

In the
Supreme Court of the United States

JOHN LASCHKEWITSCH,

Petitioner,

v.

AMERICAN NATIONAL 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 EFFECTS

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PETITION FOR REHEARING INTRODUCTORY STATEMENT

The policy was issued on March 15, 2010 and became incontestable on March 15, 2012. (Pet.App. 6, p.1, Form ART07(03), March 15, 2010 Date of Issue)). Notably, precedent from this Court, the North Carolina Supreme Court, all Circuit Courts of Appeals, and NC contestability law hold that ANICO had until March 15, 2012 to contest the policy and application within. But ANICO's first contest was filed by answer on February 5, 2015 (App. A; DE 6), which was thirty four months untimely.

Petitioner did not sign, receive or submit any of pages 2-6 of ANICO's "Texas Agreement," and neither party dated any such agreement page. ANICO also failed to assign an effective date and record petitioner as an appointed party. (Pet.App. 9, p. 1). Further, ANICO breached the non-mutual agreement seven or more times.

All courts have omitted that insured Ben first met with an ALS specialist to make a diagnostic decision by "consultation for possible ALS..." on March 23, 2010, which was after ANICO had approved and issued the policy. (Pet.Apps. 6 and 19). Also omitted is that Ben did not have probable, probable lab-supported or definite ALS until after the policy was made effective by ANICO with applied premium.

The lower courts further omitted that ANICO failed to inquire of seven or more received statements, prove sufficient Fed.R.Civ.P. § 9(b) particularity of who, when, where, time and place or identity and prove due diligence. Omitted as well is that ANICO filed its contest beyond North Carolina's 3-year statutes of limitation, deposited premium after notice and alleged knowledge, repeatedly acted to keep the policy in force beyond two years, and committed at least five unfair claim settlement practices and an unfair and deceptive trade practice. (Pet.App. 5, pp. 5-8).

REASONS FOR GRANTING A REHEARING AND REVERSING JUDGMENT

I. This Court, The NC Supreme Court, All U.S. Circuit Courts Of Appeals, And NC Law Required A Contest During ANICO's Contestable Period

"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." *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." *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, is to become incontestable." See *Enelow v. New York Life Ins. Co.*, 293 U.S. 379, 384 (S.Ct. 1935). "The [defendant, here ANICO] had opportunity in [this] 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." *Am. Life Ins. Co. v. Stewart*, 300 U.S. at 212, n. 2, 3 (S.Ct. 1937).

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 ANICO's], if [it] 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. This Court also affirmed the Seventh Circuit in *Columbian National Life Ins. Co. v. Wallerstein*, wherein 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), *cert. denied*, 302 U.S. 755, 58 (S.Ct. 1937). So ANICO's "right to contest the policy" was "lost" since it did not "invoke judicial action" or set up its defenses by March 15, 2012; but, by its own volition, delayed its contest until February 5, 2015. (App. A).¹

Further, the North Carolina Supreme Court holding in *American Trust Co. v. Ins. Co. of VA*, 173 N.C. 558, at 612-20 (App. B, attached; DE 58-5), as cited by this Court and the North Carolina 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)(citing *American Trust Co.*) (App. C, attached; DE 58-9).

¹ With this Court's *Hurni, Stewart, Enelow, Pickering, (cert. denied) and Wallerstein, (cert. denied)* precedent, ANICO's defenses are barred because it filed its contest by answer thirty four months untimely (App. A), which is a Rule 44 substantial and controlling effect.

"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.* (here, nonpayment of premium). "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?" *American Trust Co.* at 615-16.² As well, "the authorities are practically uniform in holding that an incontestable clause, which gives reasonable time for the insurance company, [here [ANICO] 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." *Id.*, at 615-16. And "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], establishing the invalidity of the contract of insurance should thereafter be treated as valid." *Id.* at 617. (Emphasis added).

² *American Trust Co.* (App. B) has been cited by this Court and the Second, Fourth, Seventh, Eighth, Ninth, Tenth and D.C. Circuit Courts of Appeals. Upon rehearing, this Court should review contestability precedent from this Court and the NC Supreme Court at Pet.Cert., pp. 6-16, which is of a substantial and controlling effect under Rule 44.2.

As also held by the NC Supreme Court, "since the incontestability provision does not expressly permit the company [ANICO] 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 from asserting this defense[s]." See *Chavis*, *supra*, at 428 (N.C. 1986)(App. C)(citing *American Trust Co.*)(App. B). And this Court should follow these North Carolina Supreme Court holdings.

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. 5)). 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 also *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..."), just as here. 78 F. 2d 647, 648 (2d Cir. 1935).

See also Franklin Life Ins. Co. 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...", as here. 9 F.2d 317, 318 (5th Cir. 1925). See also *Pickering, cert. denied*, supra, p. 3.

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 held that "It is, accordingly, settled that a principal effect of these clauses is to preclude the insurer from attempting to rescind the policy after the requisite contestability period has expired on the ground that the insured made misrepresentations in the application." *Equitable Life Ins. Soc. of U.S. v. Bell*, 27 F.3d 1274, 1279 (7th Cir. 1994); *Wallerstein, cert. denied*, supra, p. 3.

In *Peake v. Lincoln National Life Ins. Co.*, the court held that "It cannot be doubted that the great weight of authority is to the effect that a contest intended by such a clause is a contest initiated by an appropriate proceeding in court within the time limited." 15 F.2d 303 (8th Cir. 1926). Also, "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). (Emphasis added).

In *Stewart v. American Life Ins. Co.*, the court held that ("a policy must be contested [before the expiration of said period"]). 85 F.2d 791,792 (10th Cir. 1936). Also, "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).³ See also Certificate, ¶ 1.⁴

In addition to this Court, the NC Supreme Court, and all U.S. Circuit Courts of Appeals holding that ANICO had to bring a court contest within two years from March 15, 2010 (Pet.App. 6, p. 1,"March 15, 2010 Date of Issue"), North Carolina law, as promulgated by the NC State Legislature, also required a contest by ANICO within two years from the issue date. In particular, N.C.G.S. 58-58-22(2)(Pet.App. 5, p. 5), yet unconsidered by this Court or any other court, states, in pertinent part:

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 March 15, 2010 policy was in force for over two years from March 15, 2010 through March 15, 2012, 2-months beyond Ben's January 15, 2012 death, since ANICO accepted premium through September 12, 2012. (Pet.App. 14).

³ Unanimous U.S. Circuit Courts of Appeals contestability precedents required ANICO to contest the policy by March 15, 2012 (Pet.App. 6), but which was filed thirty four months untimely. (App. A). Therefore, ANICO's defenses are barred by precedents from this Court, the NC Supreme Court, and all U.S. Circuit Courts of Appeals and should thus be reheard by this Court as a Rule 44.2 substantial and controlling effect. See also Pet.Cert., pp. 13-16.

Nonpayment of premium does not statutorily apply because ANICO accepted premium for two and a half years. Therefore, "the validity of the policy cannot be contested," pursuant to North Carolina contestability law, since ANICO brought its first contest beyond two years after its 2-year contestable period expired. (App. A).⁵ In addition, the only way to keep a policy in force is with paid premium within the grace period, pursuant to the policy (Pet.App. 6, p. 4, Section 4, General Provisions, "Nonpayment of Premium"), which was paid for ten quarters (two and a half years).

II. All Courts Disregarded That No Agreement Exists Between The Parties And That ANICO Breached Its Non-Mutual Agreement

A. No Party Agreement Exists Between Petitioner And ANICO

On January 12, 2010 petitioner recorded a "Contract Checklist," which lists all "Required Documents for Contracting" and six non-contract pages. (Pet.App. 8). The Contract Checklist does not list a Senior General Agent's Agreement. (Pet.App. 8, Checklist; Pet.App. 9). And the alleged Agreement is only rubber stamp signed by ANICO, but not signed by petitioner or dated by either party. (Pet.App. 9, p.1, Form 4736). Also, ANICO did not record an effective date or record petitioner as a hereby appointed party or as its "Senior General Agent." (Pet.App. 9, p.1, 1st ¶).

Further, none of pages 2-6 are initialed, signed or dated by either party. And since ANICO filed for summary judgment before any party discovery, no evidence is in any court record proving that petitioner received or submitted pages 2-6 of the alleged agreement, such as to be bound. So, no signed or effective agreement exists.

⁵ On rehearing this petition, the Court should review *Hurni, Enelow, Stewart, Pickering and Wallerstein; American Trust Co. & Chavis* (Apps. B, C); U.S. Circuit Courts of Appeals contestability precedents, pp. 2-7, *supra*, & N.C.G.S. 58-58-22(2), all of which require that ANICO commence its contest by March 15, 2012, which it failed to do. See Certificate, ¶ 1.

"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. D). So, ANICO's unsigned, undated, and ineffective Agreement is void, pursuant to NC law, since neither petitioner nor the Recruiting Organization signed page 1. (Pet.App. 9).

On October 12, 2015 ANICO first produced pages 2-6 of its Agreement with its motion for summary judgment, which was well-beyond five years in the future. DE 26-6, Exhibit 4(a)(Under Seal). Therefore, pages 2-6 are "nugatory and void for indefiniteness," pursuant to North Carolina law. See *Boyce v. McMahan*, 285 N.C. 730, 734, 208 S.E.2d 692, 695 (1974)(App. E); *Miller v. Rose*, 138 N.C.App. 582, 587-88, 532 S.E.2d 228, 232 (2000)(citing *Boyce*)(App. F).⁶ And consequently, the parties did not "assent to the same thing in the same sense and their minds meet as to all terms," see *Normile v. Miller*, 313 N.C. 98, 103, 326 S.E.2d 11, 15 (1985); or "show the essential elements of a valid contract," see *Smith v. Joyce*, 214 N.C. 602, 604, 200 S.E. 431, 433 (1939); and "the *intent and obligation* of the parties," see *Rape v. Lyerly*, 287 N.C. 601, 615, 215 S.E.2d 737, 746 (1975).⁷ (Emphasis added).

⁶ Page 1 of the Agreement filed with ANICO's summary judgment motion had never been received prior by petitioner. And with no discovery, ANICO cannot prove otherwise. Further, the page appears fabricated since ANICO recorded "Mrs. Laschkewitsch; wife" as beneficiary even though petitioner has never been married or had a wife. As well, ANICO's filed Agreement is five pages, whereas the agreement discovered by petitioner (Pet.App. 9) has six pages with the same "05/01" date and same Form number "4736." And pages 2-6 are not the same between ANICO's filing and Pet.App. 9, which creates ambiguity and goes against the drafter of differing versions, ANICO.

⁷ Upon rehearing this petition, the Court is requested to review further NC Supreme Court precedent regarding no existence of a signed, dated, mutual or effective Agreement, and ANICO's breaches of its alleged Agreement. (Pet.Cert., pp. 16-18); Certificate, ¶ 3.

B. ANICO Breached Its Undated, Ineffective & Non-mutual Agreement

First, petitioner agreed to Page 1 only on January 12, 2010 (Pet.App. 8), with no receipt or submission of pages 2-6. On February 5, 2015 ANICO first contested the alleged Agreement, which was over five years later. Since the North Carolina statutes of limitation is three years for ANICO's alleged breach and fraud, and is inflexible and unyielding, ANICO contested its agreement over two years untimely.

Second, ANICO's termination letter did not identify any of four particular contractual reasons permissible for terminating such Agreement. As written, "The Company may terminate this Agreement at any time upon the occurrence of any of the following events:" (Pet.Apps. 9, p. 5, "Termination;" 10). ANICO'S breach was failing to notify petitioner of the occurrence of a contractual basis for termination.

Third, "Either party may terminate this Agreement by giving thirty (30) days written notice prior to the date fixed for termination." Pet.App. 9, p. 5, Termination. However, on July 9, 2012 ANICO notified petitioner that "the existing contract with the Company has been terminated on the date shown above." (Pet.App.10, "Effective Date of Termination: 08/06/2012"). ANICO's notice was 28 days "prior to the date fixed for termination," less than 30 days, which was also a breach of its Agreement.

Fourth, as written: "Any dispute or controversy arising out of or relating to this Agreement...will be resolved exclusively and finally by arbitration...before three arbitrators... the arbitrator shall not award punitive damages or attorney's fees, those damages hereby being waived..." (Pet.App. 9, p. 6, Arbitration). Therefore, ANICO breached its Agreement again by not filing a motion to stay or to compel arbitration, by pleading fees and damages, and by filing a motion for fees/damages.

Fifth, ANICO gave petitioner no due notice before sending an unknown and unproduced letter to the NC Department of Insurance to terminate its Agreement *for cause*. Here, petitioner was notified by NCDOI, not ANICO, as mandated by North Carolina insurance law. (N.C.G.S. §58-33-56(d); App. 5, p. 4)). And confirming this breach is that "Licensing of agents shall be in compliance with the statutory and regulatory requirements of the Departments of Insurance." (App. 9, p. 2, 1st ¶).

Sixth, ANICO drafted that "This Agreement...constitutes the sole agreement and supersedes all prior agreements between you and the Company." (App. 9, p. 6, "Sole Agreement"). ANICO's sixth breach is that petitioner's stand-alone agreement Page 1 signed on January 12, 2010 is superseded by ANICO's six page non-mutual, never submitted or received, undated and ineffective agreement. (App. 9, pp. 1-6) and/or the 5-page never received Agreement filed with ANICO's summary judgment motion, which was 5 years untimely. (Pet.App. 15); DE 26-6, Ex. 4(a)(Under Seal)).

Seventh, as ANICO stated: "the execution and performance of this Agreement involves transacting business in the State of Texas by you and the Company" and "all [party] actions with respect thereto are to be brought in a court of competent jurisdiction in the State of Texas" (Pet.App. 9, p. 6, "Law Applicable"), following arbitration. (Pet.App. 9, p. 5). Thus, ANICO breached its Agreement again by not filing a change of venue motion from the Eastern District of NC to the State of TX.

Further, the courts below abused their discretion by holding petitioner liable to the Agreement since petitioner had no performance in Texas, was not licensed in Texas, and did not transact business in Texas. And therefore, the Agreement cannot be found executed by performance or transactions as a valid and binding Agreement between the parties.

III. All Courts Erred By Granting And Affirming ANICO's Attorneys' Fees

Since any agreement controversy will be resolved "exclusively and finally" by arbitration before three arbitrators wherein the "arbitrator shall not award punitive damages or attorney's fees, those damages hereby being waived," the courts below abused their discretion in granting ANICO attorneys' fees and punitive damages. In addition, ANICO did not file an affidavit of prevailing market rates. See *Blum v. Stenson*, 465 US 886, 888-96 (S.Ct. 1984). Nor did ANICO file a bill of costs "after 14 days from judgment," such that its failure "**constitutes a waiver**" of all costs. See EDNC Local Rule 54.1(a)(3)(Pet.App. 5, p. 8). See also *Taniguchi v. Kan P. Saipan, Ltd.*, US, 132 S.Ct. 1997, 1999-2000, 182 L.Ed.2d 903 (2012). And ANICO did not provide any receipts or billing statements to prove the veracity of any of its costs.

As well, the district court ordered both parties to brief a position statement over fees. But ANICO failed to brief a position statement. (DE 45, DE 49, 49-2). And filed with his ten page improper brief, Gilbert C. Laite III briefed eight legal cases within his attached affidavit (DE 49-1), which should not have been permitted.⁸

IV. All Courts Omitted Ben's ALS Specialist Consult Date For Possible ALS

On March 15, 2010 the policy was issued by ANICO. (Pet.App. 6, p. 1, Form ART07(03)). 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.

⁸ ANICO's fee motion was bundled, duplicated, redundant, unnecessary and ambiguous. And the lower courts omitted petitioner's special circumstances, which render fees awarded to ANICO unjust, the American Rule, and that petitioner did not act vexatiously, wantonly, for oppressive reasons or in bad faith, pursuant to this Court's precedent. The Court should rehear Pet.Cert, pp. 16-21 and Pet.Apps. 11, ¶s 1-43; 16; and 17, ¶s 1-21, which all together prove a Rule 44 substantial and controlling effect for reversal of fees against petitioner.

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 North Carolina's "Certified Centers of Excellence" to "make that decision. Wife understands this." (Pet.App. 31, pp. 1-5; Pet.App. 37, p. 5; App. G).

And since fasciculations and muscle weakness are the first signs of ALS (Pet. App.27, p.1), Ben did not have ALS on January 22, 2010.⁹ 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 specialist Bedlack. (Pet.App. 34, 1st sentence).

On March 13, 2010 the policy was approved to be issued. (Pet.App. 19). Thus, Ben's first specialist "consultation for possible ALS..." the least certain degree of ALS (Pet.App. 28, "Diagnosis," 2nd ¶), was ten full days after ANICO had approved Ben's application and assembled the policy for a "March 15, 2010 Date of Issue."

⁹ See Pet.Apps. 19, ANICO's March 13, 2010 policy approval letter; 20, "research only" participation; 21, ¶s 1-8; 22, p. 17-21; 23 p. 7 of 8, IMPRESSION; 24, California's "ALS Certified Centers of Excellence," which does not include UCSF; 25, Meltzer Dep. 62:7-64:14; 26, questions 3, 8, 52; 27, p.1, 3rd ¶, the signs of ALS are "weakness of affected muscles and visible fasciculations," the four diagnostic ALS categories are 'Clinically definite,' 'Clinically probable', 'Clinically probable-Laboratory supported' and 'Clinically possible'; 28, Diagnosis, 2nd ¶; 29, Van Tran consult; 30, Van Tran Dep. 46:6-25; 31, pp. 1-4, Charya's January 22, 2010 consult with Ben, and p. 5, "neuro eval pending...to make that decision;" 32, "there is no specific confirmation test" and often "false-positive diagnoses;" 33, "the median time from onset to ALS diagnosis is 11 months;" 34, the first sentence of Ben's March 23, 2010 consult with specialist Bedlack "for possible ALS;" 35, the ALS diagnosis categories are "possible, probable lab-supported, probable and definite;" 36, ALS is characterized by progressive weakness and is "yet poorly understood;" 37, p. 4, Story of Robert Dawkins' three years of "inaccurate diagnoses," p. 5; 38, Affidavit of Jerry Dawson, ¶s 3-13; 39, National Institutes Of Health, "No test can provide a definite diagnosis of ALS" and "patients should always obtain a second neurological opinion;" 40, there are numerous differential diagnoses of ALS; 41, "referral to a tertiary center can have a significant positive impact;" 42, the story of Terry Herring's delayed ALS diagnosis; 43, p. 2, Fayetteville resident coach Jeff Capel Jr.'s diagnosis of ALS "by doctors at Duke," just like insured Ben; 44, ¶s 2-12; 45, p.1; and 46, lines 19-20, Ben's diagnosis of ALS in "late March, 2010." This Court is requested to rehear and review Pet.Apps. 20-46, and pp. 22-25 in petitioner's petition for a writ of certiorari.

V. ANICO Failed To Plead Or Prove Fed.R.Civ.P. 9(b) Particularity

On January 12, 2010 petitioner mailed McCall Ben's undated application and ANICO's Agreement "Page 1" with six non-contract pages. (Pet.Apps. 7, 8). Since Mitchell dated Ben's undated application, ANICO cannot prove when, where, place, or identity over Ben's application. Petitioner did not date the alleged Agreement (Pet.Apps. 8, 9); so, neither can ANICO prove when, where, time, or place over its alleged Agreement. The policy amendment (Pet.App. 6, Form NIA (4-81)) is also undated. All that remains is the exam for Mutual of Omaha, which is not part of the "Application for this Policy." (Pet.App. 6, policy, p. 3, Section 4, General Provisions, "Contract and Representations;" Form NIA (4-81)). Thus, ANICO's fraud defense is barred by its failure to plead Rule 9(b) particularity. See Pet.Cert. p. 29, n.14, n. 15.

VI. The Lower Courts Erred By Granting ANICO Collateral Estoppel

ANICO succeeded only on its collateral estoppel defense. (Pet.App. 4, pp. 2, 4-6; DE 33, 43). In granting such defense, the district court erred by not following the NC Supreme Court's most recent precedent. In *Turner v. The Hammocks Beach Corp.*, No. 450A08 (N.C. 2009)(App. H; DE 51-1), the North Carolina Supreme court held that "To successfully assert collateral estoppel as a bar to claims," a party:

"would need to show that the earlier suit resulted in a final judgment on the merits, that the issue in question was identical to an issue actually litigated and necessary to the judgment, and that both [defendant] and [plaintiff] were either parties to the earlier suit or were in privity with parties."

Id. at 773-4. Here, the judgment was not final, there are more than twenty five non-identical issues, and ANICO and petitioner were not parties to an earlier suit or in privity with any other parties. See Pet.Cert, pp. 25-26; *Clay v. United States*, 537 US 522, 524-5, 123 S.Ct. 1072, 155 L. Ed. 2d 88 (2003). (Emphasis added).

VII. ANICO Contested The Policy And Agreement Beyond NC Statutes Of Limitation, Accepted Premium After Notice And Alleged Knowledge And Committed UDTP And Unfair Claim Settlement Practices

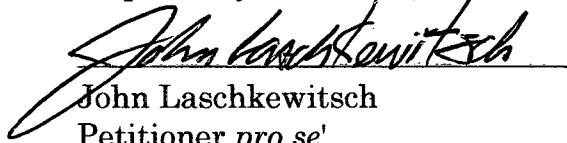
The last dated page within Ben's application and the Agreement is January 29, 2010, admittedly dated by Dell Mitchell. ANICO's first contest was on February 5, 2015, over five years later. The NC 3-year statutes of limitation are inflexible and unyielding and cannot be tolled based on ANICO's lack of discovery and knowledge. (Pet.Cert. pp. 27-29). ANICO accepted premium after notice and knowledge, which applies to waiver and estoppel of its defenses. (Pet.Cert. pp. 30-31).¹⁰ ANICO failed to attach a Buyers' Guide to the policy, an NC unfair and deceptive trade practice, see N.C.G.S. §§ 58-60-15, 30, and violated N.C.G.S. §§ 58-63-15(1), (2) and 58-63-15(11)(a), (d), (f), (n), and (i). See Pet.Cert., pp. 33-40. (Pet.App. 5, pp. 3-8).

CONCLUSION

Based on the foregoing, the below courts' judgments should be **REVERSED** and petitioner should be **GRANTED** the full policy proceeds trebled with interest.

This the 28th day of December, 2018

Respectfully submitted,



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¹⁰ See *Northern Assurance Co. v. Grandview Building Assn.*, 183 U.S. 308, 311 (S.Ct. 1902) ("By...accepting and retaining... insurance premium with knowledge of said subsisting concurrent insurance...defendant [ANICO] has waived the said condition and is estopped"); see also *Swartzberg v. Reserve Life Ins. Co.*, 113 S.E.2d 270, 277-78 (1960) 252 N.C. 150 ("As indicated, with reference to estoppel and waiver, the burden of proof was on the plaintiff [petitioner] to show that defendant [ANICO] had paid claims or accepted premiums after it acquired such knowledge or notice. See also *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 NY v. Blumenfeld*, 92 A.D.3d 487, 488-90 (2012) 938 N.Y.S.2d 84. (App. I). Therefore, ANICO waived its right to contest or rescind the policy.

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