Case No. C090436

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

BARNEY THOMAS WILLIAMS
Plaintiff, Respondent and Cross-Appellant

vs.

NATIONAL WESTERN LIFE INSURANCE COMPANY
Defendant, Appellant and Cross-Respondent

Butte County Superior Court Case No. 17CV03462
Hon. Tamara L. Mosbarger

APPLICATION OF LIFE INSURANCE CONSUMER ADVOCACY CENTER FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFF/RESPONDENT AND CROSS-APPELLANT BARNEY WILLIAMS; STATEMENT OF INTEREST; AMICUS CURIAE BRIEF

Brian P. Brosnahan
Executive Director of the Life Insurance
Consumer Advocacy Center
134 Laidley Street
San Francisco, CA 94131
Telephone: (415)305-7117
Email: bbrosnahan99@gmail.com

For Amicus Curiae Life Insurance Consumer Advocacy Center

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

APPLICATION FOR LEAVE TO FILE AMICUS BRIEF

The Life Insurance Consumer Advocacy Center ("LICAC") submits this application for leave to file an amicus curiae brief in support of Plaintiff/Respondent and Cross-Appellant Barney Williams ("Williams").

APPLICANT'S STATEMENT OF INTEREST/ASSISTANCE

LICAC a non-profit social welfare organization based in California and focused on the protection of California consumers of life insurance, including annuities. LICAC is a relatively new organization, having been formed in 2020 with a mission 1) to alert the public, including consumers and policymakers, about the potential risks of certain types of life insurance products, especially those that are sold as investments, and 2) to advocate for reasonable and essential consumer protections for these types of products. LICAC brings a balanced perspective to consumer protection problems in the life insurance industry. Its five-member board of directors includes one current attorney and one former attorney with a combined 80 years of experience representing insurance policyholders, as well as three financial professionals with a combined 125 years of experience working for life insurance companies or firms providing advice regarding life insurance products.

LICAC has a strong interest in advocating strong consumer protections for California life insurance consumers, including by assisting courts in correctly applying California law. To that end, LICAC submitted

an amicus letter in support of Williams's petition for review to the California Supreme Court. LICAC's letter focused narrowly on whether Pantaleoni was the agent of National Western Life Insurance Company ("NWL"), precisely the issue on which the Supreme Court granted review and remanded the case to this Court. LICAC's short (three page) letter addressed most of the authorities cited in the Supreme Court's mandate, including Insurance Code Section 1704.5, which had not been cited by the parties, and which makes clear that an insurer is responsible for the acts of its agents in selling its products. [Williams's RJN Exh. 14].

Having provided input on the agency issue to the Supreme Court, LICAC seeks to assist this Court by demonstrating that Pantaleoni was NWL's agent as a matter of law with respect to the annuities he sold to Williams and that NWL had a duty to exercise reasonable care in supervising Pantaleoni. LICAC is deeply concerned by the false and profoundly anti-consumer assertions made by NWL, including 1) that Pantaleoni was not NWL's agent, but Williams's agent; and 2) that NWL is absolved of responsibility because Pantaleoni's egregious conduct violated procedures set by NWL as well as California law. The amicus brief will demonstrate that NWL mischaracterizes the import of the Transfer Order and that its arguments that it is not responsible for Pantaleoni's misconduct are wrong both as a matter of California law and good public policy.

AMICUS CURIAE BRIEF

I. NWL Mischaracterizes the Transfer Order and Invites Error

NWL pretends that the Transfer Order requires only a minor adjustment of this Court's prior Opinion, specifically that "this Court excise the portion of its negligence analysis in the Opinion which states that Pantaleoni 'was akin to an insurance broker rather than insurance agent,' and notes that a broker acts on behalf of the insured rather than the insurer.' (Op. at 29-30.)" NWL Supp. Brief at 6.

NWL's argument ignores three important facts: 1) the Opinion's conclusion that "Williams cannot maintain an action for negligence or vicarious liability" was based on its finding that Williams could not "establish a legal duty on the part of NWL" (Op. at 34); 2) the Opinion's conclusion that "NWL had no duty to supervise Pantaleoni" was based on its finding that "Pantaleoni was an independent contractor and agent for Williams in the purchase of an annuity." (Op. at 31); and 3) the authorities cited by the Supreme Court make clear that Pantaleoni was NWL's agent as a matter of law, and is responsible for his acts, with respect to the sale of the annuity, as demonstrated below.

The Transfer Order requires the complete reversal of this Court's prior Opinion with respect to negligence and vicarious liability. This is obvious not only from a review of the authorities cited by the Supreme Court but by the very fact that the Supreme Court remanded the case for

this Court to apply the authorities cited. If NWL were correct that Pantaleoni's conduct was outside the scope of his agency and absolved NWL of responsibility, then there would have been no need for the remand. The Opinion's conclusion that Pantaleoni was not NWL's agent would have been harmless error, and the proper course for the Supreme Court would have been simply to deny review and depublish the Opinion. But that is not what the Supreme Court did. It remanded the case to this Court because the authorities the Supreme Court cited require that judgment be entered for Williams, just as the jury and the trial court found.

II. Pantaleoni Owed a Duty of Care to Williams Because Pantaleoni Was NWL's Agent as a Matter of Law With Respect to the Sale of the NWL Annuities.

Insurance Code Section 32, cited by the Supreme Court, states that a "life licensee" such as Pantaleoni "is a person authorized to act as a life agent on behalf of a life insurer . . . to transact . . . Life insurance."[1] Insurance Code Sections 1704 and 1704.5, also cited by the Supreme Court, establish that a life licensee can become the agent of a life insurer either by appointment by the insurer or by submitting an application pursuant to which a policy is issued by the insurer. Here Pantaleoni was appointed by NWL and submitted an application upon which a policy was issued. These

[1] Insurance Code Section 101, also cited by the Supreme Court, defines "life insurance" to include annuities.

statutes make clear that Pantaleoni was NWL's agent as a matter of law. By the plain language of the statutes, nothing more is required.

While the court in *Loehr v. Great Republic Ins. Co.* (1990) 226 Cal.App.3d 727, noted the existence of evidence in that case that further confirmed the agency status, there is no need for any evidence beyond the facts, conceded here, that NWL both appointed Pantaleoni as its agent and issued annuities based on applications submitted by Pantaleoni.[2]

There is additional evidence of Pantaleoni's agency in any event, including Pantaleoni's receipt of the very Rules and Regulations that NWL assails Pantaleoni for violating. And although NWL repeatedly asserts that Pantaleoni never identified himself as an agent for NWL, the record is to the contrary. For example, both of the annuity applications Pantaleoni had Williams sign identified Pantaleoni as the "Agent" and provided his NWL Agent Number (see 12 AA003330-3331 & 12 AA003399-3400). The delivery receipt that Pantaleoni had Williams sign identified NWL,

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[2] NWL continues to confuse matters by citing authorities that are applicable to types of agents *other than* life agents. See, e.g., NWL Brief at 9 (*citing Eddy v. Sharp* (1988) 199 Cal.App.3rd 858 and *Mercury Ins. Co. v. Pearson* (2008) 169 Cal.App.4th 1064, which deal with property-casualty agents). California law governing property-casualty agents and brokers differs fundamentally from the law governing life agents, as the concept of an "insurance broker, who transacts insurance on behalf of the insured, exists in the property-casualty world but does not exist with respect to life insurance. See Ins. Code Sections 33 &1623 (defining "insurance broker" as applying to insurance "other than life, disability, or health").

identified Pantaleoni as the "Agent" and included his NWL "Agent Number." (2 RT 428-430; 12 AA003350-3351.) The "Annuity Withdrawal Benefit Rider Application Supplement" Williams (and Pantaleoni) signed also identified Pantaleoni as the "Agent" and provided his NWL Agent Number. (12 AA003332). Likewise, the "Annuity Suitability Questionnaire" that Williams and Pantaleoni signed also identified Pantaleoni as NWL's agent. (12 AA003333-3337). Pantaleoni's status as an agent for NWL is established both as a matter of his actual authority under Sections 32, 1704 and 1704.5 and his apparent authority, as well by virtue of his representations to Williams that he was NWL's agent.

Because Pantaleoni's status as NWL's agent is established, the ordinary rules of agency as set forth in the Civil Code come into play. See Civil Code §§ 2295, 2296, 2298, 2299, 2300, 2330, 2338 & 2332, *see also O'Riordan v. Federal Kemper Life Assurance Company* (2005) 36 Cal.4th 281, 288 (finding that when Hoyme became Kemper's agent, ordinary agency rules of Civil Code applied, and Kemper was charged with knowledge of all facts known by Hoyme). The basic rules of agency are laid out in Williams's Supplemental Brief (at 12), but, tellingly, are nowhere referenced in NWL's brief.[3] Particularly noteworthy is Section

[3] Even more tellingly, NWL wraps up its argument by asserting that "Pantaleoni was acting as Williams' agent in this particular transaction, and not as NWL's agent" without citation to any authority whatsoever. NWL

2338, which states that "a principal is responsible to third persons for the negligence of his agent in the transaction of the business of the agency, including wrongful acts committed by such agent in and as a part of the transaction of such business, and for his willful omission to fulfill the obligations of the principal."

NWL claims that Pantaleoni's conduct was outside the scope of his agency because Pantaleoni allegedly violated Rules and Regulation NWL required agents to follow. NWL cites no authority for this assertion, which is plainly wrong because the scope of Pantaleoni's agency was selling NWL's annuities, and Pantaleoni's wrongful conduct occurred in his attempt to do exactly that – sell NWL's annuities. NWL would have a valid point if Williams were suing over an improperly prepared living trust. But that is not what this case is about. This case is about Pantaleoni's sale of NWL's annuities, which is exactly what he was appointed to do and what was included within the scope of his actual and ostensible authority.

While the foregoing is clear enough from the Civil Code itself, Insurance Code Section 1704.5, cited by the Supreme Court in its Transfer Order, confirms that "[i]f a policy of insurance is issued pursuant to [an application submitted by a licensed life agent], the insurer is considered to

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Supp. Brief at 16-17. This irresponsible assertion is a clear invitation to error.

have authorized the agent to act on its behalf, ***and the insurer is responsible for all actions of the agent that relate to the application and policy*** as if the agent had been duly appointed for the insurer." (Emphasis added.) The misconduct alleged in this case indisputably concerns "the application and policy," and NWL is therefore responsible for Pantaleoni's conduct in soliciting the application and selling the policy.[4]

[4] NWL claims falsely that the Opinion held that a principal can "only" be liable for the torts of its agent if the insurer directed or authorized its agent to perform the tortious actions or ratified acts it did not originally authorize. NWL Supp. Brief at 15. The Opinion merely noted that vicarious liability may apply if the insurer directed, authorized, or ratified the acts, citing *Rios v. Scottsdale Ins. Co.* (2004) 119 Cal.App.4th 1020. This part of the Opinion does not address NWL's duty of care for purposes of negligence. Moreover, *Rios* is inapplicable because it was a property-casualty case where the court found the insurance broker was the agent of the insured; therefore, his statements about the policy coverage could not create coverage not provided by the terms of the policy. *Rios* says nothing about the scope of Pantaleoni's agency, which must be construed broadly, even extending to the agent's willful and malicious torts, under *Farmers Ins. Group County of Santa Clara* (1995) 11 Cal.4th 992, 1004, *citing Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 209 [*Mary M.*].) Indeed, an employee's tortious act may be within the scope of employment even if it contravenes an express company rule and confers no benefit to the employer. (*Farmers, supra,* 11 Cal.4th at p. 1004, citing *Mary M.*, *supra*, 54 Cal.3d at p. 209.

III. The Court Should Reject NWL's Argument as a Matter of Public Policy.

NWL argues that it is immunized from liability, in both negligence and vicarious liability, because "Pantaleoni violated NWL's Rules and Regulations, ignored the requirements set forth in NWL's compliance bulletins, and violated California law." NWL Supp. Brief at 7. We have shown above that this contention, for which NWL offers no authority, is contrary to the express terms of Insurance Code Section 1704.5 as well as the Civil Code. But even if this Court had authority to accept NWL's position, doing so would entail adopting some very bad public policy.

Under NWL's view, it would be a simple matter for an insurance company to immunize itself by promulgating rules that prohibit illegal conduct or simply incorporating such rules into the agency agreements that every insurer uses with its agents. But simply prohibiting illegal conduct in a set of rules handed to agents does not protect consumers, who have no ability to protect themselves from bad agents. Unlike insurance companies, consumers generally have no relationship with the agent, no knowledge of the insurance business, and no ability to supervise agents, including by incentivizing good behavior by agents and preventing or deterring bad behavior by agents.

NWL describes its requirements as being set forth in "compliance bulletins," yet NWL believes that it need not do anything to see if an agent is actually complying with the bulletins or with the law in general. Even a cursory compliance check would have revealed a failure to comply with the requirements identified by NWL at pages 11-13 of its brief. Moreover, there were numerous red flags that should have caused NWL to carefully review what Pantaleoni was doing, and it should come as no surprise that the jury found NWL negligent in supervising Pantaleoni.[5]

The *O'Riordan* case, cited by the Supreme Court, demonstrates the absurdity of NWL's position. Under *O'Riordan*, the agent's knowledge is imputed to the insurer. As applied to Pantaleoni, this means that his knowledge of his failures to comply with NWL's Rules and Regulations, and his violations of California law, would be imputed to NWL, yet still

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[5] As Williams pointed out in his Respondent's Brief (at 75): "Here, the Insurance Commissioner's 2010 settlement with NWL for its agents' alleged use of trust mills to sell annuities shows that Pantaleoni's conduct was "not so unusual or startling" as to make it unfair to include the loss among the costs of NWL's business. (16 AA004660-4715.) What is more, NWL's own files show that, by 2013, it had actual knowledge of Pantaleoni's improper affiliation with and use of legal services companies to sell annuities. (13 AA003751-3758; 4 RT 981-983, 1003-1004.) As discussed above, NWL also saw a parade of other red flags surrounding the two transactions with Williams (e.g., irreconcilable suitability answers, Williams's handwritten note, misdated second application) which further illuminated the foreseeability of Pantaleoni's conduct." See also Respondent's Brief at 117, n. 27 (summarizing evidence regarding NWL's knowledge and practices).

NWL would claim that NWL would have no responsibility to prevent Pantaleoni from using improper and illegal sales tactics to sell Williams annuities that he did not want.

Imposing a duty of care in supervising one's agents would not only help prevent the issuance of unwanted annuities in a specific case where reasonable supervision might detect misconduct, but it would also tend to cause insurers to discontinue doing business with agents who use bad sales practices. This would improve the marketplace for annuities and help prevent consumers from being victimized by unfair or misleading sales tactics. Consumers would benefit, and so would agents who use good sales practices and should not have to compete with agents using bad sales practices. Courts would benefit by having fewer lawsuits over the sale of unwanted annuities and other life insurance policies. Even insurers would benefit because bad agents inevitably generate expensive lawsuits, as this case shows.

IV. Conclusion:The Court Should Enter Judgment for Williams and Author an Opinion Clarifying That Life Insurers in California Have a Duty to Exercise Reasonable Care in Supervising Their Agents.

Judgment must be entered for Williams because Pantaleoni was NWL's agent as a matter of law; this created a duty in NWL to supervise Pantaleoni, making NWL liable in negligence and under the laws of vicarious liability as set forth in *Farmers.* The jury found NWL liable based on substantial evidence, and there is no basis to disturb that verdict.

At the same time, the Court should author a published opinion that eliminates the confusion, evident in NWL's Supplemental Brief focused on property-casualty cases, concerning a *life insurer's* duty to supervise its agents. The Supreme Court gave this Court directions to apply the statutes, and the *O'Riordan* case, which make clear Pantaleoni's status as NWL's agent and NWL's responsibility for Pantaleoni. The Court would do a great service for California consumers, and insurers and agents too, if it clarified that a life insurer has a duty to make reasonable efforts to prevent its appointed agents from engaging in illegal sales tactics.

This case is an especially appropriate vehicle for a published opinion clarifying the law because it concerns annuity sales tactics targeted at a senior citizen. When it enacted annuity suitability requirements in 2012, the Legislature made a finding that seniors, in particular, were being targeted for the sale of unsuitable annuities. (Ins. Code, § 10509.910, Notes (Stats 2011, ch. 295).) Similarly, the California Department of Insurance has found that "[i]nappropriate insurance sales and sales tactics aimed at senior citizens are a significant and growing problem in California." (2 Appellant's Appendix(AA)000327-329.)

NWL's Supplemental Brief concedes that this case is a product of "Pantaleoni's wanton and reckless violations of the Insurance Code" in sales tactics aimed at a senior citizen. NWL Supp. Brief at 7. It is perhaps ironic that NWL now embraces the truth about Pantaleoni's conduct in its

zeal to argue that Pantaleoni's conduct was so far out of line that NWL could not have any responsibility to do anything at all to check Pantaleoni's behavior (an argument we have refuted in Part II, above). But regardless of what has prompted NWL to admit the truth of what happened here, the facts illustrate what can happen to seniors when insurers take no responsibility for inappropriate sales practices by their appointed agents. An opinion by this Court clarifying that life insurers have a duty of care to supervise their agents would help protect consumers, especially seniors, from the "significant and growing problem" of inappropriate tactics targeting sales of annuities to seniors. Such an opinion would also help the thousands of agents who do not engage in inappropriate sales tactics and who should not have to deal with competition from the likes of Pantaleoni. Ultimately, insurers and courts would benefit too, as cases like this would become rare if insurers supervised their agents more closely.

Dated: October 21, 2021

Respectfully submitted,

BRIAN P. BROSNAHAN

/s/ Brian P. Brosnahan

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Executive Director of Amicus Curiae
Life Insurance Consumer Advocacy Center

CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.204(c) of the California Rules of Court, I certify that the foregoing amicus curiae was produced on a computer in 13 point type. The word count, including footnotes, as calculated by the word processing program used to generate the brief, is 2684 words, including the matters that may be omitted under rule 8.204(c)(3).

DATED: October 21, 2021 BRIAN P. BROSNAHAN

/s/ Brian P. Brosnahan
Executive Director of Amicus Curiae
Life Insurance Consumer Advocacy Center