Rel: August 21, 2020

SUPREME COURT OF ALABAMA

SPECIAL TERM, 2020

1170765

Synergies3 Tec Services, LLC, and DIRECTV, LLC

v.

Lisa M. Corvo, Thomas Bonds, and State Farm Fire and Casualty Company

Appeal from Baldwin Circuit Court
(CV-15-900228)

STEWART, Justice.

Synergies3 Tec Services, LLC ("Synergies3"), and DIRECTV, LLC ("DIRECTV"), appeal from a judgment of the Baldwin Circuit Court ("the trial court") entered, following a jury trial, in favor of Lisa M. Corvo and Thomas Bonds and against Synergies3 and DIRECTV based on the doctrine of respondeat superior and

a claim alleging negligent hiring, training, and supervision. For the reasons discussed below, we reverse the judgment in part, affirm it in part, and remand the cause with instructions.

Facts and Procedural History

Corvo and Bonds, Corvo's fiancé, sued Daniel McLaughlin, Raymond Castro, and DIRECTV in the trial court, asserting claims of conversion and theft as to a diamond that had been removed from an engagement ring and $160 cash that, they alleged, had been taken from the master bedroom of Corvo's house on Ono Island when McLaughlin and Castro, employees of Synergies3, installed DIRECTV equipment in Corvo's house. Corvo and Bonds asserted the conversion and theft claims against DIRECTV under the doctrine of respondeat superior and, in addition, asserted claims against DIRECTV of negligent and wanton hiring, training, and supervision. They also sought damages for mental anguish and punitive damages. In June 2015, Corvo and Bonds amended their complaint to add Synergies3 as a defendant.[1]

[1]On December 18, 2015, Synergies3 and DIRECTV filed a motion seeking to add State Farm Fire and Casualty Company as a plaintiff because, they asserted, State Farm, which had paid Bonds $59,765.40 for the missing diamond pursuant to an

McLaughlin and Castro failed to file an answer to the complaint. Corvo and Bonds filed a motion for the entry of a default judgment against McLaughlin and Castro. The trial court granted the motion, entered a default judgment against McLaughlin and Castro, and reserved the determination of the amount of damages for a jury trial.

At trial, Corvo testified that she contacted DIRECTV to initiate satellite television services in her house. On February 20, 2013, Corvo and Bonds were working from home when Castro and McLaughlin arrived. Corvo testified that Bonds let them both inside the house, advised them where to install the equipment, and then resumed working. Corvo testified that Castro and McLaughlin were in the house for three and one-half hours. At one point, she and Bonds experienced an interruption in their Internet access, and, as a result, Bonds went to check with Castro and McLaughlin regarding the Internet access. Corvo noticed that the door to the master bedroom was

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insurance policy, was the real party in interest. The trial court granted the motion. Corvo and Bonds filed a petition for a writ of mandamus in this Court seeking to vacate the trial court's order joining State Farm. That petition was denied on August 12, 2016. See Ex parte Corvo (No. 1150581), 233 So. 3d 925 (Ala. 2016)(table). Before the trial began, the trial court purported to sever State Farm's claims.

"pushed to," i.e., almost closed, which she thought was "really odd." Corvo hit the bedroom door with the laundry basket to open it, which, she testified, startled McLaughlin, who was standing behind the door. Corvo testified that she did not see McLaughlin again and that she assumed he went outside. Corvo testified that she returned to her work station and that Internet access was thereafter restored. When the installation was complete, Castro provided Corvo and Bonds with a lengthy overview of the services. Corvo and Bonds finished paperwork associated with the installation, and Castro left.

Corvo testified that, after Castro left, she went to the master bedroom to retrieve her handbag, jewelry, and shoes, and she noticed that the three-carat diamond was missing from the center of her engagement ring. Corvo testified that the prongs on the ring were sticking out and were bent. Corvo told Bonds, who, in turn, telephoned Castro. Meanwhile, Corvo called local law enforcement and Ono Island security in an attempt to stop Castro and McLaughlin from leaving the island. Corvo and McLaughlin, however, had already left the island.

Corvo testified that she did not know whether Castro or McLaughlin stole the diamond but that she and Bonds had been

more suspicious of McLaughlin because of Corvo's encounter with him in the master bedroom.

Corvo testified that she and Bonds had become engaged in Paris, France, without an engagement ring. Corvo also testified that they specially designed and ordered the engagement ring to have a band that resembled the Eiffel Tower and that they found a diamond to fit into that setting.

Corvo testified that she felt "completely violated" and "sickened" by the theft of her diamond, and she opined that a person "shouldn't have to worry about people that are hired by companies to come into your home." Corvo testified that she had worried that McLaughlin and Castro might return to her house to steal additional items. According to Corvo, she suffered mental anguish and lost sleep and her sense of security as a result of the theft, but she did not seek treatment. Corvo testified that her symptoms had resolved by May 2013.

Bonds testified that he had purchased the diamond for $40,000. He had since purchased a replacement ring for Corvo at a cost of $36,200, $31,000 of which was for the diamond. Bonds testified that he heard Corvo's testimony and that it was an accurate description of what had transpired the day

Castro and McLaughlin were in the house. Bonds testified that, when he let Castro and McLaughlin into the house, they were wearing DIRECTV badges and had told Bonds that they had been sent by DIRECTV to initiate service to the house. Bonds testified that he telephoned Castro after Corvo discovered that the diamond was missing and that Castro told Bonds that he did not take the diamond.

Stacy Castro testified that she and Castro were married but that they had been separated for three years at the time of the trial. Stacy testified that Mike Tucker, one of the owners of Synergies3, had worked with Castro for a company called MasTec in Texas. According to Stacy, in approximately 2006 or 2007, Castro told her that he had "a problem stealing." Castro also told her that Tucker had suspended him while he was working for MasTec because a customer alleged that he had stolen a ring from her house while installing equipment. Stacy also testified that she had previously discovered a bag of women's jewelry in Castro's truck that he told Stacy he had obtained "off the street" from a drug addict. Stacy testified that, at the time of the trial, Castro was in jail in Texas.

Before resting their case, Corvo and Bonds's attorney admitted, over objection, a certified copy of Castro's January 31, 2001, conviction for writing worthless checks in North Carolina.

Corvo and Bonds admitted into evidence portions of the deposition of Patrick Thompson, a representative from DIRECTV. In his deposition testimony, Thompson indicated that DIRECTV had a responsibility to ensure that customers could rely on their technicians being safe, trustworthy, and law-abiding. Thompson acknowledged that Synergies3 was an agent for DIRECTV, and he testified that the technicians hired by Synergies3 were subjected to the same background and drug checks that were administered to DIRECTV's in-house employees. Thompson was asked in his deposition what criminal acts would disqualify a person from working for DIRECTV, and he acknowledged that writing worthless checks is theft and would disqualify an applicant.

Synergies3 and DIRECTV called Thompson to testify. Thompson testified that he had worked for MasTec. Thompson testified that, at the time of the trial, he was working for AT&T, which owns DIRECTV, and that he supervises all the technicians within a certain region. Thompson explained that

DIRECTV has a contract with Synergies3 to provide installation services.[2] Thompson testified that DIRECTV uses a company named "Sterling" to perform background checks for DIRECTV's potential employees and that DIRECTV has a department that reviews the background-check information Sterling provides. According to Thompson, an applicant is not assigned a "tech number" until passing a background check. Thompson testified that, once DIRECTV received a report about Corvo and Bonds's missing diamond, one of his managers contacted Synergies3 to look into the matter. Synergies3 ensured that the police were notified and that Castro and McLaughlin were "pulled" from work pending the results of the investigation. Thompson testified that DIRECTV had not received any complaints about Castro or McLaughlin before the date they installed the equipment in Corvo's house.

[2]Synergies3 and DIRECTV, in a footnote in their appellate brief, assert that the trial court erroneously ruled as a matter of law that Synergies3 was an agent of DIRECTV and that the question of agency should have been determined by the jury, and they cite Bain v. Colbert County Northwest Alabama Healthcare Authority, 233 So. 3d 945 (Ala. 2017), in support. Synergies3 and DIRECTV's brief, p. 27 n.1. Synergies3 and DIRECTV do not, however, argue on appeal that Synergies3 is not an agent of DIRECTV, nor do they provide legal authority in support of such a proposition.

Eric Atchley, one of the two owners of Synergies3, testified that he lived in San Antonio. Atchley testified that he worked for MasTec when Tucker and Castro were employed there and that he had never heard anything regarding Castro's being suspended for stealing a ring. Atchley testified that Tucker left his employment with MasTec in 2005. Atchley testified that Tucker had been his partner when they started Synergies3 but that Tucker left Synergies3 in 2014. Atchley testified that he had talked to Tucker earlier that day.

Atchley testified that Synergies3 has approximately 800 technicians located nationwide who install equipment for DIRECTV. Atchley testified that Synergies3 obtains background checks on all of its applicants for technician positions and that the cost of those background checks ranges from $100 to $1,000, depending on the number of cities in which the applicant has lived. Atchley testified that McLaughlin's background check indicated that he had one traffic violation and that Castro's background check indicated that he had no criminal history.

Atchley testified that the following would disqualify an applicant from working for Synergies3:

> "Three speeding tickets in a three-year period, any felony whatsoever and just about every misdemeanor, because a traffic ticket is also a misdemeanor, so just about any -- any theft, any assault, because sometimes those can be misdemeanors as well. But pretty much all of those would restrict you from having an eligible rating."

Atchley testified that, when he received notification regarding Corvo's missing diamond, he immediately telephoned Castro and McLaughlin's supervisor in Pensacola, Florida, and advised him to determine what had occurred, to contact law enforcement, and to prohibit Castro and McLaughlin from working until law enforcement completed its investigation. Atchley testified that the Pensacola supervisor had talked to Castro and McLaughlin and that they both had denied taking the diamond. Atchley also testified that Castro and McLaughlin were never charged with a crime in relation to the missing diamond.

Atchley read a portion of a disclosure on a general Sterling background-check report that stated that Sterling could not report negative information older than seven years. Atchley was questioned about a disclaimer on Sterling's background-check report that stated that the information in the report "has not been obtained through Sterling Testing System's standard criminal background research methods."

Atchley denied that that statement indicated that the background check was substandard.

Tucker testified that he had worked for MasTec from 2004-2007, that Castro had also worked for MasTec at that time, and that he had never heard that Castro had been suspended or accused of stealing anything while working for MasTec. Tucker testified that he had been a co-owner of Synergies3 from 2011 to 2014 and that he had hired Castro to work for Synergies3. According to Tucker, Synergies3 provides an applicant's information to a company, which then performs a background check. Tucker testified that there is no restriction regarding the length of time criminal convictions can be reported on background checks. Tucker testified that he retired from Synergies3 and that he had not spoken to Atchley in approximately three months.

Synergies3 and DIRECTV filed a motion for a judgment as a matter of law at the close of Corvo and Bonds's case and again at the close of all the evidence. The trial court granted that motion at the close of evidence as to the claim for negligent hiring, training, and supervision of McLaughlin, but it denied the motion in all other respects.

The jury rendered a verdict in favor of Corvo in the amount of $300,000 and in favor of Bonds in the amount of $65,160. The verdict form indicated that $40,000 was awarded for the diamond, $160 for the cash, $75,000 for mental anguish, and $250,000 as punitive damages. The trial court entered a judgment in accordance with the jury's verdict.

Synergies3 and DIRECTV renewed their motion for a judgment as a matter of law, alternatively seeking a new trial or a remittitur. The trial court denied that motion, without holding the requested Hammond v. City of Gadsden, 493 So. 2d 1374 (Ala. 1986), hearing. Synergies3 and DIRECTV appealed.[3]

Standard of Review

On appeal, Synergies and DIRECTV, in addition to raising evidentiary challenges, argue that the trial court should have

[3]On July 27, 2018, after determining that the claims of State Farm Fire and Casualty Company remained unresolved (see note 1, supra), this Court remanded the cause to the trial court to consider certifying the judgment as final pursuant to Rule 54(b), Ala. R. Civ. P., or resolving the outstanding claims. On remand, the trial court entered what it styled as an "amended final order" in which it, among other things, found that State Farm was entitled to reimbursement from Bonds in the amount of $59,765.40 for its subrogation claim and entered a final default judgment against McLaughlin and Castro.

entered a judgment as a matter of law in their favor on all claims against them. It is well settled that,

> "'[w]hen reviewing a ruling on a motion for a [judgment as a matter of law], this Court uses the same standard the trial court used initially in deciding whether to grant or deny the motion for a [judgment as a matter of law]. Palm Harbor Homes, Inc. v. Crawford, 689 So. 2d 3 (Ala. 1997). Regarding questions of fact, the ultimate question is whether the nonmovant has presented sufficient evidence to allow the case to be submitted to the jury for a factual resolution. Carter v. Henderson, 598 So. 2d 1350 (Ala. 1992). The nonmovant must have presented substantial evidence in order to withstand a motion for a [judgment as a matter of law]. See § 12-21-12, Ala. Code 1975; West v. Founders Life Assurance Co. of Florida, 547 So. 2d 870, 871 (Ala. 1989). A reviewing court must determine whether the party who bears the burden of proof has produced substantial evidence creating a factual dispute requiring resolution by the jury. Carter, 598 So. 2d at 1353. In reviewing a ruling on a motion for a [judgment as a matter of law], this Court views the evidence in the light most favorable to the nonmovant and entertains such reasonable inferences as the jury would have been free to draw. Id.'
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> "Waddell & Reed, Inc. v. United Investors Life Ins. Co., 875 So. 2d 1143, 1152 (Ala. 2003)."

Phillips v. Seward, 51 So. 3d 1019, 1023 (Ala. 2010).

Discussion

I. Real-Party-in-Interest Issue

Initially, we must address Synergies3 and DIRECTV's argument that the trial court violated Rule 17, Ala. R. Civ. P., by permitting Corvo and Bonds to prosecute a claim for the loss of the diamond because, they assert, that claim belonged exclusively to State Farm Fire and Casualty Company based on a provision of an insurance policy Corvo and Bonds had with State Farm. In support of that argument, Synergies3 and DIRECTV cite Broadnax v. Griswold, 17 So. 3d 656 (Ala. Civ. App. 2008), for the proposition that,

> "where the language of an insurance policy such as that involved here assigns all rights to the assignee insurance company on payment of a claim under the policy, the insurer receives the legal title to the claim from the insured and holds the exclusive right to pursue the claim against the tortfeasor."

Synergies3 and DIRECTV's brief, pp. 41-42.

In Broadnax, the Court of Civil Appeals explained: "Generally, payment of a loss by an insurer gives that insurer subrogation rights to reimbursement ... but does not divest the insured of the legal right to pursue an action against a party responsible for that loss," whereas "an assignment to one's insurer of one's rights of recovery renders the insurer the real party in interest." 17 So. 3d at 659-60.

The provision of the policy at issue in Broadnax stated: "'If any person to or for whom we make payment under this policy has rights of recovery from another, those rights are transferred to us.'" 17 So. 3d at 658. The pertinent provision in the State Farm policy in this case is entitled "Subrogation" and reads:

> "a. If any named insured to or for whom we make payment under this policy has rights to recover damages from another, those rights are automatically transferred to us to the extent of our payment. We are subrogated to the full extent of our payment and our rights are not dependent on whether that named insured is fully compensated for their loss or is made whole."

Paragraph c. of the policy, however, provides:

> "If any named insured to or for whom we have made payment recovers from any other party liable for the damages:
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> "1) that named insured shall hold in trust for us the proceeds of the recovery; and
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> "2) that named insured shall reimburse us to the extent of our payment."

Broadnax is distinguishable. The policy in this case clearly envisions a situation in which the insured recovers damages for the claimed loss and thereafter reimburses State Farm for its payment to the insured for the loss. Based on the language in the policy, we cannot say that Synergies3 and

DIRECTV have demonstrated that Bonds's and Corvo's rights were assigned to State Farm such that State Farm became the sole real party in interest.

II. Conversion Claim

Synergies3 and DIRECTV argue that Corvo and Bonds failed to present substantial evidence to support their claim alleging conversion and that a judgment as a matter of law should have been entered in their favor on that claim. "To support a claim for conversion, a plaintiff must prove '(1) a wrongful taking, (2) an illegal assumption of ownership, (3) an illegal use or misuse of another's property, or (4) a wrongful detention or interference with another's property.'" Kelly v. Connecticut Mut. Life Ins. Co., 628 So. 2d 454, 460 (Ala. 1993)(quoting Gillis v. Benefit Trust Life Ins. Co., 601 So. 2d 951, 952 (Ala. 1992)).

In support of their argument, Synergies3 and DIRECTV cite Heathcock v. Hadley, 380 So. 2d 915 (Ala. Civ. App. 1980), for the proposition that "[m]ere access to money or property, coupled with the disappearance thereof, is not sufficient evidence" of conversion. Synergies3 and DIRECTV's brief, p. 24. In Heathcock, a son had lived with his mother for 13 months before the mother's death. After the mother's death,

the mother's daughter sued the son, alleging, among other things, that the son had wrongfully taken a number of items, including money, from the mother's home because the daughter had been unable to find those items after the mother's death. The Court of Civil Appeals explained:

> "Considered most favorably to the [daughter], this evidence does not establish that the [son] wrongfully or otherwise took possession of the money but merely shows that the [son] had access to the home where the money was allegedly kept. For [a]ught that appears, the [mother] could have spent the money before her death."

380 So. 2d at 917. The court also explained:

> "The [daughter] did not see the [son] remove any of the items nor is there evidence to show the items were in fact in the possession of the [son]. The evidence, at best, showed that the [son] lived in the home prior to the [mother's] death and that some items, according to the [daughter,] were missing from the home after the [mother's] death."

380 So. 2d at 917.

It is an important distinction that, in Heathcock, there was another possible explanation for the disappearance of the money (e.g., the owner of the money could have spent it), and the daughter could not provide a time frame in which the items had disappeared or been taken.

We have previously held, in the context of a conversion claim alleged against the employees of a business, that, if a defendant makes a prima facie showing that its employees did not take the property, the burden then shifts to the plaintiff "'to produce "substantial evidence" creating ... a [genuine] dispute' as to whether one of [its] employees took or carried away the [property]." Wint v. Alabama Eye & Tissue Bank, 675 So. 2d 383, 385 (Ala. 1996) (quoting Mardis v. Ford Motor Credit Co., 642 So. 2d 701, 704 (Ala. 1994) (citing, in turn, § 12-21-12, Ala. Code 1975, and Bean v. Craig, 557 So. 2d 1249, 1252 (Ala. 1990))).

In this case, the undisputed evidence showed that Corvo and Bonds were working in the house while Castro and McLaughlin were installing the DIRECTV equipment in the house. Corvo was able to see the entry and exit points of the house from her desk. There was no evidence indicating that any individual, other than Castro, McLaughlin, Corvo, and Bonds, entered the bedroom where the diamond was kept. Corvo found McLaughlin in her bedroom where the diamond and cash were located with the door almost closed. After Castro and McLaughlin left the house, Corvo discovered that the diamond

was missing from her engagement ring and that the prongs that held the diamond in place were bent and damaged. Corvo also discovered that $160 in cash was missing. Accordingly, Corvo and Bonds presented "'"substantial evidence" creating ... a [genuine] dispute' as to whether one of [Synergies3 or DIRECTV's] employees took or carried away the [property]." Wint, 675 So. 2d at 385. Synergies3 and DIRECTV were not entitled to a judgment as a matter of law on the conversion claim.

III. Respondeat Superior Claim

Synergies3 and DIRECTV next argue that a judgment as a matter of law should have been entered as to Corvo and Bonds's claim alleging vicarious liability under the doctrine of respondeat superior. An employer may be held vicariously liable for the intentional tort of its employee or agent if the plaintiff produces sufficient evidence showing "'that [1] the agent's wrongful acts were in the line and scope of his employment; or [2] that the acts were in furtherance of the business of [the employer]; or [3] that [the employer] participated in, authorized, or ratified the wrongful acts.'" Potts v. BE & K Constr. Co., 604 So. 2d 398, 400 (Ala.

1992)(quoting Joyner v. AAA Cooper Transp., 477 So. 2d 364, 365 (Ala. 1985)).

> "The employer is vicariously liable for acts of its employee that were done for the employer's benefit, i.e., acts done in the line and scope of employment or for acts done for the furtherance of the employer's interest. The employer is directly liable for its own conduct if it authorizes or participates in the employee's acts or ratifies the employee's conduct after it learns of the action."

Potts, 604 So. 2d at 400.

Synergies3 and DIRECTV argue that the act of stealing from customers of DIRECTV is such a marked and unusual deviation from Synergies3 and DIRECTV's business of providing satellite television service that they should have been granted a judgment as a matter of law on Corvo and Bonds's claim alleging respondeat superior liability. In support of their argument, Synergies3 and DIRECTV cite Hendley v. Springhill Memorial Hospital, 575 So. 2d 547 (Ala. 1990), Hargrove v. Tree of Life Christian Day Care Center, 699 So. 2d 1242 (Ala. 1997), and Conner v. Magic City Trucking Service, Inc., 592 So. 2d 1048 (Ala. 1992).[4]

[4]Synergies3 and DIRECTV also cite Copeland v. Samford University, 686 So. 2d 190 (Ala. 1996), asserting that, in that case, this Court affirmed a summary judgment based on the trial court's finding that murder was a major deviation from the business of the university. In Copeland, this Court noted

In Hendley, a patient sued a hospital alleging that an independent contractor who maintained medical equipment for the hospital performed an unauthorized vaginal examination on the patient. The scope of the independent contractor's employment was limited to tending to certain electronic medical devices used in the hospital. In affirming the summary judgment in favor of the hospital, this Court held that the hospital could not be held liable, under the doctrine of respondeat superior, for the independent contractor's alleged unauthorized vaginal examination of the patient because that conduct was "such a gross deviation from the purpose for which [the independent contractor] was in [the patient's] room (monitoring her [medical device])." 575 So. 2d at 551.

In Hargrove, two day-care-center employees and their younger sister kidnapped the plaintiffs' child from the day-care center because one of the sisters wanted a child of her own. This Court affirmed the summary judgment entered against

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that "[t]he trial court considered the murder to be a major deviation from the master's business, as a matter of law, and granted Samford's motion for summary judgment," 686 So. 2d at 195; however, although this Court affirmed the summary judgment, it did not do so expressly on that basis.

the plaintiffs on their claims against the day-care center based on vicarious liability, holding that the sisters' "apparent plot ... constituted, as a matter of law, a gross deviation" from the business of the day-care center. 699 So. 2d at 1246. In Hargrove, however, it was undisputed that "there was nothing that should have, or could have, put ... the [day-care] [c]enter on notice that the sisters would or might kidnap one of the children." Id.

In Magic City Trucking, an employee of a trucking company, which was subcontracted by the plaintiff's employer, chased the plaintiff with a snake and eventually threw the snake on the plaintiff while the two were working in the line and scope of their employment for their respective employers. The plaintiff sued the trucking company based on the theory of respondeat superior, but the trial court entered a directed verdict (now referred to as a preverdict judgment as a matter of law, see Rule 50, Ala. R. Civ. P.) in favor of the trucking company. 592 So. 2d at 1049. In affirming the trial court's judgment, this Court held that the trucking company's employee's "actions were a marked and unusual deviation from the business of [the trucking company]. It cannot be said that [the employee's] poor practical joke was in furtherance of

[the trucking company's] business. Therefore, it was not within the scope of his employment." 592 So. 2d at 1050.

This Court, however, has recognized:

> "'In order to recover against a defendant under the doctrine of respondeat superior, the plaintiff must establish the status of master and servant and that the act done was within the line and scope of the servant's employment. Naber v. McCrory & Sumwalt Construction Company, 393 So. 2d 973 (Ala. 1981). This rule applies even where the wrong complained of was intentionally, willfully, or maliciously done in such a manner as to authorize a recovery for punitive damages. Anderson v. Tadlock, 27 Ala. App. 513, 175 So. 412 (1937). In extending the liability to a willful wrong, the motive behind the act does not defeat liability, Seaboard Air Line Railway Company v. Glenn, 213 Ala. 284, 104 So. 548 (1925), unless it can be shown that the servant acted from wholly personal motives having no relation to the business of the master. United States Steel Company v. Butler, 260 Ala. 190, 69 So. 2d 685 (1953). Whether the servant was actuated solely by personal motives or by the interests of his employer is a question for the jury. B.F. Goodrich Tire Company v. Lyster, 328 F.2d 411 (5th Cir. 1964); Craft v. Koonce, 237 Ala. 552, 187 So. 730 (1939). This is so if there is any evidence having a tendency either directly or by reasonable inference to show that the wrong was committed while the servant was executing the duties assigned to him. United States Steel Company v. Butler, supra; Lerner Shops of Alabama v. Riddle, 231 Ala. 270, 164 So. 385 (1935).'"

Meyer v. Wal-Mart Stores, Inc., 813 So. 2d 832, 834–35 (Ala. 2001)(quoting Plaisance v. Yelder, 408 So. 2d 136, 137 (Ala. Civ. App. 1981)). In Plaisance, the Court of Civil Appeals,

summarizing Avco Corp. v. Richardson, 285 Ala. 538, 234 So. 2d 556 (1970), stated:

> "In Avco, the supreme court noted that in cases where a servant's deviation from the master's business is slight and not unusual, the court may determine, as a matter of law, that the servant was still executing the master's business. On the other hand, with a very marked and unusual deviation, the court may determine that the servant is not on his master's business at all. Cases falling between these two extremes must be regarded as involving merely a question of fact to be left to the jury."

408 So. 2d at 138.

The evidence, viewed in the light most favorable to Corvo and Bonds, the nonmovants, indicates that Castro and McLaughlin went to Corvo's house to install DIRECTV's equipment. After Castro and McLaughlin left the house, the diamond from Corvo's engagement ring and $160 in cash were missing. A default judgment was entered against Castro and McLaughlin on Corvo and Bonds's theft and conversion claims against them. Theft and conversion are a "marked and unusual deviation" from the business of Synergies3 and DIRECTV for which Castro and McLaughlin were in Corvo's house -- installing equipment for DIRECTV's satellite television service. Furthermore, there was no evidence indicating that the theft or conversion was done for Synergies3's or DIRECTV's

benefit or in furtherance of their interests. Potts, 604 So. 2d at 400. Moreover, there is no evidence indicating that Synergies3 or DIRECTV authorized or participated in theft and conversion or later ratified the conduct so as to give rise to any direct liability for theft or conversion. See Potts, 604 So. 2d at 400. See also Magic City Trucking, 592 So. 2d at 1050 ("Acts that an employee has done for some purpose of his or her own are not done within the line and scope of the employee's employment." (citing Hendley, 575 So. 2d at 551)). Based on those circumstances, there was no factual dispute regarding Synergies3's and DIRECTV's vicarious or direct liability for Castro's and McLaughlin's actions that required resolution by the jury; accordingly, the trial court should have entered a judgment as a matter of law in favor of Synergies3 and DIRECTV on Corvo and Bonds's claims asserting liability based on the doctrine of respondeat superior. See Phillips, 51 So. 3d at 1022-23.

IV. Negligent Hiring, Training, and Supervision Claim

The next issue is whether the trial court should have entered a judgment as a matter of law in favor of Synergies3 and DIRECTV on Corvo and Bonds's claim of negligent hiring,

training, and supervision of Castro.[5] In support of their argument, Synergies3 and DIRECTV cite Ex parte South Baldwin Regional Medical Center, 785 So. 2d 368 (Ala. 2000). In South Baldwin, parents sued a hospital, alleging assault and battery, negligent supervision, and breach of a duty to a business invitee based on allegations that a registered nurse employed by the hospital had molested their child. 785 So. 2d at 369. The trial court in that case entered a summary judgment in favor of the hospital, and the Court of Civil Appeals reversed that summary judgment. E.P. v. McFadden, 785 So. 2d 364 (Ala. Civ. App. 2000). This Court reversed the Court of Civil Appeals' judgment, quoting Judge Crawley's dissenting opinion in E.P. v. McFadden, 785 So. 2d at 367–68, which relied on Carroll v. Shoney's, Inc., 775 So. 2d 753 (Ala. 2000). In Carroll, this Court explained:

> "Alabama law requires a plaintiff to show three elements to establish a duty that would be the basis for a cause of action such as the one presented in this case. Moye [v. A.G. Gaston Motels, Inc.], 499 So. 2d [1368] at 1370 [(Ala. 1986) (involving a

[5]The trial court entered a judgment as a matter of law in favor of Synergies3 and DIRECTV on the claim of negligent hiring, training, and supervision as it related to McLaughlin. In addition, it appears that the trial court implicitly denied Corvo and Bonds's wanton hiring, training, and supervision claims, and the parties do not address that issue on appeal.

> business's liability for injuries to an invitee resulting from the criminal act of a third party)]. First, the particular criminal conduct must have been foreseeable. Second, the defendant must have possessed 'specialized knowledge' of the criminal activity. Third, the criminal conduct must have been a probability."

775 So. 2d at 756. Carroll, however, involved the issue whether an employer could be held liable for an employee's death that resulted from the criminal act of a third party. 775 So. 2d at 754. South Baldwin involved the scope of a business's duty owed an invitee for the criminal acts of an employee. 785 So. 2d at 369.

The question in this case involves the liability of a business to a customer on the theory of negligent hiring, training, and supervision when an employee commits an intentional tort and/or criminal act. To confer liability on an employer for the negligent hiring, training, or supervision of an employee, the following principles are applicable.

> "'In the master and servant relationship, the master is held responsible for his servant's incompetency when notice or knowledge, either actual or presumed, of such unfitness has been brought to him. Liability depends upon its being established by affirmative proof that such incompetency was actually known by the master or that, had he exercised due and proper diligence, he would have learned that which would charge him in the law with such knowledge. It is incumbent on the party charging negligence to show it by proper evidence.

> This may be done by showing specific acts of incompetency and bringing them home to the knowledge of the master, or by showing them to be of such nature, character, and frequency that the master, in the exercise of due care, must have had them brought to his notice. While such specific acts of alleged incompetency cannot be shown to prove that the servant was negligent in doing or omitting to do the act complained of, it is proper, when repeated acts of carelessness and incompetency of a certain character are shown on the part of the servant to leave it to the jury whether they would have come to his knowledge, had he exercised ordinary care.'"

Lane v. Central Bank of Alabama, N.A., 425 So. 2d 1098, 1100 (Ala. 1983) (quoting Thompson v. Havard, 285 Ala. 718, 723, 235 So. 2d 853, 858 (1970)). We note that, although Lane specifically mentions "negligent supervision" and speaks in terms of "incompetency," the principles in Lane have also been applied in the context of negligent-hiring-and-training claims in relation to intentional torts. See, e.g., Machen v. Childersburg Bancorporation, Inc., 761 So. 2d 981, 986 (Ala. 1999)(reversing a summary judgment in a case involving claims against an employer based on negligent or wanton failure to properly investigate, train, supervise, and discipline an employee in the context of a sexual-harassment allegation); Big B, Inc. v. Cottingham, 634 So. 2d 999, 1003 (Ala. 1993)(affirming judgment for plaintiff on negligent-training-and-supervision claims involving false imprisonment and

assault and battery); and Sanders v. Shoe Show, Inc., 778 So. 2d 820, 824 (Ala. Civ. App. 2000)(affirming a summary judgment for defendants on negligent-hiring-and-supervision claims related to false-imprisonment allegations). See also, generally, Zielke v. AmSouth Bank, N.A., 703 So. 2d 354, 357–58 n. 1 (Ala. Civ. App. 1996) ("After reviewing Alabama caselaw, we see no distinction between claims of wrongful supervision and claims of wrongful training.").

In Anonymous v. Lyman Ward Military Academy, 701 So. 2d 25, 28 (Ala. Civ. App. 1997), the Court of Civil Appeals, in considering the liability of an employer, a military academy, for the alleged negligent supervision of an employee who molested one of its students, explained: "In order to prove his negligent supervision claim, the [plaintiff] 'must show or demonstrate that [the employer] had notice or knowledge (actual or presumed) of the [employee's] alleged [conduct].'" (Quoting Perkins v. Dean, 570 So. 2d 1217, 1219 (Ala. 1990).) The court also explained that, insofar as the student attempted to rest his negligent-supervision claim on alleged criminal acts of the employee,

> "'"[i]t is difficult to impose liability on one person for an intentional act committed by another." Moye v. A.G. Gaston Motels, Inc., 499 So. 2d 1368,

> 1370 (Ala. 1986), quoting CIE Service Corp. v. Smith, 460 So. 2d 1244, 1247 (Ala. 1984). The difficulty usually arises because, in such a situation, two essential elements of a negligence ... action are absent: duty and proximate cause. Moye, 499 So. 2d at 1370. The key to either of these elements is foreseeability. Id.
>
> "'... Our cases have established only one exception to the general rule that one has no duty to protect another from the criminal acts of a third party. Thetford v. City of Clanton, 605 So. 2d 835, 840 (Ala. 1992); Moye, 499 So. 2d at 1371. The duty to protect a second person from the criminal acts of a third person arises only when one's negligence ... creates a situation in which it is foreseeable that a third person will commit criminal conduct that endangers the second person. Thetford v. City of Clanton, 605 So. 2d 835; Moye, supra. "The number and frequency of prior criminal acts at the place where the injury occurred are used in determining whether a particular criminal act was reasonably foreseeable." Moye, 499 So. 2d at 1372.'"

Lyman Ward, 701 So. 2d at 28 (quoting E.H. v. Overlook Mountain Lodge, 638 So. 2d 781, 783 (Ala. 1994)).[6]

In order to withstand the motion for a judgment as a matter of law, Corvo and Bonds were required to submit substantial evidence that created a factual dispute requiring resolution by the jury regarding whether it was (or should have been) foreseeable to Synergies3 and DIRECTV that Castro

[6]Overlook Mountain Lodge involved a business's duty to protect invitees against the criminal acts of a third person. 638 So. 2d at 782.

would commit conversion or theft while installing services for a customer. See Overlook Mountain Lodge, supra; see also Phillips, 51 So. 3d at 1022–23. Evidence was presented to the jury showing that the background check that Synergies3 performed on Castro did not reveal any criminal history, and Tucker testified that he had no knowledge of Castro's having been suspended for stealing from a customer during his previous employment. Tucker also testified that he did not know when he hired Castro that Castro had previously been convicted of negotiating worthless checks. Furthermore, there had been no customer complaints regarding Castro before this incident.

The evidence, however, when viewed in the light most favorable to Corvo and Bonds, the nonmovants, indicated that Castro had a criminal history involving theft that should have been detected in a proper background check; that Castro had admitted to Stacy that he had been suspended at his previous employment by the same person who had hired him at Synergies3 for stealing a customer's ring; and that Stacy had discovered a stash of women's jewelry in Castro's vehicle on an occasion

when they lived in Texas.[7] Corvo and Bonds submitted substantial evidence creating a factual dispute as to whether Synergies3 and DIRECTV should have performed a more thorough background check and thereby discovered Castro's criminal history and whether it should have been foreseeable to Synergies3 or DIRECTV that Castro would steal from a customer during an installation. From that evidence, a jury could reasonably infer that Synergies3 and DIRECTV negligently hired, trained, and supervised Castro. Accordingly, the trial court did not err in denying Synergies3 and DIRECTV's motion for a judgment as a matter of law as to Corvo and Bonds's claim of negligent hiring, training, and supervision of Castro.

V. Punitive-Damages Award

[7]Synergies3 and DIRECTV also mention that the evidence regarding Castro's conviction and Stacy's testimony that contained hearsay were wrongfully admitted. Synergies3 and DIRECTV, however, merely cite Rules 401, 402, 801, and 802, Ala. R. Evid., without analyzing the application of those rules to the facts. Accordingly, we will not address this issue. See Dykes v. Lane Trucking, Inc., 652 So. 2d 248, 251 (Ala. 1994)("We have unequivocally stated that it is not the function of this Court to do a party's legal research or to make and address legal arguments for a party based on undelineated general propositions not supported by sufficient authority or argument."(citing Spradlin v. Spradlin, 601 So. 2d 76 (Ala. 1992)).

Synergies3 and DIRECTV also argue that the trial court should have entered a judgment as a matter of law in their favor on Corvo and Bonds's claim for punitive damages, and they challenge the trial court's failure to hold a postjudgment hearing to review the punitive-damages award pursuant to Hammond v. City of Gadsden, 493 So. 2d 1374, 1379 (Ala. 1986). They also challenge the verdict form submitted to the jury because, they assert, it did not permit the jury to assess punitive damages against one defendant and not the other and it permitted an award of punitive damages on a negligence claim.[8]

Punitive damages are not recoverable on negligence claims, including claims of negligent hiring, training, and

[8]Synergies3 and DIRECTV also assert in a footnote that mental-anguish damages were not recoverable on the negligence claim because there was no physical injury and, because the verdict form was a general verdict form, there was no way to determine on what claim the mental-anguish damages were awarded. Although Synergies3 and DIRECTV cite Wal-Mart Stores, Inc. v. Bowers, 752 So. 2d 1201, 1204 (Ala. 1999), in support of their assertion, the inclusion of this argument in a footnote does not satisfy Rule 28(a)(10), Ala. R. App. P. "We have unequivocally stated that it is not the function of this Court to do a party's legal research or to make and address legal arguments for a party based on undelineated general propositions not supported by sufficient authority or argument." Dykes v. Lane Trucking, Inc., 652 So. 2d 248, 251 (Ala. 1994)(citing Spradlin v. Spradlin, 601 So. 2d 76 (Ala. 1992)).

supervision. See CP & B Enters., Inc. v. Mellert, 762 So. 2d 356, 362 (Ala. 2000) ("A finding by the jury that [the employer] was only negligent in hiring, supervising, and retaining [the employee] would not warrant an award of punitive damages."). Although punitive damages may be recovered on a conversion claim, see, e.g., Liberty Nat'l Life Ins. Co. v. Caddell, 701 So. 2d 1132, 1136 (Ala. Civ. App. 1997), or based on an employer's vicarious liability, see § 6-11-27(a), Ala. Code 1975,[9] because we have held that the theft and conversion were a deviation from the line and scope

[9]Section 6-11-27(a) provides:

> "(a) A principal, employer, or other master shall not be liable for punitive damages for intentional wrongful conduct or conduct involving malice based upon acts or omissions of an agent, employee, or servant of said principal, employer, or master unless the principal, employer, or master either: (i) knew or should have known of the unfitness of the agent, employee, or servant, and employed him or continued to employ him, or used his services without proper instruction with a disregard of the rights or safety of others; or (ii) authorized the wrongful conduct; or (iii) ratified the wrongful conduct; or unless the acts of the agent, servant, or employee were calculated to or did benefit the principal, employer, or other master, except where the plaintiff knowingly participated with the agent, servant, or employee to commit fraud or wrongful conduct with full knowledge of the import of his act."

of employment and Synergies3 and DIRECTV are not vicariously or directly liable on those claims, there is no basis upon which punitive damages could have properly been awarded.

Because we hold that punitive damages were improperly awarded, we pretermit discussion of Synergies3 and DIRECTV's other arguments challenging the verdict form submitted to the jury, the apportionment of punitive damages among joint tortfeasors, and the trial court's failure to hold a postjudgment hearing to review the punitive-damages award pursuant to Hammond.[10]

Conclusion

The judgment is reversed insofar as it holds Synergies3 and DIRECTV vicariously or directly liable on the claims of theft and conversion and insofar as it awards punitive damages. The judgment is affirmed insofar as it holds Synergies3 and DIRECTV liable for the negligent hiring, training, and supervision of Castro and awards compensatory

[10]Synergies3 and DIRECTV also assert that the trial court should have held a hearing regarding their challenge to the mental-anguish damages. Hammond, however, applies to punitive-damages awards -- not mental-anguish damages -- and Synergies3 and DIRECTV have not provided this Court with argument or authority to demonstrate their entitlement to a hearing addressing mental-anguish damages.

and mental-anguish damages.[11] The cause is remanded for the trial court to enter a judgment consistent with this opinion.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED WITH INSTRUCTIONS.

Parker, C.J., and Wise, J., concur.

Bolin, J., concurs in part and concurs in the result in part.

Sellers, J., concurs in the result.

[11]As explained above, Synergies3 and DIRECTV failed to sufficiently raise and address any argument relating to the award of damages for mental anguish.

BOLIN, Justice (concurring in part and concurring in the result in part).

I concur in that portion of the opinion reversing the judgment against Synergies3 Tec Services, LLC, and DIRECTV, LLC, insofar as it awarded punitive damages to the plaintiffs based on vicarious and direct liability on the plaintiffs' claims of theft and conversion. As to the remainder of the opinion, I concur in the result only.