THIS OPINION HAS BEEN RELEASED FOR PUBLICATION BY ORDER OF THE COURT OF CIVIL APPEALS

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION II

TONYA L. CURELL,

Plaintiff/Appellee,

vs.

THE BANK OF NEW YORK MELLON TRUST COMPANY, NATIONAL ASSOCIATION, FKA THE BANK OF NEW YORK TRUST COMPANY, NA as Successor to J.P. Morgan Chase Bank, NA as Trustee,

Defendant/Appellant.

Case No. 118,668

APPEAL FROM THE DISTRICT COURT OF
PUSHMATAHA COUNTY, OKLAHOMA

HONORABLE MICHAEL D. DEBERRY, TRIAL JUDGE

AFFIRMED

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OPINION ON REHEARING BY GREGORY C. BLACKWELL, JUDGE:

¶1 The Bank of New York Mellon Trust Company, National Association (BNYM) appeals a judgment against it for fraud and breach of contract in a land sale. On review, we affirm the judgment of the trial court, based on the jury's verdict.

BACKGROUND

¶2 This case begins with a seventy-acre tract of land in Pushmataha County. In 2004, the then-owner mortgaged just ten acres of this tract, including a mobile home that was "deemed to be real estate" and which was purportedly situated on the ten aces, for $60,000. The owner defaulted on this loan and apparently filed bankruptcy in 2010. BNYM, as trustee for the investment trust that owned the loan, obtained a release from the bankruptcy court to proceed *in rem*, and the property was foreclosed on in 2011. BNYM took possession of the ten acres by sheriff's deed. The deed did not specifically describe the size of the property in acres but contained the same legal description as the mortgage, which described exactly ten acres by metes and bounds.

¶3 BNYM decided to sell the property. However, as the result of a series of errors that are at the heart of this case and which are further described below, the property that was listed and advertised to be sold was the original seventy-acre tract instead of the ten-acre tract the bank owned. Gerald Knapp, who owns property adjoining the seventy acres, noticed a sign that had been placed at the entrance to the property offering "70 acres M/L." He contacted a friend, Kurt Curell, husband of the plaintiff Tonya Curell, and suggested that the Curells might like to buy the property. The property had little apparent commercial use for cultivation or pasture, but Mr. Knapp, who hunted on his adjoining property with Mr. Curell, suggested that it would make a nice expansion of their hunting and recreation area.

¶4 The errant listing and advertising of the property as "70 acres M/L" occurred as follows. BNYM acted as trustee and legal owner of the bundle of loans that contained the foreclosed mortgage, and another company, GMAC, acted as the mortgage servicer. GMAC hired Advent REO to facilitate the sale, and one of Advent's employees, Ryan Lierman, spearheaded that project. Mr. Lierman contracted with a local real estate agent and company, Victoria Crowl and House Real Estate Oklahoma LLC (both of whom are former defendants), who specialized in the sale of bank-owned properties, which are generally known as REO (or real-estate owned) properties. In order to list the property, Ms. Crowl obtained information via an online "portal" set up between her and Advent REO. In this case, which was typical apparently, she received very limited information regarding the property to be sold—just a "Disclosure and Hold Harmless Agreement,"

which noted only the property's physical address. After some difficulty, through the county assessor's website, Ms. Crowl tied this physical address to a legal one. Critically, however, the county assessor's information for the parcel linked to that physical address corresponded not to the ten-acre tract that the bank owned, but to the entire seventy-acre tract, of which the bank owned only ten acres.

¶5 Ms. Crowell then sent this information to Mr. Lierman via "the portal"[1] as part of a proposed listing, which he signed. The property was originally listed as seventy acres for $54,900. The testimony at trial was that this price was one that a buyer might expect to pay for seventy acres of property of this type in this area, as the mobile home had little to no value.[2] When no interest was generated at this price, it was reduced to $39,000.

¶6 The Curells eventually agreed to purchase the property for approximately $33,000. The purchase contract described the seventy-acre tract and was executed by Ms. Curell as the buyer and by Mr. Lierman for the seller, who inexplicably was listed as GMAC. As a result, the bank contracted to sell seventy acres but was only capable of selling ten. A special warranty deed provided by BNYM

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[1] Ms. Crowl explained at trial that the process of an REO sale is different from a typical real estate sale. Unlike a typical sale, the local real estate agent has no direct dealing or contract with the owner, in this case BNYM. The requirements and parameters of the transaction are not negotiated but are set and confined by a number of standardized submissions, procedures, and duties established under an internet portal system and associated software program that connects the real estate agent and the seller's agent.

[2] During the sales process, there was some discussion as to who should bear the cost and trouble of *removing* the mobile home from the property, indicating that neither Ms. Crowl nor Ms. Curell felt it was worth more than it would cost to repair, although the Curells eventually made it habitable again by working on it themselves over the following two years.

as grantor did not specifically state a number of acres but used the legal description from the sheriff's deed, which precisely describes the ten-acre tract.[3] It was this deed under which Ms. Curell took title.

¶7 The Curells did not discover the discrepancy for more than two years, when the remaining sixty acres from the original seventy-acre tract were sold to a third party. This placed the Curells in direct conflict with the new owners, not only regarding land ownership and access issues, but also because the mobile home purchased by the Curells and described in the deed as being "constructed upon" the property was not actually on the ten-acre tract Ms. Curell purchased, but was just north of it, on the sixty acres that had been recently sold.

¶8 Ms. Curell hired counsel and sought a settlement with multiple parties, including BNYM, but none was obtained. Ms. Curell then filed this suit against BNYM, the Crowls, and House Real Estate LLC, for breach of contract, fraud, negligent misrepresentation, professional negligence, and violations of the Oklahoma Real Estate Code. The case against the Crowls and House Real Estate settled prior to trial, and the negligent misrepresentation claim was withdrawn. BNYM filed a motion for summary judgment, which was denied. The case against BNYM went to a jury trial conducted over four days. BNYM moved for a directed verdict at the close of Ms. Curell's case, which was also denied. On the remaining claims—being just breach of contract and fraud—the jury found for Ms. Curell,

[3] Title work was performed, and a title policy was issued by First American Title Insurance Policy Company. However, the policy was issued as to the ten-acre tract only. Neither the title company nor any of its employees were involved in this suit.

awarding actual damages of $250,000. After the second stage of trial, the jury awarded punitive damages of $500,000. BNYM filed a motion for judgment notwithstanding the verdict, which the district court denied. BNYM now appeals the resulting judgment, which the trial court entered on the jury's verdict.

STANDARD OF REVIEW

> In an action at law, a jury verdict is conclusive as to all disputed facts and all conflicting statements, and where there is any competent evidence reasonably tending to support the verdict of the jury, this Court will not disturb the jury's verdict or the trial court's judgment based thereon. Where such competent evidence exists, and no prejudicial errors are shown in the trial court's instructions to the jury or rulings on legal questions presented during trial, the verdict will not be disturbed on appeal.

Florafax International, Inc. v. GTE Market Resources, Inc., 1997 OK 7, ¶ 3, 933 P.2d 282 (citations omitted). This appeal also raises several pure questions of law, which we review *de novo. Kluver v. Weatherford Hosp. Auth.* 1993 OK 85, ¶14, 859 P.2d 1081.

ANALYSIS

¶9 BNYM makes the following allegations of error, which we will address in turn. *First*, BNYM argues that Ms. Curell's claim as to fraud was barred by the statute of limitations and that the trial court committed error by allowing the claim to go to the jury. While we are sympathetic to BNYM on the merits of this defense, we find that BNYM waived it. *Second*, BNYM argues that the evidence was insufficient as to the question of agency. We find the evidence was sufficient to submit the question to the jury. *Third*, BNYM argues that two sections of the Oklahoma Real Estate License Code concerning a realtor's provision of third-

party information as to the "size or area" of a property completely foreclose liability against BNYM. We disagree with BNYM's interpretation of this statute.

The Statute-of-Limitations Argument

¶10 The statute of limitations for a claim of fraud is two years. 12 O.S.2011, § 95(3). However, the date the clock begins to run is tolled "until the discovery of the fraud." *Id.* This tolling is limited in practice: "Fraud is deemed to have been discovered when, in the exercise of reasonable diligence, it could have or should have been discovered." *McCain v. Combined Commc'ns Corp. of Oklahoma*, 1998 OK 94, ¶ 8, 975 P.2d 865, 867.

¶11 The parties disagree whether, as a matter of law, Ms. Curell *should have* discovered the alleged fraud, at the latest, at the closing table. After all, BNYM argues, at that point she held in her hand both a contract that described seventy acres and a deed that described ten acres. Even if the average person would not know how to read and compare the two different legal descriptions, Ms. Curell had the means to discover the fraud herself—by reading the deed more carefully or by asking someone with more knowledge to do so on her behalf. *Id.* ¶ 8 ("Inasmuch as the employees had in their possession—both at the time they signed the contracts and afterward—copies of all the relevant documents, they clearly had the means and perhaps should have discovered the difference between the terms of negotiations and those of the printed form (or contract).").

¶12 While we are sympathetic to the defendant's view, we are unable to resolve the matter here, as BNYM waived the right to make this argument by failing to plead the defense of statute of limitations in its answer. The statute of limitations

is an affirmative defense which must be pled by the party claiming it and, when not so pled, it is waived. *National Zinc Co. v. Moody*, 1976 OK 156, ¶ 4, 556 P.2d 268, 269. Further, the existence of a valid but unraised affirmative defense does not affect the efficacy of an otherwise valid judgment. *RST Serv. Mfg., Inc. v. Musselwhite*, 1981 OK 45, 628 P.2d 366, 368

¶13 Here, it is undisputed that BNYM did not raise any statute of limitations defense in its answer. Although it had the opportunity to amend its pleadings to include the defense, it did not do so. Nor did it ever raise the statute of limitations under 12 O.S. § 95 in its motion for summary judgment.[4] Rather, it waited until discovery was closed and attempted to insert the defense into the pretrial conference order, some six months after its summary judgment motion and two years and six months after its first filing. Ms. Curell objected, specifically stating that BNYM had waived the defense, but the court deferred ruling on the objection until after the close of all evidence. At that time, the court refused BNYM's requested jury instruction related to the defense. Because we find that BNYM waived the defense by failing to plead it as required by 12 O.S. § 2008, and that its pleadings were never amended to include the defense, the trial court did not err in refusing to allow the jury to consider the defense.

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[4] In their reply brief, BNYM claims it raised a statute of limitations defense in its summary judgment pleadings. However, the defense was not under 12 O.S. § 95, but under 59 O.S. § 858-515.2(C)—more aptly called a statute of repose—and under the heading related solely to that law. This did not preserve BNYM's defense as it relates to § 95, which is an entirely different theory, of which Ms. Curell had no notice prior to BNYM's attempt to insert it into the pretrial proceedings. The inapplicability of § 858-515.2 to this case, including its statute of repose, is further discussed in the Opinion's discussion on Real Estate License Code, beginning at ¶ 18.

The Agency Argument

¶14 BNYM next argues that the evidence was insufficient to connect it to Ryan Lierman or Advent REO as an agent of BNYM for purposes of a sale of land of more than ten acres, and therefore no judgment against BNYM was possible. The question concerns whether the acts and knowledge of Advent REO and Ryan Lierman, who allegedly knew that the bank only had ten acres to sell,[5] can be attributed to BNYM through agency principles.

¶15 We find the bank's argument that Mr. Lierman's actions cannot be attributed to BNYM is easily resolved in favor of Ms. Curell. Whether or not the series of contracts ultimately linking Mr. Lierman to BNYM—and surely all must agree to a direct link here, as how else was Mr. Lierman authorized to do *anything* with BNYM's property?—indicates he was an agent or an independent contractor or a "mere asset manager" really has no bearing on the pertinent question. Under a reasonable interpretation of the facts as presented at trial, Mr. Lierman, through Advent REO, had the authority to sell the property at issue. The bank allowed Mr. Lierman, though whatever contractual relationship they had, to hold himself out as a person authorized to sell land on behalf of the bank. Mr. Lierman signed every pertinent document related to this sale—the listing agreement, the contract, the addendum, and others—all indicating a sale of seventy acres. The bank was happy to allow Mr. Lierman to accept a payment on

[5] Ms. Crowl testified at trial that she had no reason to believe that the property for sale was anything other than seventy acres. She also testified that Ryan Lierman had a copy of the sheriff's deed that indicated the property was only ten acres but still approved an offering and a closing for seventy acres. BNYM's witness repeatedly stated that BNYM "always understood" that it had only ten acres for sale.

the bank's behalf in exchange for a seventy-acre tract of land, and, the evidence at trial strongly suggested the valuation placed on the property was for seventy acres. Under uncontroversial law, this is more than sufficient for the jury to have considered Mr. Lierman the bank's agent for purposes of the sale. *See Consol. Flour Mills Co. v. Roberts*, 1926 OK 429, ¶11, 252 P. 29, 32 ("When an agent is held out to the world as one having the authority of a general agent, any private instructions or limitations upon his authority in a particular case, not communicated or known to those dealing with such agent, will not relieve the principal from liability incurred, where the agent oversteps such limitations." (quoting *National Surety Co. v. Miozrany*, 1916 OK 349, ¶ 0, 156 P. 651)).

¶16 Indeed, had there never been any issue with the sale of this land, but Mr. Lierman had deposited the proceeds in his own account, is there any doubt that BNYM would argue that Mr. Lierman, while blessed with the authority to accept the check at the closing table, had the reciprocal duty to hand that check over to BNYM *as their agent*? We do not think so. The bank has no legal right to consider the relationship as an agency when it benefits them, but elsewise the moment it does not. "If [a] company accepts the benefits of [an agent's] misrepresentations, it must also bear the burdens of the same; and if the company is unwilling to be bound by their misrepresentations, it must surrender the benefits obtained under them." *McLean v. Sw. Cas. Ins. Co. of Oklahoma*, 1915 OK 987, ¶ 0, 159 P. 660 (syllabus of the Court).

¶17 "The sufficiency of the evidence to sustain a judgment in an action of legal cognizance is determined by an appellate court in light of the evidence tending

to support it, together with every reasonable inference deducible therefrom, rejecting all evidence adduced by the adverse party which conflicts with it." *Badillo v. Mid Century Ins. Co.,* 2005 OK 48, ¶ 22, 121 P.3d 1080. We find no error in the jury's finding of an agency relationship.

Argument under the Real Estate License Code

¶18 BNYM finally argues that it is entirely immunized from suit, for fraud or otherwise, by the operation of two provisions contained within Oklahoma's Real Estate License Code, 59 O.S. §§ 858-101 *et. seq.* However, we read those provisions as limited to an effort to shield real estate agents[6] from liability for good-faith reporting of a third-party's calculation of a parcel's area or a house's size. BNYM's reading would do for more. Indeed, its interpretation would insulate sellers from outright fraud, which we do not believe was intended by the statute's authors.

¶19 BNYM's argument relies on one subsection of two provisions enacted in 2011, presumably in response to *Bowman v. Presley,* 2009 OK 48, 212 P.3d 1210. In that case, a buyer agreed to purchase a house that the seller had indicated, based on the records of the county assessor's office, was 2,890 square

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[6] The code refers not to agents but to real estate "licensees," which include "any person who performs any act, acts or transactions set out in the definition of a broker and licensed under the Oklahoma Real Estate License Code." 59 O.S.Supp.2017, § 858-102. A "broker" is "any person, partnership, association or corporation, foreign or domestic, who for a fee, commission or other valuable consideration, or who with the intention or expectation of receiving or collecting a fee, commission or other valuable consideration, lists, sells or offers to sell, buys or offers to buy, exchanges, rents or leases any real estate, or who negotiates or attempts to negotiate any such activity, or solicits listings of places for rent or lease, or solicits for prospective tenants, purchasers or sellers, or who advertises or holds himself out as engaged in such activities." *Id.* Thus, what we consider colloquially as a real estate "agent" is a "licensee" under the code. We will refer to both brokers and licensees as "agents" throughout this opinion.

feet. However, the buyers obtained an appraisal after closing that stated the actual size of the home was 2,187 square feet. The buyers alleged the sellers were aware the home was less than 2,890 at the time they listed it. The buyers sued the sellers and the sellers' agent for damages based on theories of fraud and breach of implied contract, and as against the sellers' agent, for violations of the Real Estate License Code. All defendants secured summary judgment, which the Court of Civil Appeals affirmed. However, the Supreme Court granted certiorari "to clarify the relative duties of buyers and sellers' of real estate and their agents when positive representations are made about the size of property to be conveyed," and reversed. *Id.* ¶ 5.

¶20 The Court held that the real estate agent *could* be liable to the seller for the provision of inaccurate third-party information as to size. *Id.* ¶ 27. The relevant question was whether the agent "represented the property size reasonably, recklessly, or with intentional dishonesty." *Id.* Because such a question "must be resolved by a trier of fact," summary judgment in favor of the agent was inappropriate. *Id.*

¶21 Presumably in response to *Bowman*, the legislature enacted two new sections of Title 59, §§ 858-515.1 and 858.515.2. *See Real Property Disclosures—Size And Area Information—Limiting Duties Of Real Estate Licensee*, 2011 Okla. Sess. Law Serv. Ch. 212 (H.B. 1598) (West).[7] Section 858-515.1 modifies the

[7] We will refer to these two new provisions as "the act." The act is contained within Chapter 20 of Title 59, which is known as "The Oklahoma Real Estate License Code." 59 O.S.2011, § 858-101.

result of *Bowman* as to agents who rely on third-party recitations of size. The section contains four subsections that each describe some aspect of an agent's duties, or lack thereof, regarding the provision of sizing information. Subsection A states that an agent is not required to provide any information regarding size, and if an agent does, it cannot be considered as a guarantee or warranty of size. Subsection B provides that if an agent elects to provide "third-party information" regarding size, it *must* disclose the source of the information. This subsection also provides a definition of "third-party information," which includes the tax assessor's information. Subsection C states that an agent has no duty to a seller or buyer to conduct an independent investigation of size or area, or to independently verify any third-party information provided. Finally, subsection D states that an agent who has complied with the section, being § 858-515.1, has no further duties regarding the provision, or lack of provision, of sizing information and shall not be subject to damages regarding "conflicting measurements or opinions of size or area."

¶22 The commands of § 858-515.1, unambiguously, all pertain to the duties and liabilities of real estate agents and have nothing to do with the duties and liabilities of buyers or sellers. However, this provision does affect the *rights* of buyers or sellers, *but only as against agents.* Under *Bowman,* it was an open question, dependent on the facts of each individual case, whether a buyer or seller could sue an agent for providing incorrect third-party information regarding the size of a parcel or a fixture thereon. After this statute, it is clear that, as long as an agent reveals the *source* of their information, they are shielded from

liability for the provision of inaccurate information concerning size or area. The *only* duty put upon any party in this statute is the duty to disclose the source of third-party information regarding property size should an agent elect to provide such information.

¶23 Section 858-515.2 has five separate subsections, and each describes, in one way or another, the consequences for an agent should he or she violate this newly created duty to disclose. Subsection A establishes a cause of action against an agent if the agent *knowingly* violates a duty to disclose the source of third-party sizing information. Subsection B limits the available remedies for a violation of the duty to disclose to actual damages. Subsection C imposes a two-year statute of repose, running from the date of closing, to bring an action under this section. Subsection D allows for prevailing party attorney fees.

¶24 Finally, there is subsection F. It this provision that BNYM argues transforms the act from a simple repudiation of *Bowman*, at least as it determined the liability of a real estate agent for the good-faith provision of the county assessor's data on the square footage of a home, into a wholesale repeal of common law fraud as to sellers of real property. The subsection states as follows:

> The provisions of this act shall apply to, regulate and determine the rights, duties, obligations and remedies, at common law or otherwise, of the seller marketing his or her real property for sale through a real estate licensee, and of the purchaser of real property offered for sale through a real estate licensee, with respect to disclosure of third-party information concerning the subject real property's size or area, in square footage or otherwise, and this act hereby supplants and abrogates all common law liability, rights, duties, obligations and remedies of all parties therefor.

59 O.S.Supp.2012, § 858-515.2(F).

¶25 BNYM's interpretation of this provision would have us substitute the phrase "licensee and seller" for each use of the singular "licensee" in § 585-515.1. They insist that "[b]ecause the act applies to sellers ... and because [the real-estate agent] obtained her information about the [p]roperty's size from the tax assessor and identified that as the source of information ... there is no violation of the Act [and] [t]here is no other cause of action because the Act 'supplants and abrogates'" all common law liability. For the following reasons, this Court cannot accept this interpretation.

¶26 First, we find that BNYM makes a simple misreading of the relevant text. Subsection F makes it clear that the act "supplants and abrogates all common law liability, rights, duties, obligations and remedies." However, it does not say, as BNYM urges, that each party discussed in the act has been given a right, a duty, an obligation, a remedy, or increased or decreased liability. Reading the statute as a whole, as we must, it is clear that only *agents* are given any additional *liability, duty* or *obligation* beyond the common law. [8] Neither sellers nor purchasers are given any of these, though they are offered certain *rights* and *remedies*. Because the two sections do not place any new liability, duty, or obligation on sellers, they do not supplant any existing liability, duty or obligation of sellers.

[8] Section 858-515.1(D) provides that "[a] *real estate licensee* who has complied with the requirements of this section ... shall not be subject to liability to any party for any damages sustained with regard to any conflicting measurements or opinions of size or area ...." It provides no such shield for "sellers."

¶27 As to sellers and purchasers, the only thing the act supplants is certain *rights* and *remedies.* Had the legislature also intended to create liabilities, duties, and obligations for a seller of real property with the act, they could have easily stated as much in a much more straightforward way than BNYM suggests. For example, each time they wrote "licensees" in the operative portions of the act, they could have written "licensees *and sellers.*" They did not do so, and we therefore reject BNYM's expansive reading of § 858-515.2(F).

¶28 Not only do we find BNYM's reading inconsistent with the history and text of the act, but adoption of their reading would also create absurd and unexpected results, which we cannot ascribe to the legislature absent a clearer expression of intent. Indeed, we are bound to provide a construction that avoids absurd consequences without violating legislative intent. *Odom v. Penske Truck Leasing Co.*, 2018 OK 23, ¶ 18, 415 P.3d 521. "The legislative intent must be ascertained from the whole act in light of its general purpose and objective considering relevant provisions together to give full force and effect to each." *Id.*

¶29 Under BNYM's reading, the statutory text indicates that a seller stating a size actually makes no representation or promise as to the size of property he or she is selling. Further, it indicates that the seller is entirely immunized if inaccurate information is attributed to a recognized third-party source, such as the county assessors' records, and that source is disclosed. BNYM's interpretation requires that a seller who knows they have a property of ten acres at a certain physical address may directly represent the known ten acres as seventy, or take deliberate advantage of the fact that the county assessor's office associates the

same address with seventy acres and represent the ten-acre property as seventy acres "according to the county assessor." Indeed, under BNYM's reading, a seller may deliberately provide false information to his or her real estate agent, which the agent then uses to market and sell the property, and, as long as the agent discloses the source of his or her information as the seller, both the agent *and the seller* are immunized. BNYM's interpretation leads to a conclusion that the legislature intended to immunize clear and obvious fraud. This Court is unwilling to accept that the legislature intended to do so.

CONCLUSION

¶30 The jury awarded damages substantially greater than the original amount paid for the property. Nonetheless, BNYM does not challenge the amount of damages on appeal. Nor does it challenge whether its conduct was egregious enough to meet the standard required to award punitive damages. Instead, it argued that Ms. Curell's claims were all barred as a matter of law, and no jury case existed for any recovery on any theory. However, we reject each of BNYM's arguments. We find that BNYM waived its defense under the generally-applicable statute of limitations for fraud, that the relevant actors that sold the property to Ms. Curell were BNYM's agents, and that no provision of the Oklahoma Real Estate License Code barred the claim. As such, we affirm the judgment entered on the jury's verdict.

¶31 **AFFIRMED.**

WISEMAN, P.J., and RAPP, J., concur.

July 21, 2022