**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI**

**NO. 2008-CA-01364**

* * *

**SARAH B. HICKS, L.T. HICKS, MARTHA JO HALE (FORMERLY MARTHA JO HORTON), WILLIAM M. EVANS, ROBERT D. CHILDERS, and RAY D. SPENCER,** **APPELLANTS**

**V.**

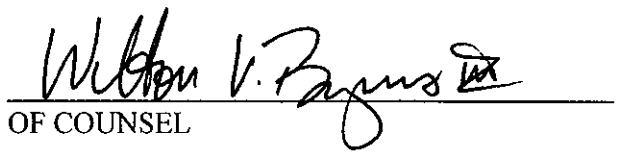
**NORTH AMERICAN COMPANY FOR LIFE AND HEALTH INSURANCE and CLIFF HANCOCK d/b/a HANCOCK INSURANCE AGENCY,** **APPELLEES**

## CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Sarah B. Hicks, Appellant;
2. L.T. Hicks, Appellant
3. Martha J. Hale (formerly Martha Jo Horton), Appellant;
4. William M. Evans, Appellant;
5. Robert D. Childers, Appellant
6. Ray D. Spencer, Appellant;
7. William C. Spencer, Esq., Attorney for Appellants;
8. Michael D. Greer, Esq., Attorney for Appellants;
9. William D. Prestage, Esq., Attorney for Appellants;
10. North American Company for Life and Health Insurance, Appellee;
11. Cliff Hancock d/b/a Hancock Insurance Agency, Appellee;
12. Wilton V. Byars, III, Esq., Attorney for Appellee North American;
13. Amanda M. Urbanek, Esq., Attorney for Appellee North American;
14. Robert W. Bradford, Jr., Esq., Attorney for Appellee North American;
15. Bo Russell, Esq., Attorney for Appellee Cliff Hancock;

16. Brian C. Smith, Esq., Attorney for Appellee Cliff Hancock;
17. Honorable Robert P. Chamberlin, Jr., Trial Court Judge.



OF COUNSEL

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## STATEMENT OF THE ISSUE

1. Whether the trial court correctly granted Defendants' motions for summary judgment due to the expiration of the applicable statute of limitations.

## STATEMENT OF THE CASE

### I. FACTUAL AND PROCEDURAL BACKGROUND

#### A. Procedural History.

Plaintiffs/Appellants' complaint was originally filed on behalf of ten Plaintiffs. The named Defendants were North American Company for Life and Health Insurance ("North American"); North American Company for Life and Health Insurance of New York ("NANY"); Clifford Hancock, d/b/a Hancock Insurance Agency ("Mr. Hancock"), and John Does 1-5. Record (hereinafter "R.") pp. 2-17.

In essence, the complaint alleges Plaintiffs were sold life insurance policies by North American through its agent Defendant Hancock pursuant to a scheme of deceptive sales practices with the knowledge of and to the benefit of North American. There are general allegations regarding a scheme to replace Allianz policies; a split illustration scheme; and fraudulent concealment. Based thereupon, the complaint sets forth causes of action for fraud, intentional misrepresentation, fraudulent concealment, fraudulent inducement, civil conspiracy, breach of the obligation of good faith and fair dealing, negligent misrepresentation, breach of fiduciary and quasi-fiduciary obligation, negligence and/or gross negligence, and tortious breach of contract. *Id.*

Plaintiffs' deposition testimony cuts through the legal jargon of the complaint and reveals that the true gravamen of their lawsuit is they were told their premiums would remain the same over the life of their respective North American policies and that if those premiums were paid, the policies would remain in effect until their demise. Plaintiffs contend those representations were false.

The Defendants filed answers denying Plaintiffs' allegations. Four Plaintiffs voluntarily dismissed their claims with prejudice after their depositions were taken. R. pp. 2213.

On July 18, 2006, the trial court dismissed the claims against NANY with prejudice based on the Joint Stipulation of Dismissal filed by all parties. R. p. 933.

This case is actually six lawsuits wrapped into one. North American filed six motions for summary judgment and supporting briefs on June 6, 2006. R. pp. 18-917. Mr. Hancock filed similar motions shortly thereafter.

Defendants' motions for summary judgment contended that: all claims brought by Plaintiffs were barred by Mississippi's general three-year statute of limitations; Plaintiffs' reliance upon the alleged misrepresentations of Defendants was not reasonable; Mississippi does not recognize a fiduciary relationship, nor does it impose a duty of good faith and fair dealing arising out of a first party insurance contract; there was no tortious breach of contract; and no vicarious liability exists in Mississippi for the acts of an independent contractor. R. pp. 18-917. Plaintiffs responded to the motions.

Oral argument was heard on June 12, 2008. The trial court correctly granted all summary judgment motions by an Order and an Opinion signed on July 3, 2008 and filed on July 10, 2008. R. pp. 2212-2219. Copies are attached at Tabs A and B respectively.[1]

In granting Defendants' motions for summary judgment, the trial court held, *inter alia:*

> The Court finds the claims in this case accrued, and the statute of limitations began to run, when the insureds purchased the policies as in *Stephens.* Therefore, unless the causes of action were tolled by fraudulent concealment, the claims are barred as it is undisputed that all the Plaintiffs' policies were issued more than three years prior to this case being filed. The court would further point to the authority

[1] "Tab" refers to the tabs contained in the two volumes of Record Excerpts of Appellee North American.

> contained in *Watts v. Horace Mann Life Insurance Company,* 949 So.2d 833 (Miss.App. 2006). In *Watts,* as in the case at hand, the insured admitted she didn't read the policy. If she had read the policy, the unambiguous language would have made her aware of her claim. As in *Watts,* the applicable language in the policies at hand does not require an expert to understand. Quite the contrary, when the language was read to the plaintiffs at their depositions they indicated that they understood what it meant.
>
> Regarding subsequent affirmative acts of concealment, the Court finds that only one of the Plaintiffs even allege that they have even spoken to Hancock since they received the policy. The Plaintiffs' expert opines that concealment occurred with the annual statements and statements of policy values that were being sent to the plaintiffs. Providing correct annual statements and statements of policy values simply does not constitute concealment.
>
> Even if the Plaintiffs have shown subsequent affirmative acts, more is required of the Plaintiffs. Regarding the issue of diligence, the court finds the evidence is undisputed that none of the Plaintiffs read the policy when they received it. The Plaintiffs all admitted that no one prevented them from reading the policy or any other documents. Also, the Plaintiffs were given twenty days to review the policy in case they decided not to keep the coverage. All of the Plaintiffs admitted that had they read the policy they would have realized it was not the deal they wanted. They all admitted that the policy clearly told them it would or could lapse. All of the Plaintiffs are well educated and well versed in business, one of which is a lawyer, and fully capable of reading and understanding the policies if they would have chosen to do so.

R. pp. 2217-2218.

**B. Facts.**

Plaintiffs' testimony reveals that when at deposition they read the revelations set forth in their policies, Statements of Policy Costs and Benefit Information, and annual policy projections, they understood that if level premiums were paid, their policies might lapse in the future in contradiction to what they contend the agent told them. The testimony of each plaintiff will now be examined.

### 1. Plaintiff Robert D. Childers.

Robert D. Childers is a highly educated and experienced attorney. In 1972, he earned a Bachelor of Arts degree from the University of Mississippi, and in 1977 he received a Master of Arts degree from Memphis State University in political science. In 1981, Mr. Childers received his law degree from Memphis State University and in that year began practicing law. Childers Deposition attached as Tab C at R. p. 2404, l. 11 - 2405, l. 18. In law school, he took such courses as torts, constitutional law, criminal law, domestic relations, tax, Uniform Commercial Code, and others. *Id.* at 2406, l. 17 - 2407, l. 23. This background resulted in the following practice: "I always advise my clients to read their contracts" and if they have questions, to inquire. *Id.* at 2408, l. 2-7.

#### a. Mr. Childers admits the policy language contradicts the alleged representations made by Hancock.

Mr. Childers testified he received his policy several weeks after applying for it in April 1993. R. p. 2425, l. 24 - 2426, l. 3. Asked if he had the opportunity to read the policy, Mr. Childers replied: "Yes, I could have read it, but I did not read it." *Id.* at 2427, l. 15-16. Mr. Childers' policy contained a twenty-day "Right to Examine" clause pursuant to which he could have sent his policy back "for any reason." *Id.* at R. p. 2440, l. 6-15.

Mr. Childers admitted the policy provisions contradicted the alleged representations by Mr. Hancock that his North American policy would remain in effect if he paid the planned premium until policy maturity or death and that his premiums would remain level. *Id.* at R. p. 2441, l. 8 - 2442, l. 3. The Policy Schedule, which is on page 3 of his policy, provides:

> The Maturity Date of this policy is the policy anniversary nearest the insured's 100th birthdate. However, it is possible that coverage will expire prior to the maturity date shown if premiums are insufficient to continue coverage to such date. It is also possible that even if

coverage continues to the maturity date there may be no surrender value available if sufficient premiums are not paid.

R. p. 2442, l. 14-21. The policy appears at Tab D.

Mr. Childers then read the second page of the Policy Schedule and testified about it as follows.

Q. And read the last two lines for me, please.

A. 'Assuming premium payments as stated above, guaranteed interest and cost of insurance charges, this policy will lapse April 23rd, 2014.'

Q. And what does that indicate to you, please, sir?

A. That it will come to an end April 23rd, 2014.

Q. And is that contrary to your understanding of how this policy was supposed to work?

A. Yes, sir.

Q. And had you read that at the time you received the policy, would you have accepted or rejected the policy?

A. I would have gone back to my agent and had him to explain why if he tells me one thing the policy says something else.

**Q. All right sir. And this what you read there that we've just gone over contradicts what you recall hearing from your agent. Is that correct?**

**A. That's correct.**

Tab C at R. p. 2441, l. 10 - 2442, l. 3 (emphasis added).

**b. Mr. Childers admits the Annual Policy Projections state that utilizing currently paid premiums, his policy could lapse in the future.**

Mr. Childers admitted receiving annual summary reports and policy projections from North American. In fact, he produced samples of each (Tab E). Mr. Childers

examined the North American policy projection for the year 1999. He knows of no reason why he would not have received it. Tab C at R. p. 2450, l. 14-15. Mr. Childers testified that this projection informed him that if guaranteed factors were applied to the policy, the death benefit would go to zero in March of 2006, and the same would be true if projected factors were applied. *Id.* at p. 2451, l. 8-16. Mr. Childers admitted this language contradicted the alleged representations of how his policy was to operate. *Id.* at p. 2451, l. 20-24. To view pertinent portions of the video testimony of Mr. Childers, click here, which is the photograph of Mr. Childers that appears in the electronic version of this brief.[2]

**c. Mr. Childers' claims are time-barred.**

Mr. Childers' testimony establishes that when he read the information sent to him by North American, he became aware that his policy could lapse in the future if only planned premiums were paid, in contradiction to the agent's alleged misrepresentations. These declarations were clear and unambiguous to Mr. Childers when he read them. Mr. Childers received his policy in 1993 and his first policy projection in 1998. The statute of limitations began to run in 1993 and in no case later than the receipt of the first policy projection in 1998. Thus, the statute of limitations ran and all of Childers' claims were time-barred in 1996 at the earliest and by 2001 at the latest. This case was filed on April 31, 2004.

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Attached at Tab F to each copy of the two volume Record Excerpts of North American is a CD/DVD disc of this brief. The disc contains links to the pertinent portions of the video testimony of each plaintiff introduced into evidence below which the trial court found compelling. To view the video testimony, click on the photograph of the particular plaintiff. Further instructions appear on the electronic copy of this brief. A copy of the original video disc introduced into evidence below is attached at Tab W.

### 2. Plaintiff William M. Evans.

Mr. Evans is a bright, articulate, college educated businessman. He attended Northeast Junior College and Ole Miss for four years. While at these institutions, he took English, History, Psychology and related courses, which required him to read and understand written material. He also researched and wrote papers. Evans Deposition, Tab G, at R. pp. 2516-2517 at pp. 8-9. Mr. Evans is an experienced businessman. He owns a pawn business that is highly regulated. Mr. Evans testified he must stay on top of such government regulations. *Id.* at R. p. 2517 at p. 12, R. p. 2519 at p. 18.

#### a. Mr. Evans admits the policy language and the Statement of Policy Costs and Benefit Information contradicts the alleged representations made by Hancock.

Mr. Evans received his policy in July 1993, but did not review it, although he could have done so if desired. *Id.* at R. p. 2523 at pp. 33-34. He does not have any reason to believe he did not receive the Statement of Policy Costs and Benefit Information that accompanied the policy. *Id.* at 2527 at p. 52. Mr. Evans' policy contained a twenty-day "Right to Examine" clause pursuant to which he could have sent his policy back "for any reason." The policy is at Tab H, R. p. 665.

Mr. Evans' only complaint is that the premiums on his policy increased. If the premiums had remained the same, he would have been perfectly satisfied. Tab G at R. p. 2525 at p. 41. He wanted a premium that would stay the same with a death benefit which stayed in effect until he died. *Id.* at 2525 at p. 42. After reading his policy during his deposition, Mr. Evans admitted the policy language contradicted the alleged representations made by Mr. Hancock. *Id.* at R. p. 2530 at p. 64.

Mr. Evans reviewed the Policy Schedule which appears on page 3 of his policy. *Id.* at R. p. 2526 at p. 47. His testimony regarding the information from North American contained in the Policy Schedule is significant.

> Q. All right. Under where it says Note (indicating), it says, "The maturity date of this policy is the policy anniversary nearest the insured's 100th birth date; however, it is possible that coverage will expire prior to the maturity date shown if premiums are insufficient to continue coverage to such date." **Is that an indication to you that there's a possibility that premiums may be insufficient to continue the coverage to maturity?**
>
> A. **Now that I'm reading this, I guess it would, yes sir.**

Tab G at R. p. 2526 at p. 48 (emphasis added).

After reading his Policy Schedule, Mr. Evans testified as follows:

> Q. And so does that second page that sentence you just -- or lines you just read indicate to you that there was a possibility that assuming the payments were as stated on the previous page that this policy would lapse April 2, 2006?
>
> **A. First time I've seen this, yes, sir.**
>
> **Q. And that is North American informing you of that in writing, correct?**
>
> **A. Yes sir.**
>
> Q. Okay. And when it says it lapses, you understand that it means go out of force?
>
> A. I would think so, yes.

(Emphasis added). *Id.* at R. p. 2527 at pp. 49-50.

**b. Mr. Evans admits the Annual Policy Projections he received state that utilizing currently paid premiums, his policy could lapse in the future.**

Mr. Evans reviewed his policy projection for 1998 which provides that: "On a projected basis, this coverage lapses in policy year eight." Tab I, R. pp. 730-735. His testimony relating to this is significant:

> **Q. Would it be fair to say based on what you've seen that in the policy itself and the policy schedule and in documents which were sent to you after that time that North American reminded you in writing or told you in writing that there was the possibility if the planned premiums were paid that this policy could lapse before maturity?**
>
> **A. It appears so, sir.**

(Emphasis added). Tab G at R. p. 2530 at p. 64. To view pertinent portions of the video of Mr. Evans' testimony, click here.

**c. Mr. Evans' claims are time-barred.**

Mr. Evans' testimony revealed that when he read the information sent to him by North American, he became aware that the written material stated that his policy could lapse in the future if only planned premiums continued to be paid which contradicts the agent's alleged misrepresentations. These statements were made in writing to him in his policy, the Statement of Policy Costs and Benefit Information, and the annual projections which he received each year from 1998 forward. These declarations were clear and unambiguous to Mr. Evans when he read them. Mr. Evans received his policy in July 1993 and his first policy projection in 1998. The statute of limitations began to run in 1993 and in no case later than the receipt of the first policy projection in 1998. This suit was filed on April 3, 2004.

### 3. Plaintiff Raymond D. Spencer.

Mr. Spencer attended two years of college. While in college, he took courses such as English, history, and marketing. He read and was tested on large volumes of written material and admits he is fully capable of reading and understanding the English language. Self-employed, Mr. Spencer has done business under the name of Spencer Home Improvement since 1982. Spencer Deposition at Tab J at R. pp. 2385-2386 at pp. 10-11, 13.

#### a. Mr. Spencer admits the policy language and the Statement of Policy Costs and Benefit Information contradicts the alleged representations made by Hancock.

Mr. Spencer received his policy in 1993. Although he does not recall receiving it, he produced a copy of his policy at his deposition. Mr. Spencer did not review his policy upon receipt. *Id.* at R. p. 2390 at pp. 30-31. He does not recall whether he received the Statement of Policy Costs and Benefit Information that accompanied the policy. *Id.* at 2394 at p. 48. Mr. Spencer's policy contained a twenty-day "Right to Examine" clause pursuant to which he could have sent his policy back "for any reason." Policy at Tab K, R. p. 2392 at p. 38.

Mr. Spencer's only complaint is that the premiums on his policy increased. If the premiums had remained the same, he would have been perfectly satisfied. Tab J at R. p. 2391 at p. 35. He wanted a premium that would stay the same with a death benefit which would remain in effect until he died. *Id.* at 2389 at p. 28. After reading his policy during his deposition, Mr. Spencer admitted the policy language contradicted the alleged representations made by Mr. Hancock. *Id.* at 2394 at p. 48.

Mr. Spencer reviewed the Policy Schedule which appears on page 3 of his policy. Regarding the information from North American contained in the Policy Schedule, he testified:

> Q. Says, "The maturity date of this policy is the policy anniversary nearest the insured's 100th birthday. However, it is possible coverage will expire prior to maturity - - to the maturity date shown if premiums are insufficient to continue coverage to such date." When it says coverage will expire, what did that mean to you?
>
> A. Well, you won't have it anymore.

Tab J at R. p. 2392 at p. 39. Mr. Spencer also reviewed his Statement of Policy Cost and Benefit Information that was sent along with his policy. He was asked: "... North American, over the years, based on what you've reviewed now, has told you periodically that using the planned premium that the policy might lapse at some time, correct?" Mr. Spencer candidly responded, "Right." *Id.* at R. p. 2394 at p. 47.

**b. Mr. Spencer admits the Annual Policy Projections he received state that utilizing currently paid premiums, his policy could lapse in the future.**

Mr. Spencer has no reason to believe he did not receive annual statements sent to him by North American beginning in 1999. Tab J at R. p. 2394 at pp. 46-48. Reviewing the 1999 policy projection from North American (Tab L), Mr. Spencer testified the chart on the second page states that, assuming planned premiums were paid, the policy would go out of force. Tab J, R. at 2394 at pp. 45-46. Mr. Spencer admitted that the last page of the 1999 projection provided: "On the projected basis, this coverage lapses in policy year 08." *Id.* at 2394 at p. 46. To review the video of pertinent portions of Mr. Spencer's testimony, click here.

**c. Mr. Spencer's claims are time-barred.**

Mr. Spencer's testimony revealed that when he read the information sent to him by North American, he became aware that the written material stated his policy could lapse in the future if only planned premiums continued to be paid which contradicts the agent's alleged misrepresentations. These statements were made in writing to him in his policy, the Statement of

Policy Costs and Benefit Information, and the annual projections which he received each year from 1999 forward. These declarations were clear and unambiguous to Mr. Spencer when he read them. Mr. Spencer received his policy in 1993 and his first policy projection in 1999. The statute of limitations began to run in 1993 and in no case later than the receipt of the first policy projection in 1999. This suit was filed on April 31, 2004.

**4. Plaintiff Martha Jo Horton Hale ("Ms. Hale").**

Ms. Hale is bright, articulate, and extremely well-educated. She obtained a Bachelor of Arts degree from the University of Mississippi in 1969 and a Master of Science degree from that same institution in 1989. During her academic career, she read and was tested on large amounts of written material. Hale deposition at Tab M at R. pp. 2535-2536 at pp. 7-9.

**a. Ms. Hale admits the policy language and the Statement of Policy Costs and Benefit Information contradicts the alleged representations made by Hancock.**

Ms. Hale received her policy in 1998 (see policy at Tab N). Thereafter, she received periodic reports on the policy and its performance, which she reviewed. She agreed that if there was anything she did not understand, she could have called North American, but never did. Tab M at R. p. 2539 at p. 24. She admitted that in forwarding the policy and later periodic reports to her, North American was attempting to convey information to her. *Id.* at R. p. 2541 at p. 31. Ms. Hale's policy contained a twenty-day "Right to Examine" clause pursuant to which she could have sent her policy back "for any reason." Tab N at R. p. 825.

Ms. Hale asserts that based on what she understood from Mr. Hancock, she thought her policy "would be a Whole Life policy that would be there to the end and that my premium would not go up." Tab M at R. p. 2541 at p. 31. She thought her policy would not "run out on her." *Id.*

at 2540 at p. 27. After reading her policy during her deposition, Ms. Hale admitted the policy language contradicted the alleged representations made by Cliff Hancock. *Id.* at R. p. 2543 at p. 39.

At her deposition, Ms. Hale read the Policy Schedule which appears on page 3 of her policy, which includes the following paragraph.

> Projected Lapse Date. Assuming Planned Premium payments as outlined here, Guaranteed Interest Rates and Guaranteed Cost of Insurance charges as shown in this Policy Schedule, and that no loans or partial surrenders will occur, this policy will lapse on APRIL 3, 2018. However, it is possible that coverage will expire prior to this date or that no surrender value will be available at that time if sufficient premiums are not paid.

Tab N. Ms. Hale's testimony about that paragraph is significant.

> Q. Is that an indication to you if the planned premium set forth on that page is paid that your policy may lapse on or before – and what's that date? April 3, 2018?
>
> A. Uh-huh.
>
> Q. Is that yes?
>
> A. Yes.
>
> Q. Okay. And that's fairly clear about what North American is telling you there in writing. Is it not? That there is a possibility if you paid a planned premium that this policy could lapse in 2018?
>
> A. Could lapse, uh-huh.

Tab M at R. pp. 2543-2544 at pp. 40-41.

**b. Ms. Hale admits the Annual Policy Projections she received state that utilizing currently paid premiums, her policy could lapse in the future.**

Ms. Hale also produced a series of annual Summaries of Policy Activity for various years sent to her by North American, as well as Projections of Policy Values which were

sent each year from 1999 forward. Tab M at R. p. 2544 at p. 42. During her deposition, Ms. Hale reviewed the 1999 Annual Projection (Tab O) she produced and testified as follows.

> Q. And I would like to direct your attention to the enclosed projection of policy values which assumes that you continue paying your premiums. And I would direct your attention to the next to last line in all caps of page three, and read that for me, please ma'am.
>
> A. 'On a projected basis this coverage lapses in policy year 22.'
>
> Q. Okay. And is that an indication that if the planned premiums are paid, that this policy based on the current assumptions or the projected assumptions would lapse in the policy year 22?
>
> A. I never saw that.
>
> Q. And this has been with you since 1999?
>
> A. Yes.

Tab M at R. pp. 2544-2545 at pp. 44-45. To review the video of pertinent portions of Ms. Hale's testimony, click here.

**c. Ms. Hale's claims are time-barred.**

Ms. Hale's testimony revealed that when she read the information sent to her by North American, she became aware that the written material stated her policy could lapse in the future if only planned premiums continued to be paid in contradiction of the agent's alleged misrepresentations. These statements were made in writing to her in her policy, the Statement of Policy Costs and Benefit Information, and the annual projections which she received each year from 1999 forward. These declarations were clear and unambiguous to Ms. Hale when she read them. Ms. Hale received her policy in 1998 and her first policy projection in 1999. The statute of

limitations began to run in 1998 at the earliest and in no case later than the receipt of the first policy projection in 1999. This suit was filed on April 31, 2004.

**5. Plaintiff L.T. Hicks.**

Mr. Hicks is bright and well educated. He obtained a Bachelor of Science degree in social studies from Rust College in 1965 where he took, among other courses, English composition, English literature, History, Social Studies, Economics, and Business. He was required to read and understand significant volumes of written material. L.T. Hicks Deposition, Tab P, R. p. 2488 at pp. 19-20. In college, Mr. Hicks was required to research and write papers based thereupon. *Id.* at p. 2489 at p. 21.

Following graduation from college, Mr. Hicks taught social studies, government, history, and economics. *Id.* at R. p. 2489 at p. 22. He routinely reads Consumer's Report, The Commercial Appeal, The Southern Reporter, The Southern Advocate, Ebony and Jet. *Id.* at pp. 2489-2490 at pp. 24-25.

**a. Mr. Hicks admits the policy language and Statements of Policy Costs and Benefit Information contradict the alleged representations made by Hancock.**

Mr. Hicks testified he received his policy. Tab P at R. p. 2498 at p. 57. However, upon receipt, he only "looked at" it. *Id.* at p. 2498 at p. 58. Mr. Hicks' policy contained a twenty-day "Right to Examine" clause pursuant to which he could have sent his policy back "for any reason." Policy at Tab Q. R. p. 2503 at p. 78. Mr. Hicks did not send his policy back, instead he put his policy "in a safe place." Tab P at p. 2498 at p. 58.

Mr. Hicks admitted the term "flexible premium" appearing on the first page of his policy meant the premium could change. *Id.* at R. p. 2503 at p. 79. Upon reading this Mr. Hicks testified **"but that wasn't what I was told."** *Id.* Mr. Hicks testified that three times on the first page North

American informed him that his premiums were flexible. *Id.* He admitted **"but that ain't what the agent told me though. That's what it says here."** *Id.*

The Policy Schedule, which is on page 3 of Mr. Hicks' policy, provides:

> The Maturity Date of this policy is the policy anniversary nearest the insured's 100th birthdate. However, it is possible that coverage will expire prior to the maturity date shown if premiums are insufficient to continue coverage to such date. It is also possible that even if coverage continues to the maturity date there may be no surrender value available if sufficient premiums are not paid.

Tab Q at R. p. 353.

Mr. Hicks read the last two lines of page 4 of the Statement of Policy Cost and Benefit Information which accompanied his policy:

> ASSUMING PREMIUM PAYMENT AS STATED ABOVE, GUARANTEED INTEREST AND COST OF INSURANCE CHARGES, THIS POLICY WOULD LAPSE NOVEMBER 18, 2009.

Tab Q at R. p. 2507 at p. 93. He agreed this informed him that if only the guaranteed interest was paid, the policy would not last past 2009. *Id.* at R. p. 2507 at pp. 93-94. Mr. Hicks received his policy and Statement of Policy Cost and Benefit Information in 1993. *Id.* at 2506 at p. 92.

**b. Mr. Hicks admits the Annual Policy Projections he received state that utilizing currently paid premiums, his policy could lapse in the future.**

Mr. Hicks identified the projections sent to him by North American (Tab R) each year beginning in 1998. He admitted he received such projections and summaries annually from North American. Tab P at R. p. 2508-2509 at pp. 100-101.

The second page of the 1998 projection contains a chart which sets forth how the policy would perform under guaranteed factors and/or projection factors. Tab R at R. p. 417. Reading the chart, Mr. Hicks stated that by this chart, North American informed him that if the guaranteed

factors were utilized, there would be no death benefit after age 68 and if the current factors remained in effect, there would be no death benefit after age 80. Tab P at R. p. 2508 at pp. 98-99.

Mr. Hicks acknowledged that the last two lines on the projection provided: "On the projected basis, this coverage lapses in Policy Year 30." *Id.* Referring to his 1998 annual projection, Mr. Hicks admitted that when the projection indicated that the "policy would lapse in policy year 30, that it is going to lapse." *Id.* at R. p. 2512 at p. 114. Each policy projection received annually thereafter contained the same clear information that the policy could lapse in the future if planned premiums were paid. To review the video of pertinent portions of Mr. Hicks' testimony, click here.

**c. Mr. Hicks' claims are time-barred.**

Mr. Hicks' testimony revealed that when he read the information sent to him by North American at his deposition, he became aware that the written material stated that his policy could lapse in the future if only planned premiums were paid, which contradicts the agent's alleged misrepresentations. These statements were made in writing to him in his policy, the Statement of Policy Cost and Benefit Information, and the annual projections which he received each year from 1998 forward. These declarations were clear and unambiguous to Mr. Hicks when he read them. Mr. Hicks received his policy and Statement of Policy Cost and Benefit Information in 1993. He received his first policy projection in 1998. The statute of limitations began to run in 1993 and in no case later than the receipt of the first policy projection in 1998. This suit was filed on April 31, 2004. There were no contrary statements or concealment by the agent or North American. Hicks Depo. at Tab P, R. p. 2503 at p. 79.

**6. Plaintiff Sarah B. Hicks.**

Mrs. Hicks is bright, articulate, and well-educated. She received a Bachelor of Science degree from Rust College in 1976. During her academic career, she took English, history,

and various education courses, among others. Sarah Hicks' Deposition, Tab S at R. p. 2471 at pp. 6-7. While in college, she was required to read and was tested on large volumes of written material and was required to research and write papers based on her research. *Id.* Since graduating from Rust College until the present, she has taught school in the Mississippi School System. *Id.*

**a. Mrs. Hicks admits the policy language and the Statement of Policy Costs and Benefit Information contradicts the alleged representations made by Hancock.**

Mrs. Hicks received her policy in 1993 and had the opportunity to review it. *Id.* at R. p. 2475 at p. 22. Mrs. Hicks identified a copy of the policy (Tab T) delivered to her that contained a twenty-day "Right to Examine" clause pursuant to which she could have sent her policy back "for any reason." Tab S at R. p. 2479 at p. 37.

Mrs. Hicks agreed that the first page of the policy declares in three separate places that the policy is a "flexible premium" policy. She agreed with her husband that "flexible premium" means the premiums are flexible and could go up or down. *Id.* at R. p. 2478-2479 at pp. 37-38.

Mrs. Hicks then read the last two lines of the Policy Schedule on page 3 of her policy which provide:

> ASSUMING PREMIUM PAYMENT AS STATED ABOVE, GUARANTEED INTEREST AND COST OF INSURANCE CHARGES, THIS POLICY WILL LAPSE OCTOBER 2, 2014.

Tab T. Mrs. Hicks admitted this language states that based on the guaranteed interest rates and guaranteed cost of insurance, if there were no increases in premium, this policy would lapse on October 1, 2014. Tab S at R. p. 2479 at p. 38.

In reviewing the second page of the Statement of Policy Cost and Benefit Information (Tab U), Mrs. Hicks admitted that a chart which described how her policy would perform under both

"guaranteed" and "current" factors showed that the policy could lapse in the future if planned premiums are paid. Tab S at R. p. 2479 at pp. 39-40.

**b. Mrs. Hicks admits the Annual Policy Projections she received state that utilizing currently paid premiums, her policy could lapse in the future.**

Projections of policy values (Tab V) were sent to Mrs. Hicks each year beginning in 1999. Mrs. Hicks believes she received these projections. Tab S at R. p. 2480 at p. 43. Mrs. Hicks agreed the second page of the 1999 projection contained a breakdown of how the policy would perform on a guaranteed basis and on a projected basis and how long it would last assuming the planned premiums were paid. *Id.* at R. p. 2480 at p. 44. She further acknowledged that North American informed her in writing on page 3 of the 1999 projection that: "On a projected basis, this coverage lapses in policy year 31." *Id.* To view pertinent portions of the video of Ms. Hicks' testimony, click here.

**c. Mrs. Hicks' claims are time-barred.**

Mrs. Hicks' testimony revealed that when she read the information sent to her by North American, she became aware that the written material stated that her policy could lapse in the future if only planned premiums continued to be paid, which contradicts the agent's alleged misrepresentations. These statements were made in writing to her in her policy, the Statement of Policy Costs and Benefit Information, and the annual projections which she received each year from 1999 forward. These declarations were clear and unambiguous to Mrs. Hicks when she read them. Mrs. Hicks received her policy in 1993 and his first policy projection in 1999. The statute of limitations began to run in 1993 and in no case later than the receipt of the first policy projection in 1999. Their case was filed on April 31, 2004.

## SUMMARY OF ARGUMENT

Plaintiffs' deposition testimony establishes that their only complaint is that Defendant Hancock allegedly represented that if level premiums were paid, their policies would remain in force until their demise.

When Plaintiffs reviewed their policies, Statements of Policy Cost and Benefits, and annual policy projections at their depositions, they admitted North American informed them in writing multiple times that if level premiums were paid, their policies could lapse in the future. These disclosures were received by Plaintiffs more than three years before suit was filed.

The trial court correctly held that North American's written disclosures were not ambiguous, that there were no post-sale affirmative acts of concealment, and that the Mississippi three-year statute of limitation barred all of Plaintiffs' claims. The trial court further found that Plaintiffs did not use reasonable diligence to discover the alleged misdeeds. The summary judgments, it is respectfully submitted, should be affirmed.

In the Brief of Appellants, Plaintiffs' counsel attempts to divert this Court's attention from their clients' forthright, but self-destructive testimony. Four pages of Plaintiffs' nine-page statement of facts set forth Defendants' alleged misdeeds. Interestingly, for purposes of the statute of limitations issue, those allegations, for sake of argument, are presumed to be true.

On appeal, Plaintiffs' learned counsel assert the written disclosures in Plaintiffs' policies were so ambiguous that Plaintiffs were unable to understand that if a level premium was paid, their policies could lapse before their demise and were thereby prevented from recognizing that the documents sent Plaintiffs by North American contradicted Mr. Hancock's alleged misrepresentations. Such a conclusion is possible only if one ignores Plaintiffs' own testimony and

the straightforward and unambiguous language of Plaintiffs' policies, post-sale policy projections, and Statements of Policy Costs and Benefits Information which Plaintiffs admit they received, but did not read until their depositions.

It appears Plaintiffs' position on appeal is that: (1) if undesirable facts are ignored, they cease to exist, or (2) if unsupported statements asserting Plaintiffs' inability to understand are repeated often enough, they become reality, despite Plaintiffs' sworn admissions that upon reading North American's disclosures, they did understand. This understanding also establishes that Plaintiffs did not exercise reasonable diligence as required by Mississippi law.

In a futile effort to overcome such irrefutable facts, Plaintiffs' counsel rely on an "expert" who opined the policies and other documents were ambiguous and confusing, in direct contradiction of Plaintiffs' testimony.

Plaintiffs also contend the relatively recent cases of *Pate v. Conseco Life Ins. Co.*, 971 So. 2d 593 (Miss. 2008) and *Wilbourn v. Equitable Life Assurance Society of the U.S.*, 998 So. 2d 430 (Miss. 2008) support their position. As is discussed in detail below, Plaintiffs' position on the law and the facts is incorrect and the decision of the trial court should be affirmed.

## ARGUMENT

### The Trial Court Correctly Granted Summary Judgment in Favor of Defendants

### I. STANDARD OF REVIEW

"The standard of review by which an appellate court reviews the grant or denial of a motion for summary judgment under Rule 56(c) of the Mississippi Rules of Civil Procedure is de novo." *Grammar v. Dollar,* 911 So.2d 619, 621-22 (¶ 4) (Miss.Ct.App. 2005) (citing *McMillan v. Rodriguez,* 823 So. 2d 1173, 1176-77 (¶ 9) (Miss. 2002)). In determining whether a motion for summary judgment was properly granted, we must view the evidence "in the light most favorable to the party against whom the motion has been made." *Weatherly v. Union Planters Bank, N.A.,* 914 So. 2d 1222, 1224 (¶ 9) (Miss.Ct.App. 2005) (citation omitted). "This Court will only reverse a trial court's decision to grant summary judgment if triable issues of fact exist." *Johnston v. Palmer,* 963 So.2d 586, 592 (¶ 11) (Miss.Ct.App. 2007) (citing *Bowie v. Montfort Jones Mem'l Hosp.,* 861 So. 2d 1037, 1041 (¶ 8) (Miss. 2003)). "If, in this view, there is no genuine issue of material fact, and the movant is entitled to judgment as a matter of law, summary judgment should forthwith be entered for the movant." *Bullock v. Life Ins. Co. of Miss.,* 872 So. 2d 658, 660 (¶ 6) (Miss. 2004) (citing *Hurdle v. Holloway,* 848 So. 2d 183, 185 (¶ 4) (Miss. 2003)).

## II. ALL CLAIMS BROUGHT BY PLAINTIFFS ARE BARRED BY MISSISSIPPI'S GENERAL THREE YEAR STATUTE OF LIMITATIONS.

Plaintiffs' deposition testimony establishes that their only complaint is that Defendant Hancock allegedly misrepresented that if level premiums were paid, their policies would remain in force until their demise.

When Plaintiffs reviewed their policies, Statements of Policy Cost and Benefit Information, and annual policy projections at their depositions, they admitted North American informed them in writing multiple times that if level premiums were paid, their policies could lapse in the future. These disclosures were received by Plaintiffs more than three years before suit was filed. The decision of the trial court, it is respectfully submitted, should be affirmed.

### A. The Statute of Limitations.

In Mississippi, causes of action for fraud, suppression, fraudulent inducement, conspiracy, breach of obligation of good faith and fair dealing, breach of fiduciary duty, negligence and/or wantonness, gross negligence, and tortious breach of contract are covered by the general three-year statute of limitations as provided in Miss. Code Ann. § 15-1-49 (1972). *See American Bankers' Ins. Co. v. Wells*, 819 So. 2d 1196, 1200 (Miss. 2001); *Agnew v. Wash. Mut. Finance Group,* 244 F. Supp. 2d 672, 675 (N.D. Miss. 2003).

#### 1. The Statute of Limitations Began to Run When Plaintiffs Received Their Policies.

In insurance cases where no allegations of post-sale misconduct exist, these above causes of action accrue and the statute of limitations begins to run "on the date that Plaintiff purchased his policy." *Parker v. Horace Mann Life Ins. Co.,* 949 So. 2d 57 at ¶ 7 (Miss.Ct.App. 2006); *Robinson v. Southern Farm Bureau Cas. Co.,* 915 So. 2d 516 at ¶ 8 (Miss.Ct.App. 2005);

*Brumfield v. Pioneer Credit Co.*, 291 F. Supp. 2d 462, 468 (S.D. Miss. 2003); *Agnew*, 244 F. Supp. 2d at 676.

In the instant case, Plaintiffs admit that when they read their Policy Schedules at deposition, they understood that if level premiums were paid, their policies could lapse in the future. The policies were received more than three years before suit was filed.

**2. Plaintiffs Have Not Met Their Burden to Establish the Statute of Limitations Should be Tolled.**

The statute of limitations can be tolled if a party fraudulently conceals "the cause of action from the knowledge of the person entitled thereto...." Miss. Code Ann. § 15-1-67 (1972). Where such exists, the statute of limitations would not begin to run until the "time at which such fraud shall be, or with reasonable diligence might have been first known or discovered." *Id.*

The burden of proving that the statute of limitations should be tolled past the policy purchase date is on the Plaintiffs. *Stephens v. Equitable Life Assur. Society*, 850 So. 2d 78, 84 (Miss. 2003). Plaintiffs have "a two-fold obligation to demonstrate that (1) some affirmative act or conduct occurred which prevented discovery of a claim, and (2) due diligence was performed on their part to discover it." *Id.* Plaintiffs here failed to carry their burden on either obligation.

**a. Plaintiffs Failed to Meet the First Test Necessary to Toll the Statute.**

As to the first obligation, Mississippi law holds that an insurer does not commit an "affirmative act or conduct" where no post-sale misconduct is alleged and the terms of the written policy are unambiguous. *Stephens*, 850 So. 2d at 84. In *Stephens*, the plaintiffs alleged that the agents orally misrepresented the terms of their "vanishing premium" policies. *Id.* This Court concluded, as a matter of law, that because the insureds were charged with the knowledge of

the contents of their policies, "whether they actually read the policy," then the insurer committed no affirmative act to prevent discovery once it issued the policies to the insureds. *Id.* at 83.

Likewise, in *Brumfield v. Pioneer Credit Company*, the court concluded that the plaintiff, who "admits he was given the opportunity to read the documents," could not show any "affirmative acts of concealment that prevented Plaintiff from discovering his cause of action in a timely manner." 291 F. Supp. 2d 462, 469 (S.D. Miss. 2003) (applying Mississippi law); *see also Rainwater v. Lamar Life Ins. Co.*, 246 F. Supp. 2d 546, 552 (S.D. Miss. 2003) (applying Mississippi law) (holding that the plaintiffs were on "notice of the fraud by virtue of the documents in their possession"). In *Smith v. Union National Life Insurance*, the court found that plaintiffs did not even allege that the agent or insurer "took affirmative steps subsequent to the agreement to prevent their reading of the insurance agreement." 286 F. Supp. 2d 782, 789 (S.D. Miss. 2003) (applying Mississippi law). Therefore, the court concluded, the plaintiffs presented no evidence that the defendants committed any affirmative acts.

The Brief of Appellants asserts that the annual statements from North American failed to mention that Plaintiffs' policies could lapse if level premiums were paid and this was a post-policy affirmative act of misrepresentation/or suppression.

However, Plaintiffs admit that upon reviewing their policies, Statement of Policy Cost and Benefits Information, and their annual policy projections, they understood that if they only paid a level premium, their policies could lapse.

- **The Affidavit of Plaintiffs' Expert is Inapposite.** Apparently recognizing that Plaintiffs' testimony and the written revelations by North American required the entry of summary judgment below, Plaintiffs' counsel offered the affidavit of a purported expert, Clint Wood. Mr. Wood's affidavit states that due to the "ambiguity, complexity, and confusing language and data

contained" in the policies, "the plaintiffs were unable to understand that their policies differed from Cliff Hancock's representations." R. p. 2128. Mr. Wood furthered opined that "concealment occurred with every document showing guaranteed rates where that plaintiff's present premium would not carry the policy to the maturity date and no warning of this impending loss of coverage was stated." R. p. 2129. The Wood affidavit should not be considered by this Court for several reasons.

First, Mississippi law does not allow an expert to testify as to ambiguity. That is a question of law for the trial court to decide. *See Watts v. Horace Mann Life Ins. Co.*, 949 So.2d 833, 837 (Miss.App. 2006); *Rotenberry v. Hooker,* 864 So. 2d 266 at 269 (Miss. 2003). In *Watts*, the plaintiff presented expert testimony regarding the ambiguity of her insurance policies in an effort to overcome summary judgment. 949 So.2d at 837. The Mississippi Appeals Court found that "Watt's deposition testimony indicated that she was fully capable of reading and writing, and therefore could have understood the clear and unambiguous terms of her insurance policies if she had read them." (Emphasis added). *Id.* at 838.

The *Watts* Court then held: "the contract at issue in this case did not require the opinion of an expert to understand. The language of the policies is clear and unambiguous and speaks for itself. After presenting a copy of the policies, Horace Mann needed to present no further evidence to prove that the language was clear and unambiguous." *Id.* at 837.

As in *Watts*, the determination of ambiguity is a question of law for this Court. Furthermore, the Wood affidavit is in direct contradiction to Plaintiffs' testimony. Plaintiffs, all of whom are highly educated, testified uniformly that when they reviewed their policies, Statements of Policy Cost and Benefits Information, and post-sale policy projections, they understood these written declarations contradicted the alleged representations of Defendant Hancock. Therefore, "the

contract at issue in this case did not require the opinion of an expert to understand." *Id.* The Wood affidavit is inapposite and should not be considered on this appeal.

- **Plaintiffs' Reliance on *Conseco* and *Wilbourn* is of No Aid to Them.** In yet another attempt to support their contention that North American's written disclosures are ambiguous despite Plaintiffs' testimony to the contrary, Plaintiffs rely on the decisions of *Pate v. Conseco Life Assurance Society of the U.S.*, 971 So. 2d 593, (Miss. 2008) and *Wilbourn v. Equitable Life Assurance Society*, 998 So. 2d 430 (Miss. 2008). These decisions are of no help to Plaintiffs.

- ***Conseco.*** The plaintiff in *Conseco* was sold a policy alleged to have a "planned monthly premium" that was not to increase. Premiums subsequently increased. 971 So. 2d at ¶¶ 2 and 4. The insured argued that the "terms of the contract are clear regarding the amount and payment of the premium." *Id.* The insurance company, on the other hand, relied on the "cash-value clause" to support its contention that the policy allowed for an increase in premiums and that the statute of limitations barred plaintiff's claims. The trial court entered summary judgment in favor of the insurance company. This Court reversed, holding the policy clearly did not provide that the company could increase premiums.

The policy provisions relied on by plaintiff in *Conseco* spoke of the insureds being able to change the amount of premiums paid. As this Court held, those provisions do not provide the insurance company has the right to increase premiums. This Court also held that the "cash-value clause" relied on by the insurer did not mention anything about the insurer having the right to increase premiums.

This Court did not hold either of the clauses to be ambiguous, thereby tolling the statute of limitations. Rather, in *Conseco,* this Court only held that all clauses were clear and that neither stated the insurer could increase premiums. *Conseco* has no application here.

- ***Wilbourn.*** In *Wilbourn,* plaintiff contended he was told he only had to pay eight years of out of pocket premiums and thereafter the policy would sustain itself and the premiums would "vanish". Defendant Equitable filed a motion to dismiss based on the three year statute of limitations. The trial court in its Order of Dismissal with Prejudice found the policy clearly stated that the premiums were payable "for life" and that "the time for filing any claim arising from the alleged representations to the contrary ... started to run on the date of delivery of the policy ... ." The Mississippi Court of Appeals affirmed the dismissal.

The decision of the Court of Appeals was overturned by this Court on a procedural basis; not on the merits. Although the motion filed by the Equitable was one to dismiss, the trial court entertained matters outside the pleadings. Such a motion is to be treated as a Rule 56 motion for summary judgment and is to be disposed of pursuant to that Rule. This Court held:

> Accordingly, this Court concludes that the circuit court erred in merely entering an 'Order of Dismissal with Prejudice' after considering 'matters outside the pleading,' but failing to properly convert the Rule 12(b)(6) motion to a Rule 56 motion for summary judgment via proper notice of said hearing, *see Miss.R.Civ.P.* 56(c), for the 'reasonable opportunity to present all materials made pertinent for such a motion by Rule 56 ... .' *Miss. R.Civ.P.* 12(b). Therefore, the circuit court's 'Order of Dismissal with Prejudice' is vacated and this case is remanded for further proceedings.

*Id.* at ¶ 13.

In dicta, this Court stated there was an ambiguity in the policy which prevented Plaintiffs from being able to determine that additional premiums might be required from the policyholder after the eighth annual payment. This Court discussed in detail that the policy language was clear that premiums must be paid for life, but was ambiguous as to the source of premiums after the eighth payment by the policyholder - *i.e.,* whether premiums would be paid from dividends or by the policyholder. *Id.* at ¶ 16.

In the instant appeal, there is no ambiguity as to who is to pay premiums. Plaintiffs admit that upon reading North American's disclosures, they understood that if level premiums were paid, their policies could lapse in the future. Thus, the foregoing portion of the *Wilbourn* opinion has no application here. However, the following statement by this Court in *Wilbourn* does apply:

> This Opinion should not be read as a retreat from the principle that absent exceptional circumstances, a fraud claim may not be predicated on false verbal representations which contradict provisions of a written contract. *See DeBallard v. Commercial Bank of DeKalb,* 2008 Miss. Lexus 500 at *15 (Miss. Oct. 9, 2008) ('[A]s a matter of law, one may not reasonably rely on the oral representations, whether negligently or fraudulently made ... . which contradicts the plain language of the documents.'); *Godfrey, Bassett & Kuykendall Architects, Ltd. v. Huntingdon Lumber Co., Inc.,* 584 So. 2d 1254, 1257 (Miss. 1981) ('A person is under an obligation to read a contract before signing it and will not as a general rule be heard to complain of an oral misrepresentation the error of which would have been disclosed by reading the contract').

*Id.* at ¶ 20.

Likewise, in *Brumfield v. Pioneer Credit Company*, the court concluded that the plaintiff, who "admits he was given the opportunity to read the documents," could not show any "affirmative acts of concealment that prevented Plaintiff from discovering his cause of action in a timely manner." 291 F. Supp. 2d 462, 469 (S.D. Miss. 2003) (applying Mississippi law); *see also Rainwater v. Lamar Life Ins. Co.*, 246 F. Supp. 2d 546, 552 (S.D. Miss. 2003) (applying Mississippi law) (holding that the plaintiffs were on "notice of the fraud by virtue of the documents in their possession"). *Conseco* and *Wilbourn* do not aid Plaintiffs' position.

**b. Plaintiffs Failed to Meet the Second Obligation Necessary to Toll the Statute.**

To toll the statute of limitations, a plaintiff has the burden to prove not only that some affirmative action prevented discovery of a claim, but also that plaintiff used due diligence

to discover the claim. Case law uniformly provides that even if affirmative actions to conceal misrepresentations were made, receipt of information which would reasonably put one on notice that misrepresentations were made starts the statute to run once again. *Walker v. City Finance Co.*, 2003 WL 554613 (N.D. Miss.). "However, even if tolled, the statute of limitations begins to run at such time as the cause 'with reasonable diligence might have been first known or discovered.'" *Id.* at 2.

An example of constructive notice of misrepresentation is illustrated by *Joe v. Minnesota Life Ins. Co.*, 337 F. Supp. 2d 821, 824 (S.D. Miss. 2004). There a federal court applying Mississippi law held that the plaintiffs did not exercise due diligence to discover their claims that the insurer's agent stole funds. In *Joe*, the Mississippi Secretary of State raided the agent's office and arrested him for stealing policyholder funds. *Id.* at 823. The events "generated publicity from the print and broadcast media...." *Id.* The court found that because of the "widespread publicity," the plaintiffs were charged with knowledge of it and held the plaintiffs could not claim that they exercised due diligence in regard to the insurer's involvement by not exploring their legal options within three years of the media publicity. *Id.* at 824.

In *Carter v. Citigroup, Inc.*, 938 So. 2d 809 (Miss. 2006), this Court upheld a summary judgment in favor of a credit life insurer and employees of a lender in an action by borrowers. The borrowers alleged the insurance company induced the lender to breach its fiduciary duty by causing the borrowers to purchase overpriced credit life insurance with their loans.

This Court agreed with the trial court that the borrowers had failed, as a matter of law, to meet the two-prong test of fraudulent concealment that would toll the statute of limitations and that the three-year statute of limitations barred the borrowers' claims. With regard to the borrower's inability to satisfy the second prong necessary to toll the statute, *i.e.*, due diligence, this Court reasoned:

> As for due diligence, the Plaintiffs stated that they were not aware of the commission rates or that the Southern Mortgage representatives had to sell the Defendants credit life insurance and could not "shop around" for lower insurance. The Plaintiffs claim that Southern Mortgage representatives did not disclose this information to them until 2002. None of the Plaintiffs stated that they made any inquiries about credit life insurance or paid commissions after closing the loans. The Plaintiffs all received copies of the loan documents from Southern Mortgage. Most of the Plaintiffs stated that they did not read the loan documents. All of the Plaintiffs stated that they were not prevented from reading the loan documents. The loan documents stated the terms of the insurance. The loan documents stated that credit life insurance was not required to obtain the loan; the interest rate; a company other than the lender could be the insurer who expected to make a profit from the sale of insurance; the premium payment amount; and the total loan finance amount. None of the Plaintiffs stated that they were precluded from asking any questions. Those Plaintiffs actually questioned about inquiries concerning insurance commissions did not ask about the payment of any insurance commission. None of the Plaintiffs objected to the credit life insurance, commissions, or loan terms in general until the filing of the complaint. The record demonstrates a total lack of due diligence by the Plaintiffs. Accordingly, the issue of the statute of limitations is dispositive of the case, and this Court need not address any other issues raised by the parties.

*Id.* at ¶ 46.

An examination of the undisputed evidence reveals Plaintiffs did not use due diligence. Plaintiffs claim they were told by Mr. Hancock that if a level premium was paid, the policy would remain in force with no increase in premium or decrease in death benefit until policy maturity or the death of the insured.

Plaintiffs' policy schedules provide that, using guaranteed assumptions, if premiums were paid, the policies could lapse prior to maturity or death. The Statements of Policy Cost and Benefit Information which accompanied the policies provide a chart which shows when the policies could lapse if planned premiums are paid based on guaranteed and on projected factors. On a separate

page, the Statements of Policy Cost and Benefit Information state when a policy would lapse based on guaranteed factors.

The policy projections, received by each Plaintiff beginning in 1998 (Ms. Hale received her first one in 1999), also have a chart which sets forth the premiums to be paid and when the policy would lapse based on guaranteed and projected factors. The last page states when the policy would lapse based on projected factors.

When Plaintiffs read their policies, Statements of Policy Cost and Benefit Information, and annual policy projections, they admitted North American had informed them in writing multiple times, more than three years prior to suit being filed, that if a level premium was paid, the policies could lapse in the future. They admitted these written declarations were contrary to the representations allegedly made by Defendant Hancock. For an in-depth discussion of the written disclosures and Plaintiffs' testimony relating thereto, see pages 4-20 above.

Plaintiffs were on notice of their claims more than three years prior to the filing of this suit. Plaintiffs failed to meet either prong of their burden necessary to toll the statute of limitations. North American is entitled to affirmation of the summary judgment entered below.

- **Plaintiffs' Fiduciary Duty Argument is of No Effect Because the Statute of Limitation Bars that Claim.** Plaintiffs appear to assert that Defendant Hancock was in a fiduciary relationship with Plaintiffs and therefore had an affirmative duty to reveal to Plaintiffs that if a level premium was paid, the policy could lapse. Plaintiffs, however, overlook solid Mississippi law which uniformly prohibits causes of action for breach of fiduciary duty and breach of duty of good faith and fair dealing in situations involving, as here, a first party insurance contract. The court in *Lady v. Jefferson Pilot Life Ins. Co.*, 241 F. Supp. 2d 655, 663 (S.D. Miss. 2001) correctly held:

> Under Mississippi law, there is no fiduciary relationship or duty between an insurance company and its insured in a first party insurance contract. *[Citations omitted.]* Mississippi imposes a duty of good faith and fair dealing upon an insurance company only when it is in the position of a liability insurer and is contractually obligated to defend its insured from suit. *[Citations omitted.]* Otherwise, there simply is no fiduciary relationship between an insurer and insured in a first-party contract.

*See also Equitable Life Assurance Society v. Weil*, 103 Miss. 186, 60 So. 133, 134 (1912); *Harrison v. Benefit Trust Life Ins. Co.*, 656 F. Supp. 304, 305 (N.D. Miss. 1987).

Plaintiffs contend the alleged suppression by Hancock that their policies could lapse if level premiums were paid was an affirmative act which tolled the statute of limitations. Plaintiffs are, once again, incorrect. Even if a fiduciary relationship existed, the statute of limitations on such a claim begins to run when Plaintiffs received information which contradicts alleged misrepresentations or exposes the alleged suppressions. *See, e.g., Sanderson Farms, Inc. v. Ballard*, 917 So. 2d 783, ¶ 33 (Miss. 2005).

When Plaintiffs reviewed their policies, Statements of Policy Cost and Benefits, and annual policy projections at their depositions, they admitted North American informed them in writing multiple times that if level premiums were paid, their policies could lapse in the future. These disclosures were received by Plaintiffs more than three years before suit was filed.

**3. Plaintiffs Understood North American's Disclosures.**

Despite Plaintiffs' straightforward admissions to the contrary, the Brief of Appellants asserts Plaintiffs testified they could not understand the written disclosures they received from North American. Not so. Each such allegation will now be debunked.

- **Robert Childers.** The Brief of Appellants asserts:

  > • Robert D. Childers testified that he saw nothing but inconsistencies in his policy after reviewing it during his deposition. R. at 2461.

Appellants' Brief at p. 18.

This statement came toward the end of Mr. Childers' deposition during cross examination by his attorney. Interestingly, lawyer Childers' testimony following that cross examination was omitted from the Brief of Appellants. The omitted testimony corroborates Mr. Childers' earlier testimony on direct examination.

> Q. Mr. Childers, as I understand it, and you correct me if I'm wrong, it was your understanding when you applied for this North American policy that it was guaranteed that if you paid the premiums that you were supposed to pay up front throughout the life of the policy, that this policy would lapse before your demise. Is that correct?
>
> A. That's correct, but as it was explained to me, I'm paying more now for the interest and make it offset to where I have a level premium throughout my life.
>
> Q. And it was presented to you that your premium would be sufficient - would be sufficient - to carry this policy to your demise or to maturity?
>
> A. That's correct.
>
> Q. And when you look at the second page of – I think it's the third page of Exhibit 168 when Mr. Greer directed your attention to where it says, 'however it is possible that coverage will expire prior to the maturity shown,' that was in direct contradiction to what you understood. It wasn't even supposed to be possible that your premiums were insufficient, correct?
>
> A. Well, again, possible, you know, that would be construed that I could no longer make the $144 payment, you know. In a simple reading of this, that's what I would –
>
> Q. Okay. Is that what it says, that if you stop making your premium payments, that they'll - that it's going to lapse?
>
> A. Yeah, premiums are not – are insufficient to cover the coverage.

Q. Okay. Then let's look at the next page where it says, 'assuming premium payments as stated above, guaranteed interest and cost of insurance charges, this policy will lapse April 23, 2014.' And that is in direct contradiction of what you understood, correct?

A. Yes.

Q. And each year or periodically you were sent reports and projections and those projections or those reports told you how much interest was being credited and how much accumulation value you had and so forth on a monthly basis, correct?

A. Yes, I remember receiving some.

Q. And in your projections, one page of what you produced us to date, the projections indicated that this policy, even assuming current factors, would lapse at a certain year. In one year, based on those factors, it was year 13 and one year it was 12, I believe, and one year it was 14, correct?

A. Yeah, and the other one said all the way up to a hundred.

Q. Okay, and that was in direct contradiction of how you once said this policy was to operate, correct?

A. Yes sir.

Tab C at R. pp. 2466. For a detailed examination of Mr. Childers' admissions on this issue, see pages 5-7 above.

- **Sarah Hicks.** The Brief of Appellants also asserts:

  > • Sarah Hicks testified that she reviewed her North American policy after receiving it and stated that she saw nothing in the policy that caused her any concern. R. at 2474-2475 at pp. 20-22.

Brief of Appellants at 17.

However, following this testimony, Mrs. Hicks' actually reviewed her policy in some detail for the first time. Mrs. Hicks admitted the language of the Policy Schedule states that based on the

guaranteed interest rates and guaranteed cost of insurance, if there were no increases in premium, her policy would lapse on October 1, 2014. Tab S, R. p. 2479 at p. 38.

Mrs. Hicks admitted that a chart on the second page of her Statement of Policy Cost and Benefits described how her policy would perform under both "guaranteed" and "current" factors provided that the policy could lapse in the future if Planned Premiums are paid. *Id.* at R. p. 2479 at pp. 39-40.

Mrs. Hicks agreed the second page of her 1999 policy projection contained a breakdown of how the policy would perform on a guaranteed basis and on a projected basis and how long it would last assuming the planned premiums were paid. R. p. 2480 at p. 44. She further acknowledged that North American informed her in writing on page 3 of the 1999 projection that: "On a projected basis, this coverage lapses in policy year 31." *Id.*

Mrs. Hicks says she spoke with Mr. Hancock in 2004. However, she does not recall the substance of that conversation. *Id.* at R. p. 2475 at pp. 23-24. The statute on Mrs. Hicks' claims ran in 1996 at the earliest and in 2001 at the latest.

- **L.T. Hicks.** Appellants' Brief further contends:

  > • L.T. Hicks reviewed his policy from North American after receiving it in the mail and when asked if it corresponded with what Hancock had represented, he responded 'Yes. I suppose so.' R. at 2498.

Brief of Appellants at 17. This testimony appears at the first of Mr. Hicks' deposition. After actually reviewing pertinent portions of the policy and other written disclosures sent by North American, Mr. Hicks testified he received his policy, but only "looked at" it. Tab P at R. p. 2498 at p. 58.

The Policy Schedule, which is on page 3 of Mr. Hicks' policy, provides:

> The Maturity Date of this policy is the policy anniversary nearest the insured's 100th birthdate. However, it is possible that coverage will expire prior to the maturity date shown if premiums are insufficient to continue coverage to such date. It is also possible that even if coverage continues to the maturity date there may be no surrender value available if sufficient premiums are not paid.

Tab Q at R. p. 353.

Upon reading information in his Statement of Policy Cost and Benefit Information which accompanied his policy, Mr. Hicks agreed this informed him that if only the guaranteed interest was paid, the policy would not last past 2009. Tab P at R. p. 2507 at pp. 95-96. Mr. Hicks received his policy and Statement of Policy Cost and Benefit Information in 1993. *Id.* at 2498 at pp. 57-58, 2506 at pp. 89-90.

The second page of Mr. Hicks' 1998 policy projection contains a chart which sets forth how the policy would perform under guaranteed factors and/or projection factors. *Id.* at R. p. 2508 at pp. 98-99. Reading the chart, Mr. Hicks stated that by this chart, North American informed him that if the guaranteed factors were utilized, there would be no death benefit after age 68 and if the current factors remained in effect, there would be no death benefit after age 80. *Id.* at R. p. 2508 at p. 99.

Mr. Hicks acknowledged that the last two lines on the projection provided: "On the projected basis, this coverage lapses in Policy Year 30." *Id.* Referring to his 1998 annual projection, Mr. Hicks admitted that when the projection indicated that the "policy would lapse in policy year 30, that it is going to lapse." *Id.* at R. p. 2512 at p. 114. Each policy projection received annually thereafter contained the same clear information that the policy could lapse in the future if planned premiums were paid.

- **Martha Jo Horton Hale.** Plaintiffs' brief asserts Martha Jo Hale read over her insurance policy after receiving it and saw nothing that caused her any concern. Brief of Appellants

at p. 17. Ms. Hale admitted that when she received her policy, "I didn't just study it over a whole lot. I read over it." Tab M at R. p. 2539 at p. 24. Ms. Hale received her policy in 1998. Thereafter, she received periodic reports on the policy and its performance, which she reviewed.

After reading her policy during her deposition, Ms. Hale admitted the policy language contradicted the alleged representations made by Cliff Hancock. *Id.* at R. p. 2543 at p. 39. Ms. Hale reviewed the Policy Schedule which appears on page 3 of her policy. *Id.* at R. pp. 2543-2544 at pp. 40-41 and agreed that North American informed her in writing that if she paid a planned premium, her policy could lapse. *Id.* at R. pp. 2543-2544 at pp. 40-41. During her deposition, Ms. Hale reviewed the 1999 Annual Projection she produced which stated that on a projected basis the policy would lapse in policy year 22. She admitted he had received this declaration in 1999. *Id.* at R. pp. 2544-2545, at pp. 44-45.

Plaintiffs' counsel submitted testimony from Ms. Hale that a "couple of years" prior to the deposition, Mr. Hancock told her the policy "was okay". She asked if loans could be taken on the dividends. Mr. Hancock said they could. *Id.* at R. p. 2540 at p. 26. Ms. Hale's deposition was taken in 2005. Two years before was 2003. The statute ran on Ms. Hale's claims in 2001 and at the latest in 2002.

- **William Evans.** The Brief of Appellants asserts:

> William N. Evans, even after being guided to see his policy information by North American counsel, honestly testified that he had no idea that his policy would lapse, stating 'I'm as illiterate on it now as I was when I walked in.'

Brief of Appellants at p. 17. The above-referenced testimony was based upon leading questions by Mr. Evans' counsel on cross examination. However, immediately after that testimony on re-direct, Mr. Evans testified:

Q. Would it be fair to say that you got written information - and I know you didn't know whether or not you received the illustration, which is 76, but the written information which you did receive and which we know you received all stated that this policy planned premiums would lapse at a certain period of time. Is that correct?

A. As you say it to me today. What you showed me ...

Q. Had you looked at it back then, it would have been a cause for concern, correct?

A. It would be hard to say, because I really didn't know when my policy expires. I don't know ...

Q. Not when it expired, but that it would. That it would lapse, a paid premium would be a concern, would it not, as you've testified before?

A. If I understand it, it would be, yes.

Q. And you and I have gone over what your understanding is of those words earlier in your testimony, haven't we?

A. Yes sir.

*Id.* at R. p. 2531 at pp. 67-68.

Mr. Evans' earlier testimony demonstrates that the disclosures by North American in a variety of documents informed him that if planned premiums were paid, his policy could lapse. Mr. Evans' only complaint is that the premiums on his policy increased. If the premiums had remained the same, he would have been perfectly satisfied. *Id.* at R. p. 2525 at p. 41. He wanted a premium that would stay the same with a death benefit which stayed in effect until he died. *Id.* at 2525 at p. 42. After reading his policy during his deposition, Mr. Evans admitted the policy language contradicted the alleged representations made by Cliff Hancock. For other testimony from Mr. Evans in which he admits other information sent him by North American informed him that if level

premiums were paid his policy could lapse, see pages 8-10 above. The statute of limitations began to run on Mr. Evans' claims in 1993 and in no case later than 1998. His claims are barred.

- **Ray Spencer.** Plaintiffs rely on Mr. Spencer's testimony that he was unable to fully understand the information, which is why he "left it in Mr. Hancock's hands to tell" him what he needed to know". Brief of Appellants at p. 17. This testimony came prior to Mr. Spencer actually reviewing the disclosures by North American in his policy and in other documents sent to him.

Mr. Spencer's only complaint is that the premiums on his policy increased. If the premiums had remained the same, he would have been perfectly satisfied. Tab J at R. p. 2391 at p. 35. He wanted a premium that would stay the same with a death benefit which would remain in effect until he died. *Id.* at 2389 at p. 28. After reading his policy during his deposition, Mr. Spencer admitted the policy language contradicted the alleged representations made by Mr. Hancock. *Id.* at 2394 at p. 48.

Mr. Spencer reviewed his Policy Schedule. His testimony regarding the information from North American contained in the Policy Schedule is significant.

> Q. Says, "The maturity date of this policy is the policy anniversary nearest the insured's 100th birthday. However, it is possible coverage will expire prior to maturity - - to the maturity date shown if premiums are insufficient to continue coverage to such date." When it says coverage will expire, what did that mean to you?
>
> A. Well, you won't have it anymore.

*Id.* at R. p. 2392 at p. 39. Mr. Spencer also reviewed his Statement of Policy Cost and Benefit Information that was sent along with his policy. He was asked: "... North American, over the years, based on what you've reviewed now, has told you periodically that using the planned premium that the policy might lapse at some time, correct?" Mr. Spencer candidly responded, "Right." *Id.* at R. p. 2394 at p. 47.

Reviewing the 1999 projection for North American, Mr. Spencer testified the chart on the second page states that, assuming planned premiums were paid, the policy would go out of force. *Id.* at 2394 at pp. 45-46. Mr. Spencer admitted that the last page of the 1999 projection provided: "On the projected basis, this coverage lapses in policy year 08." *Id.* at 2394 at p. 46.

The allegation in the Brief of Appellants that Plaintiffs could not understand the multiple written disclosures sent to them by North American is totally without merit and is debunked by Plaintiffs' testimony. The summary judgments entered below, it is respectfully submitted, should be affirmed.[3]

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Because the statute of limitation bars all of Plaintiffs' claims, it was not necessary for the trial court to address the merits of Plaintiffs' causes of action. However, a review of the applicable law and facts contained in North American's briefs in support of its motions for summary judgment reveals that if the merits were considered, the entry of summary judgment was appropriate on that basis as well.

## CONCLUSION

Plaintiffs' deposition testimony establishes that their only complaint is that Defendant Hancock allegedly misrepresented that if level premiums were paid, their policies would remain in force until their demise.

When Plaintiffs reviewed their policies, Statements of Policy Cost and Benefits, and annual policy projections at their depositions, they admitted North American informed them in writing multiple times that if level premiums were paid, their policies could lapse in the future. These disclosures were received by Plaintiffs more than three years before suit was filed.

The trial court correctly held that North American's written disclosures were not ambiguous, that there were no post-sale affirmative acts of concealment, and that the Mississippi three-year statute of limitation barred all of Plaintiffs' claims. The trial court further found that Plaintiffs did not use reasonable diligence to discover the alleged misdeeds. The summary judgments, it is respectfully submitted, should be affirmed.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I, Wilton V. Byars, III, one of the attorneys for Appellee North American Company for Life and Health Insurance, hereby certify that I have this day served a true and correct copy of the above and foregoing Brief of Appellee North American Company for Life and Health Insurance by placing said copy in the United States mail, postage prepaid, addressed to the following on this the 21st day of April, 2009.

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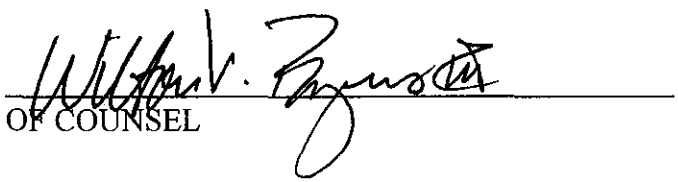

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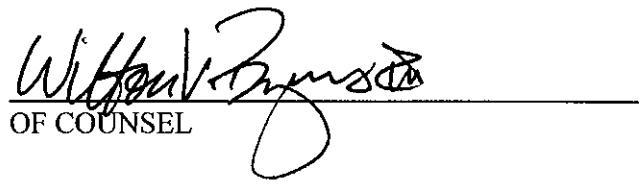
## CERTIFICATE OF FILING

I hereby certify that I have served by First Class, United States Mail, postage prepaid, the original and three copies of the Brief of Appellee North American Company for Life and Health Insurance and an electronic diskette containing same on April 21st, 2009 addressed to Ms. Betty W. Sephton, Clerk, Supreme Court of Mississippi, 450 High Street, Jackson, Mississippi 39201.



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