential's issuance of the policy with a $105,000 premium is an acceptance of that application/offer. The illustration showed the premium as $105,000. Any fair reading of those documents demonstrates that there was an offer and acceptance. *A fortiori*, there was a jury question as to the existence of offer and acceptance. The offer specified a premium as high as $105,000, and Prudential accepted by issuing a policy with an annual premium of $105,000.

Because the application does not inform the applicant of delivery in good health or "delivery requirements," they are not binding on the Stewarts. *Southern Ins. Co. v. Ryder Truck Rental, Inc.*, 240 So. 2d 283 (Miss. 1970). Moreover, Prudential's own documents state that his coverage went into effect on September 23, 1999, so long as (1) Prudential issues a policy, and the record establishes they did on August 31, 1999 (Exs. P-24, P-29, Tr. 1242-43), (2) the applicant or owner accepted it (which Larry Stewart did on August 31, 1999, reaffirmed on September 9, 1999, by signing a form stating that the insurance met his needs, and (3) *on the day he paid the first premium*, his health was as stated on the application. Prudential locks in the insured's health as of the date of premium payment, and no change in health after that date affects insurability. Prudential does this because of litigation against insurers who take a premium, underwrite for several weeks, and then issue with the policy effective the date of the application – or, worse, deny an applicant who has had a change in health between application and underwriting. Prudential's system is designed to make certain that a person who pays a premium has insurance because otherwise he has paid for nothing. In this case, however,

Prudential has refused to recognize that Edsel Stewart's policy was prepaid. Its refusal to recognize it as prepaid is based entirely on the conduct of its own agent, James Bateman.

An agent acting for Prudential, as a matter of law, made a 140-mile round trip to take an application from Edsel Stewart. At the same time he took that application, that Prudential agent accepted a check that covered the first premium and, as allowed by the policy, paid an additional amount above and beyond the initial premium. Edsel Stewart told multiple individuals before the meeting that he intended to pay the $20,000 for the insurance. Those statements of what he *intended* to do are a textbook example of the state-of-mind exception to the hearsay rule, which explicitly encompasses a declarant's statements of what he intends to do. A statement could hardly fall more fully within that exception than do Edsel Stewart's statements about his plans to pay a $20,000 premium to Bateman at the August 31 meeting during which the application was completed. At trial, the Stewarts presented their evidence that the $20,000 was for an insurance premium. Prudential presented its evidence that the $20,000 was for a fee, allegedly paid in the absence of any statement of services rendered. Edsel Stewart did not write the word "fee" on the check; the Prudential agent did. The Stewart family respectfully submits that if this evidence does not present a jury question on the issue of consideration, they are hard-pressed to imagine what would.

Prudential has misled this Court into deciding disputed issues of material fact. This Court has acted essentially as a jury, depriving the Stewart family of a jury trial on issues as to which the evidence was conflicting.

The Stewarts reaffirm the arguments made in their brief and urge this Court to grant rehearing and to reverse its decision, reinstating the jury verdict.

CONCLUSION

In reaching its Opinion, this Honorable Court has commandeered the jury's role as fact-finder and has replaced the jury's verdict with a verdict of its own. Surely this Court will recognize its error and reinstate the verdict of the jury.

Appellees petition, pray, and implore this Court to reconsider its Opinion and to reinstate the unanimous and solemn verdict of the jury.

ALEX A. ALSTON, JR., MS Bar No. [redacted]
ELIZABETH L. DECOUX, MS Bar No. [redacted]
SHELDON G. ALSTON, MS Bar No. [redacted]
SHARON F. BRIDGES, MS Bar No. [redacted]

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Contract Description

All ledger statements that make up this illustration are based upon the Contract, Riders and Supplemental Benefits shown below:

Proposed Insured: Dr. Edsel Stewart Male age 73 Select Preferred with Ratings
$1,000,000 Variable Universal Life Type A Death Benefit

Initial Annual Premium Outlay $105,000.00

Underwriting Class

The Underwriting Class reflects Pruco Life's evaluation of the degree of risk presented by an insured. The evaluation is based on various factors, including the insured's age, physical condition, medical history, occupation and avocations. As the risk to Pruco Life increases, the premium requirement to guarantee the Contract against lapse also increases. The premiums for the Contract illustrated are based on the assumed Underwriting Classifications included next to the name of each proposed insured. If the actual Underwriting Classifications assigned and stated in the Contract as issued differ from the illustration classifications, the premium requirement to guarantee the Contract against lapse will be different from that shown in the illustration, either higher or lower, depending on the actual classifications assigned.

The Underwriting Class for the Proposed Insured includes the following Rating(s):

- **Rating Class H** based on additional risk exposure incurred by Pruco Life for rated preexisting health conditions.

EXHIBIT
A

PRU-0216

Supplement to the Application

☐ The Prudential Insurance Company of America
☐ Pruco Life Insurance Company
A Subsidiary of The Prudential Insurance Company of America

No.

A Supplement to the Application for a variable contract in which Edsel Ford Stewart is named as the proposed insured.

I BELIEVE THIS CONTRACT MEETS MY INSURANCE NEEDS AND FINANCIAL OBJECTIVES. I ACKNOWLEDGE RECEIPT OF A CURRENT PROSPECTUS FOR THE CONTRACT. I UNDERSTAND THAT THE CONTRACT'S VALUE AND DEATH BENEFIT MAY VARY DEPENDING ON THE CONTRACT'S INVESTMENT EXPERIENCE..... YES ☒ NO ☐

An illustration of values is available upon request.

11/11/0225 000-0232.002

Date 8/31 .1999 Signature of Applicant X Lawrence E Stewart

ORD 86218-00

EXHIBIT
tabbies
B

CERTIFICATE OF SERVICE

I, Alex A. Alston, Jr., one of the attorneys for Appellees/Plaintiffs, hereby certify that I have this day served a true copy of the above and foregoing **Motion for Rehearing** via hand delivery to the following:

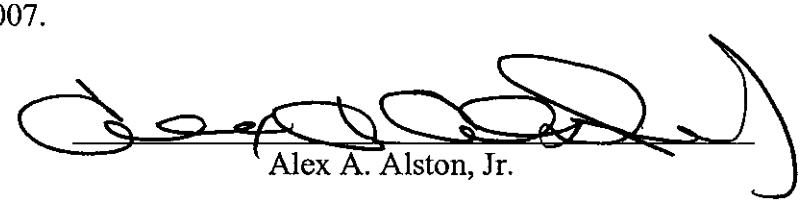
Roy H. Liddell, Esq.
Walter D. Willson, Esq.
Richard G. Norris, II, Esq.
WELLS MARBLE & HURST, PLLC
300 Concourse Boulevard, Suite 200
Ridgeland, Mississippi 39157

ATTORNEYS FOR APPELLANTS/DEFENDANTS,
THE PRUDENTIAL INSURANCE COMPANY OF AMERICA and
PRUCO LIFE INSURANCE COMPANY

Honorable Winston L. Kidd
Circuit Judge
Hinds County Courthouse
407 East Pascagoula Street
Jackson, Mississippi 39201

TRIAL COURT JUDGE

This the 10th day of October, 2007.



Alex A. Alston, Jr.