In the Supreme Court of Florida

CASE NO. SC14-1629
LT CASE NO. 3D12-1338
LT. CASE NO. 08-43845

RODOLFO VALLADARES,

Petitioner,

v.

BANK OF AMERICA CORPORATION,
a Delaware corporation,

Respondent.
_____/

RESPONDENT'S ANSWER BRIEF ON THE MERITS

On Review from the District Court of Appeal, Third District State of Florida

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PRELIMINARY STATEMENT

This is a discretionary proceeding to review the Third District Court of Appeal's decision in *Bank of America Corp. v. Valladares*, 141 So. 3d 714 (Fla. 3d DCA 2014). Plaintiff Rodolfo Valladares sued Bank of America for injuries inflicted by police after bank employees mistakenly reported him to be a robber. A jury found the Bank negligent and awarded Valladares compensatory and punitive damages. Bank of America appealed. The Third District reversed, concluding that a defendant cannot be held liable for simple negligence in reporting suspected criminal activity to the police. Valladares sought review by this Court based on an alleged decisional conflict. This Court accepted jurisdiction.

STATEMENT OF CASE AND FACTS

Meylin Garcia was a teller at a Bank of America branch in Aventura, Florida. Tr. 366. On the morning of July 3, 2008, Garcia received an email bulletin containing pictures of a suspected bank robber. Tr. 373. The suspect had allegedly robbed other Bank of America locations. *Id.* The suspect was described as a "Hispanic male, 145 pounds, medium build with black Miami Heat hat and dark sunglasses." Tr. 398.

Rodolfo Valladares entered the branch around 3:00 pm later that day. Tr. 757. He was wearing a Miami Heat hat and sunglasses. Tr. 757–58. He did not remove his hat or sunglasses while inside the bank. Tr. 757. Based on the email bulletin and the pictures she had seen that morning, Garcia "honestly thought that he was a bank robber." Tr. 370, 372, 383. Garcia "was really scared" and triggered the bank's silent robbery alarm. Tr. 370, 377, 383.

Valladares approached Garcia's window and began talking to talk to her. Tr. 379–81, 761. He also handed her a check and driver's license. Tr. 379–80. Garcia "wasn't really paying attention to what he was saying," because she "was just scared thinking about the fact that he was the bank robber." Tr. 381, 384. She excused herself to go speak to another teller. Tr. 386, 761.

Jimmy Alor, an assistant manager in training, received a call from the Bank's corporate security indicating that the silent alarm had been triggered. Tr. 407. Alor approached Garcia and asked if she had pressed the alarm. Tr. 386. Garcia said yes. *Id.* Alor saw that Garcia was shaking and scared. Tr. 411. Garcia told Alor that the robber was at her window. Tr. 388. Alor returned to his desk and informed corporate security. Tr. 410.

Corporate security alerted the Aventura Police Department that a suspected robber was at the branch. *See* R. 432. Police were dispatched at approximately 3:07 pm. Tr. 549. Officer Sean Bergert, a member of the police department's SWAT team, was among the responders. Tr. 517, 522. When he arrived, several other officers were outside the bank and had set up a perimeter. Tr. 525. Officer Bergert instructed them to follow his lead and enter the bank. Tr. 528, 550, 551.

Meanwhile, Valladares was standing at Garcia's teller window. Tr. 761. Branch manager Bianca Mercado informed Valladares that the Bank could not cash his check, and she asked him to leave. Tr. 766. Valladares became irritated, turned around, and proceeded toward the exit. Tr. 766, 767, 770.

Police officers then entered the building and instructed everyone to get on the ground. Tr. 767, 770. The officers asked bank employees where the suspect was. Tr. 418. Mercado pointed to Valladares. Tr. 418, 531, 770. At that point,

Garcia still believed that Valladares was the robbery suspect. *See* Tr. 394. She later testified: "In my mind, the whole time, I thought he was the bank robber. . . . I never in my mind thought that he was not the robber." Tr. 375, 384.

Officer Bergert approached Valladares, who was lying on the ground. Tr. 533. Officer Bergert could see one of Valladares's hands but not the other. Tr. 535. Officer Bergert aimed his weapon at Valladares and ordered him to show his hands. *Id.* Valladares did not immediately comply. Tr. 535, 536. Officer Bergert then performed a "head strike," either kicking or tapping Valladares on the head with his foot to gain compliance. Tr. 536, 546. Valladares made both of his hands visible, and another officer placed him in handcuffs. Tr. 537, 920.

Police brought Valladares into a separate room at the bank for questioning. Tr. 778. They later determined that he was not a robber. Tr. 779, 931. Officers cleared the scene by 3:25 pm. Tr. 549. Valladares was evaluated by paramedics, but he declined to go the hospital. Tr. 462.

On July 30, 2008, Valladares sued Alor, Garcia, and Bank of America. *See* R. 13. He ultimately asserted three counts against the Bank: (I) negligence, (II) battery, and (III) false imprisonment. R. 124–27. Valladares alleged that he suffered various injuries as a result of the incident. R. 125–27. He sought compensatory damages. *Id.* He also requested punitive damages on the battery

and false-imprisonment counts. *See id.* He later dismissed his claims against the individual defendants. *See* R. 678.

In January 2012, Bank of America moved for summary judgment on all claims, including the negligence count. R. 420, 428. Consistent with this Court's decision in *Pokorny v. First Federal Savings & Loan Ass'n of Largo,* 382 So. 2d 678 (Fla. 1980), the Bank argued that Valladares's negligence claim was unsustainable under Florida law. R. 429. In *Pokorny*, this Court held that:

> 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 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 when he did not in fact request any detention.

382 So. 2d at 682. The Court also stated:

> Florida courts have never recognized a separate tort for "negligently" swearing out a warrant for arrest. . . . A plaintiff contending that he had been improperly arrested as the result of negligence in swearing out a warrant must bear the burden of establishing malice and want of probable cause. Mere negligence alone is insufficient.

Id. at 83. The Bank argued that "given the Supreme Court's reasoning and the broad application of its holding to the instant case, Bank of America should not be held liable in tort when Garcia made an honest, good faith mistake in believing that

Plaintiff was a possible robber." R. 429. The Bank's summary judgment motion was denied. *See* R. 1307.

The case proceeded to a jury trial in February 2012. *See* Tr. 1. After Valladares's case-in-chief, the Bank moved for a directed verdict. Tr. 851, 948, 961. The Bank argued that under *Pokorny*, the Bank could not be held liable for simple negligence. Tr. 988, 1009. The trial court denied the motion. Tr. 988.

Bank of America proposed a jury instruction, under *Pokorny*, that the Bank could "not be held liable when its employees Meylin Garcia and Jimmy Alor made an honest, good faith mistake in believing that the Plaintiff was a possible robber . . . ." Tr. 1099. Valladares opposed the instruction, and it was stricken over the Bank's objection. *See* Tr. 1098–99.

The trial court instructed the jury, in relevant part:

> The claims in this case are as follows: Rodolfo Valladares claims that Bank of America negligently trained and supervised its employees. . . .
>
> . . . .
>
> . . . Negligence is the failure to use reasonable care which is the care that a reasonably careful person would use under like circumstances. Negligence is doing something that a reasonably careful person would not do under like circumstances or failing to do something that a reasonably careful person would do under like circumstances.
>
> . . . .

> The Court has determined and now instructs you that Bank of America is responsible for any negligence of its employees in failing to supervise other employees. . . .

Tr. 1185–86. The court gave the following instruction on punitive damages:

> There is an additional claim in this case that you must decide. If you find for Valladares and against the Bank of America you must decide whether in addition to compensatory damages punitive damages are warranted as punishment to Bank of America as a deterrent to others. Valladares claims that punitive damages should be awarded against Bank of America for its employees' conduct in the battery and false imprisonment of Valladares. Punitive damages are warranted if you find by clear and convincing evidence that Bank of America employees were personally guilty of intentional misconduct which was a substantial cause of injury to Valladares. Under those [circumstances], you may in your discretion award punitive damages against Bank of America. . . . Intentional misconduct means that Bank of America[']s employees had actual knowledge of the wrongfulness of the conduct and there was a high probability of injury or damage to Valladares and despite that knowledge they intentionally pursued that course of conduct resulting in injury or damage.

Tr. 1195–96. The final verdict form asked:

> 1) Was Defendant, BANK OF AMERICA, negligent by activating and failing to cancel the silent robbery alarm and/or by failing to properly train and/or supervise its employees?
>
> YES ____ NO ____
>
> . . . .
>
> If your answer to questions #1, #4, and #5 are all NO, your verdict is for Defendant, BANK OF AMERICA, and you should not proceed any further except to date

> and sign this verdict form and return it to the courtroom. If your answer to any of the above questions is YES, please answer all remaining questions . . . .
>
> 6) What is the total amount of any damages sustained by the Plaintiff, RODOLFO VALLADARES, and caused by the incident in question . . . .
>
> . . . .
>
> 8) Under the circumstances of this case, state whether you find by clear and convincing evidence that punitive damages are warranted against Defendant, BANK OF AMERICA?
>
> YES ____ NO ____
>
> 9) What is the total amount of punitive damages, if any, which you assess against the Defendant, BANK OF AMERICA?
>
> _____

R. 690–92.

The jury returned a verdict finding the Bank negligent. R. 690; Tr. 1216. The jury found that the Bank was not liable for battery or false imprisonment. R. 690–91; Tr. 1216–17. The jury awarded $2,603,000.00 in compensatory damages. R. 692; Tr. 1217. The jury also assessed punitive damages in the amount of $700,000.00. R. 692; Tr. 1218.

The Bank moved to set aside the verdict and resulting judgment. R. 840. The Bank reiterated that "Florida law does not permit plaintiff to maintain a negligence claim under the facts of this case." R. 851 (capitalization omitted). The Bank explained that under *Pokorny*, it "cannot be held liable for negligence

for reporting an incident to the police," and that "all the evidence indicates that Garcia made an honest, good-faith mistake in activating the silent alarm." R. 853. The Bank argued at a motion hearing that "the case law prohibits a claim for tort or in simple negligence for a defendant which . . . reports a suspected criminal activity. . . . What *Pokorny* says is that you can't sue in negligence for reporting suspected criminal activity or a suspected criminal." R. 1307–08, 1310. The trial court denied the Bank's motion. R. 1310.

The Bank appealed to the Third District. *See* R. 1097. On appeal, the Bank maintained that the negligence verdict was unsustainable under *Pokorny*. Appellant's Initial Br. 22, 23. The Bank argued that the verdict "should be set aside as it is not supported by the law or the evidence," and that "Florida law does not support Valladares's theory of liability, as there is no plausible or viable claim for negligently reporting an incident to the police." *Id.* (capitalization omitted).

The Third District agreed with the Bank and reversed the judgment. *See Bank of Am. Corp. v. Valladares*, 141 So. 3d 714, 715 (Fla. 3d DCA 2014). The court reviewed *Pokorny* and other authorities and concluded that "a person cannot be held liable for simple negligence when contacting the police to report suspected criminal activity . . . ." *Id.* The court explained:

> Florida law in many different contexts recognizes that a person who reports a suspected crime to the police has a

> qualified privilege: the person making the report cannot be liable if the report is based upon a good faith mistake. In other words, the person making the report cannot be liable unless she acted maliciously.
>
> . . . .
>
> Admittedly, none of these authorities 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. But the same reasons for recognizing a qualified privilege when the injury is wrongful prosecution, arrest, defamation, or slander apply when the injury is physical. . . . The fact that a call to the police leads to one type of harm rather than another may, of course, change the amount of damages, but it does not change the standard by which liability for making the call will be judged.
>
> Under Florida law, therefore, an individual's interest to be free from mistaken accusations is balanced against the need to encourage people to report suspected crimes. A person calling the police to report a possible crime is not liable for a good faith mistake even if the individual reported suffers personal injuries at the hands of the police. Calling the police to report a crime rises to the level of a tort only if the reporter acts maliciously, meaning the reporter either knows the report is false or recklessly disregards whether the report is false.

Id. at 717–18. The court acknowledged another decision, *Harris v. Lewis State Bank*, 482 So. 2d 1378 (Fla. 1st DCA 1986), in which the First District found actionable a claim for falsely reporting a crime. 141 So. 3d at 718. The Third District distinguished that case, however, noting that in *Harris* "[t]he allegations upon which all the counts of appellant's complaint [were] based include[d] acts beyond the innocent misunderstanding portrayed in *Pokorny*." *Id.* (quoting *Harris*,

482 So. 2d at 1384). Finally, the court found that Valladares was not entitled to a new trial, because he

> persuaded the trial court to allow the negligence count to go to the jury on a theory of simple negligence. Among other occasions, he did this by successfully striking the Bank's proposed jury instructions that would have informed the jury that the Bank could not be liable for a good faith mistake in its report to the police. Having elected to go to trial on the theory of simple negligence, Valladares ran the "clear risk" that simple negligence was not a proper theory for the relief claimed. For this reason, he is not entitled to a new trial based on another theory.

Id. at 719.

Valladares sought review by this Court, arguing that the Third District's opinion expressly and directly conflicted with *Pokorny* and *Harris*. *See* Pet'r's Jurisdictional Br. 4. In his jurisdictional brief, Valladares claimed that "the instant case conflicts with *Pokorny*, because here the District Court held that the instant action . . . could not be brought as a negligence case at all. . . . *Pokorny* holds otherwise." *Id.* at 6–7. This Court accepted jurisdiction.

Valladares filed his initial merits brief on March 11, 2015. *See* Pet'r's Initial Merits Br. 1. Valladares appears to no longer claim any decisional conflict. *See id.* at 1–25. He now argues that (a) the Third District reached a legal conclusion never argued by the Bank, so any appellate decision should not apply to his

judgment; (b) the jury verdict should be affirmed because the evidence supports a finding of bad faith under *Pokorny*; and (c) the evidence supports an independent finding a simple negligence by the Bank for not countermanding the false alarm. *See id.* at 15–25.

SUMMARY OF ARGUMENT

The Third District reached the correct conclusion and properly reversed the final judgment. This Court should either dismiss this proceeding because review was improvidently granted, or it should approve the Third District's decision.

First, contrary to Valladares's main argument, the Third District reached a holding that the Bank advanced throughout the case. The Bank maintained that under *Pokorny*, a defendant cannot be held liable for simple negligence for reporting suspected criminal activity to the police. That was the Third District's holding. Valladares tries to distinguish the Bank's argument from the court's decision, but his distinctions are without merit. His claim that the court's decision should not apply to his judgment is unfounded. Furthermore, his arguments contradict representations made to this Court in his jurisdictional brief.

Second, Valladares waived any argument that the evidence established bad faith under *Pokorny*. Valladares opposed a *Pokorny* jury instruction and tried his case only on a simple negligence theory. Valladares cannot now claim that the evidence proved bad faith if the jury neither made nor was asked to make a bad-faith finding. Valladares's attempt to defend the verdict on a theory not submitted to the jury is an improper application of Florida's "tipsy coachman" doctrine. Valladares asserts that the jury's punitive-damages award represents a finding of

bad faith, but use of the punitive-damages award as a proxy for a *Pokorny* verdict is improper. Findings on damages are irrelevant to predicate liability. The jury's punitive-damage award is also irreconcilable and meaningless, as the pleadings and jury instructions permitted a punitive-damage assessment only on the battery or false-imprisonment claims. The jury found the Bank not liable on both of those counts, so its punitive-damage assessment is a nullity.

Finally, the Bank's alleged failure to countermand the alarm is not a viable alternate theory for upholding the negligence verdict. Valladares cannot circumvent *Pokorny* by claiming that the Bank's failure to countermand the alarm—distinguished from its initial call to the police—falls outside *Pokorny* and is subject to a separate, simple negligence standard. The Bank's call to police and the police's emergency response comprised one continuous and indivisible event, throughout which the Bank's employees believed that Valladares was a robber. *Pokorny*'s bad-faith standard applies to the entire episode.

ARGUMENT

THE COURT OF APPEAL PROPERLY REVERSED THE VERDICT AND JUDGMENT

A. Standard of Review

On appeal, questions of law are reviewed de novo. *Shotts v. OP Winter Haven, Inc.*, 86 So. 3d 456, 461 (Fla. 2011). A judgment rendered on a jury verdict is reviewed for "competent, substantial evidence." *Berges v. Infinity Ins. Co.*, 896 So. 2d 665, 675 (Fla. 2004).

B. The Bank Raised the Issue Resolved by the Third District

In his merits brief, Valladares first claims that the Court of Appeal reached a conclusion of law that the Bank never argued. Pet'r's Initial Merits Br. 18. Valladares contends that throughout this case, the Bank argued that the facts could not sustain a claim for simple negligence, whereas the Third District allegedly held that "although a negligence claim may be brought in these circumstances, it is subject to a good-faith privilege." *Id.* at 14. Valladares asserts that the Third District "rejected the argument that the Bank did make, and adopted a position that the Bank had not advanced." *Id.* at 14–15. He claims that because the Third District "addressed an issue that the Bank had not raised," "there was no basis for reversing the Judgment in this particular case." *Id.* at 23. Valladares's arguments lack merit and are somewhat confounding.

Despite Valladares's contentions, Bank of America's argument and the Third District's holding were the same. Throughout this action, the Bank has consistently argued that the circumstances presented could not sustain a simple negligence claim. *See* R. 429, 763. The Bank argued that under *Pokorny v. First Federal Savings & Loan Ass'n of Largo*, 382 So. 2d 678 (Fla. 1980), the Bank "cannot be held liable for negligence for reporting an incident to the police." R. 853. The Bank emphasized that "all the evidence indicates that Garcia made an honest, good-faith mistake in activating the silent alarm." *Id.* On appeal, the Bank maintained its position that the judgment "should be set aside as it is not supported by the law or the evidence," and that "Florida law does not support Valladares's theory of liability, as there is no plausible or viable claim for negligently reporting an incident to the police." Appellant's Initial Br. 22, 23 (capitalization omitted).

The Third District agreed, holding that "a person cannot be held liable for simple negligence when contacting the police to report suspected criminal activity . . . ." *Valladares*, 141 So. 3d at 715. The court reviewed *Pokorny* and other authorities and concluded that "[c]alling the police to report a crime rises to the level of a tort only if the reporter acts maliciously, meaning the reporter either knows the report is false or recklessly disregards whether the report is false." *Id.* at

718. For that reason, "simple negligence was not a proper theory for the relief claimed." *Id.* at 719.

Valladares misconstrues the Third District's opinion. He tries to make the following distinction: while the Bank argued that there is no claim in negligence for reporting suspected criminal activity to the police, the Third District allegedly held that a plaintiff can bring a so-called "negligence" claim for reporting criminal activity—but the plaintiff must prove malice or bad faith to recover. Those two ideas are functionally equivalent. The point under either formulation is that a person reporting suspected criminal activity cannot be held liable for mere negligence. In other words, a jury verdict rendered only on a simple negligence instruction will not sustain a judgment for the plaintiff.

Even if the Third District's holding somehow differed from the Bank's position, that does not mean the court acted sua sponte or that its decision should not apply to Valladares's judgment. An appellate court can hear arguments on a preserved issue and, based on its own review of the law, reach a conclusion that varies from the parties' positions. The court is not required to accept or reject all arguments in their totality. Valladares suggests that if the court reaches a conclusion that deviates at all from the parties' arguments, the court's decision is

improper or should not affect the judgment under review. Those contentions are supported by no authority.

Valladares's argument also contradicts representations he made in his jurisdictional brief to this Court. In his jurisdictional brief, Valladares argued that "the instant case conflicts with *Pokorny*, because here the District Court held that the instant action . . . could not be brought as a negligence case at all." Pet'r's Jurisdictional Br. 6. On that basis, Valladares argued that the Third District's holding conflicted with *Pokorny* and *Harris v. Lewis State Bank*, 482 So. 2d 1378 (Fla. 1st DCA 1986), and that this Court had jurisdiction to resolve the alleged decisional conflict. Pet'r's Jurisdictional Br. 7. Valladares characterized the Third District's holding one way to persuade this Court to accept jurisdiction, but having opened the door, he has attempted to "mend the hold" by characterizing the holding inconsistently with the basis for jurisdiction. Now Valladares abandons his jurisdictional position and argues that the decision should not apply to his judgment. Meanwhile, he appears to no longer claim any conflict between the Third District's opinion and *Pokorny* or *Harris*. The Bank submits that Valladares's arguments are manipulative and improper.

For all these reasons, Valladares's attempt to distinguish the Bank's argument from the Third District's holding is meritless, and his claim that the

Third District's decision should not affect his judgment is unfounded. And if these are Valladares's main "merits" arguments, then the Bank respectfully requests that the Court find review improvidently granted and dismiss this proceeding.

C. *Valladares Waived Any Argument that the Evidence Established Bad Faith Under Pokorny*

In his merits brief, Valladares concedes that the Third District "may have correctly stated the law" as set forth in *Pokorny* and applied in *Harris*. Pet'r's Initial Merits Br. 23. He acknowledges that *Pokorny*'s bad-faith liability standard applies to the facts of the case. *See id.* at 17, 24. He also admits that he opposed any *Pokorny* jury instruction and persuaded the trial court to instruct the jury only on simple negligence. *Id.* at 11–12. Valladares now maintains, however, that the negligence verdict and judgment can be affirmed because his "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." *Id.* at 23. Valladares contends that the evidence established bad faith, gross negligence, or recklessness by the Bank. *Id.* at 23–25. He also claims that the jury's punitive-damage award reflects a finding of bad faith which supports the negligence verdict. *Id.* at 24. On these bases, he argues that the verdict and judgment can be upheld. These arguments are waived and/or meritless, as Valladares submitted his case to the jury solely on a simple

negligence theory. Valladares's attempt to defend the verdict on alternate factual grounds is a misapplication of Florida's "tipsy coachman" doctrine.

The "tipsy coachman" doctrine "allows an appellate court to affirm a decision despite a finding of error in the lower court's reasoning as long as there is an alternative basis to justify affirming the decision." *Malu v. Sec. Nat'l Ins. Co.*, 898 So. 2d 69, 73 (Fla. 2005). Under the doctrine, "even though a trial court's ruling is based on improper reasoning, the ruling will be upheld if there is any theory or principle of law in the record which would support the ruling." *Dade Cnty. Sch. Bd. v. Radio Station WQBA*, 731 So. 2d 638, 644 (Fla. 1999). "The key to the application of this doctrine of appellate efficiency is that there must have been support for the alternative theory or principle of law in the record before the trial court." *Robertson v. State*, 829 So. 2d 901, 906–07 (Fla. 2002).

"However, an appellate court cannot employ the tipsy coachman rule where a lower court has not made factual findings on an issue and it would be inappropriate for an appellate court to do so." *Bueno v. Workman*, 20 So. 3d 993, 998 (Fla. 4th DCA 2009) (citing *Bryant v. Fla. Parole Comm'n*, 965 So. 2d 825, 825 (Fla. 1st DCA 2007)); *accord Powell v. State*, 120 So. 3d 577, 590 (Fla. 1st DCA 2013).

Where a jury is not instructed on a particular theory of liability, and no findings are made on that theory, a verdict and judgment cannot be upheld on that alternate basis. *See, e.g.*, *Nissan Motor Co. v. Alvarez*, 891 So. 2d 4, 8 (Fla. 4th DCA 2004) ("[T]he jury was not instructed on the Alvarezes' claim of failure to warn and therefore, the jury could not find Nissan liable on that basis."); *Adelman v. St. Paul Guardian Ins. Co.*, 805 So. 2d 106, 111 (Fla. 4th DCA 2002) (court could not assume that jury made findings it was not asked to make); *Dunster v. Metro. Dade Cnty.*, 791 F.2d 1516, 1518–19 (11th Cir. 1986) (plaintiff could not recover on negligence theory on which trial court did not instruct jury). Failure to present the theory to the jury and to seek a corresponding instruction results in waiver of the argument. *Bluth v. Blake*, 128 So. 3d 242, 246 (Fla. 4th DCA 2013).

In addition, a jury's findings on damages are irrelevant to predicate liability and cannot be used to sustain a liability verdict. *Cf. Tricam Indus. v. Coba*, 100 So. 3d 105, 112 (Fla. 3d DCA 2012) (dispositive finding on liability renders "legally irrelevant any further finding by the jury"), *review granted*, 130 So. 3d 691 (Fla. 2013); *Engle v. Liggett Grp., Inc.*, 945 So. 2d 1246, 1262 (Fla. 2006) (a finding of liability is required before entitlement to punitive damages can be determined); *Morgan Stanley & Co. v. Coleman (Parent) Holdings Inc.*, 955 So. 2d 1124, 1132 (Fla. 4th DCA 2007) ("Had the trial court properly directed a verdict

for Morgan Stanley, the case would have ended at that point and the punitive damages phase never would have been reached."); *Peden v. Suwannee Cnty. Sch. Bd.*, 837 F. Supp. 1188, 1198 (N.D. Fla. 1993) (noting that a punitive-damage award is a "nullity" and "by definition irrelevant" without predicate liability); *Cashie v. Harris Corp.*, 742 F. Supp. 1133, 1136 (M.D. Fla. 1990) ("The jury's subsequent finding of willfulness is irrelevant since willfulness is merely the standard for assessing liquidated damages, not for a finding of substantive liability.").

Here, the Bank proposed a *Pokorny* instruction which stated that the Bank could not be liable for negligence if it made a good-faith mistake in calling the police. Valladares successfully moved to strike the instruction and persuaded the trial court to send the case to jury on a simple negligence theory. The Third District emphasized these points in its decision. *See Valladares*, 141 So. 3d at 719. Because Valladares opposed any *Pokorny* instruction and proceeded only on a simple negligence theory, he waived any argument that the evidence proved liability under *Pokorny*. Valladares cannot argue that the evidence supports a finding of bad faith, malice, recklessness, or gross negligence if the jury neither made nor was asked to make those findings. Valladares tries to use the jury's punitive-damage award as a stand-in for a bad-faith finding, but that is improper.

The punitive-damage assessment is inconsequential without an appropriate finding of predicate liability. Any punitive-damages findings also would have involved a different legal standard than the one set forth in *Pokorny*. Moreover, the jury's punitive-damage award is irreconcilable, as the pleadings and jury instructions permitted a punitive-damage award only on the intentional-tort counts. The jury found the Bank not liable on those claims, so its punitive-damage assessment is void. In short, no inferences can be drawn from the punitive-damages assessment to support the verdict and judgment.

For all these reasons, the Third District properly concluded that the jury's negligence verdict was unsustainable and must be reversed. This Court should approve the Third District's opinion, reverse the judgment, and remand for entry of judgment in favor of the Bank.

D. Valladares Cannot Circumvent Pokorny by Applying Different Liability Standards to Different Parts of the Incident

Valladares finally argues that even if triggering the alarm did not suffice to establish liability under *Pokorny*, the Bank employees' failure to call off the alarm established simple negligence supporting the jury's verdict. Valladares argues that "*Pokorny* only applies to claims based on a Defendant's 'reporting an incident.' It does not . . . apply to the Bank's negligence in not countermanding the alarm after

it was set off . . . ." Appellant's Initial Br. 17 (citations omitted). This argument is meritless and is an improper attempt to circumvent *Pokorny*.

Valladares mischaracterizes the incident as having two different stages, one in which the bank employees suspected Valladares to be a robber, and one in which they had confirmed that he was not. The record reflects that the incident was a short and continuous event, throughout which the bank employees believed Valladares to be a threat. The alarm was triggered shortly after 3:00 pm, police were dispatched at 3:07 pm, and officers had responded and cleared the scene by 3:25 pm. The Bank employees believed Valladares was the robber at all times. At one point Valladares talked to Garcia and presented a check and driver's license, but Garcia still believed he was the suspect. And even had employees confirmed that he was a customer, they would have had no realistic opportunity to call off the police before officers stormed inside the branch.

Valladares cannot avoid *Pokorny* by dividing a report of criminal activity into multiple parts, one comprising the call to police subject to a malice or bad-faith liability standard, and the other comprising an immediate, subsequent failure to call off the police subject to an ordinary negligence standard. Whenever the police are called, there is a hypothetical opportunity to call them off before they arrive or exercise authority. But at least where, as here, the call and response

comprise one continuous and indivisible episode, and where the subject is believed to be a threat at all relevant times, the *Pokorny* bad-faith standard necessarily governs the whole incident.

For these reasons, this Court should reject Valladares's argument and reverse and remand.

E. The Bank Stands on All Arguments in Its Jurisdictional Brief

To the extent Valladares still claims any conflict between *Pokorny*, *Harris*, and the Third District's opinion—which it appears he does not—Bank of America stands on all arguments raised in its jurisdictional answer brief.

CONCLUSION

Respondent, Bank of America, N.A., respectfully requests that this Court either (a) dismiss this proceeding for review having been improvidently granted, or (b) approve the Third District's decision vacating the final judgment. If the Court finds in favor of Valladares in this proceeding, then the Bank requests that the case be remanded to the Third District for consideration of all other issues raised by the Bank on direct appeal.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished via Email on May 6, 2015, to all parties on the Service List below.

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CERTIFICATE OF TYPE SIZE & STYLE

Respondent hereby certifies that the type size and style of Respondent's Answer Brief on the Merits is Times New Roman 14pt.

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