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 REPLY BRIEF ON THE MERITS

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TABLE OF CONTENTS

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TABLE OF AUTHORITIES

Cases

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I.
INTRODUCTION

It is important to emphasize a few points at the outset. Most important is to correct a factual misstatement by Respondent Bank of American Corporation ("Bank of America" or "the Bank"). The Bank says that it "proposed a *Pokorny* instruction [*Pokorny v. First Federal Savings & Loan Ass'n of Largo*, 382 So. 2d 678 (Fla. 1980)] which stated that the Bank could not be liable for negligence ***if*** it made a good-faith mistake in calling the police" (Answer Brief at 22) (emphasis added). But that is not correct. The instruction, which was verbally proposed by the Bank at the charge conference, said 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) (emphasis added) (*quoted in* Respondent's Brief at 6). The instruction verbally proposed by the Bank simply mirrored its Motion for Directed Verdict (*see* Tr. 979-89; R. 840 at 7, 13-14; R. 1303 at 6, 8), telling the jury what the jury was *required* to do--not what it had the option to do. At the least the proposed charge was ambiguous. Even if an instruction of some kind had been called for, under Florida law, the proponent has to propose a *proper* instruction, or the point is waived. *See Stephens v. State*, 787 So. 2d 747, 756 (Fla.), *cert. denied*, 534 U.S. 1025 (2001); *Cliff Berry, Inc. v. State*, 116 So. 3d 394,

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407 (Fla. 3d DCA 2012), *review denied sub nom. State v. Smith,* 133 So. 3d 528 (Fla. 2014).

Second, the trial Court's charge to the jury on the issue of punitive damages permitted the jury to make exactly the finding that *Pokorny* assertedly requires--that the Bank's conduct was not a "good-faith mistake" (*Pokorny*, 382 So. 2d at 683). And that is exactly what the jury found, based upon ample evidence. And although the District Court's Opinion is not a model of clarity--we have to acknowledge the passages that the Bank has quoted (Respondent's Brief at 16-17)--at least in some places, the District Court appeared to recognize that even when there has been no prosecution or arrest, a cause of action for negligence might be viable in some instances, while finding that the evidence in the instant case was insufficient to satisfy the standard for such a claim. (As we said, any such suggestion would be inconsistent with the Bank's only argument--that there is no available claim of any kind short of arrest and prosecution, and that a negligence claim can never be brought under any circumstances).

At other points in the decision, however, as Bank of America points out, the District Court used broader language--for example in stating that "a person cannot be held liable for simple negligence when contacting the police to report suspected criminal activity . . . ." *Bank of America Corp. v. Valladares*, 141 So. 3d 714, 719 (Fla. 3d DCA 2014). The District Court also said that "simple negligence was not

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a proper theory for the relief claimed." *Id.* at 719. And the District Court also noted conflict with *Harris v. Lewis State Bank*, 482 So. 2d 1378 (Fla. 1st DCA 1986), which recognizes a cause of action short of malicious prosecution or false imprisonment in proper cases.

Given *Pokorny*'s acknowledgment of a claim when the Defendant has not "acted reasonably," 382 So. 2d at 638, to the extent that the District Court accepted the Bank's radical position, its decision conflicts with numerous cases, including *Harris*, and was erroneous. Respectfully, the Court should make clear what it said in *Pokorny*--that there can and should be accountability even where there was not an arrest or prosecution--indeed, there should be accountability in one form or another at *any* stage of the process--and its decision in *Pokorny* does not preclude a cause of action for the failure to "act[] reasonably," absent a "good-faith mistake."

Moreover, as we argued, the Plaintiff here did present sufficient evidence to support such a claim. In awarding punitive damages, the jury found exactly what *Pokorny* said was necessary. It made a finding--albeit in another context--of "actual knowledge of . . . wrongfulness" and of a "high probability of injury," and that "despite that knowledge [the Defendant acted] intentionally" (Tr 1196). That *cannot be* a good-faith mistake. And it renders harmless any omission of the identical issue from the charge to the jury on the negligence claim. *See infra.*

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Therefore, third, the Bank has missed the point in protesting (*see* Respondent's Brief at 21-23) that Plaintiff Valladares, having insisted upon prosecuting a negligence claim below, cannot now import the jury's punitive finding into that claim. The Plaintiff's argument is not that the Court should somehow retroactively alter the elements of liability presented to the jury. The point, which the Bank never addresses, is that any omission of an element of the liability claim was rendered harmless by the jury's finding on the punitive claim. And the same notion of harmless error also inheres in the "tipsy coachman" theory that the Bank attributes to us (*see* Respondent's Brief at 13, 20), which provides that the trial court's allowance of a claim can be affirmed "as long as there is an alternative basis to justify affirming the decision." *Malu v. Security National Ins. Co.*, 898 So. 2d 69, 73 (Fla. 2005) (*cited in* the Bank's Brief at 20) (*see also* additional citations in the Argument). Here there *was* an alternative basis, which *was* presented to the jury, and which *was* supported by the evidence, on which the jury *did* make a finding--the finding that *Pokorny* assertedly required. Therefore, even if there had been error in the presentation of the negligence claim, the jury's award of punitive damages still requires affirmance of its verdict.

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II.
ARGUMENT[1]

A. The District Court's Decision Should Be Disapproved to the Extent it Holds That under Pokorny, There Can Never Be a Negligence Claim of Any Kind for Erroneously Reporting a Crime, Even If the Plaintiff Negates Good Faith. As we said (Brief at 9-12), although the Bank obliquely suggested at one point below the possibility of a negligence claim under *Pokorny*, its verbally-proposed jury instruction on the point at the charge conference (Tr. 1099) was erroneous (*see supra* p. 1); and in any event, it abandoned that contention both post-trial and on Appeal. The Bank's Brief repeatedly underscores its extreme unqualified position below--that if the Plaintiff cannot prove malicious prosecution or false arrest, meaning any case in which there was no arrest or prosecution--a Plaintiff who was injured by the Defendant's false accusation has no redress. The Bank insists that even where the Plaintiff can negate good faith, still "'there is no plausible or viable claim for negligently reporting an incident to the police,'" Respondent's Brief at 16, *quoting* its District Court Brief at 23; and therefore even the most reckless accuser "cannot

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[1]It is unclear why the Bank has provided a three-page summary of its own evidence (Respondent's Brief at 2-4), which is irrelevant. *See* Brief of Petitioner at 15, on the Standard of Review. The Bank's contention (Brief at 9, 16)--that "'all the evidence indicates that [Bank Teller] Garcia made an honest, good-faith mistake in activating the silent alarm'" (*quoting* R. 853)--is absurd. *See* Petitioner's Brief at 2-5. The jury certainly appreciated the evidence of the Bank's recklessness--enough to warrant an award of punitive damages.

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be held liable for negligence for reporting an incident to the police" (R. 853, *quoted in* Respondent's Brief at 16). *See also* Brief of Petitioner at 9-12 & n. 7, quoting many other such statements of the Bank's only position. Acceptance of that position would mean that in a case like this one, in which there was no arrest or prosecution, the Plaintiff could suffer severe injury because of gross negligence, but have no means of redress.

At least at one point in its Opinion, the District Court seemed to step back from so sweeping a position, when it said that "a person who reports a suspected crime has a qualified privilege: the person making the report cannot be liable if the report is based on a good faith belief." 141 So. 3d at 717. As we said (*see* Brief at 14, 17-18), in many cases the only potential claim when the Defendant "report[ed] a suspected crime" is a claim of negligence. When there was no prosecution or arrest, and the claim is based on the false accusation of a crime, then the claim is negligence. And *Pokorny* did recognize the viability of a claim based on the Defendant's failure to "act[] reasonably," if the Defendant did not make a "good-faith mistake." 382 So. 2d at 683. The Court in *Pokorny* therefore appreciated that a Defendant's conduct can cause injury--here, serious physical injury--even when there was no arrest or prosecution, and therefore no available claim of false imprisonment or malicious prosecution. In such cases, if there were no claim of negligence, the Defendant would be unaccountable for his reckless and harmful

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behavior. We asked in the initial Brief (pp. 14, 17-18) what other kind of claim might be available in the instant case, if not a negligence claim. The Bank has no answer.

As we noted (Brief at 19 & nn. 9, 10), numerous federal and Florida decisions recognize that *Pokorny* authorizes a jury's determination "as to whether [the Defendant] acted reasonably," *Marshall v. Regions Bank*, 2012 WL 415446 (S.D. Fla. Feb. 9, 2012)--"whether the bank and its employees acted reasonably and in good faith in relaying information [that the employee had] received from another source." *Pinchot v. First Florida Banks, Inc.*, 666 So. 2d 201, 202 (Fla. 2d DCA 1995). *See Harris v. Lewis State Bank*, 482 So. 2d 1378, 1382 (Fla. 1st DCA 1986) (jury question as to "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"). The District Court certified conflict with *Harris*. In its zeal to achieve absolute immunity from any cause of action short of malicious prosecution or false imprisonment, the Bank has ignored the body of decisions in this area.

B. Plaintiff Valladares Did Not Waive Any Argument That the Evidence Established Bad Faith Under the Standard Announced in Pokorny. As we said at the outset, the Bank's extended discussion of this question (Brief at 19-23) misses the point. The Bank protests that having pursued a traditional negligence claim below, the Plaintiff is stuck with that theory, and cannot retroactively engraft an

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element of recklessness (that is, the absence of good faith under *Pokorny*) into its claim of liability. But our purpose is not to retroactively redefine the negligence claim presented below. Our point is that in the context of this particular trial, the asserted deficiency in the elements of the claim presented to the jury would not require reversal, because at best it is harmless error. The assertedly-missing element is that under *Pokorny*, a good-faith mistake has to be negated. In the instant case, any possibility of a good-faith mistake *was* negated, by the punitive damage verdict. That rendered harmless any error in defining the elements of the underlying claim; and Florida's courts are interested in the substance of an issue--not the form--a point the Bank assiduously avoids (*see* Petitioner's Brief at 17).

There are recognized contexts in which the failure to instruct on an element of a claim or defense may be harmless. One of course is when the evidence on that element is uncontradicted.[2] Another is when the jury's verdict on other counts leaves no question of its disposition of the element omitted. *See, e.g., Lynch v. State*, 829 So. 2d 371 (Fla. 4th DCA 2002), *review denied*, 845 So. 2d 891 (Fla. 2003) (failure to instruct that conviction on one count required the operation of a vehicle was harmless, where the jury's verdict on a different count made such a finding);

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[2]*See Pena v. State*, 901 So. 2d 781, 784 (Fla. 2005); *Morton v. State*, 459 So. 2d 322, 323 (Fla. 3d DCA 1984), *review denied*, 467 So. 2d 1000 (Fla. 1985); *Gains v. State*, 417 So. 2d 719 (Fla. 1st DCA 1982), *review denied*, 426 So. 2d 26 (Fla. 1983).

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Franklin v. State, 825 So. 2d 487 (Fla. 5th DCA 2002) (failure to instruct jury on element of wilfulness in one count was harmless, where the instruction was given on three other counts, and the Defendant was acquitted on all three of those counts); *Walker v. State*, 473 So. 2d 694, 697 (Fla. 1st DCA 1985), *review denied*, 499 So. 2d 884 (Fla. 1986) (failure to instruct on a lesser included offense was harmless, where the jury found the Defendant guilty of greater charges). Here, on the issue of good faith, the punitive-damages verdict likewise left no question of the jury's disposition.

The same conclusion inheres in the "tipsy coachman" doctrine addressed by the Bank, also because the identical substantive issue was presented to the jury in a different context, and the jury then made exactly the finding that *Pokorny* assertedly required. The Bank itself (Respondent's Brief at 20) quotes *Malu v. Security National Ins. Co.*, 898 So. 2d 69, 73 (Fla. 2005), holding that a claim can be affirmed even if erroneous, "as long as there is an alternative basis to justify affirming the decision." We agree with the Bank (Respondent's Brief at 20) that affirmance is called for if "'there is any basis which would support the judgment in the record,'" *quoting Robertson v. State*, 829 So. 2d 901, 906 (Fla. 2002), *quoted in Berges v. Infinity Ins. Co.*, 896 So. 2d 665, 676 n. 5 (Fla. 2004). We agree that the jury has to be instructed on the alternative theory (Respondent's Brief at 21), and has to make "'factual findings'" on the issue (*id.* at 20, *quoting Bueno v. Workman*, 20 So. 3d

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993, 998 (Fla. 4th DCA 2009)). We therefore agree that "Valladares [could not] 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" (Respondent's Brief at 22). *See also id.* at 13. Here the jury *was asked,* and *did make* those findings, which are supported by the Record. Here we have an explicit jury finding, based on competent evidence, and a proper (model) instruction, on the precise substantive point at issue.

The Bank is incorrect in contending (Brief at 23) that "[a]ny punitive-damages findings . . . would have involved a different legal standard than the one set forth in *Pokorny*." The District Court put the point clearly in noting that the operative standard under *Pokorny* is "a good faith mistake" on the one hand, and on the other circumstances in which "the reporter acts maliciously, meaning the reporter either knows the report is false, or recklessly disregards whether the report is false." *Bank of America Corp. v. Valladares*, 141 So. 3d 714, 718 (Fla. 3d DCA 2014). The District Court's language mirrors the punitive-damages charge that was given in this case (Tr. 1196). No linguistic gymnastics can reconcile a "good-faith mistake" with the jury's finding here of "actual knowledge of . . . wrongfulness" and of a "high

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probability of injury," and "[acting] intentionally" despite such knowledge (Tr. 1196). Here too, the Bank's position is form over substance. [3]

Finally, the Bank lodges a series of attacks on the punitive award itself. These address everything except the sufficiency of the evidence to support it, which is the point at issue. The Bank argues (incredibly) that punitive damages are not available on a negligence claim; that the jury's finding for the Bank on the claims of battery and false imprisonment therefore rendered the punitive verdict "void"; and that a punitive award is not even relevant until the underlying liability is established (*see* Brief at 22-23). These contentions are not only irrelevant to the point at issue; they also were not raised below; and they are wrong anyway. Having unsuccessfully opposed the entire claim of punitive damages, the Bank never argued below that at the least, the negligence claim should be carved out of the punitive charge. Nor did the Bank object to the verdict form, which allowed punitive damages on any of the three claims (*see* Tr. 1130-31). And in any event, even if the Bank had raised the

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[3]There is clearly no merit to the Bank's contention (Brief at 21) that the jury's punitive findings--on what the Bank calls "damages"--"are irrelevant to predicate liability" (*id.*; *see also* Respondent's Brief at 14). As the trial court instructed, punitive damages are not only "damages." An entitlement to punitive damages is *conduct-based*--it requires a finding of egregious *conduct*. And yes, punitive damages are unavailable without a predicate finding of liability (*see* the Bank's Brief at 21-23, and cases cited), but that is the point. It is precisely the predicate finding noted in *Pokorny*--proof that the Bank had not made an "innocent mistake"--that was central to the claim for punitive damages. Here again, the Bank is all form--no substance.

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argument, its suggestion that punitive damages are not available on a negligence claim--that is, that in order to warrant a punitive award, the underlying liability claim itself has to involve wanton and wilful misconduct--is plainly wrong. Indeed, in one of the leading cases on the issue of punitive damages--*White Construction Co., Inc. v. Dupont*, 455 So. 2d 1026, 1028 (Fla. 1984)--the underlying claim was negligence. Many decisions confirm that a punitive claim may be brought even when the underlying finding of liability does not itself require proof of wilful and wanton misconduct, so long as such conduct is proved in support of the punitive award. *See, e.g., Como Oil Co., Inc. v. O'Loughlin*, 466 So. 2d 1061 (Fla. 1985) (negligence); *Bould v. Touchette*, 349 So. 2d 1181 (Fla. 1977) (product liability; wrongful death). Therefore, the jury's punitive verdict could indeed be based on the negligence claim; the verdicts in favor of the Bank on the other two Counts did not "void" the punitive verdict; and as noted, the jury did make a finding on all elements of liability, albeit in a different context.

The Bank cannot avoid the bottom line: the punitive claim did go to the jury; the jury reviewed the evidence; the jury found that the standard for an award of punitive damages was satisfied; the evidence supported that finding; and this was the finding that *Pokorny* assertedly requires.

C. There Was a Second, Independently Sufficient Theory of Liability, and Different Acts of Negligence in the Same Incident Are Not Necessarily Insulated Just

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Because One of Them May be Privileged. From day one in this litigation, the Plaintiff has advanced two theories of liability--gross negligence in calling the Police, and gross negligence in not calling them off (*see* Petitioner's Brief at 24-25). *Pokorny* in proper cases protects one charged with liability for "reporting an incident." 382 So. 2d at 683. The District Court here dealt exclusively with that claim. But here the Bank was even more reckless after obtaining *actual knowledge* that Rudy Valladares was *not* a robber--he had presented his check from this Bank with his address on it, and his identification--and nevertheless the Bank's employees and Officers stood silent as the Police stormed the Bank and assaulted Rudy. That was an outrage. The Police witnesses said that they would not have stormed the Bank if they had been timely informed of the mistake. *See* Petitioner's Brief at 3-7. The policies underlying *Pokorny* do not necessarily apply to such gross dereliction in failing to correct a mistake such as this one, and the Bank never asked for a special verdict separating the two theories of negligence (they are not separate elements of a single theory of negligence--they are two separate acts of negligence). *See Grenitz v. Tomlian*, 858 So. 2d 999, 1001 (Fla. 2003); *First Interstate Development Corp. v. Ablanedo*, 511 So. 2d 536, 538 (Fla. 1987).

The Bank's response (*see* Brief at 14, 23-24), which cites no authority, is that this argument "mischaracterizes the incident as having two stages," when in fact it was "a short and continuous event," which assertedly cannot be "divid[ed] . . . into

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multiple events" (Brief at 24). Here again, the Bank's position is semantic. *See, e.g., Mosby v. Harrell*, 909 So. 2d 323 (Fla. 1st DCA), *review denied sub nom. Florida Department of Law Enforcement v. Mosby*, 918 So. 2d 291 (Fla. 2005) (separate theories of negligent testing and negligent reporting of test results). For example, one part of a governmental decision may be planning level; another operational level; one is privileged, one is not. One part of a doctor's treatment may be in his capacity as an agent of the Government--another as a private entity; one is privileged, the other is not. Some of a Defendant's acts may be reckless and others negligent, and which is which could make a difference. Why should spacial or temporal proximity be dispositive? Here there were two separate acts of negligence.

We disagree with the Bank's contention (Brief at 24) that "[w]henever the police are called, there is a hypothetical opportunity to call them off before they arrive or exercise authority." To begin with, there is not always such an opportunity --for example, the caller may not remain at the scene, or may not be aware of any exculpating facts, or perhaps there was no observable basis for aborting the police action. And even when there is such an opportunity, that does not necessarily signify a second act of negligence, as we have in the instant case. Here the Plaintiff advanced two theories of negligence; both were supported by the evidence; and the Bank did not ask for a special verdict.

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The bottom line is that in proper cases, *Pokorny* does permit a theory of negligence in reporting a crime--a claim that the Defendant "did not act reasonably," 382 So. 2d at 683--even when there is no basis for claiming malicious prosecution or false imprisonment. A negligence claim should be permissible in such cases, even if subject to a requirement of proving more than a "good faith mistake," *id.*, because in some cases there may be no other possible claim, and therefore no other way of redressing wrongful conduct that caused harm. There may be conditions or privileges attached to such a claim, but there is nevertheless such a claim. And in the instant case, there is no basis for taking away the jury's award, because the jury in this case did address those conditions or privileges, albeit in a different context. The jury's punitive finding on exactly the point at issue--its necessary finding that the Bank did not make a "good-faith mistake"--requires affirmance. To hold otherwise would be an inappropriate exultation of form over substance.

III.
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.

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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 15th day of May 2015.

By s/Joel S. Perwin
Joel S. Perwin

CERTIFICATE OF COMPLIANCE

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

By s/Joel S. Perwin
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