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C

Court of Appeal, Fifth District, California.
CALIFORNIA DEPARTMENT OF CORRECTIONS and REHABILITATION, Plaintiff and Respondent,
v.
CALIFORNIA STATE PERSONNEL BOARD, Defendant and Respondent.
Darrell Snell et al., Real Parties in Interest and Appellants.

No. F048806.
Feb. 14, 2007.

Background: Disciplinary actions were brought against employees of the California Department of Corrections (CDC), based upon their dishonest denials of underlying charges that had been **barred** by **statute** of **limitations**. State Personnel Board dismissed all charges, including the charges of dishonesty. CDC filed a petition for a writ of administrative mandamus. The Superior **Court**, Fresno County, No. 03CECG02539,Rosendo Pena, J., ordered the dishonesty charges reinstated. Employees appealed.

Holding: The **Court** of Appeal, Ardaiz, P. J., held that **statute** of **limitations** did **not bar** disciplinary actions against employees based upon their dishonest denials of underlying charges that were **barred** by **statute** of **limitations**.

Affirmed.

West Headnotes

[1] Administrative Law and Procedure 15A 796

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(E) Particular Questions, Review of
15Ak796 k. Law questions in general. Most Cited Cases

Where the facts in administrative proceedings are undisputed, the administrative review board's ultimate conclusion is a pure question of law subject to de novo review.

[2] Appeal and Error 30 842(1)

30 Appeal and Error
30XVI Review
30XVI(A) Scope, Standards, and Extent, in General
30k838 Questions Considered
30k842 Review Dependent on Whether Questions Are of Law or of Fact
30k842(1) k. In general. Most Cited Cases

Officers and Public Employees 283 72.51

283 Officers and Public Employees
283I Appointment, Qualification, and Tenure
283I(H) Proceedings for Removal, Suspension, or Other Discipline
283I(H)3 Judicial Review
283k72.49 Scope of Review
283k72.51 k. Trial or hearing de novo. Most Cited Cases

Court of Appeal is not bound by the State Personnel Board's or the trial court's application and interpretation of a statute.

[3] Officers and Public Employees 283 72.12

283 Officers and Public Employees
283I Appointment, Qualification, and Tenure
283I(H) Proceedings for Removal, Suspension, or Other Discipline
283I(H)1 In General
283k72.11 Notice or Charge
283k72.12 k. In general. Most Cited Cases

Statute of **limitations** that applied to adverse actions against state employees of California Department of Corrections (CDC) did **not bar** disciplinary actions against employees based upon their dishonest

denials of underlying charges that were **barred** by **statute** of **limitations**; consistent with plain language of **statute** of **limitations** and public policy considerations, extensive lying during the course of investigative interviews that occurred within the applicable **statute** of **limitations** of the matter being investigated did **not** merge with the underlying offenses. West's Ann.Cal.Gov. Code § 19635.
See 3 Witkin, Cal. Procedure (4th ed. 1996) Actions, § 405 et seq.; Cal. Jur. 3d, Limitation of Actions, § 125 et seq.

[4] Statutes 361 ⚿181(1)

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k180 Intention of Legislature
361k181 In General
361k181(1) k. In general. Most Cited Cases

Statutes 361 ⚿184

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k180 Intention of Legislature
361k184 k. Policy and purpose of act. Most Cited Cases

When interpreting a statute, courts must ascertain legislative intent so as to effectuate the law's purpose.

[5] Constitutional Law 92 ⚿2473

92 Constitutional Law
92XX Separation of Powers
92XX(C) Judicial Powers and Functions
92XX(C)2 Encroachment on Legislature
92k2472 Making, Interpretation, and Application of Statutes
92k2473 k. In general. Most Cited Cases
(Formerly 92k70.1(2))

Statutes 361 ⚿176

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k176 k. Judicial authority and duty. Most Cited Cases

Statutes 361 ⚿186

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k180 Intention of Legislature
361k186 k. Cases and matters omitted. Most Cited Cases

In the construction of a statute the office of the judge is simply to ascertain and declare what is contained therein, not to insert what has been omitted, or to omit what has been inserted.

[6] Statutes 361 ⚿188

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k188 k. In general. Most Cited Cases

Statutes 361 ⚿190

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k190 k. Existence of ambiguity. Most Cited Cases

Statutes 361 ⚿205

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k204 Statute as a Whole, and Intrinsic Aids to Construction
361k205 k. In general. Most Cited Cases

Legislative intent will be determined so far as possible from the language of statutes, read as a whole, and if the words are reasonably free from ambiguity and uncertainty, the courts will look no further to ascertain its meaning.

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[7] Statutes 361 ⚷174

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k174 k. In general. Most Cited Cases

When construing a statute, the court should take into account matters such as context, the object in view, the evils to be remedied, the history of the times and of legislation upon the same subject, public policy, and contemporaneous construction.

[8] Statutes 361 ⚷208

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k204 Statute as a Whole, and Intrinsic Aids to Construction
361k208 k. Context and related clauses. Most Cited Cases

When construing a statute, the various parts of the enactment must be harmonized by considering the particular clause or section in the context of the statutory framework as a whole.

[9] Limitation of Actions 241 ⚷1

241 Limitation of Actions
241I **Statutes** of **Limitation**
241I(A) Nature, Validity, and Construction in General
241k1 k. Nature of statutory limitation. Most Cited Cases

There are several policies underlying **statutes** of **limitation**; one purpose is to give defendants reasonable repose, thereby protecting parties from defending stale claims, and such statutes also stimulate **plaintiffs** to pursue their claims diligently.

[10] Limitation of Actions 241 ⚷1

241 Limitation of Actions
241I **Statutes** of **Limitation**
241I(A) Nature, Validity, and Construction in General
241k1 k. Nature of statutory limitation. Most Cited Cases

A countervailing factor to those factors justifying **statutes** of **limitation**, is the policy **favoring** disposition of cases on the **merits** rather than on procedural grounds.

** Wendell J. Llopis, for Real Parties in Interest and Appellants.

No appearance for Defendant and Respondent.

K. William Curtis, Warren C. Stracener, Wendi L. Ross, and Christopher E. Thomas, for **Plaintiff** and Respondent.

*** OPINION**

ARDAIZ, P.J.

INTRODUCTION

In a case of first impression, we are asked to determine whether Government Code section 19635 [FN1] **bars** disciplinary actions against employees of the California Department of Corrections (CDC) [FN2] based upon their dishonest denials of underlying charges where the underlying charges are **barred** by section 19635. We do **not** find ** that extensive lying during the course of investigative interviews that occurred within the applicable **statute** of **limitations** of the matter being investigated merges with the underlying offense. This is consistent with case law saying that dishonesty is a separate act. Thus, section 19635 does **not bar** the disciplinary actions in this case.

FN1. All section citations are from the Government Code, unless otherwise stated.

FN2. CRC is currently known as the California Department of Corrections and Rehabilitation. For the purposes of consistency with the prior case history, we will continue to refer to it as CRC.

STATEMENT OF THE CASE

The facts are undisputed. Darrell Snell (Snell), Wayne Villarreal (W. Villarreal), Stephanie Rodriguez (Rodriguez), and Rene Villarreal (R. Villarreal), are employees of CDC. Snell and W. Villarreal are peace officer employees, and Rodriguez and R. Villarreal are civilian employees.

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***800** Pursuant to section 19574, subdivision (a), CDC served various written notices of adverse actions (Notices) imposing disciplinary sanctions upon Snell, W. Villarreal, Rodriguez and R. Villarreal for participating in a pyramid scheme from approximately June of 1996 to September of 1996. Snell and W. Villarreal were suspended for 180 work days, Rodriguez was suspended for 120 work days, and R. Villarreal was suspended for 140 work days.

The Notices alleged various causes for discipline based upon the appellants' participation in the pyramid scheme. These causes included section 19572, subdivision (d)—inexcusable neglect of duty; section 19572, subdivision (r)—incompatible activities; and section 19572, subdivision (t)—other failure of good behavior.

The Notices also alleged section 19572, subdivision (f)—dishonesty, as a cause of discipline. CDC alleged that the appellants were dishonest at various investigative interviews conducted by CDC, in calendar years 1997 and 1998, when they denied any participation in the pyramid scheme.

As alleged in the Notice, Snell was interviewed on August 8, 1997 as a witness. He denied any involvement and firsthand knowledge of the pyramid scheme. He participated in an investigatory interview on December 30, 1997. At this second interview, he denied any involvement in the pyramid scheme.

W. Villarreal was interviewed on December 30, 1997. He denied that he was ever approached or recruited into the pyramid scheme. He denied that he was familiar with the pyramid scheme, or had any knowledge of the pyramid scheme other than through rumors. He denied ever attending any pyramid scheme meeting. He further denied discussing or recruiting for the pyramid scheme on the job. He denied that he conducted or hosted pyramid scheme parties or meetings at his home. He denied that he handled monies relative to the pyramid scheme. Although he was advised that several persons had testified that he was actively involved in the pyramid scheme, and had stated that they had been at his home for recruiting parties for the pyramid scheme, W. Villarreal continued to deny any firsthand knowledge of the pyramid scheme or involvement in it at any level.

Rodriguez was interviewed on November 25, 1997. She denied any involvement in the pyramid scheme including ever being approached, recruiting, investing, attending a meeting during which the pyramid scheme was explained and hosting a pyramid scheme party at her home.

R. Villarreal was interviewed on February 11, 1998. During this interview, she denied all involvement and first hand knowledge of the pyramid scheme. She denied investing in the pyramid scheme. She denied recruiting for the ***801** pyramid scheme. She denied attending or hosting any pyramid scheme parties. She denied ****668** ever having received or handled monies for the pyramid scheme.

Snell was served with a notice on December 14, 1999. W. Villarreal was served with a notice on December 15, 1999. Rodriguez was served with a notice on December 2, 1999, and R. Villarreal was served with a notice on December 13, 1999.

Pursuant to section 19575, subdivision (a), the appellants filed timely appeals with the State Personnel Board ("SPB") requesting an administrative hearing to contest the validity of the Notices. The four appeals were consolidated for hearing.

An administrative hearing was held before a duly appointed Administrative Law Judge ("ALJ"). Appellants repeated their denials at the hearing. The ALJ issued proposed decisions sustaining all disciplinary causes of action contained in the Notices, but modified the imposed suspensions. The ALJ found that Snell's and Rodriguez's denials of involvement in the pyramid scheme were not credible in light of testimony by numerous witnesses. The ALJ found that W. Villarreal and R. Villarreal were dishonest when they denied any knowledge of, or participation in, the pyramid scheme. On July 11, 2001, SPB adopted the proposed decisions of the ALJ, but further modified the imposed suspensions.

The appellants filed a timely Petition for Rehearing with SPB pursuant to section 19568. SPB granted appellants' Petition for Rehearing and set the appeals for further hearing and argument.

On August 6, 2002, SPB issued a final decision dismissing all charges contained in the Notices, including the charges of dishonesty. SPB found that the

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Notices were not served within the three-year limitation period of section 19635, and that the facts did not warrant a finding that CDC was entitled to the fraud discovery exception of that statute. SPB held that dishonesty during an investigatory interview is "a separate and serious charge," but that the dishonesty charges were also untimely. SPB found persuasive appellants' argument that to allow the charges of dishonesty, based upon the appellants' denials of participating in the pyramid scheme, to survive the dismissal of the underlying charges "would defeat the purposes of the statute of limitations set forth in Section 19635."

SPB reasoned that for CDC to prove the appellants' denials to be false and dishonest, CDC must prove the appellants' participation in the pyramid scheme to be factually true. SPB held that such a result would force the ***802** appellants to litigate and defend matters whose litigation is already barred by the statute of limitations. According to SPB, "[t]his 'bootstrapping' of the dishonesty charges to the underlying charges would, in turn, serve to eviscerate one of the primary purposes of a statute of limitations—to prevent the hardship and injustice of having to defend against stale claims after memories have faded or evidence has been lost."

On July 11, 2003, CDC filed a Petition for Writ of Administrative Mandamus seeking to set aside SPB's final decision. CDC's Petition was heard on May 13, 2005, before the Honorable Rosendo Pena of the Fresno County Superior Court.

On July 5, 2005, Judge Pena held that SPB correctly decided that all disciplinary charges related to the employees' participation in the pyramid scheme are properly barred by the statute of limitations of section 19635, and that CDC is not entitled to the fraud discovery exception to that statute. However, Judge Pena also held that SPB erred as a matter of law when it dismissed the dishonesty charges as untimely. The trial court ordered the dishonesty****669** charges reinstated against appellants.

Appellants filed a timely Notice of Appeal on September 6, 2005. They appeal only from Judge Pena's decision holding that the dishonesty charges were not barred by section 19635.

DISCUSSION

I.
Standard of Review

[1][2] Neither the appellants nor the respondent contest the factual determinations made by the trial court, or those made by SPB. Where the facts are undisputed, SPB's ultimate conclusion is a pure question of law subject to de novo review. (*Moosa v. State Personnel Bd.* (2002) 102 Cal.App.4th 1379, 1384, 126 Cal.Rptr.2d 321, 325.) Furthermore, we are not bound by SPB's or the trial court's application and interpretation of a statute. (*Burden v. Snowden* (1992) 2 Cal.4th 556, 562, 7 Cal.Rptr.2d 531, 535.)

II.
Alameida v. State Personnel Board

[3] Appellants argue that section 19635 bars the dishonesty charges against them. According to appellants, the dishonesty charges are based upon lies that ***803** merged with, or are derivative of, the underlying misconduct. Given that section 19635 bars charges based upon the underlying misconduct where appellants argue that section 19635 also bars charges based upon lies that merge with, or are derivative, of the underlying misconduct. In support, appellants cite *Alameida v. State Personnel Bd.* (2004) 120 Cal.App.4th 46, 15 Cal.Rptr.3d 383 (*Alameida*).

Alameida involved the interpretation of section 3304, subdivision (d). [FN3] In *Alameida,* the "CDC sought to dismiss an employee ... Nathan A. Lomeli, for immorality, discourteous treatment of the public, failure of good behavior, and dishonesty during interviews investigating these charges." (*Alameida, supra,* 120 Cal.App.4th at p. 50, 15 Cal.Rptr.3d 383.) Lomeli allegedly committed sexual offenses on September 18, 1998, and lied about them by falsely denying them in an interview conducted by CDC on July 12, 2000. (*Id.* at p. 51, 15 Cal.Rptr.3d 383.) Lomeli was served with a Notice of Adverse Action on November 15, 2000. (*Ibid.*) Lomeli opposed the adverse employment action, and an administrative hearing was held before an ALJ. (*Ibid.*)

> FN3. Section 3304, subdivision (d) provides in relevant part that: "[N]o punitive action, nor denial of promotion on grounds other than merit, shall be undertaken for any act, omission, or other allegation of misconduct if the investigation of the allegation is not completed within one year of the public agency's discovery by a person authorized to

> initiate an investigation of the allegation of an act, omission, or other misconduct. This one-year limitation period shall apply only if the act, omission, or other misconduct occurred on or after January 1, 1998."

"Although the November 15, 2000, Notice of Adverse Action was served less than one year after Lomeli's alleged dishonesty in denying the sex offenses during the investigatory interview on July 12, 2000, the ALJ determined the dishonesty charge could not survive as a separate basis for discipline, because it flowed directly from the investigation of the September 1998 sex offense, and it would defeat the purpose of [the Public Safety Officers Procedural Bill of Rights Act (§ 3300 *et seq.*) (the Act)] to allow the employer to circumvent the one-year limitations period by allowing the agency to prove the underlying charges in order to demonstrate the employee was dishonest ****670** in denying the charges." (*Alameida, supra,* 120 Cal.App.4th at pp. 51–52, 15 Cal.Rptr.3d 383.) SPB adopted the ALJ's decision. (*Id.* at p. 52, 15 Cal.Rptr.3d 383.)

CDC sought a writ of administrative mandamus, and was denied. The *Alameida* court affirmed. It rejected CDC's argument that the one-year statute of limitations in section 3304, subdivision (d) was extended pursuant to section 3304, subdivision (g), which provides an extension where CDC reopens an investigation based upon significantly new evidence that resulted from the public safety officer's predisciplinary response. (*Alameida, supra,* 120 Cal.App.4th at pp. 60–61, 15 Cal.Rptr.3d 383.)

***804** The *Alameida* court went on to note that "peace officers in interrogations under the Act do not have a right to remain silent." (*Id.* at p. 62, 15 Cal.Rptr.3d 383.) It cited the California Supreme Court case of (*Lybarger v. City of Los Angeles* (1985) 40 Cal.3d 822, 827, 221 Cal.Rptr. 529, 531–32) in which our Supreme Court held that "[a]s a matter of constitutional law, it is well established that a public employee has no absolute right to refuse to answer potentially incriminating questions posed by his employer. Instead, his self-incrimination rights are deemed adequately protected by precluding any use of his statements at a subsequent criminal proceeding." Furthermore, "although the officer under investigation is not compelled to respond to potentially incriminating questions, and his refusal to speak cannot be used against him *in a criminal proceeding,* nevertheless such refusal may be deemed insubordination leading to punitive action by his employer." (*Lybarger v. City of Los Angeles, supra,* 40 Cal.3d at p. 828, 221 Cal.Rptr. 529, 710 P.2d 329.)

Drawing upon this precedent, the *Alameida* court stated that "[i]t is unseemly to force a person to answer an allegation of misconduct and then punish him for denying the allegation." (*Alameida, supra,* 120 Cal.App.4th at p. 62, 15 Cal.Rptr.3d 383, fn. omitted.) The *Alameida* court also agreed "with the ALJ and the trial court that the denial in these circumstances does not constitute separate actionable misconduct but in effect merges with or is derivative of the alleged underlying misconduct. As phrased by the ALJ, the dishonesty charge flows directly from the investigation of the assault. To allow the dishonesty charge to survive would defeat the purpose of the limitations period, which is to ensure that conduct that could result in discipline should be adjudicated when memories are fresh." (*Alameida, supra,* 120 Cal.App.4th at p. 62, 15 Cal.Rptr.3d 383.) [FN4]

> FN4. SPB also was concerned that the " 'bootstrapping' of the dishonesty charges to the underlying charges would, in turn, serve to eviscerate one of the primary purposes of a statute of limitations—to prevent the hardship and injustice of having to defend against stale claims after memories have faded or evidence has been lost."

Although appellants concede that section 3304, subdivision (d) is not the applicable statute of limitations in this case,[FN5] nevertheless, appellants argue that the holding of the *Alameida* court—that a denial of underlying charges merges with the underlying offenses—can be generalized to ****671** all statutes of limitations, including section 19635. We disagree. There is nothing in the plain language of section 19635, or in the purposes of statutes of limitations, that supports a finding that extensive lying during investigatory interviews ***805** merges with the underlying misconduct that is being investigated. Thus, we do not interpret section 19635 to bar the dishonesty charges here.

> FN5. Section 3304, subdivision (d) does not apply in this case for several reasons. First, Snell and W. Villarreal are the only public

safety officers in this appeal, and section 3304, subdivision (d) only applies to public safety officers. (§ 3301.) Second, their dishonesty occurred during interviews on December 30, 1997, and so was not within the purview of section 3304, subdivision (d), which only applies to misconduct occurring on or after January 1, 1998.

III.
Interpreting Statutes of Limitations

[4][5][6][7][8] "The principles governing the proper construction of a statute are well established...." (*California Teachers Assn. v. Governing Bd. of Golden Valley Unified School Dist.* (2002) 98 Cal.App.4th 369, 375, 119 Cal.Rptr.2d 642, 646.) " 'Courts must ascertain legislative intent so as to effectuate a law's purpose. [Citations.] "In the construction of a statute ... the office of the judge is simply to ascertain and declare what is ... contained therein, not to insert what has been omitted, or to omit what has been inserted; ..." [Citation.] Legislative intent will be determined so far as possible from the language of statutes, read as a whole, and if the words are reasonably free from ambiguity and uncertainty, the courts will look no further to ascertain its meaning. [Citation.] " 'The court should take into account matters such as *context,* the object in view, the evils to be remedied, the history of the times and of *legislation upon the same subject,* public policy, and contemporaneous construction.' " [Citations.] "Moreover, the various parts of a statutory enactment must be harmonized by considering the particular clause or section in the context of the statutory framework as a whole." [Citations.]' " (*Id.* at pp. 375–376, 119 Cal.Rptr.2d 642.)

[9][10] With respect to statutes of limitations, our Supreme Court has held that "[t]here are several policies underlying such statutes. One purpose is to give defendants reasonable repose, thereby protecting parties from 'defending stale claims, where factual obscurity through the loss of time, memory or supporting documentation may present unfair handicaps.' [Citations.] A **statute** of **limitations** also stimulates **plaintiffs** to pursue their claims diligently. [Citations.] A countervailing factor, of course, is the policy **favoring** disposition of cases on the **merits** rather than on procedural grounds. [Citations.]" (*Fox v. Ethicon Endo–Surgery, Inc.* (2005) 35 Cal.4th 797, 806, 27 Cal.Rptr.3d 661, 666–67.)

Thus, we interpret section 19635 by examining its plain language and in **light** of its purposes.

A.
Section 19635

Section 19635 states:

"No adverse action shall be valid against any state employee for any cause for discipline based on any civil service law of this ***806** state, unless notice of the adverse action is served within three years after the cause for discipline, upon which the notice is based, first arose. Adverse action based on fraud, embezzlement, or the falsification of records shall be valid, if notice of the adverse action is served within three years after the discovery of the fraud, embezzlement, or falsification."

By its plain language, section 19635 provides that disciplinary action can be imposed on a state employee only if the employee was timely served with written notice of the disciplinary action. The written notice must be served upon the state employee within three years after the ****672** cause for discipline first arose, or three years after discovery of fraud, embezzlement, or falsification. (§ 19635.) Moreover, the disciplinary action must be based upon a civil service law of California, or based upon fraud, embezzlement or the falsification of records. (*Ibid.*)

Dishonesty is specifically listed as a cause for discipline in the California civil service law. (§ 19572, subd. (f).) Thus, section 19635 applies to any adverse action based upon dishonesty.

Here, appellants were served with Notices containing dishonesty charges within three years of their dishonest denials at investigatory interviews. Thus, under the plain language of section 19635, appellants could be disciplined for their lies.

B.
The Purpose of Statutes of Limitations Does No Support Barring The Disciplinary Charges

Although appellants concede that dishonesty is categorized as a separate charge under section 19572, they argue that this does **not** mean that "dishonesty is a separately actionable cause for discipline in the context of the **statute** of **limitations** issue presented in

this appeal." Appellants contend that section 19635 should be interpreted to **bar** the dishonesty charges because, here, their lies at the investigatory interviews merged with the underlying misconduct being investigated. According to appellants, to interpret section 19635 otherwise would eviscerate the purposes of **statutes** of **limitations**. We disagree.

Lying is a separate and distinct offense from the underlying offense. (§ 19572, subd. (f); *Timothy Welch* (1992) SPB Dec. No. 92–03; *LaChance v. Erickson* (1998) 522 U.S. 262, 267–268, 118 S.Ct. 753 [holding that a federal employee can be charged with dishonesty for giving false denials of charged misconduct during an agency's investigatory interview even though the denials were not made under oath; noting that "any ***807** claim that employees not allowed to make false statements might be coerced into admitting misconduct, whether they believe that they are guilty or not, in order to avoid the more severe penalty of removal for falsification is entirely frivolous."])

Moreover, the lying here involved repeated dishonest denials of allegations relating to the underlying misconduct. We do not find that such repeated denials are mere denials of underlying charges to which *Alameida* limited itself. (*Alameida, supra,* 120 Cal.App.4th at p. 62 fn. 10, 15 Cal.Rptr.3d 383 But cf. *Brogan v. U.S.* (1998) 522 U.S. 398, 118 S.Ct. 805, 139 L.Ed.2d 830 [rejecting argument that federal statute criminalizing making of false statements has an unwritten exception for the " 'exculpatory no,' " a simple denial of guilt.])

Also, appellants were charged only a few months after the statute of limitations had expired on the underlying misconduct, and they were charged with lying within the limitations period of section 19635. These factual circumstances distinguish this case from *Alameida.* The *Alameida* court, and the SPB in this case, was concerned that discipline should be adjudicated while memories are fresh in order to prevent the hardship and injustice of having to defend against stale claims. (*Alameida, supra,* 120 Cal.App.4th at p. 62, 15 Cal.Rptr.3d 383.) In this case, however, appellants do not contend that CDC presented witnesses at the hearing before the ALJ whose memories have faded, or that the evidence presented at the hearing was stale, or that exculpatory evidence was lost. As another appellate court has observed, "the policy behind statutes of limitation, which the United States Supreme Court long ago noted is to 'promote justice by preventing ****673** surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded and witnesses have disappeared.' [Citations.] No claim slumbered here. No evidence was lost. No witnesses disappeared. Not by a long shot." (*Parra v. City and County of San Francisco* (2006) 144 Cal.App.4th 977, 998, 50 Cal.Rptr.3d 822, 838.) [FN6]

> FN6. We note that the Legislature determines limitations period for policy rationales other than just prevention of surprises through the revival of stale claims. For example, an examination of the limitations periods for crimes suggests that the limitations period depends, to some extent, on the gravity of the crime. Thus, we have no statute of limitations for very serious crimes such as murder (Pen.Code, § 799), six-year limitations period for crimes such as arson causing bodily injury (Penal Code, § 800), and three-year limitations period for other lesser crimes (Pen.Code, § 801), even though witnesses' memories may have deteriorated in the same manner for these crimes.

Appellants argue that permitting dishonesty claims to survive when the dishonest denials occurred within the limitations period of the underlying charges would effectively extend the three-year limitations period in section 19635 into a six-year limitations period for dishonesty charges. According to ***808** appellants, such a holding would permit "a public agency [to] interview an employee about a prior act of misconduct just days before the lapse of the three year limitations period upon that act of prior misconduct, then wait another three years before serving the employee with a notice of adverse action alleging charges of dishonesty based upon the employee's denial at the interview, of any involvement in that prior act of misconduct. This puts an employee in the position of having to defend against prior acts of misconduct over six years old."

Appellants overstate their case. The hypothetical situation presented by appellants is not the situation that occurred in the present case. (*Sulier v. State Personnel Bd.* (2004) 125 Cal.App.4th 21, 30, 22 Cal.Rptr.3d 615.) Here, appellants only had to defend

statements that they made approximately two years before, well within the three-year limitations period of section 19635.

Finally, public policy considerations—including the fact that correctional officers are involved, California's policy against hiring dishonest employees, and the policy favoring honesty over dishonesty—support our finding that extensive lying does not merge with underlying offense.

First, this case involves state employees who work in our correctional facilities. Appellants are public employees to whom we entrust the care and rehabilitation of criminals. Moreover, two of the appellants are peace officers who are held to a higher standard of conduct than other public employees. (*Flowers v. State Personnel Bd.* (1985) 174 Cal.App.3d 753, 759, 220 Cal.Rptr. 139, 142.) As such, to find that their lies merge with underlying misconduct and thus are barred by section 19635 would permit appellants to conduct themselves in a manner unbefitting correctional employees.

Second, "[p]ublic employees are trustees of the public interest and thus owe a special duty of integrity." (*Long Beach City Employees Assn. v. City of Long Beach* (1986) 41 Cal.3d 937, 952, 227 Cal.Rptr. 90, 99.) Moreover, "[b]y its enactment of section 19572, subdivision (f), the Legislature indicated a strong public policy against having dishonest employees in the state service." (*Gee v. California State Personnel Bd.* (1970) 5 Cal.App.3d 713, 719, 85 Cal.Rptr. 762, 769.) To permit appellants who lied during investigatory interviews and who were charged with violations of ****674** section 19572, subdivision (f), to escape unscathed would be contrary to the strong public policy against having dishonest public employees.

Lastly, a contrary finding would encourage lying during investigative interviews because there are no consequences for lying if the lie is not caught prior to the expiration of the limitations period on the underlying misconduct. For example, a finding that the lies merge with the underlying offense would ***809** encourage a rational person to lie where the investigatory interview into misconduct occurred towards the end of the limitations period, as it would be unlikely for the investigator to discover that the denials were lies within the limitations period.

Thus, policy considerations support finding that appellants' extensive lying do not merge with the underlying misconduct. Therefore, section 19635 does not bar the dishonesty charges in this case.

DISPOSITION

The judgment is affirmed.

WE CONCUR: LEVY, and GOMES, JJ.

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Patrick O'RIORDAN, Plaintiff and Appellant,
v.
FEDERAL KEMPER LIFE ASSURANCE, Defendant and Appellant.

No. S115495.
July 7, 2005.

Background: Beneficiary of decedent's life insurance sued insurer, which had rescinded policy and denied beneficiary's claim on ground that insured had concealed her smoking of cigarettes in 36-month period preceding her application thereby obtaining "preferred nonsmoker rate." The Superior Court, Sacramento County, No. 99AS04726,Joe S. Gray, J., granted insurer summary judgment. Beneficiary appealed. The Court of Appeal affirmed, and the Supreme Court granted beneficiary's petition for review.

Holdings: The Supreme Court, Kennard, J., held that:
(1) material issue of fact remained whether insured concealed her smoking, and
(2) agent's knowledge of insured's smoking was imputed to insurer.

Judgment of the Court of Appeal reversed and matter remanded.

West Headnotes

[1] Appeal and Error 30 ⚿863

30 Appeal and Error
30XVI Review
30XVI(A) Scope, Standards, and Extent, in General
30k862 Extent of Review Dependent on Nature of Decision Appealed from
30k863 k. In General. Most Cited Cases

On a plaintiff's appeal from the trial court's grant of summary judgment against him, the Supreme Court must independently examine the record in order to determine whether triable issues of fact exist to reinstate the action.

[2] Appeal and Error 30 ⚿893(1)

30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate Court
30k893(1) k. In General. Most Cited Cases

Appeal and Error 30 ⚿895(2)

30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k895 Scope of Inquiry
30k895(2) k. Effect of Findings Below. Most Cited Cases

In performing its de novo review of a summary judgment against a plaintiff, the Supreme Court views the evidence in the light most favorable to plaintiff and liberally construes plaintiff's evidence and strictly scrutinizes that of defendant in order to resolve any evidentiary doubts or ambiguities in plaintiff's favor.

[3] Insurance 217 ⚿3019

217 Insurance
217XXIV Avoidance
217XXIV(C) Special Circumstances Affecting Risk
217k3019 k. Habits. Most Cited Cases

When an applicant for life insurance misrepresents his or her history as a smoker in order to obtain a nonsmoker rate, the insurer may rescind the policy. West's Ann.Cal.Ins.Code §§ 330–332, 334, 359.

[4] Judgment 228 ⚿181(23)

228 Judgment
228V On Motion or Summary Proceeding
228k181 Grounds for Summary Judgment
228k181(15) Particular Cases
228k181(23) k. Insurance Cases. Most Cited Cases

Material issue of fact remained whether insured under life insurance policy concealed her smoking to obtain "preferred nonsmoker rate," thus precluding summary judgment for insurer in insurance beneficiary's action against insurer which had rescinded policy after insured died; applicant, who had smoked one or two cigarettes in 36-month period preceding her application, answered "no" to two questions, the question "Have you smoked cigarettes in the past 36 months?" could reasonably be construed as meaning habitual smoking, and "Have you used tobacco in any other form in the past 36 months?" could be construed as referring to tobacco products other than cigarettes. West's Ann.Cal.Ins.Code §§ 330–332, 334, 359.
See 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 415A; Croskey et al., Cal. Practice Guide: Insurance Litigation (The Rutter Group 2004) ¶ 15:921 et seq. (CAINSL Ch. 15-I); Cal. Jur. 3d, Insurance Contracts and Coverage, § 167 et seq.

[5] Insurance 217 ⚿1606

217 Insurance
217XI Agents and Agency
217XI(A) In General
217k1605 Agency for Insurer or Insured
217k1606 k. In General. Most Cited Cases

Insurance 217 ⚿1644

217 Insurance
217XI Agents and Agency
217XI(C) Agents for Insurers
217k1643 Duties and Liabilities of Agent to Insurer
217k1644 k. In General. Most Cited Cases

Insurance 217 ⚿3091

217 Insurance
217XXVI Estoppel and Waiver of Insurer's Defenses
217k3088 Knowledge or Notice of Facts in General
217k3091 k. Officers or Agents; Imputed Knowledge. Most Cited Cases

Independent agent's knowledge that life insurance applicant had smoked one or two cigarettes in 36-month period preceding application was imputed to insurer; agent became insurer's agent when he assisted applicant in responding to insurer's medical questionnaire, agent therefore had duty to disclose to insurer any material information regarding application, and insurer was deemed to have knowledge of such facts even though insured denied tobacco use in her application. West's Ann.Cal.Ins.Code §§ 330–332, 334, 359.

[6] Principal and Agent 308 ⚿177(1)

308 Principal and Agent
308III Rights and Liabilities as to Third Persons
308III(E) Notice to Agent
308k177 Imputation to Principal in General
308k177(1) k. In General. Most Cited Cases

Knowledge acquired by agent is imputed to the principal even when the knowledge was not actually communicated to the principal.

[7] Principal and Agent 308 ⚿179(2)

308 Principal and Agent
308III Rights and Liabilities as to Third Persons
308III(E) Notice to Agent
308k179 Time of Notice to Agent
308k179(2) k. Knowledge Acquired Previous to Agency. Most Cited Cases

A principal is charged with knowledge which his agent acquires before the commencement of the agency relationship when that knowledge can reasonably be said to be present in the mind of the agent while acting for the principal.

[8] Judgment 228 ⚿181(2)

228 Judgment
228V On Motion or Summary Proceeding
228k181 Grounds for Summary Judgment

228k181(2) k. Absence of Issue of Fact. Most Cited Cases

When a dispositive factual issue is disputed, summary judgment is improper.

***508** Wohl Sammis Christian & Perkins, Wohl Sammis & Perkins, Alvin R. Wohl, Robin K. Perkins and Christopher F. Wohl, Sacramento, for Plaintiff and Appellant.

Sarrail, Lynch & Hall, Vogl & Meredith, Linda J. Lynch and David A. Firestone, San Francisco, for Defendant and Appellant.

KENNARD, J.

283** **754** After his wife's death from breast cancer, plaintiff, as beneficiary of his wife's life insurance policy, sought to collect the policy proceeds. Defendant insurance company, however, rescinded the policy and denied plaintiff's claim. It asserted that the wife had concealed from the insurer her smoking of cigarettes in the 36-509** month period preceding her application, and that had she been truthful it would not have issued a policy at the "preferred nonsmoker rate." Plaintiff sued. The trial court granted the insurer's motion for summary judgment. We conclude that whether there was concealment is a disputed material fact, and therefore summary judgment was improper.

***284 I**

[1][2] Because plaintiff has appealed from the trial court's grant of summary judgment against him, we must "independently examine the record in order to determine whether triable issues of fact exist to reinstate the action." (*Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1142, 12 Cal.Rptr.3d 615, 88 P.3d 517; see also ***755** *Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 767, 107 Cal.Rptr.2d 617, 23 P.3d 1143.) "In performing our de novo review, we view the evidence in the light most favorable to plaintiff[ ]" (*Wiener, supra,* at p. 1142, 12 Cal.Rptr.3d 615, 88 P.3d 517), and we "liberally construe" plaintiff's evidence and "strictly scrutinize" that of defendant "in order to resolve any evidentiary doubts or ambiguities in [plaintiff's] favor" (*ibid.*). Viewed in that light, these are the facts here:

In 1996, plaintiff Patrick O'Riordan and his wife Amy consulted Robert Hoyme, an independent insurance agent, for the purpose of replacing their life insurance policies with term life insurance. Hoyme suggested a policy issued by defendant Federal Kemper Life Assurance Company (Kemper). In the course of two meetings with Hoyme, the O'Riordans filled out application forms for Kemper policies at the preferred nonsmoker rate.

The insurance applications had a medical questionnaire, which asked these two questions: (1) "Have you smoked cigarettes in the past 36 months?," and (2) "Have you used tobacco in any other form in the past 36 months?" According to plaintiff, his wife, Amy, had smoked for many years but quit in 1991, five years before submitting her application. Amy told Hoyme that she had been a smoker and that her previous life insurance policy was a smokers' policy. She also mentioned that she "might have had a couple of cigarettes in the last couple of years." Hoyme replied: "That's not really what they're looking for. They're looking for smokers." He explained that the O'Riordans would have to undergo blood and urine tests to determine whether their bodies contained any traces of smoking. Someone—the record does not say whether it was Hoyme or Amy—checked the boxes marked "No" next to the two questions at issue. A doctor, approved and paid for by Kemper, examined Amy and took blood and urine samples, which showed no traces of nicotine.

Although Hoyme had been an independent agent for many years, he had not previously sold insurance for Kemper. He submitted a request to be appointed as Kemper's agent, along with the O'Riordans' policy application forms, to Cenco Insurance Marketing Corporation, a general agent for Kemper with authority to recruit agents. On May 24, 1996, two days after the ***285** O'Riordans had filled out their applications, Cenco approved Hoyme's request to be appointed a Kemper agent. On June 28, 1996, Kemper issued a term life insurance policy to Amy at the preferred nonsmoker rate, listing plaintiff as the beneficiary. Kemper paid Hoyme a monthly commission as its agent on the policy.

In November 1997, Amy was diagnosed with metastatic breast cancer. When Amy learned that she had only a short time to live, she began smoking again. She died ***510** on June 26, 1998, two days before the policy's two-year contestability period expired.

When plaintiff sought to collect on Amy's life insurance policy, Kemper conducted an investigation and learned that in July 1995, less than a year before Amy applied for the policy, Amy had asked her physician for, and received, a nicotine patch. The physician's report stated that although Amy had quit smoking several years previously, "recently, due to some stressors, she did start to smoke a little bit again, but is not smoking as much as she smoked previously." Based primarily on this information, Kemper concluded that Amy had falsely answered the application's questions pertaining to her smoking. It denied plaintiff's claim, and it rescinded the policy it had issued to Amy.

Plaintiff then filed this action in superior court against Kemper, Cenco, and Hoyme. As amended, his complaint sought damages for breach of contract, breach of the covenant of good faith and fair dealing, negligence, fraud, negligent misrepresentation, and emotional distress. After plaintiff settled with Hoyme, the court, at plaintiff's request, dismissed the complaint against Cenco, leaving only Kemper as a defendant.

Kemper moved for summary judgment or summary adjudication, claiming the facts were undisputed that Amy falsely answered the application's questions about smoking and tobacco use in the 36 months preceding her application, thus entitling Kemper to rescind Amy's life insurance policy. Kemper added that had Amy told the truth it would not have issued the policy. In his response, ****756** plaintiff admitted that Amy had smoked a couple of cigarettes in 1995 but said that this was the full extent of her smoking in the 36–month period preceding her application, and that she had obtained the nicotine patch as a precautionary measure. Plaintiff asserted that Amy had accurately described her cigarette usage to Hoyme when she applied for the insurance policy. The trial court granted Kemper's motion and entered judgment for Kemper. Plaintiff appealed.

***286** In a two-to-one decision, the Court of Appeal affirmed the judgment. Justice Nicholson's lead opinion concluded that even if Amy had smoked only two cigarettes in the 36 months preceding her application, she concealed the extent of her cigarette usage because she answered "no" to the questions in the application pertaining to her cigarette and tobacco usage in that period. The lead opinion described Kemper's two questions about Amy's use of tobacco as "a term of the [insurance] contract," which unambiguously required Amy to answer "yes" to each question if she had smoked even one cigarette during the 36–month period at issue. Although the lead opinion concluded that insurance salesman Hoyme was Kemper's agent when he assisted Amy in answering those two questions, it reasoned that Hoyme's actual and ostensible authority "did not extend to interpreting an unambiguous term in the insurance."

Justice Blease concurred in the result, but on different grounds. In his view, based on the report of Amy's doctor who had given her the nicotine patch, Amy's smoking "was not confined to a couple of cigarettes but was a continuous problem...." Thus, he concluded, she "concealed the true extent of her smoking ... which justifies rescission of the policy...."

Justice Hull dissented. He concluded that Kemper was estopped from asserting any concealment by Amy of her cigarette use, because she did tell Hoyme, whom Justice Hull viewed as Kemper's agent, that she had smoked a couple of cigarettes in the two years before her application. *****511** Moreover, Justice Hull said, 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...."

We granted plaintiff's petition for review.

II

Under California law, every party to an insurance contract must "communicate to the other, in good faith, all facts within his knowledge which are ... material to the contract ... and which the other has not the means of ascertaining." (Ins.Code, § 332.) [FN1] "Materiality" is determined by "the probable and reasonable influence of the facts upon the party to whom the communication is due...." (§ 334.)

FN1. All statutory citations are to the Insurance Code unless otherwise stated.

[3] When an insured has engaged in "concealment," which is defined by statute as the "[n]eglect to communicate that which a party knows, and ought to communicate" (§ 330), the insurer may rescind the policy, even if the act ***287** of concealment was un-

intentional (§ 331). Similarly, a materially false representation at the time of, or before, issuance of a policy may result in rescission of the policy. (§ 359.) Thus, when an applicant for life insurance misrepresents his or her history as a smoker in order to obtain a nonsmoker rate, the insurer may rescind the policy. (*Old Line Life Ins. Co. v. Superior Court* (1991) 229 Cal.App.3d 1600, 1603–1606, 281 Cal.Rptr. 15.)

[4] Kemper asserts that the facts are undisputed that Amy concealed the true extent of her cigarette use during the 36–month period preceding her application for life insurance. But plaintiff argues that Kemper is estopped from asserting any concealment by Amy because Hoyme, who plaintiff claims was Kemper's agent when he sold Amy the policy, told Amy she could answer "no" to Kemper's two questions inquiring into her smoking during the period at issue. Alternatively, plaintiff argues that Hoyme had ostensible authority to construe the meaning of the questions and that in advising Amy to respond "no" to the questions at issue, he misrepresented their meaning. (See **7576 Couch on Insurance (3d ed.1997) § 85:44, p. 85–67 ["If the insurer's agent construes the questions [in an insurance application] 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 even though he or she is assisting the insured."]; see also 3 Appleman on Insurance 2d (Holmes ed.1998) § 10.4, p. 12.)

Here, we need not decide the merits of plaintiff's claims of estoppel and ostensible authority. As we will explain, regardless of how those questions are resolved, it is a triable issue of fact whether Amy concealed or failed to communicate material information to Kemper regarding her use of cigarettes in the 36 months preceding her application for life insurance at a nonsmoker rate. Therefore, the trial court erred in granting Kemper's summary judgment motion.

Pertinent are Amy's answers to the two questions in Kemper's medical questionnaire inquiring into her cigarette and tobacco usage. The first question asked, "Have you smoked cigarettes in the past 36 months?" That inquiry can reasonably be construed as an attempt to determine *habitual* use, not the smoking of a single cigarette or two during that entire period. Had Kemper intended disclosure of the ***512** latter, it could have inquired into the smoking of "any" cigarette during the relevant period. The second question asked: "Have you used tobacco *in any other form* in the past 36 months?" *288 Italics added.) Because this question directly followed the question pertaining to *cigarette* use, an applicant could reasonably construe it as inquiring into use of tobacco in any form *other than cigarettes.* Therefore, an applicant who, like Amy, has smoked just a couple of cigarettes but has not used tobacco in any other form during the period at issue could correctly answer "no" to this question.

Thus, if (as plaintiff maintains) Amy smoked only a cigarette or two during the 36 months preceding her application and did not use any other tobacco products, she did not conceal her cigarette usage by answering "no" to the two questions at issue.

[5][6] Moreover, even if, as Kemper insists, those two questions required disclosure of even a single cigarette smoked during the period at issue, Amy did not conceal that information from Kemper, because she did mention it to Hoyme when she applied for the life insurance. Although Hoyme was not Kemper's agent when he assisted Amy in responding to Kemper's medical questionnaire, he became one when his request to be so appointed—submitted with Amy's application—was granted. (See generally Ins.Code, § 1704.5.) Once he became Kemper's agent, Hoyme had a duty to disclose to Kemper any material information he had pertaining to Amy's life insurance policy, and Kemper is deemed to have knowledge of such facts. (*In re Marriage of Cloney* (2001) 91 Cal.App.4th 429, 439, 110 Cal.Rptr.2d 615 ["As a general rule, an agent has a duty to disclose material matters to his or her principal, and the actual knowledge of the agent is imputed to the principal."]; Civ.Code, § 2332 ["As against a principal, both principal and agent are deemed to have notice of whatever either has notice of, and ought, in good faith and the exercise of ordinary care and diligence, to communicate to the other."].) Therefore, Hoyme's knowledge of Amy's smoking of one or two cigarettes during the 36 months preceding the application was imputed to Kemper. "The fact that the knowledge acquired by the agent was not actually communicated to the principal ... does not prevent operation of the rule." (*Columbia Pictures Corp. v. DeToth* (1948) 87 Cal.App.2d 620, 630, 197 P.2d 580.)

[7] Nor does it matter that Hoyme acquired the

information regarding Amy's cigarette use before he became Kemper's agent. "The principal is charged with knowledge which his agent acquires before the commencement of the relationship when that knowledge can reasonably be said to be present in the mind of the agent while acting for the principal." (*Columbia Pictures Corp. v. DeToth, supra,* 87 Cal.App.2d at p. 631, 197 P.2d 580; see also *Schiffman v. Richfield Oil Co.* (1937) 8 Cal.2d 211, 220–221, 64 P.2d 1081; Rest.2d Agency, § 276.) Here, because Hoyme became Kemper's agent shortly after acquiring information about Amy's ****758** smoking, his knowledge of her smoking ***289** "can reasonably be said to be present in [his] mind" (*Columbia Pictures Corp., supra,* 87 Cal.App.2d at p. 631, 197 P.2d 580) while he was acting as Kemper's agent.

Kemper contends that Amy did not tell Hoyme that she had smoked any cigarettes during the 36 months preceding the application.[FN2] And Kemper points to the *****513** medical report by Amy's physician who, at Amy's request, prescribed a nicotine patch in the year preceding her application, as evidence that Amy smoked more than just "a couple" of cigarettes in the period at issue. Based on the medical report, Justice Blease concluded in his concurring opinion that Kemper was entitled to summary judgment because Amy's cigarette use "was not confined to a couple of cigarettes but was a continuous problem."

> FN2. Although Hoyme testified in his deposition that he did not recall Amy telling him that she had smoked two cigarettes during the 36 months preceding the application, he did remember having "some conversation [with Amy] or a question ... about, you know, having, you know, a cigarette ... in the past, you know, at a special function or something like that...." He also said that he often told applicants that "if you have one [cigarette] once or twice a year, then it's probably not a big deal."

[8] But the question of Amy's cigarette use is a disputed material fact. In response to Kemper's motion for summary judgment, plaintiff declared that Amy had quit smoking in 1991 (more than three years before her life insurance application) and, apart from two cigarettes Amy shared with her sister during the three-year period at issue, she did not resume smoking until after she was diagnosed with terminal cancer in 1997, the year after submitting her application. Plaintiff also submitted a corroborating declaration by Amy's sister, Pamela Inouye, who said that to her knowledge the only cigarettes Amy smoked from 1991 to 1997 were a couple of cigarettes the two of them shared. When, as here, a dispositive factual issue is disputed, summary judgment is improper. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334, 100 Cal.Rptr.2d 352, 8 P.3d 1089.)

In their briefs, the parties address the question whether the trial court should have granted Kemper's motion for summary adjudication of certain causes of action in plaintiff's amended complaint. The Court of Appeal did not address these issues, for its conclusion that Amy had materially misrepresented the extent of her smoking during the 36 months preceding her application, thus entitling Kemper to rescind Amy's policy, necessarily disposed of plaintiff's entire complaint. Nor were these issues encompassed in our grant of review. We therefore do not consider them here.

***290 CONCLUSION**

We reverse the judgment of the Court of Appeal, and we remand the matter to that court for further proceedings consistent with this opinion.

WE CONCUR: GEORGE, C.J., BAXTER, WERDEGAR, CHIN, and MORENO, JJ.

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