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IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC14-1629
L.T. CASE NO.: 3D12-1338

RODOLFO VALLADARES,

Petitioner,

v.

BANK OF AMERICA CORPORATION, a Delaware corporation,

Respondent.

_____________________________/

PETITIONER'S INITIAL BRIEF ON THE MERITS

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I.
INTRODUCTION

This Petition addresses the legal question of whether the evidence concerning Plaintiff Rodolfo Valladares' violent apprehension by the police at Respondent Bank of America Corporation (hereinafter "Bank of America" or "the Bank"), as a result of the Bank's false report that he was committing a robbery, failed to satisfy the standard of liability articulated in *Pokorny v. First Federal Savings & Loan Ass'n of Largo*, 382 So. 2d 678 (Fla. 1980). Plaintiff Valladares (or "Rudy") was seriously injured when employees of the Bank falsely reported that he was committing a robbery, and then compounded their recklessness by failing to advise the police when they knew that their report was erroneous. Doing so would have timely halted the police raid on the Bank and the assault on Rudy, which caused him serious injury. The jury not only found the Bank and its employees to have been negligent, awarding Rudy compensatory damages of $2,603,000, but also that the Bank was liable for $700,000 in punitive damages (R. 1421-22).[1] The jury therefore found that the evidence satisfied the standard of liability attributed to *Pokorny* by the District Court of Appeal, Third District. *See Bank of America Corp. v. Valladares*, 141 So. 3d 714

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[1]"R." refers to the Record on Appeal. "Tr." refers to the Trial Transcript. We are stating the evidence in the light most favorable to the jury's verdict, and we entreat the Bank to do the same.

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(Fla. 3d DCA 2014).

Nevertheless, the District Court held that the Bank was entitled to a directed verdict, on the ground that the Plaintiff's evidence did not satisfy the standard of liability established in *Pokorny*. This proceeding followed.

II.
STATEMENT OF FACTS

A. The Evidence.

1. The Bank's Dereliction. On July 3, 2008, Plaintiff Valladares went to an Aventura branch of Bank of America, where he had an account, and wanted to cash a check (Tr. 752). He went to the window of teller Meylin Garcia (*see* Tr. 378, 761). Ms. Garcia was not qualified to deal with situations in which she suspected a robbery. When she was hired, Ms. Garcia was given one week of training; shown a video with only a few minutes devoted to bank robberies in very general terms; and given a manual that was equally superficial (*see* Tr. 367-68, 431, 482). She was given no on-the-job training; told nothing about how to identify a bank robber; and given no instruction as to when to call off an alarm (Tr. 368-70). The Plaintiff's expert said that the reason for adequate training is to prevent what happened here--panic by a bank teller leading to injury (*see* Tr. 463-64). The jury could find that in providing Ms. Garcia no training, Bank of America was indifferent

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to the serious risk.

Ms. Garcia said that the only reason she triggered the alarm was her poor memory of a photograph shown earlier to her by the Bank, in which a different-looking suspect wore a different Miami Heat cap and sunglasses (*see* Tr. 370, 375, 377). Without having the photograph at her station, the moment she saw Rudy in his cap and sunglasses, Ms. Garcia believed that Rudy was a bank robber (Tr. 370). Ms. Garcia acknowledged that Rudy looked nothing like the man in the photo, and said that if she'd had the photo at her station, she would not have triggered the alarm (Tr. 375). But the Bank did not post such photos at tellers' stations, content to rely upon the tellers' memories of such photos in deciding whether to call the police (Tr. 373-74). The Plaintiff's expert said that obviously the Bank should have posted such photos at the tellers' stations (Tr. 481). The defense expert did not even know whether Ms. Garcia had the photo at her station (Tr. 1070). But the defense expert did verify that such decisions are made at the Bank's corporate level (Tr. 1092). The Bank's dereliction on this simple matter shows complete indifference to the consequences of a false alarm.

Ms. Garcia admitted that triggering the alarm was the cause of everything that happened (Tr. 370). Before Rudy had said a word; before he presented the check for $100 on a Bank of America account with his name on it; before he presented his ID;

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looking "nice"; with no weapon, no threat; no talk of robbery; with no indication of any kind that he was committing a robbery, Ms. Garcia, who was untrained and unprepared, panicked and hit the alarm (Tr. 377-80, 387-88, 482-83, 1064-65). Ms. Garcia admitted that she panicked (Tr. 398, 484-85), and the Bank's expert said that she panicked (Tr. 1064-65).[2]

To make matters worse, even *after* she saw the check and the driver's license, Ms. Garcia did nothing (*see* Tr. 390-91). Even the Bank's expert said that the check and the driver's license showed that Rudy was *not* a bank robber (Tr. 1082). But Ms. Garcia, having received no training in such matters, "had it set in my mind according to the description I had seen that morning" (Tr. 383). She therefore repeated the accusation to Assistant Bank Manager (in training) Jimmy Alor (*see* Tr. 386), without telling him that Rudy had presented the check and ID; she later admitted that she should have done so (Tr. 386, 388, 390, 398-99). She said: "I was just focusing in my mind, yes, this was the bank robber. This is the guy that I saw this morning in the pictures. . . . That's why I didn't call off the silent alarm. I never in my mind thought

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[2]The defense expert, however, did not echo this conclusion. He did not say what the Bank argued to the jury and on Appeal--that in her panic Ms. Garcia simply made a mistake. The expert testified that the bulletin concerning a different-looking suspect, plus Rudy's (different) hat and sunglasses, and the holiday season, *justified* pushing the panic button (Tr. 1072). The expert also acknowledged that he had not spoken to Assistant Branch Manager (in training) Jimmy Alor, and had not read the police officers' depositions (Tr. 1079, 1086).

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that he was not the robber" (Tr. 384). Nor did Ms. Garcia say anything to the police after they stormed the Bank (Tr. 394).

Assistant Branch Manager Jimmy Alor had no prior banking experience, and no training in how to respond to a situation like this one (Tr. 402-03, 429). He verified that the Bank *left it up to the tellers* to decide what to do if they thought the Bank was being robbed (Tr. 403). This was wanton indifference by the Bank. Mr. Alor also said that on this occasion he confirmed that a robbery was taking place solely *by looking at Ms. Garcia's panicked face*! Tr. 412. This absurdity is also proof of the Bank's management's wanton and willful indifference to the danger of a false alarm. It shows why training is necessary, and why not training is gross negligence at the least.

The Bank's wrongdoing consisted of its alarming indifference to training and safety measures, as simple as having the photo at the tellers' stations, and the disinterest of its managerial employees. There were two bases of liability supported by the evidence in this case: 1) the gross negligence of both the Bank and its employees in triggering the alarm; and 2) the gross negligence of both the Bank and its employees in not calling it off. This two-fold transgression is important to the District Court's holding that under *Pokorny*, the Bank was not liable for its negligence in calling the police--a holding that did not address the Bank's gross

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negligence in not countermanding the alarm, which is outside of *Pokorny*'s analysis.

2. *The Assault.* Exploiting the element of surprise (Tr. 528), three to five Officers of the Aventura Police Department stormed the Bank from one side--another group from another side (Tr. 528). They were carrying semi-automatic machine guns (Tr. 520-21, 526, 534, 771, 883), which they pointed at Rudy's head from only a few feet away (Tr. 534, 777). The Officers yelled at Rudy to get down on the ground, and he did (Tr. 533, 535). Two Officers immediately were on top of him; a boot was on the back of his head (Tr. 774). An Officer testified that he could not see one of Rudy's hands, and feared that Rudy might have a weapon. Therefore, when Rudy did not respond to a command fast enough and looked away, "I struck him in the head with my foot . . . just trying to get some sort of reaction from him" (Tr. 535; *see* Tr. 451, 539, 548). This action is called a head strike; it is part of the protocol (Tr. 536-37). Rudy testified that he was kicked twice in the side of the head (*see* Tr. 774-75, 831; *see* Tr. 565); and the jury also could believe the medical experts' testimony concerning the effects of the blow to the head (*see infra*).[3]

Rudy was terrified and in pain (Tr. 771). He testified that after he was kicked,

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[3]The Officer wrote in his report that he had only tapped Rudy on the ear with his left toe (D. Ex. C), and he testified that this was accurate (Tr. 547). The Officer did call it a head strike--a kick--though not like kicking a field goal (Tr. 536). The jury was entitled to believe the Plaintiff's evidence.

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the Officers lifted him up by the hands and took him out (Tr. 775). When they finally learned the truth, they released Rudy.

An Officer testified that if Ms. Garcia's call had been countermanded, the Officers would "[a]bsolutely have handled [the situation] differently"; they would not have entered the Bank the way they did; in fact they would not have entered the Bank at all, but rather would have waited outside for the Bank Manager; they would have talked to Rudy; they would not have handcuffed or kicked him (Tr. 445, 541, 543, 556-57).

3. *The Damages.*[4] The testimony concerning the effects of the incident was overwhelming. The paramedics on the scene saw signs of head injury (Tr. 452, 458-59), noting that Rudy immediately complained of head pain (Tr. 458). Rudy suffered permanent bilateral damage to his optic nerve, and constricted peripheral vision (Tr. 693-94, 696-97). The Bank did not call an expert to countermand this testimony. Rudy suffered traumatically-induced pain in the front temporal area of his brain; headaches; dizziness; trauma to the optic nerve; vision problems; lightheadedness; difficulty sleeping; cervical strain in the soft tissue of the

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[4]There was uncontradicted testimony that Rudy had suffered none of the conditions noted below before this event (*see* Tr. 567, 665, 671-72, 676, 681-82, 717-18, 746-50, 862). There also was uncontradicted testimony that all of Rudy's injuries--physical and emotional--were caused by this event (*see* Tr. 567, 655-56, 668-89, 719).

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neck; muscle contraction; chronic muscle discomfort; painful secondary inflammations; anxiety; panic; depression; changes in appetite; hoarding impulses; paranoia; loss of concentration; loss of direction; cognitive damage; withdrawal and isolation; constriction of emotional range (flat affect); confusion; and side effects from his medication (*see* Tr. 563, 566-69, 572-73, 576-77, 580-81, 628, 633, 642-49, 651, 674, 678, 682, 689, 692, 781, 784-97). The Plaintiff's psychologist testified without contradiction that this was a "very traumatic" event--the kind that "affects the brain"--"like an identative inside the brain that never goes away"--an experience at "the severe spectrum" on the scale of traumatic events (Tr. 636, 643, 652). She said that his life was totally impaired (Tr. 645). She said: "His life was ruined. He couldn't go anywhere or do anything" (Tr. 644). She diagnosed post-traumatic stress disorder with anxiety and depression (Tr. 628). Rudy's symptoms are all consistent with that diagnosis (Tr. 651). His progress was not good (Tr. 625-26); his symptoms are not curable (Tr. 635, 653, 719). His vision problems are permanent--not correctable with glasses (Tr. 689, 700-01). Bank of America did not call a psychiatrist or psychologist to address this evidence.

Even though the Plaintiff filed this lawsuit within 30 days of the incident, Bank of America produced only a partial surveillance video, which mysteriously edited out the *precise segment* that would have shown Rudy being beaten (*see* Tr. 324

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(Plaintiff's statement in opening argument--no objection), 613-20 (defense expert)).[5]

B. *The District Court's Decision.* Given that Rudy was not arrested or prosecuted, he had no claim of malicious prosecution. He pleaded negligence, battery and false imprisonment (R. 123). The Bank argued for a jury instruction that would have told the jury that it could only be held liable for false imprisonment or malicious prosecution, upon proof of bad faith (Tr. 950, 1008-09, 1098-1100). Given that Rudy had no claim of malicious prosecution or false imprisonment, that would mean that his injury would go unredressed. Likewise, the Bank moved for a directed verdict on the ground that under *Pokorny*, Rudy was limited to a claim of false imprisonment or malicious prosecution, which were unavailable on the facts of this case, and that *Pokorny* precluded any claim of negligence under any circumstances, even if the

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[5]The Bank's attempt to explain away the missing portion of the tape was a disaster. Its "expert" testified that the tape was programmed to delete portions in which there was no movement, which he called the "time between two motion sequences" (Tr. 618-19). But the expert then identified a portion of the tape in which there was no movement that was not deleted; and he could not explain how there could possibly have been no movement in the erased portion of the tape in which Rudy was driven to the floor and kicked in the head (*see* Tr. 613-14, 617). The expert was asked: "Isn't it true, sir, when I took your deposition you had no explanation as to why this video had been erased?" His incoherent answer: "When taken out of context in individual frames it is very difficult for me to tell that. But if I were to look at each individual frame regardless of the sequential, it taken out of context of the video itself I couldn't tell you. Indeed, I could not explain it" (Tr. 619-20). This testimony could not have helped the Bank.

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Bank had been negligent, causing him serious injury (*see* Tr. 979-86).[6]

Likewise, in its post-trial Motion, the Bank's only argument was that Rudy had no cause of action under any circumstances. It noted that "[a]t the charge conference, Bank of America requested that the Court provide a single instruction to the jury regarding Malicious Prosecution as that is the only cause of action which is viable under the facts of this case under applicable Florida law" (R. 840 at 7). It repeated its argument that "Plaintiff is required to pursue a claim for malicious prosecution" (*id.* at 13).[7] And then, having said that Rudy could only bring a claim for malicious prosecution, the Bank noted that he had no such claim, because he was not arrested (*id.* at 13-14): "[E]ven if the Court had properly given the instruction of Malicious Prosecution, Plaintiff would have been unable to prove his claim." And Bank of

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[6]At the charge conference, as a back up position, the Bank suggested a modified negligence instruction that would require a showing of bad faith (*see* Tr. 1098-99). However, after it was rejected, this suggestion then disappeared from the lawsuit. It was not asserted in the Bank's Motion for Judgment in Accordance with its Prior Motion for Directed Verdict (R. 840); or on Appeal (*see* Brief of Appellant at 15, 23-25). *See infra.*

[7]*See id.* at 7 ("Bank of America requested that, at a minimum, the negligence count be removed and that the jury be provided the malicious prosecution instructions"); 9 ("The only viable cause of action in such circumstances is the claim for Malicious Prosecution"; "Under Florida law, a private citizen may not be held liable in tort where he neither actually detained another nor instigated the other's arrest by law enforcement"); 11 ("The only viable cause of action under the circumstances is one for Malicious Prosecution").

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America argued the same thing at the post-trial hearing (R. 1303 at 6): "[W]e requested a jury instruction on malicious prosecution, which, in our opinion, is the only claim that could arise from the conduct and evidence in the trial." It said: "Pokorny stands for the proposition that reporting criminal activity is not actionable unless the plaintiff can establish malicious prosecution" (*id.*). *See id.* at 8:

> The Pokorny case does not state that merely good faith is a defense to a claim of negligence. The good faith language is a defense to a malicious prosecution claim. What Pokorny says is that you can't sue in negligence for reporting suspected criminal activity or a suspected criminal.

Thus, the Bank's only argument was that even if it had acted wrongly in causing Rudy serious physical injury, absent a warrant or arrest there was no remedy.

The Plaintiff countered in the trial Court that *Pokorny* said nothing to preclude a claim of negligence when a Defendant's conduct in causing a police action did not result in an arrest or prosecution, but nevertheless injured the Plaintiff (*see* R. 1303 at 9-12). *Pokorny* had addressed the elements of claims that the Defendant had either detained the Plaintiff or sworn out a warrant for the Plaintiff's arrest, holding that such claims have to be brought as claims of false arrest or malicious prosecution. However, *Pokorny* did not address claims of negligence in making reports to the police that result in the plaintiff's injury, but could not be brought as claims of

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malicious prosecution or false imprisonment (*id.*). Such claims should be permissible when the Defendant's negligence caused physical injury. The trial Court agreed, and submitted the negligence claim to the jury, which found for the Plaintiff. The jury also found the Bank liable for punitive damages.

In the District Court, the Bank again asserted its one argument--that Rudy had no claim at all. It said: "Under Florida law, negligently reporting an incident to the police is not a valid claim" (Brief at 15). It said that "there is no plausible or viable claim for negligently reporting an incident to the police" (Brief at 23). It said that "the Bank should not have been held liable for reporting the incident to the police. Instead, the Bank should only be held liable for malicious prosecution" (*id.* at 25). It said that "the Bank may not be held liable in tort where its employees neither detained nor instigated a Plaintiff's arrest by law enforcement" (*id.* at 15). And again, the Bank noted that Rudy had no such claim (*id.* at 25): "The court did not instruct the jury on such a claim, but even if it had, [the Plaintiff] did not prove the elements of malicious prosecution." Again, the Bank's only argument was that there was no claim of negligence in this circumstance, no matter how framed, and regardless of its elements. "[T]he evidence did not support a claim for malicious prosecution" (*id.* at 26).

The Plaintiff responded 1) that *Pokorny* did not foreclose a negligence claim

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in proper cases; 2) that *Pokorny* only dealt with liability for "reporting an incident" (382 So. 2d at 683); it did not address a claim of negligence in failing to countermand a call to the police; and 3) that the jury's finding of entitlement to punitive damages satisfied even the standard that the Bank attributed to *Pokorny*. *See* Brief of Appellee.

The District Court agreed with the Plaintiff that a claim is available when a police action short of arrest or prosecution causes the Plaintiff injury. It therefore rejected the Bank's only argument. However, the District Court found that Rudy's evidence did not prove the elements of such a claim, because it assertedly did not prove bad faith. The Court did not address Rudy's claim for the Bank's failure to call off the police raid, or the import of the jury's finding of liability for punitive damages.

The District Court described *Pokorny's* holding that "[a] mistaken report to the police that leads to a false arrest rises to the level of a tort if the reporting person acted with malice or specifically requested the arrest and detention." 141 So. 3d at 717, *citing Pokorny*, 382 So. 2d at 683. The District Court looked at cases involving "false arrest," leading to "an innocent person being prosecuted," "ris[ing] to the tort of malicious prosecution" (*id.* at 718). The District Court also acknowledged that "none of [the] authorities" that it cited, including *Pokorny*, "dealt with the exact cause of action before us: a mistaken report of a crime that results in the person reported

receiving personal injuries at the hands of the police." *Id.* The Court did not identify this "cause of action," or explain how it could be anything other than a claim of negligence. But whatever it is, the Court said that it is subject to a good-faith privilege. It found that "the same reasons for recognizing a qualified privilege when the injury is wrongful prosecution, arrest, defamation, or slander apply when the injury is physical," justify a "qualified immunity" (*id.*). The only claim that the Court could have meant by this, subject to a good-faith privilege, would be a claim of negligence. Rudy admittedly had no claim of wrongful prosecution or arrest, and any claim of defamation or slander would not address his physical injuries. The only viable claim in such circumstances would seem to be a claim of negligence. Nevertheless, the District Court appeared to question whether a negligence claim, even one subject to a good-faith defense, can be brought, by acknowledging conflict with *Harris v. Lewis State Bank*, 482 So. 2d 1378 (Fla. 1st DCA 1986) (discussed *infra*).

As noted, the Bank had argued only that if a Plaintiff has no claim of malicious prosecution or false arrest, he has no claim at all. The Bank did not argue what the District Court held--that although a negligence claim may be brought in these circumstances, it is subject to a good-faith privilege. The District Court therefore rejected the argument that the Bank did make, and adopted a position that the Bank

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had not advanced.

III.
ISSUE FOR REVIEW

WHETHER THE DISTRICT COURT ERRED IN HOLDING THAT *POKORNY* BARRED THE PLAINTIFF'S CLAIM.

IV.
STANDARD OF REVIEW

The determination of a governing legal standard presents a *de novo* issue of law. *See State v. Glatzmayer*, 789 So. 2d 297, 303 (Fla. 2001). The evidence is reviewed in the light most favorable to the prevailing party, *Tricam Industries, Inc. v. Coba*, 100 So. 3d 105, 108 (Fla. 3d DCA 2012), taking all inferences in his favor. *Posner v. Walker*, 930 So. 2d 659, 665 (Fla. 3d DCA), *review denied*, 944 So. 2d 348 (Fla. 2006). An appellate Court will not consider arguments not raised in the Court below. *See Bainter v. League of Women Voters of Florida*, 150 So. 3d 1115, 1126 (Fla. 2014); *Chames v. DeMayo*, 972 So. 2d 850, 850 n. 2 (Fla. 2007); *Powell v. State*, 120 So. 3d 577, 590 (Fla. 1st DCA 2013).

V.
SUMMARY OF ARGUMENT

Pokorny v. First Federal Savings & Loan Ass'n of Largo, 382 So. 2d 678 (Fla. 1980) addressed the elements of a claim that the Defendant either himself wrongfully

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detained the Plaintiff, or wrongfully swore out a warrant that resulted in his arrest. It held that such a claim has to be brought as a malicious-prosecution claim. It held that malicious-prosecution claims can be sustained upon 1) proof of negligence--that is, that the Defendant did not "act[] reasonably," *id.* at 683; and 2) something more than a "good-faith mistake." *Id. Pokorny* did not discuss the viability or elements of a claim based on a Defendant's reports to the police that did not lead to the Plaintiff's arrest, but nevertheless caused him injury. However, there is no reason to think that *Pokorny* intended to rule out such claims, based on a physical injury to a Plaintiff, even when the Plaintiff was not arrested or prosecuted. Even if there might be a good-faith privilege in such cases, there is no merit to the Bank's contention--its only contention--that under all circumstances, absent a claim of malicious prosecution, there is no claim at all.

In fact, the District Court rejected that contention, holding that there is such a claim, and that the *Pokorny* elements apply to such a claim, but that the Plaintiff's evidence did not prove those elements. This was a point that Bank of America had not asserted. The District Court should have held that the issue was not before it, having not been raised. *See supra* p. 15. At the least, any holding by this Court on the issue should not apply to the Judgment in the instant case.

Moreover, even if the argument had been made, in the instant case there were

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factual questions on the issues of negligence and good faith, relative to the Bank's original call to the police. Both issues were in fact litigated, and the jury found for Rudy on both. Moreover, *Pokorny* only applies to claims based on a Defendant's "reporting an incident." *Id.* at 683. It does not even apply to the Bank's negligence in not countermanding the alarm after it was set off, when the Bank had actual knowledge that no robbery was taking place. Moreover, the jury's finding that the Plaintiff was entitled to an award of punitive damages--a finding amply supported by the evidence-- necessarily satisfied the bad-faith standard adopted in *Pokorny.* That this finding came on the punitive-damage claim, and not on the negligence claim, does not change its substantive import. Florida courts do not exalt form over substance.[8] Therefore there was no basis for a directed verdict.

VI.
ARGUMENT

THE DISTRICT COURT ERRED IN HOLDING THAT *POKORNY* BARRED THE PLAINTIFF'S CLAIM.

Rejecting the Bank's argument, the District Court held that the privilege recognized in *Pokorny* in cases claiming malicious prosecution and false arrest applies equally in cases based on a Defendant's initiation of a police action not

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[8]*See Babcock v. Whatmore*,707 So. 2d 702, 703 n. 3 (Fla. 1998); *IndyMac Federal Bank FSB v. Hagan*, 104 So. 3d 1232, 1236 (Fla. 3d DCA 2012).

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resulting in the detention or arrest of the Plaintiff, but nevertheless resulting in injury to the Plaintiff. However, it then held that the Plaintiff here proved only simple negligence, and therefore that Bank of America was entitled to Judgment as a matter of law. This was a point that Bank of America had not even made, unsuccessfully asserting only that there can never be any claim in such matters other than malicious prosecution or false imprisonment. Thus, this was an issue that the District Court need not have addressed, because it was not raised by Bank of America on Appeal. For this reason, any holding of this Court on the issue should not apply to this case, and the District Court's decision should be reversed on that narrow point.

On the merits, *Pokorny* was an action against the First Federal Savings and Loan Association of Largo for false imprisonment and unlawful detention. False imprisonment requires detention or the procurement of an arrest. *See Marshall v. Regions Bank*, 2012 WL 415446 *5 (S.D. Fla. Feb. 9, 2012). Malicious prosecution requires the commencement and continuation of a criminal proceeding. *Harris v. Lewis State Bank*, 482 So. 2d 1378, 1381 (Fla. 1st DCA 1986). The Court in *Pokorny* addressed the elements of such claims, which arise from a Plaintiff's arrest, detention and prosecution. It said that "Florida courts have never recognized a separate tort for 'negligently' swearing out a warrant for arrest. Such cases may be brought only in the form of civil suits for malicious prosecution. . . . Mere negligence alone is not

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sufficient." 382 So. 2d at 683. It said, *id.* at 683:

> We hold that under Florida law a private citizen may not be held liable in tort [for malicious prosecution] where he neither actually detained another nor instigated the other's arrest by law enforcement officers. If the private citizen makes an honest, good-faith mistake in reporting an incident, the mere fact that his communication to an officer may have caused the victim's arrest does not make him liable [for malicious prosecution] when he did not in fact request any detention.
>
> *****
>
> As long as the employees acted reasonably, their action did not constitute "direct procurement of an arrest" as set forth in *Johnson v. Weiner*, [155 Fla. 169, 19 So. 2d 699 (Fla. 1944)].

Thus, a Plaintiff charging malicious prosecution has to prove that the Defendant did not "act[] reasonably," which means that he was negligent.[9] But such

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[9]*See Marshall v. Regions Bank*, 2012 WL 415446 (S.D. Fla. Feb. 9, 2012) (malicious prosecution; allegation of failure to supervise; jury "question as to whether [Defendants] acted reasonably"); *Borneisen v. Capital One Financial Corp.*, 490 Fed. Appx. 206 (11th Cir. 2012) (malicious prosecution; judgment for Defendant because "Wilson undoubtedly acted reasonably in reporting" crime); *Lopez v. Ingram Micro, Inc.*, 1997 WL 401585 (S. D. Fla. March 18, 1997) (false imprisonment; claim stated for negligent instigation); *Glenney v. Forman*, 936 So. 2d 660 (Fla. 4th DCA 2006) (asserted negligence in listing victim as defendant; "One can be liable for negligence for proximately causing a false arrest"); *Pinchot v. First Florida Banks, Inc.*, 666 So. 2d 201, 202 (Fla. 2d DCA 1995) (false arrest after Plaintiff cashed check; denial of summary judgment; "In order to affirm a summary judgment in favor of the bank and its employee, we would have to hold that no genuine issue of material fact exists as to whether the bank and its employees acted reasonably and in good faith in relaying information she received from another source"); *Godines by and through Godines v.*

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proof is not sufficient. *Pokorny* also held that the Defendant is not liable for malicious prosecution if he made an "honest, good-faith mistake." *Id.*[10]

Pokorny did not specifically address the permissibility and elements of claims against Defendants who instigate police actions that cannot be redressed by malicious prosecution claims, because the Plaintiff was not arrested or prosecuted, but in which the Defendant's accusations are alleged to have been a procuring cause of physical

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First Guaranty Savings & Loan Ass'n, 525 So. 2d 1321, 1325 (Miss. 1988) ("[T]he Court's qualification [in *Pokorny*] that the employees 'acted reasonably' suggests that procurement might hinge on some reasonableness of the employee's actions"). *See also Deadman v. Valley National Bank of Arizona*, 154 Ariz. 452, 461, 743 P.2d 961, 970 (1987) ("At least one court [*citing Pokorny*] requires that a person giving information to police act 'reasonably' under the 'facts known or readily available to him'").

[10]*See Marshall v. Regions Bank*, 2012 WL 415446 (S.D. Fla. Feb. 9, 2012) (Fla. law) (malicious prosecution; "The holding in *Pokorny*, by its own terms, does not absolve the citizen who procures another citizen's arrest by means consisting of less than good faith . . ."); *Zivojinovich v. Ritz Carlton Hotel Co., LLC*, 445 F. Supp. 2d 1337, 1346-47 (M.D. Fla. 2006) (Fla. law) (claim of false arrest stated in allegation that defendant "personally arrested and detained" the plaintiff, and made "false" accusations "not in good faith"); *Alterra Healthcare Corp. v. Campbell*, 78 So. 3d 595 (Fla. 2d DCA 2011) (employee's action against employer for malicious prosecution; verdict for plaintiff affirmed; elements of malice and lack of probable causation overlapped "[b]ecause . . . good faith is 'an essential element to be considered on the question of probable cause.'" 78 So. 3d at 602, *quoting Glass v. Parrish*, 51 So. 2d 717, 720 (Fla. 1951); *Harris v. Lewis State Bank*, 482 So. 2d 1378, 1382 (Fla. 1st DCA 1986) (reversing summary judgment for bank on malicious-prosecution claim; jury question "presented as to whether probable cause existed for appellant's prosecution and whether malice could be inferred by the jury from the absence of probable cause and the bank's actions, both before and after her arrest").

injury to the Plaintiff. At the same time, *Pokorny* offered no reason why such claims could not be brought, given the alternative that the injured Plaintiff would have no means of redress at all. And the only judicial rubric under which such claims may be brought is a negligence action, whether subject to a good-faith privilege or not. Indeed, it was *Pokorny* itself which said that Defendants in this area may escape liability if they "acted reasonably." 382 So. 2d at 683. In holding that the *Pokorny* privilege should apply to such claims, the District Court made no suggestion of what such claims could be, other than claims of negligence.

As the District Court noted, the Court in *Harris v. Lewis State Bank*, 482 So. 2d 1378 (Fla. 1st DCA 1986) applied *Pokorny* in a context broader than malicious prosecution or false imprisonment. In *Harris* the Court not only allowed an action against the Bank for malicious prosecution, but also sanctioned the Plaintiff's claims of negligence and fraud and deceit in reporting the Plaintiff to the police. The Court in *Harris* rejected the Bank's argument, which relied upon *Pokorny*, that these claims were "based upon appellant's prosecution, damages for which may only be sought in a suit for malicious prosecution." It held that even in the absence of a viable claim of malicious prosecution, the Bank could be held liable, subject to the standard announced in *Pokorny*, upon proof of negligence and the absence of an honest, good-faith mistake, *id.* at 1384:

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> The holding in *Pokorny* was that an honest, good faith mistake in reporting an incident which results in an arrest does not make the informant liable when he did not in fact request any detention. It is at least arguable that in the case sub judice, the misinformation allegedly reported to the police was not the result of an honest, good faith mistake on the part of the bank. The allegations upon which all the counts of appellant's complaint are based include acts beyond the innocent misunderstanding portrayed in *Pokorny*. The dicta in *Pokorny* do not support the bank's assertions.

Likewise in *Allen v. Gooden*, 2012 WL 1102705, *3 (S.D. Fla. April 2, 2012) (Fla. law), the plaintiff brought an action under 42 U.S.C. §1983 based on the allegation that his accuser was acting under color of law in reporting him to the police, resulting in the plaintiff's allegedly-unconstitutional detention. As in the instant case and *Harris*, in *Allen* there was no arrest or prosecution. The defendant moved to dismiss, invoking *Pokorny's* insulation of "an honest, good-faith mistake in reporting an incident," 382 So. 2d at 683. The court in *Allen* denied the motion, because the plaintiff had alleged that the defendant had "intentionally lied to the police." *Allen v. Gooden*, 2012 WL 1102705, *3 (S.D. Fla. April 2, 2012). In the instant case, the allegation was negligence (and the proof was at least gross negligence), but the importance of *Allen*'s holding is that in proper cases, *Pokorny* authorizes an action even when the defendant could not be held liable for false arrest or malicious prosecution.

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As noted, Bank of America did not argue on Appeal that the Plaintiff's claim of negligence should be subject to a requirement of proving bad faith. In the trial court, it initially proposed a jury instruction to that effect, but then dropped the point both post-trial and on Appeal (*see supra* pp. 9-12 & n. 6). The Bank's only argument was that there could be no negligence claim under any circumstances. The District Court rejected that argument. Instead, it addressed an issue that the Bank had not raised. The District Court may have correctly stated the law, but there was no basis for reversing the Judgment in this particular case.

Moreover, the Plaintiff's proofs did satisfy *Pokorny*. The Plaintiff's allegations against the Bank were based on "acts beyond the innocent misunderstanding portrayed in *Pokorny*" (*Harris*), and the Plaintiff proved those allegations. In proving negligence, the Plaintiff by definition showed that the Bank did not "act[] reasonably." *Pokorny* at 683. Moreover, the Bank's primary defense--on all counts--was that its employees had acted in good faith (*see* Tr. 1163-66). The jury rejected that defense. Indeed, the jury's finding of entitlement to punitive damages by definition negated any issue of good faith--a point the District Court did not discuss. The trial court charged the jury that to award punitive damages, it had to find "actual knowledge of the wrongfulness of the conduct and [that] there was a high probability of injury or damage to Valladares and, despite that knowledge they intentionally

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pursued that course of conduct, resulting in injury or damage" (Tr. 1196). Under §768.72, Fla. Stat., the standard is equivalent to intentional wrongdoing--the opposite of good faith. *See R.J. Reynolds Tobacco Co. v. Townsend*, 90 So. 3d 307, 313 (Fla. 1st DCA 2012), *review denied*, 110 So. 3d 441, 442 (Fla. 2013) ("wanton and intentional conduct"). The jury's verdict, supported by substantial evidence, negated any claim of good faith. As noted, *supra* note 8, that the jury did so on the punitive claim does not change the substance of its verdict. *Pokorny* did not mandate Judgment for Bank of America as a matter of law.

Finally, *Pokorny* only deals with liability for "reporting an incident." 382 So. 2d at 683. Here the Plaintiff also proved that Bank of America was grossly negligent in failing to retract its false accusation and call off the police when the Bank's employees knew that no robbery was taking place. When Rudy presented his driver's license and a check from the Bank with his name and address on it, the teller admitted that this should have told her there was no robbery, and the Plaintiff's expert said the same thing (*see supra* pp. 3-4). But the teller did nothing to call off the police assault (*see supra* pp. 5-7). The police officers said that they would not have stormed the Bank if the Bank employees had told them what they realized. Certainly the jury could find that the Bank officers were worse than negligent in allowing the assault to take place even after knowing that Rudy was not a bank robber. Even if the Bank

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had a defense regarding its decision to falsely report a robbery, that did not protect the Bank's recklessness in failing to call off the police action. The District Court did not address this second theory of negligence. This evidence independently sustains the jury's verdict.

VII.
CONCLUSION

It is respectfully submitted that the decision of the District Court should be disapproved, and the cause remanded with instructions to reinstate the Plaintiff's Judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via e-mail upon all counsel on the attached Service List on this 11th day of March, 2015.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Brief complies with the font requirements of Fla. R. App. P. 9.210(a)(2).

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