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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

PATRICK O'RIORDAN, Plaintiff and Appellant, v. FEDERAL KEMPER LIFE ASSURANCE COMPANY et al., Defendants and Respondents.	C037789 (Super. Ct. No. 99AS04726)

Defendant Federal Kemper Life Assurance Company (Kemper) issued a life insurance policy for Amy O'Riordan. The agent, Robert Hoyme, advised her to answer "no" to the question of whether she had smoked a cigarette in the past 36 months, even though she told him she had smoked during that time. Thereafter, Amy O'Riordan passed away. Instead of paying the death benefit, Kemper rescinded the policy and refunded the premium payments. Amy O'Riordan's husband, plaintiff Patrick O'Riordan (O'Riordan), sued Kemper, alleging breach of contract and other causes of action. The trial court granted summary judgment in favor of Kemper because it held Kemper was entitled to rescind the policy. I conclude the trial court was correct. While he does so for different reasons, Justice Blease also concludes the judgment must be affirmed.

STANDARD OF REVIEW

"Summary judgment is granted if all the submitted papers show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) A defendant seeking summary judgment has met the burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action cannot be established or that an affirmative defense to that cause of action exists. (Code Civ. Proc., § 437c, subd. (n);

see *Rowe v. Superior Court* (1993) 15 Cal.App.4th 1711, 1724.) Once the defendant's burden is met, the burden shifts to the plaintiff to show that a triable issue of fact exists as to that cause of action. (Code Civ. Proc., § 437c, subd. (o).) The plaintiff must set forth specific facts showing that a triable issue of material fact exists. (*Ibid*.) [¶] In reviewing the propriety of a summary judgment, the appellate court independently reviews the record that was before the trial court. [Citation.] We must determine whether the facts, as shown by the parties, give rise to a triable issue of material fact. [Citation.] In making this determination, the moving party's affidavits are strictly construed while those of the opposing party are liberally construed. [Citation.]" (*Arnold v. Dow Chemical Co.* (2001) 91 Cal.App.4th 698, 707.)

FACTS

In 1996, Patrick and Amy O'Riordan decided to buy term life insurance. They contacted Robert Hoyme at the recommendation of another life insurance agent. After several meetings with Hoyme, Amy O'Riordan applied for a life insurance policy from Kemper through Cenco Insurance Marketing Corporation (Cenco). Cenco is a general agent for Kemper and has the express authority to recruit agents to solicit insurance and to recommend these agents be appointed by Kemper. Once Cenco recruits agents, these agents file applications for Kemper insurance policies through Cenco, which processes the applications. In order to "write" insurance policies for Kemper, the agents are required by state law to be appointed by Kemper. (Ins. Code, § 1705.)

The application listed Hoyme as the agent. Hoyme assisted the couple with completing the insurance applications and offered to help with some of the questions on the application. The questions at issue in this case involved Amy O'Riordan's smoking and tobacco history. The questions asked whether Amy O'Riordan had "smoked cigarettes in the past 36 months" and whether she had "used tobacco in any other form in the past 36 months?" In answering these questions, Amy O'Riordan informed Hoyme she had smoked a couple of cigarettes in social situations within the prior 36 months and that she had been a habitual smoker more than three years ago. In addition, Amy O'Riordan informed him the reason they wanted to buy term life insurance was to replace a policy from a previous insurance company because the premiums were too high. She told him her previous insurance policy was a "smoker's policy." Hoyme stated the application question was not really looking for a person who had smoked cigarettes on a couple of occasions. Rather, he told her Kemper was looking for "smokers" and, if she was not smoking then, she did not fall within this category.

Hoyme testified in deposition that he typically discussed the distinction between an occasional smoker and a habitual smoker to potential insureds. He stated that if you have a cigarette "just once or twice a year, then it's not a big deal." He told the O'Riordans that Kemper would explore Amy O'Riordan's medical history and would do a complete blood and urine analysis to determine whether she had nicotine in her system. He stated a medical examination would reveal any residual effects of smoking in the body.

Amy O'Riordan had shared a couple of cigarettes with her sister in 1995, the year before she applied for the Kemper Preferred Non-Tobacco policy. After she shared a

couple of cigarettes with her sister in 1995, she started using a nicotine patch to ensure she would not start smoking again. She did not smoke cigarettes again until 1997, after Kemper issued the policy and after she had been diagnosed with terminal cancer. Despite her tobacco use in 1995, she answered "no" to the questions regarding cigarette and tobacco use.

Hoyme sent the applications to Kemper along with a check for the first premium. Kemper typed the information provided on the applications and sent a copy of the typed application to Hoyme for the O'Riordans to review. He took the typed applications to the O'Riordans who reviewed and signed the applications. The typed applications also asked about Amy O'Riordan's smoking history. Amy O'Riordan again answered "no" to the smoking and tobacco use questions.

Before Hoyme could complete the transaction with the O'Riordans he had to complete an appointment application with Kemper to be filed with the California Department of Insurance. Hoyme completed this application and sent it to Cenco with a copy of his agent's license. A Cenco representative signed and filed this application with the Department of Insurance. This appointment form appointed Hoyme as a "Life Agent" for Kemper.

After Kemper appointed Hoyme as its agent, Hoyme arranged for the O'Riordans to be examined by a medical doctor, a prerequisite for coverage under the policy. A physician approved of and paid for by Kemper examined Amy O'Riordan and conducted a blood and urine screening -- which was intended to reveal any lasting effects of nicotine on her body. This test came back negative for any traces of nicotine. After the medical examination, Kemper issued a Preferred Non-Tobacco policy for Amy O'Riordan. Hoyme delivered this policy to the O'Riordans.

This type of insurance relationship is typical for Kemper. Kemper sells insurance in California through agents, whom it appoints with the Department of Insurance to sell insurance on its behalf.

Kemper has a general agency relationship with Cenco. Cenco solicited Hoyme as an agent and, at Cenco's suggestion, Kemper appointed Hoyme as an agent. Kemper does not have an agent's agreement with Hoyme, and Hoyme is not an employee of Kemper. He also works with other insurance companies to transact insurance business. Hoyme transacted insurance business on Kemper's behalf only on this one occasion.

In 1997, after Kemper issued the insurance policy to Amy O'Riordan, she learned she had terminal cancer. Soon thereafter, she started smoking cigarettes again.

On June 26, 1998, less than two years after Kemper issued the policy, Amy O'Riordan died, just two days before the policy became incontestable by its own terms. Because she had died within the contestability period, Kemper investigated her claim and researched her medical records. During the course of its investigation, Kemper discovered Amy O'Riordan had smoked before and after Kemper issued the policy.

Because of her smoking, Kemper notified Patrick O'Riordan it was going to rescind the policy and would not pay the death benefits owed to O'Riordan under the policy. Instead, Kemper sent O'Riordan a check refunding the premiums paid to the time of rescission.

PROCEDURAL HISTORY

O'Riordan filed this action against Kemper, Cenco and Hoyme for breach of contract, breach of covenant of good faith and fair dealing, negligence, fraud, and intentional and negligent infliction of emotional distress. Kemper is the only remaining party to this action because O'Riordan settled with Hoyme and dismissed his appeal as to Cenco.

Kemper moved for summary judgment or, alternatively, for summary adjudication of issues. In its motion, Kemper claimed it was not liable for breach of contract or bad faith claims because it was entitled to rescind the life insurance policy based on Amy O'Riordan's failure to disclose her tobacco use on the insurance application.

The trial court did not immediately deny Kemper's motion, even though the court found Kemper had not met its burden because it had not put on any evidence regarding its relationship with Hoyme. Instead, the court continued the matter under Code of Civil Procedure section 437c, subdivision (h), on its own motion and permitted Kemper to supplement the evidence regarding its relationship with Hoyme.

After receiving Kemper's additional evidence, the court granted Kemper's motion and, ultimately, entered judgment in Kemper's favor.

DISCUSSION

I

Actual Authority

There can be no doubt that, under the evidence construed in favor of O'Riordan as it must be on appeal after a summary judgment, Hoyme lured Amy O'Riordan into stating she had not smoked during the 36 months before she filled out the application for life insurance when, in reality, she had smoked. While the question of Hoyme's liability to O'Riordan has been resolved by settlement, Kemper's potential liability is the focus of this appeal.

If an insured conceals material information in an application for life insurance, the insurer is entitled to rescind the policy. (Ins. Code, § 331; *Rutherford v. Prudential Ins. Co.* (1965) 234 Cal.App.2d 719, 724-725.) Critical to a determination of whether Amy O'Riordan concealed material information from Kemper is whether Hoyme's receipt of the information that she had smoked during the 36 months before she applied for life insurance with Kemper is attributable to Kemper. This requires an analysis of the relationship between Kemper and Hoyme. I therefore turn to the question of whether Hoyme was Kemper's agent with respect to Amy O'Riordan's application and, if so, what was the extent of Hoyme's authority as an agent. In order to determine whether Hoyme was Kemper's agent I look to the Insurance Code, which defines the relationship between insurance carriers and their agents. In addition, I will look to the Civil Code, which sets out the provisions of agency law.

In California, all insurance agents and brokers must be licensed and admitted to transact insurance business by the Department of Insurance. (Ins. Code, §§ 24, 31, 1631.) For insurance other than life insurance, an insurance "agent" is a person authorized by an insurer to engage in insurance transactions on behalf of the insurer. (Ins. Code, §§ 31, 1621.) An "insurance broker" represents the insured in transactions

with an insurer and is an agent of the insured. (Ins. Code, §§ 33, 1623.) An insurance broker may act both as a broker for an insured and an agent for the insurer, sometimes even in the same insurance transaction. (*Maloney v. Rhodes Island Ins. Co.* (1953) 115 Cal.App.2d 238; *Ivey v. United Nat. Indem. Co.* (1958) 259 F.2d 205 [applying California law].)

California has established a separate licensing scheme for life insurance sales. (Ins. Code, § 32.) A life insurance agent is defined as a "life agent" under California law. (Ins. Code, §§ 32, 1622.) California does not license "brokers" for the sale of life insurance. The broker function is covered by a "life and disability insurance analyst." (Ins. Code, §§ 32.5, 1831, subd. (d).) A life insurance analyst must be specially licensed by the state Department of Insurance and cannot be compensated by an insurance carrier. Therefore, under California law a person engaged in transacting life insurance is either an agent or an analyst. (Ins. Code, §§ 32, 32.5.)

California requires insurance agents, including life agents, to be authorized by the insurance carrier to transact business on the carrier's behalf. (Ins. Code, § 1704.) Thus, before an agent can engage in an insurance transaction, the carrier must file a notice of appointment with the Department of Insurance. The agent is not limited to any number of appointments and may "transact" business on behalf of any number of insurance carriers at the same time. (Ins. Code, § 1704, subd. (a).)

Once the insurer files a notice of appointment with the Department of Insurance, the agent has the authority to transact insurance business for the insurer. (Ins. Code, § 1704, subd. (a).) Insurance Code section 35 defines the authority to "transact" insurance as the authority to (1) solicit business; (2) negotiate before execution of an insurance contract; (3) execute an insurance contract; and (4) conduct all matters arising out of the contract subsequent to its execution. (Ins. Code, § 35.)

In addition to the definition of agent in the Insurance Code, the Civil Code sets out the general rules of agency. (Civ. Code, §§ 2295-2357.) The Civil Code defines an agent as one who represents the principal in dealings with third persons. (Civ. Code, § 2295.) The agency relationship can be created with respect to a particular act or transaction or for all purposes. (Civ. Code, § 2297.)

In this action, Hoyme had a license from the Department of Insurance to sell insurance as an insurance agent. Kemper appointed Hoyme to serve as a "life agent."

By appointing Hoyme as an agent for licensing purposes Kemper authorized Hoyme to "transact" insurance business on its behalf in the State of California. (Ins. Code, § 35.) By authorizing Hoyme to transact business on Kemper's behalf, Kemper, by law, authorized Hoyme to solicit business on Kemper's behalf, negotiate before executing insurance contracts, execute insurance contracts, and conduct all matters arising out of the contract subsequent to its execution. (Ins. Code, § 35.)

The Civil Code defines an agent as one who represents the principal in dealings with third persons. (Civ. Code, § 2295.) Kemper filed an appointment form with the Department of Insurance, which by law authorized Hoyme to solicit business and to negotiate, execute and service insurance contracts on its behalf. (Ins. Code, § 35.)

Because Hoyme was authorized to represent Kemper in dealings with third persons on Kemper's behalf, he is Kemper's agent.

Kemper asserts Hoyme is not an agent because he was merely a producer, acted independently, had never sold insurance for Kemper before, was not supervised by Kemper, and was not a Kemper employee. Kemper asserts that, because of these facts, Hoyme was an agent for the O'Riordans rather than Kemper. To support this position Kemper cites several cases that distinguish between agents and brokers. (*Maloney v. Rhode Island Ins. Co., supra,* 115 Cal.App.2d at pp. 244-245; *Marsh & McLennan of Cal., Inc. v. City of Los Angeles* (1976) 62 Cal.App.3d 108, 117-118.)

These cases are not relevant because even if Hoyme is independent and works for other insurance carriers at the same time, he is still Kemper's agent. California agency law provides an agency relationship can be created with respect to a particular act or transaction and a life agent may be appointed to represent a number of insurance carriers at the same time. (Civ. Code, § 2297; Ins. Code, § 1704, subd. (a).) Even if Hoyme was only appointed for a particular transaction and he did not sign any employment contract, he is nonetheless considered an agent of Kemper for that limited transaction.

II

Scope of Hoyme's Authority

Next, I must determine the extent of Hoyme's authority as Kemper's agent. The Civil Code provides that "every agent has actually such authority as is defined by this Title, unless specially deprived thereof by his principal, and has even then such authority ostensibly, except as to persons who have actual or constructive notice of the restriction upon his authority." (Civ. Code, § 2318.)

Here, Kemper vested Hoyme with actual authority to transact business on its behalf but not to define or interpret the unambiguous terms of the contract. The principal can confer actual authority on the agent either expressly or impliedly. (Civ. Code, § 2315.) "Actual authority is such as a principal intentionally confers upon the agent, or intentionally, or by want of ordinary care, allows the agent to believe himself to possess." (Civ. Code, § 2316.)

Kemper appointed Hoyme to act as its agent when it appointed Hoyme to serve as a life agent under California life insurance law. By appointing Hoyme, it intentionally conferred the power to transact insurance on its behalf. This granted Hoyme the authority to (1) solicit business; (2) negotiate before execution of an insurance contract; (3) execute an insurance contract; and (4) conduct all matters arising out of the contract subsequent to its execution. (Ins. Code, § 35.)

Hoyme had express actual authority to transact business on Kemper's behalf, limited to the authority to transact business as set out in Insurance Code section 35. Hoyme's authority, however, did not extend to interpreting an unambiguous term in the insurance. The only possible provision of Insurance Code section 35 that is applicable to this issue is the authority to negotiate before executing an insurance contract. Even this provision falls short because changing an unambiguous term to mean something different cannot be considered negotiation unless the parties actually modified the unambiguous term, for example, by reducing the outcome of the negotiations to writing in some way,

possibly by crossing out the term in the contract and replacing it with the new, agreed upon term. This amendment, however, would likely be outside the scope of Hoyme's authority because the contract at issue here states the agent does not have the authority to alter the "rules or requirements" of the "Agreement, the Receipt, or the Policy."

O'Riordan argues that, because "rules or requirements" is not defined anywhere in the contract, it is reasonable to assume O'Riordan had the authority to interpret a term of the contract so long as he is not authorizing a change in the "rules or requirements." In addition, he argues the limitation only extends to the Agreement, the Receipt and the Policy and does not extend to the smoking questions, which are located in the "General Information" section of the contract.

This interpretation of the contract is unreasonable. A plainly unambiguous question like "Have you smoked cigarettes in the past 36 months?" or "Have you used tobacco in any other form in the past 36 months?" needs no further interpretation. Because the term is unambiguous, I reject O'Riordan's argument that Hoyme had the authority to interpret the term to mean anything other than what it plainly means.

III

Ostensible Authority and Estoppel

While Hoyme did not have authority to interpret the contract in a manner to allow the decedent to answer negatively to the question of whether she had smoked in the prior three years, I must still determine whether Kemper is estopped from rescinding the contract. O'Riordan argues that, even if we determine Hoyme acted outside the scope of his authority, we should find Kemper is estopped from rescinding the policy because Hoyme was Kemper's agent when he misled the O'Riordans. This is essentially a question of whether Hoyme had ostensible authority to advise Amy O'Riordan to answer negatively to the questions concerning smoking in the prior three years. "'Many courts use the terms ostensible agency, apparent agency, apparent authority, and agency by estoppel interchangeably. As a practical matter, there is no distinction among them.' [Citation.]" (*Armato v. Baden* (1999) 71 Cal.App.4th 885, 897, fn. 4.)

"Ostensible authority is such as a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess." (Civ. Code, § 2317.) While actual authority is based on what the principal leads the agent to believe, ostensible authority is based on what the principal leads the third person to believe.

"'"It is settled [in California] that ostensible authority arises as a result of conduct of the principal which causes the third party *reasonably to believe* that the agent possesses the authority to act on the principal's behalf."' [Citation.] Significantly, '[o]stensible authority must be based *upon acts or declarations of the principal* and not the conduct or representations of the alleged agent.' [Citations.]" (*Petersen v. Securities Settlement Corp.* (1991) 226 Cal.App.3d 1445, 1452, emphasis in original.) Liability of the principal for the ostensible agent requires not only the principal's conduct that creates the authority, but also "justifiable reliance by a third party, and a change of position from such reliance resulting in injury." (*Preis v. American Indemnity Co.* (1990) 220 Cal.App.3d 752, 761; Civ. Code, § 2334.)

While it is undisputed the O'Riordans relied on Hoyme's representations to their detriment, the other two components of ostensible authority are missing: (1) conduct by Kemper leading the O'Riordans to believe Hoyme possessed authority beyond his actual authority and (2) justifiable reliance on Hoyme's representation.

Kemper had no direct dealings with the O'Riordans. In addition, Kemper was unaware of Hoyme's representations about the questions concerning Amy O'Riordan's smoking history. Therefore, Kemper cannot be said to have led the O'Riordans to believe, by want of ordinary care, that Hoyme had the authority to change an unambiguous term of the contract.

Furthermore, as noted above, the questions concerning smoking were unambiguous. Therefore, the O'Riordans' reliance on Hoyme's representation that Amy O'Riordan could answer the questions negatively was unjustified.

Based on the undisputed facts, Hoyme did not have ostensible authority to make the representations concerning the smoking questions, as a matter of law. Stated differently, Kemper is not estopped from rescinding the policy.

IV

Other Causes of Action

In addition to his claim that the policy was enforceable, O'Riordan asserted causes of action relating to Kemper's denial of the claim and rescission of the policy. These causes of action, however, were based on the premise the policy was enforceable. On appeal, O'Riordan, still premising his argument on the enforceability of the contract, asserts Kemper may be held liable for misrepresentation, bad faith, and infliction of emotional distress, with resulting punitive damage liability. Having concluded Hoyme's representations did not bind Kemper, I agree with the trial court that, "with no enforceable contract, [Kemper] was justified and truthful in rescinding the policy . . . ." None of O'Riordan's causes of action has merit.

DISPOSITION

The judgment is affirmed.

NICHOLSON, J.

I concur in the judgment but write separately.

The insured, Amy O'Riordan, obtained a non-smoker's policy of life insurance from Kemper based on an application which answered "No" to the question: "Have you smoked cigarettes in the past 36 months."

The lead opinion is based on the view Amy "O'Riordan informed Hoyme [Kemper's agent] she had smoked a couple of cigarettes in social situations within the prior 36 months
. . . ." (Lead opn. at p. 3.) The opinion cites to a provision of the clerk's transcript in which Mr. O'Riordan, Amy's husband is asked:

> "Is it your recollection that your wife's precise words were 'I do have a cigarette every now and then?' [¶] "A. No. She said . . . 'I might have had a couple of cigarettes in the last couple of years' or something. I can't -- the exact wording -- she put him [Hoyme] on notice. And he says, 'That's not really what they're looking for, they're looking for smokers.'"

Mr. O'Riordan in his declaration also states:

> "In 1998, after Amy died, I learned that she shared a couple of cigarettes with her sister in 1995. I obtained this information from Amy's sister, Pam. Pam told me that because Amy was afraid that she was going to start smoking again, Amy asked for and received patches. I am aware that Amy did not smoke at any other time before learning that she had breast cancer in November 1997 . . . ."

However, an exhibit from Amy O'Riordan's doctor, dated June 8, 1995, upon which Kemper relies to rescind the insurance policy and which is attached to the declaration of Lynn Patterson, Chief Underwriter for Kemper, puts a different light on the smoking. It states:

> "She also would like to talk today about smoking cessation. She quit smoking several years ago after using patches that worked very well for her, however, recently, due to some stress[], she did start to smoke a little bit again, but is not smoking as much as she smoked previously. She would like to go back on the patches to help her get over the hump."

This statement was not conveyed to Hoyme. Mrs. O'Riordan's smoking was not confined to a couple of cigarettes but was a continuous problem requiring patches. Thus, Amy O'Riordan concealed the true nature of her problem from Kemper's agent, Hoyme.

Concealment by the insured of a material fact is a ground of rescission. (Ins. Code, § 331.) "Materiality is to be determined not by the event, but solely by the probable and reasonable influence of the facts upon the party to whom the

communication is due, in forming his estimate of the disadvantages of the proposed contract . . . ." (Ins. Code, § 334.)

In this case Kemper's Chief Underwriter avowed that: "Federal Kemper underwriting guidelines in use at the time that the Amy O'Riordan risk was presented unequivocally precluded issuance of a Preferred Non-Tobacco policy to anyone whose application for that insurance . . . disclosed any use whatsoever of tobacco in any form at any time in the three-year period immediately preceding the date of application for that insurance." Moreover, the policy of insurance issued Mrs. O'Riordan states: "We rely on the statements made in the application for this policy."

Accordingly, Mrs. O'Riordan concealed the true extent of her smoking, a material fact, from her agent which justifies rescission of the policy of insurance.

BLEASE, Acting P. J.

Hull, J., Concurring and Dissenting

Justice Nicholson affirms the judgment for reasons with which I disagree. Justice Blease affirms the judgment for different reasons, but I disagree with those reasons, too. I concur and dissent.

All three of us agree that, for purposes of this transaction, Robert Hoyme was an agent for Federal Kemper Life Assurance Company (Kemper). We also agree that Hoyme did not have the actual authority to change the terms of the contract.

Justice Nicholson and I part company when it comes to the question of, as the parties have described it, Hoyme's "ostensible authority" to advise the O'Riordan's regarding information that Kemper would find significant in its decision to issue a nonsmoker's policy and to advise them that, under the circumstances Amy O'Riordan described, she could answer "no" to the questions: "Have you smoked cigarettes in the past 36 months?" and "Have you used tobacco in any other form in the past 36 months?" Justice Nicholson thinks that the evidence presented on the motion for summary judgment is insufficient to raise a triable issue of material fact as to Hoyme's ostensible authority to interpret the questions in the way that he did because that interpretation changed an unambiguous term of the contract. I cannot agree.

When the O'Riordan's decided, in 1996, that the smoker's policies they held with Farmer's Insurance were too expensive, they called their Farmer's Insurance agent and asked him about term insurance. Their agent told them Farmer's Insurance did not offer term insurance; he referred them to Hoyme. The O'Riordan's believed that Hoyme "had been in the business of selling life insurance for many years" and "that he knew what he was doing."

Thereafter, the O'Riordans met with Hoyme and Hoyme gave them, among other things, "Policy Summary Sheets" that bore the name and address of "Federal Kemper Life Assurance Company" and identified "Robert C. Hoyme, Cenco Insurance Mktg. Corp." as "Agent."

At some point, Hoyme presented to, and discussed with, the O'Riordans a life insurance application with Kemper, parts of which bore the Kemper Life Insurance Companies logo. He also had Amy O'Riordan complete a Kemper form entitled "Notice of AIDS Virus (HIV) Antibody Testing and Consent for Testing" and one entitled "Authorization to Obtain and Disclose Information." Each said, at the top, that it was a Kemper form. Both of these identified Hoyme as the agent and both instructed Hoyme to complete two copies, to leave the applicant with one copy, and to send the other to the "Home Office" with application. Part C of the application was a medical questionnaire, which set forth the questions at issue here regarding smoking. It was on a separate page that, again, bore the heading "Federal Kemper Life Assurance Company.

Later in the process of issuing the policy, Kemper sent to Hoyme, and Hoyme forwarded to the O'Riordans, an "Underwriting Requirement Letter" bearing the letterhead "Zurich Kemper Life." The life insurance policy in question was issued by "Federal Kemper Life Assurance Company" and thereafter, on a Kemper form entitled "Policy Delivery Receipt," the O'Riordan's acknowledged receipt of the policy. Hoyme

signed the receipt as Kemper's agent. I note that this form also required the O'Riordan's to acknowledge that Hoyme, as the agent, "has explained to [the insured] the policy provisions . . . ."

During the course of the transaction there were numerous other forms and documents relating to issuance of the policy, each of which was prepared by Kemper, identified by Kemper as a Kemper form, and sent to Hoyme to present to the O'Riordans.

In *Schwartz v. Royal Neighbors etc.* (1910) 12 Cal.App. 595, Mrs. Schwartz applied for insurance and was asked as part of her application how many miscarriages she had suffered and the dates of those miscarriages. Mrs. Schwartz told the agent for the insurer that she had once suffered a miscarriage, but the agent told her that "the miscarriage suffered by [the] applicant was not such a miscarriage as was contemplated by the question" and that Mrs. Schwartz's answer to the question should be "none." (*Id*. at pp. 597-598.) Mrs. Schwartz followed the agent's advice. (*Ibid*.)

After Mrs. Schwartz died, the insurer refused to pay the policy benefits, arguing in part that Mrs. Schwartz had lied in answering the question regarding miscarriages. The company argued that Mrs. Schwartz had warranted her answers on the application she signed to be literally true and that the company's agent did not have the authority to waive a truthful answer. We said: "The question here seems to us not one of waiver so much as it is the acceptance of the answers as satisfactory by the [insurer's] agent. The answer as orally given was literally true, for Mrs. Schwartz said she had a miscarriage and, after explanation, it was the agent and not Mrs. Schwartz who gave a meaning to the sickness and wrote down what was not strictly true. It was the [insured's] agent and not the insured who did this, and if the insured accepted it as her answer we may safely assume that she did so in acceptance of the construction put upon the matter by the agent." (*Id.* at 602-603.) We went on to note our agreement with Mr. Justice Cooley's observation in *North American Ins. Co. v. Throop* (1871) 22 Mich. 146 [7 Am.Rep. 638, 646] that: "If the insurer himself, or his agent, drafts an answer to [a question on the application], in which he treats [the applicant's answer] as immaterial and does not observe strict accuracy in his statement of facts, the assured might well suppose he could be thought captious and hypercritical if he should insist upon answers exactly correct, when the party seeking the information, and who, alone, was interested in it, was satisfied with statements less accurate . . . ." (*Swartz v. Royal Neighbors etc., supra*, 12 Cal.App. at p. 603.) It should not matter whether the agent completes the application, or instead tells the applicant how to complete it.

In any event, the law has been the same ever since. (See *Lyon v. United Moderns* (1906) 148 Cal. 470 475-476 ["'Where the insured, in good faith, makes truthful answers to the questions contained in the application, but his answers, owing to the fraud, mistake, or negligence of the agent . . . are incorrectly transcribed, the company is estopped to assert their falsity as a defense to the policy'"]; *Bass v. Farmers Mut. P. Fire Ins. Co.* (1937) 21 Cal.App.2d 21, 22-23 [in placing a fire insurance policy, applicant told agent she owned one-half of subject property in fee and held a life estate in the other one-half; agent filled out form to show applicant owned entire property in fee]; *Boggio v. Cal.-Western States Life Ins. Co.* (1952) 108 Cal.App.2d 597, 598 [applicant for life insurance

failed to disclose blow to head resulting in subarachnoid hemorrhage suffered while in navy when agent told him he did not have to disclose it so long as he had not received medical discharge].) The principle is described in 6 Couch on Insurance 3d. (1996) section 85.44, page 85-67 as follows: "If the insurer's agent construes the questions either by stating what they mean or by specifically stating that certain information is or is not required, any misrepresentations which result therefrom are charged to the insurer, the theory being that the insurer's agent remains the insurer's agent although he or she is assisting the insured."

Justice Nicholson is of the opinion that the question of whether Kemper "is estopped from rescinding the policy" is "essentially a question of whether Hoyme had ostensible authority to advise Amy O'Riordan to answer negatively to the questions concerning smoking . . . ." (Lead opn., ante, at p. 14.) He sees the question as whether Kemper's actions led Amy O'Riordan to believe "that Hoyme had the authority to change an unambiguous term of the contract." I would agree that, on this record, Hoyme did not have that authority. I note, however, that the agents did not have the authority, actual or ostensible, to change an unambiguous question regarding miscarriages in *Schwartz*, or an unambiguous question regarding pleurisy in *Lyon*, or an unambiguous question regarding an injury in *Boggio*. But that did not end the matter.

First of all, in my view, my colleagues are misled by the parties' mischaracterization of this issue as one involving ostensible authority. Once we conclude that Hoyme was Kemper's agent in this transaction, if Amy O'Riordan told Hoyme the truth, she told the company the truth, and Kemper is now estopped from claiming it did not know the truth. While ostensible authority may estop an agent's principal, not all estoppels are based on ostensible authority.

But if we must approach this question as one implicating the principles of ostensible authority, I would state the issue differently than Justice Nicholson does. The question is whether Hoyme had the ostensible authority to advise Amy O'Riordan of the information the insurance company needed to decide whether to issue a nonsmoker's policy, and in turn and based on that how to answer the questions regarding smoking and tobacco use.

On this issue, it is apparent that O'Riordan presented sufficient evidence on the motion for summary judgment to at least raise a triable issue of material fact regarding Kemper's claim that it was entitled to rescind the contract of insurance based on Amy O'Riordan's answers on the application.

As Justice Nicholson recognizes, ostensible authority arises when the conduct of a principal causes a third party reasonably to believe that the agent has the authority to act on the principal's behalf. (Lead opn., ante, at p. 15.) Applied to the facts of the case before us, the issue is whether Kemper's conduct in this transaction caused Amy O'Riordan reasonably to believe that Hoyme could advise her of the amount of smoking or tobacco use that Kemper would consider significant in deciding to issue a nonsmoker's policy.

I think the evidence is sufficient to require a jury to decide the issue. Kemper's conduct in giving Hoyme the authority to conduct this transaction on its behalf and in

giving Hoyme the Kemper documents and forms necessary to place this insurance is conduct by Kemper that a jury might decide was sufficient to satisfy that aspect of the doctrine of ostensible authority that requires conduct by the principal that gives rise to the third party's beliefs.

Further, there is sufficient evidence to require a jury to decide whether Amy O'Riordan's belief was reasonable. Her own insurance agent referred them to Hoyme as a person experienced in placing life insurance policies. As such, the O'Riordans might reasonably have believed that Hoyme was experienced in knowing what an insurance company considered significant in deciding whether to issue a nonsmoker's life insurance policy. Kemper then authorized Hoyme to represent Kemper in the transaction and gave Hoyme the means to conduct the transaction on its behalf, arguably leading the O'Riordan's reasonably to believe also that Kemper placed its trust in Hoyme, as an experienced life insurance agent, to know the type of information Kemper was interested in. While the matter is in conflict and a jury might find that Kemper's conduct was not such that it caused Amy O'Riordan reasonably to believe that Hoyme had the authority to tell her that she could report that she had not "smoked cigarettes in the past 36 months," there are triable issues of material fact, and a jury should decide those issues. Thus, if ostensible authority is an issue at all in this appeal, I respectfully disagree with Justice Nicholson's resolution of it.

Nor am I able to agree with Justice Blease. As I read his opinion, he is willing to accept for purposes of argument that Hoyme had the ostensible authority to advise Amy O'Riordan as Hoyme did, but he concludes that the record establishes that Amy O'Riordan concealed and misrepresented the extent of her tobacco use even from Hoyme. Justice Blease comes to this conclusion by comparing Amy O'Riordan's admission to Hoyme that "'she might have had a couple of cigarettes in the last couple of years'" (conc. opn. of Blease, J. ante, at p. 1) with a notation in her medical records that, as of June 1995 she "'recently'" started "'to smoke a little bit again'" and that she wanted to return to nicotine patches to "'get over the hump'" (conc. opn. of Blease, J. ante, at p. 2). While I agree that the latter reference may mean Amy O'Riordan smoked more than "a couple" of cigarettes in the preceding two years, a jury should decide whether, when she reported to her doctor that she had started to smoke again "a little bit," she was referring to only the two cigarettes she had shared with her sister. It is also significant that Amy O'Riordan underwent medical tests at or shortly after the time the policy was issued that showed no evidence of nicotine.

I would reverse the judgment.

_____HULL_____, J.