Opinion filed May 29, 2020

In The

Eleventh Court of Appeals

No. 11-17-00307-CV

A.E. NELSON JR. D/B/A NELSON FARM & RANCH PROPERTIES, Appellant/Cross-Appellee

V.

MCCALL MOTORS, INC., Appellee/Cross-Appellant

On Appeal from the 350th District Court
Taylor County, Texas
Trial Court Cause No. 10811-D

O P I N I O N

This appeal arises from Bryan Parmelly's sale of approximately 225 acres of land in Taylor County to McCall Motors, Inc. McCall Motors learned after the sale that the land was subject to a surface lease for the strip-mining of rock. McCall Motors sued Parmelly; A.E. Nelson Jr., the realtor who represented Parmelly; First Texas Title Company, LLC, which was the closing agent for the sale; and Bradshaw,

McCall & Westbrook, PLLC, the law firm that prepared some of the closing documents.

As relevant here, McCall Motors alleged that Nelson committed common law and statutory fraud based on the representation in the sales contract that there would be no surface leases on the land at the time of closing. Eleven members of the jury found that Nelson committed both common law and statutory fraud and that Nelson was 70% responsible for McCall Motors' damages. On each claim, the jury awarded McCall Motors $16,000 for out-of-pocket damages and $30,000 for lost profits.

The trial court granted McCall Motors' motion to disregard the jury's findings as to lost profits and found that McCall Motors had conclusively established lost profits of $161,660 and total damages of $177,660. The trial court determined that Nelson was entitled to a settlement credit of $47,000 based on McCall Motors' settlement with Parmelly. In its final judgment, the trial court awarded McCall Motors $130,660 for actual damages, apportioned 70% of the damages to Nelson, and found that Nelson was jointly and severally liable for all the damages.[1] The trial court also ordered that McCall Motors recover from Nelson $177,500 for attorney's fees as well as conditional attorney's fees on appeal.

In his first three issues, Nelson contends that he is entitled to a take-nothing judgment because McCall Motors failed to prove either a material misrepresentation or reliance, which are elements of both common law and statutory fraud; because there is no evidence to support the damages awarded by the jury and McCall Motors did not conclusively prove the damages that were awarded by the trial court for lost profits; and because the settlement credit exceeded the damages awarded by the jury. In his fourth issue, Nelson argues that, because he is entitled to a take-nothing

[1]The trial court entered a take-nothing judgment as to the law firm and rendered judgment against the title company in the amount of $39,198. This opinion does not impact those portions of the trial court's judgment.

judgment, he is the prevailing party and is entitled to recover attorney's fees under the contract between Parmelly and McCall Motors. In the alternative, Nelson asserts in his fifth issue that this case should be remanded for a new trial due to error in the charge and because the evidence is factually insufficient to support the jury's findings. In one cross-issue, McCall Motors contends that the trial court erred when it awarded a settlement credit to Nelson.

We hold that, as a matter of law, McCall Motors failed to establish that it justifiably relied on any misrepresentation by Nelson. Therefore, we reverse the trial court's judgment as to Nelson and render judgment that McCall Motors take nothing against Nelson on its fraud claims or on its claim for attorney's fees. We remand Nelson's request for attorney's fees to the trial court for further proceedings.

Background Facts

The land at issue is a portion of approximately 700 acres originally owned by Parmelly. The 700 acres are naturally divided by a steep bluff into an "upper" and "lower" part. In 1999, Parmelly signed a surface lease with Vulcan Construction Materials LP that covered most of the 700 acres, including a portion of the lower tract. The lease had a twenty-year term with an option for Vulcan to renew the lease for an additional five years.

Under the lease, Vulcan had the right to remove rock from the land, to dump dirt and waste from its operations on the land, to build plants, and to conduct other mining operations on the land. Vulcan also had the right to object to activities on the land that interfered with its operations. Vulcan has mined rock on the upper tract but has not conducted any operations on the lower tract.

In 2013, Parmelly hired Nelson, the owner of Nelson Farm & Ranch Properties, to sell the lower tract, which consisted of approximately 225 acres. Gary McCall, the principal of McCall Motors, is a businessman who has been involved in over 160 real estate transactions. Gary McCall saw an advertisement for the property

and called Bob Welborn, an agent at Nelson Farm & Ranch. Welborn and Gary McCall viewed the property on two or three occasions. During those inspections, Gary McCall saw Vulcan's mining operations on the upper part of the property. The border of the lower tract of the property was just feet from the edge of the quarry.

McCall Motors decided to purchase the property. McCall Motors was not represented by a real estate broker in the transaction. Welborn prepared the sales contract executed by Parmelly and McCall Motors on a form "Farm and Ranch Contract" promulgated by the Texas Real Estate Commission. McCall Motors agreed to pay $1,500 per acre for the lower portion of the property.

Section 6 of the sales contract pertained to "Title Policy and Survey." The preprinted portion of Section 6(F) provided as follows:

> SURFACE LEASES: Prior to the execution of the contract, Seller has provided Buyer with copies of written leases and given notice of oral leases (Leases) listed below or on the attached exhibit. The following Leases will be permitted exceptions in the Title Policy and will not be a basis for objection to title: _____
> _____

Welborn typed the words: "None at time of closing" at the end of Section 6(F). These five words form the basis of McCall Motors' fraud claims against Nelson. Welborn testified that Gary McCall "wanted no leases on the property." Gary McCall also testified that he did not want any leases on the property.

Section 6(A) of the contract required Parmelly to provide a title policy to McCall Motors. As the selected company, First Texas Title Company, LLC had twenty days after it received a copy of the contract to prepare a commitment for title insurance and to deliver that commitment to McCall Motors. Although the time to deliver the commitment could be extended, if McCall Motors did not timely receive the commitment, McCall Motors could terminate the contract.

Pursuant to Section 6(D) of the contract, after McCall Motors received the title commitment, it could object in writing to "defects, exceptions, or encumbrances" reflected in the title commitment. If McCall Motors did not object by the earlier of the closing date or five days after it received the title commitment, it waived the right to object to any listed defect, exception, or encumbrance. Gary McCall did not remember reading Section 6(D) before he signed the contract.

The title company prepared a title commitment effective May 15, 2013, that specifically listed as exceptions from coverage the Vulcan lease and at least two oil and gas leases that were recorded in the deed and public records. Gary McCall acknowledged that a title commitment was important and that he had reviewed the title commitment in almost every other real estate transaction in which he had been involved.

Gary McCall denied that he received the title commitment prior to closing. However, at the closing on May 23, 2013, Gary McCall signed a "Representations of and Disclosures to Buyer at Closing," which included the following provision:

> RECEIPT OF TITLE COMMITMENT AND DOCUMENTS AFFECTING TITLE: Buyer acknowledges having received a copy of the Commitment for Title Insurance issued in this transaction, and that Buyer has been advised to carefully review the Title Commitment and all documents referenced in the commitment. Buyer has had sufficient opportunity to review the Commitment for Title Insurance and all documents referenced therein. Buyer understands that the Title Company has not provided copies of the documents referenced in the Title Commitment, but that Buyer has had sufficient opportunity to obtain copies of those documents from the Title Company or from the County Clerk's office. Buyer understands and agrees that the Owner's Title Insurance Policy will contain the exceptions set forth in Schedule B of the Title Commitment, and any additional exceptions to title resulting from the documents involved in this transaction or agreed to by Buyer.

Gary McCall acknowledged that, even though this document was important, he chose to sign it without reading it or the title commitment. Ultimately, McCall Motors purchased the property subject to the Vulcan lease.

McCall Motors made improvements to the property and, in 2015, decided to sell the property. Jeremy and Jennifer Britten agreed to buy the property for $500,000, but they terminated the contract after the Vulcan lease was listed as an exception in their title commitment. At the time of trial, McCall Motors still owned the property.

McCall Motors sued Parmelly, Nelson, the title company, and the attorney and the law firm that were involved in the transaction. Before trial, McCall Motors settled with Parmelly for $40,000 plus half of the future lease payments that Parmelly received from Vulcan. Eleven members of the jury found that Nelson committed common law and statutory fraud, that the title company failed to comply with its agreement to close the transaction in accordance with the parties' contract, that Nelson was 70% responsible for McCall Motors' damages, and that the title company was 30% responsible for McCall Motors' damages.

As to Nelson, on each fraud claim, the jury was instructed that the elements of damages included "[t]he difference, if any, between the purchase price paid by McCall Motors, Inc. and the value of the property as it was received," and "[t]he loss from the termination of the Britten contract." On each fraud claim, the jury awarded McCall Motors $16,000 for its out-of-pocket damages and $30,000 for lost profits.

The jury was instructed that the elements of McCall Motors' damages for the title company's breach of fiduciary duty consisted of the exact same out-of-pocket and lost profit damages. As to the title company, the jury found that those damages, combined, were $2,500.

Nelson filed a motion for a take-nothing judgment, while McCall Motors requested that the trial court disregard the jury's findings as to damages. The trial

court denied Nelson's motion and McCall Motors' motion as to the jury's finding on McCall Motors' out-of-pocket damages, but it granted McCall Motors' motion as to the jury's findings of lost profits. The trial court found that McCall Motors had conclusively established that it suffered $161,660 in lost profits based on the loss of the Britten contract and awarded McCall Motors total damages of $177,660. The trial court also found that Nelson and the title company were entitled to a settlement credit of $47,000, which reduced the recoverable damages to $130,660. As to Nelson, the trial court rendered judgment in favor of McCall Motors and awarded McCall Motors $130,660 for actual damages and $177,500 for attorney's fees.

Analysis

In his first issue, Nelson contends that the evidence is legally insufficient to support the jury's findings that Nelson committed common law and statutory fraud. Nelson specifically argues that, as a matter of law, McCall Motors failed to prove either a misrepresentation by Nelson or justifiable reliance by McCall Motors on any alleged misrepresentation.

When we determine whether evidence is legally sufficient to support a jury's finding, we review the evidence in the light most favorable to the verdict. *JBS Carriers, Inc. v. Washington*, 564 S.W.3d 830, 841–42 (Tex. 2018). We credit favorable evidence if reasonable jurors could and disregard contrary evidence unless reasonable jurors could not. *Cruz v. Andrews Restoration, Inc.*, 364 S.W.3d 817, 819 (Tex. 2012). The evidence is legally sufficient if it "would enable reasonable and fair-minded people to reach the verdict under review." *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005).

Because Nelson has challenged the legal sufficiency of the evidence to support an adverse jury finding on an issue on which he did not have the burden of proof at trial, he must demonstrate that there is no evidence to support the adverse finding. *Exxon Corp. v. Emerald Oil & Gas Co., L.C.*, 348 S.W.3d 194, 215 (Tex.

2011). We will uphold the jury's finding if it is supported by more than a scintilla of competent evidence. *Tanner v. Nationwide Mut. Fire Ins. Co.*, 289 S.W.3d 828, 830 (Tex. 2009).

To prevail on a common law fraud claim, a plaintiff must prove that "(1) the defendant made a false, material representation; (2) the defendant 'knew the representation was false or made it recklessly as a positive assertion without any knowledge of its truth;' (3) 'the defendant intended to induce the plaintiff to act upon the representation;' and (4) the plaintiff justifiably relied on the representation, which caused the plaintiff injury." *Barrow-Shaver Res. Co. v. Carrizo Oil & Gas, Inc.*, 590 S.W.3d 471, 496 (Tex. 2019) (quoting *JPMorgan Chase Bank, N.A. v. Orca Assets G.P., L.L.C.*, 546 S.W.3d 648, 653 (Tex. 2018)). To establish statutory fraud, the plaintiff must show the following: (1) the transaction involves real estate or stock; (2) the defendant made a false representation of a past or existing material fact or made a promise to do an act with the intention of not fulfilling it; (3) the defendant made the false representation or promise for the purpose of inducing the claimant to enter into a contract; and (4) the plaintiff relied on the false representation or promise in entering into the contract. TEX. BUS. & COM. CODE ANN. § 27.01(a) (West 2015). As in a common law fraud claim, the plaintiff's reliance must be justifiable. *TCA Bldg. Co. v. Entech, Inc.*, 86 S.W.3d 667, 674 (Tex. App.—Austin 2002, no pet.).

McCall Motors asserted at trial that Nelson made a representation that there would be no surface leases on the property at the time of closing. McCall Motors further asserted that Nelson made this representation to induce it to enter into the contract. McCall Motors contended that this representation was a misrepresentation because there was in fact a surface lease on the property at the time of closing in the form of the Vulcan lease.

Nelson contends that he is entitled to a take-nothing judgment on McCall Motors' common law and statutory fraud claims because, as a matter of law, McCall Motors failed to establish that it justifiably relied on the statement in the contract that there would be no surface leases at the time of closing. McCall Motors responds that the jury was not instructed that reliance must be justifiable, that Nelson failed to object to that omission from the charge, and that we should consider only whether the evidence was sufficient to support a finding that McCall Motors relied on Nelson's misrepresentation.

We measure the sufficiency of the evidence against the trial court's charge as submitted to the jury without objection. *Wal–Mart Stores, Inc. v. Sturges*, 52 S.W.3d 711, 715 (Tex. 2001); *Osterberg v. Peca*, 12 S.W.3d 31, 55 (Tex. 2000). In this case, the trial court's charge to the jury tracked the Texas Pattern Jury Charges for common law and statutory fraud[2] and, as relevant here, instructed the jury that fraud occurred if McCall Motors relied on a misrepresentation by Nelson. The charge did not explicitly instruct the jury that McCall Motors' reliance must have been justifiable.

The Eighth and Fourteenth Courts of Appeals have held that, if the charge did not instruct the jury that the plaintiff's reliance must be justifiable, the court of appeals should consider only whether the evidence was sufficient to support a finding that the plaintiff relied on the misrepresentation. *Ghosh v. Grover*, 412 S.W.3d 749, 756 (Tex. App.—Houston [14th Dist.] 2013, no pet.); *Harstan, Ltd. v. Si Kyu Kim*, 441 S.W.3d 791, 799 (Tex. App.—El Paso 2014, no pet.). The Houston First Court of Appeals, however, reached a different conclusion in *Ginn v. NCI*

[2]*See* Comm. on Pattern Jury Charges, State Bar of Tex., *Texas Pattern Jury Charges: Business, Consumer, Insurance & Employment* PJC 105.2, 105.9 (2016); *see also Fleishman v. Guadiano*, 651 S.W.2d 730, 731 (Tex. 1983) (encouraging the "bench and bar" to use the Texas Pattern Jury Charges).

Building System, Inc. 472 S.W.3d 802, 830 (Tex. App.—Houston [1st Dist.] 2015, no pet.).

In *Ginn*, the plaintiff sued for common law fraud, among other causes of action. 472 S.W.3d at 811. The trial court in *Ginn* refused the defendant's request that the jury be instructed that the plaintiff "actually and justifiably relied on" the defendant's alleged misrepresentation and gave an instruction that was identical to the one given by the trial court in this case. *See id.* at 827–28. Our sister court held that, in the case of a direct misrepresentation, justifiability is included in the determination of whether a party actually relied on the misrepresentation. *Id.* at 829–30. Because the charge required the jury to find that the plaintiff "relied on" the defendant's misrepresentations, the issue of whether the plaintiff's reliance was justified was "likewise submitted," and the instruction requested by the defendant was not reasonably necessary to enable the jury to render a proper verdict. *Id.* at 830–31; *see also Lake v. Cravens*, 488 S.W.3d 867, 895 (Tex. App.—Fort Worth 2016, no pet.) ("[R]eliance is a necessary element of a statutory fraud claim, and we assume that the reliance must have been justifiable.").[3]

We agree with the First Court of Appeals and hold that, under the facts of this case, the trial court's instruction to the jury that McCall Motors was required to show that it relied on the statement "[n]one at time of closing" necessarily included the inquiry as to whether any reliance was justifiable. Thus, we will address whether McCall Motors failed to establish justifiable reliance as a matter of law.

"Justifiable reliance usually presents a question of fact." *Orca Assets*, 546 S.W.3d at 497. "But justifiable reliance may 'be negated as a matter of law when

[3]The Texas Supreme Court has not explicitly addressed this issue. However, its prior holdings support that we may consider whether the evidence was sufficient to support justifiable reliance. *See Zorrilla v. Aypco Constr. II, LLC*, 469 S.W.3d 143, 153 (Tex. 2015) (holding that question of whether there was an enforceable agreement was necessarily subsumed in jury's finding of fraudulent inducement).

circumstances exist under which reliance cannot be justified.'" *Barrow-Shaver,* 590 S.W.3d at 497 (quoting *Orca Assets*, 546 S.W.3d at 653).

To determine whether justifiable reliance was negated as a matter of law, we consider the contract and the nature of the parties' relationship. *Id.* This analysis encompasses the plaintiff's "individual characteristics, abilities, and appreciation of facts and circumstances at or before the time of the alleged fraud." *Grant Thornton LLP v. Prospect High Income Fund*, 314 S.W.3d 913, 923 (Tex. 2010) (quoting *Haralson v. E.F. Hutton Grp., Inc.*, 919 F.2d 1014, 1026 (5th Cir. 1990)). "[A] person may not justifiably rely on a representation if 'there are "red flags" indicating such reliance is unwarranted.'" *Id.* (quoting *Lewis v. Bank of Am. NA*, 343 F.3d 540, 546 (5th Cir. 2003)). A plaintiff's claimed reliance on a misrepresentation that the written contract directly and unambiguously contradicts "is itself a large red flag." *Mercedes-Benz USA, LLC v. Carduco, Inc.*, 583 S.W.3d 553, 559 (Tex. 2019).

"[I]n an arm's-length transaction[,] the defrauded party must exercise ordinary care for the protection of his own interests and is charged with knowledge of all facts which would have been discovered by a reasonably prudent person similarly situated." *Barrow-Shaver*, 590 S.W.3d at 497 (quoting *Thigpen v. Locke*, 363 S.W.2d 247, 251 (Tex. 1962)). "A 'failure to exercise reasonable diligence is not excused by mere confidence in the honesty and integrity of the other party.'" *Id.* (quoting *Thigpen*, 363 S.W.2d at 251). To this end, that party "cannot blindly rely" on a representation by a defendant when the plaintiff's knowledge, experience, and background alert it to investigate the defendant's representations before acting in reliance on those representations. *Id.* at 501.

In this case, there were many "red flags" that indicated that McCall Motors' reliance on the statement that there would be no surface leases at the time of closing was unwarranted. First, the quarry operation on the property was very apparent. Gary McCall, the principal of McCall Motors, viewed the property at least twice

before McCall Motors decided to purchase it. On the upper portion of the property, there was a clearly visible mining quarry and a large sign, which stated that there was a quarry and identified Vulcan. There was no mining activity on the lower portion of the property, but parts of the lower portion were within feet of the quarry.

Second, the context of the "surface leases" provision cannot be ignored. The words "[n]one at time of closing" were preceded by the following sentence: "The following Leases will be permitted exceptions in the Title Policy and will not be a basis for objection to title." When read in context, the words "[n]one at time of closing" mean that no leases "will be permitted exceptions in the Title Policy." Thus, under the terms of the sales contract, a surface lease in existence at the time of closing, like the Vulcan lease, would give McCall Motors a ground for objecting to the title to be conveyed.

Third, the statement in the contract that there would no surface leases at the time of closing was contradicted by other provisions of the contract. Specifically, the contract stated that Parmelly would retain ownership of the royalty for the "current" mineral production on the property, which was some indication that the property was subject to an oil and gas lease. In this regard, the term "surface leases" in the sales contract would appear to also include mineral leases.

Fourth, McCall Motors had certain contractual obligations as to the existence of surface leases. McCall Motors had a limited time after it received the title commitment to object to any exceptions to title listed in the title commitment or take title subject to those exceptions. Gary McCall, however, did not recall reading the section of the contract that related to McCall Motors' duty to either object to the exceptions to title or take title to the property subject to those exceptions.

Fifth and most paramount, the title commitment gave notice that at least portions of the property that McCall Motors was purchasing were subject to the Vulcan lease. Although McCall Motors contends that it did not receive a copy of

the title commitment, Gary McCall acknowledged at closing that McCall Motors received the title commitment, that McCall Motors had an opportunity to review the title commitment, and that McCall Motors had been advised to discuss the title commitment with counsel of its choice.

Gary McCall, a sophisticated businessman who has engaged in over 160 real estate transactions, admitted that he knew the significance of the title commitment and that he had read the title commitment in almost all of the real estate transactions in which he had been involved. Even though the existence of a surface lease on the property was unacceptable to McCall Motors, Gary McCall chose not to read the title commitment that would, and did, describe any existing leases before closing this deal. *See Nat'l Prop. Holdings, L.P. v. Westergren*, 453 S.W.3d 419, 425 (Tex. 2015) (per curiam) (holding that plaintiff's decision not to read a release before signing a contract was not justifiable). Because the law presumes that the party knows and accepts the contract terms, *id.* at 425, we must presume that McCall Motors had knowledge of the Vulcan lease and accepted to close on the transaction on those terms, *see id.*; *AKB Hendrick, LP v. Musgrave Enters., Inc.*, 380 S.W.3d 221, 232 (Tex. App.—Dallas 2012, no pet.) (when a party fails to exercise diligence, it is "charged with knowledge of all facts that would have been discovered by a reasonably prudent person similarly situated"); *see also Orca Assets*, 546 S.W.3d at 654, 656–57 (noting that "savvy participants" to an arm's-length transaction should be expected to recognize red flags that the less experienced may overlook and that, when a party is "skeptical" or recognizes "substantial risk," it cannot blindly rely on the other party's representations).

Viewing the circumstances of this transaction in its entirety, we conclude that there were sufficient red flags that the lower portion of the property that McCall Motors was purchasing was subject to a surface lease to negate, as a matter of law, McCall Motors' justifiable reliance on the statement "[n]one at time of closing." As

noted previously, the context of the contract provision where these words were inserted does not support McCall Motors' interpretation that the exclusion for the Vulcan lease in the title commitment was irrelevant. Accordingly, we sustain Nelson's first issue on the basis that the evidence is legally insufficient to find that McCall Motors justifiably relied on any misrepresentation by Nelson.

Based on our resolution of this issue, we need not address the remainder of Nelson's first issue in which he complains that there is legally insufficient evidence that he made a misrepresentation, Nelson's second and third issues in which he challenges the damages awarded by the trial court, Nelson's fifth issue in which he asserts that the evidence is factually insufficient to support the judgment, or McCall Motors' cross-issue in which it asserts that the trial court erred when it applied a settlement credit based on the settlement with Parmelly. *See* TEX. R. APP. P. 47.1.

In his fourth issue, Nelson asserts that, because he is entitled to a take-nothing judgment, he is the prevailing party and may recover attorney's fees pursuant to the contract between Parmelly and McCall Motors. The contract provides that "[a] Buyer, Seller, Listing Broker, Other Broker, or escrow agent who prevails in any legal proceedings related to this contract is entitled to recover reasonable attorney's fees and all costs of such proceeding." Nelson pleaded that he was entitled to recover attorney's fees pursuant to the contract and filed a post-judgment motion in which he requested an award of attorney's fees. The trial court denied Nelson's motion.

We have significantly changed the trial court's judgment in this case. Therefore, we sustain Nelson's fourth issue and remand the issue of Nelson's request for attorney's fees to the trial court. In doing so, we express no opinion as to whether Nelson is entitled to recover attorney's fees in this case.

This Court's Ruling

We reverse the judgment of the trial court as to Nelson and render judgment that McCall Motors take nothing on its claims against Nelson based on common law

and statutory fraud and on its claim for attorney's fees. We reverse the trial court's order in which it denied Nelson's request for attorney's fees, and we remand that issue to the trial court for further proceedings.

JOHN M. BAILEY
CHIEF JUSTICE

May 29, 2020

Panel consists of: Bailey, C.J.,
Stretcher, J., and Wright, S.C.J.[4]

Willson, J., not participating.

[4]Jim R. Wright, Senior Chief Justice (Retired), Court of Appeals, 11th District of Texas at Eastland, sitting by assignment.