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See Okla.Sup.Ct.R. 1.200 before citing.

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION IV

VALLIANCE BANK,

Plaintiff/Appellee,

vs.

DEREK MASK,

Defendant/Third-Party Plaintiff/ Appellant,

and

ROBERT M. HOLBROOK,

Defendant/Third-Party Plaintiff,

vs.

ROY OLIVER and STANTON NELSON,

Third-Party Defendants/ Appellees,

and

JOSEPH HARROZ JR. and MATTHEW CLOUSE,

Third-Party Defendants.

Case No. 120,940

APPEAL FROM THE DISTRICT COURT OF
CLEVELAND COUNTY, OKLAHOMA

HONORABLE JEFF VIRGIN, DISTRICT JUDGE

AFFIRMED IN PART AND REVERSED IN PART

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OPINION BY GREGORY C. BLACKWELL, JUDGE:

The appellant, Derek Mask, appeals various rulings of the court in favor of the appellees, Valliance Bank and Roy Oliver. Upon review, we find that the court properly denied Mask's motion to vacate on the basis that the jury rendered inconsistent verdicts or that the verdicts were contrary to law, that the court did not commit any reversible errors at trial, and that the jury properly assessed damages for Oliver's violation of the Oklahoma Securities Act. However, we find that the court improperly modified the jury's award by including prejudgment interest that the bank sought from the jury. Accordingly, we reverse the court's award of prejudgment interest in favor of the bank but affirm in all other respects.

I. BACKGROUND

On July 1, 2013, Mask took a loan from Valliance and executed a promissory note in the principal amount of $527,645, repayable with interest. Mask used the loan to invest in a company called Foundation Health Enterprises

LLC, which was referred to throughout trial and will subsequently be referred to in this opinion as NewCo. NewCo came into existence as a result of a merger between two existing companies, Graymark Healthcare Inc. and Foundation Surgical Associates. Graymark, a publicly-traded company, was by all accounts in some financial trouble pre-merger, while Foundation was a highly successful private enterprise that owned and operated several hospitals and surgery centers. Via the merger, Foundation sought to go public and Graymark sought to alleviate its financial woes and pivot to a more profitable business model. The merger was completed in 2013.

In 2016, NewCo purchased a hospital that failed, ultimately leading to NewCo's bankruptcy. As a result of its bankruptcy and failure, NewCo stopped making payments to Mask and other investors. In turn, Mask stopped paying on the note and defaulted in 2017. Mask stopped making payments because he claimed that bank officials made intentionally misleading statements to induce Mask and other investors to execute the promissory notes transferring bank funds to NewCo for the purchase of those securities.

Valliance sued on the note, and Mask filed counterclaims against the bank as well as a third-party petition against Oliver, Stanton Nelson, and other bank officials. Mask claimed breach of contract against Valliance; fraud, negligence,[1] violations of the Oklahoma Securities Act, conspiracy, violation of Oklahoma's Deceptive and Unfair Trade Practices Act, and violation of the Oklahoma

[1] Both the negligence and Oklahoma Deceptive and Unfair Trade Act claims were dismissed against the bank and Oliver before trial.

Consumer Protection Act against both Valliance and Oliver;[2] and breach of fiduciary duty against Oliver. The case ultimately proceeded to jury trial, which was held from May 25, 2022, to June 8, 2022. Several witnesses testified and at the close of testimony Valliance moved for a directed verdict on Mask's Oklahoma Consumer Protection Act claim and breach of the implied duty of good faith claim. The court granted the motion. The remaining claims between Mask and Valliance—breach of contract, fraud, constructive fraud, civil conspiracy, and Oklahoma Securities Act violations—went to the jury. Oliver moved for a directed verdict/demurrer to the evidence on Mask's fraud claim against him, which the court granted. Mask's remaining claims against Oliver, the conspiracy and Oklahoma Securities Act claims, went to the jury.

The jury found in favor of Valliance on both its own claims and on Mask's counterclaims for fraud, conspiracy, and violations of the Oklahoma Securities Act. It awarded Valliance damages of $340,918 on the note for breach of contract. The jury found in favor of Oliver on Mask's conspiracy claim; however, it found in Mask's favor on the Oklahoma Securities Act claim. The jury awarded one dollar in nominal damages against Oliver and $100,000 in punitive damages for violations of this act.

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[2] Mask also sued Joseph Harroz Jr., then director at Valliance, and Matthew Clouse, then vice president and now president of the bank. However, both parties were dismissed before trial. Additionally, the bank sued another individual, Robert Holbrook, along with Mask for defaulting on the loan. However, Holbrook reached a settlement with the bank before trial. Finally, we note that Mask and Nelson reached a settlement agreement in bankruptcy court that resulted in the dismissal of Nelson's counter-appeal. Thus, the only parties remaining for the purposes of this appeal are appellant Mask and appellees Valliance Bank and Oliver.

Mask and Valliance could not agree on the interest to be applied to the bank's judgment. The bank filed a motion to settle the journal entry, arguing that it was entitled to pre- and post-judgment interest. The court ultimately agreed and calculated prejudgment interest at $302,559.85, which is reflected in its journal entry.

Mask filed a motion to vacate the judgment, alleging that the jury's findings that he had breached his contract to the bank and was required to pay back the loan and the finding that Oliver violated the Oklahoma Securities Act were inconsistent. Mask also argued that the court should correct the judgment as the jury did not properly assess the damages for Oliver's violation of the Oklahoma Securities Act. The court denied the motion to vacate.

Oliver filed a motion for judgment notwithstanding the verdict, alleging that the jury improperly awarded punitive damages against him because punitive damages are not recoverable under the Oklahoma Securities Act. The court agreed and granted the motion.[3]

Mask now appeals the various legal rulings and alleged errors of the court during jury trial, the prejudgment interest awarded in the journal entry of judgment, and the court's decision to deny the motion to vacate.

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[3] While Mask originally preserved this error of appeal, he later waived it in his reply brief. Mask states that "appellant withdraws Proposition Six as it relates to the award of punitive damages under the Act. Appellant preserves the right to assert punitive damages via fraud against Oliver as argued in Proposition Five." *Reply Brief*, pg. 16. However, because we find that the court properly granted a demurrer on the fraud claim, as discussed in detail below, we also find that Mask is not entitled to recover punitive damages on this claim.

II. ANALYSIS

On appeal, Mask alleges five propositions in error. They are: (A) the court erred in denying his motion to vacate (Proposition I); (B) the court committed five reversible procedural errors during trial (Proposition II); (C) the court wrongly granted Oliver's demurrer to the evidence on Mask's fraud claim (Proposition V); (D) the court wrongly denied Mask's portion of the motion to vacate which asks the court to correct the judgment to assess the measure of damages for his Oklahoma Securities Act claim against Oliver (Proposition IV); and (E) the court erred in awarding Valliance pre-judgment interest (Proposition III). We will discuss each in turn.

A. Mask's Motion to Vacate

Mask alleges that the trial court erred in denying his motion to vacate Valliance's judgment against him for breach of contract. Mask argues that this decision was error because the jury determined that Mask was defrauded in the investment, thereby prohibiting recovery for the bank on the note. Because Mask's motion to vacate was filed within ten days of the filing of the journal entry, the order disposing of the motion to vacate and the underlying judgment are both reviewable. 12 O.S.2011 § 990.2(A); Okla.Sup.Ct.R. 1.22(c)(2). Mask appealed both orders. The standard of review for a trial court's ruling either vacating or refusing to vacate a judgment is abuse of discretion. *Ferguson Enterprises, Inc. v. Webb Enterprises, Inc.*, 2000 OK 78, ¶ 5, 13 P.3d 480. An abuse of discretion occurs when a decision is based on an erroneous conclusion of law or where there is no rational basis in evidence for the ruling. *Smith v. City*

of Stillwater, 2014 OK 42, ¶ 11, 328 P.3d 1192, 1197. In this case, the propriety of the trial court's denial of the motion to vacate rests on the correctness of the underlying journal entry of judgment reflecting the jury's findings that Mask breached his contract with the bank and Oliver violated the Oklahoma Securities Act. *Id.* 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. *Florafax Int'l, Inc. v. GTE Mkt. Res., Inc.*, 1997 OK 7, ¶ 3, 933 P.2d 282, 287.

As noted above, Mask and Nelson reached a settlement agreement in bankruptcy court, in which Nelson agreed to dismiss his counterappeal. *See* note 2, *supra.* The parties clarified that their settlement agreement does not affect Mask's rights to obtain damages under the Oklahoma Securities Act or recovery for attorney's fees against Roy Oliver. Thus, the issue we must address is whether the jury's finding that Oliver alone violated the Oklahoma Securities Act is inconsistent with the jury's finding that Mask breached his contract with Valliance to pay back the loan and whether such findings were supported by competent evidence. Upon review, we find that the court did not abuse its discretion in denying the motion because the verdicts are consistent and the jury's findings in the underlying judgment were supported by competent evidence.

Mask specifically argues that the motion to vacate should have been granted and a new trial ordered under 12 O.S. § 1031 and § 651 as the court's

order was "contrary to law" and "irregular" under § 1-509(K) of the Oklahoma Securities Act and Oklahoma contract law statutes. The act states:

> A person that has made or has engaged in the performance of, a contract in violation of this act or a rule adopted or order issued under this act, or that has acquired a purported right under the contract with knowledge of conduct by reason of which its making or performance was in violation of this act, may not base an action on the contract.

71 O.S. § 1-509. Mask contends that because Oliver repeatedly made promises, representations, and assurances regarding Valliance Bank and its ability to provide financing for the loan, it shows the bank's knowledge and participation in an investment scheme at NewCo. However, Valliance Bank argues that the jury found that Mask was not defrauded via the *bank note*; rather, the jury determined that Oliver violated the Oklahoma Securities Act as it relates to the NewCo *investment contract.* We agree with Valliance.

Mask lodged counterclaims against Valliance for fraud, constructive fraud, civil conspiracy, and violations of the Oklahoma Securities Act. The jury found in favor of Valliance on all of the above claims. Mask also brought civil conspiracy and violation of the Oklahoma Securities Act claims against Oliver individually. As discussed above, the jury found that Oliver had violated the Oklahoma Securities Act; however, it found in favor of Oliver on the civil conspiracy claim. Thus, by finding that Oliver was not a participant in a civil conspiracy with the bank *and* finding that the bank did not defraud Mask or violate the Oklahoma Securities Act, it is clear that the jury rejected Mask's contentions that the bank was part of any fraudulent investment scheme. The jury found that Oliver's

actions regarding the investment were not part of Valliance's business or done within the scope of his position at Valliance.

This finding was supported by competent evidence. Mask himself testified that he never spoke to Oliver about the bank loan. Tr. (May 26, 2022), 442. Matthew Clouse, vice president and later president of Valliance, also testified that Oliver was not a part of Mask's loan approval process. *Id.* at 342. Lexie Garrison, Valliance's chief credit officer, testified that Oliver did not vote on or otherwise participate on the individual loan committee. Tr. (May 31, 2022), 786. Oliver himself testified that he does not use his power or role within the bank to influence its decisions. Tr. (June 2, 2022), 1357. Oliver added that he did not review any of the loans themselves, did not review the individuals' financial information, and did not approve any specific loan amounts given to each individual. *Id.* at 1374. Thus, we find the court's denial of the motion to vacate was not an abuse of discretion and we decline to disturb the underlying judgment as there was competent evidence showing Mask breached his contract with the bank.

B. Procedural Errors

Mask's second proposition of error is that the jury's verdict in favor of the bank cannot stand because the court committed several reversible errors during trial. He argues that (1) the court's decision to allow statements by plaintiff's counsel during opening regarding settlements with other investors; (2) the court's failure to exclude expert testimony from former federal judge, Michael Burrage; (3) the court's failure to give an agency instruction to the jury; (4) the

court's refusal to strike a prospective juror all constituted reversible errors; and (5) the court improperly granted the bank's demurrer on Mask's breach of contract claim. We will discuss each allegation in turn.

1. Prejudicial Statements in Opening Statement

Mask first alleges that counsel for Valliance violated 12 O.S. § 2408 during opening statements and prejudiced Mask by informing the jury that former co-defendant, Dr. Robert Holbrook, settled his claims against Valliance the week prior. Specifically, counsel stated:

> And just this past Sunday the other guy agreed to pay after seeing all the same evidence that Mr. Mask has, after seeing all the same evidence that the Court has, and after having the same lawyers that Mr. Mask has. The guy that was his wing man on this said on Sunday, I don't want anymore. That will be the evidence. And he accepted responsibility. The only person who has not accepted responsibility in this transaction is Dr. Mask.

Tr. (May 26, 2022), 268. Upon conclusion of Valliance's counsel's opening statement, counsel for Mask moved for a mistrial, alleging that counsel's statements regarding Dr. Holbrook prejudiced Mask's claims. *Id.* at 271. The court stated that it would address the motion later after all opening statements and instructed the jury that "opening statements, arguments of counsel are not evidence either. That's going to come from the witness stand, any exhibits that you see." *Id.* at 272. The court ultimately denied the motion for mistrial and the case proceeded.

Oklahoma courts have consistently held that attorneys "have wide latitude in opening and closing statements, subject to the trial court's control, and limitation of the scope of the arguments is within the trial court's discretion."

Carter v. Pendley, 2024 OK CIV APP 3, ¶ 11, 544 P.3d 970, 974 (citing *Covel v. Rodriguez*, 2012 OK 5, ¶ 22, 272 P.3d 705). Further, if the jury is admonished to disregard an improper argument it cures any prejudice that might have been created since it cannot be presumed as a matter of law that the jury will not heed the admonition given by the court. *Id.* This Court also noted that:

> In order for the alleged misconduct of counsel in argument to the jury to effect a reversal of the judgment it must appear that substantial prejudice resulted therefrom and that the jury was influenced thereby to the material detriment of the party complaining." *Id.*; *see also Nye*, 2018 OK 51, ¶ 39, 428 P.3d 863 (holding that "[o]rdinarily, a reviewing court will not reverse based upon alleged attorney misconduct unless such conduct 'substantially influences the verdict or denies the defendant a fair trial'"). "The ultimate question is whether counsel's remarks result in actual prejudice." *Middlebrook*, 1985 OK 66, ¶ 33, 713 P.2d 572. "This determination rests with the trial judge and the appellate court will not reverse that determination unless it clearly appears that the verdict was so influenced, considering all pertinent facts and circumstances in the record." *Id.*

Id. ¶ 11.

Here, Mask contends that counsel for the bank's introduction of Holbrook's settlement was so prejudicial as to necessitate reversal under the standards stated above. Title 12 O.S. § 2408 states that evidence of "a valuable consideration in compromising" a disputed claim is not admissible to prove liability for the claim. Here, we find that counsel's statements were not made to prove that Mask was liable; rather, he was highlighting that there were other investors who also took out loans and later paid them back and now Mask is "the last man standing." Mask's counsel agreed that there "was nothing wrong with saying that Derek is on an island and all the investors have either paid,

agreed to pay, or are paying." Tr. (May 26, 2022), 270. Further, Mask himself called other investors who had paid off their Valliance loans to testify at trial. Specifically, Samuel Dakil and Douglas Beall were called by Mask, and both acknowledged that they obtained loans from Valliance to invest in NewCo and have since paid or are paying back their loans after NewCo went under. Tr. (May 27, 2022) 645, 700.

The decision regarding whether such a statement in opening amounts to unfair prejudice "rests with the trial judge" and this Court will not reverse that determination unless it clearly appears that the jury verdict was influenced by the prejudicial statement. *Carter*, 2024 OK CIV APP 3, ¶ 11. We also note that "[a]ny remark or query by counsel regarding settlement negotiations must ... be closely scrutinized and any doubt about its prejudicial effect should be resolved in favor of the complaining party. *But ... the mere suggestion of settlement negotiations should not warrant an automatic reversal.*" *Boring v. Geis Irrigation Co.*, 1975 OK CIV APP 46, ¶ 10, 547 P.2d 988, 992. (emphasis supplied). The bank's counsel's statement in opening regarding Holbrook's settlement a few days prior to trial was not unfairly prejudicial and it is clear that the jury could have reached its verdict that Mask was not defrauded when obtaining the loan based on all the other evidence presented. Further, Mask himself brought in the third-party investors to testify that they had invested and subsequently paid back their loans and testified that he was the only one left who had not yet paid the bank.

For these reasons, we cannot say that the jury verdict rests on counsel's remarks in his opening statement, even if they were improper. Further, while the court did not specifically admonish the jury to disregard the statement about Holbrook's settlement in opening, it reminded the jury that opening statements and arguments of counsel are not evidence. We find that Mask failed to prove that substantial prejudice resulted or that the jury's verdict was influenced by Valliance's counsel's statements made during opening statements. The trial court has wide discretion in the scope of opening statements, and we find there was no abuse of that discretion in failing to order a mistrial on this basis.

2. Expert Testimony of Michael Burrage

Next, Mask alleges that the court's failure to exclude the expert testimony of Michael Burrage, an attorney and former federal judge, warrants reversal of the bank's judgment against Mask. Mask argues that it is inherently prejudicial to have an attorney serve as an expert witness,[4] that Burrage lacked the sufficient qualifications to be considered an expert in banking, that Burrage improperly testified regarding certain hearsay statements, and finally that Burrage "usurped the role of the jury" by testifying to certain legal conclusions during trial. *Brief-in-Chief*, 14-15.

A trial court's ruling to admit or exclude evidence, including the admissibility of expert testimony, is reviewed for a clear abuse of discretion.

[4] Mask also takes issue with the fact that Burrage was referred to by Valliance's counsel as "judge" and the fact that Mask's counsel "had no choice but to extend the same title." Tr. (June 3, 2022), pg. 1578. We note that Mask's counsel did not object to calling the witness judge, so it is unclear why Mask believes he had no choice but to refer to the witness as such.

Christian v. Gray, 2003 OK 10, ¶ 42, 65 P.3d 591, 608. "An abuse of discretion occurs when a court bases its decision on an erroneous conclusion of law or where there is no rational basis in the evidence for the ruling." *Id.* ¶ 43 (citation omitted). Moreover, "[b]efore any claimed error concerning the admission or exclusion of evidence will be deemed reversible error, an affirmative showing of prejudicial error must be made." *Kahre v. Kahre*, 1995 OK 133, ¶ 45, 916 P.2d 1355, 1365 (citations omitted). Here, we find that Mask does not make an affirmative showing of prejudicial error by the court in allowing Burrage to testify; thus, his testimony was properly admitted by the court.

Burrage testified that he has been involved with the banking industry since 1982 when he bought into a failed bank. Tr. (June 3, 2022), 1579. Burrage also testified that over the years he has served in banks as a part-owner and director. *Id.* As a director, he was involved in the day-to-day operations such as lending, policy enforcement, personnel issues, and other regulatory matters. *Id.* After serving on the federal bench, Burrage testified that he went back to private practice where he now represents major banks. *Id.* A witness can be qualified to testify as an expert if they have specialized knowledge which will assist the trier of fact to understand the evidence. 12 O.S. § 2702. Here, Burrage testified that he had roughly forty-two years of experience in the banking industry and has sufficient knowledge about banking practices, procedures, standards, and regulations that a lay person would not be familiar with. Thus, Burrage's testimony was useful to the trier of fact and the court did not abuse its discretion

in allowing Burrage to testify as an expert, as he clearly had the requisite knowledge, skill, training, and expertise to be useful to the jury in this case.

While Mask alleges that Burrage's legal experience and expertise are inherently prejudicial, we disagree. In support of his argument, Mask cites *Specht v. Jensen*, 853 F.2d 805 (10th Cir. 1988), which found that "expert witness testimony from an attorney posed significant risk of prejudice and that the decision to admit such testimony was reversible error." However, the facts in *Specht* are much different than the present case. *Specht* concerned an action for damages based upon an allegedly invalid search of the plaintiffs' home. The plaintiffs sought to call an attorney, who would testify regarding a "hypothetical" of facts that were evidence and whether those facts gave rise to a search. We note that *Specht* is entirely different than the present case as the plaintiffs sought to call their attorney-expert so he could opine on a strictly legal question that should have been left entirely to the judge.[5] Burrage's testimony is different in that his opinions were based on his experience in the banking industry, not on his role as an attorney or former judge. That Burrage gained some of the

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[5] Specifically, the court held:

> [T]he expert in this case was improperly allowed to instruct the jury on how it should decide the case. The expert's testimony painstakingly developed over an entire day the conclusion that defendants violated plaintiffs' constitutional rights. He told the jury that warrantless searches are unlawful, that defendants committed a warrantless search on plaintiffs' property, and that the only applicable exception to the warrant requirement, search by consent, should not vindicate the defendants because no authorized person voluntarily consented to allow a search of the premises. He also stated that the acts of the private individual could be imputed to the accompanying police officer to constitute sufficient "state action" for a § 1983 claim.

Specht, 853 F.2d at 808.

experience that qualified him as a banking expert while working as an attorney and as a judge does not make him any less qualified.

Next, Mask alleges that the court committed reversible error by allowing Burrage to testify about hearsay evidence from a bank regulator, certain audits, regulations, and examinations that were not introduced as evidence by the bank. Section 2703 discusses the bases of opinion testimony by experts. It reads as follows:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

Id.

As stated in the statute, the facts and data on which an expert bases his opinion need not be admissible if they are reasonably relied upon by the expert. Here, counsel for Mask specifically objected to testimony regarding Burrage's conversations with a bank regulator who informed Burrage that the bank did not violate any standards of care and that various bank audits had been performed. Tr. (June 3, 2022), 1582. Burrage's testimony on this matter is admissible as he relied on the regulator's statements in forming opinions and inferences regarding the bank's conduct in this case. The court heard lengthy argument from all parties regarding the probative value of the testimony and

ultimately determined that it outweighed any prejudice. And, neither the record nor Mask's brief on appeal addresses how the statements' probative value was outweighed by their prejudicial effect. Therefore, we find that the court did not abuse its discretion in allowing Burrage to testify regarding information he learned from the bank regulator.

Finally, Mask argues that Burrage made "numerous inappropriate and highly prejudicial legal conclusions claiming the Bank had no breaches, no violations, and no fraud." *Brief-in-chief,* 15. First, Mask alleges that Burrage improperly testified about fraud. For example, counsel for the bank asked Burrage, "When you looked at this entire matter surrounding Dr. Mask's—Dr. Mask's loan from Valliance and the issues around it, did you see anything that was fraud on behalf of Valliance Bank?" Tr. (June 3, 2022), 1598. Burrage responded, "No." *Id.* at 1598. At the same time, counsel for Mask lodged an objection, which the court sustained. *Id.* By sustaining the objection, it is clear that the court agreed that the testimony was improper, thus, on appeal, it is unclear how a sustained objection agreeing with Mask's argument constitutes reversible error. Counsel for Mask could have asked the court to admonish the jury to disregard his answer but did not. Even absent admonishment, however, because the court agreed with counsel that Burrage opining on fraud was improper, we decline to find that the testimony could be so prejudicial as to constitute reversible error. *Kahre v. Kahre,* 1995 OK 133, ¶ 45, 916 P.2d 1355, 1365.

Burrage also testified that the bank did not breach its standard of care and that Roy Oliver also did not breach the standard of care in his dealings with loans. For example, Burrage testified that Oliver did not breach the standard of care by sending an email for "aggregate exposure" loan approval relating to Mask's loan. *Id.* at 1590. Mask characterizes this email as Oliver approving Mask's individual loan with Valliance Bank, but Burrage, along with other witnesses, explained that there are integral differences between aggregate exposure and individual loans.[6]

Regarding the testimony elicited from Burrage about the bank's violation of the standard of care, the following exchange occurred between counsel for the bank and Burrage:

> Q: In your experience, did Valliance, by—did they fully disclose Dr. Mask's obligations under the note, the involvement of directors under the note, and the fact that it doesn't matter how this investment that he wanted to make pans out, that he would owe the note?
> A: That is all directly from the documents that he signed.
> Q: And that applies with standard of care in banking?
> A: It does.
> Q: No breaches?
> A: I did not find any breaches.

Id. at 1597.

Oklahoma courts have held that while § 704(a) of the federal rules of evidence has long been modified to allow an expert to testify as to "ultimate

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[6] Burrage testified that "individual loan approval is were [sic] we're looking at an individual loan with regard to creditworthiness, assets, liabilities, loan repay ...." *Id.* at 1590. Lexie Garrison also explained that "aggregate exposure for us means that there is a group of loans that are related in one way, shape or form. And we add those numbers together. And that can result in a higher level of exposure for the bank than say if you and I just had a car note." Tr. (May 31, 2022), 795.

issues," experts "may not testify to the legal implications of conduct." *Le v. Total Quality Logistics, LLC*, 2018 OK CIV APP 71, ¶ 46, 431 P.3d 366, 379 (citing *Montgomery v. Aetna Cas & Sur. Co.*, 898 F.2d 1537, 1541 (11th Cir. 1990)). Here, it does not appear that Burrage is testifying to either an ultimate issue or a legal conclusion.

In *Le*, this Court held that the expert's report contained impermissible legal conclusions as it "followed a format in which established case facts are listed, and [the expert] then opines as to legal consequences of those facts in a manner that requires no expertise beyond that of a judge or jury looking at the same facts." 2018 OK CIV APP 71, ¶ 46. In the present case, Burrage does not appear to opine on any legal conclusions. By stating that the bank followed the requisite standard of care, he is testifying about knowledge outside of what a lay person would know and he is opining that the bank, based on his review, followed procedure. Notably, negligence was also not an issue tried to the jury; rather, only the fraud, conspiracy, Oklahoma Securities Act and Oklahoma Consumer Protection Act claims were at issue during trial. Burrage did not tell the jury that Oliver did not violate the Oklahoma Securities Act, or that the bank did not violate certain banking regulations; rather, he rendered an opinion on whether Oliver and the bank breached its own procedure and acted in accordance with regular banking practice. Therefore, we find that Burrage's testimony does not amount to the level of impropriety discussed by this Court in *Le*.

3. Agency Instruction

Next, Mask alleges that the court erred in refusing to give a jury instruction on agency regarding the actions Oliver and Nelson took on behalf of the bank. Specifically, Mask contends that an agency instruction would have altered the jury's analysis of the bank's liability in this case. An appellate court reviews alleged errors in instructions for whether a probability exists that jurors were misled and reached a different conclusion than they would have reached but for the questioned instructions. *Watson v. BNSF Ry. Co.*, 2024 OK 74, ¶ 11, ___ P.3d ___. Upon review, we find it is not probable that jurors were misled or would have reached a different conclusion had they been given the agency instruction.

Under this proposition of error, Mask generally states that there was significant evidence introduced to support an instruction on the bank's liability on an agency theory via actions of Oliver. *Brief-in-chief*, 17. In his reply brief, he asserts that the "countless emails, memorandum, and documents," coupled with the "plan and scheme to effectuate with the merger" demonstrate a need for an agency instruction as it relates to Oliver and the bank. *Reply Brief*, 5. However, Mask makes no citation to the record to show where such significant evidence, countless emails, memorandum, and documents occur.[7] Mask does, however, cite to the record regarding argument made by the bank that a director, as a

[7] Okla.Sup.Ct.R. 1.11(e)(1) provides that the brief of the moving party must contain a summary of the record that sets forth "facts and documents upon which the party relies" and that such facts "must be supported by citation to the record where such facts occur." Further, Oklahoma courts have held that consistent with rule 1.11(e)(1), "we are not required to search the multiple volumes of this record to find where those 'facts' were demonstrated in the evidence." *Patzkowsky v. State ex rel. Oklahoma Bd. of Agric.*, 2009 OK CIV APP 18, ¶ 3, 217 P.3d 146, 147.

matter of law, is not an agent of a corporation. Mask argues that such a statement of the law is erroneous because Nelson and Oliver were not mere directors. Mask then cites to different federal regulations and banking laws that, he argues, show that Nelson and Oliver are "executive officers of the bank as a matter of law" and could, therefore, be found to be agents acting on behalf of the bank. *Id.* at 7-8

We note first that Oliver and Nelson had different roles at the bank and were involved with bank loans and investment in different ways. Thus, while Mask's argument was directed toward both Nelson and Oliver, because Nelson is no longer a part of this case, we will only examine Oliver's purported agency role for the bank.

In response to this agency argument on appeal, Valliance cites to ample evidence from trial that does not support Mask's agency theory. The bank points out that Mask himself testified that he never talked to or otherwise communicated with Oliver before deciding to invest in NewCo and that Oliver never misled him in either the loan agreement or the NewCo investment. Tr. (May 26, 2022), 442. Oliver also testified that he had never talked to Mask. Tr. (June 2, 2022), 1419. If Oliver was not involved in procuring the loan for Mask, it is difficult to imagine a scenario in which a fact finder could conclude that Oliver was acting as an agent of the bank.

Further, neither Mask's nor Oliver's testimony at trial suggests that Oliver was acting as an agent for Valliance in connection with Mask's investment. Lexie Garrison testified that Oliver was not a part of the loan approval process for

Mask's individual loan. Tr. (May 31, 2022), 786. Matthew Clouse, president of the Norman Valliance bank, testified to the same. Tr. (May 26, 2022), 342. Additionally, as discussed in section II-A regarding Mask's motion to vacate, the jury's finding that Oliver violated the Oklahoma Securities Act was clearly limited to his actions in procuring the *investment*, not the loan. Oliver was not involved in pitching, presenting, or discussing the loan with Mask. The bank loaned Mask money and the record reflects that Oliver was not part of that decision to loan the money in any way.

Oliver was the chairman of the board of directors at the bank and a shareholder. Tr. (June 2, 2022), 1426. Generally, an agent is one who is authorized to act for another. *U.S. Bank, N.A. ex rel. Credit Suisse First Boston Heat 2005-4 v. Alexander*, 2012 OK 43, n.12, 280 P.3d 936, 942. An individual may have apparent authority to act as another's agent when there is: "(1) conduct of the principal which would reasonably lead the third party to believe that the agent was authorized to act on the principal's behalf; (2) reliance thereon by the third party; and (3) change of position by the third party to his detriment." *See Sparks Bros. Drilling Co. v. Texas Moran Exploration Co.*, 1991 OK 129, ¶ 17, 829 P.2d 951, 954. On these facts, Mask, the third party, could not have believed that Oliver was authorized to act on behalf of the bank, as he testified, he did not speak to Oliver when he was procuring his loan with the bank. Additionally, Mask could not have relied on any information from Oliver regarding the loan, as the record reflects that Oliver gave Mask no information regarding the Valliance loan. Further, Mask's own testimony was that he was not misled by

Oliver. And finally, Mask could not have changed his position, *i.e.*, decided to go forward with the loan, based on Oliver's actions because they did not interact during the time in which Mask was inquiring about the loan, obtaining the loan, or had started paying on the loan. Thus, we find that there is no evidence to support an agency theory in this case and that a probability did not exist that jurors were misled by the court's failure to render the agency instruction.

4. Prospective Juror

Mask also contends that the trial court's refusal to strike a prospective juror due to the juror's "personal relationship" with the bank's law firm was prejudicial error. *Brief-in-chief*, 19. Mask argues that he was "forced to waste" a "peremptory challenge on an objectionable juror" who should have been disqualified by the trial court. *Id.*

During voir dire, the court asked the prospective jurors if any of them knew counsel for the bank, Mr. Deligans. Tr. (May 25, 2022), 16. One prospective juror, Ms. Parsons, responded that she made cakes for his office. *Id.* She added that she had never met Mr. Deligans personally, and that her fiancé's aunt works for his office. *Id.* at 17. The court asked if she would be biased in any way because she made cakes for their office and Ms. Parsons responded in the negative. *Id.* She later added that the law firm had also paid her husband to remove snow a few times. *Id.* at 61-63. She also re-emphasized that the fact that her aunt worked for the firm would not have bearing on her ability to be fair. *Id.* 61-62, 64. Despite Mask's argument that he was forced to use a peremptory challenge on Ms. Parsons, the record reflects that Mask's counsel did not use a peremptory

challenge on Ms. Parsons. However, counsel made a for-cause challenge that was denied by the court, and Mask's counsel used his peremptory challenges on other prospective jurors. *Id.* at 224-230.

A trial court's ruling on a challenge of a juror for cause will not be disturbed unless there has been an abuse of discretion shown. *McAlester Urban Renewal Auth. v. Lorince*, 1973 OK 148, ¶ 9, 519 P.2d 1346, 1348. Ms. Parsons repeatedly stated that she could be fair and would remain unbiased towards the parties in the case. She never indicated that her occasionally providing cakes to the firm or the fact that her aunt and fiancé had also done work for the firm would impact her decision-making in any way. She is not employed by the firm, she indicated that she had only set foot in the building one time to pick up a check, and she stated that she otherwise knew nothing about the firm. *Id.* at 61-64. Neither the snow removal nor the cakes made up a significant portion of the couple's income. *Id.* For these reasons, we find it clear that the court did not abuse its discretion denying Mask's for-cause challenge as to Ms. Parsons.

5. Valliance Bank's Demurrer

Mask also contends that the court improperly granted the bank's demurrer regarding Mask's breach of contract claim via breach of the implied duty of good faith and fair dealing and Mask's Oklahoma Consumer Protection Act Claim. In support of this argument, Mask states that the record is "replete of evidence that a jury could find the Bank acted in bad faith and breached this duty." However, Mask cites to nothing in the record to support his claim. Further, Mask also does

not make any legal argument regarding this issue and cites to no authority of any kind.

Oklahoma courts have held that consistent with Rule 1.11(e)(1), "we are not required to search the multiple volumes of this record to find where those 'facts' were demonstrated in the evidence." *Patzkowsky v. State ex rel. Oklahoma Bd. of Agric.*, 2009 OK CIV APP 18, ¶ 3, 217 P.3d 146, 147 (citing *Peters v. Wallace,* 1927 OK 279, 260 P. 42). Further, assignments of error presented by counsel in the brief, unsupported by convincing authority, will not be considered on appeal when it is not apparent without further research that they are well-taken. *Paris Bank of Texas v. Custer,* 1984 OK 5, ¶ 31, 681 P.2d 71, 78. "The court has on many occasions said that judicial review will not be given to issues that receive only superficial treatment in an appellate brief or to assignments of error that lack a reasoned argument or supporting authority." *Cox Oklahoma Telecom, LLC, v. State ex rel. Oklahoma Corp. Comm'n,* 2007 OK 55, ¶ 33, 164 P.3d 150, 162. Thus, we find that this Court is under no duty to address this argument in the absence of citation to the record and legal authority as well as superficial treatment of this issue in the brief.

C. Oliver's Demurrer

Next, Mask alleges that the trial court wrongly granted Oliver's demurrer to the evidence on Mask's fraud claim. When reviewing a court's grant of a demurrer to the evidence, we must review the record "in a light most favorable to the plaintiff but will disturb the trial court's sustention of the directed verdict only if there is competent evidence to support the material elements of the

plaintiff's cause of action." *Gillham v. Lake Country Raceway*, 2001 OK 41, ¶ 7, 24 P.3d 858, 860. The Court's standard of review of a trial court's grant of a demurrer or directed verdict is *de novo. Computer Pub's, Inc. v. Welton*, 2002 OK 50, ¶ 6, 49 P.3d 732. Upon review, we find that the court properly granted Oliver's demurrer to the evidence as Mask failed to present competent evidence as to the material elements of fraud.

The elements of actionable fraud are: (1) a material misrepresentation; (2) known to be false at the time made; (3) made with specific intent that a party would rely on it; and (4) reliance and resulting damage. *Bowman v. Presley,* 2009 OK 48, ¶ 13, 212 P.3d 1210, 1218. Mask himself testified that he never spoke to Oliver before making his investment in NewCo. Tr. (May 26, 2023), 441. Mask was then asked by counsel for the bank, "Mr. Oliver never misled you about your loan in foundation, did he?" *Id.* at 442. Mask responded, "No, sir." Counsel for the bank then asked, "He never misled you about your loan from Valliance, did he?" *Id.* Mask again responded, "No sir." *Id.* Thus, by Mask's own admission, he was not misled by Oliver and did not testify to any material representation made by Oliver to him regarding either the investment or the bank loan. If there was no material representation made by Oliver, indeed, there was no representation at all, it follows that Mask could not have relied on such a misrepresentation and then subsequently been damaged by it. Therefore, we will not disturb the court's decision to grant Oliver's demurrer as Mask failed to present a prima facie case for fraud.

D. Damages Under the Oklahoma Securities Act

Mask next alleges that the court wrongly denied the portion of his motion to vacate which asked the court to "correct" the judgment to reflect the "proper" measure of damages for his successful Oklahoma Securities Act claim against Oliver. *Brief-in-chief*, 23. Mask contends that although the jury found that Oliver had violated the Oklahoma Securities Act, it did not assess the required amount of damages per statute. The jury awarded one dollar in what we presume to have been nominal damages.[8] Mask claims that the only award allowed by law under the instructions was $427,601. He asked the trial court, and now asks us, to therefore modify the jury's award. For the reasons explained below, we find that the jury's award was permitted under the instructions given, instructions that Mask himself specifically requested. Accordingly, we uphold the jury's verdict and affirm the trial court's denial of Mask's request to modify the jury's verdict.

We agree with Oliver that Mask's own requested jury instructions specifically allowed for an award of nominal damages. One path the jury could have traveled to arrive at a one-dollar award starts with Instruction No. 41, which Mask tendered and to which Oliver objected. That instruction mirrors 71 O.S. § 1-501 and provides that "[a] person engages in a practice which is declared to be unlawful under the Oklahoma Uniform Securities Act when, in connection with the offer, sale, or purchase of a security, directly or indirectly, he ...

[8] While we can never truly know how the jury arrived at one dollar in damages, it is clear that any calculation that would have resulted in one dollar in actual damages would have been entirely unsupported by the evidence.

[e]ngages in an act, practice, or course of business that operates or would operate as a fraud ***or deceit*** upon another person." ROA 3850 (citing 71 O.S. § 1-501) (emphasis added). From there, the jury might have noted Instruction No. 33, entitled Actual Damages for ***Deceit***, ROA 3842 (citing OUJI 18.12) (emphasis added), which states, "[o]ne who willfully ***deceives*** another, with intent to induce him to alter his position to his injury or risk, is liable for any injury which he thereby suffers." *Id.* (emphasis added). Finally, Instruction No. 40, entitled Actual Damages, which Mask also tendered over Oliver's objection, specifically allows for nominal damages, stating: "If you decide for Dr. Mask on his claims for ***deceit*** ... then you must assess his damages, which may be actual ***or nominal***" and which further defines nominal damages as "the sum of one dollar." ROA 3849 (emphasis supplied).

Thus, it is clear that the instructions provided a permissible path for the jury to decide in favor of Mask on his claim against Oliver for a securities violation but award only one dollar in nominal damages. Instructions 40 and 41 were *specifically requested by Mask and objected to by Oliver.*[9] Thus, even if these instructions were somehow erroneous under the circumstances, an issue we

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[9] The record reflects that Oliver objected to the court's inclusion of Instructions 39, 40, and 41, in large part, somewhat ironically, for precisely the concerns that Mask now raises. *See* Tr. (June 8, 2022), 1929-30 ("Plaintiff and third-party defendants object to Instruction 39, emotional distress for pain and anguish, defined in Instruction 40, actual damages, emotional distress.... [T]his instruction misstates the law, as it indicates emotional damages can be awarded for violations of the Oklahoma Securities Act.... Plaintiff and third-party defendants object to Instruction Number 41, Oklahoma Securities Act, as it misstates the law. Oklahoma Statute Title 71 O.S. § 1-501 does not create a private right of action, and *inclusion of this instruction creates a risk that the jury will erroneously base liability under ... 71 O.S. Section 1-501 and a risk that the express limitations of 71 O.S. Section 1-509, the civil remedy section of the Oklahoma Securities Act will be circumvented.*" (emphasis added)).

need not decide here, Mask cannot now be heard to complain that the instructions *he insisted on* resulted in a jury verdict that he does not favor. *Union Texas Petroleum v. Corporation Comm'n of the State of Oklahoma,* 1981 OK 86, ¶ 36, 651 P.2d 652 ("Parties to an action on appeal are not permitted to secure a reversal of a judgment upon error which they have invited and acquiesced in, or to assume an inconsistent position from that taken in the trial court."). *See also Doyle v. Kelly,* 1990 OK 119, n.1, 801 P.2d 717, 718 (vacating the Court of Civil Appeals opinion that reversed the district court on the basis of an error in the jury instructions because "the Court of Appeals lacked jurisdiction" to review the instruction because "[t]he appellant could not have objected" to the specific instruction because "the record reveals that [the appellant] offered the very instruction which was accepted and given by the trial court ..."); *Vanderpool v. Loftness,* 2012 OK CIV APP 115, ¶ 33, 300 P.3d 953, 962, as modified on denial of reh'g (Aug. 30, 2012) (holding that the tendering of an instruction invokes the doctrine of invited error).

Mask nevertheless argues on appeal that because another permissible path to different amount of damages, via Instruction No. 49, was offered to the jury, the path it apparently chose was impermissible. Instruction No. 49 provided:

> If you find in favor of Dr. Mask on his claim for violations of the Oklahoma Securities Act you ***may*** asses [sic] damages in the following amount: The consideration paid for the security, and interest at the legal rate of interest per year from the date of purchase, less the amount of any income received on the security.

ROA 3858 (emphasis added). But, as our emphasis may foretell, Mask's argument is fully unraveled by that instruction's use of the word "may." The phrasing invites the jury to seek other avenues to calculate damages, an invitation the jury apparently accepted. We reject the argument that, under the instructions that Mask specifically sought, the only possible method under which the jury might calculate damages was under Instruction No. 49.

Finally, we note Mask contends that *Lambrecht v. Bartlett*, 1982 OK 158, 656 P.2d 269, is decisive here. In *Lambrecht*, plaintiffs appealed on the basis that they were awarded inadequate damages for a violation of the Oklahoma Securities Act and that the court erred in denying their motions for directed verdict and judgment notwithstanding the verdict. *Id.* In denying the motion for directed verdict, the trial court ruled that there was sufficient evidence which, if believed by the jury, would result in an exemption of the registration of the securities, therefore, allowing the jury to find that the Oklahoma Securities Act was not violated. *Id.* ¶ 20. The Supreme Court disagreed, holding that the evidence at trial could only lead to one conclusion: that the appellee violated the Oklahoma Securities Act. *Id.* ¶ 21. Thus, *Lambrecht* differs from the present case as the issue here is that Mask submitted multiple Oklahoma Securities Act instructions to the jury—a question not presented in *Lambrecht*—not that the jury failed to determine that Mask violated the Oklahoma Securities Act generally. We do not find that Mask's argument as to *Lambrecht*, or any other argument on this issue, overcomes the jury's verdict, which was permissible given the court's instructions, which Mask himself insisted upon.

E. Prejudgment Interest

Finally, Mask alleges that the court erred in awarding Valliance Bank prejudgment interest reflected in the court's journal entry of judgment, after the bank sought, but did not receive, the same award from the jury. We agree with Mask and reverse the trial court's award of prejudgment interest.

In Oklahoma, a prevailing plaintiff may recover prejudgment interest under certain conditions:

> Any person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor from paying the debt.

23 O.S. § 6. The issue, then, is whether the contract damages were certain or capable of being made certain before trial.

The bank presented evidence at trial regarding how much it was owed by Mask after breaching their agreement, including interest. Specifically, during closing argument, the bank's counsel made the following argument and pledge to the jury:

> Now, I told you that I was going to ask for judgment on the note....
>
> Now, the amount is going to be left up to you all. Because I told you I was going to ask for your judgment. I wasn't going to impose mine on you. But I'm going to give you some guidance. What the man owed was [$]422,000 and the principal. [sic] What the man agreed to pay if he defaulted in the event he broke his promise, the man agreed to pay 18 percent on top of that. That number is $812,552. That is the amount he agreed to pay if he chose to breach the contract. That's a decision up to you. $812,552. If you feel like he should pay what he owes, that's the amount.

> If you decide he should pay what this bank could have loaned out the [$]422,000 that was remaining to somebody else at 5 percent interest, if you decide that's what you would rather do, and let him slide on what he's put us all through that number would be $558,542. That's a 5 percent interest on his $422,000 note. That's your decision to put in that blank.
>
> Valliance Bank has authorized me to say that they will accept whatever route the jury chooses to go in that regard.

Tr. (June 8, 2022) 1842-43. Despite being given the opportunity to award the full contractual interest, no interest, or something in between, the jury awarded Valliance Bank a general verdict of $340,918. Post-verdict, Valliance then claimed a right to prejudgment interest pursuant to statute. We hold that Valliance was limited to its plea before the jury, and the jury's subsequent award.

This Court, in *Bird Const. Co., Inc. v. Oklahoma City Hous. Auth.*, 2005 OK CIV APP 12, ¶ 29, 110 P.3d 560, 568, cited a multitude of cases which stand for the proposition that "'if the fact-finder must weigh conflicting evidence in order to determine the precise amount of damages due to the plaintiff, then a court cannot grant prejudgment interest.'" *Id.* (quoting *Strickland Tower Maint., Inc. v. AT & T Commc'ns, Inc.*, 128 F.3d 1422, 1429 (10th Cir. 1997)). Thus, the Court found in *Bird* that it was apparent the jury weighed the conflicting evidence on damages to reach its verdict on Bird's contract claim; therefore, the award of prejudgment interest was in error. Similarly, the jury in this case clearly weighed evidence on the damages owed to the bank on its breach of contract claim. At the explicit invitation of the bank's counsel, this weighing included interest.

Additionally, Mask contends that Valliance's request for prejudgment interest required the court to assume that the amount awarded by the jury did

not already include such interest. Mask cites *Mayor v. Weaver*, 1952 OK 423, 250 P.2d 844, for the contention that a trial court may only add interest to a verdict when it is "clearly apparent that the prevailing party is entitled to interest upon the amount found in the verdict to be due, and it is unquestionably clear that the jury allowed no interest." The *Mayor* Court cites *Blackwell, E.S.W. Ry. Co. et al. v. Bebout*, 1907 OK 72, 91 P. 877, 878, which held:

> The judgment of the court must follow the verdict, and where the verdict is general and for a sum in gross, and the question of interest was not reserved by the court, and there is nothing in the record to indicate that the jury omitted interest, it will be presumed that it is embraced in the amount of their finding, and the court cannot add interest to the amount found by the verdict of the jury.

Id. ¶ 7 (emphasis supplied).

Here, the record reflects that the court did not reserve the issue of interest, and Valliance's counsel specifically requested that the jury award contractual prejudgment interest at eighteen percent as part of its verdict. The jury awarded $340,918 on the breach of contract claim, and it is impossible to go behind that general verdict and calculate how much interest, if any, the jury awarded. Thus, we agree with Mask that the court erred in awarding statutory prejudgment interest post-verdict and reverse the portion of the court's judgment awarding prejudgment interest to Valliance.

CONCLUSION

Upon careful review of the record in this case as well as the arguments by all parties, we find that the court did not commit reversible procedural errors during trial. We also find that the court properly denied Mask's motion to vacate on the basis that the jury's verdicts were inconsistent or contrary to law. Further,

we find that the jury properly assessed damages according to the instructions it was given by the court. However, the court improperly awarded prejudgment interest, and we thereby reverse that portion of the court's judgment awarding such interest.

AFFIRMED IN PART AND REVERSED IN PART.

WISEMAN, P.J., and FISCHER, J., concur.

March 17, 2025