IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

MIRNA GUZMAN,	§	
	§	
Plaintiff,	§	
	§	
v.	§	2:19-CV-187-BR
	§	
ALLSTATE ASSURANCE COMPANY,	§	
	§	
Defendant.	§	

ORDER GRANTING ALLSTATE ASSURANCE COMPANY'S MOTION FOR SUMMARY JUDGMENT

Before the Court is Defendant and Counter-Plaintiff Allstate Assurance Company's ("Allstate") Motion for Summary Judgment. (ECF 25). By that motion, Allstate moves for summary judgment on (1) Allstate's counterclaim for declaratory judgment and (2) Plaintiff and Counter-Defendant Mirna Guzman's ("Mirna Guzman") claims under the Texas Deceptive Trade Practices Act ("Texas DTPA") and Texas Insurance Code. (ECF 26 at 19, 29). Allstate filed a brief and appendix in support of its motion. (ECF 26; ECF 27). Mirna Guzman filed a response, brief, and appendix to Allstate's Motion for Summary Judgment. (ECF 29 – ECF 31). Allstate filed a reply with an appendix to Mirna Guzman's response. (ECF 33; ECF 34).

For the reasons discussed below, the Court finds that Allstate's Motion for Summary Judgment should be GRANTED.

I. BACKGROUND

This case involves a life insurance policy issued by Allstate to the decedent, Saul D. Guzman ("Saul Guzman"), and whether that policy is due to be rescinded under the Texas Insurance Code. (ECF 26 at 8; ECF 29 at 4). The underlying facts of the case are basically uncontroverted.

On August 17, 2017, Saul Guzman completed and signed a two-part Application for Life Insurance with Allstate. (ECF 27 at 4–10). Allstate issued life insurance policy number 06T1E72410 to Saul Guzman on September 19, 2017. (*Id.* at 50). The policy insured the life of Saul Guzman at a "Standard No-Tobacco" rate, with an annual premium of $290.00, and with a death benefit of $250,000. (*Id.* at 50, 53). The sole beneficiary of the policy is Mirna Guzman. (*Id.* at 64).

It is undisputed that the policy contains a standard, two-year incontestability clause:

> **Incontestability**
>
> We will not contest this policy after it has been in force during the lifetime of the insured for two years from its issue date except for failure to pay the premium required to keep this policy and its riders in force. When this policy or any riders are reinstated, a contestable period will be measured during the lifetime of the insured for two years from the reinstatement date.
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> . . .

(*Id.* at 59). Mirna Guzman notified Allstate on January 31, 2019 that Saul Guzman had passed away two days earlier. (*Id.* at 73–74). Allstate then began a routine investigation because Saul Guzman died within the two years of when it issued the policy. (*Id.* at 59, 75–77).

On June 18, 2019, Allstate sent a letter to Mirna Guzman stating that, based on "the findings in the medical records and what was stated on the application, . . . the representations made by Mr. Guzman [in his Application for Life Insurance regarding his tobacco history] were false and material to the Company's decision to issue the policy in question." (ECF 27-1 at 140–41). As such, Allstate notified Mirna Guzman that it had elected to rescind the policy and enclosed a premium refund check. (*Id.* at 141).

Mirna Guzman filed an Original Petition on August 28, 2019 in state court prior to removal, asserting claims for breach of contract, violations of the Texas DTPA, and violations of Sections 542.003 and 542.060 of the Texas Insurance Code. (ECF 1-1 at 4–5). Allstate filed its Answer and

Affirmative Defenses and Counterclaim for Declaratory Judgment on October 2, 2019. (ECF 7). Through its counterclaim, Allstate "seeks a judicial determination that the [life insurance policy issued to Saul Guzman] is due to be rescinded based on material misrepresentations made by Saul D. Guzman in the Application for Life Insurance and that Allstate is not liable to Counter-Defendant Mirna Guzman for benefits under the [p]olicy." (*Id.* at 14). Mirna Guzman filed her Answer to Defendant's Counterclaim on October 7, 2019. (ECF 8).

II. LEGAL STANDARD

Summary judgment is appropriate when the pleadings, affidavits, and other summary judgment evidence show that no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). A fact is material if it might affect the outcome of the lawsuit under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). A dispute about a material fact is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Id*. at 248. To determine whether there are any genuine issues of material fact, the Court must first ascertain the factual issues that are material under the applicable substantive law. *See id*.; *Lavespere v. Niagra Mach. & Tool Works*, 910 F.2d 167, 178 (5th Cir. 1990), *abrogated on other grounds by Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075–76 n.14 (5th Cir. 1994).

The Court must next review the evidence on those issues, viewing the facts in the light most favorable to the nonmoving party. *Lavespere*, 910 F.2d at 178; *Newell v. Oxford Mgmt., Inc.*, 912 F.2d 793, 795 (5th Cir. 1990) (citing *Reid v. State Farm Mut. Auto. Ins. Co.*, 784 F.2d 577, 578 (5th Cir. 1986) (internal quotation marks omitted)); *Medlin v. Palmer*, 874 F.2d 1085, 1089 (5th Cir. 1989). "The court need consider only the cited materials, but it may consider other materials in the record." Fed. R. Civ. P. 56(c)(3). However, Rule 56 "does not

impose upon the district court a duty to sift through the record in search of evidence to support" a party's motion for, or opposition to, summary judgment. *Skotak v. Tenneco Resins, Inc.*, 953 F.2d 909, 915–16 n.7 (5th Cir. 1992) (Wisdom, J., dissenting). The Court should not weigh the evidence and determine the truth of the matter in determining whether there is a genuine issue for trial. *See Anderson*, 477 U.S. at 249.

If the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, no genuine dispute for trial exists. *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir. 1986). Conclusory allegations, unsubstantiated assertions, improbable inferences, and unsupported speculation are not competent summary judgment evidence and are insufficient to defeat a motion for summary judgment. *Eason v. Thaler*, 73 F.3d 1322, 1325 (5th Cir. 1996); *Forsyth v. Barr*, 19 F.3d 1527, 1533 (5th Cir. 1994) (citations omitted).

If "the movant bears the burden of proof on an issue, either because he is the plaintiff or as a defendant he is asserting an affirmative defense, he must establish beyond peradventure *all* of the essential elements of the claim or defense to warrant judgment in his favor." *Fontenot*, 780 F.2d at 1194 (emphasis in original). The "beyond peradventure" standard imposes a "heavy" burden. C*ont'l Cas. Co. v. St. Paul Fire & Marine Ins. Co.*, No. 3:04-CV-1866-D, 2007 WL 2403656, at *10 (N.D. Tex. Aug. 23, 2007).

If "the burden of proof at trial lies with the nonmoving party, the movant may satisfy its initial burden by showing—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case." *Duffie v. United States*, 600 F.3d 362, 371 (5th Cir. 2010) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986) (internal quotation marks omitted)). The movant then "must demonstrate the absence of a genuine issue of material fact" but does not have "to negate the elements of the nonmovant's case." *Id*. (citing *Boudreaux v. Swift*

Transp. Co., 402 F.3d 536, 540 (5th Cir. 2005)). "If the moving party fails to meet its initial burden, the motion for summary judgment must be denied, regardless of the nonmovant's response." *Quorum Health Res., L.L.C. v. Maverick Cty. Hosp. Dist.*, 308 F.3d 451, 471 (5th Cir. 2002) (citing *Little*, 37 F.3d at 1075). On the other hand, if the movant meets its burden to show an absence of evidence supporting the nonmovant's case, then the nonmovant must go beyond his pleadings and designate specific facts showing there is a genuine issue for trial. *Little*, 37 F.3d at 1075 (citing *Celotex*, 477 U.S. at 324). If the nonmovant cannot provide some evidence to support its claim, summary judgment is appropriate. Fed. R. Civ. P. 56(e); *Stahl v. Novartis Pharms. Corp.*, 283 F.3d 254, 263 (5th Cir. 2002).

III. ANALYSIS

Allstate moves for summary judgment on its counterclaim for declaratory judgment and Mirna Guzman's claims under the Texas DTPA and Texas Insurance Code. (ECF 26 at 19, 29; *see* ECF 7 at 14; ECF 1-1 at 4–5). Allstate contends that if it is entitled to summary judgment on its counterclaim for declaratory judgment rescinding Saul Guzman's life insurance policy, then it is also entitled to summary judgment on all of Mirna Guzman's claims because she cannot maintain her breach of contract or extra-contractual claims if the policy is due to be rescinded. (ECF 26 at 30). As such, Allstate moves the Court to grant its counterclaim and deny Mirna Guzman's claims in their entirely. (*Id.* at 33).

A. Allstate's Counterclaim for a Declaratory Judgment

Allstate contends that it is entitled to summary judgment on its request for a declaratory judgment regarding whether the life insurance policy issued to Saul Guzman is due to be rescinded under Section 705.051 of the Texas Insurance Code, such that Allstate is not liable to Mirna Guzman for benefits under the policy. (ECF 26 at 19; ECF 7 at 14). Allstate asserts that it is entitled

to summary judgment on its counterclaim because Saul Guzman's statements in his Application for Life Insurance that he was not and had never been a smoker constitute material misrepresentations on which Allstate relied when it issued the policy to him at a Standard No-Tobacco premium rate. (ECF 26 at 19–28). Mirna Guzman contends that Allstate cannot establish any of the elements of its claim for rescission of a life insurance contract under Section 705.051. (ECF 29 at 8).

1. The Declaratory Judgment Act

Under the Declaratory Judgment Act ("DJA"), a federal court "may declare the rights and other legal relations of any interested party seeking such declaration[.]" 28 U.S.C. § 2201(a). The DJA is "an enabling Act, which confers discretion on the courts rather than an absolute right upon a litigant." *Wilton v. Seven Falls Co.*, 515 U.S. 277, 287 (1995) (quoting *Public Serv. Comm'n of Utah v. Wycoff Co.*, 344 U.S. 237, 241 (1952)). Federal courts have "unique and substantial discretion in deciding whether to declare the rights of litigants." *Id.* at 286. "In the declaratory judgment context, the normal principle that federal courts should adjudicate claims within their jurisdiction yields to considerations of practicality and wise judicial administration." *Id.* at 288. The DJA "does not create a substantive cause of action" and "is merely a vehicle that allows a party to obtain an 'early adjudication of an actual controversy' arising under other substantive law." *MetroPCS Wireless, Inc. v. Virgin Mobile USA, L.P.*, No. 3:08-CV-1658-D, 2009 WL 3075205, at *19 (N.D. Tex. Sept. 25, 2009) (quoting *Collin County, Tex. v. Homeowners Ass'n for Values Essential to Neighborhoods, (HAVEN)*, 915 F.2d 167, 170 (5th Cir. 1990).

2. Rescission of Insurance Contracts Under Texas Law

In its Motion for Summary Judgment, Allstate contends that Saul Guzman's medical records prove that he misrepresented whether he was a current or former smoker at the time he

completed the insurance application. (ECF 26 at 19). Allstate asserts that Saul Guzman's misrepresentation of his smoking history is material and was relied on by Allstate when it issued this particular policy. (*Id.* at 23, 27). As such, Allstate argues that it was entitled to rescind the life insurance policy, thereby avoiding payment. (*Id.* at 19).

Mirna Guzman responds that there is summary judgment evidence that Saul Guzman's representations in his Application for Life Insurance were not false, made with an intent to deceive, or material, and that Allstate did not rely on those representations to issue the policy. (ECF 29 at 8–9). Mirna Guzman thus asserts that there is a fact issue as to each element of a claim for rescission of an insurance contract and, as such, Allstate's Motion for Summary Judgment should be denied. (*Id.*).

a. Five-Element *Mayes* Test and Recodification of the Texas Insurance Code

"Traditionally, under Texas case law, there are five elements a movant must establish in order to rescind an insurance contract." *Colonial Penn Life Ins. Co. v. Parker*, 362 F. Supp. 3d 380, 399 (S.D. Tex. 2019). An insurer must plead and prove: "(1) the making of the representation; (2) the falsity of the representation; (3) reliance thereon by the insurer; (4) the intent to deceive on the part of the insured in making same; and (5) the materiality of the representation." *Mayes v. Massachusetts Mut. Life Ins. Co.*, 608 S.W.2d 612, 616 (Tex. 1980). However, the Texas Legislature recodified the Texas Insurance Code in 2003. *See Federated Life Ins. Co. v. Jafreh*, 392 F. App'x 280, 283 (5th Cir. 2010) (discussing the recodification of the Insurance Code). The amendments took effect on April 1, 2005 and are therefore applicable to this case. *See id.*

Under the recodified version of the statute, the applicable elements of a claim for rescission of an insurance contract depend on the type of insurance contract and length of that contract's existence. *See* Tex. Ins. Code § 705.001 *et seq.*; *Parker*, 362 F. Supp. 3d at 399. The requirements

for rescission appear in Chapter 705, "Misrepresentations by Policyholders." *See* Tex. Ins. Code § 705.001 *et seq.* Subchapter A of Chapter 705 contains general provisions for all policies—except for a life insurance policy "that contains a provision making the policy incontestable after two years or less" and "on which premiums have been duly paid." *Id.* § 705.105. It is undisputed in this case that the insurance contract contains a standard two-year incontestability clause and that the premiums were duly paid. (*See* ECF 26 at 12; ECF 29 at 1–17). Therefore, Subchapter A is not applicable in this case.

Subchapter B contains special provisions related to life, accident, and health insurance policies, and Subchapter C contains other special provisions related only to life insurance policies. *See* Tex. Ins. Code §§ 705.051, .101–.105. Subchapter B contains only one section, which states:

> A misrepresentation in an application for a life, accident, or health insurance policy does not defeat recovery under the policy unless the misrepresentation:
>
> (1) is of a material fact; and
>
> (2) affects the risks assumed.

Id. § 705.051. The provisions of Subchapter C serve to: define an "insurance policy" as a contract or policy of insurance (Section 705.101); note that Subchapter C applies to any insurance policy issued or contracted for in Texas (Section 705.102); mandate what items must accompany a life insurance policy (Section 705.103); eliminate the defense of misrepresentation in a life insurance application when a lawsuit is filed two or more years after the policy was issued—unless certain conditions are satisfied (Section 705.104); and, as noted above, make Subchapter A inapplicable to life insurance policies that contain a clause "making the policy incontestable after two years or less" and "on which premiums have been duly paid" (Section 705.105).

"Most Texas and related federal cases that discuss misrepresentations on insurance applications concern life insurance contracts that went into effect prior to the April 2005

recodification." *Parker*, 362 F. Supp. 3d at 402. As such, there are very few cases which "clearly reconcile the inconsistency between the intent element from *Mayes* and the lack of an explicit intent requirement in parts of the updated legislation." *Id.*; *see Mayes*, 608 S.W.2d at 616. Indeed, Subchapters B and C contain two sections for misrepresentation defenses: Section 705.051 within Subchapter B and Section 705.104 within Subchapter C. And only one of them mentions "intent"—Section 705.104.[1] Although Section 705.104 mentions "intent," that section only applies to "a suit brought on the policy on or after the second anniversary of the date of issuance of the policy[.]" *See* Tex. Ins. Code § 705.104. In other words, an insurer is *only* able to contest a life insurance policy two or more years after it is issued *if* the insurer shows the misrepresentation was intentionally made. *See id.*; *Jafreh*, 392 F. App'x at 283.

To hold otherwise would result in an interpretation of the Texas Insurance Code that renders "part of the statute meaningless or superfluous." *Crosstex Energy Servs., L.P. v. Pro Plus, Inc.*, 430 S.W.3d 384, 390 (Tex. 2014). As United States District Judge Andrew S. Hanen noted in *Colonial Penn Life Insurance Company v. Parker*, one of the few orders concerning misrepresentations on life insurance applications published after the recodification of the Texas

[1] Although Section 705.004 in Subchapter A does not apply to the insurance policy in this case because, as noted above, the policy contains a two-year incontestability clause and the premiums were duly paid, the Court notes that Section 705.004 also covers misrepresentation defenses. *See* Tex. Ins. Code §§ 705.004, .105. Section 705.004 also does not mention "intent"—further suggesting that the Texas Legislature purposely chose to eliminate the intent-to-deceive element for rescission claims when the policy is contested less than two years after it is issued. *See Parker*, 362 F. Supp. 3d at 401 n.11; *Landeros v. Transamerica Life Ins. Co.*, No. 7:17-CV-00475, 2020 WL 3107795, at *7 (S.D. Tex. May 8, 2020) ("In order to give meaning to all of section 705.104, the absence of an intent requirement in the section's statutory counterpart, section 705.051, must also be given meaning."); Andrew C. Whitaker, *Update on Texas Law on the Rescission of Insurance Policies*, 13 J. TEX. INS. L. 23, 24 (2015) ("Since the Texas Legislature clearly knew how to impose an intent requirement, its refusal to include one in the statutes setting forth the elements of a rescission claim—Sections 705.004 and 705.051—provides further evidence that intent to deceive is no longer an element of a rescission claim during the first two years [of] a life insurance policy"); *see also Iliff v. Iliff*, 339 S.W.3d 74, 81 (Tex. 2011) ("Because [the statute at issue] is unambiguous, we decline to read into the statute an extra proof requirement that the Legislature did not express."); *Meritor Auto., Inc. v. Ruan Leasing Co.*, 44 S.W.3d 86, 90 (Tex. 2001) ("Ordinarily when the Legislature has used a term in one section of a statute and excluded it in another, we will not imply the term where it has been excluded."); *Smith v. Baldwin*, 611 S.W.2d 611, 616 (Tex. 1980) (observing that some sections of the Texas DPTA require proof of intent but other sections do not, and thus, intent would not be implied where it had been excluded).

Insurance Code in 2005,[2] if "an insurer must always prove intent to deceive, regardless of whether the policy was in effect for two or more years, then the language, 'on or after the second anniversary of the date of issuance of the policy' would be superfluous." *Parker*, 362 F. Supp. 3d at 403 (quoting Tex. Ins. Code § 705.104); *see also Landeros*, 2020 WL 3107795, at *7 n.16 ("In other words, were the Court to adopt Plaintiff's argument, that intent to deceive is also required in order to rescind a policy that has been in force for less than two years on the basis of misrepresentation, the words 'intentionally made' in section 705.104 would be superfluous.").[3] Consequently, this Court holds that Section 705.051 is the applicable section for misrepresentation defenses available to an insurer when (1) the life insurance policy contains a two-year incontestability clause, (2) all premiums were duly paid, and (3) the insurer contests the policy less than two years after its issuance.

As already noted, Saul Guzman's life insurance policy contains a two-year incontestability

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[2] The Court has only located two orders that specifically address whether, following the recodification of the Texas Insurance Code in 2005, intent is an element of an insurer's claim to rescind a life insurance policy in force for less than two years. Both courts held that it is not. *See Parker*, 362 F. Supp. 3d at 402 ("Accordingly, this Court agrees that the policy at issue here is controlled by Tex. Ins. Code § 705.051, and that under this section, [the insurer] is not required to prove intent to deceive."); *see also Landeros*, 2020 WL 3107795, at *8 (in which United States District Judge Randy Crane held that "an insurer who seeks to rescind a life insurance policy within two years from the date of its issuance is not required to prove the insured's intent to deceive.").

The Court is also aware of an appeal pending before the Texas Seventh Court of Appeals in which one of the issues raised relates directly to this issue. *See Arce v. Am. Nat'l Ins. Co.*, No. 07-19-00362-CV (Tex. App.—Amarillo). That case was submitted on oral argument on September 2, 2020, but, as of the date of this order, the Seventh Court of Appeals has not yet issued an opinion.

[3] In addition to rendering parts of the statute superfluous, a contrary holding would necessitate that parties research the prior common law and read an intent-to-deceive element into Section 705.051—which would be unfair and illogical. As explained by the Texas Supreme Court in *Fleming Foods*:

> Citizens, lawyers who represent them, judges, and members of the Legislature should not be required to research the law that preceded every codification to determine if there had been some change and accordingly whether the prior law rather than the current law prevails. We must be able to accept and to rely upon the words written by the Legislature if they are clear and unambiguous, their meaning is plain when the code in which they appear is read in its entirely, and they do not lead to absurd results.

Fleming Foods of Texas, Inc. v. Rylander, 6 S.W.3d 278, 285 (Tex. 1999).

clause and all premiums were duly paid. (*See* ECF 26 at 12; ECF 29 at 1–17). Additionally, this case was filed in the 320th District Court in and for Potter County, Texas on August 28, 2019—less than two years after Allstate issued the life insurance policy to Saul Guzman on September 19, 2017. (*See* ECF 1-1; ECF 27 at 50). As such, Section 705.051 is the applicable section for Allstate's misrepresentation defense in this case.

The Court notes that Mirna Guzman contends that Allstate must prove that Saul Guzman intended to deceive Allstate when he represented in his Application for Life Insurance that he was neither currently nor formerly a smoker. (ECF 29 at 7–8). Although Mirna Guzman concedes that most of the authority on this issue is from Texas cases resolved prior to the recodification of the Texas Insurance Code, she cites to one Texas appellate court opinion issued after 2005 in support of her argument that there is still an intent-to-deceive element: *Medicus Insurance Company v. Todd*, 400 S.W.3d 670 (Tex. App.—Dallas 2013, no pet.). (*Id.* at 6). However, Mirna Guzman's reliance on this case is misplaced because the Texas Fifth Court of Appeals's decision in *Todd* is readily distinguishable. Significantly, the case involved an application for medical malpractice coverage—not life insurance. *Id.* at 676. As such, the applicable provision was Section 705.004 of the Texas Insurance Code—not Section 705.051. *Id.* at 676–77; *see Landeros*, 2020 WL 3107795, at *8 n.18.

To conclude, the Court finds that Section 705.051 is the statutory misrepresentation provision applicable to this matter, and Allstate is not required to prove that Saul Guzman intended to deceive Allstate when he represented that he was not a current or former smoker.

b. Section 705.051 of the Texas Insurance Code

Under Section 705.051, "[a] misrepresentation in an application for a life . . . insurance policy does not defeat recovery under the policy unless the misrepresentation: (1) is of a material

fact; and (2) affects the risks assumed." Tex. Ins. Code § 705.051. In other words, "in order to establish an affirmative defense of misrepresentation, an insurer rescinding a life insurance policy within two years from the date of its issuance must prove: '(1) the making of the representation; (2) the falsity of the representation; (3) reliance thereon by the insurer; . . . and (5) the materiality of the representation.'" *Landeros*, 2020 WL 3107795, at *8 (quoting *Mayes*, 608 S.W.2d at 616).

(1) The Making of the Representation

Saul Guzman completed and signed Allstate's two-part Application for Life Insurance on August 17, 2017. (ECF 27 at 4–10). In response to the question of whether he "currently use[d] tobacco or nicotine," Saul Guzman answered no. (*Id.* at 8). In response to the question of whether he had "ever used tobacco or nicotine," Saul Guzman answered no. (*Id.*). "A representation is made if the applicant signs a statement indicating the answers in the application are true and correct when the policy is delivered." *Darby v. Jefferson Life Ins. Co.*, 998 S.W.2d 622, 628 (Tex. App.—Houston [1st. Dist.] 1995, no writ.) (citing *Mayes*, 608 S.W.2d at 616). Here, the Application for Life Insurance contained the following statement:

> I declare that the answers written above are full and correct to the best of my knowledge and belief. I understand and agree that the statements above, along with the application, will be the basis for any insurance issued.

(ECF 27 at 10). Saul Guzman signed the application immediately below this statement. (*Id.*).

Accordingly, the Court finds Saul Guzman's responses to the questions of whether he currently or had ever used tobacco or nicotine are representations made by Saul Guzman.[4]

(2) The Falsity of the Representation

Allstate contends that the summary judgment evidence clearly establishes that Saul Guzman's representations that he was not and had never been a smoker were false. (ECF 26 at 21).

[4] Mirna Guzman does not dispute that Saul Guzman made these representations. (ECF 29 at 10).

Mirna Guzman disagrees, asserting that her deposition testimony and declaration, as well as the declaration of Saul Guzman's sister, Martha Mendoza, create a fact issue as to whether Saul Guzman's representations as to his smoking history were false. (ECF 29 at 10–11).

A representation in a life insurance application is false if it was untrue at the time it was made. *Legion Ins. Co. v. Texas Timber Grp.*, No. 3:99-CV-0932-BC, 2000 WL 1456447, at *4 (N.D. Tex. Sept. 29, 2000) ("It is now settled law that if the answers to the questions in the [insurance] application were untrue at the time they were given, the untrue answers constituted misrepresentations.") (quoting *Mayes*, 608 S.W.2d at 616). The Court will address the summary judgment evidence submitted by both parties, as well as Allstate's objections to some of Mirna Guzman's evidence.

(a) Evidence Proffered by Allstate

Mirna Guzman made a formal claim for the policy's death benefit as the primary beneficiary under the policy by submitting an executed Claimant's Statement for Life Insurance Proceeds, HIPAA Authorization, and Certificate of Death on March 13, 2019. (ECF 27 at 78–88). Allstate began its routine investigation and assigned Carrie Sykes, a senior consultant, to be the claim handler. (*Id.* at 75–77).

Through this investigation, Allstate obtained medical records from: (1) Baptist St. Anthony Health System ("BSA"); (2) Dr. Gincy Samuel and Texas Neurology; and (3) Dr. Gloria Fuller and Faith Medical Clinic. (ECF 26 at 13; ECF 27 at 89–154; ECF 27–1 at 1–133). The Emergency Department Record from BSA indicates under smoking history that Saul Guzman "smokes." (ECF 27 at 99). The Emergency Physician Record from BSA also indicated under social history that Saul Guzman is a "smoker." (*Id.* at 102). These records are dated April 17, 2016—approximately sixteen months before Saul Guzman submitted his Application for Life Insurance. (*Id.* at 99, 102).

The Progress Notes completed by Dr. Gincy Samuel at Texas Neurology indicate under social history that Saul Guzman was a "current smoker" and that he smoked "some days, but not every day." (ECF 27-1 at 71). The Progress Notes also state that Saul Guzman was accompanied by his wife at this visit. (*Id.*). This medical record is dated June 29, 2016—roughly thirteen and a half months before Saul Guzman submitted his application. (*Id.*).

Finally, the medical records from Dr. Gloria Fuller and Faith Medical Clinic indicate that Saul Guzman was seen on April 24, 2017—approximately four months before Saul Guzman submitted his application. (*Id.* at 129). Under social history, the record reflects that Saul Guzman was a "[f]ormer smoker." (*Id.*). Another medical record from Faith Medical Clinic shows that Saul Guzman was seen on May 31, 2017—approximately two and a half months before he submitted his application to Allstate. (*Id.* at 127). That visit note states that Saul Guzman was a "[c]urrent every day smoker." (*Id.* at 127).

Allstate also notes in its Motion for Summary Judgment that Mirna Guzman produced Saul Guzman's medical records from Northwest Texas Hospital. (ECF 26 at 14 n.2). Those records are included in the appendix to Allstate's Motion for Summary Judgment and indicate that Saul Guzman was a "current" smoker as of December 10, 2016—approximately eight months before Saul Guzman submitted his Application for Life Insurance. (ECF 27-1 at 134).

(b) Evidence Proffered by Mirna Guzman and Allstate's Evidentiary Objections

Mirna Guzman contends that Saul Guzman's representations that he was not a current or former smoker were true statements and that there is evidence in the summary judgment record demonstrating a genuine issue of material fact as to this element. (ECF 29 at 10–11). In support, Mirna Guzman cites to her own deposition testimony in which she stated that, to her knowledge, Saul Guzman was not a smoker; that she had never seen him use tobacco products; and that she

never smelled tobacco on him. (*Id.* at 10; ECF 31 at 25). Mirna Guzman also cites to a declaration she submitted in the appendix to her Response to Allstate's Motion for Summary Judgment in which she makes roughly the same assertions, including:

> . . .
>
> 8. Saul de Jesus . [sic] Guzman represented in his policy application [which became a part of the terms and conditions of the contract for insurance] that he was not a smoker.
> 9. That statement was true.
> 10. My husband, Saul de Jesus Guzman, did not smoke nicotine products at all. He denied smoking to me and our family members.
> 11. I never smelled tobacco smoke on his breath, his hands, his clothes, or in his pickup truck.
> 12. He did not ever smell like a person who uses tobacco or tobacco products including smoking same.
> 13. I have been around people who smoke tobacco and tobacco products and I am able to tell whether they use tobacco because they have a peculiar and specific tobacco smoke smell.
> 14. My husband never had that smell.
> 15. We had a very happy marriage and we were around each other constantly when he was not at work.
> 16. If he were a smoker of tobacco products, I would have smelled tobacco smoke and tobacco residue on him\, [sic] his breath and/or on his clothes – which I did not.
> 17. I would kiss his hands. If he were a smoker, I would have smelled tobacco smoke and tobacco residue on his hands — which I did not.
> 18. My husband had a Chevrolet Equinox automobile that he drove to work and elsewhere. He was constantly in that vehicle if not at home with me or at work. If he were a smoker of tobacco products, that vehicle would have smelled like tobacco smoke or tobacco products — which it did not.
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> . . .

(ECF 31 at 4). Next, Mirna Guzman cites to the declaration of Martha Mendoza, Saul Guzman's sister, to support her argument. (ECF 29 at 10). Ms. Mendoza also states in her declaration that Saul Guzman was not a smoker and that she "never smelled tobacco smoke on his breath, his clothes, or in his personal motor r [sic] vehicle." (ECF 31 at 8–9).

Allstate raises numerous objections to Mirna Guzman's evidence in its Reply. (EF 33 at 7–11). First, Allstate objects to the portions of Mirna Guzman and Martha Mendoza's declarations stating that Saul Guzman's representation in his Application for Life Insurance that he was not a smoker "was true." (ECF 33 at 7–8; *see* ECF 31 at 4, 8–9). Allstate contends that those statements in the declarations (1) are not made with personal knowledge and (2) are contradicted by several of Saul Guzman's medical records reflecting that he was a smoker. (ECF 33 at 7–9). Allstate also objects to paragraph 10 in Mirna Guzman's declaration, which states: "My husband . . . did not smoke nicotine products at all. He denied smoking to me and our family members." (ECF 33 at 8; ECF 31 at 4). Allstate contends that this paragraph is (1) not made on Mirna Guzman's personal knowledge, (2) contradicted by Saul Guzman's medical records, and (3) hearsay. (ECF 33 at 8). Allstate further objects to paragraphs 16, 17, and 18 of Mirna Guzman's declaration and paragraphs 12 and 13 of Martha Mendoza's declaration, wherein they both assert that they would have smelled tobacco or smoke on Saul Guzman and his vehicle if he was a smoker, as speculation. (*Id.* at 8–9; ECF 31 at 4, 9). As outlined in this Order, the Court finds that these statements are "conclusory allegations, unsubstantiated assertions, improbable inferences, and unsupported speculation that are not competent summary judgment evidence" and are insufficient to defeat a motion for summary judgment. *See Eason*, 73 F.3d at 1325; *Forsyth*, 19 F.3d at 1533.

In addition to the above-mentioned objections, Allstate contends that the Court should disregard all testimony from Mirna Guzman. (*Id.* at 7, 10). Allstate asserts that she is an interested

witness, and that her testimony therefore may not be considered at the summary judgment stage. (*Id.*).

"The court must review all evidence in the record, giving credence to evidence favoring the nonmovant as well as 'evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that evidence comes from disinterested witnesses,' and disregarding evidence favorable to the movant that the jury would not be required to believe." *Gary v. Combined Grp. Ins. Servs., Inc.*, No. 3:08-CV-228-L, 2009 WL 2868485, at *10 (N.D. Tex. Sept. 4, 2009) (quoting *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 151 (2000)); *see also Roberson v. Alltel Info. Servs.*, 373 F.3d 647, 653 (5th Cir. 2004) (quoting this portion of *Reeves*); *Thomas v. City of San Antonio, Texas*, No. SA-08-CA-891-H, 2011 WL 13180180, at *3 (W.D. Tex. Dec. 29, 2011) (same); *Galaviz v. Post-Newsweek Stations*, No. SA-08-CA-305, 2009 WL 2105981, at *2, 11 (W.D. Tex. July 13, 2009), *aff'd*, 380 F. App'x 457 (5th Cir. 2010) (same); *Equal Emp't Opportunity Comm'n v. Chevron Phillips Chem. Co.*, No. H-05-3377, 2007 WL 9711755, at *3 (S.D. Tex. June 5, 2007), *report and recommendation adopted*, 2007 WL 9711754 (S.D. Tex. July 5, 2007) (same).

The Court finds that Allstate's objections to Mirna Guzman's deposition and declaration and Martha Mendoza's declaration because they are interested witnesses should be overruled. Mirna Guzman, the plaintiff in this case, and Martha Mendoza, Saul Guzman's sister who is "very close with [her] sister-in-law, Mirna Guzman, the widow of [her] brother," may certainly be interested witnesses. (ECF 31 at 8). However, the rule set forth by the Supreme Court in *Reeves v. Sanderson Plumbing Products, Inc.* only applies to the Court's consideration of evidence supporting the *movant*:

> Thus, although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe. That

> is, the court should give credence to the evidence favoring the nonmovant as well as that "evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses."

Reeves, 530 U.S. at 151 (quoting 9A C. Wright & A. Miller, Federal Practice and Procedure § 2529, p. 300 (2d ed. 1995)). Mirna Guzman's and Martha Mendoza's testimony is evidence supporting the *non-movant*. *See id.* As such, the Court cannot refuse to consider it at the summary judgment stage under the disinterested witness rule.

However, Allstate is correct in describing the declarations as conclusory and self-serving. (*See* ECF 33 at 5). Not all self-serving affidavits and declarations are, *ipso facto*, inadmissible. *See Cedar Lodge Plantation, L.L.C. v. CSHV Fairway View I, L.L.C.*, 753 F. App'x 191, 199 n.35 (5th Cir. 2018) ("This court has explained that 'merely claiming that the evidence is self-serving does not mean we cannot consider it or that it is insufficient. Much evidence is self-serving and, to an extent, conclusional.'") (quoting *Rushing v. Kan. City S. Ry. Co.*, 185 F.3d 496, 513 (5th Cir. 1999), *superseded on other grounds as recognized in Mathis v. Exxon Corp.*, 302 F.3d 448, 459 n.16 (5th Cir. 2002)); *see also Spring St. Partners-IV, L.P. v. Lam*, 730 F.3d 427, 441 n.7 (5th Cir. 2013) ("Affidavits or declarations . . . that set forth only conclusory and unsupported assertions are sometimes described disparagingly as 'self-serving' affidavits, as if the 'self-serving' nature of a document renders it automatically insufficient.") (quoting 11 Moore's Federal Practice—Civil § 56.94[3] (3d ed. 2013)).

To be admissible and sufficient to overcome a motion for summary judgment, self-serving declarations or testimony must be supported by other evidence in the record. *See Spring St. Partners-IV, L.P.*, 730 F.3d at 441 n.7 ("[T]here is nothing wrong with self-serving affidavits and declarations, provided they are supported by the facts in the record[.]") (quoting 11 Moore's Federal Practice—Civil § 56.94[3] (3d ed. 2013)); *Medlin*, 255 F. App'x at 893 (affirming district

court's grant of summary judgment against party who "failed to submit any evidence, other than self-serving testimony"); *Burrle v. Plaquemines Par. Gov't*, 553 F. App'x 392, 394 (5th Cir. 2014) ("Summary judgment continues to be proper, however, when (a) the only evidence the plaintiff produces after extensive discovery is a self-serving affidavit and (b) evidence favoring summary judgment is overwhelming.").

The other evidence that Mirna Guzman has proffered in support of her assertion that Saul Guzman's representations about his smoking history were not false include medical records from Northwest Texas Hospital and BSA Hospital that document the treatment of Saul Guzman on January 28, 2019 and January 29, 2019—shortly before his death. (ECF 29 at 11; ECF 31 at 82–83). The Emergency Department record from Northwest Texas Hospital states "Tobacco Use Last 30 Days: No tobacco use of any form." (ECF 31 at 82). Mirna Guzman cites to the following statement in the BSA Hospital record: "LUNGS/PLEURA: Endotracheal tube present with tip well above the carina. No significant pulmonary parenchymal abnormalities. VASCULATURE: Normal. Unremarkable pulmonary vasculature." (*Id.* at 83).

Mirna Guzman also points to another medical record from January 28, 2019 that states under "Tobacco Use" and "Smoking status": "Current Every Day Smoker." (*Id.* at 84). Yet, Mirna Guzman contends that the record does not indicate when Saul Guzman conveyed this information to the hospital, and further, that he may have provided such answer while "in [a] desperate condition being quizzed about [h]is smoking habit[.]" (ECF 29 at 12). Mirna Guzman contends: "The entry 'Current Every Day Smoker' issued under his desperate health conditions smacks of 'boiler plate entries.' [Not technically binding but is hardly trustworthy]." (*Id.*). Mirna Guzman then concludes by stating that "a fact issue exists as to whether Saul D. Guzman made a false statement to Allstate in his application for life insurance related to whether he was a non-

smoker[.]" (*Id.*).

However, Mirna Guzman's reliance on these medical records from shortly before Saul Guzman's death in January 2019 to support her assertion that there is a fact issue as to whether Saul Guzman's representations were false is not persuasive. As stated above, the relevant question is whether the representation was untrue *at the time it was made*. *See Mayes*, 608 S.W.2d at 616; *Legion Ins. Co.*, 2000 WL 1456447, at *4. The medical records Mirna Guzman cites to are dated approximately seventeen and a half months *after* Saul Guzman completed and signed his Application for Life Insurance. (*See* ECF 27 at 4–10; ECF 31 at 82–84). The Emergency Department record from Northwest Texas Hospital, which states, "Tobacco Use Last 30 Days: No tobacco use of any form," therefore does not create a genuine issue of material fact as to the issue of whether Saul Guzman was a current or former smoker when he completed his Application for Life Insurance on August 17, 2017. (*See* ECF 27 at 4–10; ECF 31 at 82). The other medical records likewise do not establish that Saul Guzman was not a current or former smoker on August 17, 2017. (*See* ECF 31 at 83–14). If anything, the statement in the Northwest Texas Hospital record that Mirna Guzman cites to states under Social History, "Tobacco: Current (Last Updated: 12/10/2016)." (*Id.* at 82). As Allstate has argued, that record actually provides additional evidence that Saul Guzman was a current or former smoker at the time he represented on his Application for Life Insurance that he was not.

Accordingly, the Court finds that, even viewing the evidence in the light most favorable to Mirna Guzman, the evidence is insufficient to establish that there is a genuine issue of material fact as to whether Saul Guzman's representations that he was not a current or former smoker were true statements. *See* Fed. R. Civ. P. 56(c); *Anderson*, 477 U.S. at 247–48. The only evidence Mirna Guzman has submitted that directly relates to the falsity of Saul Guzman's

representations is self-serving testimony and declarations. As such, that self-serving evidence has not been supported by other evidence in the summary judgment record and is insufficient to establish a genuine issue of material fact as to this element. *See Spring St. Partners-IV, L.P.*, 730 F.3d at 441 n.7; *Medlin*, 255 F. App'x at 893; *Burrle*, 553 F. App'x at 394.

Further, there is ample evidence in the record demonstrating that Saul Guzman's representations were false at the time he made them. Saul Guzman's medical records from multiple providers dated earlier than August 17, 2017—the date that Saul Guzman submitted his Application for Life Insurance—show that he was a current or former smoker. (*See* ECF 26 at 13; ECF 27 at 89–154; ECF 27–1 at 1–134). As recognized in the Advisory Committee's Notes to Rule 803(4) of the Federal Rules of Evidence, these statements are admissible as exceptions to the rule against hearsay because they are independently reliable "in view of the patient's strong motivation to be truthful." Fed. R. Evid. 803(4) advisory committee's notes to 1972 amendment; *see Ripple v. Marble Falls Indep. Sch. Dist.*, 99 F. Supp. 3d 662, 679 (W.D. Tex. 2015) ("The rationale behind [Rule 803(4)] is that a patient has a strong motivation to be truthful in making statements for diagnosis or treatment purposes.").

Even further, the Court agrees with Allstate's assertion that "[e]ven if accepted at face value and viewed in the light most favorable to [Mirna Guzman], these [d]eclarations demonstrate, at best, that [Saul] Guzman effectively hid his smoking from his family." (ECF 33 at 5). Allstate argues that neither Mirna Guzman nor Martha Mendoza have stated that they never saw Saul Guzman use any tobacco product. (*Id.* at 10). Allstate also notes that while Mirna Guzman claimed that she was "constantly" with Saul Guzman, she also admitted that there were times that she was not with him—namely, when he was at work. (*Id.*; ECF 31 at 4). And Martha Mendoza's declaration does not specify how frequently she was with Saul Guzman. (ECF 31 at 8–9).

Although it is possible that Saul Guzman was not "currently us[ing] tobacco or nicotine" when he completed his application, the summary judgment record conclusively establishes that his statement that he was not a former smoker was false at the time he made it. (*See* ECF 27 at 8); *Darby*, 998 S.W.2d at 628; *Mayes*, 608 S.W.2d at 61; *Legion Ins. Co.*, 2000 WL 1456447, at *4. The record taken as a whole could not lead a rational trier of fact to find for Mirna Guzman, and as such, there is no genuine dispute for trial. *See Fontenot*, 780 F.2d at 1194; *see also Scott v. Harris*, 550 U.S. 372, 380 (2007) ("When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment."); *Anderson*, 477 U.S. at 247–248 ("[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.") (emphasis in original).

The Court finds that, at a minimum, some of Saul Guzman's representations regarding his smoking history—specifically, that he was not a former smoker—were false when made.

(3) Reliance on the Representation by the Insurer

Allstate contends that it relied on the above-mentioned representations in Saul Guzman's Application for Life Insurance. (ECF 26 at 27). Mirna Guzman contends that "[t]here is summary judgment evidence that Allstate did not rely on any statement Saul D. Guzman made in his application for life insurance." (ECF 29 at 13). Specifically, Mirna Guzman contends that Allstate must not have relied on any statements made by Saul Guzman in his Application for Life Insurance because Allstate conducted an examination of Saul Guzman, including a blood test and urinalysis, prior to issuing the policy. (*Id.* at 13–15). Mirna Guzman notes that the urinalysis tested for the presence of cotinine (nicotine), and that result was negative. (*Id.* at 15).

Additionally, Allstate's underwriter requested Saul Guzman's medical records during its risk investigation prior to issuing the policy. (ECF 27 at 26–27). Allstate received thirteen pages of records from Dr. Gloria Fuller and Faith Medical Clinic on August 28, 2017. (*Id.* at 29–42). Within the records, it was noted that as of July 27, 2015, Saul Guzman had never been a smoker. (*Id.* at 39). Finally, a TeleServ Life Quest inspection was conducted by telephone on September 18, 2017. (*Id.* at 43–49). During the inspection, Saul Guzman was asked if he "now use[s] cigars, cigarettes, pipe, chew, or snuff" and if he had "ever used tobacco in any form." (*Id.* at 44). Saul Guzman answered no to both questions. (*Id.*).

Mirna Guzman contends that "we must presume" that Allstate did not rely on Saul Guzman's representations in his Application for Life Insurance because Allstate conducted these investigations prior to issuing the policy at a non-smoking premium rate. (ECF 29 at 15). Allstate contends that Mirna Guzman's argument as to reliance is without legal support and that "Texas law is clear that the fact that an insurer makes an investigation does not absolve an applicant from providing truthful responses to application questions." (ECF 33 at 16).

Allstate is correct. As the Fifth Circuit has explained:

> The mere fact that the insurer makes an independent investigation . . . does not absolve the applicant from telling the truth nor lessen the right of the insurer to rely upon his representations, unless the investigation either discloses the falsity of the representations or discloses facts which would put a prudent person on further inquiry.

Adamson v. Home Life Ins. Co., 508 F.2d 766, 768 (5th Cir. 1975) (quoting *Apperson v. U. S. Fid. & Guar. Co.*, 318 F.2d 438, 441 (5th Cir. 1963)). Further, Allstate has provided evidence that in the course of its initial review and investigations, Allstate's underwriter noted Saul Guzman's representation on his application that he had never used tobacco products and that the policy was subsequently issued under a Standard No-Tobacco premium rate. (ECF 27 at 26, 50). This provides

some affirmative evidence that Allstate relied on Saul Guzman's misrepresentations. *See Kirk v. Kemper Inv'rs Life Ins. Co.*, 448 F. Supp. 2d 828, 834 (S.D. Tex. 2006) (noting that an insurer may demonstrate reliance on an insured's misrepresentation by affirmative evidence).

Additionally, an insurer may rely on a misrepresentation of which he had no knowledge as to its falsity. *See Darby*, 998 S.W.2d at 628 ("Reliance is established when the insurer does not know the representations are false."). There is no evidence in the summary judgment record demonstrating that Allstate knew that Saul Guzman's representations about his smoking history were false when it issued the policy. *See Landeros*, 2020 WL 3107795, at *9 ("In other words, only an insurer's actual knowledge of the falsity of the representation will prevent an insurer from establishing that it relied on such representation.") (citing *Koral Indus. v. Sec.-Conn. Life Ins. Co.*, 802 S.W.2d 650, 651 (Tex. 1990) (per curiam)); *see also Principal Mut. Life Ins. Co. v. Toranto*, No. 3:95-CV-2841-R, 1997 WL 279751, at *3 (N.D. Tex. June 23, 1997) ("Only the insurer's *actual* knowledge of the misrepresentations would destroy its fraud claim.") (emphasis in original).

Accordingly, the Court finds that Allstate did not have actual knowledge of the falsity of Saul Guzman's representations about his smoking history and that Allstate relied upon those misrepresentations.

(4) Materiality of the Representation

Allstate contends that Saul Guzman's representations regarding his smoking history are material as a matter of law because Allstate would not have issued the particular policy that it issued to Saul Guzman if it had known the true facts of his smoking history. (ECF 26 at 25). Instead, Allstate claims that it "would have only offered him a policy at a Standard Smoker annual premium rate of $685." (*Id.*). Mirna Guzman disagrees, asserting that Saul Guzman's representations were not material because Saul Guzman's cause of death was related to a seizure

he had on January 18, 2019—and that the seizure disorder had been properly disclosed to Allstate on the Application for Life Insurance. (ECF 29 at 16–17). In other words, Mirna Guzman contends that Saul Guzman's representations cannot be material as a matter of law because "[t]here is no evidence" that he "died as a result of any use of tobacco he may have had." (*Id.* at 17).

"The representation is material if it actually induces the insurance company to assume the risk." *Darby*, 998 S.W.2d at 628. "When determining materiality, the relevant time is the time at which the policy is issued, not the time at which the loss occurred." *Landeros*, 2020 WL 3107795, at *11 (citing *Robinson v. Reliable Life Ins. Co.*, 569 S.W.2d 28, 30 (Tex. 1978)). "[T]he principal inquiry in determining materiality is whether the insurer would have accepted the risk if the true facts had been disclosed." *Robinson*, 569 S.W.2d at 29.

Allstate represents, and there is evidence in the record, that Allstate would not have issued the life insurance policy to Saul Guzman had it known of Saul Guzman's actual smoking history. (ECF 26 at 25). The record demonstrates that, in the course of the investigation instigated because Saul Guzman died less than two years after Allstate issued his life insurance policy, the claim handler, Carrie Sykes, sent the additional medical records (mentioned above) she gathered along with an Underwriting Referral form to Val Munchez-van der Wagt, Allstate's chief underwriter. (ECF 27–1 at 135, 147). The Underwriting Referral contained a "[s]ummary of non-disclosed history uncovered via claim investigation" and posed the following question for the underwriting department: "Based on underwriting policy and procedure, what action would have been taken if the above information was disclosed on the application?" (*Id.* at 135). Ms. Munchez-van der Wagt returned the first Underwriting Referral on May 15, 2019 with the following response:

> Records dated 4/17/16 from Baptist St Anthony H.S., show he was smoking. Records from Faith Medical show former smoker on 4/27/17 but smoking again (Current every day smoker) on 5/31/17. Had we known he was a smoker we would not have issued this policy on a non-smoker basis.

(*Id.*). Ms. Sykes sent a second Underwriting Referral to Ms. Munchez-van der Wagt following the receipt of additional medical records. (*Id.* at 136). Ms. Munchez-van der Wagt stated as her response to the second Underwriting Referral that "based on the May 31, 2017 entry of current every day smoker" in the medical records Allstate received from Texas Neurology, "had we known he was a smoker we would not have issued this policy." (*Id.*).

Although Allstate may have still issued a life insurance policy to Saul Guzman had it known of his actual smoking history, Allstate only has to show that it would not have issued this particular policy that was actually issued in order to demonstrate the materiality of the misrepresentation. *See Hinna v. Blue Cross Blue Shield of Tex.*, No. 4:06-CV-810-A, 2007 WL 3086025, at *6 (N.D. Tex. Oct. 22, 2007) ("While [the insurer] very well may have issued [the insured] a policy that would have covered the claims relating to [the insured's] liver condition even if it had known of her history of migraines, it would not have issued the particular policy it did issue."); *see also Pacific Mut. Life Ins. Co. v. Johnson*, 74 F.2d 367, 370 (5th Cir. 1934) (noting that "matters for consideration in determining the materiality of the misrepresentation" include whether the fact that was misrepresented "might reasonably have caused the insurance company to refuse to issue the policy, or to decline to take such risk unless at a higher premium, or which would impose a materially greater risk on the insurer"); *Fidelity Union Fire Ins. Co. v. Pruitt*, 23 S.W.2d 681, 684 (Tex. 1930) (holding that a misrepresentation is material if it "would have influenced the company . . . as to the premium to be charged").

The Court finds that the summary judgment record conclusively establishes that Saul Guzman's misrepresentations were material to the risk. Accordingly, Allstate has proven: "(1) the making of the representation; (2) the falsity of the representation; (3) reliance thereon by the insurer; . . . and (5) the materiality of the representation." *Mayes*, 608 S.W.2d at 616; *see* Tex. Ins.

Code. § 705.051. The Court therefore finds that Allstate has established that it is entitled to judgment as a matter of law on its counterclaim for declaratory judgment rescinding the life insurance policy issued to Saul Guzman. Allstate's Motion for Summary Judgment as to its counterclaim for declaratory judgment is GRANTED.

B. Mirna Guzman's Claims Under the Texas DTPA and Texas Insurance Code

In addition to alleging that Allstate improperly rescinded Saul Guzman's life insurance policy, Mirna Guzman alleges multiple extra-contractual claims in her Original Petition. (ECF 1-1 at 4–8). Specifically, Mirna Guzman alleges that Allstate violated the Texas DTPA and Sections 542.003 and 542.060 of the Texas Insurance Code. (*Id.*). These claims are based on Allstate's allegedly wrongful rescission of the life insurance policy. (*See id.*).

Because Allstate has established its right to rescind the life insurance policy issued to Saul Guzman as a matter of law, Mirna Guzman's extra-contractual claims fail as a matter of law. *See Landeros*, 2020 WL 3107795, at *10; *Progressive Cty. Mut. Ins. Co. v. Boyd*, 177 S.W.3d 919, 921–22 (Tex. 2005) (per curiam) (finding that the extra-contractual claims predicated on the insurance policy at issue were precluded by a finding that the policy did not cover the relevant occurrence). Accordingly, Allstate's Motion for Summary Judgment as to Mirna Guzman's claims under the Texas DTPA and Sections 542.003 and 542.060 of the Texas Insurance Code is GRANTED.

IV. HOLDING

For the reasons stated herein, the Court determines that Allstate is entitled to summary judgment on its claim for declaratory judgment rescinding the policy pursuant to Section 705.051 of the Texas Insurance Code. Additionally, the Court determines that Allstate is entitled to summary judgment on Mirna Guzman's claims under the Texas DTPA and Texas Insurance Code.

Accordingly, the Court finds that Allstate's Motion for Summary Judgment (ECF 25) should be GRANTED in its entirety. The Court will enter a separate Judgment consistent with this Order.

IT IS SO ORDERED.

ENTERED December 3, 2020.

Lee Ann Reno

LEE ANN RENO
UNITED STATES MAGISTRATE JUDGE