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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

RICHARD V. FORREST,

Plaintiff and  
Appellant,

v.

HAWAIIAN INSURANCE &  
GUARANTY COMPANY,

Defendant and  
Respondent.

B190677

(Los Angeles County  
Super. Ct. No.  
BC324050)

APPEAL from judgment of the Superior Court of Los Angeles County, Tricia A. Bigelow, Judge. Affirmed.

Stoll Nussbaum Polakov, Robert J. Stoll, Jr. and Julie Farrugia, for Plaintiff and Appellant.

No appearance by Defendant and Respondent.

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Plaintiff and appellant Richard V. Forrest appeals from the grant of summary judgment in favor of defendant and respondent Hawaiian Insurance & Guaranty Company (Hawaiian). Forrest was involved in a car accident with Hawaiian's alleged insured, William Olivas. Hawaiian refused to defend Olivas on the basis that his monthly auto liability insurance policy lapsed on January 10, 2004—one day before the accident occurred. After a default judgment was entered in a separate case against Olivas in Forrest's favor, Olivas assigned Forrest his rights as insured against Hawaiian. Forrest then filed this suit against Hawaiian and others.

On appeal, Forrest contends there are triable issues of fact whether: (1) Olivas had conditional insurance coverage on the date of the accident; (2) Hawaiian is liable for false representations made to Olivas by his insurance broker regarding the terms of the policy; and (3) Hawaiian waived its right under the policy to enforce a lapse in coverage for failure to make full and timely renewal payments because Olivas overpaid the initial premium payment. We conclude Forrest forfeited the conditional coverage claim, and there is no triable issue of material fact that Hawaiian can be vicariously liable for the broker's representations, or that Hawaiian waived its right to enforce the policy's terms. We affirm the judgment.

## FACTS AND PROCEDURAL BACKGROUND

### The Operative Complaint

On August 5, 2015, Forrest filed the operative complaint, asserting causes of action against Hawaiian, SCJ Insurance Services (SCJ), Prompt Insurance Services (Prompt), Paul Ruelas, and Anthony Medina.<sup>1</sup> As relevant here, the complaint alleged six causes of action against Hawaiian, including judgment pursuant to Insurance Code section 11580; breach of the implied covenant of good faith and fair dealing; ratification and waiver; declaratory relief; fraud; and negligent misrepresentation.<sup>2</sup>

The complaint alleged that in June 2002, Hawaiian entered into a Producer Agreement with SCJ, which authorized SCJ to act as Hawaiian's managing agent to

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<sup>1</sup> Forrest filed this appeal challenging the lower court's order granting motions for summary judgment on behalf of Hawaiian and SCJ. SCJ was dismissed from the appeal on May 11, 2007. Hawaiian has not filed a brief, and all of its counsel have been relieved.

<sup>2</sup> The operative complaint also included a cause of action for intentional interference solely against SCJ, which was disposed of when Forrest dismissed SCJ from the appeal. The remaining cause of action in the complaint, for professional negligence, was asserted against Prompt, Ruelas, and Medina, and not against Hawaiian and SCJ, was not addressed in Hawaiian's Motion for Summary Judgment, and is not at issue on this appeal.

contract with subproducers to solicit insurance policies. SCJ was prohibited from assigning or delegating binding authority to any subproducer under the agreement. The Producer Agreement incorporated SCJ's California Underwriting Guide and Rate Manual (Underwriting Guide), which required that "[a]ll [insurance] applications must contain the date and time of completion and [be] sign[ed] by both the applicant and the broker. No coverage is effective prior to the completion and signing of the application . . . ."

Several years prior to entering the Producer Agreement with Hawaiian, SCJ had entered into an agreement with Paul Ruelas, the executive officer of Prompt. Per the agreement, Prompt could sell certain auto liability insurance policies of various insurers as an independent contractor. Prompt was required to sell any given policy in accordance with the underwriting guidelines and procedures of SCJ and the particular insurance company.

On December 1, 2003, Olivas met with Ruelas to purchase auto liability insurance. At the meeting, Olivas paid Prompt \$384 and executed an agreement appointing Prompt as his broker and granting Prompt limited power of attorney to execute insurance transactions on his behalf. At that time, Ruelas did not have a valid license to conduct insurance business in the state of California.

Prompt submitted an application with SCJ for a Hawaiian policy on December 10, 2003. Olivas did not sign

the application.<sup>3</sup> Hawaiian issued a personal auto policy and temporary insurance identification card to Olivas the same day. The complaint contends the Hawaiian policy was a quarterly insurance policy.

The policy, which is attached as an exhibit to the complaint, stated that coverage was “[e]ffective 12/10/03 at 12:01 am” and “[e]xpires 1/10/04 12:01 am.” The policy was set to be “continuous based on premium being paid when due,” and was “provided only for the specific coverages listed and charged for here.” It had a personal injury limit of \$15,000. The temporary identification card also reflected coverage from December 10, 2003 to January 10, 2004.

The complaint attached Hawaiian’s offer to renew the monthly auto liability policy, which Olivas received on December 18, 2003. The offer specified that Olivas must “[p]ay this bill by its due date to renew [his] policy,” and listed January 10, 2004 as the renewal date. It emphasized that the “bill must be paid by its due date or you will have no insurance. [¶] You will have no insurance if your payment is late.” The back of the offer stated “[the] notice is an offer to renew your . . . policy for 1 month from 01/10/04 to 02/10/04. Continued coverage is contingent upon payment of \$210.00 by 01/10/04.” The offer also stated, “There is no grace period and this is the only notice you will receive. A partial payment will not renew your policy. You must pay the full \$210.00 by 01/10/04. [¶] If your policy lapses, it may

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<sup>3</sup> The application does not appear in the record on appeal.

be reinstated with a lapse in coverage, if your \$210.00 is received at SCJ by 02/09/04. Coverage will begin again at 12:01 a.m. . . . on the day your payment is received at SCJ.”

Olivas received a temporary identification card on December 18, 2003, indicating the effective renewal date of his policy as January 10, 2004. The identification card showed coverage for January 10 through February 10, 2004. The card stated, “Coverage exists only if all premium payments are made on time.”

On January 11, 2004, Olivas and Forrest were involved in an automobile accident. On March 15, 2004, Forrest filed suit against Olivas in Orange County Superior Court. Olivas tendered to Hawaiian, and Hawaiian denied Olivas a defense under the policy. On September 24, 2004, a final default judgment was entered against Olivas in favor of Forrest for \$35,000,643. Olivas assigned all of his rights as insured against Hawaiian, SCJ, Prompt, Ruelas, and Medina to Forrest, who initiated the instant lawsuit.

The complaint asserted the following causes of action: (1) Insurance Code section 11580 against Hawaiian; (2) intentional interference with Forrest’s rights under the policy against SCJ; (3) breach of the implied covenant of good faith and fair dealing against Hawaiian and SCJ; (4) professional negligence against Prompt, Ruelas, and Medina; (5) ratification and waiver against Hawaiian; (6) declaratory relief against Hawaiian; (7) fraud and deceit against all defendants; and (8) negligent misrepresentation against Hawaiian and SCJ.

Forrest's claims against Hawaiian are based on his allegation that the insurer wrongfully denied coverage. He contends that the additional \$32 that Olivas paid on December 1, 2003—computed by subtracting Prompt's broker fee (\$100) and the cost of the policy for the initial month (\$252) from Olivas's sole payment (\$384)—constituted a partial overpayment on the initial policy, which extended daily credit that "waiv[ed] the alleged lapse" of the policy for January 11, 2004. Forrest also contends Hawaiian engaged in fraud and negligent misrepresentation through Ruelas, who informed Olivas there was a day grace period to pay premiums. Finally, Forrest claims Ruelas falsely informed Olivas he would receive coverage for a period of three months. Olivas relied on these representations to his detriment, which resulted in a default judgment.

### **The Motion for Summary Judgment**

On September 16, 2005, Hawaiian filed a motion for summary judgment, or in the alternative, summary adjudication. Following an order to revise its separate statement, Hawaiian filed an amended motion for summary judgment on December 6, 2005.

As to causes of action under Insurance Code section 11580, the implied covenant of good faith and fair dealing, and ratification and waiver, Hawaiian argued there was no material question of fact or issue of law with respect to the duration and term of the policy. Forrest offered no evidence

to contradict Hawaiian's assertion that Olivas was issued a one-month policy effective December 10, 2003 to January 10, 2004. The policy expired by its own express terms on January 10 because Olivas failed to make a renewal premium payment in full prior to the expiration. At the time of the accident, Olivas did not have insurance coverage with Hawaiian. Olivas failed to make a payment until the day after the accident, causing a lapse in insurance coverage at the time of the accident.

As to the fraud and negligent misrepresentation causes of action, Hawaiian argued there were no facts to support the allegations that Hawaiian or anyone acting on its behalf made representations to Olivas regarding the nature of the insurance coverage, or the date on which the premium payments were due. Hawaiian had no agency relationship with Prompt. Prompt and Ruelas were never authorized to make representations on Hawaiian's behalf.

In support of its motion for summary judgment, Hawaiian submitted an agreement between SCJ and Ruelas dated February 20, 1998. Per the agreement, Ruelas was authorized to have coverage bound according to certain guidelines and procedures. The agreement prohibited Ruelas from modifying or changing policy rates, terms, or conditions. The agreement would terminate "automatically, without notice, if [Ruelas was] not properly licensed to transact insurance" as required by the California Department of Insurance. Ruelas was classified as an



independent contractor, “not an agent or employee of SCJ for any purpose.”

Hawaiian submitted the December 1, 2003 agreement between Prompt and Olivas. Olivas executed the agreement and paid a fee of \$100 for Prompt’s services as “Insurance Broker of Record.” Under the agreement, Olivas provided Prompt a limited power of attorney to execute insurance transactions on his behalf.

Hawaiian provided a full insurance policy that was “identical to the form and language of the policy that would have been purchased by [] Olivas on or about December 10, 2003 through his insurance broker, Prompt.” The policy provided that “[a]n insurance broker cannot change the terms of the policy.”

Hawaiian also submitted the initial policy issued to Olivas on or about December 10, 2003, the December 18, 2003 renewal offer and temporary identification cards, and excerpts of Ruelas’s deposition. Ruelas testified that he met with Olivas on December 1, 2003 to discuss auto liability insurance. At that time, Olivas paid Ruelas \$384, which included a \$100 broker fee and \$284 for a down payment for an auto liability policy through Topa Insurance Company. Prompt applied for the \$284 Topa policy the same day. After Topa rejected Olivas’s application, Prompt applied for the \$252 Hawaiian policy. Olivas’s initial payment for the Topa policy less the broker fee and first month’s premium payment for the Hawaiian policy totals \$32—the very same amount Forrest contends was an “overpayment.” The day

after the accident, Olivas came into the office to make a premium payment on the Hawaiian policy and was told the policy had lapsed.

### **The Opposition to the Motion for Summary Judgment**

Forrest filed an opposition to the motion for summary judgment. Among other evidence, Forrest submitted Olivas's declaration. Olivas received a rejection notice from another insurance company (presumably Topa) on December 9, 2003, so he called Ruelas to inquire. Ruelas told Olivas "not to worry and that he would place [Olivas] with [Hawaiian]." During their conversation, Ruelas assured Olivas there was nothing else to do to obtain "immediate coverage," Ruelas was an agent for Hawaiian and "had bound coverage with Hawaiian during [the] telephone conversation," and Olivas "was fully covered." By the end of their conversation, Olivas believed he "had 15,000/30,000/5000 coverage, including uninsured motorist, liability, collision and comprehensive." Ruelas promised Olivas that he would receive his policy and that he was covered for three months. Olivas received a bill on or about December 19, 2003, indicating he owed an additional \$210, and that coverage would terminate in 20 days. At that time, Olivas had paid \$384 but did not have a policy. Olivas asked Ruelas why the policy had a one-month term when Ruelas previously represented that Olivas was covered under a three-month policy. In response, Ruelas told Olivas not

worry about coverage, and that Hawaiian provided a “two or three day grace period” for premium payments. Immediately following the car accident, Olivas provided the police an insurance card reflecting coverage between January 10 and February 10, 2004. On January 12, 2004, Ruelas assured Olivas he had a day grace period to pay the premium, so Olivas paid the additional \$210 that day. Forrest also submitted payment records indicating that his payment money was transmitted to SJC on December 11, 2003 and put into SJC’s books on December 12, 2003.

From the evidence, Forrest argued that there were triable issues that Olivas had coverage from Hawaiian in place on January 11, 2004, the date of the accident. Forrest based his claim of coverage principally on evidence that he had overpaid Prompt, in the amount of \$32 beyond what was necessary for coverage up to January 10, 2004. Forrest contended that the overpaid funds had the effect of extending his insurance for approximately four days (so as to cover the date of the accident). Alternatively, he argued that Hawaiian’s acceptance of the \$32 overpayment after the accident, as part of another month’s premium, constituted a waiver of any argument that the policy had lapsed at the time of the accident. Finally, Forrest contended that the evidence of when funds were transmitted to SCJ, combined with the Underwriting Guide, meant that the policy could not have had an effective date any earlier than December 11, 2013, which would mean it remained in place on the date of the accident.

Forrest also contended that, regardless of the terms of the insurance policy, Hawaiian had authorized SCJ to appoint Prompt as a subproducer. As a subagent, Ruelas's knowledge was imputed to Hawaiian, and Hawaiian was bound by Ruelas's assurances to Olivas, including that he had a three-month insurance policy and a grace period for payment of premiums. Ruelas and Olivas had conflicting accounts of their December, 2003 meetings and conversations, and the insurance application, which created triable issues of material fact.

### **The Reply**

Hawaiian filed a reply, arguing the evidence demonstrated that Olivas's policy took effect on December 10, 2003. Forrest's waiver argument lacked foundation in fact or law, because accepting a late premium payment on an expired policy did not reinstate coverage retroactively. The duty to defend did not extend to events that occurred after the policy expired. There was no valid contract in force, and thus no duty to defend.

Forrest failed to provide evidence establishing actual agency between Hawaiian and Prompt. There was no agreement, formal appointment, or evidence of direct communication between the parties. As Hawaiian's only California agent, SCJ was expressly precluded from delegating any of its authority to a subproducer. There was no evidence from which an objectively reasonable person

could believe that Hawaiian might have held Prompt or Ruelas out as an agent.

### **The Trial Court's Ruling**

A hearing on the motion for summary judgment was held on December 28, 2005. During argument, the court expressed concern that Ruelas was not a licensed broker, because that would invalidate the broker agreement and power of attorney such that Ruelas could not obtain insurance on Olivas's behalf.

On January 31, 2006, the trial court issued an order granting summary judgment in favor of Hawaiian. The court reasoned that Forrest had not made a prima facie showing that Olivas was insured on the date of the accident, or that Hawaiian was vicariously liable for any alleged representations made by Ruelas or Prompt that contradicted the express terms of the insurance policy. The policy documents that Olivas received were clear and explicit—Olivas had a one month policy effective December 10, 2003 to January 10, 2004. The offer to renew stated the effective date of January 10, 2004 for one month if a full premium payment was made by that date. It was undisputed that Olivas made a renewal payment on January 12, 2004—two days late and one day after the accident. Per Insurance

Code section 663, Olivas’s policy was terminated for failure to pay the premium on time.<sup>4</sup>

Forrest also failed to submit evidence or authority to support his argument that late payment to SCJ changed the offered policy inception date, or that the remaining \$32 balance in Prompt’s trust account—Olivas’s initial payment less the broker fee and first month’s premium payment—operated to renew the policy. The renewal offer clearly stated that partial payment would not satisfy its terms.

Forrest filed a timely notice of appeal.<sup>5</sup>

## DISCUSSION

Summary judgment may be granted only if “all the papers submitted show that there is no triable issue as to

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<sup>4</sup> Insurance Code section 663 requires an insurer to deliver or mail to the insured a “written or verbal offer of renewal of the policy, contingent upon payment as stated in the offer.” (Ins. Code, § 663, subd. (a)(1).) “The plain meaning of the provision of section 663 . . . is that the failure of an insured to pay a premium on or before the date specified in the renewal offer will result in termination of the policy.’ [Citation.]” (*Monteleone v. Allstate Ins. Co.* (1996) 51 Cal.App.4th 509, 516 (*Monteleone*).)

<sup>5</sup> Forrest filed his appeal in May 2006. This court stayed the proceedings in October 2006 to allow Hawaiian to commence and proceed through liquidation proceedings in the bankruptcy court. Liquidation proceedings were terminated in December 2017.

any material fact and that the moving party is entitled to a judgment as a matter of law.” (Code Civ. Proc., § 437c, subd. (c); *Hampton v. County of San Diego* (2015) 62 Cal.4th 340, 347 (*Hampton*).) A defendant moving for summary judgment must show “one or more elements of the cause of action . . . cannot be established, or that there is a complete defense to the cause of action.” (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 (*Aguilar*).) If the defendant makes this showing, the burden shifts to plaintiff to produce admissible evidence showing a triable issue of material fact exists. (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar, supra*, at p. 850.) ““The plaintiff . . . may not rely upon the mere allegations or denials of its pleadings . . . but, instead, shall set forth the specific facts showing that a triable issue of material fact exists . . . .” ([Code Civ. Proc., § 437c], subd. (o)(2); [citations].)’ [Citations.]” (*Andrews v. Foster Wheeler LLC* (2006) 138 Cal.App.4th 96, 101, fn. omitted.)

We review de novo the trial court’s grant of summary judgment. (*Hampton, supra*, 62 Cal.4th at p. 347; *Hartford Casualty Ins. Co. v. Swift Distribution, Inc.* (2014) 59 Cal.4th 277, 286.) We take the facts from the record that was before the trial court and consider all the evidence set forth in the moving and opposing papers except that to which objections were made and sustained. (Code Civ. Proc., § 437c, subd. (c); *Hampton, supra*, 62 Cal.4th at p. 347.) “We liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the

evidence in favor of that party.” (*Yanowitz v. L’Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1037; accord, *Hampton, supra*, 62 Cal.4th at p. 347.)

**Forrest Has Forfeited His Conditional Coverage Contention, and His Argument Has No Merit**

Forrest first contends the Producer Agreement and Underwriting Guidelines provide for conditional binding coverage, and that Olivas did not satisfy the condition precedent of personally signing the application. Without any binding authority on the matter, Forrest further contends that, because of the absence of his signature on an application, the Hawaiian policy did not become effective until December 12, 2003, when Hawaiian mailed the policy documents to Olivas. Notwithstanding the absence of authority to support an effective date of December 12, 2003 based on this theory, Forrest did not raise this claim in the trial court, and has therefore forfeited any challenge to the issue on appeal. (*Bardis v. Oates* (2004) 119 Cal.App.4th 1, 13–14, fn. 6 [theories of liability not raised in the trial court may not be asserted for the first time on appeal].)

Forrest also raises on appeal the contention made in the trial court that the fact that Prompt did not transmit payment to SJC until December 11, 2003, means the effective date of Hawaiian’s insurance policy could be no earlier than December 11, 2003. Forrest cites no authority to support this argument (and cited no authority below), and the argument is waived. (See Cal. Rules of Court, rule



8.204(a)(1)(B); *In re Marriage of Falcone & Fyke* (2008) 164 Cal.App.4th 814, 830 [“We are not bound to develop appellants’ arguments for them. [Citation.] The absence of cogent legal argument or citation to authority allows this court to treat the contentions as waived”]; *Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979.) Even were we to reach the merits, however, Forrest’s argument cannot overcome the plain language of the policy provided to him by Hawaiian with respect to the coverage dates of December 10, 2003 to January 10, 2004, nor Olivas’s testimony that he was told and believed that he was already covered as of December 9, 2003. (See *In re First Capital Life Ins. Co.* (1995) 34 Cal.App.4th 1283, 1288.)

### **Hawaiian is Not Vicariously Liable for Ruelas’s Representations**

Forrest next contends there is a triable issue of material fact as to whether Hawaiian is vicariously liable for Ruelas’s false representations as an actual or ostensible agent. We conclude that Forrest failed to raise a triable issue of fact under either agency theory. (See Civ. Code, § 2298.)

“An insurer, as a principal, may be vicariously liable for the torts of its agent if the insurer directed or authorized the agent to perform the tortious acts, or if it ratifies acts it did not originally authorize.”” (*American Way Cellular, Inc. v. Travelers Property Casualty Co. of America* (2013) 216 Cal.App.4th 1040, 1051 (*American Way*).)

“An agency is actual when the agent is really employed by the principal.” (Civ. Code, § 2299.) Actual agency typically arises by express agreement, but may be implied from the conduct of the parties. (*van’t Rood v. County of Santa Clara* (2003) 113 Cal.App.4th 549, 571.) The “formation of an agency relationship is a bilateral matter. Words or conduct by both principal and agent are necessary to create the relationship . . . .” [Citation.]” (*Ibid.*) Absent mutual consent, there can be no agency. (*Rental Housing Owners Assn. of Southern Alameda County, Inc. v. City of Hayward* (2011) 200 Cal.App.4th 81, 91.)

We conclude there is no triable issue of material fact that an actual agency relationship existed between Hawaiian and Ruelas. The Producer Agreement between Hawaiian and SCJ prohibited SCJ from assigning or delegating binding authority to a subproducer or third party. By Forrest’s own admission, Ruelas was legally prohibited from acting as an insurance agent or insurance broker, or otherwise negotiating or effecting insurance contracts in this state. (Ins. Code, § 1631.) The 1998 agreement between SJC and Ruelas expressly disavowed Ruelas as an agent for SCJ or any insurance company, and prohibited Ruelas from changing policy terms or rates, or conferring grace periods to policyholders as an independent contractor. Ruelas’s unlicensed status triggered the proviso in the 1998 agreement mandating automatic termination. Forrest did not present evidence to contradict this evidence or otherwise establish actual agency. (See *American Way*, *supra*, 216

Cal.App.4th at pp. 1052–1053 [no triable issue of fact regarding agency where producer acted as a broker and agreed in writing it “was not acting as the agent or representative” of the insurer or the insurer’s agent]; *Rios v. Scottsdale Ins. Co.* (2004) 119 Cal.App.4th 1020, 1026 (*Rios*) [no triable issue of fact regarding agency where contract expressly disclaimed agency relationship and producer had no authority to modify contract terms].)<sup>6</sup>

Ostensible agency arises where the insurer intentionally or carelessly causes a third person to believe someone who is not really employed by the insurer is its agent. (Civ. Code, § 2300.) “Before recovery can be had against the principal for the acts of an ostensible agent, three requirements must be met: The person dealing with an agent must do so with a reasonable belief in the agent’s authority, such belief must be generated by some act or neglect by the principal sought to be charged and the person relying on the agent’s apparent authority must not be negligent in holding that belief. [Citations.] Ostensible agency cannot be established by the representations or conduct of the purported agent; the statements or acts of the principal must be such as to cause the belief the agency exists. [Citations.]” (*J.L. v. Children’s Institute, Inc.* (2009) 177 Cal.App.4th 388, 403–404.)

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<sup>6</sup> Forrest has not raised a ratification theory of actual agency (Civ. Code, §§ 2307, 2310), so we do not address the issue. (*In re Marriage of Falcone & Fyke, supra*, 164 Cal.App.4th at p. 830.)

There is no evidence in this case that Hawaiian held Prompt or Ruelas out as an agent. Hawaiian's only representations to Olivas, made through the initial policy, temporary insurance identification cards, and renewal offer were wholly inconsistent with Ruelas's representations. The policy and identification cards refer to Prompt as Olivas's "broker." "[A] broker has no binding authority and is as a matter of law not a general agent for the insurer." (*Rios, supra*, 119 Cal.App.4th at p. 1026.) Because Forrest made no showing that Hawaiian declared or acted in such a way that Olivas could reasonably believe an agency relationship existed, he failed to raise a triable issue of material fact as to whether Ruelas was an ostensible agent. (*American Way, supra*, 216 Cal.App.4th at p. 1053.)

**Hawaiian Did Not Waive its Right to Enforce the Policy Term Requiring Full Renewal Payments Be Made on Time**

Forrest contends that Hawaiian waived its right to enforce the requirement that full renewal payments be made on time to prevent a lapse in coverage, because Olivas made an "overpayment" of \$32 on his initial premium when he deposited \$384 with Prompt on December 1, 2003.

“““[W]aiver is the intentional relinquishment of a known right after knowledge of the facts.’ [Citations.] The burden . . . is on the party claiming a waiver of a right to prove it by clear and convincing evidence that does not leave the matter to speculation, and ‘doubtful cases will be decided

against a waiver' [citation].” (*Waller v. Truck Ins. Exchange* [(1995)] 11 Cal.4th 1, 31.)” (*Monteleone, supra*, 51 Cal.App.4th at p. 517.) Waiver applies only when the insurer intentionally relinquishes its rights to deny coverage, or acts so inconsistently with an intent to enforce as to induce a reasonable belief that such right has been relinquished. (*Pacific Business Connections, Inc. v. St. Paul Surplus Lines Ins. Co.* (2007) 150 Cal.App.4th 517, 525.) Implied waiver is generally unavailable to bring risks not covered by the terms of an insurance policy or expressly excluded therefrom within coverage. (*R & B Auto Center, Inc. v. Farmers Group, Inc.* (2006) 140 Cal.App.4th 327, 352.)

Hawaiian’s insurance policy clearly stated that failure to make a full premium payment by January 10, 2004 would result in a lapse in the policy. The documents Olivas received consistently reflect the policy and make clear there are no grace periods on making premium payments. As we have discussed, Ruelas’s representations cannot be imputed to Hawaiian because he was not its agent. Forrest presented no evidence to support the inference that Hawaiian was aware of the additional \$32 that Ruelas held on Olivas’s behalf, let alone that Hawaiian accepted partial payment of the premium before January 10, 2004 in direct contravention of the terms of its policy. With no knowledge of the additional \$32 that Olivas deposited with Ruelas, Hawaiian could not knowingly waive its right under the policy. To the contrary, the evidence is consistent with Hawaiian’s intent to enforce the requirement that Olivas make full premium

payments on time to extend coverage. Having waived his conditional coverage contention, and presenting no evidence to support vicarious liability or waiver, we conclude there is no triable issue as to any material fact on all causes of action against Hawaiian.

### **DISPOSITION**

The judgment is affirmed. Respondent Hawaiian Insurance & Guaranty Company is awarded costs on appeal.

MOOR, J.

We concur:

BAKER, Acting P.J.

JASKOL, J.\*

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\* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.