No. 17-_____

In the
Supreme Court of the United States

JOHN LASCHKEWITSCH,

Petitioner,

v.

LEGAL & GENERAL AMERICAN, INC., d/b/a Banner Life Insurance Company

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE FOURTH CIRCUIT COURT OF APPEALS

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QUESTIONS PRESENTED FOR REVIEW

1. Whether LGA can rely on a policy never issued or produced by either party, changed absent the policy owner's written consent; and *Hurni*, *Enelow*, *Stewart and Pickering* precedent from this Court; *American Trust Co.* and *Chavis* precedent from the NC Supreme Court; U.S Circuit Courts of Appeal unanimous precedent; N.C. Gen. Stat. §58-58-22(2); and other cited insurance authorities bar LGA's defenses since LGA's first contest of the policy contract was over forty months after its two-year contestable period had expired, which the lower courts manifestly disregarded?

2. Whether fees can be awarded LGA since LGA's counsel committed perjury by false swearing and fraud on the court in its fee filing, filed its fee motion without a required affidavit of prevailing market rates or bill of costs; and over an Agreement not submitted or timely received by petitioner, not signed and dated by both parties and since LGA breached the Agreement seven times and three times admitted that no agreement exists, all of which the courts below manifestly disregarded?

3. Whether the district court omitted Ben Laschkewitsch's March 23, 2010 first specialist referred "possible ALS" diagnosis date, North Carolina three year statutes of limitation, waiver or estoppel by depositing premium after notice and knowledge and actions affirming the policy beyond three years; and LGA's failure to plead or prove sufficient Fed.R.Civ.P § 9(b) particularity, reasonable due diligence, inquire of statements received; and its multiple unfair claim settlement practices, unfair and deceptive trade practices and polarity of power over petitioner bar LGA's over forty month untimely contest, excessive fees from seven attorneys and defenses since the lower courts omitted all of petitioner's claims?

CORPORATE DISCLOSURE STATEMENT

Under Rule 29.6, petitioner is not incorporated, has no incorporated business, and there is no parent or publicly held company owning 10% or more of stock in any corporation owned by petitioner.

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PETITION FOR A WRIT OF CERTIORARI

John Laschkewitsch petitions for a writ of certiorari to review the erroneous judgments granted LGA by the district court, which were affirmed by the Fourth Circuit by its refusal to adhere to its precedent over contestability, notice/inquiry failures, an unauthenticated affidavit, statutes of limitation, Rule 9(b) particularity, estoppel by benefit, contract breaches, unfair practices and Ben's delayed diagnosis.

Opinions Below

A. Fourth Circuit Court of Appeals, Case No. 17-2374; affirmation, dated June 7, 2018. (Appendix 1).

B. EDNC, Case No. 5:15-CV-251-D, denial of Rules 60(a),(b)(4) motions, opposition to attorneys' fees and summary judgment motion. (Appendices 2, 3 & 4).

Jurisdiction

The Fourth Circuit Court of Appeals affirmed the district court's judgment on June 7, 2018. (Appendix 1). This Court has jurisdiction under U.S.C. §1254(1).

Constitutional And Statutory Provisions Involved

Interpretation of the due process element of the Fourteenth Amendment to the United States Constitution is involved since petitioner's claims have not been heard. Article III, § 2 of the U.S. Constitution is involved since LGA did not suffer a concrete injury-in-fact, which was particularized, prove traceability to petitioner, but to IMC, or that its over three year untimely contest and improper fee motion are redressable. Also, U.S. Codes, Federal Rules, EDNC Local Rules and N.C. General Statutes are involved, as designated by page number or *in passim*. (App. 5, pp. 1-7).

STATEMENT OF THE CASE

A. INTRODUCTION

This Court, the North Carolina Supreme Court and every U.S. Circuit Court of Appeals has held that a policy contest must be filed in court within the statutory and contractual contestability time period, which here expired on January 14, 2012. But Legal & General America, Inc., d.b.a. "Banner" filed its untimely first contest by answer on May 11, 2015, such that all of its defenses are barred. Pp. 8-19, below.

There is no evidence within the district court record that Banner's five-page Agreement was received or submitted by petitioner to IMC, Crump, Banner or LGA. Also, no Agreement page is signed or dated by petitioner, LGA or Banner, such that Banner's Agreement is void. And since Banner first produced its Agreement within its motion for summary judgment, it is nugatory, indefinite and void. Petitioner will herein prove that Banner breached its alleged Agreement. Moreover, as omitted by the courts below, Banner's counsel committed perjury within its declaration and fee motion, fraud on the court within its declaration and improperly filed its fee motion.

The lower courts overlooked that insured Ben first consulted by referral with a specialist "for possible ALS" on March 23, 2010, over two months after the policy was issued and in force. Also, the lower courts omitted Banner's failure to inquire of received statements, prove sufficient Fed.R.Civ.P. §9(b) particularity of who, when, where, time and place or identity and prove due diligence. Further omitted is that Banner filed its contest beyond the NC applicable statutes of limitation, deposited premium after received notice and alleged knowledge, acted to keep the policy in force beyond two years and committed at least five unfair claim settlement practices and a deceptive trade practice. (N.C.G.S. §§ 58-63-15(11), 75-1.1))(App. 5, pp. 5-7).

B. SUMMARY OF THE CASE

1. The Incontestable Policy

The original policy was issued on January 14, 2010. (App. 6, policy); DE 1-3. The policy, which includes Ben's application, became incontestable on January 14, 2012. (App. 6, application); DE 1-3. Legal & General America, Inc., d.b.a. "Banner," hereinafter LGA ("LGA") first contested the policy in the Eastern District of North Carolina on March 11, 2015. (DE 8), which was three years, one month and twenty five days untimely. And pursuant to holdings from this Court, see *Hurni*, *Enelow*, *Stewart* and *Pickering*; North Carolina Supreme Court precedent, see *American Trust Co.* and *Chavis*; and unanimous Circuit Courts of Appeal precedent, pp. 8-19, below, all of LGA's claims are barred for filing its first contest forty months beyond the expiration of its two year contestable period.

Upon issuance of the January 14, 2010 policy, policy owner Ben requested that the Policy Date, which drives premium, be moved from September 22, 2009 to be "current" with the January 14, 2010 policy Issue Date. And LGA agreed to do so. However, LGA next sent agent petitioner a policy with a February 24, 2010 Issue Date and a January 26, 2010 Policy Date. (App. 7); DE 106-6. No other policy was issued or delivered to petitioner or Ben by LGA/Banner during Ben's lifetime.

Following Ben's death on January 15, 2012, petitioner requested and paid for a duplicate policy from LGA, in part to know whether LGA relied on the January 14, 2010 Issue Date or the February 24, 2010 Issue Date. Another reason was that Ben died one day after the January 14, 2012 contestable expiration date (Apps. 6, 8) and the obvious expectation that LGA would rely on the February 24, 2010 policy.

Thus on February 7, 2012, LGA mailed petitioner the duplicate policy with a February 6, 2012 duplicate policy letter. (App. 9, request, postmarked mailing and LGA duplicate policy letter); DE 1-5. In such duplicate policy, issued and delivered by LGA following Ben's death, LGA changed the Issue Date to March 8, 2010 (App. 10, duplicate policy); DE 52-11, which created ambiguity and outright confusion.

Expanding on its ambiguity, LGA demanded that petitioner return to LGA a policy with a January 26, 2010 Issue Date, which had never been assembled, issued or delivered by LGA. LGA went further by changing its records to rely on a fictitious Issue Date of January 26, 2010. (Apps. 11, p. 1; 12); DE 1-7, 8 and 9. Further, LGA threatened petitioner with legal action unless petitioner returned an alleged policy with a January 26, 2010 Issue Date and demanded that petitioner sign a notarized statement that a policy with a January 26, 2010 Issue Date had been lost. (App. 13, p.1, 4th ¶, p.3, 4th ¶, legal action threat; demand for a sworn lost policy statement).

The January 14, 2010 incontestable original policy, February 24, 2010 policy and March 8, 2010 duplicate policy were all mailed to agent petitioner by LGA. But LGA erroneously alleges that it mailed a January 26, 2010 policy to insured Ben, which is untrue since LGA sends all policies to the agent of record to be delivered.

With LGA's assertion, petitioner requested that LGA produce a full policy bearing a January 26, 2010 Issue Date. In response, LGA promised that it "Banner will produce a copy of the Policy it issued on the Insured's life." (App. 14, p. 5, LGA's response to petitioner's Sixth Production Request)(emphasis added). However, LGA did not produce a copy of a January 26, 2010 policy. Factually, LGA only produced a copy of the incontestable January 14, 2010 policy and the March 8, 2010 duplicate.

To make up for its failure, LGA produced a sham and unsupported affidavit of Cheryl Milor. (App. 15); DE 63-14. Milor stated that "it is not Banner's business practice to keep a copy of every policy it delivers," despite that it kept a copy of the incontestable and duplicate policies. (App. 15, ¶ 7). And Milor falsely stated, under oath, that the March 8, 2010 duplicate policy (Ex. 1-I) is a "true and correct copy of the alleged January 26, 2010 policy," which was not attached to her affidavit. (¶ 7).

The district court abused its discretion by accepting the false statements in the unsupported, unauthenticated and impeached affidavit of Milor; by holding an unproduced January 26, 2010 policy to be the "operative policy;" and that the owner insured Ben "rejected" the January 14, 2010 incontestable policy. (App. 4, p. 9).

2. LGA Breached An Agreement Not Received, Submitted, Signed Or Dated By Petitioner, Committed Perjury And Fraud On The Court And Improperly Filed Its Fee Motion And Declaration

Neither LGA/Banner nor petitioner signed or dated any page of LGA's 5-page "Agent/Broker Agreement," ("Agreement") which was first produced by LGA in its motion for summary judgment on June 24, 2016. (App. 16, pp. 1-5). And since LGA first produced the non-mutual Agreement beyond five years and nine months after petitioner signed a one-page "Adoption Authorization" form (App. 17, p. 1), LGA's alleged Agreement is barred by North Carolina's three year statutes of limitation. (App.5, pp. 3, 4). As well, LGA did not consent to the Adoption Authorization form since LGA did not sign or date such form. (Apps. 16, 17). Thus, the Agreement Adoption Authorization was not "executed as set forth below by and among Banner Life Insurance Company"... in order to be in proper "consideration of the covenants contained in the Banner Life Agent/Broker Agreement." (App. 17, p. 1, 1st ¶).

In addition, "In WITNESS WHEREOF, the parties hereto have signed this Adoption Authorization and agree it is effective as of the date authorized by the Company, i.e., The Contract Date." (App. 17, 3rd ¶). But since LGA did not sign or date the Adoption Authorization, such Agreement never became "effective as of the date authorized by the Company," such as to bind the parties to an Agreement.

Also, Edward Murray is the CFO/Treasurer of Marketing Alliance Brokers Network, Inc., which is located at 111 West Port Plaza, Suite 1010, Saint Louis, MO, 63146, and is not an affiliate of or part of LGA/Banner. And notably, a close examination of the signature under his printed name shows that the signature line was altered or changed with white out, and the replaced signature does not appear to be the signature of Edward Murray (App. 16). This is confirmed since the actual General Agent is Crump Life Insurance Services, Inc. ("Crump")(App. 17, General Agent), which was signed by Alan H. Herman on "09/30/09," not Edward Murray.

Moreover, on September 26, 2009 petitioner, while working with the "Abacus Insurance" agency, faxed seven pages to Crump (App. 17, header, footer), of which LGA's Adoption Authorization form was "P. 5." Page 1 was a fax cover page, pages 2 and 3 was for "Biographical Information For Contract Applicant," page 4 was for "EFT Payment Options," page 6 was for an "Agent/Agency Commission Payment Profile," and page 7 was LGA's "Request for Taxpayer Identification Number and Certification." (App. 17, pp. 1-6). And on October 5, 2009 LGA received pages 1-11 from IMC, Inc. (App. 16, header, footer). Thus, petitioner did not receive or submit LGA's neither signed nor dated, ineffective, non-mutual and void 5-page Agreement; rather, IMC added the 5-page Agreement to six pages submitted by petitioner.

LGA's first breach was by first producing its 5-page Agreement over three years and ten months after the NC applicable three year statutes of limitation had expired for fraud and breach of contact. (App. 5, pp. 3, 4). LGA committed a second breach by not signing or dating the Adoption Authorization to make it "effective as of the date authorized by the Company" such as to bind the parties to an agreement.

LGA's third breach is by mending its hold over General Agent IMC, Inc. in Charlotte, NC and General Agent Crump in Harrisburg, PA by altering its reliance on June 24, 2016 to GA "The Marketing Alliance" and by revising the GA name and signature line. (Apps. 16, 17). Fourth, LGA drafted that "The Agent/Broker shall indemnify the Company and the above named Brokerage General Agent;" however, there is no Brokerage General Agent named above. (App. 16, p. 2, "3. Indemnity").

LGA's fifth breach is that none of the five pages within its alleged Agreement make mention of, refers to or incorporates LGA's unsigned, undated and ineffective Adoption Authorization; rather, the only other document incorporated within is the "Agent/Broker Compensation Schedule." (App. 16, p. 2, "4. Compensation, 3rd ¶; p. 5, "18. Entire Agreement"). And sixth, "This Agreement, together with the current Agent/Broker Compensation Schedule and any amendments attached hereto now or in the future, constitute the entire Agreement among the Company, the Brokerage General Agent, and the Agent/Broker;" but the "09/20/09" Adoption Authorization is neither attached as a numbered page or otherwise and is not specifically mentioned. (App. 16, pp. 1-5; p. 5, "18. Entire Agreement")(LGA's sixth breach). Seventh, LGA admitted in its responses to petitioner's Complaint and Amended Complaint, that petitioner and LGA are "no longer parties to an Agent/Broker Agreement." (DE 8, DE 16, and DE 30 at ¶s 82)(emphasis added).

Hutson B. Smelley committed false swearing to the court in that "I hereby certify that on April 6, 2017, a true and correct copy of the foregoing was sent via U.S. and Certified Mail to: John B. Laschkewitsch; /s/ Hutson Smelley," which was false since Smelley sent service to petitioner by U.S. and Certified Mail on April 7, 2017. (App. 18); DE 103; DE 104; DE 109-2; DE 115-1, ¶s 1-35. Further, Smelley declared under penalty of perjury in his fee declaration that "Banner is not seeking the fees and costs for its local counsel. It is also not seeking fees for time spent by other paralegals and another attorney..." (App. 19); DE 104, ¶ 8. However, Smelley committed perjury by seeking fees for local counsel, other paralegals, and for four other attorneys, which was omitted by the district court and the Fourth Circuit.[1]

3. The Lower Courts Omitted Insured Ben's Delayed March 23, 2010 Diagnosis Date And All Of Petitioner's Legitimate Claims

Both lower courts omitted contestability precedent from this Court, the NC Supreme Court, all U.S. Circuit Courts of Appeal, authoritative legal contestability references and N.C.G.S. § 58-58-22(2). (App. 5, p. 4). The courts below also omitted NC applicable statutes of limitation and LGA's agreement breaches, failure to plead or prove Fed.R.Civ.P. § 9(b) particularity, policy affirmations beyond its contestable period, inquiry/notice failures, Ben's March 23, 2010 first "possible ALS" diagnosis date and estoppel by depositing premium after notice and knowledge. And the lower courts did not consider LGA's unfair claim settlement and deceptive trade practices.

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[1] This Court is repectfully requested to review "Plaintiff's Declaration In Support Of Smelley's Fraud By Perjury...," which proves that Hutson Smelley billed for three "another attorney[s]" and local counsel fees within seventeen invoices (App. 20); DE 115-1. The total that Smelley billed for two "another attorney[s]" is $26,570.50. (App. 20, Table 1, lines 1-6). And the fee total that Smelley billed for "local counsel" alone is $17,736.90 or more. (App. 20, Table 1, lines 6-17). These facts prove that Smelley committed fraud on the court.

REASONS FOR GRANTING THE PETITION

I. This Court, The NC Supreme Court And All U.S. Circuit Courts Of Appeal Require A Court Contest Within The Contestable Period

The policy and application within were issued by LGA on January 14, 2010 and became incontestable on January 14, 2012. (App. 6, policy, "January 14, 2010 Date of Issue")(N.C.G.S. § 58-58-22(2)); App. 5, p. 4. LGA first contested the policy and Ben's application on May 11, 2015 (DE 8), which was over three years and four months after its two-year contestable time period had expired.

The policy was delivered in North Carolina and so is subject to NC law. See N.C. Gen. Stat. § 58-3-1. (App. 5, p. 4). North Carolina's contestability statute, N.C. Gen. Stat. § 58-58-22(2) (App. 5, p. 4), states, in pertinent part, as follows:

> Incontestability.–"A provision that the validity of the policy shall not be contested, except for nonpayment of premium, once it has been in force for two years after its date of issue..."

Notably, the controlling statute does not include the phrase "during insured's lifetime,"[2] which was omitted by both lower courts. In fact, the lower courts did not consider, review or ever respond to N.C. Gen. Stat. § 58-58-22(2). (Apps. 1, 2, 3, 4).

On May 29, 2012 LGA deposited petitioner's tenth quarterly premium, check number 8586, in LGA's account with Wells Fargo Bank. (App. 21); DE 1-14. On September 12, 2012 LGA accepted and deposited petitioner's eleventh quarterly premium check. (App. 22); DE 1-15. Then on November 29, 2012 LGA deposited petitioner's twelfth quarterly premium check. (App. 23); DE 1-16.

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[2] "[A] precisely drawn, detailed statute pre-empts more general remedies" (quoting *Brown* v. *GSA,* 425 US 820, 834, 96 S.Ct. 1961, 48 L.Ed.2d 402 (1976)); as in all statutory construction cases, we "assum[e] that the ordinary meaning of [the statutory] language accurately expresses the legislative purpose." *Hardt* v. *Reliance Standard Life Ins. Co.,* 560 US ___, ___, 130 S.Ct. 2149, 2156,176 L.Ed.2d 998(2010). (Emphasis added).

And on February 5, 2013, LGA accepted and deposited petitioner's thirteenth quarterly premium check. (App. 24); DE 1-17, which kept the policy paid and in force through May 26, 2013, over fifteen months beyond LGA's contestable period. Thus, the single statutory exception of "nonpayment of premium" does not apply. And "during insured's lifetime" is not relevant since it is not statutorily included or excluded for policies delivered in North Carolina. Also, the NC contestability statute trumps the policy's contestable provision since the NC State Legislature authored the mandate of N.C. Gen. Stat. § 58-58-22(2)(App. 5, p. 4). See n. 2, supra.

A. United States Supreme Court Contestability Precedent

Here the words, referring to the written policy, are "from its date of issue." "While the question... is not certainly free from reasonable doubt... that in such case the doubt must be resolved in the way most favorable to the insured, we conclude that the words refer not to the time of actual execution of the policy or the time of its delivery but to the date of issue as specified in the policy itself," which here, is January 14, 2010. (App. 6, p. 3, "Issue Date"). *Mutual Ins. Co.* v. *Hurni Co.*, 263 US 167, 175 (S.Ct. 1923). "The argument advanced is that a policy of insurance necessarily imports a risk and where there is no risk there can be no insurance; that when the insured dies what had been a hazard has become a certainty and that the obligation then is no longer of insurance but of payment; that by the incontestability clause the undertaking is that after two years, provided the risk continues to be insured against for the period, the insurer will make no defense against a claim under the policy; but that if the risk does not continue for two years (that is, if the insured dies in the meantime) the incontestability clause is not applicable." *Id.*

"Only in the event of the death of the insured after two years, it is said, will the obligation to pay become absolute. The argument is ingenious [and] fallacious, since it ignores the fundamental purpose of all simple life insurance, which is not to enrich the insured but to secure the beneficiary, who has, therefore, a real, albeit sometimes only a contingent, interest in the policy." *Id.* at 176. (Emphasis added).

"It is true... that the contract is with the insured and not with the beneficiary but, nevertheless, it is for the use of the beneficiary and there is no reason to say that the incontestability clause is not meant for his benefit as well as for the benefit of the insured. It is for the benefit of the insured during his lifetime and upon his death immediately inures to the benefit of the beneficiary." As said by the Supreme Court of Illinois in *Monahan* v. *Metropolitan Life Ins. Co.,* 283 Ill. 136, 141: "Some of the rights and obligations of the parties to a contract of insurance necessarily become fixed upon the death of the insured. The beneficiary has an interest in the contract, and as between the insurer, [here LGA/Banner], and the beneficiary, [here petitioner], all the rights and obligations of the parties are not determined as of the date of the death of the insured. *Id.* The incontestable clause in a policy of insurance inures to the benefit of the beneficiary after the death of the insured as much as it inures to the benefit of the insured himself during his lifetime." *Id.*

"The rights of the parties under such an incontestable clause as the one contained in this contract do not become fixed at the date of the death of the insured." *Id.* at 177. (Emphasis added)."The provision plainly is that the policy shall be incontestable upon the simple condition that two years shall have elapsed from its date of issue; — not that it shall be incontestable after two years if the insured shall live, but incontestable without qualification and in any event," just as here. *Id.*

Here, as aforementioned, pursuant to this Court's precedent, N.C.G.S. § 58-58-22(2) controls, which does not include "during insured's lifetime," n. 2, supra. So here, as in *Hurni*, the NC contestability statute "plainly is that the policy shall be incontestable upon the simple condition that two years shall have elapsed from its date of issue; — not that it shall be incontestable after two years if the insured shall live, but incontestable without qualification and in any event." We "are constrained to hold that it admits of no other interpretation than that the policy became incontestable upon the sole condition that two years had elapsed," as here. *Id.*, 178.

As further held by this Court, "The instant case is not one in which there is resort to equity for cancellation of the policy during the life of the insured and no opportunity exists to contest liability at law. Nor is it a case where, although death may have occurred, action has not been brought to recover upon the policy, and equitable relief is sought to protect the insurer against loss of its defense by the expiration of the period after which the policy by its terms, [as here], is to become incontestable." *Enelow* v. *New York Life Ins. Co.*, 293 US 379, 384 (S.Ct.1935).

Citing *American Life Ins. Co.* v. *Stewart*, "on the death of the insured, an action at law was brought on the policy, and the defendant had opportunity in that action at law, and before the policy by its terms became incontestable, to contest its liability and accordingly file its affidavit of defense."A 'contest' within the purview of the policy contract has generally been held to mean a present contest in a court, not a notice of repudiation or of a contest to be waged thereafter." 300 US at 212, n. 2, n. 3 (S.Ct. 1937)(DE 112-2). Here, LGA has no resort to equity or in law, pursuant to this Court's precedent, as it brought a contest after the expiration of the January 14, 2012 contestable period and after the policy by its terms became incontestable.

Moreover, this Court affirmed the Fifth Circuit in *Northwestern Mutual Life Insurance Co.* v. *Pickering*, 293 F.496, 499 (5th Cir.) cert. denied, 263 US 720 [44 S.Ct. 229, 68 L.Ed. 524] (1923). In *Pickering*, the Fifth Circuit held that "Under the terms of the policy now in question, the insurer's right to contest would have been lost, [here LGA's], if the insurer had not contested the policy by invoking judicial action to that end within two years from the date the policy took effect, [issue date], not from the date of the execution of the policy, which is charged to have been procured by alleged false statements." 293 F. 496. Thus, LGA's "right to contest the policy" was "lost" since LGA did not "invoke judicial action" by January14, 2012, but chose, by its own volition, to delay its first contest until May 11, 2015. (DE 8).

B. North Carolina Supreme Court Contestability Precedent

Foremost, federal courts are courts of limited jurisdiction and are supposed to follow rulings from the highest Court, when spoken, in the State in which they sit. However, by the Fourth Circuit's affirmation, the lower court omitted NC Supreme Court precedent. See *Sanderson* v. *Rice,* 777 F.2d 902, 905 (4th Cir.1985).

Am. Trust Co. v. *Ins. Co. of VA*, 173 N.C. 558, at 612-620 (DE 58-5), as cited by this Court and the NC Supreme Court controls. See *American Life Ins. Co.* v. *Stewart*, 300 US 203 at n. 2 (S.Ct. 1937)(DE 112-2); *Chavis* v. *Southern Life Ins. Co.*, 347 SE2d at 427 (N.C. 1986)(DE 115-3).[3] "The modern rule is that a life insurance policy containing a provision that it shall be incontestable after a specified time cannot be contested by the insurer on any ground not excepted in that provision."*Id.*

[3] This NC Supreme Court precedent was briefed in the lower courts; however, omitted by both lower courts, which prejudiced petitioner. See DE 106; pp. 4-11; DE 115, pp. 6-12.

Also, "the incontestable clause covers this defense of the bad health of the insured at the time of the delivery of the policy as well as false and fraudulent statements in the application and the policy and if this is not the legal effect of the clause, why insert it, except for the purpose of deceiving and misleading the insured?" *Id.* at 615-16. (Emphasis added). "The authorities are practically uniform in holding that an incontestable clause, which gives a reasonable time for the insurance company [here LGA] to make investigation, is valid, and that it means what it says, and that is that after the time named in the clause has expired no defense can be set up against the collection of the policy, unless it comes within the excepted classes named in the clause itself, which in this case, as here, would be the nonpayment of premiums." *Trust Co.,* at 615-16. (Emphasis added).

Thus, "it has become an almost universal practice with insurance companies to provide against any contest or forfeiture of their policies after a certain length of time, greater in some cases and less in others." *Id.* at 616. "The practical and intended effect of the stipulation is to create a short statute of limitation in favor of the insured, *within which limited period the insurer must, if ever, test the validity of the policy.*" *Id.*, at 616-17. (Emphasis added). Moreover, "While fraud is obnoxious, and should justly vitiate all contracts, the courts should exercise care that fraud and imposition should not be successful in annulling an agreement to the effect that if cause be not found and charged within a reasonable and specific time [two years from the policy's issue date], establishing the invalidity of the contract of insurance, [the policy] should thereafter be treated as valid." *Id.* at 617. (Emphasis added).

"This is also in accordance with the authorities holding that if the [defendant] wishes to contest and to avoid the payment of the policy and the force of the incontestable clause, it must take affirmative action within the time limited by the policy." *Id.* at 619. The meaning of the terms, "take affirmative action," "test the validity of the policy," if in doubt, is made clear by the decision in *Wright* v. *Benefit Association*, 43 Hun., 65, which was affirmed in 118 N.Y. 237, in which the court, speaking of a policy which became incontestable after two years, says:

"Its effect is not to prevent the insurer from annulling the contract upon the ground of the fraudulent representations of the insured, provided *an action is brought* in the lifetime of the insured and *within two years from the date of the policy." Id.* at 620 (emphasis added). "We are, therefore, of opinion, as the [plaintiff] had an insurable interest in the life of the insured when the policy was issued, and as no action was brought by the [defendant] within one year from the date of the policy to have the contract of insurance canceled or rescinded, that the incontestable clause was in force at the death of the insured, and the [defendant] is precluded thereby from relying on the defenses set up." *Id.* (Emphasis added). As further held by the NC Supreme Court, "since the incontestability provision does not expressly permit the company to contest the policy on grounds of material misrepresentations by the insured beyond the two-year limit, ordinary rules of contract construction [precludes] the company, [here LGA/Banner], from asserting this defense." *Chavis* v. *Southern Life Ins. Co.*, 347 S.E.2d at 427 (N.C. 1986)(citing *American Trust Co.*).[4]

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[4] Though briefed, the district court erred by omitting contestability precedent from the NC Supreme Court, this Court, and all U.S. Circuit Courts of Appeal. (DE 106; pp. 4-11; DE 115, pp. 6-12). Also *Am. Trust Co.* has been cited 101 times, including by this Court and the Second, Fourth, Seventh, Eighth, Ninth, Tenth and D.C. U.S. Circuit Courts of Appeal.

C. Unanimous Circuit Courts Of Appeal Contestability Precedent

The First Circuit holds that "Incontestability clauses set temporal limits on an insurer's right to challenge its insurance policy based on alleged misstatements in the insurance application." *Velez-Gomez* v. *SMA Life Assurance Co.*, 8 F.3d 873, 875-76 (1st Cir. 1993); ("The court expressly rejected the argument that there could not have been a mutual rescission because the terms of the policy would have prevented unilateral rescission (specifically, because the contestable period had expired)). The judgment of the district court is *affirmed;*" *Pruco Life Ins. Co.* v. *Wilmington Trust Co.*, 721 F.3d 1 (1st Cir. 2013). ("If the two-year period, after which the policy became incontestable, except for nonpayment of premiums, ran for all purposes..., the answer set up no defense and summary judgment was properly granted... Accordingly, if more than two years had elapsed since the date that the policy bore, though somewhat less than two years had elapsed since the date when the policy was delivered, the company could not avoid payment on the ground of fraud for the reason that such a defense was barred by express agreement of the parties." *Wallach* v. *Aetna Life Insurance Co.*, 78 F. 2d 647, 648 (2nd Circuit 1935).

See also New England Mutual Life Ins. Co. v. *Gillette*, 171 F.2d 500 (2nd Cir. 1948)("The gravamen of the action was that, as all claims made under the policy became incontestable after two years from its issue, it was necessary for the insurer to establish its defense within that period"); *Franklin Life Ins. Company* v. *Bieniek*, 312 F. 2d at 368 (3rd Cir. 1962)("The great weight of authority supports the position that the insurer must at least disavow liability within the contestable period to be relieved — not necessarily by legal action, but some definite step, specifying the ground of complaint, in such form as to effect a cancellation of the contract").

The Fourth Circuit holds that "The insurer has a statutory period in which to ascertain the facts and act thereon, and failing so to do it will not be heard to assert defenses precluded by a statute of incontestability." *Sutton* v. *American Health & Life Ins. Co.*, 683 F. 2d at 96 (4th Cir. 1982). See also *Provident Mutual Life Ins. Co.* v. *Parsons*, 70 F.2d 863, 866 (4th Cir. 1934)("...a rule of law which imposes on the applicant the simple duty of reading the contents of his application to assure himself of the accuracy and completeness of the information to be given the Company as the basis of its acceptance of the risk, cannot reasonably be said to be too rigorous or exacting; especially where the policy contains an incontestable clause, limiting the time during which the Company may contest its liability on the ground of fraud or misrepresentation to a relatively short period")(emphasis added). See also *Bell* v. *Philadelphia Life Ins. Co.*, 78 F. 2d 322 (4th Cir.1935).

In *Scharlach* v. *Pacific Mut. Life Ins. Co.*, the Fifth Circuit held that "The District Court also erred in striking out that part of the amended answer which sought to set out affirmatively that the insured was in bad health and suffering from a fatal disease. It is true that a clause in a life insurance policy making it incontestable after one year imports [a] contest by litigation, and that a mere denial or repudiation by the insurer of liability, accompanied by a tender of the premium paid, is not a contest within the meaning of such clause." 9 F. 2d 317, 318 (5th Cir. 1925). See also *Pickering*, 293 F.496, 499, supra, at 13. The Sixth Circuit holds that "The weight of authority is to the effect that contest, within the meaning of clauses of this kind, means some affirmative or defensive action taken in court." *Rose* v. *Mutual Life Ins. Co. of New York*, 19 F. 2d 280 (6th Cir. 1927).

The Seventh Circuit holds that "The incontestability clause is in the nature a statute of limitation and repose, and while conscious fraud practiced in inducing another to act, to his detriment, is extremely obnoxious, yet the law recognizes that there should be a limitation of time in which an action may be brought or a defense set up."*Columbian Nat'l Life Ins. Co.* v. *Wallerstein*, 91 F.2d 351, 352 (7th Cir.1937). In *Peake* v. *Lincoln Nat. Life Ins. Co.*, the Eight Circuit held that a "Contest, within the meaning of the provision of the [contestable] clause in question, is confined to appropriate court proceedings within the time limited." 15 F. (2d) 303 (8th Cir.).

The Ninth Circuit holds that "The purpose of an incontestable clause is to annul all warranties and conditions that might defeat the right of the insured after the lapse of the stipulated time." *Button* v. *Connecticut General Life Ins. Co.*, 847 F.2d at 588 (9th Cir. 1988). In *Stewart* v. *American Life Ins. Co.*, the Tenth Circuit held that "That by the foregoing provisions said policy is incontestable after two years from its date of issue; that by reason of said provision said policy of insurance must be contested by this complainant on or before the expiration of the said period of contestability, notwithstanding the intervening death of the insured; that the defendant herein, the beneficiary under said policy, may delay the commencement of an action at law for the enforcement and collection of said policy until after the expiration of said contestable period or, if action is instituted, may dismiss the same after the expiration of said two-year period, so as to prevent this complainant from defending its liability under the policy on the ground of misrepresentation and fraud..." 85 F.2d 791,792 (10th Cir.1936). See also *Hurt* v. *New York Life Ins. Co.*, 51 F. 2d 936, 938 (10th Cir. 1931).

"Incontestability clauses function much like statutes of limitations. While they recognize fraud and all other defenses, they provide insurance companies with a reasonable time in which to assert such defenses, and disallow them thereafter." *American United Life Ins. Co.* v. *Martinez*, 480 F.3d at 1059 (11th Cir. 2007); See also *Allstate Life Ins. Co.* v. *Miller*, 424 F. 3d 1113, 1115-17 (11th Cir. 2005). And "The clause, in effect, if not in form, is a statute of limitations, established by convention, and like the statute is directed to remedies in court." *Densby* v. *Acacia Mutual Life Association*, 78 F. 2d at 205, 6 (D.C. Cir. 1935). (Emphasis added).[5]

D. The Courts Below Erred By Holding A Non-Produced January 26, 2010 Policy To Be The "Operative Policy"

No policy with an Issue Date of January 26, 2010 was produced by either party or is in a lower court record. Petitioner produced the incontestable January 14, 2010 policy; the second issued February 24, 2010 policy; and the March 8, 2010 duplicate policy, which was delivered to petitioner on February 7, 2012, three weeks following Ben's death. (Apps. 6, 7, 9); DE 1-3, DE 52-2, 10, 11 and DE 106-6. LGA produced the incontestable January 14, 2010 and the March 8, 2010 duplicate policy only. DE 63-1, Ex.1-E, BANNER 2388-2421; and DE 63-1; Ex. 1-I, BANNER 2348-2378. Nonetheless, LGA and the lower courts relied on the sham affidavit of Cheryl Milor (App. 15), wherein she basically stated that every policy could be produced, but for the January 26, 2010 policy that LGA and the courts below wholly relied on.

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[5] Therefore, the lower courts abused their discretion since this Court, the NC Supreme Court and all U.S. Circuit Courts of Appeal hold that a life insurance policy contest must be commenced in a court within the two year contestable time period, which LGA failed to do. See also Couch, Vol. 8, § 2155b; 18 Couch et al., § 72:71 (2d ed. rev. vol. 1983); 1A John A. Appleman & Jean Appleman, *Insurance Law and Practice* § 332 (rev. vol. 1981); N.C. Gen. Stat. § 58-58-22(2); and the Annotation "What Amounts To Contest Within Contemplation Of Incontestability Clause," 95 A.L.R.2d 420, § 2 (1964), which all maintain the same and have been cited by this Court, the NC Supreme Court and all U.S. Circuit Courts of Appeal.

Notably, at 4:19 P.M. on February 22, 2012, five weeks after Ben's January 15, 2012 death, Ambika Kumar, LGA's issue department supervisor, stated "this Policy was issued and mailed out yesterday with effective date of 01/26/10." (App. 25, p. 1) DE 1-9; but petitioner did not receive such "01/26/10" policy. Nonetheless, this admission proves that all of LGA's generated "01/26/10" policy forms, (App. 26); DE 63-1, Ex. 1-F, were assembled by LGA following Ben's death. (App. 8); DE 1-11.

Also, the alleged January 26, 2010 policy relied on by LGA (App. 26); DE 63-1, Ex. 1-F) is incomplete. Missing in front of the "Policy Schedule" is the policy cover page signed by LGA's President and Secretary and a "Table of Contents."[6] Absent following the "Policy Schedule" is a "Policy Schedule (Continued);" Policy pages 4-11; Ben's Application "Part 1," pages 1-5; Ben's Application "Part 2," pages 7-9; the Policy's final page announcing "Renewable and Convertible Term Life Insurance;" LGA's "Statement of Cost and Benefit Information;" a "Notice Concerning Coverage Limitations And Exclusions Under The North Carolina Life And Health Insurance Guaranty Association Act," as required by NC law; and LGA's required "Privacy Policy," and "Life Insurance Buyer's Guide," as also required by NC law.[7]

Insured Ben is the owner of the incontestable January 14, 2010 policy. (App. 6, Ben's application, p.1, question 18). Ben simply requested that LGA bring the original Policy Date forward/current from September 22, 2009 to January 14, 2010.

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[6] Notably, the incontestable January 14, 2010, February 24, 2010 and duplicate March 8, 2010 policies are all signed by LGA's President and Secretary (Apps. 6, 7 and 9), but not so for the non-existent January 26, 2010 "correspondence" produced by LGA (App. 26).

[7] LGA's failure to include a Buyer's Guide in its incomplete January 26, 2010 documents is an unfair and deceptive trade practice in North Carolina. (App. 5, p. 5, N.C.G.S. §§ 58-60-15, 30 and Article 63 (Unfair Trade Practice Act). Therefore, reliance by LGA and the courts below on a January 26, 2010 policy calls for treble damages against LGA.

Owner Ben did not make a request in writing to LGA; rather, on January 25, 2010 petitioner notified LGA of Owner Ben's request by telephone. (App. 27); DE 106-2. Notably, LGA admitted that "All change request[s] must be made in writing within the free look period to ensure completion of the change" (App. 27); DE 106-2, which never happened. Further, "only the owner may exercise all the rights and agree with us as to changes in the policy." (App. 6, policy, p. 4, "Owner;" p. 6 "The Contract"). However, policy owner Ben did not agree made in writing to change the Issue Date from January 14, 2010. Also, LGA responded that it "would produce a copy of the policy it issued on the insured's life." (App. 14); DE 47-7, 8, LGA's Sixth Production Response. But, LGA thereafter admitted that it did not have a copy of a .January 26, 2010 Policy within its policy file. (App. 28, pp. 3, 4; DE 59); App. 26.[8]

As *this Court* well explained in *Anderson* v. *Liberty Lobby*, "On summary judgment, we must draw all justifiable inferences in favor of the nonmoving party, [here petitioner], including questions of credibility and of the weight to be accorded particular evidence." 477 US 242, 255, 106 S.Ct. 2505, 2513, 91 L.Ed.2d 202 (1986). The non-moving party is entitled "to have the credibility of [its] evidence as forecast assumed, [its] version of all that is in dispute accepted, [and] all internal conflicts in it resolved favorably to [it]." *Miller* v. *Leathers,* 913 F.2d 1085, 1087 (4th Cir.1990), *cert. denied,* ___ U.S. ___, 111 S.Ct. 1018, 112 L.Ed.2d 1100 (1991).

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[8] Petitioner testified under oath before the district court that neither petitioner nor Ben was delivered a policy with an Issue Date of January 26, 2010, either during Ben's lifetime or thereafter. (App. 29); DE 1-10, ¶s 4-21. However, the lower courts omitted petitioner's under oath testimony. Further, the district court abused its discretion under Rule 201(c) of the Federal Rules of Evidence by refusing judicial notices from petitioner that no policy was produced by either party or is in the court record with a January 26, 2010 Date of Issue. DE 106, p. 1; DE 106-7, ¶s 24, 32-37, 47-52, 64-67, 76-104, and 196; and DE 109-1.

Moreover, the Fourth Circuit disregarded its own precedent. Fed.R.Civ.P. 56 procedures "allow a district court to ascertain, through criteria designed to ensure reliability and veracity, that a party has real proof of a claim before proceeding to trial." *Orsi* v. *Kirkwood*, 999 F. 2d 86, 91 (4th Cir. 1993). In addition, "plaintiffs did not offer their proof in the proper, authenticated form. It is well established that unsworn, unauthenticated documents, [as here], cannot be considered on a motion for summary judgment." *Id.*; *Hal Roach Studios, Inc.* v. *Richard Feiner and Co.,* 896 F.2d 1542, 1550-51 (9th Cir.1990); *Martz* v. *Union Labor Life Ins. Co.,* 757 F.2d 135, 138 (7th Cir.1985). To be admissible at the summary judgment stage, "documents must be authenticated by and attached to an affidavit that meets the requirements of Rule 56(e)," which LGA failed to do. See 10A Charles A. Wright et al., *Federal Practice and Procedure* § 2722, at 58-60 (1983 &1993 Supp.); *Orsi,* supra, at 92.

Moreover, Federal Rule of Civil Procedure 56(e) provides, in relevant part:

> (e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith...[9]

And the critical factor for authentication is demonstrating, "through evidence ... a finding that the document is what the proponent claims." Fed.R.Evid. § 901. But here, the March 8, 2010 duplicate policy was not the document proponent Milor claimed it to be; "a true and correct copy," of a non-existent January 26, 2010 policy.

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[9] The affidavit of Cheryl Milor (App. 15) was not in the proper form. Milor falsely stated that the March 8, 2010 duplicate policy, which was delivered three weeks after Ben's death, is a true and correct copy of LGA's alleged January 26, 2010 policy. Here, Milor failed to attach a certified copy of a January 26, 2010 policy contract to support her false reference.

II. The Courts Below Omitted LGA's Agreement Breaches, Improperly Filed Fee Request, Under Oath Perjury And Fraud On The Court

Petitioner fully incorporates his "Summary of the Case; 2." at pp. 5-8, supra, which prove LGA's seven or more breaches of its ineffective non-mutual Agreement, Hutson B. Smelley's under oath perjury by false swearing regarding the service date of his declaration and fee motion, and Smelley's fraud on the court by his knowingly made false statements in his fee declaration. Also, LGA's fee request was improper since LGA failed to file an affidavit of prevailing market rates. *Blum* v. *Stenson,* 465 US 886, 888-96 (S.Ct. 1984). Nor did LGA file a required "bill of costs," pursuant to EDNC Local Rule 54.1(a)(3); 28 U.S.C. § 1920. (App. 5, pp. 2, 7). See also *Taniguchi* v. *Kan P. Saipan, Ltd.,* US, 132 S.Ct. 1997, 1999-2000, 182 L.Ed.2d 903 (2012).

Since no Agent/Broker Agreement was submitted by petitioner and was first received from LGA on June 24, 2016 within LGA's summary judgment filing, the alleged Broker Agreement is "nugatory and void for indefiniteness," pursuant to NC Supreme Court precedent. See *Boyce* v. *McMahan,* 285 N.C. 730, 734, 208 S.E.2d 692, 695 (1974); *Miller* v. *Rose,* 138 N.C.App. 582, 587-88, 532 S.E.2d 228, 232 (2000)(citing *Boyce*). (App. 16, pp. 1-5, altered "Adoption Authorization," 11 pages "RCVD" by LGA; App.17, pp. 2-6). And since LGA failed to sign or date the Adoption Authorization, such form was not made "effective as of the date authorized by the Company," such as to bind either party to an Agreement. (App. 16, pp. 1-5, Adoption Authorization, ¶s 1, 3). See *Normile* v. *Miller,* 313 N.C. 98, 103, 326 S.E.2d 11, 15 (1985)(Before a valid contract can exist under North Carolina law, the parties must "assent to the same thing in the same sense, and their minds meet as to all terms."

Further, the writing or writings must "show the essential elements of a valid contract," *Smith* v. *Joyce,* 214 N.C. 602, 604, 200 S.E. 431, 433 (1939), and "'the *intent* and *obligation* of the parties.'" *Rape* v. *Lyerly,* 287 N.C. 601, 615, 215 S.E.2d 737, 746 (1975)(quoting *Mayer* v. *Adrian,* 77 N.C. 83, 88 (1877)). If any portion of the proposed terms is not settled, or no mode agreed on by which they may be settled, there is no agreement.'" *Boyce* v. *McMahan,* 285 N.C. 730, 734, 208 S.E.2d 692, 695 (1974). No contract is formed without an agreement to which at least two parties manifest an intent to be bound. *Parker* v. *Glosson,* 641 SE 2d at 737 (N.C.App. 2007)(quoting *Croom* v. *Goldsboro Lumber Co.,* 182 N.C. 217, 220, 108 S.E. 735, 737 (1921)(mutual assent is an "essential element" of every contract).

In law, this agreement is commonly called mutual assent and is customarily described as a "meeting of the minds." Id. See also *Charles Holmes Mach. Co.* v. *Chalkley,* 143 N.C. 181, 183, 55 S.E. 524, 525 (1906)("The first and most essential element of an agreement is the consent of the parties, an *aggregatio mentium,* or meeting of two minds in one and the same intention, and until the moment arrives when the minds of the parties are thus drawn together, the contract is not complete, so as to be legally enforceable"). Here, no met minds or mutual consent occurred.

The reason for holding the instrument void is that it was intended that all the parties should execute it and that each executes it on the implied condition that it is to be executed by the others, and, therefore, that *until executed by all it is inchoate and incomplete and never takes effect as a valid contract... "Hilliard* v. *Thompson,* 81, N.C.App. at 409, 344 S.E.2d at 591(1986)(Whichard, J. concurring). Here, no valid contact took effect since LGA failed to execute its Adoption form.

The stand-alone one-page Adoption Authorization is subject to NC law since petitioner signed and dated such form in North Carolina. Pursuant to NC law, there was no "assent to the same thing in the same sense," no meeting of minds between all parties as to all terms, no *intent* and *obligation* of the parties and no agreement to which LGA manifested an intent to be bound, with unmet essential elements of a valid contract. And the proposed terms were not settled to form an agreement. This is so since petitioner signed and dated the Adoption Authorization form (Apps. 16, 17), but LGA neither signed nor dated the Adoption Authorization form in order for petitioner and LGA to meet minds in the same sense or to manifest the same intent.

III. The Courts Below Omitted Insured Ben's March 23, 2012 Specialist Referral Date To Determine Whether Ben Had "Possible ALS"

The courts below omitted that insured Ben first consulted with a specialist by referral to determine whether or not he had ALS on March 23, 2010, which was over two months after the policy was approved and issued. (App. 6, policy, p. 1). From August 18-20, 2009 Ben voluntarily participated at UCSF's "California Alzheimer's Disease Center" for "research only." (App. 30, 2nd ¶). During the out-brief, Ben was NOT told that he had ALS, did NOT receive any research records, had NO follow up scheduled and was only told he should find an "East Coast specialized physician... should the need arise." (App. 31, ¶s 6, 8, DE 27-43; App. 32, ¶s 17-21, DE 27-44).[10]

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[10] A research "IMPRESSION" of Ben's voluntary participation was discovered following Ben's death, wherein UCSF stated: "The gene for FTD/ALS, which resides on chromosome 9, has not been identified, and therefore a definitive test for diagnosing his illness is not possible." (App. 33, "IMPRESSION," p. 7 of 8, excerpt). This finding from UCSF that it was not possible to diagnose Ben in August, 2009 proves that the district court erred in alleging that Ben was diagnosed with ALS in August, 2009 (App. 4, p. 2) and by relying on records not possessed by Ben or petitioner or produced until after Ben's death. Also, UCSF was not then an "ALS Certified Center of Excellence" or a multi-disciplinary ALS clinic. (App. 34).

On August 24, 2009 Ben consulted with Dr. Morton Meltzer regarding his concern over elevated cholesterol. Dr. Meltzer testified that if he or his staff "would have seen anything or any reason to make a referral, he would have done so." (App. 35, Meltzer Dep. 62:7-64:14); DE 106-12. On September 29, 2009 Ben had a General Physical Examination with U.S. Health Works. Therein, Ben stated that he had no major illness, injury, mental illness or muscle weakness. (App. 36, questions 3, 8, 52); DE 106-14. And progressive muscle weakness is the first sign of ALS. (Apps. 37, 38); DE 115-4, 5. Therefore, Ben did not then have or believe that he had ALS.

On December 15, 2009 Ben consulted with PA Michael Lischynski, who was "unbelievably thorough; you could come in with a hangnail and he'd find out everything about you" and would have referred Ben to see a specialist if he believed that Ben had an illness. (App. 35, Meltzer Dep. 35:15-21, 40:14-41:1, 63:22-64:14); DE 106-12. And on December 17, 2009 Ben consulted with Dr. Lucas Van Tran who recorded a normal exam and testified that, if he "suspected a 20% chance" that Ben had ALS, he would have referred Ben to see a specialist at Duke or Chapel Hill, N.C. (App. 39, Dr. Van Tran consult; App. 40, Van Tran Dep. 46:6-25); DE 106-15.

On January 22, 2010, VA neurologist Dr. Sampath Charya met with Ben and thereafter transcribed "Motor: full power and normal tone in all four limbs, able to toe-walk, heel-walk and tandem walking; and no abnormal involuntary movements, fasciculations... symmetric muscle bulk" from his consultation with Ben. (App. 41, pp. 1-4). Dr. Charya concurrently referred Ben to Duke University Medical Center's multidisciplinary ALS Clinic, one of North Carolina's five "ALS Certified Centers of Excellence." (App. 41, p. 5, "he has fee basis neuro eval pending"); DE 106-17.

This neurological evaluation of Ben is proof from a certified VA neurologist, given after the January 14, 2010 incontestable policy was approved and issued by LGA, that Ben did NOT have ALS in January, 2010 since the first signs of possible ALS are progressive muscle weakness and a visible fasciculation (App. 37, p. 1, Table 1, p. 3, "Possible ALS," DE 115-4; App. 38, p. 1, 1st ¶, 2nd ¶, p. 2, DE 115-5; App. 42,) and since "the median time from onset to diagnosis is 11 months. " (App. 43).[11] And also then recorded by Dr. Charya is "per specialist like neurologist to make that decision. Wife understands this." (App. 41, p. 5). (Emphasis added).

On March 23, 2010 Ben first consulted, by referral from Dr. Charya, with ALS specialist Dr. Richard Bedlack at Duke Medical Center, one of North Carolina's five ALS Certified Centers of Excellence "to make that decision," of whether Ben had "possible ALS?" (App. 44). Notably, this specialist referral was over two months after the incontestable policy was issued and over one month after LGA had placed the incontestable policy in force with receipt of premium. (App. 45, LGA's receipt of premium). Further, ALS diagnostic categories are "possible, probable, probable lab-supported and definite" (App. 37, p.1, 3rd ¶; App. 46; App. 47 and App. 40, p. 46), with "possible" ALS being the "least certain degree." (App. 38, "Diagnosis,"2nd ¶).

As well, the diagnosis of ALS requires a second opinion by an ALS "expert" in a "multidisciplinary clinic," known as an "ALS Certified Center of Excellence." (App. 48, p. 5). DE 106-18. Thus Ben's March 23, 2010 specialist consult referral date with an ALS "expert" was required for a confirmed diagnosis of "possible ALS." And Dr. Bedlack did transcribe "consultation... for possible ALS..." (App. 44, first sentence).

[11] The courts below had this evidence, but erroneously held petitioner to have known more than Dr. Meltzer, Dr. Van Tran, Dr. Charya and PA Lischysnki. (DE 106-11-18).

Moreover, "there are false positive diagnoses, ailments with symptoms that mimic ALS and people diagnosed with ALS have lived for ten or more years." (App. 49, ¶s 3-13, 16-18, DE 27-2; App. 38, "Diagnosis," 1st ¶, p. 2; Apps. 42, 43, 47, 50, 51 and 52). And it is for these reasons that a specialist referral in a "Certified Center of Excellence" is required to diagnose ALS, which for Ben was on March 23, 2010.

Further confirming Ben's March 23, 2010 consult "for possible ALS" is the story of Robert Hawkins, an Air Force veteran residing in Fayetteville, NC, just like Ben, who was finally diagnosed with ALS in 2008 "after three years of inaccurate diagnoses" (App. 48, p. 4); DE 106-18, the story of Terry Herring (App. 53), former Fayetteville State Basketball Coach Jeff Capel, Jr.'s death from ALS on November 13, 2017 after being "diagnosed ... by doctors at Duke University," not by doctors in Fayetteville, NC, where he also resided (App. 54, p. 2); DE 115-6, the Affidavit of Scott T. Laschkewitsch (App. 55, ¶s 2-12); DE 106-16, Imelda L. Laschkewitsch's Affidavit (App. 56, p. 1); DE 27-42, and Ben's obituary. (App. 57; lines 19-20).

Thus, LGA's and the lower courts reliance on a "possible ALS" diagnosis date earlier than March 23, 2010 on Ben has no merit. And the lower courts abused their discretion by relying on documents outside of the policy and Ben's application, not in petitioner's possession during Ben's lifetime and the policy contract approved on January 7, 2010 (App. 58), with February 22, 2010 applied premium. (App. 45).

IV. The Lower Courts Omitted All Of Petitioner's Remaining Claims

A. LGA's First Contest Was Beyond NC Statutes Of Limitation

The policies and the one-page Adoption Authorization were all delivered and signed in North Carolina and are subject to NC law. (App. 5, p. 4, N.C.G.S. §58-3-1).

The one-page Adoption Authorization with five additional appointment forms were all signed and dated in North Carolina on July 20, 2009. Ben's application was signed and dated in North Carolina on September 22, 2009. The policy was issued and delivered to North Carolina on January 14, 2010. The incontestable policy was in force with received and applied premium on February 22, 2010. (Apps. 6, 58).

On May 11, 2015 LGA first contested the policy contract, Ben's application within the policy contract and an alleged, but ineffective Agreement. (DE 8). LGA's contest was over five years after every contested document or contract was signed, dated, submitted and received.

The North Carolina applicable statutes of limitation for breach of contract and fraud are three years. (App. 5, p. 3, 4, N.C.G.S. §§ 1-52(1), (9)). Thus, all of the limitations periods expired on or before February 22, 2013.

An NC statute of limitation is "inflexible and unyielding and does not permit tolling based on an injured parties' discovery." *Flexible Foam Prod., Inc.* v. *Vitafoam Inc.*, 980 F. Supp. 2d 690, 701 (W.D.N.C. 2013)(quoting *Pearce* v. *N.C. State Highway Patrol Voluntary Pledge Comm.*, 312 S.E. 2d 421, 425-26 (N.C. 1984)(DE 115-8). (Emphasis added). And "This Court strictly adheres to and is bound by the following principles enunciated in *Shearin* v. *Lloyd,* 246 N.C. 363, 98 S.E.2d 508 (1957)." *See also Pearce*, supra, 312 S.E. 2d at 425 (N.C. 1958).

> "Statutes of limitations are inflexible and unyielding. They operate inexorably without reference to the merits of [claimant's] cause of action. They are statutes of repose, intended to require that litigation be initiated within the prescribed time or not at all."

Pierce, at 425. "It is not for us to justify the limitation period prescribed for actions such as this." *Id.*

"Suffice to say, this is a matter within the province of the General Assembly." See *Shearin* at 370, 98 S.E.2d at 514. "A [parties]'s lack of knowledge concerning his claim does not postpone or suspend the running of the statute of limitations." *Lewis* v. *Shaver,* 236 N.C. 510, 73 S.E.2d 320 (1952). "Equity will not afford relief to those who sleep upon their rights, or whose condition is traceable to that want of diligence which may fairly be expected from a reasonable and prudent man."*Coppersmith* v. *Insurance Co.,* 222 N.C. 14, 17, 21 S.E.2d 838, 839 (1942).

Since LGA first contested Ben's application and its alleged Agreement on May 11, 2015 (DE 8), all of its defenses are barred by N.C.G.S. §§ 1-52(1), (9) and North Carolina Supreme Court precedent; *Pearce*, *Shearin*, *Shaver*, and *Coppersmith*, supra, because the NC limitations periods are "inflexible and unyielding" and cannot be suspended based on LGA's discovery and "lack of knowledge." Thus, this Court should summarily REVERSE judgment over NC law and NC precedent.

B. LGA Failed To Inquire Or Exercise Reasonable Diligence Over Multiple Statements Received

Ben authorized LGA to obtain and disclose information, including any and all "medical and personal information... for twenty four months from the September 22, 2009 date on Ben's application." (App. 6; policy; p. 5; "Authorization To Obtain and Disclose Information"). But LGA never inquired. On October 8, 2009 LGA notified Ben that "We have received your insurance application and we are in the process of evaluating all medical and personal information." (App. 59); DE 106-8. On October 16, 2009 IMC forwarded 158,674 Total Bytes of Ben's VA medical records to LGA's underwriter for review. (App. 60; DE 52-4). But LGA again made no inquiry.

On November 24, 2009 LGA's underwriter, Barbara Ballard, decided to limit LGA's coverage offer for Ben by stating: "please note that this case will be limited to $500,000." (App. 61); DE 52-6. Also on November 24, 2009 LGA's Chief Underwriter hand wrote "Postponed" over MIB Code 200#ZN and MIB Symbol FD and noticed Ben that "At this time, it is our decision to postpone your application..." [12] (App. 62); DE 52-3. On November 25 LGA's underwriter noticed Ben that "Unfortunately, we are unable to issue a policy at this time." (App. 63); DE 52-5. And on an unknown date in late November, 2009, an LGA affiliate spoke with Ben "at length" regarding a possible "neuro exam between 07/09/09 and now" and asked if Ben had "an exam scheduled." (App. 64); DE 106-8. But LGA made no other inquiries, despite having taken notice of "missing pages" during this same time period. (App. 65); DE 106-8.

On January 7, 2010 LGA made its coverage offer through its communication with IMC, Inc. that "Case approved standard non tobacco due to chol/hdl ratio 7.4." (App. 58); DE 106-8; IMC 0086, 0087). However, at no time between September 22, 2009 and January 7, 2010 did LGA inquire of petitioner, Ben, Ben's spouse, any of Ben's physicians or LGA's paramedical examiner. Then on January 11, 2010, LGA's underwriter, Barbara Ballard, recorded that "This case has been randomly selected for audit; the final decision is subject to this review." (App. 66). But again, LGA's underwriter did not inquire of Ben, petitioner, Ben's spouse, MIB, Inc., LGA's examiner, Ben's disclosed physicians or Ben's disclosed VA medical providers. (App. 6, policy, "Application Part 2 Medical History," p. 7, question 4, Primary Physician).

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[12] *See Columbian Nat. Life Ins. Co.* v. *Rodgers,* 116 F.2d 705 (10th Cir. 1941)(holding the insurance company liable for failing to inquire of MIB Codes). And notably, this decision is from the same Court of Appeals that Justice Neil Gorsuch served on. ("MIB Codes 200," possible neurological disorder; "MIB Symbol FD," possible fronto-temporal dementia).

Also, LGA's underwriter did not request/order a Personal History Interview, Inspection Report or customary ScriptCheck or IntelliScript Report on Ben. And in sum, LGA did not inquire between receiving Ben's incomplete medical records (App. 60); DE 52-4), limiting a possible coverage offer by over 40%, (App. 61); DE 52-6, postponing Ben's application over MIB Code 200#ZN and "MIB Symbol FD" (App. 62); DE 52-3, withdrawing its offer of coverage (App. 63); DE 52-5, noting that it was "missing pages" of Ben's medical records (App. 65); DE 106-8; DE 52-6), approving Ben's application (App. 58), deciding to issue Ben's application on January 7, 2010 (App. 6); DE 106-9 or auditing Ben's application for review before making a final decision (App. 66); DE 52-6. And LGA did not make an inquiry of Ben's health, other insurance or employment in its "Amendment to Application" or at any time during its contestable period. (App. 6; Amendment to Application); DE 63-1; DE 1-3.

Moreover, under NC law, tolling for an alleged breach of contract and fraud is barred absent the exercise of reasonable diligence. *Rothmans Tobacco Co., Ltd.* v. *Liggett Grp., Inc.*, 770 F.2d 1246, 1249 (4th Cir. 1985)(citing *Wilson* v. *Crab Orchard Dev. Co.*, 276 N.C. 198, 171 S.E.2d 873, 884 (1970). Consequently, with LGA's failed due diligence from failed inquiry over received statements, North Carolina's 3-year statutes of limitation cannot be tolled. (N.C.G.S. §§ 1-52(1), (9); App. 5, p. 3, 4)).

LGA first filed its contest over three years beyond the NC limitations periods and repeatedly failed to inquire or exercise due diligence of received information. So this Court should summarily REVERSE judgment against petitioner.

C. LGA Is Estopped By Continuing To Deposit Premium After Receipt Of Notice And Alleged Knowledge

In *Swartzberg* v. *Reserve Life Ins. Co.*, 113 S.E.2d 270, 277-78 (1960) 252 N.C. 150, the North Carolina Supreme Court held, in pertinent part, as follows:

> "As indicated, with reference to estoppel and waiver, the burden of proof was on plaintiff to show that defendant had paid claims or accepted premiums after it acquired such knowledge or notice... Accordingly, the judgment is vacated and the cause remanded to the end that there may be a determination...of the... issues relating to (1) waiver and estoppel and (2) the statute of limitations."

LGA received notice of Ben's death by April 24, 2012. (App. 67); DE 27-4. On May 29, 2012 LGA deposited check number 8586, in its account with Wells Fargo Bank. (App. 21); DE 1-14. On September 12, 2012 LGA deposited petitioner's eleventh quarterly premium check. (App. 22); DE 1-15. On November 29, 2012 LGA deposited petitioner's twelfth quarterly premium check. (App. 23); DE 1-16. And on February 5, 2013, LGA deposited petitioner's thirteenth quarterly premium check, (App. 24); DE 1-17, which kept the policy in force through May 26, 2013; over nine months after LGA received notice of Ben's death and after LGA continued alleging knowledge of a misrepresentation in Ben's application. See DE 27-14-20. So, by NC Supreme Court precedent, LGA waived its right to rescind the policy.

In *Gouldin* v. *Inter-Ocean Ins. Co.*, the NC Supreme Court held that:

> "In general, any act, declaration, or course of dealing by the insurer, with knowledge of the facts constituting a cause of forfeiture *** which recognizes and treats the policy as still in force and leads the person insured to regard himself as still protected thereby will amount to a waiver of the forfeiture *** and will estop the insurer from insisting on the forfeiture or setting up the same as a defense when sued for a subsequent loss."

102 S.E.2d 846 (1958) 248 N.C. 161.

Pursuant to this NC Supreme Court precedent, LGA "recognized and treated the policy as still in force" by depositing premium for thirteen quarters, over three years, which "amounts to a waiver of the forfeiture" of the policy and "will estop the insurer from insisting on the forfeiture or setting up the same as a defense."[13]

D. The Courts Below Omitted LGA's Unfair Claim Settlement And Unfair And Deceptive Trade Practices

In enacting N.C.G.S. §§ 75-1.1 and 75-16 (App. 5, pp. 5-7), the NC legislature intended to effect a private cause of action for consumers. *Stanley* v. *Moore,* 339 N.C. 717, 723, 454 S.E.2d 225, 228 (1995). In order to establish a violation of N.C.G.S. § 75-1.1, a plaintiff must show: (1) an unfair or deceptive act or practice, (2) in or affecting commerce, and (3) which proximately caused injury to plaintiffs. See N.C.G.S. § 75-1.1(a). "In *Marshall* v. *Miller,* 302 N.C. at 548, 276 S.E.2d at 403, this Court noted that a practice is deceptive if it has the tendency to deceive...and where a party engages in conduct manifesting an inequitable assertion of power or position, such conduct constitutes an unfair act or practice."

An insurance company that engages in the act or practice of "[n]ot attempting in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear," N.C.G.S. §58-63-15(11)(f); (App. 5, p. 6), also engages in conduct that embodies the broader standards of N.C.G.S. § 75-1.1... without the necessity of an additional showing of frequency indicating a "general business practice, "N.C.G.S. §58-63-15(11). (App. 5, pp. 6, 7). *Gray* v. *North Carolina Insurance Underwriting*, 529 SE 2d 676, 683 (N.C. 2000). (Emphasis added).

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[13] This Court is respectfully requested to review DE 27-14-20; DE 115-9 at 277-78; DE 115-10 at 848; and DE 115, pp. 29-30 in the district court record regarding LGA's waiver by notice and knowledge during its acceptance of and depositing premium for over three years.

1. LGA Violated N.C. Gen. Stat. § 58-63-15(2)

The making of an "assertion, representation or statement with respect to the business of insurance or with respect to any person in the conduct of his insurance business, which is untrue, deceptive or misleading" is an unfair settlement practice.

LGA/Banner made false statements that: (1) "We will pay the face amount to the beneficiary if the insured dies while this policy is in force" (App. 6, Policy; p. 1; Form RT-97; 1st and 4th ¶s), since LGA kept the policy in force for over three years by depositing premium for thirteen quarters, p. 33, supra; (2) "We may not change or amend this policy without the owner's consent except as expressly provided in the policy" (App. 6, Policy, p. 6; General Provisions; "Contract;" 2d ¶); (3) "Only the owner may exercise all the rights and agree with us as to changes of the policy" (App. 6, Policy, p. 4; "Ownership," 1st ¶) since Owner Ben did not "agree with" LGA to change the Issue Date from January 14, 2010 to February 24, 2010 to March 8, 2010 or to January 26, 2010; (4) "Banner will produce a copy of the Policy it issued on the Insured's life" (App. 14, LGA's response to petitioner's sixth production request), DE 47-7, 8; App. 28, p. 4, since LGA did not produce a policy with an Issue Date of January 26, 2010 (App. 26); (5) "it is not Banner's business practice to keep a copy of the Policy every time it is sent to the owner" (App. 15 at 2, ¶ 7); DE 63-14, since the only policy not produced is the policy LGA relies on; (6) "all change request must be made in writing within the free look period to ensure completion of the change" (App. 27); DE 106-2, since no request was made in writing during the free look period to change the incontestable January 14, 2010 policy; and (7) the "March 8, 2010 duplicate policy is a "true and correct copy" of a January 26, 2010 policy not in the record or attached. (App. 15, ¶, p. 2, ¶7)(App. 5, p. 5, N.C.G.S. § 58-63-15(2)).

2. LGA Violated N.C. Gen. Stat. § 58-63-15(11)(a)

LGA "misrepresented pertinent facts and insurance policy provisions relating to the coverage at issue" over the policy's General Provisions of "Ownership" and "Contract" (App. 6, Policy, p. 4; "Ownership," 1st ¶; p. 6, "Contract;" 2d ¶) because owner Ben never gave consent or agreed with LGA made in writing during the free look period, as LGA requires (App. 27); DE 106-2. In addition, LGA misrepresented pertinent facts over the incontestable policy since LGA never relied on the February 24, 2010 policy, cannot rely on the March 8, 2010 duplicate policy since such policy was delivered beyond Ben's death. As well, LGA relied on a Policy alleged to have been issued on January 26, 2010, but never filed in the court record or produced, not delivered to petitioner or Ben, admitted by LGA to not be within LGA's "policy file," not made effective without a request from Ben made in writing, promised by LGA to be produced, but not produced, with no proof of being issued or delivered, and which was not filed as a "true and complete policy" in LGA's summary judgment motion. (App. 26)(App. 5, p. 5, N.C.G.S. § 58-63-15(11)(a)), p. 4, N.C.G.S. §§ 58-38-40(a), (b).

3. LGA Violated N.C. Gen. Stat. § 58-63-15(11)(e)

LGA did not "deny coverage"... "within a reasonable time after proof-of-loss statements had been completed" since LGA did not return over three years of paid premium to petitioner until March 4, 2013 (App. 68); DE 1-18, which was over ten months after LGA's notice of Ben's death (App. 67). During its claim investigation, LGA demanded that petitioner return a Policy with a Policy Date and Issue Date of January 26, 2010 or sign under notarized oath a "Death Claim Lost Policy Form" (App. 13, pp. 1-4); DE 1-7, which was unreasonable since no policy with a January 26, 2010 Issue Date was issued, delivered, is in the record or was produced by LGA.

Further unreasonable, regarding LGA's extended claim investigation, is that LGA demanded the return of an "Amendment signed by both you and your brother on March 3, 2010, which amended the Question 20 (payor name) on Part 1 of the application," (App. 11, 2nd ¶); DE 1-7; and DE 27-10, 11, which LGA falsely claimed to be part of a Policy with a January 26, 2010 Issue Date. Also unreasonable is that LGA demanded that petitioner produce Ben's 2010 and 2011 tax returns, (App. 69); DE 27-17, 19, despite that petitioner had no access to Ben's tax returns and was not Ben's next-of-kin. And LGA further demanded that petitioner "produce a HIPPA Authorization Form and a never received January 26, 2010 policy or sign a sworn "Lost Policy" Form or face a "declaratory judgment court action" over a Policy with a January 26, 2010 Issue and Policy Date. (App. 11, p. 1; App. 13, pp. 1, 3), which was totally unreasonable since no January 26, 2010 policy is in LGA's policy file or was issued and delivered and petitioner was not Ben's next-of-kin in order to be able to comply. Thus, LGA's demand for documents that petitioner never did possess and threats that petitioner must produce a January 26, 2010 policy, were unreasonable and delayed LGA's claim process. (App. 5, p. 6. N.C.G.S. § 58-63-15(11)(e)).

4. LGA violated Article 63 (Unfair Trade Practice Act)

LGA committed an unfair trade practice in violation of N.C.G.S. §§ 58-60-15, 30 and Article 63 by not delivering a Buyer's Guide or a Policy Summary within its alleged, but incomplete January 26, 2010 "correspondence."[14] (App. 26); DE 64-1, Ex. I-F, which does not include either. (App. 5, p. 5, N.C.G.S. §§ 58-60-15, 30)).

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[14] The insurer shall provide to all prospective purchasers a Buyer's Guide and a Policy Summary prior to accepting any applicant's initial premium deposit... The failure of an insurer to provide or deliver a Buyer's Guide, or a Policy Summary as provided in G.S. 58-60-15(a) and (b) shall constitute an omission which misrepresents the benefits, advantages, conditions or terms of an insurance policy within the meaning of G.S. 58-58-40 and Art. 63.

5. LGA Violated N.C. Gen. Stat. §§ 58-63-15(11)(f), (n)

LGA did not "attempt in good faith to effectuate a prompt, fair and equitable settlement" of petitioner's claim "in which liability has become reasonably clear" or "promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of [petitioner's] claim." In addition, to admitting that no January 26, 2010 policy is within its policy file, not producing a January 26, 2010 policy though promising "Banner will produce a copy of the Policy it issued on the Insured's life," not attaching the relied on policy to Milor's affidavit, and not receiving an admittedly required request from Owner Ben made in writing to change the incontestable January 14, 2010 policy, LGA cannot prove why it issued a February 24, 2010 policy if it had already delivered a January 26, 2010 policy. See the February 24, 2010 policy (App. 7); DE 52-10; LGA's sixth production request response (App. 14), Milor's affidavit with no attached evidence, (App. 15, ¶ 7); DE 64-14, the incomplete January 26, 2010 policy (App. 26); DE 64-1, Ex. I-F, LGA's admission (App. 27); and DE 59, pp. 3, 4; LGA's second admission (App. 28).

And Milor is "a Policy Issue Supervisor at Banner Life Insurance Company," an interested party witness. (App. 15, 1st ¶), DE 63-14. "Although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe." See 9A C. Wright & A. Miller, Federal Practice and Procedure § 2529, p. 299 (2d ed. 1995). "That is, the court should give credence to the evidence favoring the nonmovant as well as "evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses." Wright & A. Miller, *supra*, at 300; *Reeves* v. *Sanderson Plumbing Prod., Inc.*, 530 US 133, at 151. (S.Ct. 2000).

So pursuant to *Sanderson Plumbing, Liberty Lobby* and Wright & A. Miller, this Court should strike the impeached and contradicted LGA affidavit of interested witness Cheryl Milor (App. 15), which is the single basis of LGA's and the courts below reliance on a non-existent January 26, 2010 policy.(App. 26), DE 64, Ex. I-F.[15]

Even should LGA be permitted to rely on a never issued, delivered or existent policy, this Court has four or more times held that an insurer must bring a contest forward within its contestable period. See *Hurni, Enelow, Stewart* and *Pickering*, supra, pp. 3, 9-13. Also, the North Carolina Supreme Court has held so in *American Trust Co.* and *Chavis* and has again cited *Trust Co.* six or more times, which has also been cited by this Court and the Second, Fourth, Seventh, Eighth, Ninth, Tenth and District of Columbia U.S. Circuit Courts of Appeal. Pp. 13-15, supra. And every U.S. Circuit Court of Appeals has held that an insurer, here LGA, must contest an insurance policy in a court within its contestable time period. Pp. 16-19, supra. But here, LGA first contested the policy more than forty months untimely. (DE 8).

This Court has also held that "[A] precisely drawn, detailed statute pre-empts more general remedies" and that we "assum[e] that the ordinary meaning of [the statutory] language accurately expresses the legislative purpose." n. 2, supra. Thus, N.C.G.S. § 58-58-22(2) controls, as required by N.C.G.S. § 58-3-1. (App. 5, p. 4). N.C.G.S. § 58-58-22(2) states that "the validity of the policy shall not be contested, except for nonpayment of premium," after in force for 2 years from its date of issue.

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[15] This Court should require LGA to produce evidence of a complete January 26, 2010 policy, and the date such policy was delivered to petitioner, and prove that an Agreement was received and submitted by petitioner and dated and signed by LGA and petitioner or otherwise summarily REVERSE judgment against petitioner. Further, this Court should review Petitioner's pauperis motion, which proves that petitioner has been severely injured.

LGA kept the policy in force for over three years and affirmed that the policy remained in force beyond three years, with accepted premium for thirteen quarters, and filed its contest beyond three years untimely. So LGA did not "effectuate a fair settlement" or provide a "reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial for denying petitioner's claim." (App. 5, pp. 6, 7, N.C.G.S. §§ 58-63-15(11)(f), (n), 75-1.1.[16] See pp. 2-39, supra.

6. LGA Exercised Polarity Of Power In Violation Of N.C.G.S. § 75-1.1

LGA repeatedly demanded documents not within petitioner's possession and threatened petitioner. For evidence and facts in support of LGA's polarity of power, this Court is requested to review DE 27-25, 28-30, 36-41; broken promises, threats.

CONCLUSION

Unless, by this Court's direction, LGA can produce a full January 26, 2010 policy and an Agreement received and submitted by petitioner and signed and dated by both parties, the lower courts judgment should be summarily REVERSED with treble and compensatory damages and pre- and post-judgment interest. Otherwise, this writ should be GRANTED or remanded with assigned representation.

This the 5th day of September, 2018

Respectfully submitted,

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[16] LGA has falsely asserted that it mailed Ben a January 26, 2010 policy. However, by its own "Agent/Broker Agreement" terms, such policy had to first be delivered to petitioner for delivery to Ben. (App. 16, p. 3, Privacy Policy, 2nd ¶; p. 4, Delivery of Policies). And LGA has not proven that it ever mailed petitioner a January 26, 2010 policy. (App. 29).