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**

ON APPEAL FROM THE CIRCUIT COURT OF BENTON COUNTY, MISSISSIPPI
CAUSE NO. B2004-066

BRIEF OF APPELLANTS

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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 (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.

William D. Prestage

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STATEMENT OF THE ISSUE

1. **Whether the trial court erred in granting the defendants' motions for summary judgment.**

STATEMENT OF THE CASE

I. Factual and Procedural Background

A. Procedural History

The lawsuit underlying the present appeal is based upon allegations of fraudulent inducement, common-law fraud, fraudulent concealment, fraudulent and deceptive sales practices, improper training, and breach of fiduciary duties of North American Company for Life and Health Insurance (hereinafter "North American" and their agent Cliff Hancock (hereinafter "Hancock"). Evidence in the record demonstrates the fraudulent scheme developed between North American and Hancock in order to induce insureds to purchase life insurance policies which differed from the illustrations shown and representations made at the point of sale. The record further illustrates North American and Hancock's acts of concealment are an attempt to prevent the insureds from discovering the wrongs committed against them.

After the plaintiffs uncovered North American and Hancock's true actions with regard to the insurance policies at issue, they promptly and properly filed the underlying lawsuit on August 31, 2004. Record, (hereinafter "R."), pp. 2-16; Record Excerpts, (hereinafter "Excerpts"), Tab "B".

North American filed its Motions for Summary Judgment on June 6, 2006, with Hancock filing similar motions shortly thereafter. The insureds fully responded to Defendants' motions, which came on for hearing on June 12, 2008. The trial court judge subsequently granted all summary judgment motions via its Order and Opinion signed on July 3, 2008 and filed on July 10, 2008. R., pp. 2212-2219; Excerpts, Tabs "C" and "D", respectively.

The trial court's Opinion, providing the basis for its granting summary judgment, stated that, "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 deposition they indicated that they understood what it meant." R. at 2217; Excerpts, Tab "D". The trial court further found that the plaintiffs failed to satisfy the requirement of due diligence by failing to fully read the policies they were provided by North American and Hancock. R. at 2217-2218; Excerpts, Tab "D".

The trial court went on to find that summary judgment was proper as to the plaintiff's claims of breach of fiduciary duty and suppression, due to the fact that "there is no fiduciary relationship or duty between an insurance company and its insured in a first party insurance contract." R. at 2218; Excerpts, Tab "D".

It is from the trial court's granting of summary judgment in favor of the underlying insurer and agent that the insureds now appeal. R. at 2257; Excerpts, Tab "F".

B. Underlying Facts.

The North American life insurance policies at issue are referred to as Term UL policies. Term UL policies are universal life products that operate like a term product. R. at 2265. This type of policy was created not to build cash value, but to compete more against term products and operate like a term product with levelized charges and lower costs for a certain period of time, 20 or 30 years. R. at 2265.

The policies were sold by agents of North American using illustrations which showed two different interest rates. R. at 2267. These illustrations contained both projected rates and guaranteed rates. The projected rate contained in the illustrations was generally equal to the current crediting rate, but the agents had the ability to change the rates during preparation of the

illustrations. R. at 2267-2268. Due to the fact that its agents had this ability to manipulate the numbers on the illustrations shown to potential customers, North American is unable to tell us exactly what illustrations were shown to the clients at the point of sale or what interest rates were used as projected rates on these illustrations. R. at 2268.

Generally, the base premium on a Term UL policy is equal to the minimum premium. R. at 2269. On the Classic Term UL II, for example, the minimum premium was designed to carry the policy for thirty (30) years. R. at 2269. On the Classic Term UL 20, the minimum premium would only have kept the policy in effect for twenty (20) years. R. at 2269. These policies, despite clearly containing a maturity age of 100, were not actually designed to reach maturity unless something more than the base premium was paid. R. at 2270.

North American operates under a general agent system. R. at 2278. In utilizing this general agent system, North American only sent communications concerning their sold policies to their general agents despite the fact that the selling agents actually sold the polices and had contact with the insureds. R. at 2279. The home office of North American sends absolutely no communications to their writing agents and would have no knowledge of what its general agents forward on to its writing agents. R. at 2279-2280. North American's file pertaining to its agent included in the lawsuit underlying the present appeal, Cliff Hancock, contains no evidence of training, correspondence concerning use of illustrations, or communication regarding sales practices. R. at 2281. Additionally, North American has no knowledge of any supervision Cliff Hancock's supervising general agent may have given him. R. at 2281.

According to North American policy, the illustrations used during the sale of these policies were not required to be left with the policy holder, and the agent did not even have to illustrate the type of policy that was actually sold or delivered. R. at 2282. North American's

only requirement was that a signed amendment must be procured which acknowledged the change in policy type. R. at 2282. North American was unable to testify to whether the Mississippi state requirements were complied with during the sale of the policies at issue. R. at 2284.

Between 1990 and 1998, North American created performance reports containing information about the company and interest rate trends as well as the interest rates North American was crediting on their portfolio. R. at 2295. These reports accompanied the annual statements which were sent to their policyholders and informed the policyholders of this important info, but were discontinued at North American's election after 1998. R. at 2295-2296.

The annual statements which were sent out by North American did not contain or inform insureds of yearly changes in interest rates. In order to determine if the interest rate credited to their policies had changed, policyholders had to refer to their statements from the previous year. R. at 2290. The annual statements contained a disclosure telling the insured when their policy would lapse in the event the insured made no more premium payments. However, nothing in the annual statements showed when, or if, the policy would lapse if the insured were to continue making their planned premium payments. R. at 2290. The illustrations prepared by North American generally contain a projected stop age for the policy as 99 with no explanation that the policy will not reach that age. R. at 2292. In addition, the mere fact that policies were "guaranteed" by North American to last twenty (20) years did not in reality guarantee twenty (20) years of coverage for an insured. R. at 2293. Illustrative of this point is the case of Sarah Hicks, whose twenty (20) year "guarantee" was immaterial.

Q. And this is the policy that was designed to go – guarantee 20 years?

A. It was not guaranteed for 20 years blanket statement. It was – it had a guarantee that the – the 20 years was a variable depending upon your issue age. It scaled down the older you got, but it was 20 – it was 20 years as

> long as your account value remained positive, so if she became – had a negative account value, which is – looks to be the situation here, she would have gone into grace despite that guarantee.

R. at 2293.

North American provided a number of services in order to train their general agents in regard to North American's products, but did not make these training services available to its writing agents who were selling North American products to the public. R. at 2310. North American conducted some seminars with some writing agent participation, but there is no evidence that Cliff Hancock attended any such seminar. R. at 2310. In fact, North American had a sales support staff available to answer general agent's questions. R. at 2310. This service was occasionally utilized by the writing agents, but not because North American intended for them to use it. R. at 2310. When asked how they notified their writing agents of the availability of such a service, North American's testimony was that "**We didn't notify them, they found out**." R. at 2310.

North American had no knowledge of its general agents actually providing any training materials to the selling agents, nor did it have any formal policy by which the home office monitored the general agents' supervision of its selling agents. R. at 2311-2312.

North American, through its 30(b)(6) testimony, acknowledged the importance of its agents clearly disclosing how their policies operate and making certain that an insured understands its policy when delivered. R. at 2317. The importance of these disclosures at the point of sale is shown throughout the testimony.

> **Q.** Would it be improper for a sales agent to represent that a premium – that the policyholder could pay a certain premium until maturity, and the policy would remain in force until maturity if, in fact, this premium was a premium that turned out to be insufficient to carry the policy to maturity?
>
> A. Yes, that would be improper.

Q. If a sales agent has shown an illustration at point of sale or leading up to the point of sale, and, in fact, it's determined that a different type policy would actually be sold or issued rather than the one that was illustrated?

A. Uh-hum.

Q. All right. Wouldn't North American expect or require the sales agent to disclose to the potential policyholder that the illustration they've looked at is not an illustration of the policy they're, in fact, buying?

A. Yes.

Q. Would it be improper for a selling agent to not disclose that the premium could change for various circumstances rather than remain level throughout the term of the policy?

A. It would be improper for him not to advise the client of that, yes.

R. at 2318.

Additionally, each of the plaintiffs in the underlying lawsuit testified via deposition, that they were misinformed about their North American policies at the time of sale, were unable to understand the policies after review of same, and filed the present lawsuit promptly after learning of the actionable conduct of North American and its agent, Cliff Hancock.[1] For the Court's convenience, brief summarizations of the plaintiffs' applicable testimony will be included below:

Sara B. Hicks and L.T. Hicks

Hancock approached the Hicks regarding insurance and sold them both North American policies on his initial visit with them. R. at 2473-2475, 2478, 2495. At the point of sale, Hancock assured the Hicks that the premium on the North American policy would remain the same throughout the policy, that the policy would build cash value, and that it would remain in force for the rest of the Hicks' lives. R. at 2496, 2500, 2503, 2505-2506, 2510-2511. Hancock

[1] It is also pertinent to note that the bulk of North American and Cliff Hancock's actionable conduct was not only concealed from the view of the plaintiffs, but was completely unknown until the plaintiffs had the opportunity to conduct discovery after filing the underlying lawsuit.

showed a brochure and projection to the Hicks regarding the North American policies, which in no way indicated that the insurance would only last fifteen years. R. at 2596, 2506, 2511. The first time Ms. Hicks was put on notice that her policy was different than represented to her was when she received a 2004 letter from North American informing her that her premiums would be increasing. R. at 2481. Only when Sara Hicks premiums were increased in 2004 did L.T. Hicks become concerned about his policy. R. at 2500. The Hicks were **never** told that their policies would end after a certain number of years, **nor could they understand the policy despite review.** R. at 2505. Mr. Hicks clearly testified that he would have cancelled the policy immediately has he been notified in clear language that the policy would lapse. R. at 2512.

Ray Spencer

Mr. Spencer had previously purchased an insurance policy through Cliff Hancock in the mid-eighties, and contacted Hancock when he felt he needed additional insurance. R. at 2388. Mr. Spencer informed Hancock on the phone prior to the first visit that he wanted a $100,000 policy on himself that would last the rest of his life, and based on their ongoing relationship, trusted Hancock to tell him what he needed. R. at 2389. Hancock came to Mr. Spencer's house to meet with Mr. Spencer and his wife sometime around the spring of 1993. R. at 2389. At that meeting, Mr. Spencer again informed Hancock that he wanted policy with payments which would be the same amount every month, with the option to increase his coverage in the future, in order to protect his wife and children. R. at 2389. Mr. Hancock showed Mr. Spencer several policies and brochures during the hour long meeting, and Mr. Spencer applied for the North American policy at issue shortly thereafter. R. at 2389-2390. Mr. Spencer trusted Hancock to look after his best interest in the sale of life insurance, stating that, "...with insurance, it's Greek

to me. You know, I trust him. That's why I called Clifford, because I did know him, to say you sell me what I need. And that's pretty much how I left that." R. at 2390.

In 2004, Mr. Spencer sent in his regular quarterly payment and was later informed that he still owed around thirty to forty dollars. R. at 2390. He then sent in the extra amount of money and forgot about the payment. R. at 2390. When the next bill came, the North American statement showed that Mr. Spencer owed the regular amount of $135 and Spencer paid the bill. R. at 2391. However, once again, North American notified Spencer that an extra thirty to forty dollars was due on his account. R. at 2391. Once again, Mr. Spencer paid the extra money, but contacted North American in an effort to find out the reason for the increase. R. at 2391. Although he talked to three different people at North American, Mr. Spencer was unable to find out the reason for the increase in his payments. R. at 2391. Unable to get an answer from the company, Mr. Spencer turned to his agent, Cliff Hancock, to help him find out the reason for the increase. R. at 2391. Although Hancock told Mr. Spencer that he would try to find out why his premiums had gone up, Hancock never got back in touch with him. R. at 2391.

Mr. Spencer's quarterly bills did not reflect the required increase in premium payments until receiving his third quarterly bill of 2004. R. at 2391. Mr. Spencer was never notified by North American of an increase in his premiums or of any reduction in his cash value. R. at 2391. In fact, Spencer emphatically denies receiving any letters in 2004 regarding the increase in his premium payments. R. at 2395.

William Evans

William H. Evans purchased a Kentucky Central policy from Cliff Hancock in the late 1980's. R. at 2520, 2527. Since that time, Hancock also became Mr. Evans agent for his wrecker business in 2003. R. at 2518. Mr. Evans trusted Hancock, as his insurance agent, to

provide him with policies that meet his needs. R. at 2522. Mr. Evans was satisfied with his Kentucky Central policy until Hancock approached Mr. Evans and informed him that he needed to take out a policy with a different company. R. at 2522, 2527. Hancock explained to Mr. Evans that the new North American policy was a whole life policy just like his policy with Kentucky Central and represented to Mr. Evans that its premiums would remain constant. R. at 2522, 2524.

On the day Mr. Evans applied for the North American policy, Hancock showed him various brochures and charts. R. at 2523. The next time Mr. Evans met with Hancock in regards to his North American policy was around 2004 at which time Mr. Evans questioned Hancock as to why his premiums were rising. R. at 2524. Hancock replied that he did not know why Mr. Evans premiums increased and told Mr. Evans that he would look into the matter and call him back with any information. R. at 2524. However, Hancock never called Mr. Evans back regarding the increases. R. at 2524. Shortly after Hancock's failure to get back in contact with Mr. Evans as promised, Mr. Evans initiated the present lawsuit. R. at 2524.

Mr. Evans had no idea that his policy could expire prior to his death until after the lawsuit had been initiated. In fact, even after reviewing the policy and undergoing a deposition in this action, Mr. Evans was still not clear on whether or not his insurance policy would lapse and was unable to understand the various dates in the policy. R. at 2525, 2531.

Martha Jo Hale

Martha Jo Hale contacted Cliff Hancock regarding insurance and stated to Hancock on the telephone prior to their initial meeting that she wanted a while life policy that would never end as long as she paid the level premiums. R. at 2536-2538, 2543. On the initial visit to her home, Hancock showed Ms. Hale various brochures and charts relating to the North American

insurance policy. R. at 2538. Ms. Hale applied for a $100,000 policy on the initial visit and Hancock filled out all the information for her on the application. R. at 2539.

A couple of years ago, Ms. Hale questioned Hancock regarding loan options on her policy. R. at 2540. He informed Ms. Hale that it was available and assured her that the policy "would be okay." R. at 2540. Ms. Hale did not contemplate the present suit, as she didn't know she had any problems, until she was contacted by her attorney, Michael Greer's office. R. at 2540. In fact, Ms. Hale reviewed the policy after being contacted by Mr. Greer and still was unable to recognize any problems in the policy because she could not understand the language. R. at 2541.

Robert D. Childers

Prior to purchasing the North American policy at issue, Mr. Childers purchased a Kentucky Central policy from Hancock. R. at 2413-2414. Mr. Childers had known Cliff Hancock since high school and was satisfied with the Kentucky Central policy until Hancock approached him and informed him that he needed to take out a policy with a different company due to financial problems with Kentucky Central. R. at 2414-2417, 2422-2423. At Hancock's urging, Mr. Childers agreed to a $400,000 North American policy. R. at 2417, 2424. At the point of sale Hancock represented to Mr. Childers that the North American premium payments would remain level and might even decrease, explaining that he was "paying more now so the interest [could] make it offset to where I'd have a level premium throughout my life." R. at 2424, 2439, 2465.

Mr. Childers did not become concerned about the North American policy he purchased until receiving a letter from Michael Greer in 2003, at which point he became concerned about the policy and promptly contacted Hancock. R. at 2426-2427. Hancock informed Mr. Childers

that he could not answer any questions until he received a specific print-out from North American. R. at 2426-2427. After Mr. Childers had North American send him a print-out which he forwarded to Hancock, Hancock informed Childers that North American could cancel him, decline to write him, or require Mr. Childers to pay higher premiums. R. at 2426-2427, 2436. Upon learning this information, Mr. Childers decided to contact Mr. Greer in order to protect his rights and initiate the present action. R. at 2435.

SUMMARY OF ARGUMENT

The underlying defendants' motions, and the trial court based its decision to grant summary judgment in favor of the defendants, was anchored to a statute of limitations defense based on the insureds' being put on notice of potential claims against the insurer and failure to establish the requisite elements of fraudulent concealment. Additionally, the trial court held that the underlying plaintiffs' claims of breach of fiduciary duty "has no merit regardless of any proof." R. at 2217; Excerpts, Tab "D".

The three year statute of limitations, as set out in Mississippi Code 1972 Annotated §15-1-49, is clearly applicable to the case *sub judice*. However, that statute of limitations can be tolled by proof of fraudulent concealment under authorization of §15-1-67 Mississippi Code of 1972 Annotated. It must be remembered that the statute of limitations is an affirmative defense as to which the party asserting the same bears the burden of proof, Graham v. Pugh, 417 So. 2d 536 (Miss. 1982), Smith v. Franklin Custodian Funds, Inc., 726 So. 2d 144 (Miss. 1998).

The deposition testimony and documentary evidence accumulated during discovery of the underlying lawsuit against Cliff Hancock and North American, has clearly presented a genuine issue of material fact as to whether the insureds were put on notice of any potential claims against North American and Hancock until either: 1) receiving information regarding an increase in their required premium payments, or 2) informing the insureds that their policies operated differently than represented and could in fact lapse. In the alternative, the insureds adequately demonstrated, when the testimony and evidence is taken in the light most favorable to the plaintiffs, both affirmative acts of fraudulent concealment and due diligence as required under Mississippi substantive law to toll the statute of limitations.

Additionally, the trial court's finding that the insureds allegations of breach of fiduciary duty against North American and its agent Cliff Hancock "has no merit regardless of any proof" due to the fact that "there is no fiduciary relationship or duty between an insurance company and its insured in a first party insurance contract" is contrary to Mississippi authority. R. at 2218. Contrary to the trial court's holding, Mississippi authority has shown that such a relationship can exist in the context of a first party insurance contract based on the specific facts of each situation. In the case *sub judice*, the insureds deposition testimony, when taken in the light most favorable to the insureds, presents sufficient factual allegations to raise a genuine issue of material fact regarding the existence of a fiduciary duty between the parties.

ARGUMENT

The trial court erred in granting summary judgment in favor of the insured.

1. **Standard of Review.**

Rule 56(c) of the Mississippi Rules of Civil Procedure provides that summary judgment shall be granted by a court if "the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact...." M.R.C.P. 56(c); *see* Saucier ex rel. Saucier v. Biloxi Reg'l Med. Ctr., 708 So. 2d 1351, 1354 (Miss. 1998). The moving party has the burden of demonstrating there is no genuine issue of material fact while the non-moving party should be given the benefit of every reasonable doubt. Tucker v. Hinds County, 558 So. 2d 869, 872 (Miss. 1990). *See also* Heigle v. Heigle, 771 So. 2d 341, 345 (Miss. 2000). A fact is material if it "tends to resolve any of the issues properly raised by the parties." Palmer v. Anderson Infirmary Benevolent Ass'n, 656 So. 2d 790, 794 (Miss. 1995). "Issues of fact sufficient to require denial of a motion for summary judgment obviously are present where one party swears to one version of the matter in issue and another says the opposite." Tucker, 558 So. 2d at 872. The Supreme Court has stated that "If any triable issues of fact exist, the lower court's decision to grant summary judgment will be reversed." Richmond v. Benchmark Constr. Corp. , 692 So. 2d 60, 61 (Miss. 1997).

2. **The underlying lawsuit was filed well within the three year statute of limitations, as the underlying plaintiffs did not know, nor could they have known of their potential claims against North American and Cliff Hancock until shortly before filing suit.**

The facts, when viewed in the light most favorable to the insureds, establish the fact that despite acting with reasonable diligence, these insureds were unable to discover their causes of

action against North American and Cliff Hancock until many years after the sale of the policies at issue. In fact, the bulk of North American and Hancock's improper actions were completely unknown until the plaintiffs were able to conduct discovery.

It is undisputed that the general statute of limitations would applies to the underlying lawsuit. The general Mississippi statute of limitations provision, Miss. Code Ann. §15-1-49, requires that a suit be brought within three (3) years after the cause of action accrues. O'Bannon v. Guardian Life Ins. Co. of America, 331 F. Supp. 2d 476, 478 (S.D. Miss. 2004). However, §15-1-49 also states that the limitations period does not begin until the injury is discovered, or with reasonable diligence, should have been discovered. Miss. Code Ann. §15-1-49(2).

Each of the underlying insureds' causes of action, based on the language of Miss. Code Ann. § 15-1-49, accrued at the time they discovered that their policies would in fact terminate unless they increased their premium payments drastically, a realization which is directly contrary to the repeated representations of Cliff Hancock on behalf of North American. In the case *sub judice*, the statute of limitations began to run upon notice of an impending increase in premiums, or upon being informed that their policies could differ from what was represented. The appellants first discovered the potential existence of claims against North American and Hancock within the three year statute of limitations set out in Miss. Code Ann. § 15-1-49 and filed suit accordingly.

The policies and annual statements these plaintiffs received contained no language which alerted the insureds of any potential claims against North American and its agent, Cliff Hancock. The plaintiffs were unable to understand that their policies differed from North American's representations due to the "ambiguity, complexity, and confusing language and data contained" in each of the policies. Affidavit of Clint Wood, R. at 2128; Excerpts, Tab "E". In addition, the

annual statements and other documents which North American sent to these insureds were "confusing, contradictory, and misleading." R. at 2129; Excerpts, Tab "E".

Throughout the insureds' depositions, North American's counsel pointed to specific, isolated wording which they claimed put these insureds on notice of their claims. Defendants' hold tightly to the legal proposition by which Mississippi charges an insured with the knowledge of the contents of their policies whether or not the insured actually read the policy. Stephens, 850 So. 2d at 83. North American and Hancock, however, completely disregard the fact that Mississippi law requires that a policy **be found clear and unambiguous** prior to imputing such knowledge on an insured. Id. It would be unjust and contrary to Mississippi law for an insured to be bound with knowledge which is not clearly and unambiguously set out in its insurance policy.

Each insured testified that they were never put on notice by any document they received from North American. In fact, each insureds, after reviewing their policies and being deposed thoroughly, stated that they were unable to understand when the policies would lapse, or that they differed from Hancock and North American's representations.

- 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.

- 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.

- Martha Jo Hale read over her insurance policy after receiving it and saw nothing that caused her any concern. R. at 2539.

- William M. Evans, even after being guided through his policy information by North American's counsel, honestly testified that he had no idea when his policy would lapse, stating "I'm as illiterate on it now as when I walked in." R. at 2531.

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

- Ray Spencer also testified that he was unable to fully understand the information, which was why he "left it in Mr. Hancock's hands to tell" him what he needed to know. R. at 2391.

The insureds even provided the trial court with expert testimony as to the ambiguity of the policies, documents, and information provided by North American. The insureds expert, Clint Wood, provided an Affidavit finding that:

> Even if these reasonable plaintiffs had read and studied their policies and the statements regularly sent to them by the defendant life insurance company, nothing in these documents would have contradicted the representations made by the defendant agent to the extent necessary to put a reasonable person on notice that each's policy was in fact different than the defendant agent had led each to believe. These documents are devoid of substantive information whereby a reasonable person could ascertain the status of his coverage, indicating a conscious and ongoing fraudulent concealment by the defendant life insurance company. Affidavit of Clint Wood, R. at 2129; Excerpts, Tab "E".

Neither North American nor Cliff Hancock provided the trial court with any expert testimony regarding the alleged "clarity" of the insurance policies at issue. Additionally, the trial court's opinion specifically noted that Clint Wood's affidavit, which found the documentary evidence applicable to the insureds claims to be ambiguous, confusing, and misleading, was not stricken for the purposes of the summary judgment motion. R. at 2214; Excerpts, Tab "D".

Despite the insureds voluminous deposition testimony provided in the case *sub judice*, North American and Hancock continue to focus on snippets of testimony stating that the insureds were able to understand the policies at issue. However, a closer review of these insureds' testimony in whole differed substantially from the insurer's characterization, as seems to generally be the case. Each of these insureds specifically stated, as referenced above, that

despite review of the North American policies and documentation, they were unable to determine when the policy would lapse or that their policy differed from Cliff Hancock's representation.

The trial court's opinion supports this contention stating that Clint Wood's affidavit "**does not contradict the overall testimony of the plaintiffs but contradicts the defendants' version of the plaintiffs' testimony and will not be stricken.**" R. at 2214 (Fn 1); Excerpts, Tab "B". This finding by the trial court, coupled with Mississippi's requirement that an insurance policy must be found to be **clear and unambiguous** before imputing knowledge of its terms on the insured – when taken in the light most beneficial to the insureds – mandates that the case be remanded for a trial on the merits.

In Pate v. Conseco Life Ins. Co., 971 So. 2d 593 (Miss. 2008), the Mississippi Supreme Court recently reversed a trial court's grant of summary judgment in favor of an insurer, finding that the policy contained no clear and unambiguous language which would allow for an increase in premiums. The facts in Pate, although distinguished by the trial as being a breach of contract case rather than alleging misrepresentation, is clearly analogous to the case *sub judice*. The North American policies and documentation provided to the underlying insureds contained no clear and unambiguous language contradicting Hancock and North American's representations that the insurance policies would not lapse during the insureds' lifetimes.

Even more recently recently, in the case of Wilbourn v. Equitable Life Assurance Society of the U.S., No. 2005-CT-02244-SCT (Miss. December 11, 2008), this Court was faced with a similar legal argument. In Wilbourn, the insurer convinced the trial court to dismiss the plaintiff's action, finding that the insured's actions were time barred because the statute of limitations began running upon delivery of the policy. Id. at 2. The Mississippi Court of Appeals agreed with the trial court's statute of limitations analysis and affirmed the decision. Id.

The Mississippi Supreme Court subsequently granted certiorari and reversed these holdings, finding that the insurance policies were ambiguous when viewed as a whole and did not directly contradict the representations made at the point of sale.

Wilbourn was a vanishing premium case in which the insurer relied, and was granted judgment as a matter of law, based on a particular statement in the policy declaring "[p]remiums payable for life." Id. at 10. However, the Mississippi Supreme Court, in accordance with well-settled Mississippi law regarding contract interpretation, went beyond this isolated statement and found that subsequent terms in the policy regarding payment of dividends and dividend options confused the seemingly plain statement upon which the insurer and lower courts had relied. Id. at 10-11. The Wilbourn Court noted that "ambiguous terms in an insurance contract are to be construed most strongly against the preparer, the insurance company," and found that the policy language coupled with the insurer and agent's representations, "reasonably could have been interpreted to mean that the policy" operated as represented to the insurers. Id. at 11, 14.

The Wilbourn case's reasoning is directly applicable to the case *sub judice*. Hancock represented to each insured that the North American policies provided would stay in force for life. The policy schedule provided for the insureds clearly declared that "The maturity date of this policy is the policy anniversary nearest the insured's 100th birthdate." R. at 511; Excerpts, Tab "G".[2] The policy schedule provided for a "base premium" of $27.00, but a "planned periodic premium" specifically chosen for Ms. Hicks to be $37.00. R. at 511; Excerpts, Tab "G". The document includes the statement that "it is possible that coverage will expire prior to the maturity date shown if premiums are insufficient to continue coverage to such date," but at no point advises that Ms. Hicks "planned periodic premium" was insufficient to carry the policy

[2] For ease of review, Appellants brief with regard to ambiguities in North American documentation and policy language will focus on the policyholder file of Sarah Hicks, despite the record reflecting that similar or identical statements are included in each insured's policy file.

to maturity. R. at 511; Excerpts, Tab "G". Ms. Hicks, as would any insured, reasonably believed that her "planned" premium was sufficient for the policy to act as represented by Hancock and North American.

The statement in the policy upon which the insurer and Hancock rely so heavily is on the second page of the schedule, which states, "Assuming premium payment as stated above, guaranteed interest and cost of insurance charges, this policy will lapse October 1, 2014." R. at 512; Excerpts, Tab "G". There is absolutely no language which ties this statement to the "planned periodic premium" which was calculated specifically for Ms. Hicks and her needs. The policy itself, in the premium provisions section, speaks extensively about "base premiums" and the "base premium expiry date," while making no mention of "planned periodic premiums" other than stating that North American will send reminder notices to the insured. *See* R. at 508-531; Excerpts, Tab "G". Additionally, none of the annual statements or documentation provided by North American during the life of Ms. Hicks' policy informs Ms. Hicks that the policy would or could lapse if she continued to pay her "planned" premium. *See* R. at 552-613; Excerpts, Tab "G". The only lapse information available anywhere in the annual statements applies to the situation in which an insured makes no more premium payments, a scenario which is wholly inapplicable to the case *sub judice*. R. at 556-588; Excerpts, Tab "G".

The policy language and documents provided by North American, when viewed in their entirety and construed in the light most favorable to the insureds, **does not clearly and unambiguously** contradict the representations made by Hancock at the point of sale. This fact alone, which is supported by the expert affidavit of Clint Wood, raises a genuine issue of material fact with would precludes summary judgment in favor of North American and Hancock and requires reversal of the trial court's decision to do so.

3. **The insureds deposition testimony and documentary evidence procured throughout the underlying litigation raises a genuine issue of material fact as to whether the insureds' causes of action were fraudulently concealed by the calculated and improper conduct of North American and Cliff Hancock.**

Miss. Code Ann. § 15-1-67 state that:

> 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.

A party seeking to establish fraudulent concealment has "a two-fold obligation to demonstrate that (1) some affirmative act or conduct was done and prevented discovery of a claim, and (2) due diligence was preformed on their part to discover it." Stephens v. The Equitable Life Assurance Society of the United States, 850 So. 2d 78, 84 (Miss. 2003). These elements, when taking the evidence in the light most favorable to the insureds, were shown by the testimony and documentary evidence, thereby tolling the statute of limitations. In fact, the bulk of the insureds claims against North American and Hancock, due to their fraudulent nature, remained unknown until the discovery phase of the underlying litigation.

There have been numerous reviews of this exact issue by courts applying Mississippi law in recent years. In a frequently cited case, Myers v. The Guardian Life Insurance Company of America, 5 Fed. Supp. 2 d 423 (N.D. Miss. 1998), the District Court noted (citing Prather v. Neva Paperbacks, Inc., 446 F. 2d 338 (5th Cir. 1971)) that the doctrine of fraudulent concealment of a cause of action tolled its statute of limitations. However, that doctrine ". . . should not be confused with the doctrine applicable where the gist of the action itself is fraud, and the concealment is inherent in the fraud." 5 F. Supp. 2d at 431.

Stephens, 850 So. 2d at 78, is notable for clearly holding that fraudulent concealment requires an affirmative act or conduct of the insurer that prevents discovery of a claim, as well as due diligence of insureds to discover the claim. In Stephens, it was noted that all the plaintiffs had written insurance policies in their possession and there was no demonstrated affirmative act to prevent discovery. The Court held that bringing a fraud action twenty-nine years later without any evidence of fraudulent concealment was not permitted. Notably, Myers v. Guardian Life Insurance Company, 5 F. Supp. 423 (N.D. Miss. 1998) was distinguished and cited with approval. Likewise, the case of Phillips v. New England Mutual Life Insurance Company, 36 F. Supp. 2d 345 (S.D. Miss. 1998) was distinguished on the basis that the time Plaintiffs were placed on notice of the wrongful acts of the defendant insurance company was within the limitation period. "Thus, the Phillipses filed a claim within three years of learning of the alleged fraudulent concealment. The plaintiffs here, on the other hand, waited over nine years and over six years respectively to file their claims once the premiums were to have vanished. " Stephens, 850 So. 2d at 82.

More recently, this Court addressed the statute of limitations and fraudulent concealment doctrine in Andrus v. Ellis, 887 So. 2d 175 (Miss. 2004). Citing American Bankers Insurance Company of Florida v. Wells, 819 So. 2d 1196 (Miss. 2001) the Court reaffirmed:

> "... the test on whether to toll the statute of limitations is whether a reasonable person similarly situated would have discovered potential claims. Id. at 1201. The Plaintiffs in Wells alleged that the bank committed fraud by backdating and charging borrowers insurance premiums from the date the other insurance lapsed rather than from the date that force placed coverage actually began.
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> * * * *
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> "As to the first Plaintiff, the Court found that based on the fact that she denied ever receiving notice of the force placed coverage and based on the fact that there was no testimony that she indeed ever received such, the

> statute of limitations as tolled until the time at which she first received notice of the back dating. In that instance, the Court assumed it to be during discovery." (Emphasis added.) 887 So. 2d 175 at 180.

With regard to the issue of the second prong requiring due diligence to discover claims, the Court noted that the plaintiff asserted that insurance coverages were misrepresented to her. When faced with the fact that the plaintiff had been advised more than three years prior to the filing suit that she did not have health insurance, the Court observed, "[a]t this point, diligence requires Woods to either object or inquire as to why her understanding of the insurance contract fundamentally differs from Commercial Credit's understanding." 887 So. 2d at 181.

In the case at bar, each of the plaintiffs, promptly after being put on notice, contacted Hancock, North American, or their attorney Michael Greer in order to inquire as to how their North American policy differed from what was represented to them by Hancock. Promptly upon learning that their policies could lapse or that their premium payments could increase, each of the plaintiffs began taking the necessary steps to identify the problem and protect themselves.

Additionally, the insureds' claims of fraudulent actions and improper training and supervision of agents asserted against North American were wholly undetectable and could not have possibly been uncovered until discovery was conducted in the present action. The insureds should not be barred from asserting their claims against North American simply because they were well hidden. Any claims arising from fraudulent and improper acts which did not come to light until the discovery process should certainly not be barred by the statute of limitations.

The factual situation at hand, when viewed in the light most favorable to these insureds, is obviously sufficient to establish fraudulent concealment under Mississippi law. North American committed an affirmative act which concealed their misrepresentations and wrongdoing each time they prepared and sent out annual statements without stating when the

policy would lapse if the insured continued to pay the planned premium. Mr. Wood, the insureds expert, opined on their behalf 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." Affidavit of Clint Wood, R. at 2129; Excerpts, Tab "E".

In the current action, each of the insureds testified through sworn testimony that they took swift action after realizing that their policies would terminate unless premium payments were increased, contrary to what was represented by Cliff Hancock on behalf of North American. What more should a reasonably diligent consumer do? Upon learning that the policies would require an increase in premium payments or discovering that the policies not intended to function as represented, neither of which is apparent from the policy language or documentation provided by North American, the insureds promptly set out to rectify the situation. Whether the insureds' specific actions were sufficient to constitute "reasonable diligence" is an obvious fact question which should be determined by a jury.

It is well-settled law in the State of Mississippi that whether there has been a fraudulent concealment and whether due diligence has been exercised in attempting to discover the cause of action is a question of fact for the jury. Robinson v. Cobb, 763 So. 2d 883, 888-89 (Miss. 2000). In the case *sub judice*, the insureds' allegations constituting fraudulent concealment stem from actual, material, affirmative misrepresentations made by North American and their agent Cliff Hancock. Each insured reasonably relied on their agent's representations regarding the function of the life insurance policies they were sold. Additionally, the policy language and subsequent correspondence received from North American were confusing, ambiguous, and failed to place the insureds on notice of their claims. None of the annual statements received by the insureds

informed them that their policies would ever actually terminate at any specific time. R. at 556-588; Excerpts, Tab "G".

It was not until the discovery phase of the underlying litigation that these insureds learned that North American, in fact, designed the Classic Term UL II to only last thirty (30) years and the Classic Term UL 20 to only last twenty (20) years despite both containing a maturity ages of 100. R. at 2269-2270. These policies were sold by North American, through Hancock, as providing coverage until death despite the fact that the policies were designed to lapse prior to their maturity date. R. at 2269-2270. The insureds in the underlying litigation did not and could not know their North American policies were designed to lapse prior to the maturity dates contained in the policies and represented by Hancock until the underlying lawsuit was filed.

Absolutely nothing in the present set of facts put the insureds on notice of a potential claim until receiving letters informing them of a premium increase, having their premiums increased with no notice, or otherwise being informed of a problem with their policies. After receiving such notification, each insured diligently and reasonably discovered their claims and filed suit. Barring these claims due to the running of the statute of limitations would be improper, as the reasonableness and the diligence of the insureds' actions is a fact question which should be decided by a jury.

North American and Hancock rely almost exclusively on the proposition that "Mississippi binds insureds, as a matter of law, with the knowledge of the contents of their policy. . . notwithstanding whether they actually read the policy." Stephens, 850 So. 2d at 83). However, it is imperative to note that Stephens, just as any other case imputing the knowledge of contractual terms upon a party, required the Court to find that the "**unambiguous**, written terms" of the plaintiff's policy contradicted her understanding of the contract. Stephens, 850 So. 2d at

83 (emphasis added). Such a holding is clearly distinguishable from the facts currently before this Court in which the insureds have testified, and provided expert testimony, regarding the confusing, ambiguous, and misleading policy language in their North American policies. In order for the insureds to be bound with knowledge of the North American policy language, the Court must find the universal life insurance policies at issue to be clearly written and unambiguous.

In Mississippi, certain rules have been well established to guide the interpretation of an insurance contract: (1) where the policy is plain and unambiguous, the court must construe the contract as written; (2) the policy must be read **as a whole** to give effect to all provisions; (3) the court must read an insurance policy more **strongly against the drafter**; (4) where the terms of the policy are ambiguous, the court must interpret them **in favor of the insured**; (5) where a policy is subject to two reasonable interpretations, a court must adopt the interpretation affording the **greater indemnity to the insured**; (6) where there is no practical difficulty in making the language of a policy free from doubt, any doubtful provision must be **resolved against the insurer**; (7) a court must interpret policies, especially exclusions, **favorably to the insured wherever reasonably possible**; and (8) a court must refrain from changing a policy where the terms are unambiguous, despite any resulting hardship. Clarendon Amer. Ins. Co. v. Embers, Inc., 273 F.3d 1107 (5th Cir. 2001) (emphasis added); *See* Centennial Ins. Co. v. Ryder Truck Rental, Inc., 149 F.3d 378, 382-83 (5th Cir. 1998) (citations omitted).

These rules make clear that intention that an insurance contract be "read as a whole" and construed in favor of the insured. North American and Hancock have been quick to point to a particular passage or table of the policies at issue and declare it sufficient to put insureds on notice of Cliff Hancock's fraudulent statements at the point of sale. However, the test is not

whether any particular clause contains inconsistent information, but is whether the universal life insurance policy provided by North American clearly and unambiguously contradict the statements of the agent selling these North American policies.

The touchstone of interpretation is the intention of the parties. "If there is ambiguity within a policy of insurance, then the intention of the parties to the insurance contract should be determined based upon what a reasonable person placed in the insured's position would have understood the terms to mean." Clarendon Amer. Ins. Co., 273 F.3d 1107 (*quoting* J & W Foods Corp. v. State Farm Mut. Auto. Ins. Co., 723 So. 2d 550, 552 (Miss. 1998)). Therefore, whether the insureds' reliance is reasonable or justifiable is an issue to be determined by a jury.

The Mississippi Supreme Court, in Allen v. Mac Tools, Inc., 671 So. 2d 636, 642-643 (Miss. 1996), noted that:

> This Court has stated before that "[s]ummary judgment may be inappropriate in most complex cases--for example, in cases dealing with fraud." Cunningham v. Lanier, 555 So. 2d 685, 687 n. 2 (Miss. 1989) (citation omitted). In the context of summary judgment when the party has alleged fraud this Court has alluded to the notion that the cases which involve allegations of fraud or misrepresentation generally are inappropriate for disposition at a summary-judgment stage. Great S. Nat'l Bank v. McCullough Envtl. Servs., Inc., 595 So. 2d 1282, 1289 (Miss. 1992); Pursue Energy Corp. v. Perkins, 558 So. 2d 349, 354 (Miss. 1990). Thus, concluded by our jurisprudence is the understanding that triable issues of fact do exist when the facts or evidence support the allegation that fraud and misrepresentation were involved. Great S. Nat'l Bank, 595 So. 2d at 1289. It is well established that fraud is never assumed but is essentially a question of facts which clear and convincing evidence must prove. Parker v. Howarth, 340 So. 2d 434, 437 (Miss. 1976). Fraud is essentially a question of fact best left for the jury.
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> "In an allegation of fraud ... the precise facts which would establish the fraud will often be known only by the party or parties alleged to have committed the fraud. Because the factor of intent which is necessary to establish fraud requires knowledge of the perpetrator's state of mind, it may not be possible for an opponent to reveal detailed precise facts in support of his claim." Crystal Springs Ins. Agency, Inc. v. Commercial Union Ins. Co., 554 So. 2d 884 (Miss. 1989) (citing 10A Charles A.

> Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure: *Civil 2d* § 2727 (1983)). "[T]he clear and convincing standard required of the evidence to sustain a claim of fraud is certainly met in a summary judgment posture when one witness specifically claims a representation was in fact made." Simmons v. Thompson Machinery of Mississippi, Inc., 631 So. 2d 798, 802 (Miss. 1994) (quoting McMullan v. Geosouthern Energy Corp., 556 So. 2d 1033, 1037 (Miss. 1990)). Finally, in a motion for summary judgment, a genuine issue of material fact is obviously present where one party testifies to one account of the matter in interest and the other party swears otherwise. Simmons, 631 So. 2d at 802 (citing Newell v. Hinton, 556 So. 2d 1037, 1041 (Miss. 1990)).

In the case *sub judice*, the evidence and testimony presented by the insureds, when viewed in the light most favorable to them, clearly presents a jury question regarding whether the insureds' actions constituted "reasonable diligence" and whether the North American policies at issue are "clear and unambiguous." The trail court judge, in his opinion, even acknowledged that the insureds deposition testimony, and expert affidavit "contradicts the defendants' version of the plaintiffs' testimony." R. at 2214; Excerpts, Tab "D".

"The conduct of these defendants is an ongoing violation of industry standards and accepted practices which deny these plaintiffs the benefit of their bargains, and which denial these plaintiffs could not have discovered for themselves with reasonable diligence." Affidavit of Clint Wood, R. at 2130, Record Excerpts Tab "E". Due to the complexity of misrepresentations made by Hancock on behalf of North American and the ambiguity of the policies and statements created by North American to conceal such misrepresentations, the insureds' claims should not be barred by the statute of limitations. To do so would in effect award North American and Hancock's fraudulent and improper actions, and preclude these insureds from the opportunity to stand up for themselves. The actions at issue were timely filed after receiving notice of their causes of action in accordance with Miss. Code Ann. § 15-1-49 and Miss. Code Ann. § 15-1-67.

4. **Contrary to the trial court's finding, Mississippi authority establishes the fact that a fiduciary relationship can in fact exist in the context of an insurance agent-insured relationship if the facts establish a confidential relationship between the agent or insurer and insured.**

In addition to granting summary judgment in North American and Hancock's favor regarding the aforementioned statute of limitations issue, the trial court went on to hold:

> Regarding the claim of breach of fiduciary duty, under Mississippi law, there is no fiduciary relationship or duty between an insurance company and its insured in a first party insurance contract. This applies even when life insurance such as in this case is involved. *See* Lady v. Jefferson Pilot Life Ins. Co., 241 F. Supp. 2d 655 (S.D. Miss. 2001). Therefore, this claim has no merit regardless of any proof.

R. at 2218; Excerpts, Tab "D".

With all due respect to the trial court, this holding is not in accord with Mississippi law, as the existence of a fiduciary relationship is determined by the specific facts surrounding each case. The general rule, upon which the trial court relied, states that "[u]nder Mississippi law, there is no fiduciary relationship or duty between an insurance company and its insured in a first party insurance contract." Langston v. Bigelow, 820 So. 2d 752, 756 (Miss. Ct. App. 2002) (*quoting* Gorman v. Southeastern Fidelity Ins. Co., 621 F. Supp. 33, 38 (S.D. Miss. 1985)). However, it is well recognized that in some relationships between an insured and the agent or insurer, the latter has a fiduciary duty under proper circumstances. Brown v. Vickers Employees Credit Union, 162 F. Supp. 2d 528 (S.D. Miss. 2001), (citing American Bankers Ins. Co. of Florida v. Alexander, 818 So. 2d 1073 (Miss. 2001)), (citing Lowery v. Guaranty Bank & Trust Co., 592 So. 2d 79 (Miss. 1991)).

In Lowery, the Mississippi Supreme Court stated that:

> "Fiduciary relationship" is a very broad term embracing both technical fiduciary relations and those informal relations which exist wherever one person trusts in or relies upon another. A fiduciary relationship may arise in a legal, moral, domestic, or personal context, where there appears "on

> the one side an overmastering influence or, on the other, weakness, dependence, or trust, justifiably reposed." Additionally, a confidential relationship, which imposes a duty similar to a fiduciary relationship, may arise when one party justifiably imposes special trust and confidence in another, so that the first party relaxes the care and vigilance that he would normally exercise in entering into a transaction with a stranger.

Lowery v. Guaranty Bank & Trust Co., 592 So. 2d 79, 83 (Miss. 1991) (citations omitted). The Lowery court held that that the evidence of a relationship in a credit life case between the bank and its customer where they had dealt with the bank prior to this particular transaction was sufficient for an issue of fact to exist and precluded the entry of a summary judgment.

Such a relationship exists in the present case. All of the insureds had great confidence and imposed substantial trust in Cliff Hancock and his insurance advice. Several insureds had done business with Hancock previously and relied on his representations concerning the policies which he sold on behalf of North American. The case at hand does not involve "arms-length transactions," but relationships of trust.

The trial court's finding that these insureds claims with regard to breach of fiduciary duty have "no merit regardless of any proof," simply disregards Mississippi authority to the contrary. The Lowery case is still good law. Therefore, whether or not the specific facts of the case *sub judice* give rise to a fiduciary relationship should be recognized as a genuine issue of material fact to be decided by a jury.

CONCLUSION

The insureds in the present lawsuit have presented sufficient evidence to establish the fact that the cause of action did not accrue until the insureds became aware, or could have become aware of their causes of action, or alternatively, raised a genuine issue of material fact as to whether the statute of limitations was tolled by the fraudulent concealment of North American and Cliff Hancock. Additionally, a Mississippi law clearly states that a fiduciary relationship can be established in the context of an insurer-insured relationship based on the specific facts surrounding the relationship. In the case *sub judice*, the insureds' deposition testimony, when taken in the light most favorable to them, has sufficiently raised a genuine issue of material fact which would preclude the entry of summary judgment.

For all the reasons set forth above, the trial court's granting of summary judgment in favor of North American and Cliff Hancock due to the running of the statute of limitations and the finding that no fiduciary relationship can exist between an insurer and insured was improper and should be reversed by this Court.

RESPECTFULLY SUBMITTED,
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CERTIFICATE OF SERVICE

I, William D. Prestage, one of the attorneys for the Appellants, hereby certify that I have this day served a true and correct copy of the above and foregoing BRIEF OF APPELLANTS by placing said copy in the United States Mail, postage prepaid, addressed to the following:

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CERTIFICATE OF FILING

I hereby certify that I have served via first-class, United States mail, postage prepaid, the original and three copies of the Brief of Appellant and an electronic diskette containing same on January 21, 2008, addressed to Ms. Betty W. Sephton, Clerk, Supreme Court of Mississippi, 450 High Street, Jackson, Mississippi 39201.

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