IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

WELLS FARGO BANK, N.A.,

Appellant/Cross-Appellee,

v. Case No. 5D20-655

ELECTRONIC FUNDS TRANSFER CORPORATION D/B/A THE EFT NETWORK, INC., AND TJEM, INC. D/B/A CHECKCARE SYSTEMS,

Appellees/Cross-Appellants.

_________________________________/

Opinion filed August 13, 2021

Appeal from the Circuit Court for Seminole County,
Susan Stacy, Judge.

R. Hugh Lumpkin and Noah S. Goldberg, of Reed Smith LLP, Miami, and Ronald D. Edwards, Jr. and Melody B. Lynch, of Lowndes, Drosdick, Doster, Kantor & Reed, P.A., Orlando, for Appellant/Cross-Appellee.

Kasey J. Curtis, of Reed Smith LLP, Los Angeles, California, for Appellant/Cross-Appellee.

Robert J. Stovash and Dana S. Lidfeldt, of Stovash, Case & Tingley, P.A., Orlando, for Appellee/Cross-Appellant, Electronic Funds Transfer Corporation d/b/a The EFT Network, Inc.

No Appearance for Appellee/Cross-Appellant TJEM, Inc. d/b/a Checkcare Systems.

EVANDER, J.

Wells Fargo Bank, N.A. ("Wells Fargo"), the defendant below, appeals from a final judgment awarding the plaintiff below, Electronic Funds Transfer Corporation d/b/a The EFT Network, Inc. ("EFT"), approximately $2 million dollars in compensatory damages and $5 million dollars in punitive damages. The judgment was based on a jury verdict finding that Cristos Cucci, a "relationship manager" for Wells Fargo, negligently misrepresented to EFT that the account of a Wells Fargo customer, TJEM, Inc. d/b/a Checkcare Systems ("Checkcare"), was in good standing. In fact, Wells Fargo had decided to terminate its relationship with Checkcare because Checkcare's account activity suggested that it was engaging in high risk and/or fraudulent business practices. Cucci's misrepresentation induced EFT to continue its ongoing business relationship with Checkcare, ultimately resulting in EFT incurring substantial losses.

On appeal, Wells Fargo raises several issues. EFT raises a single issue on cross-appeal. We conclude that the trial court erred in denying Wells Fargo's motion for judgment notwithstanding the verdict on EFT's punitive damage claim, but we otherwise affirm.

Checkcare was a company that provided collection services for its customers' returned checks. In exchange for guaranteeing its clients' payments on the face value of a check at the point of sale, Checkcare handled any returned checks by drafting its own remotely-created checks, known in banking as RCCs. An RCC is a check that is remotely created by the payee or the payee's service provider. It is not created by the payor or the payor's bank and does not bear the payor's signature. Checkcare would deposit the RCCs in its Wells Fargo account, and if they were returned, it would attempt to collect the check amount, plus large penalties, from the payor. Because RCCs are not signed, they are subject to a high risk of abuse and fraud by creating and depositing an RCC against a customer's account without the customer's approval.

For years, a daily circular process of moving funds between various entities occurred. First, Checkcare would create and then deposit RCCs into its bank account with Wells Fargo. To streamline the return of any checks that had deposited, Checkcare entered into a processing agreement with

EFT. Pursuant to that agreement, Checkcare placed an endorsement stamp on the back of its deposited checks directing Wells Fargo to forward any returned checks to EFT's bank, First Premier Bank ("First Premier"). First Premier would credit Wells Fargo for the total amount of the forwarded checks and then charge EFT the same amount. EFT generated reports for Checkcare analyzing all returned checks that First Premier received from Wells Fargo. Finally, EFT would make a daily "ACH debit," or electronic transfer from Checkcare's Wells Fargo account, to reimburse First Premier for the value of the returned checks forwarded to First Premier.

Checkcare was a large revenue customer in Wells Fargo's Orlando market. Each day, Checkcare deposited two hundred or more checks totaling in excess of $100,000. Its account generated approximately $180,000 per year in revenue for Wells Fargo from fees for deposits, returned checks, ACH transactions, and other services.

The Checkcare account was managed by Wells Fargo employee Cristos Cucci. Cucci was part of a team of eight relationship managers and four business associates that managed Wells Fargo's account relationships with local small businesses in the Orlando area. Cucci and the other seven relationship managers on his team had the title of vice president. Cucci's team reported to a team manager, Dan Hilken ("Hilken"), whose title was senior vice president. Hilken relied on Cucci to manage the Checkcare account relationship. Checkcare was the largest fee generator in Cucci's portfolio. Cucci had significant, but certainly not unlimited, authority to make decisions regarding accounts in his portfolio.

By the end of July 2014, Wells Fargo's Financial Crimes/Risk Management Department ("Financial Crimes Department") reached the conclusion that Wells Fargo should terminate its relationship with Checkcare.[1] It is unnecessary to detail the nature of Checkcare's account activity that caused the Financial Crimes Department to reach that conclusion. It is sufficient to state that the evidence presented at trial amply supported the appropriateness of the decision.

On August 5, 2014, Cucci was notified of Wells Fargo's decision to exit its relationship with Checkcare. Although Cucci was requested to notify Checkcare to move its account from Wells Fargo within thirty days, Wells Fargo policy permitted the "local market" some discretion in determining the amount of time needed to exit a relationship. Cucci and Hilken decided to give Checkcare sixty days to make other banking arrangements.

[1] During this same time period, Wells Fargo's Regional Operating Credit Services Department and Regional Bank Compliance and Operational Risk Department also reached the conclusion that Wells Fargo should terminate its relationship with Checkcare.

Consequently, on August 15, Cucci notified Checkcare that it would be closing its account on October 15.

On October 1, prior to the scheduled closing of Checkcare's account, Wells Fargo froze Checkcare's account and declined an ACH debit of $448,018.93 to reimburse EFT for returned checks forwarded to First Premier. EFT's principal, Steve Davis, promptly contacted Checkcare's owner, Ernest McManaway. McManaway advised Davis that the account freeze was a mistake on Wells Fargo's part. Davis insisted that McManaway provide a letter from Wells Fargo confirming McManaway's assertion. On or about October 3, Cucci contacted the Financial Crimes Department and requested a removal of the "hard hold," or freeze, on Checkcare's account. However, removal of the hard hold did not occur until requested by Wells Fargo's Business Banking Regional Service Manager—an individual who was many levels higher than Cucci in Wells Fargo's organizational hierarchy.

On October 6, at McManaway's request, Cucci emailed McManaway a letter that provided:

> Dear Sir,
>
> We are writing concerning an ACH, debit trace # [redacted] for $448,018.93 that was refused on 10/01/2014 due to the account being reported as frozen.

> This was an error involving our back office and the debit should not have been refused. Be assured that our customer's account is in good standing and we will honor any replacement ACH from 1st Premier Bank.
>
> Thank you for your consideration and we apologize for any inconvenience that this has caused.
>
> Sincerely,
>
> Chris Cucci

McManaway forwarded that letter to Davis. Thereafter, Davis called Cucci and asked if it was safe for EFT to continue its relationship with Checkcare. Cucci responded in the affirmative and reiterated that the freeze on Checkcare's account was Wells Fargo's mistake. Cucci did not advise Davis that Wells Fargo was terminating its relationship with Checkcare in just a few days, on October 15, because of concerns regarding Checkcare's business practices and its account activity.

Subsequently, McManaway asked Cucci to extend the October 15 account closure date. With Hilken's approval, Checkcare's account closure date was extended until October 31, 2014.

After closing Checkcare's account on October 31, Wells Fargo continued forwarding Checkcare's returned checks to First Premier until November 10, but declined all ACH debits for reimbursement. As a result, EFT processed 1,863 of Checkcare's returned checks, totaling $2,551,957.53, for which it was not reimbursed.

EFT subsequently brought suit against Checkcare, McManaway, and Wells Fargo. It obtained summary judgment on its fraud counts against McManaway and the now defunct Checkcare. EFT's action against Wells Fargo proceeded to trial on two counts—negligent misrepresentation and fraudulent misrepresentation. EFT's theory on these claims was that Cucci's written and verbal representations to EFT misrepresented the status of Checkcare's account with Wells Fargo, which induced EFT to continue doing business with Checkcare and resulted in a $2,377,957.53 loss to EFT.[2] The jury found for EFT on the negligent misrepresentation count, but not the fraudulent misrepresentation count. The jury further found that EFT suffered $2,377,957.53 of compensatory damages, but that EFT was twenty percent comparatively negligent.[3]

EFT also asserted a claim for punitive damages against Wells Fargo based on both a direct liability theory and a vicarious liability theory. At the

[2] EFT held $175,000 in reserve from Checkcare, so that amount was deducted from $2,551,957.53 to arrive at the amount of compensatory damages requested by EFT.

[3] The trial court subsequently reduced the $2,377,957.33 amount to $1,902,366.02 in accordance with the jury's determination that EFT was twenty percent comparatively negligent.

conclusion of the evidentiary part of the trial, Wells Fargo moved for a directed verdict on EFT's punitive damage claim, but the trial court allowed the claim to go to the jury under both theories. The jury found that Wells Fargo was directly liable for punitive damages because: Cucci was "an officer, director, managing agent, or other person whose conduct may warrant punitive damages without proof of a superior's fault"; Cucci was personally guilty of intentional misconduct or gross negligence which was a substantial cause of loss or damage to EFT; and $5 million was the appropriate amount of punitive damages to be assessed. Importantly, the jury also found that Wells Fargo was not vicariously liable for punitive damages because it did not knowingly participate in, condone, ratify, or consent to Cucci's intentional misconduct or gross negligence.

In its post-trial motion for judgment notwithstanding the verdict, Wells Fargo argued, inter alia, that there was no evidence upon which the jury could find that Cucci's conduct warranted direct liability for punitive damages against Wells Fargo without proof of a superior's fault. We agree.

We review an order on a motion for judgment notwithstanding the verdict de novo, viewing the evidence and inferences of fact in the light most favorable to the nonmoving party, in this case EFT. *Kopel v. Kopel*, 229 So. 3d 812, 819 (Fla. 2017).

In Florida, there are two methods for establishing a claim for punitive damages against a corporation: "(1) vicarious liability based on the willful and malicious actions of an employee with a finding of independent negligent conduct by the corporation; or (2) direct liability based on the willful and malicious actions of managing agents of the corporation." *Schropp v. Crown Eurocars, Inc.*, 654 So. 2d 1158, 1159 (Fla. 1995). Because the jury found for Wells Fargo on the vicarious liability theory, we confine our analysis to the direct liability theory.

In order to prevail on a direct liability theory, EFT was required to establish that Cucci was a "managing agent" or held a policy-making position at Wells Fargo. *See id*. at 1161. A "managing agent" is an individual such as a president, primary owner, or other individual who holds "a position with the corporation which might result in his acts being deemed the acts of the corporation." *Fla. Power & Light Co. v. Dominguez*, 295 So. 3d 1202, 1205 (Fla. 2d DCA 2019) (quoting *Taylor v. Gunter Trucking Co.*, 520 So. 2d 624, 625 (Fla. 1st DCA 1988)); *see also Kent Ins. Co. v. Schroeder*, 469 So. 2d 209, 210 (Fla. 5th DCA 1985) ("[B]y virtue of his position as corporate president of Gags and the manager of the bar owned by Gags, the acts of McElfish are indistinguishable from the acts of the corporation itself."); Ted C. Craig & Christopher N. Johnson, *When Is A Manager A Managing Agent?*, Fla. B.J., January 2001, at 62 ("[T]he body of [Florida] decisions on this issue consistently requires employees to exercise high-level, policymaking authority before they can expose their corporate employers to direct liability for punitive damages.").

Thus, many prior cases have established that a managing agent is more than a mid-level employee who has some, but limited, managerial authority. *See Dominguez*, 295 So. 3d at 1206 (holding that regional supervisor in FPL's vegetation management program, who had "significant managerial power" over regional program but did not make policy decisions, was not managing agent for purpose of establishing direct corporate liability for punitive damages); *Ryder Truck Rental, Inc. v. Partington*, 710 So. 2d 575, 576 (Fla. 4th DCA 1998) ("[A] job foreman is not, as required for imposing direct liability, a managing agent of the company."); *Cap. Bank v. MVB, Inc.*, 644 So. 2d 515, 521 (Fla. 3d DCA 1994) (holding bank vice president was not managing agent of bank for purposes of punitive damages because he was one of several vice presidents, was not member of board of directors or loan committee, and was required to request loan committee approval of loans over his limit); *see also Mr. Furniture Warehouse, Inc. v. Barclays Am./Com. Inc.*, 919 F.2d 1517, 1524 (11th Cir. 1990) (holding defendant's assistant vice president, who was subordinate to thirty vice presidents and senior vice presidents, was not managing agent; further observing assistant vice president did not participate in formation of company policy).

Here, the evidence established that Cucci was a mid-level employee with limited managerial authority. He was part of a team that managed Wells Fargo's account relationships with small businesses in the Orlando area.[4] He reported to a senior vice president who served as the team's manager. While Cucci had the power to remove holds placed on certain transactions of one of his customers, the evidence did not establish that he had authority, on his own, to remove a "hard hold" such as the one placed on Checkcare's account by the Financial Crimes Department. Furthermore, he sought his immediate supervisor's approval to extend Checkcare's account's closing date to October 31, 2014. Finally, there was no evidence that Cucci participated in the formation of company policy. In summary, Cucci was not a managing agent for purposes of imposing direct liability for punitive damages. Accordingly, the trial court erred in denying Wells Fargo's motion for judgment notwithstanding the verdict on EFT's punitive damage claim.

[4] The parties stipulated that Wells Fargo was one of the five largest banks in the United States with annual revenue of approximately $85 billion dollars in 2018.

We conclude that the other issues raised on Wells Fargo's appeal and EFT's cross-appeal were either unpreserved, without merit, or rendered moot by our determination that Cucci was not a managing agent for purposes of imposing punitive damages against Wells Fargo on a direct liability theory.

AFFIRMED, in part; REVERSED, in part; and REMANDED.

EDWARDS and WOZNIAK, JJ., concur.