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U.S. DISTRICT COURT
N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
(SOUTHERN DIVISION)

ALLISON HARBIN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**2:15-CV-1069-SLB**
	)	
ROUNDPOINT MORTGAGE SERVICING CO.,	)	
	)	
Defendant.	)	

PRETRIAL ORDER

Pretrial conferences were held in the above case on **August 9, 2021** and **August 27, 2021**, wherein, or as a result of which, the following proceedings were held and actions were taken:

(1) APPEARANCES: Appearing at the conferences were:

For ***Allison Harbin***: Jason L. Yearout

For ***Allison Harbin***: M. Stan Herring

For ***RoundPoint Mortgage Servicing Corporation***: Shaun K. Ramey

For ***RoundPoint Mortgage Servicing Corporation***: T. Dylan Reeves

(2) JURISDICTION AND VENUE:

a. The court has subject matter jurisdiction of this action under the following statutes: **Diversity under 28 U.S.C. § 1332(a).**

b. All jurisdictional and procedural requirements prerequisite to maintaining this action have been met.

c. Is personal jurisdiction or venue contested? ____Yes X No

(3) PARTIES AND TRIAL COUNSEL: Any remaining fictitious parties are hereby **STRICKEN.** The parties and designated trial counsel are correctly named as set out below:

	Parties:	Trial Counsel:
Plaintiff(s)	***Allison Harbin***	Jason L. Yearout
		M. Stan Herring
		William P. Traylor, III
Defendant(s)	***RoundPoint Mortgage Servicing Corporation***	Shaun K. Ramey
		T. Dylan Reeves

(4) PLEADINGS: The following pleadings have been allowed:

a. Complaint [Doc. 1].

b. Answer to Complaint [Doc. 8].

c. First Amended Complaint [Doc. 29].

d. Answer to First Amended Complaint [Doc. 33].

(5) STATEMENT OF THE CASE:

a. Narrative Statement of the Case.

The Plaintiff, Allison Harbin, had a home with a promissory note that was secured by a mortgage with First Guaranty Mortgage Corporation. The note and mortgage were serviced by Defendant RoundPoint Mortgage Servicing Corporation from December 2012 until June 2016.

Ms. Harbin's home was scheduled for foreclosure on June 3, 2015. Prior to the scheduled foreclosure sale, Ms. Harbin was seeking a loan modification. On May 29, 2015, Ms. Harbin called RoundPoint to inquire about the status of the foreclosure so she could complete the loan modification process. A RoundPoint employee told Ms. Harbin that the foreclosure has been "suspended temporarily".

On June 3, 2015, the foreclosure sale proceeded. Ms. Harbin sued RoundPoint for fraud based on the representation that the foreclosure had been "suspended temporarily".

b. Undisputed Facts.

1. Plaintiff Allison Harbin owned a home located at 245 Stonecreek Way, Helena, Alabama 35080.

2. To purchase the home, Ms. Harbin signed a promissory note, which was secured by a mortgage.

3. First Guaranty Mortgage Corporation owned the note and mortgage.

4. Defendant RoundPoint Mortgage Servicing Corporation serviced Ms. Harbin's loan on behalf of First Guaranty starting in December 2012.

5. RoundPoint was First Guaranty's agent.

6. Ms. Harbin fell behind on her monthly loan payments.

7. Due to Ms. Harbin's delinquency on payments, foreclosure was initiated in 2015.

8. Ms. Harbin applied for a loan modification in early 2015; however, she did not qualify for a loan modification at that time since she did not have sufficient income.

9. On April 17, 2015, Ms. Harbin and RoundPoint entered a Forbearance Plan which reduced the monthly payment to $100 for the term of the Plan.

10. The Forbearance Plan began on May 1, 2015 and ended on June 1, 2015.

11. Ms. Harbin made the forbearance payment by May 1, 2015.

12. On May 7, 2015, Sirote & Permutt, the law firm handling the foreclosure, sent a letter to Ms. Harbin stating that First Guaranty instructed Sirote & Permutt to postpone the foreclosure sale scheduled for April 27, 2015, until June 3, 2015.

13. On May 25, 2015, Ms. Harbin submitted another application for a loan modification.

14. On May 26, 2015, Ms. Harbin called RoundPoint and discussed the foreclosure. A recording was made of that call.

15. On May 29, 2015, Ms. Harbin called RoundPoint and discussed the foreclosure. During that conversation, Ms. Harbin was told "it does look like it has been suspended temporarily". A recording was made of that call.

16. Ms. Harbin did not ask anyone at RoundPoint to explain what it meant by the phrase "suspended temporarily".

17. RoundPoint did not explain to Ms. Harbin what it meant by the phrase "suspended temporarily".

18. Following the call, RoundPoint's employee entered into RoundPoint's account notes that he had advised Ms. Harbin that the foreclosure was "postponed based on FOR1, FOR2, and FOR3".[1]

19. On June 2, 2015, RoundPoint mailed a letter to Ms. Harbin and confirmed that her application for a loan modification was incomplete because she was missing certain pieces of information.

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[1] Pursuant to this Court's pre-trial order instructions, RoundPoint does not dispute this fact but has filed a motion in limine and reserves the right to object at trial concerning whether it is properly admissible.

20. Ms. Harbin did not receive this letter until after the foreclosure sale.

21. On June 3, 2015, First Guaranty conducted the foreclosure sale where it purchased the property as the highest bidder.

c. Uncontested Issues of Law.

1. "Fraud by one, accompanied with damage to the party defrauded, in all cases gives a right of action." Alabama Code § 6-5-100.

2. "Misrepresentations of a material fact made . . . recklessly without knowledge, and acted on by the opposite party, or if made by mistake and innocently and acted on by the opposite party, constitute legal fraud." Alabama Code § 6-5-101.

3. "The elements of fraud are (1) a false representation (2) of a material existing fact (3) reasonably relied upon by the plaintiff (4) who suffered damage as a proximate consequence of the misrepresentation." *Exxon Mobil Corp. v. Alabama Dep't of Conservation & Nat. Res.*, 986 So. 2d 1093, 1114 (Ala. 2007), *quoted Harbin v. Roundpoint Mortg. Co.*, 758 Fed. App'x 753, 757 (11th Cir. 2018); Submission Order (Blackburn, J.) (Doc. 112, pp. 2-3).

4. Reliance requires that the misrepresentation actually induced the injured party to change its course of action," and, "if the plaintiff would have adopted the same course irrespective of the misrepresentation and would have sustained the same degree of damages anyway, it cannot be said that the misrepresentation caused any damage . . . ." *Reagan Pharmacy, Inc. v. Fred's Stores of Tennessee, Inc.*, No. 1:13-CV-848WHA, 2014 WL 293439, *4 (M.D. Ala. Jan. 27, 2014) (quoting *Hunt Petroleum Corp. v. State*, 901 So. 2d 1, 4 (Ala. 2004) (other citations and alteration omitted)); Submission Order (Blackburn, J.) (Doc. 112, p. 3); APJI 18.10.

d. Contested Issues of Law.[2]

1. A statement that is true cannot support a misrepresentation claim.

RoundPoint's Statement of Law: A statement that is true cannot support a claim for fraudulent misrepresentation. *See Nobility Homes, Inc. v. Ballentine*, 386 So. 2d 727 (Ala. 1980)[3] (declaring as an incorrect statement of the law a jury instruction that "a representation, though literally true, which is misleading may constitute a misrepresentation actionable under our statutes."); *Kaye v. Pawnee Constr. Co.*, 680 F.2d 1360, 1369 (11th Cir. 1982) (affirming directed verdict because "the precise statement was not a misrepresentation.").

In *Nobility Homes*, the Alabama Supreme Court reversed a trial court that instructed the jury "that a representation, though literally true, which is misleading may constitute a misrepresentation actionable under our statutes" noting that "[t]here is no Alabama authority which supports such a proposition." *Nobility Homes*, 386 So. 2d at 730. At issue in *Nobility Homes* was a representation in a brochure for a mobile home that stated "Floor decking is 3/4" tongue and groove for added strength." *Id.* at 728. The Ballentines (the plaintiff/purchasers) later "found that [the

[2] The parties have endeavored to identify the key contested issues of law in this section but have also identified other law they deem to be relevant in their respective statements of the case and adopt those contentions to the extent any of the law cited therein can be classified as contested.

[3] *Nobility Homes* is binding precedent upon this Court sitting in diversity and subsequent Alabama state courts. In the 41 years that it has been binding precedent, RoundPoint is unaware of the Alabama Supreme Court overruling or narrowing its holding.

mobile home] was constructed with six-foot wide particle board with tongue and groove joints at each six-foot interval." *Id.* The Ballentines asserted "a count in fraud against Nobility alleging that Nobility fraudulently represented to the Ballentines, through its brochure, that the home had tongue and groove flooring when in fact the flooring was constructed of tongue and groove particle board." *Id.* at 729. The basis for the Ballentines' misrepresentation claim was "that 'tongue and groove' implies a three or four-inch wide board and not a six-foot wide particle board." *Id.* at 730. The testimony and stipulations at trial established "that the flooring in the home did in fact have a tongue and groove joint." *Id.* Therefore, the Alabama Supreme Court described the representation as "literally true." Consequently, the Court reasoned that the jury charge was erroneous because "[t]his Court has heretofore consistently adhered to the position that a misrepresentation as envisioned by the statute must in fact be a *false* representation." *Id.* (emphasis original).[4]

Any duty to correct a false impression is not actionable as a misrepresentation claim. Cases regarding a speaker's duty to correct and/or disclose further information, including those cited by Judge Proctor in his order denying RoundPoint's second motion for summary judgment (*see* Doc. 99 at 9, 10), pertain

[4] In a special writing concurring in part and dissenting in part, Justice Jones noted that the facts in *Nobility Homes* should have been analyzed under suppression pursuant to Ala. Code § 6-5-102. Notably, here, Plaintiff has not asserted a suppression claim. *See Harbin v. Roundpoint Mortg. Co.*, 758 F. App'x 753, 758 n.3 (11th Cir. 2018) ("Harbin did not argue a claim of fraudulent suppression before the district court, so it is not properly before us on appeal.")

to a suppression claim under Ala. Code §6-5-102 and not a misrepresentation claim under Ala. Code § 6-5-101. For example, *Mitchell v. Mod. Woodmen of Am.*, No. 2:10-CV-00965-JEO, 2015 WL 13637160, at *1 (N.D. Ala. June 8, 2015), which Judge Proctor relied upon for the law on "half-truths," involved a breach of contract claim where the insurance company did not issue benefit payments pursuant to the insurance certificates because the insurer claimed that the insured had made material misrepresentations and omissions on her insurance applications. In denying the insured's motion in limine seeking to exclude evidence of "fraud, omissions, concealment, or half-truths" in the application process, the court in *Mitchell* only examined Ala. Code § 6-5-102 concerning suppression and not Ala. Code § 6-5-101 concerning misrepresentation. 2015 WL 13637160, at *2-8.

Furthermore, the pertinent part of *Jackson Co. v. Faulkner*, 315 So. 2d 591, 599–600 (Ala. Civ. App. 1975), which was the *Mitchell* court's primary authority, only addressed a suppression claim—it did not discuss misrepresentation under § 6-5-101. This is logical because *Am. Bonding Co. v. Fourth Nat'l Bank*, 91 So. 480, (Ala 1921), which *Mitchell* cited and *Jackson Co.* quoted, stated that "to tell a half truth is a *concealment* of the other half." *Id.* at 483 (emphasis added).

A misrepresentation is a claim "distinct from fraudulent suppression, . . ." *Pitts v. Boody*, 688 So. 2d 832, 836 (Ala. Civ. App. 1996). Therefore, *Mitchell*, *Jackson Co.*, and *Am Bonding Co.* do not apply because Plaintiff did not assert a

suppression claim. *See Harbin v. Roundpoint Mortg. Co.*, 758 F. App'x 753, 758 n.3 (11th Cir. 2018) ("Harbin did not argue a claim of fraudulent suppression before the district court, so it is not properly before us on appeal.").

Plaintiff's Response: Roundpoint relies on the holding in *Nobility Homes, Inc. v Ballentine*, 386 So. 2d 727 to support the proposition that "a statement that is true cannot support a misrepresentation claim." The holding in *Nobility Homes* is not applicable to the facts of this case, but instead focused on whether the plaintiff had proved a fraudulent suppression claim. In short, the court found the plaintiff did not.

In *Nobility Homes*, the court in a *per curium* opinion reversed the trial court and held that under the circumstances of that case, where two sophisticated businesses conducted arm's length transactions, "no duty to disclose arose because no request for information regarding the material comprising the decking was made; plaintiff simply assumed that the decking was made of wood." *Nobility Homes, Inc. v. Ballentine*, 386 So. 2d 727, 730 (Ala. 1980).

That is not the situation presented here. First, this is not an arm's length business transaction between two sophisticated actors. Second, the issue here is not whether there was a duty to disclose certain information. Third, the Eleventh Circuit has already concluded that Harbin has presented a jury issue on her fraud claim. *See Harbin v. Roundpoint Mortg. Co.*, 18-11713 *2-3 (11th Cir. Dec. 17, 2018).

Concurring in part and dissenting in part, Justice Jones noted that some frauds are not clearly a misrepresentation verses a suppression, but are based on a half-truth. "A half-truth is defined, in general, as an assertion which is literally true so far as it goes but which would be materially qualified were additional facts brought out rather than concealed. *See American Bonding Co. of Baltimore v. Fourth National Bank*, 206 Ala. 639, 91 So. 480, 482-483 (1921), quoted in *Jackson Company v. Faulkner*, 55 Ala. App. 354, 315 So.2d 591, 599-600 (1975). *See also, First Virginia Bankshares v. Benson*, 559 F.2d 1307 (5th Cir. 1977)." *Nobility Homes, Inc. v. Ballentine*, 386 So. 2d 727, 732 (Ala. 1980). Justice Jones, went on to reason that,

> It is only through the assertion of certain selected facts that the other party is induced to act at all, but it is the concealment or suppression of other facts which induces him to act contrary to his interest. By definition, then, a fraud resulting from a half-truth consists of both the commission of an act and, at the same time, an omission. Assuming, therefore, that an action for fraud resulting from a half-truth is correctly analyzed under § 6-5-102 for suppression, rather than under § 6-5-101 for misrepresentation, Appellees' failure to correctly classify the nature of the fraud committed is of no import. Appellant had notice from Appellees that fraud, generally, was being alleged and that the basis for that fraud lay in the misleading nature of Appellant's brochure.

Nobility Homes, 386 So. 2d at 732.

While the principle asserted by Roundpoint is technically a true principle of law, it is essentially a "half-truth" of the law as applied to the facts of this case. The court of Civil Appeals noted,

> where, with intent to deceive, a party to a contract conceals material facts which good faith requires him to declare or disclose, it is the

> equivalent of false misrepresentation and fraudulent concealment." 361 So. 2d 585, 588 (Ala. Civ. App. 1978), citing *Southern Land Development Co. v. Meyer*, 230 Ala. 40, 159 So. 245 (1935).

Ballentine, 386 So. 2d at 732. Justice Jones went on to note in his special concurrence and dissent in *Nobility Homes* "[t]o allow this type of literal truth to fall outside the ambit of misrepresentation contemplated by our fraud statutes is to place a premium on the craftiness of the drafter." *Id.*

A few years later the Alabama Supreme Court – rejecting the same argument made here – again held that a "literal[ly true] statement" could support a fraudulent misrepresentation claim. *See Cooper Chevrolet, Inc. v. Chambers*, 529 So. 2d 913 (Ala. 1988). In *Chambers*, the court held, where a party makes a statement that is technically true or true as far as it goes, but misrepresents the truth of the whole situation, that is in fact a misrepresentation under Alabama law. The Court stated the defendant, Cooper Chevrolet "may have chosen his language carefully, but even if the jury believed his version of his answer, it nevertheless could have found that he had the intent to defraud [the plaintiff]; Cooper Chevrolet should not be released from liability for fraud simply because [it's employee's] literal statement was accurate." *Chambers*, 529 So. 2d at 915. So too, here. *See id*; *see also Harbin v. Roundpoint Mortg. Co.*, 18-11713 *2-3

2. Reasonable reliance requires a plaintiff to discern the truthfulness of an alleged fraudulent misrepresentation.

RoundPoint's Statement of Law: Reasonable reliance requires a plaintiff to discern the truthfulness of an alleged fraudulent misrepresentation. *See Harris v. M & S Toyota, Inc.*, 575 So. 2d 74, 77–78 (Ala. 1991); *McGriff v. Minn. Mut. Life Ins. Co.*, 127 F.3d 1410, 1414 (11th Cir. 1997) (discussing *Harris* and the "considerable debate in the Alabama courts as to the proper application of the 'reliance' element in fraud cases").

The Alabama Supreme Court, when it abandoned the reasonable reliance standard in favor of the justifiable reliance standard, distinguished the two standards as follows:

> The present standard of "justifiable reliance" requires the party making a representation to refrain from dishonest, untrue, or recklessly inaccurate or untrue statements. The party receiving the representation is required to be alert to statements that are patently false. *Whereas the old standard of reasonable reliance placed a burden on the party to whom a representation was made -- the burden of discerning the truthfulness of a statement* -- the new standard of justifiable reliance places a burden on the party making the statement -- the burden of knowing the truthfulness of a statement.

Harris, 575 So. 2d 74, 77–78 (Ala. 1991) (emphasis added). Although Alabama has reverted back to the reasonable reliance standard, the explanation in *Harris* is instructive here because it dictates that Ms. Harbin, as the person to whom a representation was made, had the burden of discerning the truthfulness of the statement instead of—under the justifiable reliance—placing the burden upon

RoundPoint's employee to know the truthfulness of the statement. For example, the Alabama Supreme Court, in *Harris*, noted that by moving to and adopting the justifiable reliance standard from the reasonable reliance standard, "[i]nstead of 'let the buyer beware,' the standard is becoming 'let the liar beware.'" Id. at 78. Presumably, by moving back to the reasonable reliance standard, Alabama has moved back to "let the buyer beware." Consequently, the burden was on Plaintiff to discern the truthfulness of Gerstenfeld's statement and not upon Gerstenfeld to notice that Plaintiff did not understand his statement.

Plaintiff's Response: Reasonable reliance does not require Harbin to assume Roundpoint was lying and institute a comprehensive investigation to discern the lie. If this were the law, then no claim for fraud could ever survive summary judgment. Absent special knowledge possessed by Harbin that would arouse suspicion in what Gerstenfeld said, she had the right to reasonably and properly rely on what the Roundpoint agent (Gerstenfeld) said about the foreclosure. After all, the whole point of the conversation was about the June 2015 foreclosure which was 100% in the control of Roundpoint.

The starting point is the Alabama Pattern Jury Instruction, which states:

> **A plaintiff suing for fraud must have reasonably relied on the important fact(s) by (acting/not acting) on the important fact(s). You must take into account all the circumstances that existed at the time in deciding if plaintiff (name of plaintiff) reasonably relied on the important fact(s). Among the circumstances you may consider are (see examples in Notes on Use and References).**

As the APJI 18.10 notes in its discussion:

> The law does not presume bad faith or fraudulent conduct. **Men are not charged with the duty of suspecting fraud when dealing with their fellows "in the absence of indicia of fraud, or unless the transaction is fraudulent per se."** *Winn v. Winn*, 242 Ala. 324, 328, 6 So. 2d 401 (1942). (Emphasis added).

This is the law in Alabama on reasonable reliance according to the APJI:

> Ex parte ERA Marie McConnell Realty, Inc., 774 So. 2d 588, 591 (Ala. 2000) ("A purchaser's '**reliance is reasonable in the absence of independent knowledge sufficient to arouse the purchaser's suspicion, and he is not obligated to make an independent investigation as to the truth of the seller's representations absent such knowledge**.'" (quoting Saranthus v. McIntyre, 557 So. 2d 1275, 1276 (Ala. Civ. App. 1989)). (Emphasis added).

There is no obligation or burden, as argued by the Defendant, for Plaintiff to investigate or discern the truthfulness of Gerstenfeld's statement unless there was some knowledge to "arouse the purchaser's suspicion" and there is no need to investigate the truthfulness of what Gerstenfeld said unless there was some reason to question his truthfulness.

The APJI sections following the applicable jury charge provided, "Notes on Use" by the court stating,

> Use this instruction in cases filed after March 14, 1997, when the claim is based on false representation or suppression.
>
> The court should instruct on the relevant circumstances suggested by substantial evidence. The references give examples of circumstances that are relevant in a particular fact situation. They are not inclusive or

> exclusive. This instruction does not define the descriptive terms or phrases, e. g., "the relative bargaining power of the parties."

The jury may consider circumstances such as mental capacity, education, relative sophistication, and the bargaining power of the parties. *See Foremost Ins. Co. v. Parham*, 693 So. 2d 409 (Ala. 1997); *Standard Furniture Mfg. Co., Inc. v. Reed*, 572 So. 2d 389, 393 (Ala. 1990); *Arkel Land Co. v. Cagle*, 445 So. 2d 858, 861 (Ala. 1983) (farmer with a fifth-grade education did not understand legal significance and was entitled to rely on attorney whom he did not know to be representing the grantee); *Torres v. State Farm Fire & Cas. Co.*, 438 So. 2d 757 (Ala. 1983); *Southern Building & Loan Ass'n v. Dinsmore*, 225 Ala. 550, 552–53, 144 So. 21 (1932) (farmer with little or no experience in corporate stock was lulled into a feeling of security and into any neglect to read the certificate by the misrepresentations of the agent).

Courts can also look to the special knowledge of the parties. *Ex parte ERA Marie McConnell Realty, Inc.*, 774 So. 2d 588, 591 (Ala. 2000) ("A purchaser's 'reliance is reasonable in the absence of independent knowledge sufficient to arouse the purchaser's suspicion, and he is not obligated to make an independent investigation as to the truth of the seller's representations absent such knowledge.'" (quoting *Saranthus v. McIntyre*, 557 So. 2d 1275, 1276 (Ala. Civ. App. 1989)); *Standard Furniture Mfg. Co., Inc. v. Reed*, 572 So. 2d 389, 393 (Ala. 1990) (plaintiff, a service manager of defendant, had no special knowledge of defendant's pension

plan and was entitled to rely upon representation by the administrator of the plan); *Reynolds v. Mitchell*, 529 So. 2d 227, 231 (Ala. 1988) ("where the facts are not equally known to both sides, a statement of opinion by the one who knows the facts better, often involves a statement of a material fact that justifies his opinion, … therefore, in such a situation, an action for fraud may be predicated on an opinion, depending on whether the reliance on the representation of the opinion is reasonable."); *Parker v. Ward*, 224 Ala. 80, 82, 139 So. 215 (1932) ("When the statement of a fact is assumed to be within the knowledge of the person making it, the other has the right to rely on its truth, and in the absence of anything to arouse suspicion is not bound to make inquiry or examine for himself."); *Cartwright v. Braly*, 218 Ala. 49, 117 So. 477 (1928) ("The statement of opinion which is not his opinion, made to deceive and which does deceive, may, by reason of his peculiar knowledge of facts upon which a reliable opinion may be based and not accessible to the other party, amount to deceit.").

3. Plaintiff's Contributory Negligence Bars Her Claim For Negligent Misrepresentation

RoundPoint's Statement of Law: "The recipient of a negligent misrepresentation is barred from recovery for pecuniary loss suffered in reliance upon it if he is negligent in so relying." Restatement 2d of Torts, § 552A. Although the Eleventh Circuit has noted that "Alabama law, however, is unclear as to whether contributory negligence is a defense to fraud which is based upon a negligent

misrepresentation," *Auto-Owners Ins. Co. v. Johnson, Rast & Hays Ins., Inc.*, 820 F.2d 380, 383 n.1 (11th Cir. 1987) (declining to address issue because appellant did not preserve issue for appeal), fundamental concepts of Alabama law establish that Alabama's general doctrine of contributory negligence applies to a negligent misrepresentation. Under Alabama law, "[c]ontributory negligence is an affirmative and complete defense to a claim based on negligence." *Hilyer v. Fortier*, 227 So. 3d 13, 23 (Ala. 2017) (quoting *Norfolk S. Ry. v. Johnson*, 75 So. 3d 624, 639 (Ala. 2011)). Although the Alabama Supreme Court has not—and it is unclear whether it has been presented with the opportunity to—explicitly adopt Restatement (Second) of Torts § 552A, it has "adopted Restatement (Second) of Torts § 552 (1977) as the law of this State in cases involving negligent misrepresentations relied upon by third parties, or parties who were not in privity of contract with the person making the misrepresentation." *Fisher v. Comer Plantation, Inc.*, 772 So. 2d 455, 461 (Ala. 2000). This view, especially considering Alabama has adopted the Restatement approach to the law of misrepresentation, is consistent with well-settled law that contributory negligence is a complete defense to a negligent act. *See Gilchrist Timber Co. v. ITT Rayonier*, 95 F.3d 1033, 1036 (11th Cir. 1996) (certifying the question to the Florida Supreme Court under similar circumstances as noting "[t]his

view is consistent with the idea that contributory negligence is a defense to unintentional torts, but not to intentional torts.").[5]

Plaintiff's Response: Roundpoint's assertion that Section 552 of Restatement of Torts should apply to plaintiff's fraud claim is misplaced and not supported by the law and logic. Section 552 applies to cases involving justifiable reliance, which Alabama no longer follows. Additionally, the current elements of a misrepresentation claim, namely that plaintiff reasonably relied on the representation already accounts for the reasonableness of plaintiff's conduct unlike a pure negligence claim, which does not.

The elements of a misrepresentation claim are 1) a misrepresentation of material fact, 2) made willfully to deceive, recklessly, without knowledge, or mistakenly, 3) which was reasonably relied on by the plaintiff under the circumstances, and 4) which caused damage as a proximate consequence. See *Foremost Ins. Co. v. Parham*, 693 So.2d 409, 421-22 (Ala.1997) (citing Alabama Code § 6–5–101; *Harrington v. Johnson–Rast & Hays Co.*, 577 So. 2d 437 (Ala.1991)).

[5] Because Florida law adopts the doctrine of comparative negligence in lieu of contributory negligence, the Florida Supreme Court responded to the Eleventh Circuit's certified question and "concluded that 'the doctrine of comparative negligence applies to an action for negligent misrepresentation.'" *Gilchrist Timber Co. v. ITT Rayonier*, 127 F.3d 1390, 1398 (11th Cir. 1997) (quoting *Gilchrist Timber Co. v. Itt Rayonier*, 696 So. 2d 334, 335 (Fla. 1997)). The Florida Supreme Court followed a similar analysis of § 552, § 552A, and principals of Florida's comparative negligence doctrine and is set forth *supra* under Alabama law. *See* 696 So. 2d at 337–38.

Courts applying the *Restatement (Second) of Torts* § 552 have done so to address the conduct of a real estate appraiser's act of conducting an appraisal. The court noted,

> In *Fisher*, this Court held that a real-estate appraiser could be held liable for a negligently conducted appraisal under *Restatement (Second) of Torts* § 552 (1977), which it quoted, in pertinent part, as follows:
>
> "'(1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.
>
> "'(2) Except as stated in Subsection (3),[ ] the liability stated in Subsection (1) is limited to loss suffered
>
> "'(a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and
>
> "'(b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.'"
>
> 772 So.2d at 461. In *Fisher*, this Court held that its adoption of *Restatement (Second) of Torts* § 552 extended liability to a real-estate appraiser for a negligently conducted appraisal, as follows:
>
> "The rule of § 552 may be applied to anyone who in the course of his 'business, profession or employment' engages in an activity that meets the requirements set forth in Subsection (1). Comment c to § 552 states that this rule 'subjects to liability only such persons as make it a part of their business or profession to supply information for the guidance of others in their business transactions.' *Section 552 would clearly, by its terms, govern real-estate appraisers, who, as an integral part of their*

> *business, facilitate real-estate transactions by issuing opinions regarding the value of real property.*

Bryant Bank v. Talmage Kirkland & Co., 155 So. 3d 231, 238-39 (Ala. 2014). The case at issue does not involve a real estate appraiser.

Alabama courts have also applied this to a claim against an insurance agent under a negligent-procurement claim. The court found,

> In *Kanellis v. Pacific Indemnity Co.*, 917 So. 2d 149, 155 (Ala. Civ. App. 2005), the Court of Civil Appeals set forth the elements a plaintiff asserting a negligent-procurement claim is required to establish:
>
> "Like any negligence claim, a claim in tort alleging a negligent failure of an insurance agent to fulfill a voluntary undertaking to procure insurance ... requires demonstration of the classic elements of a negligence theory, *i.e.*, '(1) duty, (2) breach of duty, (3) proximate cause, and (4) injury.' *Albert v. Hsu*, 602 So.2d 895, 897 (Ala.2002). Under Alabama law, however, contributory negligence is a complete defense to a claim based on negligence. *Mitchell v. Torrence Cablevision USA, Inc.*, 806 So.2d 1254, 1257 (Ala.Civ.App.2000)."

Alfa Life Ins. Corp. v. Colza, 159 So. 3d 1240, 1247-48 (Ala. 2014). Based on the reported decisions, these claims arise more in the negligence context than that of a fraud or misrepresentation.

Likewise, the Florida district court's application to section 552 is inapplicable to this case. The Florida court applied 552 in a case applying the comparative negligence standard to negligent misrepresentation claims and under the justifiable reliance standard that Alabama rejected in 1997. In doing so, the court noted,

> By this opinion, we adopt the Restatement (Second) of Torts' position on negligent misrepresentation contained in section 552. Further, we

> find that the comparative fault provisions contained in section 768.81 apply to actions involving negligent misrepresentation. [ ]
>
> In reaching our decision today, we reaffirm our previous conclusion in Johnson v. Davis, 480 So.2d 625, 628 (Fla. 1985), that "[o]ne should not be able to stand behind the impervious shield of caveat emptor and take advantage of another's ignorance." Moreover, we still conclude that "[t]he law appears to be working toward the ultimate conclusion that full disclosure of all material facts must be made whenever elementary fair conduct demands it." Id. This does not mean, however, that the recipient of an erroneous representation can hide behind the unintentional negligence of the misrepresenter when the recipient is likewise negligent in failing to discover the error. Nor are we persuaded that the parade of horribles espoused by Gilchrist will follow our decision reached today. Clearly, a recipient of information will not have to investigate every piece of information furnished; a recipient will only be responsible for investigating information that a reasonable person in the position of the recipient would be expected to investigate.

Gilchrist Timber Co. v. ITT Rayonier, Inc., 696 So. 2d 334, 339 (Fla. 1997).

However, the difference between the Florida court's application of this standard to negligent misrepresentations and the law for negligent misrepresentation under Alabama can be found in the fact that Alabama courts apply a reasonable, not justifiable, reliance standard. This was highlighted in an opinion by another court under the justifiable reliance standard that found,

> Viewed in the light most favorable to Condor, the record in this case shows (1) that Fuller said he *did not know* if there were any "zoning problems", but he *guessed* there were not; (2) that the lease allocated to Condor the responsibility for investigating encumbrances and restrictions; and (3) that before Condor signed the lease, it was told by its own attorney that it should order a title report or otherwise investigate encumbrances and restrictions. Given these facts, a rational trier of fact could not find that Condor exercised ordinary care in looking out for its own interests; rather, it would necessarily find that

> Condor negligently relied upon what Fuller said, whether or not Fuller was also negligent in speaking as he did. A rational trier of fact also could not find that Condor's contributory negligence was not a proximate cause of damage to its own pecuniary interests; rather, it would necessarily find that Condor's negligence was a proximate cause, for it cannot be disputed that even a simple investigation — for example, ordering a title report — would have brought the covenants to Condor's attention. Because Condor can recover only if it proves justifiable reliance, and **because Washington case law presently equates justifiable reliance with lack of contributory negligence**, Condor could not recover if this case went to trial. Therefore, the trial court did not err by granting a summary judgment of dismissal.

Condor Enterprises v. Boise Cascade, 71 Wn. App. 48, 54-55 (Wash. Ct. App. 1993).

Alabama's reasonable reliance standard already considers the plaintiff's conduct in relying on the alleged misrepresentation. It asks, was that reliance reasonable, focusing on the Plaintiff's conduct verses the conduct on the person making the representation. If a plaintiff's conduct in relying on the representation was deemed by the jury to be unreasonable that is akin to finding the Plaintiff to have been negligent. To the extent the Defendant's statement of the law is even valid, which is questionable, adopting such a standard would be redundant and lead to confusion by the jury.

Additionally, adopting a contributory negligence standard where the plaintiff's conduct is already one of the elements of Plaintiff's prima facie case might lead to inconsistent verdicts. This could arise where a jury found that the plaintiff

"reasonably relied" on the representation, but also held they were contributorily negligent.[6]

4. Punitive Damages Are Not Available For Negligent Or Reckless Misrepresentation.

RoundPoint's Statement of Law: Punitive damages are not available for a negligent or reckless misrepresentation. *Winn-Dixie Montgomery, Inc. v. Henderson*, 371 So. 2d 899, 902 (Ala. 1979) (negligent misrepresentation); *Morgan Bldg. & Spas, Inc. v. Gillett*, 762 So. 2d 366, 370 (Ala. Civ. App. 2000) (reckless misrepresentation); *see also* Ala. Code § 6-11-20 (providing punitive damages only where a defendant acted "consciously or deliberately").

In *Morgan Bldg.*, 762 So. 2d 366, 370 (Ala. Civ. App. 2000), the Alabama Court of Civil Appeals held that "the trial court erred in charging the jury [pursuant to the Alabama Pattern Jury Instructions] that it could award punitive damages on the basis of reckless [fraudulent] conduct." *Id.* at 369, 371 ("We must therefore reverse that portion of the judgment awarding punitive damages."). The *Morgan Bldg.* court reasoned that Ala. Code § 6-11-20[7] only authorized punitive damages where a plaintiff "prove[s] by *clear and convincing evidence* that the defendant

[6] In a simple negligence claim, the plaintiff's conduct is not at issue in the prima facie case – '(1) duty, (2) breach of duty, (3) proximate cause, and (4) injury.' *Albert v. Hsu*, 602 So.2d 895, 897 (Ala.2002). Here, contributory negligence makes sense and could not lead to an inconsistent verdict.

[7] Section 6-11-20 became effective in 1987, which is why the *Morgan Bldg.* court distinguished its decision from law based on "rights accrued after [] June 11, 1987, . . ." 762 So. 2d at 371.

consciously or deliberately engaged in . . . fraud, wantonness, . . ." and because the trial court dismissed the "claim of intentional fraud"—the only fraud claim submitted to the jury was "reckless fraud"—"the only claim under which [the plaintiff] might have recovered punitive damages was not submitted to the jury." Id. at 371 (emphasis original). Consequently, the Court held that "the trial court erred in charging the jury that it could award punitive damages on the basis of reckless conduct." Id.

Although the *Morgan Bldg.* court concluded, without explicitly stating, that a defendant cannot be "consciously or deliberately" reckless, the Alabama Supreme Court has explicitly noted that "[a] concept of a 'wanton intentional fraud' would be an unacceptable contradiction in the law" because "[o]ne may be guilty of wanton misconduct without actual intent to [injure] anyone." *GMC v. Bell*, 714 So. 2d 268, 286 (Ala. 1996) (quoting *Dixie Elec. Co. v. Maggio*, 318 So. 2d 274, 276 (Ala. 1975)).

Plaintiff's Response: While punitive damages may not be appropriate for legal (innocent or negligent) fraud, it is available here where the evidence supports a claim for reckless fraud. *See Ex parte Lewis*, 416 So. 2d 410 (Ala. 1982) (reckless fraud supports punitive damages); *see also Big Three Motors, Inc. v. Smith (Smith II)*, 412 So. 2d 1222, 1223-24 (Ala. 1982); *Spartan Pools v. Royal*, 386 So. 2d 421 (Ala. 1980); *Burkett*, 494 So. 2d at 418; *Geneva County BOE*

v. CNA Ins., 874 F.2d 1491 (supporting punitive damages for reckless fraud). "It is ***well-settled*** under Alabama law that an award of punitive damages on a claim of fraud must be supported by a finding of malice, ***reckless disregard for the truth***, **or** intent to injure. *CNA Ins.*, 874 F.2d at 1496 (emphasis added) (citing *State Farm Fire Cas. Ins. Co. v. Lynn*, 516 So. 2d 1373 (Ala. 1987); *Best Plants Food Products, Inc. v. Cagle*, 510 So. 2d 229 (Ala. 1987); *Burkett*, 494 So. 2d 418)); *see also Griffin v. Ed Syed Auto, LLC*, 1:19-963-ACA (N.D. Ala. Aug. 17, 2020) ("Under Alabama law, mental anguish damages are recoverable for [] fraud [] actions." (citing *Burkett*, 494 So. 2d 418).

In *Ex parte Smith*, the Alabama Supreme Court summarized the rule on punitive damages by quoting American Jurisprudence on Damages:

> Exemplary damages, if recoverable at all, may be recovered only in cases where the wrongful act complained of is characterized by, or partakes of, some circumstances of aggravation, *such as willfulness*, wantonness, maliciousness, gross negligence or **recklessness**, oppression, outrageous conduct, indignity and contumely, insult, or **fraud** or **gross fraud**. . . .
>
> "**One or more of the conditions under which exemplary damages are recoverable is sufficient.** For example, if the act is done with a fraudulent, malicious, or oppressive motive on the part of the wrongdoer, there is ground for exemplary damages, although the act is done without rudeness or insult. **Exemplary damages may be also recovered**, although there is no malice, fraud, or intent to oppress on the part of the wrongdoer, **if the act is done in a** rude, insulting, or **reckless manner**, in disregard of social obligations, or with such gross negligence as to amount to positive misconduct."

Ex Parte Smith, 412 So. 2d 1222, 1223 (Ala. 1982) (italics emphasis original; bold emphasis added) (quoting 22 AM. JUR. 2d *Damages* § 249 (1965)). "The elements are disjunctive. One need not prove each of them, but must prove at least e one of them, to justify an award of punitive damages." *Ex Parte Smith*, 412 So. 2d at 1223. To that end, if Harbin can prove that the misrepresentation was intentional, willful, or reckless, then she is entitled to an award of punitive damages. *Id.* The Alabama Supreme Court has even recognized that where the representation is "made so recklessly and heedlessly" that can amount to knowledge of the falsity. *Id.* at 1224-25.

5. Mental Anguish Damages Are Available Only For Willful Fraud.

RoundPoint's Statement of Law: Mental anguish damages are available only when the fraud is willful. *See Pac. Mut. Life Ins. Co. v. Haslip*, 553 So. 2d 537, 540 (Ala. 1989) ("Again, damages for mental distress may not be awarded unless the fraud was willful.").

A. Alabama's General Rule Requires A Physical Injury To Recover Mental Anguish In Tort Cases.

"[A]s a general rule, the law will not permit the recovery of damages for mental distress, where the tort results in mere injury to property.'" *Hayes v. Newton Bros. Lumber Co.*, 481 So. 2d 1123, 1124 (Ala. 1985) (quoting *B. F. Goodrich Co. v. Hughes*, 847 (Ala. 1940)); *see also Harris v. Birmingham Hide & Tallow Co.*, 589 So. 2d 150, 151 (Ala. 1991). The Alabama Pattern Jury Instructions, therefore,

instruct that mental anguish is available only when a plaintiff suffers a personal injury (APJI 11.10) or is put in the zone of danger (APJI 11.11), neither of which are at issue in this case. Beyond this general rule, Alabama law on mental anguish is not a model of clarity. Many cases make the unsubstantiated, conclusory assertion that mental anguish damages are available in other contexts without analyzing conflicting precedent, rejecting (much less overruling) prior conflicting precedent, and/or without announcing any new rule(s). A detailed review of the history of Alabama's law on mental anguish damages, however, reveals that mental anguish damages are available for fraud only when the misrepresentation is willful. *Cf.* Ala. Code § 6-5-101 (there are three types of fraudulent misrepresentation: (1) "willfully to deceive," (2) "recklessly without knowledge," or (3) "by mistake and innocently").

B. Mental Anguish Damages May Not Be Awarded Unless The Fraud Was Willful

Alabama case law specifically addressing a fraudulent misrepresentation claim has consistently stated that mental anguish is recoverable for a fraud claim only when the fraud is willful. *See* Haslip, 553 So. 2d at 540 ("Again, damages for mental distress may not be awarded unless the fraud was willful." (citing *Holcombe v. Whitaker*, 318 So. 2d 289 (Ala. 1975)[8])); *Res. Nat'l Ins. Co. v. Crowell*, 614 So.

[8] *Holcombe* is a fraudulent inducement to marry case.

2d 1005, 1011 (Ala. 1993) ("Damages for mental distress may be awarded in a case of willful fraud."); *see Foster v. Life Ins. Co. of Georgia*, 656 So. 2d 333, 337 (Ala. 1994) ("the jury was authorized under Alabama law to award compensatory damages for mental anguish and emotional distress if it found that Life of Georgia had intentionally perpetuated a fraud on Foster."); *Holcombe*, 318 So. 2d at 293 (holding that "where the wrong is willful rather than negligent, recovery may be had for . . . mental anguish").

However, as previously noted, there are also cases that are vague and/or ambiguous concerning the circumstances in which mental anguish can be awarded. *E.g.*, *Williams v. Williams*, 786 So. 2d 477 (Ala. 2000) (promissory fraud based on misrepresentation, an element of which is "present intent to deceive," supported jury award for mental anguish and punitive damages); *Life Ins. Co. of Georgia v. Johnson*, 684 So. 2d 685, 687 (Ala. 1996) (the court noted that testimony pertaining to degree of mental anguish suffered supported amount of award for "intentional and reckless fraud and fraudulent suppression"); *Ford Motor Co. v. Burkett*, 494 So. 2d 416, 417 (Ala. 1986) (the court allowed mental anguish for misrepresentation in a conclusory fashion without examining applicable law on mental anguish or explaining the type of fraud at issue). Cases like *Williams*, *Johnson*, and *Burkett*, however, are not helpful because the courts in those cases did not squarely address the propriety of mental anguish damages; it is not clear whether the issue was subject

to an objection or properly preserved in the trial court and/or raised on appeal; nor is it clear whether the damages award was tied only to the willful misrepresentation claim or also to the lesser included reckless misrepresentation claim. Moreover, in these cases, it appears that multiple claims were submitted to the jury and it is not stated, or apparent, whether the jury simply returned a general verdict for the plaintiff. Consequently, these cases carry little, if any, persuasive or precedential value.

C. Exceptions To The General Rule.

i. Breach of contract for residential repair or construction.

Over time, some exceptions to the general rule have developed. Primarily, there is a line of cases where the Alabama Supreme Court has allowed recovery of mental anguish damages "for actions on contracts for the repair or construction of houses or dwellings or the delivery of utilities thereto, where the breach affected habitability." *E.g., Orkin Exterminating Co. v. Donavan*, 519 So. 2d 1330 (Ala. 1988); *Lawler Mobile Homes, Inc. v. Tarver*, 492 So.2d 297 (Ala. 1987); *Alabama Power Co. v. Harmon*, 483 So.2d 386 (Ala. 1986). These cases provide that "damages for mental anguish can be recovered . . . where the contractual duty or obligation is so coupled with matters of mental concern or solicitude, or with the feelings of the party to whom the duty is owed, that a breach of that duty will necessarily or reasonably result in mental anguish or suffering." *Ruiz de Molina v.*

Merritt & Furman Ins. Agency, Inc., 207 F.3d 1351, 1359 (11th Cir. 2000) (quoting *Liberty Homes, Inc. v. Epperson*, 581 So. 2d 449, 454 (Ala. 1991)); *see also id.*

Significantly, the Alabama Supreme Court explicitly refused to extend this line of cases beyond breach of contract cases to tort cases when the Court stated:

> **The plaintiffs argue that although the general rule is that "the law will not allow recovery of damages for mental distress where the tort results in mere injury to property,"** *Reinhardt Motors, Inc. v. Boston*, 516 So. 2d 509, 511 (Ala. 1986**), mental-anguish awards are proper in tort cases when the property damaged is a person's home**. The plaintiffs cite *F. Becker Asphaltum Roofing Co. v. Murphy*, 224 Ala. 655, 141 So. 630 (1932); *B&M Homes, Inc. v. Hogan*, 376 So. 2d 667 (Ala. 1979); and *Orkin Exterminating Co. v. Donavan*, 519 So. 2d 1330, 1333 (Ala. 1988), in support of their argument. However, as the plaintiffs admit, these cases involve recovery for breach of contract, not tort liability, and the plaintiffs do not cite any caselaw [sic] in support of their argument that this liability should be extended to tort actions. Thus, the plaintiffs' argument is not persuasive in light of the well-established rule that in tort cases damages for mental anguish have to be linked to actual physical injury or "zone of danger," **and we decline to extend the exception to tort-liability cases**.

Birmingham Coal & Coke Co. v. Johnson, 10 So. 3d 993, 999 (Ala. 2008)[9] (emphasis added); *cf. Bowers v. Wal-Mart Stores, Inc.*, 827 So. 2d 63, 70 (Ala. 2001) (refusing to extend exception to breach of warranty where car damages house because "[t]o work backward from the house fire to the car fire and then to conclude that, because those events caused the [plaintiffs'] emotional distress, the breach of the warranty, if indeed there was such a breach, should support mental-anguish

[9] This explicit denial is significant in light of the mistaken case law, *see infra*, that has arisen from *Kyles*, which relied upon this line of cases.

claims would be to convert the law from a fixed star that guides us to a result, into something malleable that serves whatever result we might choose to reach.").

ii. Nuisance and trespass accompanied by malice, insult, inhumanity, or contumely.

There is a line of cases pertaining to nuisance and trespass that permitted mental anguish damages without a physical injury "if the mental suffering inflicted is accompanied by malice, insult, inhumanity, or contumely." *Seale v. Pearson*, 736 So. 2d 1108, 1113 (Ala. Civ. App. 1999); *e.g.*, *Jefferies v. Bush*, 608 So. 2d 361, 363 (Ala. 1992); *Wal-Mart Stores, Inc. v. Bowers*, 752 So. 2d 1201, 1204 (Ala. 1999) (citing cases). "The 'insult-or-contumely' exception does not, however, apply in cases of 'mere negligence.'" Bowers, 752 So. 2d at 1204. Consequently, Plaintiff does not qualify for this exception.

iii. Malicious prosecution claims permit mental anguish damages.

Additionally, although not applicable to the instant matter, there is a line of cases permitting a plaintiff to recover mental anguish without physical injury for malicious prosecution. *Delchamps, Inc. v. Bryant*, 738 So. 2d 824, 837 (Ala. 1999); *Kmart v. Kyles*, 723 So. 2d 572 (Ala. 1998); *United States Fidelity & Guar. Co. v. Miller*, 117 So. 668, 670 (Ala. 1928); *Thompson v. Ki*nney, 486 So. 2d 442, 445-46 (Ala. Civ. App. 1986), overruled on other grounds by *Barrett Mobile Home Transp., Inc. v. McGugin*, 530 So. 2d 730 (Ala. 1988).

iv. The Alabama Supreme Court has permitted mental anguish damages in a few unique, isolated circumstances.

Finally, there are various one-off cases that permit mental anguish but which would not be applicable to the current dispute. *E.g.*, *Nashville C.St.L. Ry. v. Campbell*, 101 So. 615 (Ala. 1924) (contracts of carriage); *Taylor v. Baptist Med. Ctr., Inc.*, 400 So. 2d 369 (Ala. 1981) (breach of a contract to deliver a baby, when the baby was stillborn); *Volkswagen of America, Inc. v. Dillard*, 579 So. 2d 1301 (Ala. 1991) (statutory breach of warranty in the sale of a "lemon" car); *Sexton v. St. Clair Fed. Sav. Bank*, 653 So. 2d 959 (Ala. 1995) (burial of a loved one). None of these exceptions apply here.

D. There is an unreliable line of cases perpetuating an inaccurate statement of law.

At least one federal court in Alabama has expressed concern about a line of cases that contradict the precedent they cite. *Hardesty v. CPRM Corp.*, 391 F. Supp. 2d 1067, 1072 n.1 (M.D. Ala. 2005) (discussing the "contradiction" created by the out-of-context-*Kyles* line of cases and granting summary judgment on negligence and wantonness claims because plaintiffs did not establish physical injury or zone of danger). This line of cases state that Alabama law permits mental anguish damages without a physical injury, but "a close reading" of the precedent upon which this line of cases relies, demonstrates that this line of cases misapplied the precedent. *See id.* This line of cases includes *George H. Lanier Memorial Hospital*

v. Andrews, 901 So. 2d 714 (Ala. 2004) and *Brown v. First Fed. Bank*, 95 So. 3d 803 (Ala. Civ. App. 2012). The precedent they do not accurately apply is *Kmart Corp. v. Kyles*, 723 So. 2d 572 (Ala. 1998), *Alabama Power Co. v. Harmon*, 483 So. 2d 386 (Ala. 1986), and *B&M Homes, Inc. v. Hogan*, 376 So. 2d 667 (Ala. 1979).

These cases quote *Kyles*, *Harmon*, and *B&M* (or cases quoting these cases) out of context to perpetuate an inaccurate statement of law that a physical injury is not required for mental anguish damages.[10] However, *Kyles*, *Harmon*, and *B&M* pertain to the sufficiency of proof—i.e., can a plaintiff simply testify that she was anxious or must she prove a physical manifestation of that anxiety in order to recover punitive damages. E.g., *B&M*, 376 So. 2d at 672–73 ("Appellants contend, that before recovery for mental anguish or suffering can be allowed, the mental anguish has to be corroborated by physical symptoms, i.e., becoming physically sick or ill. We reject this contention. The cases have not required mental anguish to be corroborated by the presence of physical symptoms.").

For example, *Kyles* was a malicious prosecution case where the Alabama Supreme Court reversed the denial of a remittitur motion because "the jury awarded more than $90,000 for mental anguish damages even though [plaintiff] presented no evidence of severe mental anguish." *Id.* at 579 (Ala. 1998). In making a general

[10] When the prior district court denied RoundPoint's second motion for summary judgment, it mistakenly relied on *Kyles* for the same reasons discussed here.

statement of Alabama law, unconnected to whether a plaintiff can recover mental anguish damages for the cause of action, the Alabama Supreme stated:

> Under Alabama law, the presence of physical injury or physical symptoms is not a prerequisite for a claim for damages for mental anguish. *Alabama Power Co. v. Harmon*, 483 So. 2d 386 (Ala. 1986). "The plaintiff is only required to present some evidence of mental anguish, and once the plaintiff has done so, the question of damages for mental anguish is for the jury." *Harmon*, 483 So. 2d at 389.

Id. at 578. In context, this is an accurate statement of law that, when a cause of action permits mental anguish, a plaintiff must not prove a physical manifestation of her mental anguish. However, a line of subsequent cases consistently quotes these two sentences from *Kyles* out of context to conclude that a plaintiff may recover mental anguish for any cause of action without suffering a physical injury. *See infra*. (string cite).

Significantly, *Harmon* (which *Kyles* cites and quotes) was a breach of contract case where there was property damage to a home and, thus, fell within that line of cases. Likewise, *B&M* was a case involving breaches of an implied covenant and express warranty. *B&M*, 376 So. 2d at 671. Based on that established law, the *Harmon* court stated that "claims for damages for mental anguish need not be predicated upon the presence of physical symptoms." *Harmon*, 482 So. 2d at 389 (citing *B&M*, 376 So. 2d at 71). *Harmon*'s statement pertaining to "the presence of physical symptoms," however, was not a statement intended to disconnect mental anguish damages from the general rule requiring a physical injury. Rather, it was a

statement of what a plaintiff must prove when mental anguish damages are recoverable for a cause of action. *See id.* ("The plaintiff also testified that he was upset by relying upon others to provide shelter for his family, felt inadequate in his family obligations, and felt as if everything was 'falling in on him.'"). In other words, the *Harmon* court was stating that mental anguish must not manifest as physical symptoms to be recoverable. That is why *Harmon* noted "[t]he plaintiff is only required to present some evidence of mental anguish, and once the plaintiff has done so, the question of damages for mental anguish is for the jury." *Id.* (quoting *B&M*, *supra*). Thus, the context for the statement was simply a statement on the sufficiency of the evidence in a breach of contract case.

Courts in Alabama, however, have perpetuated the quote from *Kyles* (relying upon *Harmon* relying upon *B & M Homes*), to mistakenly state in some cases that a physical injury is not necessary for mental anguish damages.[11] *E.g.*, *Brown*, 95 So. 3d at 818 (holding that mental anguish damages are available for wantonness based upon quotes from *Wal-Mart Stores, Inc. v. Goodman*, 789 So. 2d 166, 178 (Ala.

[11] It is unclear how the courts in this line of cases reconcile the direct conflict with the explicit refusal to extend the breach of contract line of cases in *Birmingham Coal & Coke Co. v. Johnson*, 10 So. 3d at 999.

2000)[12] and *Andrews*, 901 So. 2d at 725;[13] *Harbin v. RoundPoint Mortg. Co.*, No. 2:15-CV-01069-RDP, 2019 WL 7167588, at *7 (N.D. Ala. Nov. 6, 2019) (Doc. 99 at 12) (quoting *Kyles*, *supra*);[14] *Beale v. Ocwen Loan Servicing, LLC*, No. 7:15-cv-00397-LSC, 2015 U.S. Dist. LEXIS 78159, at *9 (N.D. Ala. June 17, 2015) (relying upon *Brown*, *supra*, to state that mental anguish damages are available for wantonness); *Chamblee v. Duncan*, 188 So. 3d 682, 693 (Ala. Civ. App. 2015) (relying upon *Brown*). Consequently, this line of cases is not reliable because they are premised upon an inaccurate analysis of Alabama law. *See Hardesty v. CPRM Corp.*, 391 F. Supp. 2d 1067, 1072 n.1 (M.D. Ala. 2005) (discussing the "contradiction" created by the out-of-context-*Kyles* line of cases and granting summary judgment on negligence and wantonness claims because plaintiffs did not establish physical injury or zone of danger).

E. Conclusion

Despite a few examples of rogue, inaccurate case law, the Alabama Supreme

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[12] *Goodman*, in pertinent part, only reviewed whether the jury's mental anguish award was excessive in light of the evidence submitted. 789 So. 2d at 178. It did not address whether a plaintiff must suffer a physical injury to recover mental anguish. *See id.*

[13] *Andrews*, a case where parents sued a hospital and employee for removing and donating their deceased child's corneas without their consent, also did not consider whether mental anguish was recoverable absent a physical injury, but rather whether a mental anguish award was supported by the evidence. 901 So. 2d at 726 ("We hold that each plaintiff presented substantial evidence that he or she suffered mental anguish.").

[14] RoundPoint believes the prior district court erred in this ruling, but the denial of a summary judgment is not reviewable by appeal except in limited, inapplicable circumstances.

Court has not overruled the general rule that "the law will not permit the recovery of damages for mental distress, where the tort results in mere injury to property." *Hayes*, 481 So. 2d at 1124. The only cases from Alabama's Supreme Court directly addressing whether mental anguish is recoverable for misrepresentation have concluded that mental anguish damages are available only for a willful misrepresentation. *See Haslip*, 553 So. 2d at 540; *Crowell*, 614 So. 2d at 1011. The instant matter does not fall into the other established exceptions or one-off cases where mental anguish damages are recoverable absent a physical injury or presence in the zone of danger. Because Plaintiff does not allege a personal injury or presence in the zone of danger, she cannot recover damages without proving willfulness, which is not possible under the facts of this case and the remaining theories of liability.

Plaintiff's Response: [15] The Defendant's legal argument misses the mark. First, most of the Defendant's cases deal with either contract disputes or negligence claims rather than fraud, the claim before this Court. In fraud claims (including

[15] Harbin respectfully reserved the right to supplement or amend her response for the reasons stated below. Plaintiff only received section 5 regarding mental anguish damages after 7 p.m. Friday, August 20th. While Roundpoint's counsel had been working on this section arguably for a couple of weeks, Plaintiff's counsel has had a limited amount of time to research and respond, especially given the fact that one of Plaintiff's counsel was traveling and returned late Saturday evening and the other has experienced a medical issue over the weekend requiring doctor's follow up on Monday, August 23rd.

innocent fraud claims), as discussed below, plaintiffs are entitled to present evidence of, and recover damages for, emotional distress.

In *Ford Motor Corp. v. Burkett*, the Alabama Supreme Court concluded that the claim was legal fraud. *See Ford Motor Corp. v. Burkett*, 494 So. 2d 416, 418 (Ala. 1986) (unable to find evidence to support the fraud was with malice, intent, or recklessness). While the court concluded that without malice, intent, or recklessness, there can be no punitive damages, it did not overturn the award of damages for emotional distress. *Burkett*, 494 So. 2d at 418. In *Burkett*, the Alabama Supreme Court made it crystal clear that a finding of legal fraud "authorizes an award of compensatory damages, including … mental anguish proximately resulting from the wrong." *Burkett*, 494 So. 2d at 418; *see also* Doc. 99 at 11-12; Doc. 100 at 3 ("Under Alabama Code section 6–5–101, a false representation, even if made by mistake or innocently, is actionable and entitles a plaintiff to compensatory damages." (citing *Hall Motor Co. v. Furman*, 285 Ala. 499, 504, 234 So. 2d 37, 41 (1970)).

"[A] plaintiff may recover compensatory damages for mental anguish, even when mental anguish is the only injury visited upon the plaintiff." *Kmart v. Kyles*, 723 So. 2d 572, 578 (Ala. 1998) ("Under Alabama law, the presence of physical injury or physical symptoms is not a prerequisite for a claim for damages for mental anguish."); *see also Alabama Power Co. v. Harmon*, 483 So. 2d 386, 389 (Ala. 1986). To be sure, "[t]he plaintiff is only required to present some evidence of mental

anguish, and once the plaintiff has done so, the question of damages for mental anguish is for the jury." *Id*. (quoting *Harmon*, 483 So.2d at 389).

In *Cochrun v. Ward*, 935 So. 2d 1169 (Ala. 2006), a home damage case, the Alabama Supreme Court affirmed a substantial jury verdict on a legal fraud claim that the court concluded was supported by the economic and mental anguish evidence. *Ward*, 935 So. 2d at 1176. In *Ward*, the plaintiff sued for negligence, wantonness, fraud, and suppression. *Id.* at 1172. Trial proceeded on the fraud and suppression claim, among others. *Id.* Trial resulted in a general plaintiff's verdict. *Ward*, 935 So. 2d at 1172. The verdict form only addressed legal fraud (innocent). *Id.* at 1176. To that end, the Alabama Supreme Court concluded that the damages were not punitive and were only compensatory. *Id*. The legal fraud damage award – without regard to physical injury – was affirmed by the Alabama Supreme Court. *Id.* at 1176-77.

Even if the Defendant's arguments were legitimate regarding mental anguish damages in tort cases, Harbin would still be entitled to recover since she was in the "zone of danger." *See White Consolidated Indus. v. Wilkerson*, 737 So. 2d 447, 449 (Ala. 1999). If a plaintiff was placed in an immediate risk of physical harm, then she can recover for emotional distress or mental anguish without a physical injury. *See Wilkerson*, 737 So. 2d at 449. In this case, Harbin was – at a minimum – placed in the "zone of danger" since she was the target of the fraud and that her home would

be lost because of the fraud. The Eleventh Circuit has identified cases that warrant emotional distress damages.

> Because a person's home is said to be his "castle" and the 'largest single individual investment the average American family will make," these contracts are "so coupled with matters of mental concern or solitude or with the feelings the party to whom the duty is owed, that a breach of that duty will necessarily or reasonably result in mental anguish or suffering."

Ruiz de Molina v. Merritt & Furman Inc. Agency, Inc., 207 F.3d 1351 (11th Cir. 2000). While this case is not a contract action, it does involve the Plaintiff's home and involves the same concerns. This places Harbin in the zone of danger, permitting mental anguish damages.

e. Plaintiff's Claims.

1. Fraud against RoundPoint – Facts

a. Ms. Harbin's home was scheduled for foreclosure on June 3, 2015.

b. RoundPoint was servicing the loan for First Guaranty.

c. In May 2015, RoundPoint was working with Harbin on a loan modification.

d. By May 29, 2015, Harbin realized she might need additional time to complete the loan modification package.

e. On May 29, 2015, Ms. Harbin called RoundPoint to request additional time to complete the loan modification package.

f. RoundPoint initially told Ms. Harbin that the sale was set to proceed and that she needed to complete the loan modification package to be considered for a postponement.

g. On May 29, 2015, Ms. Harbin called and spoke to RoundPoint employee Daniel Gerstenfeld.

h. During that call, Ms. Harbin discussed the status of her requested postponement of the June 3, 2015, foreclosure sale.

i. Ms. Harbin explained to Mr. Gerstenfeld that she would file bankruptcy if RoundPoint did not postpone the sale.

j. Prior to the call with Mr. Gerstenfeld, Ms. Harbin had contacted Suzanne Shinn, a bankruptcy attorney.

k. Suzanne Shinn works for the bankruptcy law firm Bonds and Botes.

l. Ms. Harbin informed Ms. Shinn that she was engaged in a loan modification process, but that a foreclosure sale was pending on June 3, 2015.

m. Ms. Harbin further explained to Ms. Shinn that she did not want to be foreclosed and wanted to do what she could to avoid a foreclosure. In response, Shinn explained that in the event the modification did not come through in time or Roundpoint would not agree to postpone the

foreclosure, Ms. Harbin could file Chapter 13 bankruptcy, which would stop the foreclosure sale.

n. Ms. Shinn further explained the requirements in order to file bankruptcy and then remain in bankruptcy.

o. Ms. Harbin agreed that she was willing to do this as a last resort.

p. Shinn and Harbin agreed to meet again to gather the final information required to file the bankruptcy if necessary.

q. Ms. Shinn was ready, willing, and able to assist Ms. Harbin filing bankruptcy to protect her home from foreclosure.

r. Mr. Gerstenfeld initially explained that the sale was set to proceed on June 3, 2015.

s. After checking with another RoundPoint employee, Mr. Gerstenfeld represented to Ms. Harbin that the sale was suspended temporarily.

t. Ms. Harbin requested that Mr. Gerstenfeld confirm in writing that the sale was postponed.

u. Mr. Gerstenfeld said “okay”.

v. After the call with Mr. Gerstenfeld, Ms. Harbin emailed him the additional information requested by RoundPoint.

w. Mr. Gerstenfeld confirmed receipt of the two missing items.

x. During the exchange of emails on May 29, 2015, Mr. Gerstenfeld, confirmed, in writing, that the sale was suspended temporarily (in other words, postponed).

y. Mr. Gerstenfeld entered into the account notes that he advised Ms. Harbin that the foreclosure was "postponed".

z. The term "suspended temporarily" is a RoundPoint term of art.

aa. RoundPoint never explained what "suspended temporarily" meant or provided context to it.

bb. RoundPoint represented to Ms. Harbin that the June 3, 2015, foreclosure sale was postponed.

cc. As a result of that representation and written confirmation, Ms. Harbin did not proceed with the bankruptcy and informed Ms. Shinn of the postponement of the foreclosure.

dd. At that point, Ms. Harbin instead continued her efforts to complete the loan modification.

ee. Harbin reasonably relied upon the postponement representation to her detriment when she abandoned her intent to file for Chapter 13 bankruptcy.

ff. Ms. Harbin would have filed bankruptcy if RoundPoint did not postpone the June 3, 2015, foreclosure sale.

gg. Ms. Harbin's mother would have helped her with her mortgage payments and her bankruptcy payments, to the extent she could, to help save Ms. Harbin's home.

hh. Carl Cummings, Ms. Harbin's husband, would have helped Ms. Harbin with her bankruptcy payments and mortgage payments to help save Ms. Harbin's home.

ii. Ms. Harbin was damaged when the home was foreclosed.

jj. Ms. Harbin no longer owns the home or has ownership rights to it.

kk. The June 3, 2015, foreclosure sale has never been set aside, modified, or vacated.

ll. First Guaranty now owns the home.

mm. She has lost her ownership and equity interests in the home.

nn. Plaintiff reserves the right to offer additional evidence and facts not identified herein to support her claims and/or to rebut evidence offered by the Defendant.

2. Fraud against RoundPoint – Legal Authority

a. *Harbin v. RoundPoint*, 758 Fed. Appx. 753 (11th Cir. 2018).

b. Alabama Code § 6-5-100.

c. Alabama Code § 6-5-101 ("Misrepresentations of material fact made … recklessly without knowledge, and acted on by the opposite party, or, if made by mistake and innocently ... constitute legal fraud.").

d. Alabama Pattern Jury Instructions ("APJI"):

i. Fraud:

1. APJI 18.00 – Introduction
2. APJI 18.02 – Reckless False Statement
3. APJI 18.03 – Mistaken False Statement
4. APJI 18.07 – Promissory Fraud
5. APJI 18.08 – Definition of Important Fact / Promise
6. APJI 18.10 – Reliance

ii. Damages:

1. APJI 11.00 – Introduction
2. APJI 11.01 – Compensatory Damages
3. APJI 11.03 – Punitive Damages
4. APJI 11.10 – Personal Injury – Physical Pain and Mental Anguish

e. *Exxon Mobil Corp. v. Ala. Dep't of Conservation & Natural Res.*, 986 So. 2d 1093 (Ala. 2007).

f. *Baker v. Metropolitan Life Ins. Co.*, 907 So. 2d 419 (Ala. 2005).

g. *ALFA Mut. Ins. Co. v. Northington*, 561 So. 2d 1041 (Ala. 1990) ("A material fact is one that would induce someone to act").

h. *Hunt Petroleum Corp. v. State*, 901 So. 2d 1 (Ala. 2004).

i. *Deng v. Scroggins*, 169 So. 3d 1015 (Ala. 2014).

j. *Brass v. American Film Technologies, Inc.*, 987 F.2d 142 (2nd Cir. 1993) (citing *Junius Constr. Corp. v. Cohen*, 178 N.E. 672 (1931).

k. *Aaron Ferer & Sons Ltd. v. Chase Manhattan Bank, N.A.*, 731 F.2d 112 (2d Cir. 1984).

l. *Peerless Mills, Inc. v. American Tel. Co.*, 527 F.2d 445 (2d Cir. 1975) (must present facts to prevent partial statement from being misleading).

m. *LeMarie v. Lone Star Life Ins. Co.*, 2000 U.S. Dist. LEXIS *9 (E.D. La. June 7, 2000).

n. Plaintiff reserves the right to supplement this section after a full review of the Defendant's position and legal authority.

f. Defendant's Defenses.

1. Response to Claim of Fraud against RoundPoint – Facts

a. Ms. Harbin fell behind on her monthly loan payments shortly after taking out her loan.

b. Starting in April 2013, RoundPoint sent Ms. Harbin at least 25 letters encouraging her to contact RoundPoint to explore mortgage assistance.

c. Ms. Harbin did not respond to any of the letters by submitting a loan modification package until 2015.

d. Due to Ms. Harbin's delinquency on payments, the foreclosure process was initiated in 2015.

e. Ms. Harbin applied for a loan modification in early 2015; however, she did not qualify for a loan modification at that time since she did not have sufficient income.

f. On April 17, 2015, Ms. Harbin and RoundPoint entered into a forbearance agreement effective May 1, 2015.

g. The forbearance agreement allowed Ms. Harbin to pay $100 in exchange for having her foreclosure suspended for a total of 30 days.

h. On May 7, 2015, the law firm handling the foreclosure sent a letter to Ms. Harbin stating that First Guaranty Mortgage has instructed us to postpone the foreclosure sale scheduled for April 27, 2015, until June 3, 2015.

i. Ms. Harbin submitted another loss mitigation package on May 25, 2015.

j. Since Ms. Harbin had previously submitted and been denied a loan modification, there was no legal requirement for RoundPoint to consider her for another modification. Nevertheless, RoundPoint was willing to work with Ms. Harbin on another potential loan modification.

k. On May 26, 2015, Ms. Harbin spoke with a RoundPoint employee named Mario who advised her she must submit a complete loan package for a postponement, the sale was set for June 3rd, without a complete package they could not even attempt to postpone the sale, and that she couldn't afford to waste time.

l. On May 29, 2015, Ms. Harbin called again and spoke to RoundPoint employee Daniel Gerstenfeld, with whom she had not previously spoken and was not her special point of contact.

m. Mr. Gerstenfeld explained that the sale was set to proceed on June 3, 2015.

n. Ms. Harbin misrepresented to Mr. Gerstenfeld that Mario, with whom she had previously spoken, told her that the sale was to be postponed. This was not true.

o. Mr. Gerstenfeld re-checked the account and stated that it looks like the foreclosure has been suspended temporarily. This statement was true because the system showed the loan still being in active loss mitigation. That active loss mitigation being the forbearance agreement that did not lapse until June 1, 2015.

p. Ms. Harbin had not even submitted a complete loan modification package at the time of her discussion with Mr. Gerstenfeld. As Mario previously advised, a postponement of the sale would not even be possible without the submission of a complete loss mitigation package.

q. Following their conversation, Mr. Gerstenfeld emailed Ms. Harbin for documents and information that were still needed to complete Ms. Harbin's loan modification package.

r. In response to that email, Ms. Harbin asked whether the sale date on her house had been postponed. Mr. Gerstenfeld, once again, said that the foreclosure has been suspended temporarily. His statement was once again true due to the active loss mitigation, which consisted of the forbearance agreement that did not lapse until June 1, 2015. His statement was also made before Ms. Harbin had submitted the additional requested documents, which she had previously been advised was a requirement in order for them to even attempt to postpone the sale.

s. At no point did Ms. Harbin ask Mr. Gerstenfeld or anyone else to confirm the meaning behind the phrase "suspended temporarily" or ask how long the suspension would be in place.

t. Mr. Gerstenfeld did not have the authority to postpone a foreclosure sale.

u. On June 2, 2015, RoundPoint wrote Ms. Harbin a letter and confirmed that her loss mitigation application was incomplete because she was missing certain pieces of information.

v. The pieces of missing information included information which had previously been requested consisting of Ms. Harbin's last two (2) months of bank statements for any and all checking, savings, money market and/or brokerage accounts held by each borrower.

w. While Ms. Harbin had previously provided some bank statement information, she failed to provide complete copies.

x. The June 2, 2015 letter from RoundPoint also included a request for a copy of her homeowners' association bill.

y. Ms. Harbin failed to previously disclose in her initial loss mitigation application that she was subject to a homeowners' association and that it held liens on the property.

z. Unlike the prior scheduled foreclosure, Ms. Harbin did not receive a letter from the law firm conducting the foreclosure advising her of a new continuance date nor did Ms. Harbin contact the foreclosure firm to confirm that the sale had been postponed.

aa. On June 3, 2015, First Guaranty Mortgage proceeded with the foreclosure and the home was sold to First Guaranty as the highest bidder.

bb. At the time of the foreclosure, payment was due for the October 2014 payment and all subsequent payments.

cc. As of the date of the foreclosure sale, Ms. Harbin's homeowners' association had valid liens on the property, which meant she did not hold and could not convey clear title to the property, which would have been necessary in order to receive approval for a loan modification.

dd. As of the date of the foreclosure sale, Ms. Harbin had not submitted a complete loan modification application.

ee. Shortly after the foreclosure sale, Ms. Harbin lost her job and thus would not have been able to perform under any loan modification and would have eventually been foreclosed due to her inability to make payments.

ff. Non-party First Guaranty, which became owner of the home via foreclosure, is the only entity that had or has the legal right to undo the foreclosure.

gg. Despite the foreclosure sale and not paying on the loan since October 23, 2015, Ms. Harbin still has possession of the property, although she has not lived at the property for prolonged periods of time, including

the time of the foreclosure sale, her utilities have been cut off to the property on multiple occasions, and she is not currently living there or claiming it as her primary residence.

hh. Ms. Harbin has not sought any medical treatment or counseling for her alleged damages.

ii. Mr. Gerstenfeld did not induce Plaintiff not to file bankruptcy. He in fact said if she did file bankruptcy, to notify them.

jj. RoundPoint reserves the right to supplement this section after a full review of the Plaintiff's position and legal authority.

2. Response to Claim of Fraud against RoundPoint – Legal Authority

a. There is no fraud because the statements at issue were literally true.

See, e.g., *Nobility Homes, Inc. v. Ballentine*, 386 So. 2d 727 (Ala. 1980); *Chesnut v. Bd. of Zoning Adjustment*, 208 So. 3d 624, 632 (Ala. 2016); *Landau v. Roundpoint Mortg. Servicing Corp.*, No. 17-11151, 2019 U.S. App. LEXIS 17399, at *15 (11th Cir. June 11, 2019); *Kaye v. Pawnee Constr. Co.*, 680 F.2d 1360, 1369 (11th Cir. 1982).

b. RoundPoint did not have a duty to disclose.

See, e.g., *Shedd v. Wells Fargo Home Mortg., Inc.*, No. 14-00275-CB-M, 2015 U.S. Dist. LEXIS 145450, at *23 (S.D. Ala. Oct. 26, 2015); *Buckentin v. SunTrust Mortg. Corp.*, 928 F. Supp. 2d 1273, 1285 (N.D. Ala. 2013); *Swann v. Regions Bank*, 17 So. 3d 1180, 1191 (Ala. Civ. App. 2008); *Bank of Red Bay v. King*, 482 So. 2d 274, 285 (Ala. 1985).

c. Negligent misrepresentation requires a duty, and any duty RoundPoint owed was contractual, and hence, (1) that duty cannot support a claim for fraud; (2) that duty cannot support a claim premised on providing faulty information; (3) that duty precludes Plaintiff's fraud claims as a result of the economic loss rule; (4) per that duty, RoundPoint cannot be liable because it was acting as an agent servicing Plaintiff's mortgage for its principal, First Guaranty; and (5) RoundPoint had no duty to evaluate the Plaintiff's loan modification application when submitted.

See, e.g., *Legg v. Wyeth*, 428 F.3d 1317, 1324 (11th Cir. 2005); *Fisher v. Comer Plantation, Inc.*, 772 So. 2d 455, 463 (Ala. 2000); *U.S. Bank Nat'l Ass'n v. Shepherd*, 202 So. 3d 302, 314-15 (Ala. 2015); *Lage v. Ocwen Loan Servicing LLC*, 839 F.3d 1003, 1005 (11th Cir. 2016); 12 C.F.R. § 1024.41(c)(1); Plaintiff's mortgage at ¶¶ 9(d), 13, and 18; *Speigner v. Howard*, 502 So. 2d 367, 371 (Ala. 1987); Restatement (Second) of Agency § 357 (1958); *Blake v. Bank of Am., N.A.*, 845 F. Supp. 2d 1206, 1210–11 (M.D. Ala. 2012); *Boler v. Bank of Am., N.A.*, No. 2:17-cv-00303-JEO, 2017 U.S. Dist. LEXIS 210868, at *23 (N.D. Ala. Dec. 22, 2017); *Beale v. Ocwen Loan Servicing, LLC*, No. 7:15-cv-00397-LSC, 2015 U.S. Dist. LEXIS 78159, at *8 (N.D. Ala. June 17, 2015); *McClung v. Mortg. Elec. Registration Sys.*, No. 2:11-CV-03621-RDP, 2012 U.S. Dist. LEXIS 63834, at *34 (N.D. Ala. May 7, 2012); *Indus. Dev. Bd. v. Russell*, 124 So. 3d 127, 138 (Ala. 2013); *Wallace v. SunTrust Mortgage, Inc.*, 974 F. Supp. 2d 1358, 1370 (S.D. Ala. 2013); *James v. Nationstar Mortg., LLC*, 92 F. Supp. 3d 1190, 1200 (S.D. Ala. 2015); 12 C.F.R. §§ 1024.41(c)(1) and (g); *Miller v. Chase Home Fin., LLC*, 677 F.3d 1113 (11th Cir. 2012); *Cantrell v. JPMorgan Chase Bank, N.A.*, No. 4:14-CV-668-VEH, 2014 U.S. Dist. LEXIS 113488, at *22 (N.D. Ala. Aug. 15, 2014); *Tidmore v. Bank of Am., N.A.*, No. 4:15-cv-2210-JEO, 2017 U.S. Dist. LEXIS 15294, at *14 (N.D. Ala. Feb. 3, 2017).

d. Contributory negligence bars Plaintiff's negligent misrepresentation claim.

See, e.g., *Restatement 2d of Torts*, § 552A; *Auto-Owners Ins. Co. v. Johnson, Rast & Hays Ins., Inc.*, 820 F.2d 380, 383 n.1 (11th Cir. 1987) *Hilyer v. Fortier*, 227 So. 3d 13, 23 (Ala. 2017); *Norfolk S. Ry. v. Johnson*, 75 So. 3d 624, 639 (Ala. 2011); *Fisher v. Comer Plantation, Inc.*, 772 So. 2d 455, 461 (Ala. 2000); *Gilchrist Timber Co. v. ITT Rayonier*, 95 F.3d 1033, 1036 (11th Cir. 1996); *Gilchrist Timber Co. v. ITT Rayonier*, 127 F.3d 1390, 1398 (11th Cir. 1997); *Gilchrist Timber Co. v. Itt Rayonier*, 696 So. 2d 334, 335 (Fla. 1997); *Coursen v. Shapiro & Fishman, GP*, 588 F. App'x 882, 886 (11th Cir. 2014).

e. Plaintiff cannot prove recklessness and thus, cannot prove reckless misrepresentation.

See, e.g., *Roberson v. Gulf Life Ins. Co.*, 655 So. 2d 953, 959 (Ala.

1995).

f. Alabama's reasonable reliance rule precludes Plaintiff's fraud claims because the rule requires Plaintiff to discern the truthfulness of the statement, which she did not do.

See, e.g., *Harris v. M & S Toyota, Inc.*, 575 So. 2d 74, 77–78 (Ala. 1991); *McGriff v. Minn. Mut. Life Ins. Co.*, 127 F.3d 1410, 1414 (11th Cir. 1997).

g. RoundPoint did not induce Plaintiff not to file bankruptcy.

See, e.g., *St. Paul Fire & Marine Ins. Co. v. Anderson*, 358 So. 2d 151, 155 (Ala. Civ. App. 1977).

h. The statute of frauds bars Plaintiff's fraud claims.

See, e.g., *Estate of Bunnie Davis v. Wells Fargo Home Mortg., Inc.*, No. 2:15-cv-00329-JEO, 2016 U.S. Dist. LEXIS 12039, at *12 (N.D. Ala. Feb. 2, 2016); *Coleman v. BAC Servicing*, 104 So. 3d 195, 206 (Ala. Civ. App. 2012); *Charles J. Arndt, Inc. v. Birmingham*, 547 So. 2d 397, 402 (Ala. 1989); *DeFriece v. McCorquodale*, 998 So. 2d 465 (Ala. 2008).

i. Plaintiff is not entitled to mental anguish damages.

See, e.g., *Hayes v. Newton Bros. Lumber Co.*, 481 So. 2d 1123, 1124 (Ala. 1985); *Brown v. First Federal Bank*, 95 So. 3d 803, 818 (Ala. Civ. App. 2012); *Beale v. Ocwen Loan Servicing, LLC*, No. 7:15-cv-00397-LSC, 2015 U.S. Dist. LEXIS 78159, at *8 (N.D. Ala. June 17, 2015).

j. The amount of damages must be fairly proved and not left to guess, conjecture, or speculation.

See, e.g., *Ross v. W. Wind Condo. Ass'n*, 216 So. 3d 438, 443-44 (Ala. Civ. App. 2016); *Continental Volkswagen, Inc. v. Soutullo*, 309 So. 2d 119, 122-23 (Ala. Civ. App. 1975); *Briggs v. Woodfin*, 388 So. 2d 1221, 1225 (Ala. Civ. App. 1980); *Brown v. Norris*, 819 F. Supp. 2d 1249, 1253 (N.D. Ala. 2011); *Jamison, Money, Farmer & Co., P.C. v.*

Standeffer, 678 So. 2d 1061, 1067 (Ala. 1996).

k. Plaintiff can seek no damages for alleged equity in the home as a properly conducted foreclosure sale is deemed conclusive of the fair and reasonable price of the sale.

See, e.g., *Mt. Carmel Estates, Inc. v. Regions Bank*, 853 So. 2d 160, 166 (Ala. 2002).

l. Plaintiff must prove that her damages were the "proximate consequence" of the false representation.

See, e.g., Submission Order (Blackburn, J.) (Doc. 112, p. 3) (quoting Pattern Civ. Jury Instr. 11th Cir. 6.2 (2019); *Coursen v. Shapiro & Fishman, GP*, 588 F. App'x 882, 886 (11th Cir. 2014).

m. Plaintiff has suffered no damages as she would not have been able to successfully complete a Chapter 13 bankruptcy.

See, e.g., Fed. R. Bankr. P. 1006(a) and (b), 1007, 2003(a), and 3015(b); 11 U.S.C. §§ 101(30), 109(e), 362, 507, 521, 1321, 1322(d), 1324, 1325(a), 1326, and 1329; 28 U.S.C. § 586(e)(1)(B)(i); *Davis v. Gore*, 2014 U.S. Dist. LEXIS 16197, at *7 (Bankr. N.D. Ala. Feb. 10, 2014); *In re Burton*, 442 B.R. 421, 451 (Bankr. W.D.N.C. 2009); *In re Wark*, 542 B.R. 522, 539 (Bankr. Kan. 2015); *In re Hickman*, 104 B.R. 374, 376 (Bankr. D. Colo. 1989); *In re Jongsma*, 402 B.R. 858, 871 (Bankr. N.D. Ind. 2009); *In re Albany Partners, Ltd.*, 749 F.2d 670, 674 (11th Cir. 1984).

n. As this is a simple fraudulent misrepresentation case based on alleged negligent and/or reckless behavior, RoundPoint does not cite any law related to a promissory fraud claim, which claim the 11th Circuit did not remand (*see Harbin v. RoudPoint*, 758 Fed. Appx. 753, 758 n.3 (11th Cir. 2018)), or fraudulent suppression, which the Eleventh Circuit noted Plaintiff did not assert and also which Plaintiff has confirmed is not at issue (Doc. 95, pp. 22-23).

o. Plaintiff has also conceded that she does not believe that RoundPoint's employee acted willfully (Doc. 95, p. 34) and hence, willful fraudulent misrepresentation is not at issue nor can Plaintiff prove entitlement to

punitive damages. Nevertheless, in the event it is at issue, RoundPoint raises the following legal defenses and reserves the right to supplement them and/or raise any other defenses as may arise during the course of the trial or otherwise surface during the course of the case.

- Plaintiff cannot prove willful misrepresentation because RoundPoint's employee did not willfully deceive her. *See, e.g.*, *Southland Bank v. A & A Drywall Supply Co*., 21 So. 3d 1196, 1214 (Ala. 2008); *Spearman v. Wyndham Vacation Resorts, Inc.*, 69 F. Supp. 3d 1273, 1281 (N.D. Ala. 2014); *McCutchen Co. v. Media General, Inc.*, 988 So. 2d 998, 1003 (Ala. 2008).

- Plaintiff cannot prove entitlement to punitive damages because Plaintiff cannot prove by clear and convincing evidence that RoundPoint consciously or deliberately engaged in oppression, fraud, wantonness, or malice with regard to Plaintiff. Ala. Code § 6-11-20.

(6) DISCOVERY AND OTHER PRETRIAL PROCEDURES:

a. Pretrial Discovery.

i. X Pursuant to previously entered orders of the court, discovery is closed.

ii. ___ The parties are given leave to proceed with further discovery provided it is commenced in time to be completed by _____.

b. Pending Motions.

None.

(7) TRIAL: (JURY CASE)

Per the Court's order of August 10, 2021, the parties will present the Court with proposed jury instructions on or before August 23, 2021.

(8) TRIAL DATE.

a. This case is set for trial on September 13, 2021.

The foregoing admissions of fact and stipulations of law having been made, and the parties having specified the issues of fact and law remaining to be litigated, this pretrial order shall govern the course of the trial unless modified by order of the court to prevent manifest injustice.

DONE and **ORDERED** this 27th day of August, 2021.

Sharon Lovelace Blackburn

SHARON LOVELACE BLACKBURN
UNITED STATES DISTRICT JUDGE