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.

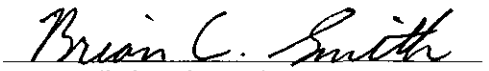
NORTH AMERICAN COMPANY FOR LIFE AND HEALTH INSURANCE and CLIFF HANCOCK d/b/a HANCOCK INSURANCE AGENCY, **APPELLEES**

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 Jo Hale, Appellant;
4. William M. Evans, Appellant;
5. Robert D. Childers, Appellant;
6. Ray D. Spencer, Appellant;
7. William C. Spencer, Attorney for Appellants;
8. William D. Prestage, Attorney for Appellants;
9. Mitchell, McNutt & Sams, P.A., Attorney for Appellants;
10. Michael D. Greer, Attorney for Appellants;
11. Greer, Pipkin, Russell, Dent & Leathers, P.A., Attorney for Appellants;
12. Cliff Hancock d/b/a/ Hancock Insurance Agency, Appellee;
13. North American Company for Life and Health Insurance, Appellee;
14. William F. Ray, Attorney for Appellee Cliff Hancock;
15. Brian C. Smith, Attorney for Appellee Cliff Hancock;
16. Watkins & Eager PLLC, Attorney for Appellee Cliff Hancock;
17. Bo Russell, Attorney for Appellee Cliff Hancock;
18. Bo Russell, PLLC, Attorney for Appellee Cliff Hancock;

19. Wilton V. Byars, III, Attorney for Appellee North American;
20. Amanda M. Urbanek, Attorney for Appellee North American;
21. Daniel Coker Horton & Bell P.A., Attorney for Appellee North American;
22. Robert W. Bradford, Jr., Attorney for Appellee North American;
23. Hill Hill Carter Franco Cole & Black PC, Attorney for Appellee North American;
24. Honorable Robert P. Chamberlin, Jr., Trial Court Judge.



Brian C. Smith

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STATEMENT CONCERNING ORAL ARGUMENT

Appellee Cliff Hancock does not request oral argument. The issues in this appeal are familiar ones which have been addressed in numerous opinions by Mississippi's appellate courts. The record evidence clearly and overwhelmingly supports the circuit court's well-reasoned decision. Therefore, Hancock submits that oral argument is not necessary.

STATEMENT OF THE ISSUES

1. Whether the trial court correctly held that appellants/plaintiffs' alleged claims accrued upon the sale of the subject life insurance policies?

2. Whether the trial court correctly held that appellants/plaintiffs failed to establish either prong of Mississippi's fraudulent concealment statute, MISS. CODE ANN. § 15-1-67, necessary to toll the statute of limitations?

3. In the alternative, whether the trial court correctly held that no fiduciary duty existed between the appellants/plaintiffs and appellees/defendants?

STATEMENT OF THE CASE

This case, which actually comprises six separate lawsuits, concerns the sale of North American Company for Life and Health Insurance Company (North American) universal life insurance policies by Cliff Hancock during the 1990s. Plaintiffs assert that they believed they were getting coverage that would last until their death, with premiums which would remain level throughout the life of the policy. All plaintiffs admit they received their policies from North American shortly after their applications were submitted. At their depositions, upon reviewing the policies and additional policy-related documentation sent by North American, each plaintiff admitted that the documentation contradicted their understanding of the policy. Plaintiffs further admitted that they had ample opportunity to review the documentation but simply did not do so. All claims were filed well over three years after plaintiffs received their policies.

The claims advanced by plaintiffs at the summary judgment hearing were for fraud, intentional misrepresentation, fraudulent concealment, fraudulent inducement, civil conspiracy, breach of obligations of good faith and fair dealing, tortious breach of contract, negligent misrepresentation, negligence and/or gross negligence and breach of fiduciary duty and quasi-fiduciary obligations. (R. 2213.) The circuit court granted summary judgment against all plaintiffs for all claims based on the statute of limitations. Concerning the "fiduciary" claims, the circuit court also granted summary judgment based on the fact that no fiduciary relationship exists between an insured and his insurer/ insurance agent under Mississippi law.

A. Procedural History

In the interest of brevity, appellee Cliff Hancock hereby adopts and incorporates by reference the "Procedural History" Section of North American's Appellee Brief, Section I.A., pp. 2-4.

B. Facts

Although plaintiffs' complaint asserts a number of different causes of action, plaintiffs' real complaint is that they believed they were purchasing life insurance policies, which would remain in force until their death, with premiums remaining level throughout the life of the policy. (*See* R. 2389 at Dep. p 26 [Spencer]; R. 2438 [Childers]; R. 2477 at Dep. p. 30 [Sarah Hicks]; R. 2503 at Dep. p. 79; R. 2505-06 pp. 88-89 [L.T. Hicks]; R. 2525 at Dep. pp. 41-42 [Evans]; R. 2538 at Dep. p. 18 [Hale].) At their depositions, plaintiffs extensively reviewed their policies and other policy-related documents showing that plaintiffs' coverage would lapse in the future even if current premiums continued to be paid. The "Facts" section of North American's Appellee Brief contains a detailed summary of this deposition testimony with respect to each plaintiff. In addition, the brief's "Argument" section A.3. contains extensive citations to deposition testimony showing that plaintiffs understood North American's disclosures when they read them (allegedly for the first time) at their depositions. Appellee Cliff Hancock hereby adopts and incorporates by reference these portions of North American's Appellee Brief, pp. 4-20, 34-42. North American's discussion and record citations conclusively establish:

- All plaintiffs are well educated and fully capable of reading and understanding their policies and policy-related documentation sent by North American;
- All plaintiffs admit that they received their policies from North American;[1]
- No plaintiff denied receiving annual policy projections from North American beginning in 1998;

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[1] Barbara Murray, one of North American's 30(b)(6) deponents, testified that policies are mailed to customers as part of a "policy kit" that includes "a welcome letter, a buyer's guide, statement of policy cost and benefit and the policy itself." (R. 2282 at Dep. p. 27.)

- No plaintiff testified that he or she actually read his or her entire policy;
- After reading the relevant provisions from their policies, annual policy projections, and Statements of Policy Costs and Benefit Information for the first time at their depositions, all plaintiffs admit that they understood it to mean that their coverage could lapse in the future prior to their death, even if they continued to make their current premium payments; and
- All plaintiffs admit the policy language and other documents they read at their deposition contradicted their understanding of the policy.

Hancock's Course of Dealings with Plaintiffs

As plaintiffs contend that a fiduciary relationship arose from their purchase of insurance from Hancock, a summary of relevant facts regarding the business relationship between Hancock and each plaintiff is necessary:

L.T. Hicks

- Mr. Hicks had never discussed any kind of insurance with Hancock prior to applying for the North American policy in 1992. (R. 2494-95 at Dep. pp. 44-46.)
- Contrary to plaintiffs' assertion in their appellant brief, it was Mr. Hicks who first approached Hancock about purchasing life insurance. (*Compare* Appellant Br. p. 7 *with* R. 2495 at Dep. p. 46.)
- Mr. Hicks was specifically interested in purchasing universal life insurance as opposed to whole life insurance. (*See* R. 2495 at Dep. pp. 46-47; "I was trying to get Universal Life, get away from Whole Life, where I could get insurance that – actually it will pay more and at the same time, you know, probably wouldn't have to pay a high premium.")
- After applying for the North American policy, Mr. Hicks never again contacted Hancock concerning the North American policy. (R. 2499 at Dep. pp. 61-62.)

Sarah Hicks

- Mrs. Hicks had never discussed any kind of insurance with Hancock prior to applying for the North American policy in 1992. (R. 2473 at Dep. pp. 14-15.)
- Contrary to plaintiffs' assertion in their appellant brief, it was Mr. Hicks who first approached Hancock about purchasing life insurance. (*Compare* Appellant Br. p. 7 *with* R. 2473 at Dep. p. 14-15.)
- Mrs. Hicks recalled that her and her husband's main concern was obtaining cheaper coverage. (R. 2473 at Dep. p. 15.)
- After applying for the North American policy, the only contact Mrs. Hicks recalls with Hancock concerning insurance was in 2004 when she received some "insurance information" which she could not specifically recall. She stated that it may have been "about possibly replacing the North American policy with a Primerica policy." (R. 2475 at Dep. pp. 23-24.)
- The record indicates Mrs. Hicks never made any attempts to contact either Hancock or North American concerning questions about her North American policy. (R. 2475-76 at Dep. pp. 23-25.)

Martha Jo Hale

- Prior to purchasing the North American policy, Hale did not know Cliff Hancock. (R. 2537-38 at Dep. pp. 16-17.)
- Hale was the one who first approached Hancock about purchasing insurance. (R. 2538 at Dep. p. 17.)
- After applying for the policy, the only contact she recalls with Hancock concerning the policy was at an unspecified school function, where she asked him in a casual conversation about taking loans against the policy. (R. 2540 at Dep. pp. 25-26.) Hale testified she did not take

out any loans against the policy. (R. 2540 at Dep. p. 26.) She also seemed to recall Hancock telling her the policy "would be ok". (R. 2540 at p. 25.)

William Evans

- Prior to purchasing the North American policy, Evans had purchased a Kentucky Central life insurance policy from Hancock. (R. 2520, 2527.) Evans first approached Hancock about obtaining the policy. (R. 2520 at Dep. p. 22.)
- Evans replaced the Kentucky Central policy with the North American policy after learning of Kentucky Central's financial difficulty. (R. 2522 at Dep. p. 31-32; R. 2178-79.)[2]
- Hancock also sold Evans general liability insurance for his wrecker business beginning in 2003. (R. 2518 at Dep. p. 15.)
- According to Evans, he contacted Hancock four to five years after his premiums began increasing. (R. 2524 at Dep. pp. 38-39.)

Robert Childers

- Prior to purchasing the North American policy, Childers had purchased a Kentucky Central life insurance policy from Hancock. (R. 2415-16.)
- Childers replaced the Kentucky Life policy with the North American policy after learning of Kentucky Central's financial difficulty. (R. 2416-17.)
- Childers applied for the North American policy in 1993 (R. 2416), but did not contact

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[2] Plaintiffs' brief mentions that with respect to two of the plaintiffs, William Evans and Robert Childers, the North American policies they purchased were replacement policies for Kentucky Central policies they had previously purchased from Mr. Hancock. (*See* Appellants' Brief at 9-11.) The record is uncontradicted that Hancock recommended the Kentucky Central policies be replaced because Hancock was informed the company was experiencing financial difficulties. (R. 2178-79.) The company went into receivership shortly after the policies were replaced. (R. 2179.)

Hancock concerning its performance until 2003. (R. 2435-36.) After receiving a printout from North American, Hancock informed Childers that among other things, his premiums could increase. (R. 2436.)

Ray Spencer

- Spencer had purchased another insurance policy with Hancock prior to applying for the North American policy, but cancelled that policy for financial reasons. (R. 2387 at Dep. pp. 19-20.)
- A few years after canceling the prior policy, Spencer approached Hancock about purchasing life insurance. (R. 2388 at Dep. p. 24.)
- Spencer testified that he contacted Hancock once about his increased premiums. (R. 2391 at Dep. p. 34-35.)

SUMMARY OF THE ARGUMENT

Plaintiffs' claims are based upon allegations that they believed they had purchased North American life insurance policies which would remain in effect until death with level premiums throughout the duration of the policies. Plaintiffs all admit they received their policies shortly after the policy applications were submitted. Plaintiffs' policies, as well as additional documents sent by North American, clearly informed them that coverage could lapse prior to maturity of the policy even if current premiums continued to be paid.

Under Mississippi law, all of plaintiffs' claims accrued when the policies were sold. The policies and additional policy-related documentation provided by North American unambiguously informed plaintiffs that coverage could lapse even if their current premiums continued to be paid. Because plaintiffs' alleged financial injuries were not inherently undiscoverable, the discovery rule does not toll the statute of limitations unless plaintiffs can prove fraudulent concealment. All of plaintiffs' claims were filed well over three years after the purchase of their policies. The claims are therefore barred by Mississippi's general three-year statute of limitations.

Plaintiffs fail their burden of presenting evidence that defendants fraudulently concealed plaintiffs' claims. Plaintiffs have not identified any subsequent acts of concealment by either Hancock or North American which were designed to conceal and actually did conceal plaintiffs' alleged claims. Plaintiffs have not identified any evidence supporting a finding that they conducted due diligence in trying to ascertain their claims. Plaintiffs contend that their claims could not have been discovered even had they exercised due diligence. This contention is unsupportable as plaintiffs' deposition testimony clearly establishes that, when they read their policies and additional documentation, they understood that the language conflicted with their alleged understanding.

Plaintiffs' claim for breach of fiduciary duty also fails because no fiduciary duty exists

between an insured and an insurance agent concerning the sale of a life insurance policy. Plaintiffs have presented no evidence that would support a finding that the sale of the subject policies were anything other than arms-length transactions. The business relationship between plaintiffs and Hancock strictly concerned only the sale of insurance. No record evidence exists which would support departing from the general rule that no fiduciary relationship exists in these circumstances.

ARGUMENT

I. STANDARD OF REVIEW

The Supreme Court applies a *de novo* standard of review to a trial court's grant of summary judgment. *See, e.g., Moss v. Batesville Casket Co.*, 935 So. 2d 393, 398 (Miss. 2006). "Furthermore, the application of a statute of limitation is a question of law to which a de novo standard also applies." *Windham v. Latco of Mississippi, Inc.*, 972 So. 2d 608, 610 (¶ 4) (Miss. 2008) (quotation omitted). In reviewing the grant or denial of a summary judgment motion, the Court 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 (¶ 8) (Miss. 2005) (citation omitted). The Court may affirm the grant of summary judgment based upon any ground supported by the record. *Brocato v. Miss. Publishers Corp.*, 503 So. 2d 241, 244 (Miss. 1987).

II. PLAINTIFFS' CLAIMS ARE TIME-BARRED BY THE STATUTE OF LIMITATIONS

A. All of Plaintiffs' Claims are Subject to Mississippi's General Three-Year Statute of Limitations Contained in Miss. Code Ann. § 15-1-49(1)

It is undisputed that the general three-year statute of limitations applies to the plaintiffs' claims in this action. (Appellants' Br. at 16.) Mississippi law is clear that claims based upon a misrepresentation in the sale of an insurance policy and for breach of fiduciary duty are subject to MISS. CODE. ANN. § 15-1-49. *See CitiFinancial Mortgage Co. v. Washington*, 967 So. 2d 16, 17 (Miss. 2007); *Stephens v. Equitable Life Assur. Society of U.S.*, 850 So. 2d 78, 81-82 (Miss. 2003).

B. Plaintiffs' Claims Accrued at the Time the Policies Were Sold

Mississippi law is clear that claims based on negligent or fraudulent misrepresentation with

respect to the sale of an insurance policy accrue at the time of sale. *Stephens*, 850 So. 2d at 83 (¶ 16) ("The purchase[s] of the policies were made in 1972; thus the causes of action accrued in 1972.") (citing *Dunn v. Dent*, 169 Miss. 574, 153 So. 798 (1934)); *Black v. Carey Canada, Inc.*, 791 F. Supp. 1120, 1123 (S.D. Miss. 1990) (cause of action based on a fraudulent or negligent representation "'accrues upon the completion of the sale induced by such false representation or upon the consummation of the fraud.'") (quoting *Dunn v. Dent*, 153 So. 798, 798 (Miss. 1934)). Similarly, a claim for breach of fiduciary duty concerning a loan or insurance transaction accrues upon the execution of the relevant documents. *See Carter v. Citigroup Inc.*, 938 So. 2d 809, 818 (Miss. 2006). Accordingly, plaintiffs' alleged claims accrued when they purchased their policy, or at the latest, when they received their policy.

1. There is No General "Discovery Rule" in Mississippi

Plaintiffs contend that the statute of limitations is tolled by the limited "discovery rule" contained in MISS. CODE. ANN. § 15-1-49(2). Specifically, plaintiffs contend that "§ 15-1-49 ... states that the limitations period does not begin until the injury is discovered, or with reasonable diligence, should have been discovered." (Appellant Br. at 16.) This is a significant mischaracterization of Mississippi law concerning the statute of limitations.

Plaintiffs fail to mention that this provision is specifically limited to claims involving "latent injury or disease".[3] "For an injury to be latent it must be undiscoverable by reasonable methods." *PPG Architectural Finishes, Inc. v. Lowery*, 909 So. 2d 47, 51 (¶ 14) (Miss. 2005) (citation omitted).

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[3] *See* MISS. CODE ANN. § 15-1-49(2) ("In actions for which no other period of limitation is prescribed and which involve latent injury or disease, the cause of action does not accrue until the plaintiff has discovered, or by reasonable diligence should have discovered, the injury.") (emphasis added); *see also PPG Architectural Finishes, Inc. v. Lowery*, 909 So. 2d 47, 50 (¶ 9) (Miss. 2005) (characterizing this provision as "a special exception to the standard three-year statute of limitations").

As shown by plaintiffs' own deposition testimony, not only were their alleged injuries not inherently undiscoverable, they were readily discoverable by plaintiffs – they only needed to read their policies or other documentation provided by North American.

"The intent of the discovery rule is to protect potential plaintiffs who cannot, through reasonable diligence, discover injuries done to them." *Pierce v. The Clarion Ledger*, 433 F. Supp. 2d 754, 758-59 (S.D. Miss. 2006) (emphasis added); *Blailock ex rel Blailock v. Hubbs*, 919 So. 2d 126, 131 (Miss. 2005) ("The discovery rule's purpose is to protect plaintiffs 'who *cannot*, through reasonable diligence, discover injuries done to them.'") (emphasis in original) (quoting *Wayne Gen. Hosp. v. Hayes*, 868 So. 2d 997 (Miss. 2004)). "The discovery rule protects persons with *latent* injuries, that is, injuries which are not manifested or ascertainable within a reasonable time following the negligent act." *Neglen v. Breazeale*, 945 So. 2d 988, 990 (Miss. 2006) (emphasis in original; medical malpractice action). *See also Lady v. Jefferson Pilot Life Ins. Co.*, 241 F. Supp.2d 655, 660 (S.D. Miss. 2001) (discovery rule did not apply to claims for fraud in selling life insurance policy, when "the true terms of the policy were not inherently undetectable").

In *Carter v. CitiGroup, Inc.*, *supra*, plaintiffs alleged that their mortgage broker, Southern Mortgage, "breached its fiduciary duties by inducing them to buy overpriced credit life insurance with their loans." 938 So. 2d at 810. Plaintiffs accused CitiGroup of "conspiracy to breach the broker's fiduciary duty," conspiracy to violate insurance statutes, negligent misrepresentation, and other breaches. The claims were dismissed based on the statute of limitations, and the Supreme Court affirmed. The Court found "that the Plaintiffs' claims were governed by [the] three-year statute of limitations and the claims accrued at the time the loan documents were executed." *Id.* at 818. The Court further found plaintiffs had failed to meet their two-prong burden to prove tolling via fraudulent concealment. *Id.* at 819. The Court neither stated nor implied that the statute of

limitations depended on "discovery."

Thus, Mississippi does not apply a discovery rule to commercial/ financial injuries because such injuries are not "latent," i.e., they are not inherently undetectable. Instead, financial loss claims accrue when the loss is incurred. Mississippi applies a discovery rule to commercial claims only if the defendant fraudulently conceals the cause of action. This is logical and consistent with the principles set out above, because a financial injury is seldom "inherently undiscoverable." Absent concealment, a plaintiff can ascertain the facts about his financial affairs by exercising due diligence.

As stated recently by the Mississippi Court of Appeals in a case alleging fraud in the sale of insurance policies:

> A cause of action for fraud is subject to the three-year statute of limitations set out in Mississippi Code Annotated Section 15-1-49 (Rev. 2003). *Stephens v. Equitable Life Assurance Soc'y of the U.S.*, 850 So. 2d 78, 82 (¶ 12) (Miss. 2003). **This three year period begins to run once the cause of action accrues**. Miss. Code Ann. § 15-1-49 (Rev. 2003). **A claim for fraudulent inducement accrues upon the completion of the sale induced by the fraud**. *Stephens*, 850 So. 2d at 82 (¶ 13).
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> . . . .
>
> ... **If the defendant fraudulently conceals a cause of action, then the cause of action is deemed to accrue at "the time at which such fraud shall be, or with reasonable diligence might have been, first known or discovered." Miss. Code. Ann. § 15-1-67 (Rev. 2003).** To prove fraudulent concealment, plaintiff must show (1) defendant engaged in an affirmative act or conduct designed to prevent, and which does prevent, discovery of a claim, and (2) due diligence was performed on the plaintiff's part to discover defendant's fraud. *Stephens*, 850 So. 2d at 83-84 (¶ 18).

Warren v. Horace Mann Life Ins. Co., 949 So. 2d 770, 772-73 (¶¶ 8, 10) (Miss. App. 2006) (emphasis added).

Plaintiffs seek to recover for commercial/ financial injuries. Under Mississippi law, such injuries are not "latent" and are therefore not subject to a discovery rule. Instead, a discovery rule

only applies to commercial/ financial injuries in the event of fraudulent concealment.

2. Plaintiffs' Policies are Unambiguous as a Matter of Law

In order to avoid the clear language of the plaintiffs' insurance policies and the bar of the statute of limitations, plaintiffs attempt to manufacture an ambiguity in the subject policies based upon the irrelevant affidavit of their insurance "expert". Plaintiffs compound their error by asserting that summary judgment is not appropriate because fact issues exist concerning whether the policies are ambiguous. (Appellant Br. at 29.)

Because the existence *vel non* of a contractual ambiguity is an issue of law, the circuit court properly decided the issue on summary judgment. *See Royer Homes of Miss., Inc. v. Chandeleur Homes, Inc.*, 857 So. 2d 748, 751 (¶ 7) (Miss. 2003) ("First of all, it is a question of law for the court to determine whether a contract is ambiguous and, if not, enforce the contract as written.") (citations omitted); *see also Biddix v. McConnell*, 911 So. 2d 468, 471 (Miss. 2005) ("The initial question of whether a contract is ambiguous is a matter of law."). Plaintiffs' assertion that, under Mississippi law, the existence of a contractual ambiguity is a fact question for the jury is simply incorrect.

Citing their expert's affidavit, plaintiffs allege that the policies and other documentation provided by North American were ambiguous. The affidavit itself contains nothing but conclusory statements to the effect that the policies and other documents sent by North American were ambiguous and could not be understood by the plaintiffs. The affidavit does not quote from or cite any actual, specific contractual provisions which are alleged to be ambiguous. (R. 2128-30.)

In contrast, at their depositions, when the plaintiffs actually read the relevant policy provisions for the first time, they clearly admitted that the language contradicted their alleged understanding of the policy. (*See* R. 2392- 95 at Dep. p. 37-50; [Spencer]; R. 2464-66 [Childers]; R. 2478-81 at Dep. pp. 34-46 [Sarah Hicks]; R. 2506-09 at Dep. pp. 89-101 [L.T. Hicks]; R. 2443-

45 at Dep. pp. 37-46 [Hale]; R. 2526-31 at Dep. pp. 46-68 [Evans]; *see also* North American's Appellee Br. at 4-20, 34-42.)[4] Given this testimony, the circuit court correctly held that:

> [T]he 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.

(R. 2217.) Similar efforts to manufacture a contractual ambiguity using expert testimony have been rejected. *See Watts v. Horace Mann Life Ins. Co.*, 949 So. 2d 833, 837 (¶ 12) (Miss. App. 2006) ("Although Watts provided the affidavit of an "expert" on insurance matters, and Horace Mann did not present an expert for the court, we find that Watts's expert was not sufficient to overcome the motion for summary judgment. Simply put, 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.")

Plaintiffs cite *Stephens v. Equitable Life Assur. Society of U.S.*, 850 So. 2d 78, 83 (Miss. 2003), claiming that it stands for the proposition that the entire policy must be found to be unambiguous before knowledge of its contents is imputed to the insured. (Appellants Br. at 17, 19.) This is a misreading of *Stephens*.

In *Stephens*, plaintiffs sued their life insurer and insurance agent for misrepresentation and fraud in the sale of their policies. One set of plaintiffs (the Stephenses) alleged that the agent "orally stated that the monthly premiums would be $45.10, the policy would be fully paid in twenty (20) years and the premiums would cease at that time." *Id* at 79 (¶ 4). The other plaintiff (Palmer)

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[4] Contrary to plaintiffs' claim that "North American and Hancock continue to focus on snippets of testimony stating that the insureds' were able to understand the policies at issue" (Appellants' Br. at 18), defendants cite substantial portions of plaintiffs' deposition testimony to establish they understood the North American policies and accompanying documents as soon as they actually read them.

alleged that the agent "stated that if Palmer paid a monthly premium of $45.88 until he reached age 58, then the premium would be fully paid with dividends." *Id* at 80 (¶ 5).

In holding that plaintiffs' claims were filed well outside the statute of limitations, the Supreme Court stated:

> The plaintiffs purchased their insurance policies in 1972. They filed a lawsuit in 2001, approximately 29 years after the date of purchase. As Mississippi case law provides, insureds are bound as a matter of law by the knowledge of the contents of a contract in which they entered notwithstanding whether they actually read the policy. *Cherry*, 501 So. 2d at 419. Any alleged oral agreement in this case does not have any effect on the written insurance contract. *Godfrey*, 584 So. 2d at 1257. The terms of the policy, as outlined above, unambiguously state that the Stephenses' premium was payable for the joint-life of the spouses, i.e., until such time as one of the spouses died. The unambiguous, written terms of Palmer's policy stated that a monthly premium of $45.88 was payable until he reached age 70 and a monthly premium of $37.97 was payable thereafter.

Id. at 83. This is the extent of the Court's ambiguity analysis in *Stephens*.

The Court in *Stephens* does not hold that the entire policy must be unambiguous before knowledge is imputed to the insured. Rather the Court simply holds that where an oral misrepresentation conflicts with unambiguous policy language, knowledge is imputed to the insured. As stated *supra* and as admitted by plaintiffs at their depositions, the policy language, statement of policy costs, and annual statements all contradict the alleged misrepresentation that, based upon current premium payments, coverage could not lapse prior to the insured's death.

Plaintiffs attempt to confuse the issue by citing to snippets of plaintiffs' deposition testimony to the effect that plaintiffs "were unable to understand **when the policies would lapse** ...." (Appellants Br. at 17; emphasis added.) The theory of plaintiffs' complaint is that they understood that their policies **could not lapse** at all if their current premiums were paid. Accordingly, any plaintiff's testimony that they did not know when their policy would lapse is irrelevant to the issues

in this case.

Finally, plaintiffs cite the recent cases of *Pate v. Conseco Life Insurance Co.*, 971 So. 2d 593 (Miss. 2008) and *Wilbourn v. Equitable Life Assurance Society of the U.S.*, No. 2005-CT-02244-SCT (Miss. Dec. 11, 2008), claiming they support the ambiguity argument. The circuit court expressly considered the *Pate* case in its opinion and found it distinguishable on multiple grounds (R. 2216-17.)

Pate involved a claim for breach of contract rather than misrepresentation. The insured in *Pate* brought suit after his premiums were increased. 971 So. 2d at 594. None of the contractual provisions were held to be ambiguous; rather the Court found they were clear and did not provide that the insurer could increase premiums. *Id.* at 596. The policies in this case clearly stated they could lapse prior to maturity even if current premiums are paid. The circuit court correctly found that *Pate* is not applicable. (R. 2216-17.)

Wilbourn is similarly distinguishable. In that case, the Supreme Court reversed the grant of a Rule 12(b)(6) motion to dismiss because:

> 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 into a Rule 56 motion for summary judgment via proper notice of said hearing, *see* Miss.R. Civ. P. 56(c), or the 'reasonable opportunity to present all material made pertinent to such a motion by Rule 56 ....' Miss. R. Civ. P. 12(b).

Wilbourn, slip opn. at p. 10. The Court went on to note the existence of an ambiguity concerning the source of premiums because the policy provided that it "participates in dividends." *Id.* at 11 (¶ 15).

No such ambiguity exists in these policies. Not a single one of plaintiffs' policies participate in dividends. Almost all of the policies specifically disclaim dividend participation on the first page:

> **Non-Participation.** This policy is non-participating and does not share in our profit or surplus earnings. We pay no dividends on this policy. Changes to interest rates or cost of insurance rates are determined and redetermined only prospectively. We may not recoup prior losses by means of a change to interest rates or cost of insurance rates.

(R. 47, 202, 509, 665.) In addition, the issue in this case concerns whether plaintiffs were informed that their policies could lapse based upon their current premium payments, not the source of premium payments. *Wilbourn* is clearly distinguishable and inapplicable. The circuit court correctly held that the insurance policies and other documentation sent by North American unambiguously informed plaintiffs that their policies could lapse even if current premiums were paid.

C. More Than Three Years Has Lapsed Since All Plaintiffs Purchased Their Policies

Because plaintiffs all admit they received their policies and other documentation sent by North American, and because the claims asserted by plaintiffs do not concern latent injuries, plaintiffs' claims accrued upon the sale of the policy. The last plaintiff to purchase her policy was Hale in March 1998. (R. 823.) It is undisputed that North American also began sending out annual statements in 1998 that clearly informed plaintiffs that their policies could lapse. This case was not filed until August 2004. Accordingly, defendants have met their burden in establishing that the statute of limitations has run on these claims.

III. PLAINTIFFS HAVE COMPLETELY FAILED TO PROVE EITHER ELEMENT OF FRAUDULENT CONCEALMENT

Under Mississippi law, once the statute of limitations has run on a non-latent injury, the

claim will be dismissed unless the plaintiff can show that his claims were fraudulently concealed.[5] Fraudulent concealment requires a two-pronged showing that: "(1) some affirmative act or conduct was done and prevented discovery of a claim, and (2) due diligence was performed on [plaintiffs'] part to discover it." *Stephens*, 850 So. 2d at 84 (¶ 18). Plaintiffs bear the burden of proving both elements of fraudulent concealment. *See Spann v. Diaz*, 987 So. 2d 443, 449 (Miss. 2008). In addition, fraudulent concealment, as a species of fraud, must be proven by clear and convincing evidence. *Frye v. Southern Farm Bureau Cas. Ins. Co.*, 915 So. 2d 486, 492 (Miss. App. 2005).

A. Plaintiffs Fail to Provide Evidence of Any Subsequent Acts of Concealment of Their Alleged Claims by Defendants

"Pursuant to § 15-1-67, [p]laintiffs were required to prove an affirmative act of fraudulent concealment post-completion of the insurance sales in order to toll the statute of limitations." *Ross v. Citifinancial, Inc.*, 344 F.3d 458, 464 (5th Cir. 2003). As stated above, the proof must be clear and convincing. *Frye*, 915 So. 2d at 492. Further, the misrepresentation must post-date the original tort:

> The Mississippi Supreme Court has been clear about what a plaintiff must show to avail himself of tolling via fraudulent concealment: He must show "both (1) an affirmative act to conceal the underlying tortious conduct, and (2) a failure to discover the factual basis for the claims despite the exercise of due diligence." *Boone*, 416 F.3d at 391 n. 11 (citing *Robinson v. Cobb*, 763 So. 2d 883, 887 (Miss. 2000)). Moreover, "[t]he affirmative act of concealment must have occurred after and apart from the discrete acts upon which the cause of action is premised." *Id.* (citing *Stephens v. Equitable Life Assur. Soc'y of the U.S.*, 850 So. 2d 78, 83-84 (Miss. 2003)).

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[5] *See* Miss. Code Ann. § 15-1-67 ("If a person liable to any personal action shall fraudulently conceal the cause of action from the knowledge of the person entitled thereto, the cause of action shall be deemed to have first accrued at, and not before, the time at which such fraud shall be, or with reasonable diligence might have been, first known or discovered.")

Smith v. First Family Financial Services, 436 F. Supp. 2d 836, 840-41 (S.D. Miss. 2006); *see also Cain v. United Ins. Co. of America*, 2006 WL 581181 *3 (S.D. Miss. 2006) (same, summarizing recent holdings). Furthermore, the post-tort concealment must be shown as intended to hide the cause of action, and must have that effect. Plaintiffs cannot defeat the statute of limitations unless they prove "some act or conduct of an affirmative nature designed to prevent and which does prevent discovery of the claim." *Carter*, 938 So. 2d at 819 (¶ 44) (emphasis added; quoting *inter alia Reich v. Jesco, Inc.*, 526 So. 2d 550, 552-53 (Miss. 1988)).

In this case, plaintiffs have failed to present any evidence of subsequent acts of concealment by either party. Plaintiffs do not even allege an act of concealment on the part of Hancock. (Appellant's Br. at 22-29.) Plaintiffs' expert lamely contends that North American engaged in acts of concealment by sending annual statements and statements of policy value to plaintiffs. (R. 2129, 2217). This argument is empty. There is no record evidence that any of the documentation sent by North American to plaintiffs was incomplete or inaccurate, much less that the statements had the effect of concealing the claims. As found by the circuit court, "[p]roviding correct annual statements and statements of policy value simply does not constitute concealment." (R. 2217.)

At the summary judgment hearing, plaintiffs failed to point to any subsequent acts of concealment on the part of either defendant. (*See* Hearing Transcript, Record Volume 20 at pp. 32-40.) Plaintiffs have completely failed their burden of presenting evidence of subsequent, affirmative acts of concealment by either Hancock or North American.

B. Plaintiffs Cannot Prove They Were Duly Diligent in Attempting to Discover Their Claims

In addition to proving defendants engaged in affirmative, subsequent acts of concealment,

plaintiffs must also prove they used due diligence in attempting to discover their claims. Concerning due diligence, the trial court found that:

> 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. 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. 2217-18.) The record evidence supporting these findings is manifest:

Robert Childers

- Childers in a licensed attorney in both Mississippi and Tennessee, and has been a justice court judge in Union County since 1983. (R. 2405.)
- Childers has a good understanding of universal life insurance policies. (R. 2418-19.) Childers knew that the North American policy he purchased was a universal life policy. (R. 2425.)
- Childers candidly admits that he received his policy in 2003, and had ample opportunity to read it, but chose not to. (R. 2426.)
- Childers admits that when he received his annual statements, he looked at the premium amount then threw the statements away. (R. 2434.)

Ray Spencer

- Spencer attended two years of college at Northeast Junior College and admitted he was capable of reading and writing in the English language. (R. 2385 at Dep. pp. 10-11.) Spencer has operated his own business, "Spencer's Home Improvement," since 1982. (R. 2386 at Dep. p. 13.)

- Spencer admits that he received his policy and had ample time to review it and ask any questions that he may have had. (R. 2390 at Dep. pp. 30-32.) Spencer also admits that he received annual statements provided by North American and was able to produce one at his deposition. (R. 2390 at Dep. pp. 31-32.)
- Spencer admits that he had ample opportunity to review those documents in as great a detail as he wanted. (R. 2390 at Dep. p. 32.) Spencer further admits that, with the exception of premium and coverage amounts, "I have not physically looked at any of this stuff." (R. 2394 at Dep. p. 46.)
- Spencer originally could not recall ever attempting to contact Hancock after purchasing the North American policy. (R. 2390 at Dep. p. 31.) Spencer later recalled contacting Hancock in August or September of 2004[6] and asking Hancock whether he had to pay the increased premiums. (R. 2390-91 at Dep. pp. 32-34.)

L.T. Hicks

- Mr. Hicks has a Bachelor of Science degree from Rust College. (R. 2488 at Dep. pp. 18-19.)
- Mr. Hicks admits that he received his policy in 1992. (R. 2498 at Dep. pp. 57-58.) He further admits receiving periodic statements and reports concerning his policy's performance from North American. (R. 2498 at Dep. pp. 58-59.)
- Mr. Hicks testified that he considered becoming an insurance agent, took numerous hours of training courses, and sat for the insurance agent's exam. (R. 2509 at Dep. p. 104.)
- Mr. Hicks' deposition testimony establishes that he has a basic understanding of the differences in various types of life insurance policies such as term and whole life policies.

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[6] The Complaint in the action was filed August 31, 2004. (R. 1.)

(R. 2493 at Dep. pp. 38-39.)

- Mr. Hicks never attempted to communicate with either Hancock or North American concerning questions with his policy in the years between the purchase of the policy and filing suit in 2004. (R. 2499 at Dep. pp. 61-64.)

Sarah Hicks

- Mrs. Hicks has a Bachelor of Science degree from Rust College. (R. 2471 at Dep. p. 6.)
- Mrs. Hicks admits that she received her policy in 1992. (R. 2475 at Dep. p. 22.) She further admits receiving from North American periodic statements and reports concerning her policy's performance. (R. 2475 at Dep. p. 23.)[7]
- Mrs. Hicks never attempted to communicate with either Hancock or North American concerning questions with her policy in the years between the purchase of the policy and filing suit in 2004. (R. 2475-76 at Dep. pp. 23-25.)

William Evans

- Evans attended Northeast Junior College and the University of Mississippi for four years. (R. 2516-17 at Dep. pp. 8-9.) Evans is an experienced businessman and owns a pawn and wrecker business. (R. 2517 at Dep. p. 12.)
- Evans admits that he received his policy after it was issued in 1993. (R. 2523 at Dep. pp. 34-35.) He further admits receiving periodic statements and reports concerning his policy's performance from North American. (R. 2523 at Dep. pp. 35-36.)
- Evans admits he did not review any of this information although he had the opportunity to

[7] The only communication that Mrs. Hicks could recall having with Hancock after the purchase of her policy was a phone conversation in January 2004 concerning a letter sent by Primerica about possibly replacing her North American policy. (R. 2475 at Dep. pp. 23-24.)

do so. (R. 2523 at Dep. pp. 35-36.)

- Evans testified that his premiums has been increasing four or five years before he ever attempted to discuss the matter with Hancock. (R. 2524 at Dep. pp. 37-39.)
- Evans admits he never attempted to contact North American regarding any concerns he may have had with the policy. (R. 2524 at Dep. p. 40.)

Martha Jo Hale

- Hale has a Bachelor of Arts degree and Masters degree from the University of Mississippi. (R. 2536 at Dep. pp. 11-12.)
- Hale admits that she received her policy in the mail after completing her application. (R. 2539 at Dep. pp. 23-24.) Hale also admits receiving periodic statements and reports from North American concerning her policy's performance. (R. 2539 at Dep. p. 24.)
- Hale admits she had the opportunity to review all of this information. (R. 2539 at Dep. p. 24.)
- After applying for the policy, the only contact Hale recalls with Hancock concerning the policy was at an unspecified school function, where she asked him in a casual conversation about taking loans against the policy. (R. 2540 at Dep. pp. 25-26.) Hale testified she did not take out any loans against the policy. (R. 2540 at Dep. p. 26.) Hale seemed to recall that Hancock stated that he felt the policy "would be ok." (R. 2540 at Dep. p. 25.)

The record is devoid of any evidence of due diligence by plaintiffs.

Plaintiffs attempt to avoid the requirement to prove due diligence by claiming that they could not have discovered that their policies differed from their understanding even with reasonable diligence. (Appellant's Br. at 29.) Similar claims were made in *Boone v. Citigroup, Inc.*, 416 F.3d 382 (5th Cir. 2005) (applying Mississippi law). In *Boone*, the plaintiffs contended that, as part of

their loan transactions, defendants sold them credit and insurance products they did not want. *Id.* at 385. As in this case, plaintiffs did "not allege that the relevant terms of the transaction were not disclosed in the written instruments themselves. Rather, they contend that [defendant] and its employees orally misrepresented what was in the written instruments, which, [plaintiffs] maintain, they could not understand because they lacked the sophistication to do so." *Id.*

The loan transactions for all of the *Boone* plaintiffs occurred more than three years prior to the filing of the lawsuit. As any claims accrued at the time of the transaction, plaintiffs' claims would have been "plainly time-barred by the Mississippi's three-year residual statute of limitations." *Id.* at 390. Plaintiffs alleged fraudulent concealment. The Fifth Circuit held that plaintiffs completely failed their burden of producing evidence to support either prong of the statute necessary to toll the limitations period. Concerning the "due diligence" prong, the court stated:

> Furthermore, appellants do not anywhere argue that they were even minimally duly diligent in the management of their affairs. Nowhere, for example, do appellants challenge the district court's finding that none of them even bothered to read the written instruments at issue. A person who fails to read his or her own loan and insurance contracts may not be characterized as having been duly diligent. *Russell v. Performance Toyota, Inc.*, 826 So. 2d 719, 726 (Miss. 2002) ("In Mississippi, a person is charged with knowing the contents of any document that he executes."). *See also Washington Mut. Finance Group v. Bailey*, 364 F.3d 260, 264-266 (5th Cir. 2004) (same); *Ross v. Citifinancial*, 344 F.3d 458 (5th Cir. 2003) (same). Accordingly, the exception to the statute of limitations found in section 15-1-67 does not apply.

Id. at 390 n. 11 (emphasis added).

In this case, as in *Boone*, the plaintiffs do not challenge the circuit court's finding "the evidence is undisputed that none of the Plaintiffs read the policy when they received it." (R. 2217.)[8]

[8] During their depositions, a few plaintiffs contended that they briefly "looked at" or "read over" their policies after receiving them. (*See* R. 2539 at Dep. p. 24. "I didn't just study it over a whole lot. I read

As found in *Boone*, this fact alone should preclude a finding of due diligence. But even if this Court were to find that due diligence may be established without reading one's policy, the record is completely devoid of any instances of plaintiffs exercising diligence in attempting to ascertain their claims. It is telling that the plaintiffs' Appellants Brief pp. 22-29, which concerns their fraudulent concealment argument, does not contain a single record citation to any conduct by plaintiffs in support of the claim that they exercised due diligence in trying to discover their claims.

The two Supreme Court cases plaintiffs cite in support of their fraudulent concealment claim are *Andrus v. Ellis*, 887 So. 2d 175 (Miss. 2004) and *American Bankers Insurance Company of Florida v. Wells*, 819 So. 2d 1196 (Miss. 2001). (Appellants Br. at 23-24.) Both cases support the dismissal of plaintiffs' claims.

In *Andrus*, the plaintiffs filed suit against eight individual defendants, claiming that the defendants fraudulently induced them to purchase credit insurance policies in connection with consumer loans. *Id.* at 176. Plaintiffs alleged either that they were not aware that they had purchased credit insurance, or they were aware, but thought such was required to obtain the loans. In reversing and rendering the circuit court's denial of summary judgment, the Court found:

> All Plaintiffs testified during their depositions that they received copies of the loan documents. ... "In Mississippi, a person is charged with knowing the contents of any document that he executes." *Russell v. Performance Toyota, Inc.*, 826 So. 2d 719, 725 (Miss. 2002) (citing *J.R. Watkins Co. v. Runnels*, 252 Miss. 87, 172 So. 2d 567, 571 (1965) ("A person cannot avoid a written contract which he has entered into on the ground that he did not read it or have it read

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over it." (Hale); R. 2498 at Dep. p. 58; "Q. Okay. And did you take the opportunity to review the material or review the policy and any other material that might have come with the policy at that time? A. Yes, we looked at, yes." (L.T. Hicks).) No plaintiff testified that they read the entire policy or accompanying documents. As demonstrated in North American's Appellee Brief at pp.34-42, when plaintiffs actually read the relevant policy provisions at their depositions, they admitted that it clearly informed them that their policies could lapse prior to death and that premiums could increase depending on fluctuations in interest rates and cost of insurance charges.

> to him.")). "[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." *Godfrey, Bassett & Kuykendall Architects, Ltd. v. Huntington Lumber & Supply Co.*, 584 So. 2d 1254, 1257 (Miss. 1991). Accordingly, the Plaintiffs are charged with notice and therefore all claims accrued at the time the loan agreements were executed.

Id. at 180 (¶ 28). As in *Andrus*, all plaintiffs admit they received their policies. Therefore, any claims accrued at the time of the sale.

For this same reason, plaintiffs' reliance on *American Bankers Insurance Company of Florida v. Wells*, 819 So. 2d 1196 (Miss. 2001), is misplaced. That case involved "force-placed" credit insurance for automobile loans to protect the lender's security interest in the vehicle should the borrowers' coverage lapse. *Id.* at 1199. After the plaintiffs' automobile coverage lapsed, the lenders purchased credit insurance coverage at the expense of the borrowers and backdated the coverage to the date the borrowers' coverage lapsed rather than the date the credit insurance was purchased. None of the loan documents executed by the borrowers gave the lenders the right to backdate the force-placed coverage. *Id.* at 1202. Accordingly, the Court held that plaintiffs' claims did not accrue until they received documentation disclosing the backdated coverage. *Id.* One plaintiff (Oliver) admitted receiving a "Certificate of Insurance" showing the backdated coverage; the other plaintiff (Wells) denied receiving any documentation. *Id.* Accordingly, the Court affirmed summary judgment against Oliver but reversed with respect to Wells. *Id.*

In this case, the record evidence is overwhelming and uncontradicted that all plaintiffs received their policies. In addition, North American sent annual statements and additional documentation disclosing that plaintiffs' policies could lapse prior to maturity based upon their current premium payments. This is obviously distinguishable from *Wells*, where the plaintiff denied

receiving any documentation from the insurer. Numerous cases decided since *Wells* have confirmed that claims based upon an alleged misrepresentation concerning the sale of an insurance policy accrue upon the sale of the policy. *See Carter*, 938 So. 2d at 818; *Sanderson Farms, Inc. v. Ballard*, 917 So. 2d 783, 789 (Miss. 2005); *Andrus*, 887 So. 2d at180-81; *Stephens*, 850 So. 2d at 81-82.

Finally, plaintiffs contend that a fact issue exists concerning whether plaintiffs exercised due diligence. Plaintiffs, however, have presented no evidence of due diligence in attempting to ascertain their claims. Without such evidence, a reasonable jury could not find they have satisfied the "due diligence" requirement. Summary judgment based upon the statute of limitations should be affirmed.

IV. NO FIDUCIARY RELATIONSHIP EXISTS BETWEEN PLAINTIFFS AND CLIFF HANCOCK

In addition to being time-barred, plaintiffs' claims for breach of fiduciary duty fail as a matter of law because no fiduciary relationship exists between an insured and an insurance agent. The Supreme Court, especially in recent years, has been particularly stringent in testing such claims. "[T]he severity of the burdens and penalties that are integral to a fiduciary relationship ... should not apply to ordinary commercial loan applications." *AmSouth Bank v. Gupta,* 838 So.2d 205, 216 (Miss. 2002) (reversing, as a matter of law, jury's finding of fiduciary relationship). "The party asserting the existence of a fiduciary relationship bears the burden of proving its existence by clear and convincing evidence." *Id.* (citing *Smith v. Franklin Custodian Funds, Inc.*, 726 So. 2d 144, 150 (Miss. 1998).

Plaintiffs' inflation of their claims with allegations of "substantial trust" in Hancock do not avoid these legal rules. "[U]nilateral trust alone will not support a finding of a fiduciary relationship[;] ... there must instead be a finding of trust together with some circumstance which

justifies that professed trust." *Barnes v. First Franklin Finance Corp.*, 313 F. Supp. 2d 634, 638-39 (S.D. Miss. 2004) (emphasis in original). Again, numerous plaintiffs have tried this tactic and lost.

For example, in *Walden v. American General Life,* 244 F. Supp. 2d 689 (S.D. Miss. 2003), plaintiffs' allegations were similar to those in the present case. The court in *Walden* noted the general rule under Mississippi law that "a fiduciary relationship does not exist between an insurer and insured, or between the agent of the insurer and the insured, in the context of first-party contracts." *Id.* at 693 (citations omitted).[9] The *Walden* plaintiffs alleged, *inter alia*, that the defendant insurance agents held themselves out as "highly knowledgeable with respect to insurance matters," that the agents "became the Plaintiffs' friends, confidantes, and financial and insurance advisors," and that "Plaintiffs therefore justifiably reposed trust in and dependance upon" the insurance agents. *Id.* at 695. The court dismissed the "fiduciary" claims against the insurance agents, and found those allegations inadequate even to meet the "arguably reasonable basis" threshold test for "fraudulent joinder" analysis. *Id.* at 697-98. The Southern District held:

> Plaintiffs have not directed the Court to any case in which Mississippi law recognized the creation of a fiduciary duty between an insurance agent and an insured under circumstances similar to those presented here. The cases cited by Plaintiff each involve circumstances indicating a history of dealings between the parties giving rise to a fiduciary relationship. The circumstances here do not involve such circumstances. Rather, the circumstances here indicate a simple relationship between an insurance salesman and a client. Such a relationship is not the basis for a fiduciary relationship in and of itself.

Id. at 696-97.

In their brief, plaintiffs rely almost exclusively on the case of *Lowery v. Guaranty Bank &*

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[9] The life insurance policies at issue are clearly "first-party" insurance contracts. *See* BLACK'S LAW DICTIONARY 804 (7th ed. 1999) (citing examples "such as life insurance, health insurance, disability insurance, and fire insurance").

Trust Co., 592 So. 2d 79 (Miss. 1991), in support of their "fiduciary" claims. *Lowery* is readily distinguishable. In that case, plaintiffs sued their bank and its agent for breach of fiduciary duty for failing to advise them that their credit life insurance had expired. The evidence showed that an agent of the bank had handled all of the family business, had twice extended bank notes due without any formal application, and had advised the family in the past regarding financial and insurance matters. *Id.* at 85. The credit life policy had two "grace period" provisions that would have allowed plaintiffs to renew the insurance had they been timely notified that it had lapsed. The Court held that under these circumstances fact issues existed concerning the existence of a fiduciary "duty to notify them that the credit life insurance had lapsed ...." *Id.*

The facts of this case are not even remotely similar to *Lowery*. In contrast to *Lowery*, no plaintiff testified to any business relationship with Hancock other than purchasing insurance. There is no record evidence that Hancock "handled" any of the plaintiffs' financial affairs, other than to sell them insurance policies. For example, some plaintiffs testified that prior to purchasing the North American policies, they had not purchased any insurance from Hancock. (R. 2494-95 at Dep. pp. 44-46 [L.T. Hicks]; R. 2473 at Dep. pp. 14-15 [Sarah Hicks]; R. 2537-38 at Dep. pp. 16-17 [Hale].) The remaining plaintiffs testified that their only prior business dealings with Hancock had concerned the purchase of insurance. (R. 2520, 2527 [Evans]; R. 2415-16 [Childers]; R. 2387 at Dep. pp. 19-20 [Spencer].)

There are no allegations or evidence that Hancock assumed any duties on behalf of the plaintiffs other than submitting their insurance applications, which he did. Similarly, there are no allegations, as in *Lowery*, that Hancock represented that any relevant deadline with respect to the life insurance policies would be extended or waived. Nor is there record evidence that Hancock advised the plaintiffs on any matters outside of the insurance context.

As stated *supra*, plaintiffs are all well educated and most have significant business experience. There is simply no record evidence of any special circumstances which would support the conclusion that these transactions were anything other than arms-length transactions or which would justify departing from the general rule that no fiduciary relationship exists between an insurance agent and an insured. The circuit court correctly held that no fiduciary duty exists.

CONCLUSION

The circuit court's decision should not be disturbed. The circuit court correctly found that plaintiffs' alleged claims accrued at the sale of their policies. This action was filed over six years after the last policy was purchased. Therefore, all of plaintiffs' claims are time-barred by Mississippi's general, three-year statute of limitations. No record evidence exists supporting a finding that defendants engaged in subsequent, affirmative acts of concealment or that plaintiffs conducted due diligence in trying to discover their claims; therefore, plaintiffs cannot prove fraudulent concealment. Finally, no fiduciary duty existed between plaintiffs and defendants. The entry of summary judgment should be affirmed.

DATED: April 21, 2009.

Respectfully submitted,

CLIFF HANCOCK d/b/a HANCOCK INSURANCE AGENCY

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CERTIFICATE OF SERVICE

I, the undersigned attorney of record, hereby certify that I have this day caused to be mailed via United States mail, postage prepaid, a true and correct copy of the above and foregoing document to the following counsel of record:

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This 21st day of April, 2009.

Brian C. Smith

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CERTIFICATE OF FILING

I hereby certify that I have filed with Ms. Betty W. Sephton, Clerk, Supreme Court of Mississippi, 450 High Street, Jackson, Mississippi 39201, by hand delivery, the original and three copies of the *Brief of Appellee Cliff Hancock d/b/a Hancock Insurance Agency*, and an electronic diskette containing same, on April 21, 2009.

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