

NOT FOR PUBLICATION

In the
United States Court of Appeals
For the Eleventh Circuit

No. 24-13693
Non-Argument Calendar

BANCOR GROUP INC,
STITCHING PARTICULIER FONDS FRANEKER,
derivatively on behalf of Eastern National Bank, N.A.,
Plaintiffs-Appellees,

versus

GABINA RODRIGUEZ,
CARLOS RODRIGUEZ,
Defendants-Appellants,

LOUIS FERREIRA, et al.,
Defendants.

Appeals from the United States District Court
for the Southern District of Florida
D.C. Docket No. 1:22-cv-20201-DPG

Before ROSENBAUM, GRANT, and LUCK, Circuit Judges.

PER CURIAM:

Bancor Group Inc. and Stitching Particulier Fonds Franeker filed a shareholder derivative lawsuit as minority shareholders of Eastern National Bank, N.A., against two former bank directors—Gabina and Carlos Rodriguez—for breach of their fiduciary duties of care and loyalty. After a jury found for the minority shareholders, the district court entered judgment against the directors. The directors appeal a number of the district court’s pretrial, trial, and posttrial rulings. After careful review, we affirm.

FACTUAL BACKGROUND

In 2016, Eastern National Bank began doing business with Banco de Venezuela, Venezuela’s largest state-owned financial institution. Against the advice of its chief compliance officer, the bank’s board approved opening an account for Banco. Two of the bank’s directors, Carlos and Gabina Rodriguez, also approved disabling the bank’s account monitoring system to avoid alerting the bank of money laundering risks from politically-exposed persons associated with the Venezuelan account.

2017 Office Examination

In 2017, the Department of the Treasury’s Office of the Comptroller of the Currency, a supervisory and regulatory authority for the bank, conducted an examination of the bank’s anti-money laundering programs. The Office found the bank’s board management and supervision deficient because the bank could not

24-13693

Opinion of the Court

3

properly monitor transactions made through the Venezuelan account. Because it could not monitor the transactions, the bank closed the Venezuelan account, but it continued to process pending transactions.

2018 Consent Order

In 2018, the Office issued a consent order against the bank because the bank had opened and operated the Venezuelan account without a proper monitoring program in place. The consent order required the bank to review the Venezuelan transactions, overhaul its existing anti-money laundering program, ensure proper internal controls, strengthen board oversight, and develop a capital planning program that avoided payment of dividends without regulatory approval.

The bank did not comply with the consent order. Instead, at Gabina's behest, the board fired the chief compliance officer who warned against opening the Venezuelan account.

2020 Consent Order

When the bank did not comply with the first consent order, the Office issued a second consent order, finding that the bank was still in violation of anti-money laundering controls; engaged in "numerous unsafe or unsound practices"; and lacked effective governance, including board oversight and capital planning. The Office concluded that these problems were "exacerbated by a dominant chairman," namely, Gabina. To help fix the bank's financial situation, the Office ordered it to reduce director compensation.

The bank's finances continued to deteriorate, however, and the bank lost money in 2018, 2019, 2020, and 2021.

PROCEDURAL HISTORY

After the bank failed to comply with the consent orders, two minority shareholders, Bancor and Franeker, brought a shareholder derivative lawsuit on the bank's behalf alleging that the directors breached their fiduciary duties of care and loyalty. The minority shareholders alleged that Gabina acted as an "agent of the Venezuelan [g]overnment" to control the board, funnel Venezuelan funds into the bank, and help the Venezuelan government evade executive orders sanctioning it, while Carlos "[a]llow[ed]" the control to happen "to the [bank's] detriment."

We'll focus on the parts of the proceedings relevant to this appeal.

Privilege Motion

In discovery, the directors produced thirty-one documents related to the Office's examination. The examination documents contained the Office's opinion that Gabina prioritized the Venezuelan government's interests over the bank's as well its findings on the bank's overall management deficiencies. After discovery ended, the directors tried to claw back the documents, claiming that they were privileged.

The minority shareholders moved to adjudicate the privilege dispute, seeking an order "allowing [them] to use [the examination documents]." In response, the Office intervened to exclude

24-13693

Opinion of the Court

5

the examination documents, asserting that they were protected by the “bank examination privilege.” The minority shareholders replied that the district court should overrule the privilege for “good cause.”

After reviewing the documents in camera, the district court overruled the Office’s privilege claim. Although it acknowledged that neither we nor the Supreme Court had ever recognized the privilege, the district court noted that neither the minority shareholders nor the Office “dispute[d]” that the privilege existed and “appear[ed] to agree” that a five-factor framework controlled the inquiry.

Applying the framework, the district court found that four factors strongly supported disclosure and only one weakly weighed against it. First, the district court found that the evidence contained in the documents was relevant since it “show[ed] how and why the [b]ank’s regulator was dissatisfied with the [b]ank’s leadership’s inability to achieve regulatory compliance.” Second, the district court ruled that other evidence was not available because the examination documents, as compared to its “raw data” in the form of “[bank] books and records,” uniquely “put the [b]ank’s leadership on notice” of their performance deficiencies.

As to the third and fourth factors, “[r]egarding the seriousness of the litigation and the role of government in the litigation,” the district court explained that the “allegation that the leadership of an American bank conspired with a foreign government to retain access to the American banking system despite an executive

order to the contrary . . . call[ed] for some sunlight into the way our federal government regulates our national banks.” Finally, the district court found the risk of “chilling the speech of future government regulators . . . to be considerably low,” and that this was “one such case” in which the “the other factors discussed above outweigh[ed] the public interest in candor between banking regulators and banks.”

Motion in Limine

The directors also filed a motion in limine to exclude the examination documents under Federal Rule of Evidence 403 because their “probative value . . . [wa]s substantially outweighed by the likelihood of unfair prejudice.” The district court denied the motion because the documents were important to the “central issues” of the case, and the “solution [wa]s not to exclude [them, but] rather . . . to admit the evidence that directly contradicts [them].” And, the district court added, “if any undue prejudice c[ould] be imagined from the jury’s consideration of [the documents], a limiting instruction c[ould] be requested.”

At trial, the district court gave the jury a limiting instruction. It told the jury that a “violation of the regulations of a governmental agency does not, in and of itself, make a director or officer liable for any losses sustained by the corporation,” and that although that “conduct . . . may be considered, [the jury’s] decision . . . must be based on all facts and the entire circumstances in the case.”

24-13693

Opinion of the Court

7

Business Judgment Rule Instruction

The district court also instructed the jury on the business judgment rule, which protects directors from liability when making good faith business decisions. In its business judgment rule instruction, the district court instructed the jury on the corporate waste doctrine, which governs whether director compensation is so excessive as to constitute a breach of fiduciary duty.

The district court's instructions did not include the directors' proposed instruction that the minority shareholders must meet their burden to prove corporate waste "by the greater weight of the evidence." The district court did, however, provide the jury a separate instruction as to the plaintiffs' preponderance-of-the-evidence burden of proof on "any essential part of a claim or contention."

Motion to Dismiss

The directors also moved to dismiss the complaint for lack of constitutional standing under Article III and prudential standing under Federal Rule of Civil Procedure 23.1. They argued that because the minority shareholders' principal failed to disclose an interest in the bank's shares in a personal bankruptcy filed two decades earlier, the shares never should have been transferred to the minority shareholders, and they should be judicially estopped from "[c]laiming [o]wnership" of them. For that reason, the directors argued, the minority shareholders had no interest in the bank, and therefore they had no standing to bring the lawsuit.

The minority shareholders responded that the directors had “long-since” waived their judicial estoppel argument by “fail[ing] to plead judicial estoppel in [their] answer.” Also, they added, the principal “*expressly* disclosed his interest [in] . . . the entity that held the [bank] shares” to the bankruptcy court and so there was no inconsistent position to judicially estop the minority shareholders, who were not parties to the bankruptcy, from asserting ownership in the existing lawsuit. The directors did not dispute that they did not plead estoppel in their answer.

The district court denied the dismissal motion. First, the district court concluded that the directors waived their judicial estoppel argument because they “failed to include any affirmative defense of [judicial] estoppel” in their answer, and their counsel was “aware of [the principal’s] bankruptcy since he entered an appearance in the case.” Nor could they say that meant the plaintiffs were not actually shareholders and had no standing, since they had “admitted in their answer that [p]laintiffs *are* shareholders.”

Second, the district court determined that, even if the [directors had not waived their judicial estoppel argument, they failed to demonstrate that judicial estoppel applied “as a matter of law.” The parties agreed that Florida’s four-element test for judicial estoppel controlled, which the district court then applied. The district court ruled that three of the four factors could not be satisfied “on [the existing] record,” and so the argument failed “under Florida law.”

Specifically, the district court found that there were no “inconsistent or clearly conflicting” positions taken by the principal “between the bankruptcy case and this lawsuit” and “neither [the minority shareholders nor the directors] were parties to [the principal’s] bankruptcy proceeding.” And, the district court ruled, there could be “little doubt” that the fourth factor could not be satisfied “unless some exception” to the mutuality requirement applied since neither of the parties in the lawsuit were the same as those in the bankruptcy. Nor could the “special fairness and policy considerations” exception as to the fourth factor apply since there was “substantial evidence in the record” that the principal never concealed his “indirect interest in the [b]ank” during the bankruptcy because he “expressly disclosed” his interest in the entity which held the bank shares, and since the conduct in this case “occurred many years” after the purported concealment.

Prejudgment Interest Award

The case went to trial, and the jury reached a verdict for the minority shareholders, finding that both Carlos and Gabina breached their duty of care and Gabina breached her duty of loyalty. The jury awarded the minority shareholders \$800,000 in damages. The district court then entered judgment for the minority shareholders, adding that prejudgment interest was “to be calculated from October 25, 2018,” the date of the first consent order.

The directors moved for a new trial, partly on the basis that the district court erred in calculating the prejudgment interest award because the consent order “ha[d] no bearing” on the loss and

no “fixed date of loss” was ever “establish[ed].” The minority shareholders responded that the loss occurred “at a specific time” and was “related to addressing” issues raised in the consent orders. The district court denied the motion and entered judgment for the minority shareholders.

STANDARD OF REVIEW

Four standards of review govern this appeal. First, we review a district court’s evidentiary rulings for abuse of discretion, including its ruling on a claim of evidentiary privilege. *See United States v. Singleton*, 260 F.3d 1295, 1301 (11th Cir. 2001).

Second, “[w]e review jury instructions de novo to determine whether they misstate the law or mislead the jury to the prejudice of the objecting party, . . . but the district court is given wide discretion as to the style and wording employed in the instructions.” *Goldsmith v. Bagby Elevator Co.*, 513 F.3d 1261, 1276 (11th Cir. 2008) (citation modified). Third, we review a district court’s application of judicial estoppel for abuse of discretion and its factual findings for clear error. *Robinson v. Tyson Foods, Inc.*, 595 F.3d 1269, 1273 (11th Cir. 2010). And fourth, we review de novo “the calculation of prejudgment interest, when that calculation depends on the construction of state law.” *SEB S.A. v. Sunbeam Corp.*, 476 F.3d 1317, 1319 (11th Cir. 2007).

DISCUSSION

Our discussion proceeds in five steps. First, we’ll review the application of the bank examination privilege to the examination

documents. Second, we'll examine the denial of the motion in limine. Third, we'll consider the business judgment rule instruction. Fourth, we'll look at the denial of the motion to dismiss. And finally, we'll turn to the prejudgment interest award.

Privilege Motion

First, the directors argue that the district court erred by admitting the examination documents because it “failed to properly weigh” the five-factor framework applicable to the bank examination privilege. Not so.

Some of our sister circuits have recognized a “bank examination privilege” that protects certain communications between bank examiners and the banks they regulate. *See In re Subpoena*, 967 F.2d 630, 633–34 (D.C. Cir. 1992) (explaining that the bank examination privilege promotes honesty in and the integrity of the regulatory process); *see also In re Bankers Tr. Co.*, 61 F.3d 465, 471 (6th Cir. 1995). The privilege protects opinions and deliberative processes, while “[p]urely factual” material falls outside the privilege. *In re Bankers*, 61 F.3d at 471. Below and here, the parties assume that, like our sister circuits, we would apply the privilege to the examination documents. For purposes of this appeal, so will we.

But even in circuits that have recognized the privilege, it is not absolute. The bank examination privilege “may be overridden” upon a showing of “good cause.” *Id.* To determine whether good cause exists, our sister circuits apply a non-exhaustive five-factor framework:

(i) the relevance of the evidence sought to be protected; (ii) the availability of other evidence; (iii) the “seriousness” of the litigation and the issues involved; (iv) the role of the government in the litigation; and (v) the possibility of future timidity by government employees who will be forced to recognize that their secrets are violable.

In re Subpoena, 967 F.2d at 634 (citation modified); *see also In re Bankers*, 61 F.3d at 472 (“While this list does not purport to be an exhaustive list of factors a court might consider, it is at least a floor upon which to balance sufficiently the competing interests of the parties and the federal agency.”).

The district court did not abuse its discretion in concluding that there was good cause to override the privilege under the five-factor framework. First, the district court found that the examination documents were relevant since they “show[ed] how and why the [b]ank’s regulator was dissatisfied with the [b]ank’s leadership’s inability to achieve regulatory compliance.” The directors contend that the district court “fail[ed] to consider that the communications . . . were intended to improve the management and leadership of the [b]ank, rather than to highlight deficiencies.” But whatever the Office’s subjective intentions were in communicating with the bank, the examination documents showed that the Office identified compliance failures, the directors knew about the failures, and they still ignored them. Those facts were clearly relevant to the breach-of-fiduciary duty claims against the directors.

Second, the district court ruled that other evidence was not available because the examination documents uniquely “put the [b]ank’s leadership on notice” of their performance deficiencies. The directors respond that the district court “selectively highlighted unfavorable information” and “overlook[ed]” the possibility that the bank’s records could inform on its “economic condition.” But they never tell us what records the district court overlooked. And, reviewing the district court’s order, we don’t see any that it did overlook.

As to the third and fourth factors, “[r]egarding the seriousness of the litigation and the role of government in the litigation,” the district court ruled that the “allegation that the leadership of an American bank conspired with a foreign government to retain access to the American banking system despite an executive order to the contrary . . . call[ed] for some sunlight into the way our federal government regulates our national banks.” According to the directors, that ruling ignored the bank’s “decisive action” in closing the Venezuelan account. But the bank’s action was not as decisive as it lets on. Even after the Venezuelan account was closed, the bank continued to process backlogged transactions.

Finally, the district court found the risk of “chilling the speech of future government regulators . . . to be considerably low” and that this was “one such case” in which the “the other factors discussed above outweigh the public interest in candor between banking regulators and banks.” The directors complain that the district court’s decision “set[s] a harmful precedent” that

“could” discourage candor and open communication. Beyond their speculation, though, the directors fail to challenge the fact that the district court was engaging in the exact kind of “balanc[ing] . . . [of] the competing interests of the parties and the federal agency” as the privilege requires. See *In re Bankers*, 61 F.3d at 472. We see no abuse of discretion in the district court’s good cause finding to override the privilege. See *Singleton*, 260 F.3d at 1301.

Motion in Limine

Second, the directors assert that the admitted examination documents “unfairly prejudiced” the jury against them. Federal Rule of Evidence 402 requires the admission of relevant evidence unless an exclusion applies. Fed. R. Evid. 402. Evidence is relevant if it has “any tendency” to make a fact that is “of consequence in determining the action . . . more or less probable than it would be without the evidence.” *Id.* R. 401. Under Federal Rule of Evidence 403, relevant evidence may be excluded if its “probative value is substantially outweighed” by the danger of “unfair prejudice.” *Id.* R. 403. Evidence should be excluded under rule 403 “very sparingly.” *Wilson v. Attaway*, 757 F.2d 1227, 1242 (11th Cir. 1985) (citation modified). Thus, in “reviewing issues under [r]ule 403, we look at the evidence in a light most favorable to its admission, maximizing its probative value and minimizing its prejudicial impact.” *United States v. Brown*, 441 F.3d 1330, 1362 (11th Cir. 2006).

We agree with the district court that the risk of undue prejudice did not substantially outweigh the probative value of admit-

ting the examination documents. *See* Fed. R. Evid. 403. The district court admitted the documents because they provided evidence that the directors had notice or knowledge in advance of the likelihood they were breaching their fiduciary duties—and did nothing. Given how highly probative the documents were of the “central issues” of the case, the district court did not err in ruling that the risk of “undue prejudice” did not “substantially outweigh[]” their probative value. *See id.*

Even so, the directors dispute the admission of the documents, arguing that they “distorted the evidentiary balance” and were “improperly presented as indicative of regulatory breach.” But any sting of prejudice was neutralized by the limiting instruction that violations of governmental-agency regulations were not dispositive for liability and the jury had to make its decision based on “all facts and the entire circumstances in the case,” which we presume the jury followed. *See United States v. Hill*, 643 F.3d 807, 829 (11th Cir. 2011).

Business Judgment Rule Instruction

Third, the directors contest the exclusion of their proposed jury instruction on the burden of proof for corporate waste. “We examine [a] challenged [jury] instruction[] as part of the entire charge, in view of the allegations of the complaint, the evidence presented, and the arguments of counsel, to determine whether the jury was misled and whether the jury understood the issues.” *Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233, 1283 (11th Cir. 2008) (citation modified). If the instructions, “taken together, properly

express the law applicable to the case, there is no error.” *Somer v. Johnson*, 704 F.2d 1473, 1477–78 (11th Cir. 1983) (citation modified). We reverse only if “left with a substantial and ineradicable doubt as to whether the jury was properly guided in its deliberations.” *Id.* at 1478 (citation modified).

The directors argue that the district court’s business judgment rule instruction was deficient because it did not mention the burden of proof for corporate waste. But “[t]he district court’s refusal to give [a] requested instruction[] is not error if the substance of the proposed instruction was covered by another instruction, which was given.” *Goulah v. Ford Motor Co.*, 118 F.3d 1478, 1485 (11th Cir.1997).

Here, the district court specifically informed the jury in a separate instruction that the plaintiffs must prove “any essential part of a claim or contention” by a preponderance of the evidence. Because the district court informed the jury as to the plaintiffs’ burden of proof, it did not “misstate the law or mislead the jury,” much less “prejudice [] the [directors].” *See Goldsmith*, 513 F.3d at 1276. There was no error in declining to repeat the burden of proof in its later instruction on the business judgment rule. *See id.*

Motion to Dismiss

Fourth, the directors contend that the district court erred in denying their motion to dismiss because the minority shareholders were estopped from asserting ownership over the shares and therefore had no constitutional or prudential standing to pursue deriva-

24-13693

Opinion of the Court

17

tive claims. The directors insist that the “historical context” surrounding the shareholder’s bankruptcy meant that the shares would have “likely [been] sold [] for the benefit of creditors” instead of transferred to the plaintiffs.

But the directors waived their judicial estoppel argument because they admitted the plaintiffs had standing in their answer, and they failed to plead judicial estoppel as an affirmative defense. And even if they didn’t waive their estoppel argument, it failed under Florida law.

In Florida, judicial estopped requires:

[1] A claim or position successfully maintained in a former action or judicial proceeding [2] [that] bars a party from making a completely inconsistent claim or taking a clearly conflicting position in a subsequent action or judicial proceeding, [3] to the prejudice of the adverse party, [4] where the parties are the same in both actions, subject to the “special fairness and policy considerations” exception to the mutuality of parties requirement.

Salazar-Abreu v. Walt Disney Parks & Resorts U.S., Inc., 277 So. 3d 629, 631 (Fla. Dist. Ct. App. 2018) (citation modified). Here, as the district court found, there were no “inconsistent or clearly conflicting” positions taken by the shareholder “between the bankruptcy case and this lawsuit.” And the parties in this derivative shareholder lawsuit were not the same as those in the bankruptcy proceeding. Either because of waiver or because the judicial estoppel

argument failed as a matter of Florida law, the district court did not err in denying the directors' motion to dismiss.

Prejudgment Interest Award

Last, the directors maintain that the district court erred by miscalculating the prejudgment interest award from the date of the consent order instead of the date the action was filed. We are unconvinced.

"[I]t has long been the law in Florida that in contract actions, and in certain tort cases, once the amount of damages is determined, prejudgment interest is allowed from the date of the loss or the accrual of cause of action." *Bosem v. Musa Holdings, Inc.*, 46 So. 3d 42, 46 (Fla. 2010) (citation modified). Although personal injury claims "are generally excepted from the rule allowing prejudgment interest, primarily because tort damages are generally too speculative," *Lumbermens Mut. Cas. Co. v. Percefull*, 653 So. 2d 389, 390 (Fla. 1995), prejudgment interest is available in tort cases when (1) "the loss is wholly pecuniary," and (2) it "may be fixed as of a definite time" prior to the entry of judgment. *Bosem*, 46 So. 3d at 46 (citation modified).

Both conditions were met here. The jury determined the amount of damages to be \$800,000, so there was a "wholly pecuniary" loss. *See id.* And the complaint upon which the jury based their verdict alleged that those losses stemmed from the directors' breaches of their fiduciary duties of loyalty and care because they never ensured the bank complied with the 2018 consent order. So,

the loss was “fixed as of a definite time” prior to the entry of judgment—from the date of the 2018 consent order. *See id.*

The directors respond that where the loss date is disputed, courts “often” look to the date the action was filed in Florida, and the district court should follow suit. It’s true that Florida courts have sometimes used the date the action is filed as a proxy for the date of loss in contract cases where the date of breach is in dispute, since under contract law, prejudgment interest is due when performance is due, and the filing date can constitute a demand for payment. *See, e.g., Berloni S.p.A. v. Della Casa, LLC*, 972 So. 2d 1007, 1012 (Fla. Dist. Ct. App. 2008). But here, in this tort action for breach of fiduciary duty, the district court correctly calculated prejudgment interest from the time the loss was fixed, so it did not err by awarding prejudgment interest “from the date of the loss.” *See Bosem*, 46 So. 3d at 46.¹

¹ *See also Underhill Fancy Veal, Inc. v. Padot*, 677 So. 2d 1378, 1379–80 (Fla. Dist. Ct. App. 1996) (holding that the trial court did not err in awarding prejudgment interest “from the date [the defendant] left the employ of the [plaintiffs]” that he breached his fiduciary duty with); *Greenberg v. Grossman*, 683 So. 2d 156, 157–58 (Fla. Dist. Ct. App. 1996) (reversing refusal to award prejudgment interest where there were “damages that [we]re determinable as of a date certain from the record” after the trial judge heard testimony from an accountant “as to the date that each payment was made” in a civil theft action); *Barnett Bank of Marion Cnty., N.A. v. Shirey*, 655 So. 2d 1156, 1159 (Fla. Dist. Ct. App. 1995) (reversing denial of prejudgment interest on a breach-of-fiduciary-duty award “from the date of the sale of the real property” that the defendant had breached his fiduciary duty in handling); *Camper & Nicholsons Int’l, Ltd. v. Manios*, 758 So. 2d 716, 718 (Fla. Dist. Ct. App. 2000) (entitling the plaintiff to prejudgment

20

Opinion of the Court

24-13693

AFFIRMED.

interest on the jury's damages award, to run from the date of the closing for the sale of property that the defendant tortiously interfered with).