[DO NOT PUBLISH]

In the

United States Court of Appeals

For the Eleventh Circuit

No. 22-11565

Non-Argument Calendar

ALLISON HARBIN,

Plaintiff-Appellant-Cross Appellee,

versus

ROUNDPOINT MORTGAGE COMPANY,
a foreign corporation,

Defendant-Appellee-Cross Appellant,

FIRST GUARANTY MORTGAGE
CORPORATION,
a foreign corporation,

Defendant.

Appeals from the United States District Court
for the Northern District of Alabama
D.C. Docket No. 2:15-cv-01069-SLB

Before ROSENBAUM, LAGOA, and BRASHER, Circuit Judges.

PER CURIAM:

Looking to save her home from an impending foreclosure sale, Allison Harbin asked the servicer of her mortgage loan, RoundPoint Mortgage Company ("RoundPoint"), to postpone the sale so that she could finish an incomplete loan-modification application she had submitted. She planned to file for bankruptcy as a last resort. A RoundPoint employee initially told her the sale was set to go forward, but, after looking into the matter and speaking with other agents, he confirmed first orally and later in writing that the foreclosure sale had been suspended, and he directed her to submit the remaining documents necessary to review her application. Believing the sale date had been pushed back, Harbin did not file for bankruptcy and instead attempted to finish the application. But the sale had not been postponed or delayed, and her home was sold while she gathered the necessary documents.

Harbin then sued both RoundPoint and the lender, First Guaranty Mortgage Corporation, alleging fraud and breach of contract, among other claims. The district court initially granted summary judgment for the defendants, but we vacated that ruling in part on appeal, holding that sufficient evidence supported Harbin's claim of simple fraud under Alabama law. *Harbin v. RoundPoint Mortg. Co.*, 758 F. App'x 753 (11th Cir. 2018).

On remand, the fraud claim was tried before a federal jury, which returned a verdict in Harbin's favor and awarded her $12,500 in damages. In particular, the jury found that the RoundPoint employee made a false statement by mistake or accident on which Harbin reasonably relied to her detriment. The district court denied the parties' post-verdict motions for new trial or judgment as a matter of law, and both parties appealed.

In her appeal, Harbin contends that the district court erred by striking a prospective juror for cause, that the court misled the jury as to the proper legal standard in its instructions and verdict form, and that the verdict should be set aside as inconsistent, a compromise, and against the great weight of the evidence as to her damages. She seeks a new trial. For its part, RoundPoint maintains that the jury's finding that its employee made the alleged false representation innocently and by mistake means it cannot be liable. RoundPoint also asserts that Harbin failed to prove a false representation or reasonable reliance, and that her own contributory negligence bars recovery as a matter of law.

After careful review of the record and the parties' briefs, we agree with Harbin that the district court reversibly erred when instructing the jury. Her remaining arguments are moot as a result. We reject RoundPoint's arguments that it was entitled to judgment as a matter of law. We vacate and remand for further proceedings consistent with this opinion.

I. HARBIN'S APPEAL

Harbin claims that the district court's jury instructions and verdict form improperly focused the jury's attention solely on the knowledge and intent of Daniel Gerstenfeld, the RoundPoint employee with whom she communicated. We agree that, under Alabama law, this was error requiring a new trial.

A.

At trial, Harbin repeatedly sought to have the jury instructions and verdict form reflect that it was "RoundPoint making the representation" about the foreclosure sale being suspended, not Gerstenfeld, and that RoundPoint's intent was at issue, not just Gerstenfeld's. Harbin's position was that, even if Gerstenfeld acted innocently, RoundPoint could still be liable for intentional fraud under well-established Alabama law.

The district court denied this request and instructed the jury as follows:

> Ms. Harbin states and says in this case that the defendant employee Daniel Gerstenfeld misrepresented the state of a foreclosure to her. Misrepresentations of a

> material fact made intentionally to deceive or recklessly without knowledge and acted on by the opposite party or if made by mistake and innocently and acted on by the opposite party constitutes legal fraud.
>
> In this case, the plaintiff contends that the misrepresentations were made intentionally, recklessly or by mistake. A false statement may be spoken or written. Plaintiff Allison Harbin says that the false statements are:
>
> One, Daniel Gerstenfeld's oral statement made on May 29th, 2015 that it, quote, it looks like here it has been suspended temporarily, end quote, when referring to the foreclosure sale; and
>
> Second, an email from Daniel Gerstenfeld on May 29th, 2015, when he wrote, quote, the foreclose, foreclosure has been suspended temporarily, end quote.
>
> And as I stated in the beginning, when I say Daniel Gerstenfeld, I'm not going to repeat it every time I say his name, I'm referring to RoundPoint.

Then, in describing the elements of intentional, reckless, or mistaken false statements, the district court centered the inquiry solely on Gerstenfeld's state of mind. To prevail, according to the court, Harbin was required to prove, among other things, that (a) "Gerstenfeld knew that the statement was false when he made it";

(b) "[Gerstenfeld] made the statement recklessly without knowing whether it was true when he made it"; or (c) "Gerstenfeld's statement was made by mistake or innocently." Likewise, in describing punitive damages, the court charged the jury that Harbin must prove that "Gerstenfeld consciously or deliberately acted toward Ms. Harbin with fraud or malice." Tracking these instructions, the verdict form asked the jury to find whether "Daniel Gerstenfeld" intentionally, recklessly, or mistakenly made a false representation, though it advised at the outset that any reference to Gerstenfeld should be interpreted as "referring to Defendant RoundPoint."

In a post-verdict motion for new trial, Harbin raised the same issue, contending that the court misled jurors by asking them to base their decision solely on Gerstenfeld's state of mind, when it was RoundPoint's knowledge that mattered. The court denied the motion, reasoning that "[t]he only misrepresentations at issue in the case were made by Gerstenfeld. The only relevant intent was Gerstenfeld's in making the statements at issue." The court also noted that it had made clear that "for all intents and purposes, Gerstenfeld and RoundPoint were interchangeable."

B.

We apply the same deferential standard of review to jury instructions and verdict forms. *McNely v. Ocala Star-Banner Corp.*, 99 F.3d 1068, 1072 (11th Cir. 1996). "So long as the jury instructions and verdict form accurately reflect the law"—which we review *de novo*—"the trial judge is given wide discretion as to the style and wording employed." *Id.* (quotation marks omitted). "Our practice

is not to nitpick the instructions for minor defects." *Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233, 1283 (11th Cir. 2008). Nevertheless, we will reverse "where we are left with a substantial and ineradicable doubt as to whether the jury was properly guided in its deliberations." *Id.* (quotation marks omitted).

C.

In Alabama, "[t]he elements of fraud are (1) a false representation (2) of a material existing fact (3) reasonably relied upon by the plaintiff (4) who suffered damage as a proximate consequence of the misrepresentation." *Exxon Mobil Corp. v. Ala. Dep't of Conservation & Nat. Res.*, 986 So. 2d 1093, 1114 (Ala. 2007) (quotation marks omitted). Ordinarily "intent is not an element" of a simple fraud claim, but a finding of intent is necessary to award punitive damages. *Id.*; *see* Ala. Code §§ 6-5-101, 6-11-20.

"[M]isrepresentations of material facts made by an agent, which are made within the scope of the agent's authority, are imputable to the principal." *Leisure Am. Resorts, Inc. v. Knutilla*, 547 So. 2d 424, 426 (Ala. 1989). But an agent's individual "lack of intent does not of itself end the inquiry with respect to the corporation's requisite intent to defraud." *Id.* In other words, a corporation can still be liable for intentional fraud even though "the agent through whom it acted was without knowledge of the true facts. The issue . . . is whether the corporation had knowledge of the true facts." *Birmingham News Co. v. Horn*, 901 So. 2d 27, 60–61 (Ala. 2004) (quoting *Shelter Modular Corp. v. Cardinal Enters., Inc.*, 347 So.2d 1334, 1338 (Ala. 1977)). The "analysis focuses on the conduct,

particularly the intent, of [the] corporate entity, as made known through the conduct of its agent[,] and not the intent of individual agents themselves who are not defendants." *Knutilla*, 901 So. 2d at 60. In short, "it is [corporation's] intent to deceive that is at issue—not the intent of the company representative who made the statement." *Aldridge v. DaimlerChrysler Corp.*, 809 So. 2d 785, 797 (Ala. 2001).

In *Bolton Ford of Mobile, Inc. v. Little*, for example, the plaintiff bought a car in reliance on the salesman's representation that it had never been in a wreck, which turned out to be false. 344 So. 2d 1208, 1209–10 (Ala. 1977). While the salesman "did not know that the car had been wrecked," the Alabama Supreme Court upheld an award of punitive damages based on intentional fraud. *See id.* It explained that "[t]he evidence shows that several other agents of Bolton knew that the demonstrator had been in a wreck, and Bolton cannot escape liability merely because its salesman was not informed of the true facts." *Id.* at 1210.

Similarly, in *AT&T Information Systems, Inc. v. Cobb Pontiac-Cadillac, Inc.*, a company bought a new phone system in reliance on an AT&T agent's representation that the company was eligible for a substantial discount. 553 So. 2d 529, 532–33 (Ala. 1989). While there was no evidence that the agent intended to deceive the plaintiff company when he made that representation, the court upheld a finding of intent to deceive against AT&T because "AT&T (through its agent) represented that [the plaintiff] would receive

the discount when [AT&T] knew that [the plaintiff was] not eligible for discounts." *See id.* at 533–34.

D.

Here, the district court's instructions and verdict form did not accurately reflect Alabama law. Harbin's fraud claim is against RoundPoint, not Gerstenfeld. And her theory is that, while Gerstenfeld may have acted innocently, RoundPoint still could be found liable for intentional fraud because RoundPoint (through its agent) represented that the upcoming foreclosure sale had been suspended or postponed when it knew that was untrue.

Under Alabama law, whether RoundPoint had an intent to defraud cannot be answered solely by reference to its agent's intent. *See Knutilla*, 547 So. 2d at 426 (stating that an agent's "lack of intent does not of itself end the inquiry with respect to the corporation's requisite intent to defraud"). That's because "it is [RoundPoint's] intent to deceive that is at issue—not the intent of the company representative who made the statement." *Aldridge*, 809 So. 2d at 797. Thus, the jury should have considered "whether the corporation had knowledge of the true facts," *Horn*, 901 So. 2d at 60–61, even if its agent, Gerstenfeld, did not. But by asking the jury to find whether Gerstenfeld intentionally, recklessly, or mistakenly made a false representation, the court gave the erroneous impression that Gerstenfeld's intent was all that mattered.

We are not convinced that the district court cured the problem by clarifying that any reference to Gerstenfeld should be

interpreted as referring to RoundPoint. That clarification simply reflects that Gerstenfeld was acting as RoundPoint's agent, such that his conduct could be attributed to RoundPoint. The problem remains, though, that the jury was directed to consider and make findings about Gerstenfeld's intent alone. Indeed, a key component of RoundPoint's closing argument to the jury was "[Gerstenfeld's] state of mind when he was speaking with [Harbin]," and the court overruled Harbin's objection that the issue was actually RoundPoint's broader knowledge.

Nor are we persuaded by RoundPoint's arguments in response. RoundPoint claims that the caselaw we have described does not apply because this case involves "a single employee that a jury found mistakenly or innocently made a false statement," so there was no reason for the jury to "consider[] RoundPoint's corporation knowledge about the present state of the foreclosure sale."

But that was also true in *Cobb Pontiac-Cadillac*, which RoundPoint cites, where the jury exonerated AT&T's agent for making the sole false representation on which the plaintiff's claim was based. *See* 553 So. 2d at 530–31, 534. And there was no evidence of a broader deception by the corporate entity, as there was in *Bolton Ford*. *See Bolton Ford*, 344 So. 2d at 1209–10. Nevertheless, the Alabama Supreme Court upheld the jury's finding that AT&T intended to deceive the plaintiff, not on the basis of vicarious liability, but because "AT&T (through its agent) represented that [the plaintiff] would receive the discount when it knew that

[the plaintiff was] not eligible for discounts." *Cobb Pontiac-Cadillac*, 553 So. 2d at 534 ("That is not to say that AT&T is vicariously liable."). Accordingly, despite RoundPoint's reliance on general principles of agency law, we see no grounds to deviate from the ordinary rules established in caselaw specific to claims against a corporation where intent to deceive is an element.[1]

Because the district court's instructions gave the jury a misleading impression of the law and the issues to be resolved, we are left with a "substantial and ineradicable doubt as to whether the jury was properly guided in its deliberations." *Morgan*, 551 F.3d at 1283. We therefore vacate the judgment and remand for a new trial. Harbin's other arguments are moot as a result.

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[1] For example, RoundPoint cites *Gowens v. Tys. S. ex rel. Davis*, 948 So. 2d 513, 526 (Ala. 2006), for the proposition that "the imputation of the principal's knowledge to the agent is contrary to the general principles of agency." But that case was about whether individual state employees were entitled to state-agent immunity for claims against them, which turned on whether the employees acted in bad faith or in disregard of clear rules. *See id.* Where the agent's intent or conduct is all that matters, as in *Gowens*, it makes sense not to impute a principal's knowledge to the agent. But as *Gowens* itself noted, "[a]s *against a principal*, both principal and agent are deemed to have notice of whatever either has notice of." *Id.* (quoting Ala. Code § 8-2-8) (emphasis in original). Because Harbin's claim was against the principal, RoundPoint, and not its agent, RoundPoint's reliance on *Gowens* is misplaced.

II. ROUNDPOINT'S CROSS-APPEAL

For its part, RoundPoint makes several arguments seeking judgment as a matter of law, which we consider in turn.[2] First, RoundPoint argues that there was no evidence of a false representation, stressing that Gerstenfeld's statement that the foreclosure sale was "suspended" was literally true because, at the time he made that statement, Harbin's account was in a temporary forbearance that ended on May 31, 2015. We rejected that argument in the first appeal, though, and our decision is law of the case here. *See Culpepper v. Irwin Mortg. Corp.*, 491 F.3d 1260, 1271 (11th Cir. 2007) ("The law-of-the-case doctrine holds that subsequent courts will be bound by the findings of fact and conclusions of law made by the court of appeals in a prior appeal of the same case." (quotation marks omitted)). Notably, RoundPoint does not contend that the trial produced substantially different evidence from what we considered at summary judgment. *See id.*

And as we previously explained, a reasonable jury could conclude from the context of Harbin's communications with Gerstenfeld, which were entirely about postponing the upcoming sale, that "Gerstenfeld was referring to the June 3 sale date and not to the forbearance agreement" when he made the statements at issue.

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[2] We do not address its argument that, because the jury found that Gerstenfeld acted innocently or by mistake, RoundPoint did not deviate from its duties as mortgage servicer and so is not liable in tort. In light of our resolution of Harbin's appeal, that issue on appeal is moot.

Harbin, 758 F. App'x at 757–58. In other words, the falsity of the statement comes from what a reasonable jury could conclude Gerstenfeld in fact said, not simply what Harbin understood Gerstenfeld to mean. For that reason, this case is not like *Nobility Homes, Inc. v. Ballentine*, 386 So. 2d 727, 730 (Ala. 1980), where the Alabama Supreme Court held that no fraud can result from a statement that is misleading but "literally true." Here, sufficient evidence supported the jury's finding that Gerstenfeld's statement was not just misleading but actually false.

Second, RoundPoint maintains that Harbin failed to establish reasonable reliance. In RoundPoint's view, Harbin failed to take reasonable steps to discern the truthfulness of what Gerstenfeld said, and she should have known that the upcoming sale remained unchanged. Again, though, we rejected this same argument in the prior appeal, and that decision is law of the case. Specifically, we found that, despite Gerstenfeld's use of "suspend" rather than "postpone," a reasonable jury could find reasonable reliance given that Harbin repeatedly requested confirmation that her understanding was correct and did not receive any contrary information which would have led her to the true facts. *Harbin*, 758 F. App'x at 758. This was a factual question for the jury. *See Farmers Ins. Exch. v. Morris*, 228 So. 3d 971, 986 (Ala. 2016) (whether a plaintiff "could have reasonably relied upon the repeated oral representations made to him in direct response to his repeated inquiries . . . was a factual question for the jury").

Third, RoundPoint contends that contributory negligence bars Harbin's claim. Even assuming contributory negligence could apply to a fraud claim, however—we express and imply no opinion about that issue—it would not entitle RoundPoint to judgment as a matter of law on the facts of this case, as RoundPoint claims. At best, contributory negligence would be an issue for the jury to resolve. Notably, part of RoundPoint's argument on this point is intertwined with whether Harbin reasonably relied on Gerstenfeld's statement, which presented a genuine issue of material fact and which the jury resolved in Harbin's favor.

Finally, based on our disposition of RoundPoint's arguments, we see no reason to certify any questions to the Alabama Supreme Court at this time.

III. CONCLUSION

In sum, and for the foregoing reasons, we vacate the judgment on the verdict and remand for further proceedings consistent with this opinion.

VACATED AND REMANDED.