No. 18-5931

In the
Supreme Court of the United States

JOHN LASCHKEWITSCH,

Petitioner,

v.

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

Respondent.

ON PETITION FOR A RULE 44 REHEARING FROM THE FOURTH CIRCUIT COURT OF APPEALS; FILED IN GOOD FAITH, FOR NO PURPOSE OF DELAY, AND WITH SUBSTANTIAL GROUNDS AND CONTROLLING PRECEDENTIAL EFFFECTS

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PETITION FOR REHEARING INTRODUCTORY STATEMENT

The first issued policy became incontestable on January 14, 2012. (Pet.App.6; policy, p. 3, "Issue Date: 0/14/2010"). LGA admitted that "All change requests must be made in writing during the Free Look period to ensure completion of the change." (Pet.App. 27). But no change request was made in writing or ever produced by LGA. "Only the owner may exercise all the rights and agree with us as to changes in the policy." (Pet.App. 6, policy, p. 4, "Owner;" p. 6 "The Contract"). But owner Ben did not agree with LGA to change the January 14, 2010 policy. (Pet.App.6, application Part 1, p. 1, question 18, "OWNER, proposed insured"). Rather, owner Ben asked petitioner to verbally ask that LGA move the Policy Date to match the Issue Date of January 14, 2010, which LGA agreed to do, but did not. (Pet.Apps. 6, p. 3; and 7).

After relying on a non-produced January 26, 2010 policy (Pet.Apps.11-13, 26), LGA noticed petitioner that it "would produce a copy of the policy it issued on the insured's life." (Pet.App. 14, Sixth Production Response). However, LGA thereafter admitted that it had no copy of its relied upon "January 26, 2010 Policy in its policy file." (Pet.Apps. 14; 26; and 28, pp. 3, 4). Thus, no January 26, 2010 policy exists.

Petitioner produced the January 14, 2010 incontestable policy (Pet.App. 6), a February 24, 2010 policy (Pet.App. 7), which was the only other policy issued during insured Ben's lifetime, and a duplicate March 8, 2010 policy, which was delivered to petitioner three weeks after Ben's death. (Pet.Apps. 9, 10). LGA produced only the January 14, 2010 incontestable policy and the March 8, 2010 duplicate policy. (DE 63-1, Ex.1-E, BANNER 2388-2421; and DE 63-1; Ex. 1-I, BANNER 2348-2378). And the district court erred by relying on the sham affidavit of interested party Cheryl C. Milor (Pet.App. 15), with no attached evidence of a January 26, 2010 policy.

REASONS FOR GRANTING A REHEARING AND REVERSING JUDGMENT

I. This Court Omitted Its "Disinterested Witnesses" Ruling, Fed.R.Civ.P. 56(e), Fed.R.Evid. 901 And U.S. Circuit Courts Of Appeals Holdings

In reaching its erroneous holding, the district court relied exclusively on the unauthenticated affidavit of Milor and the false statements made therein. (Pet.App. 4, p. 9; Pet.App. 15). Interested party 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 non-produced "January 26, 2010 policy." (Pet.Apps. 9; 10; 15, ¶ 7; and 26). Milor knew that the January 14, 2010, February 24, 2010 and March 8, 2010 policies had been produced (DE 1-3, DE 52-2, 10, 11 and DE 106-6), but that no January 26, 2010 policy had ever been produced by petitioner or LGA. Therefore, Milor falsely asserted that "it is not Banner's business practice to keep a copy of the Policy every time it is sent to the owner." (Pet.App. 15, p. 2, ¶ 7).

Milor is "a Policy Issue Supervisor at Banner Life Insurance Company," an interested party witness. (Pet.App. 15, 1st ¶). As this Court held, "the court should give credence to the evidence favoring the nonmovant [petitioner], [and] "evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that the evidence comes from disinterested witnesses." See *Reeves* v. *Sanderson Plumbing Prod., Inc.*, 530 US 133, at 151. (S.Ct. 2000). *See also* 9A C. Wright & A. Miller, Federal Practice and Procedure §2529, p. 300 (2d ed. 1995).

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 and 1993 Supp.); Pet.App. 15, DE 64-14.

Further, 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...[1]

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 is not the document that proponent Milor claimed it to be; "a true and correct copy," of a non-existent January 26, 2010 policy.

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.* See also *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)(Emphasis added).[2]

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[1] The affidavit of Cheryl C. Milor (Pet.App. 15) is not in the proper form. Milor failed to attach a certified copy of a January 26, 2010 policy contract to support her false statements.

[2] 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]." See *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). Thus, the non-produced January 26, 2010 policy cannot be relied on.

II. This Court Disregarded N.C. Gen. Stat. §58-3-1, N.C. Gen. Stat. §58-58-22(2) And The Incontestable January 14, 2010 Policy Contract

The only policies produced by both parties are the incontestable January 14, 2010 and March 8, 2010 duplicate policies. (DE 1-3, 52-2, 10, and 11, 106-2, and 63-1, Exhibits 1-E, 1-I). Since the March 8, 2010 policy (Pet. Apps. 9, 10) was delivered after Ben's death (Pet.App. 9, February 6, 2012 duplicate policy letter; postmark), the January 14, 2010 policy is the only policy produced by both parties and issued during Ben's lifetime, which became incontestable one day before Ben's death. (Pet. Apps. 6, policy, p. 3, "ISSUE DATE: 01/14/2010;" 8; Ben's January 15, 2012 death).

As well, on February 5, 2013, LGA accepted petitioner's thirteenth quarterly premium. (Pet.App. 24), which kept the policy paid and in force through May 26, 2013, which was over fifteen months beyond LGA's 2-year contestable period. And LGA first contested the policy and application on May 11, 2015 (App. A), which was over three years and four months after its two-year contestable time period expired.

North Carolina's two year contestability statute, N.C. Gen. Stat. §58-58-22(2) (Pet. App. 5, p. 4), yet unheard by any court, 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..."

Here, the January 14, 2010 policy (Pet.App. 6) was in force for two years from January 14, 2010 through January 14, 2012 since Ben died on January 15, 2012. And nonpayment of premium does not apply since LGA deposited premium for over three years. Also, since the policy was delivered in North Carolina, it is subject to North Carolina law. (N.C. Gen. Stat. §58-3-1; App. 5, p. 4). Thus, pursuant to North Carolina law, the "validity of the policy shall not be contested." Pet.App. 29, ¶s 4-21.

III. This Court Disregarded U.S. Supreme Court, N.C. Supreme Court, And U.S. Circuit Courts Of Appeals Contestability Precedents

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." See *Mutual Ins. Co.* v. *Hurni Co.*, 263 U.S. 167, 175-6 (S.Ct. 1923). "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. "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.* We "are constrained to hold that it admits of no other interpretation [other] than that the policy became incontestable upon the sole condition that two years had elapsed," as here. *Id.* at 178. "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 [was] 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." See *Enelow* v. *New York Life Ins. Co.*, 293 U.S. 379, 384 (S.Ct.1935). "The defendant [here LGA] had opportunity in that action at law to contest its liability, and before the policy by its terms became incontestable. A 'contest' within the purview of the policy contract has generally been held to mean a present contest in a [district] court, not a notice of repudiation or of a contest to be waged thereafter." See *American Life Ins. Co.* v. *Stewart*, 300 U.S. at 212, n. 2, n. 3 (S.Ct. 1937)(DE 112-2)(emphasis added).

Moreover, this Court affirmed the Fifth Circuit in *Northwestern Mutual Life Insurance Co.* v. *Pickering*, 293 F.496, 499 (5th Cir.) cert. denied, 263 U.S. 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 execution of the policy, which is charged to have been procured by alleged false statements." 293 F. 496. So, LGA's "right to contest the policy" was "lost" since LGA did not "invoke judicial action" by January 14, 2012; but, by its own volition, delayed its first policy contest until May 11, 2015. (App. A, attached).[3]

The NC Supreme Court holding in *Trust Co.* v. *Ins. Co. of VA*, 173 N.C. 558, at 612-620 (App. B, attached; DE 112-2), as cited by this Court and the NC Supreme Court, controls. See *American Life Ins. Co.* v. *Stewart*, 300 U.S. 203, n. 2 (S.Ct. 1937); *Chavis* v. *Southern Life Ins. Co.*, 347 SE2d at 427 (N.C.1986)(DE 115-3; App. C). "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.* (nonpayment of premium). Further, "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.

[3] Pursuant to this Court's *Hurni, Stewart, Enelow* and *Pickering* precedent, LGA had no "opportunity at law" or resort in equity to contest the policy and "lost" its right to contest or "invoke judicial action" by first contesting the policy beyond three years untimely. (App. A).

Also, "the authorities are practically uniform in holding that an incontestable clause, which gives a reasonable time for the insurance company [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, [just as here], would be the nonpayment of premiums." *American Trust Co.*, N.C. at 615-16. (Emphasis added). "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, should thereafter be treated as valid." *Id.* at 617 (emphasis added). As also held by the North Carolina 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], from asserting this defense[s]." See *Chavis* v. *Southern Life Ins. Co.*, 347 S.E.2d at 427 (N.C. 1986)(App. C)(citing *American Trust Co.* v. *Ins. Co. of Va.*)(App. B).[4] And this Court should follow NC Supreme Court holdings.

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[4] Moreover, *American Trust Co.* (App. B) has been cited by this Court and the Second, Fourth, Seventh, Eighth, Ninth, Tenth and D.C. U.S. Circuit Courts of Appeals. And this Court should review petitioner's Petition for a Writ at pp. 9-15, in relation to contestability precedent from this Court and the NC Supreme Court, which is a Rule 44.2 substantial and controlling effect regarding timely contestability; for which LGA failed by over three years.

The Fourth Circuit abused its discretion by not following its own precedent. In *Sutton* v. *American Health & Life Ins. Co.*, the court held 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." 683 F.2d at 96 (4th Cir. 1982)(N.C.G.S. 58-58-22(2); Pet.App. 5, p. 4)). As well, in *Provident Mutual Life Ins. Co.* v. *Parsons*, the court held that "...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"...). 70 F.2d 863, 866 (4th Cir. 1934)(emphasis added).

In *Pruco Life Ins. Co.* v. *Wilmington Trust Co.*, "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.*" 721 F.3d 1(1st Cir. 2013); see *Wallach* v. *Aetna Life Ins. Co.*, ("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[s] and summary judgment was properly granted... 78 F. 2d 647, 648 (2d Cir. 1935). *See also Franklin Life Ins. Company* v. *Bieniek*, ("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... 312 F. 2d at 368 (3rd Cir. 1962). In *Scharlach* v. *Pacific Mutual Life Ins. Co.*, the Fifth Circuit held that "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... is not a contest...," just as here. 9 F. 2d 317, 318 (5th Cir. 1925).

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). In *Columbian Nat'l Life Ins. Co.* v. *Wallerstein*, the Seventh Circuit held 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." 91 F.2d 351, 352 (7th Cir.1937); *Peake* v. *Lincoln Nat. Life Ins. Co.*, 15 F.2d 303 (8th Cir. 1926)(same). 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). *See also Stewart* v. *American Life Ins. Co.*, 85 F.2d 791,792 (10th Cir. 1936)(a policy contest must be before "expiration of said period").

"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). 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 Ass'n*, 78 F.2d at 205-06 (D.C. Cir. 1935).[5]

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[5] Regarding unanimous U.S. Circuit Courts of Appeals contestability precedents, see petitioner's petition for a writ at pp. 16-19. So, LGA's over three year untimely filed contest (App. A) is barred by precedents from this Court, the North Carolina Supreme Court, and all U.S. Circuit Courts of Appeals, which constitutes a Rule 44.2 substantial and controlling effect regarding a timely filed contest within the NC two year contestable time period.

IV. This Court Disregarded NC Statutes Of Limitation And NC Supreme Court Precedent Regarding Such Limitations Periods

The one-page Adoption Authorization with five additional appointment forms were signed and dated on July 20, 2009. (Pet.App. 17). Ben's application was signed and dated on September 22, 2009 (Pet.App. 6). The policy was issued and delivered to petitioner in NC on January 14, 2010. The incontestable policy was in force with received and applied premium on February 18, 2010. (Pet.Apps. 6, 45). On May 11, 2015 LGA first contested the policy, Ben's application within, and LGA's undated, unsigned, ineffective, void and nugatory Agreement. (App. A; Pet.App. 16). So here, LGA's contest was over five years after all signed, dated and submitted documents.

"It is a well-settled rule...that the [3-year] statute of limitations for a breach of contract claim is not tolled pending the injured party's discovery of the breach...'a defendant's lack of knowledge concerning his claim does not postpone the running of a statute of limitations.'" *Pearce* v. *N.C. State H'way Patrol Vol. Pledge Comm.*, 312 S.E.2d 421,425-26(N.C.1984)("Statutes of limitations are inflexible and unyielding... They operate inexorably without reference to merits of [LGA's] causes of action"); *Shearin* v. *Lloyd,* 246 N.C. 363, 98 S.E.2d 508, 514 (1957)(App. D);" *Lewis* v. *Shaver,* 236 N.C. 510, 73 S.E.2d 320, 321-22 (1952)(App. E); *Coppersmith* v. *Ins. Co.,* 222 N.C. 14, 17, 21 S.E.2d 838, 839 (1942). (Pet.App. 5, pp. 3, 4, N.C.G.S. §§1-52(1), (9)).

And under NC law, tolling for breach of contract and fraud is barred absent the exercise of reasonable diligence. *Rothmans Tobacco Co., Ltd.* v. *Liggett Group, 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)). Here, LGA did not exercise reasonable or due diligence or inquire of received statements. See Petition for a Writ at pp. 28-32.

V. This Court Disregarded Insured Ben's Specialist Consult And Ben's March 23, 2010 First "Possible ALS" Diagnosis Date

Insured Ben was **NOT** told that he had ALS at UCSF or diagnosed with ALS by doctor Meltzer or neurologists Van Tran and Charya through January 22, 2010, which was after issuance and delivery of the incontestable January 14, 2010 policy.[6] Rather, on January 22, 2010 Ben had "full power and normal tone in all four limbs, was able to toe-walk, heel-walk and tandem walking... had no abnormal involuntary movements, fasciculations" and was referred to ALS specialist Richard Bedlack at one of NC's five "ALS Certified Centers of Excellence" to "make that decision. Wife understands this." (Pet.App. 41, pp. 1-5; Pet.App. 48, p. 5)(emphasis added).

And since fasciculations and muscle weakness are the first signs of ALS (Pet. App. 37, p. 1), Ben did not have ALS on January 22, 2010. Nor did insured Ben have probable, probable lab-supported or definite ALS on March 23, 2010 since he was in "consultation for possible ALS..." with a specialist. (Pet.App. 44, first sentence).

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[6] See Pet.Apps. 31, ¶s 1-8; 32, ¶s 17-21; 33, p. 7 of 8, "Impression;" 34, California's "ALS Certified Centers of Excellence," which does not include UCSF; 35, Meltzer Dep. 62:7-64:14; 36, questions 3, 8, 52; 37, p.1, 3rd ¶, the signs of ALS are "weakness of affected muscles and visible fasciculations;" and the four diagnostic categories of ALS are 'Clinically definite,' 'Clinically probable', 'Clinically probable-Laboratory supported' and 'Clinically possible;' 38, "Diagnosis," 2nd ¶; 39, Van Tran consult; 40, Van Tran Dep. 46:6-25; 41, pp. 1-4, Charya's January 22, 2010 consult with Ben, p. 5, "neuro eval pending...to make that decision;" 42, "there is no specific confirmation test" and often "false-positive diagnoses;" 43, "the median time from onset to diagnosis is about 11 months;" 44, first sentence of Ben's March 23, 2010 consult with specialist Bedlack for "possible ALS;" 45, LGA's February 18, 2010 receipt of premium; 46, the ALS diagnosis categories are "possible, probable lab-supported, probable and definite;" 47, ALS is "yet poorly understood;" 48, p. 4, Story of Robert Dawkins' three years of "inaccurate diagnoses," p. 5; 49, Affidavit of Jerry Dawson,¶s 3-13; 50, National Institutes Of Health, "No test can provide a definite diagnosis of ALS" and "patients should always obtain a second neurological opinion;" 51, there are many differential diagnoses of ALS; 52, "referral to a tertiary center can have a significant positive impact;" 53, the story of Terry Herring's delayed diagnosis; 54, p.2, Fayetteville resident Jeff Capel Jr.'s diagnosis of ALS by physicians at Duke, just like insured Ben; 55, ¶s 2-12; 56, p. 1; and 57, lines 19-20, Ben's obituary, diagnosis of ALS in "late March, 2012." This Court should fully review Appendices 31-57 in petitioner's petition for a writ and pp. 25-28 within such petition.

VI. This Court Disregarded That LGA Deposited Premium After Notice And Knowledge Pursuant To NC Supreme Court Precedent

LGA received notice of insured Ben's death by April 24, 2012. (Pet.App. 67). LGA accepted premium on May 29, 2012, September 12, 2012, November 29, 2012, and a thirteenth quarterly premium on February 5, 2013. (Pet.Apps. 21, 22, 23 and 24.) Since LGA accepted premium checks after notice and after alleging knowledge of false answers (Pet.App. 13, pp.1-7; App. F) and for over three years, LGA ratified the policy beyond three years and is therefore estopped from rescinding the policy.[7]

Also, in *Gouldin* v. *Inter-Ocean Ins. Co.*, 102 S.E.2d 846 (1958) 248 N.C. 161, the North Carolina Supreme Court held, in particular, that:

> "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."

Pursuant to holdings from this Court and the North Carolina Supreme Court, LGA accepted premium after acquiring such notice and knowledge and contested the policy beyond NC states of limitation. LGA also recognized, treated, and acted to keep the policy in force over three years by accepting premium through February 5, 2013. Therefore, this Court should follow such precedent and reverse judgment.

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[7] *Northern Assurance Co.* v. *Grandview Building Assn.*, 183 U.S. 308, 311 (S.Ct. 1902) (holding: "By procuring, receiving, accepting and retaining of said insurance premium with knowledge of said subsisting concurrent insurance the defendant has waived the said condition and is estopped"). *Phoenix Life Ins. Co.* v. *Raddin*, 120 U.S. 183, 196 (same). See also *Swartzberg* v. *Reserve Life Ins. Co.*, 113 S.E.2d 270 (1960) 252 N.C. 150, 277-78 ("As indicated, with reference to estoppel and waiver, the burden of proof was on plaintiff to show that defendant paid claims or accepted premiums after it acquired such knowledge or notice... Accordingly, the judgment is vacated and remanded ... [for] a determination...of ... (1) waiver and estoppel and (2) the statute of limitations." (p. 10, supra); *Brooks* v. *Hackney*, 329 N.C. at 174, 404 S.E.2d at 859 (1991)("A party will not be allowed to accept benefits which arise from certain terms of a contract and at the same time deny the effect of other terms of the same agreement"); *United States Life Ins. Co. in the City of New York* v. *Blumenfeld,* 92 A.D.3d 487,488-90(2012) 938 N.Y.S.2d 84 (App.G), all of which are on point.

VII. This Court Disregarded That No Page Of The Agreement Is Dated Or Signed, LGA Did Not Date Or Sign The Adoption Authorization Form And LGA's Breaches Of Its Non-Mutual Agreement

This Court omitted that LGA failed to sign and date the Agreement Adoption Authorization and that no page of the 4-page Agent/Broker Agreement is signed or dated by either party. (Pet.App. 16, pp. 1-5; Pet.App. 17, p.1).[8] And LGA agreed that "this Adoption Authorization is executed as set forth below by and among Banner Life Insurance Company...the General Agent and the Agent/Broker. (Pet.App. 17, p. 1, 1st ¶). However, LGA did not execute the "Agreement Adoption Authorization."[9]

In addition, LGA first produced the "Adoption Authorization" it relies on with its summary judgment motion on June 24, 2016. (Pet.App. 16, DE 63-3, BANNER 002515). This was over five years after petitioner had signed the original "Adoption Authorization." (Pet.App. 17, p.1).[10] Further, the Agreement Adoption Authorization form is not numbered page 1 of 6 or page 6 of 6 in LGA's five page Agreement. As well, such Adoption Authorization is not part of the Agent/Broker Agreement.[11]

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[8] 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...*," just as here. *Hilliard* v. *Thompson,* 81, N.C.App. 409, 344 S.E.2d at 591-92(1986)(App. H). Therefore, the Agreement Adoption Authorization form and the 4-page Agent/Broker Agreement are void, pursuant to North Carolina law.

[9] The Adoption Authorization never became effective since LGA agreed that "the parties hereto have signed this Adoption Authorization and agree it is effective on the date authorized by the Company (Pet.App. 17, p. 1, 3rd ¶); but, LGA failed to sign or date such form.

[10] See *Boyce* v. *McMahan,* 285 N.C. 730-34, 208 S.E.2d 692, 695 (1974)(App. I)(holding: "a contract, or offer to contract, leaving material portions open for future agreement [just as here], is nugatory and void for indefiniteness." So, the Agreement is again void by NC law.

[11] "This Agreement, together with the Agent/Broker Compensation Schedule and any amendments attached hereto...constitute the entire Agreement" (Pet.App. 16, p. 5 of 5, BANNER 002513, Section 18, "Entire Agreement"), which does not include the "Adoption Authorization" form as part of the Entire Agreement. And since the Adoption Authorization wasn't attached, page numbered or included by amendment, it is not part of the Agreement.

Moreover, proving that petitioner did not receive or submit an Agent/Broker Agreement to or from LGA, Banner or Crump, is that petitioner sent a cover page, five non-contract pages and the "Adoption Authorization" form to Crump. (Pet.App. 17, BANNER 002514, header), which did not include an Agent/Broker Agreement.[12]

VIII. This Court Disregarded LGA's Unfair Claim Settlement And Unfair And Deceptive Trade Practices

The non-existent January 26, 2010 policy (Pet.App. 26), as exclusively relied on by LGA/Banner (Pet.Apps. 11-13) and the district court (Pet.App. 4, p. 9) was not produced by either party and is not in any court below record. Rather, such relied on policy does not include a policy contract, company signature page, Schedule pages, Ben's Application Part 1 or Part 2, a Buyer's Guide or a Policy Summary.

In North Carolina, the failure of an insurer [here, LGA] to include or deliver a Buyers' Guide or Policy Summary within a policy is an unfair and deceptive trade practice. (Pet.App. 5, pp. 5-7, N.C. Gen. Stat. §§ 58-60-15, 30, 58-63-15(11)). So, this Court should reverse judgment and award petitioner treble damages. (Pet.App. 26).

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." (Pet.App. 5, pp. 6, 7, N.C. Gen. Stat. §§ 58-63-15(11)(f), (n)).[13]

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[12] On October 1, 2009 Crump sent LGA six pages received from petitioner with its own cover page, neither of which included an Agent/Broker Agreement. (Pet.App. 17, BANNER 002514, footer). And since LGA first produced its alleged agreement on June 24, 2016, it is "nugatory and void for indefiniteness;" see *Boyce*, n.10, supra. And this Court is respectfully requested to rehear further NC Supreme Court precedent in petitioner's writ at pp.23-25.

[13] The district court erred by holding that Ben "rejected" the incontestable policy based on the sham and unauthenticated affidavit of Milor. (Pet.Apps. 4, p. 9; 6, policy; 15, ¶ 7; 26).

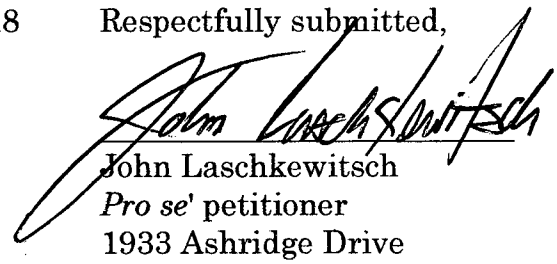
LGA twice noticed petitioner that "Banner will produce a copy of the Policy it issued on the Insured's life." (Pet.Apps. 14, 28). LGA thereafter admitted that "the policy file does not contain a copy of the January 26, 2010 policy..." (Pet.App. 28). LGA never relied on the February 24, 2010 policy. (Pet.App. 7). LGA attempted to rely on the policy with a March 8, 2010 Date of Issue (Pet.Apps. 9; 10; and 15, ¶ 7), which was delivered three weeks after Ben's death. (Pet. App. 9). The January 26, 2010 policy, relied on by LGA, does not exist. (Pet.App. 26). LGA admitted that that "no change could be made [to the incontestable January 14, 2010 policy] unless made in writing by the owner during the Free Look Period" (Pet.App. 27); but, never produced a request made in writing during the Free Look period. And LGA falsely admitted that it mailed the alleged January 26, 2010 policy to petitioner five weeks after Ben's death. (Pet.Apps. 8, 25), which never existed or was placed in force.[14] So, LGA violated N.C. Gen. Stat. §§ 58-63-15(11)(f) and (n). (Pet.App. 5, pp. 6, 7).[15]

CONCLUSION

Based on the foregoing, judgments of the lower courts should be summarily **REVERSED** with the policy proceeds trebled and interest **AWARDED** petitioner.

This the 26th day of December, 2018

Respectfully submitted,



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[14] The non-existent January 26, 2010 policy (Pet.App. 26; DE 63-1, Ex. 1-F), never relied on February 24, 2010 policy (Pet.App. 7; DE 52-10), and duplicate March 8, 2010 policy, first delivered after Ben's death (Pet.App. 9; DE 52-11), cannot be relied on. Thus, the only true policy, never changed without a request made in writing by the owner during the Free Look Period, is the incontestable January 14, 2010 policy. (Pet.App. 6, DE 1-3; Pet.App. 8).

[15] LGA also violated N.C.G.S. §§ 58-63-15(2), 58-63-15(11)(a), (e) & 75-1.1. (petitioner's petition for a writ, pp. 34-40; Certificate, ¶s 1-9). See also Pet.App. 70 and Apps. J, K, L and M (attached) regarding petitioner's special circumstances and proven damages.

Additional material from this filing is available in the Clerk's Office.