IN THE SUPREME COURT OF MISSISSIPPI

No. 2009-CA-00182

WALTER AKINS d/b/a AKINS CONSTRUCTION COMPANY

Appellant

vs.

GOLDEN TRIANGLE PLANNING & DEVELOPMENT DISTRICT, INC.

Appellee

Appeal of the Final Judgment and Order of the Oktibbeha County Circuit Court, The Honorable Lee J. Howard, Circuit Judge in *Akins v. Golden Triangle Planning & Development District, Inc.*, Civil Action No. 2006-0502-CV

BRIEF OF APPELLEE GOLDEN TRIANGLE PLANNING & DEVELOPMENT DISTRICT, INC.

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities have an interest in the outcome of this case.

1. Walter Akins d/b/a Akins Construction Company, Appellant
2. Golden Triangle Planning & Development District, Inc., Appellee
3. Phyllis Tate
4. J. Niles McNeel, Counsel for Appellant
5. McNeel and Ballard, Counsel for Appellant
6. Tommie S. Cardin, Counsel for Appellee
7. William M. Gage, Counsel for Appellee
8. Paul M. Ellis, Counsel for Appellee
9. BUTLER, SNOW, O'MARA, STEVENS & CANNADA, PLLC, Counsel for Appellee
10. Maison Heidelberg, Counsel for Appellee
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STATEMENT OF ISSUE

Whether Golden Triangle Planning & Development District, Inc. ("Golden Triangle") can be vicariously liable under the doctrine of *respondeat superior* for a former employee's theft committed solely for the employee's personal benefit and purpose and not in furtherance of Golden Triangle's business.

STATEMENT OF THE CASE

Golden Triangle is a non-profit economic development corporation. It assists state and local governments in servicing the needs of residents living in east Mississippi. *See generally* Golden Triangle website, available at http://www.gtpdd.com/history/index.htm (last visited July 10, 2009). Golden Triangle administers state and federal grant programs, including the federal HOME program which is the "largest federal block grant to State and local governments designed exclusively to create affordable housing for low-income households." *See generally* HOME Program website, available at http://www.hud.gov/offices/cpd/affordablehousing/programs/home/index.cfm (last visited July 10, 2009). The HOME program has helped many low-income households in Mississippi upgrade their living conditions.

Phyllis Tate ("Tate") was a Housing Specialist employed by Golden Triangle to administer the HOME program. *See* March 31, 2008 Rudy Johnson Affidavit ("Johnson Affidavit"); Record ("R.") at 31, ¶2. Tate's duties included enrolling participating counties and cities in the program, assisting counties and cities in the selection of eligible participants, advertising and soliciting bids from third-party contractors to construct houses, verifying that participants were awarded the most competitive bid, reviewing inspector reports certifying percentage of work completed on a house, and submitting requests to the Mississippi Development Authority to disburse monies to counties and cities so they could pay contractors for work completed on a house. *Id.*

Appellant Walter Akins ("Akins") was a general contractor who built houses under the HOME program. *See* Complaint, R. at 4, ¶ III. In August 2005, Golden Triangle suspected that Akins and/or Tate were involved in potentially fraudulent activity related to the use of HOME funds. *See* Johnson Affidavit, R. at 32, ¶ 4. Golden Triangle promptly hired a forensic CPA who discovered that Tate was stealing HOME funds. *Id.*

Golden Triangle immediately reported Tate's conduct to the Oktibbeha County District Attorney, the Mississippi State Auditor, and the Mississippi Development Authority. *Id.* at ¶ 5. In October 2005, the Oktibbeha County Sheriff's Office arrested Tate. Shortly thereafter, the Federal Bureau of Investigation initiated its own investigation. On May 31, 2007, a federal grand jury in the Northern District of Mississippi returned a forty-seven count indictment against Tate and several alleged co-conspirators for fraud, theft and money laundering of HOME funds. The indictment details how Tate perpetrated her theft and fraud by illegally directing monies to J-Max Construction Company – Tate's personal shell corporation. It states, in pertinent part:

> 3. PHYLLIS TATE created fraudulent requests for cash purportedly for J-Max Construction Company . . . .
>
> 4. J-Max Construction Company received funds for low income housing it did not build . . . .
>
> 5. J-Max Construction was purportedly a construction company operated by JASON CLARK[1], KEINA TATE'S[2] then boy-friend. The company and its checking account were created for no reason other than to funnel money designated to build low income housing into the pockets of JOSH BROWN[3], JASON CLARK, KEINA TATE, AND PHYLLIS TATE.
>
> 6. KEINA TATE and JASON CLARK were the only individuals with signatory authority for J-Max Construction's checking account, and once the funds from the town, city, or county were deposited into the account, either KEINA TATE or JASON CLARK would withdraw a portion of those funds and transfer them to PHYLLIS TATE either by paying her cash or transferring it to one of PHYLLIS TATE'S personal accounts, including, but not limited to,

[1] Jason Clark is Keina Tate's former boyfriend.
[2] Keina Tate is Phyllis Tate's daughter.
[3] Josh Brown was an inspector for the HOME program.

> PHYLLIS TATE'S Curry Club account, a non-business account in Phyllis Tate's maiden name. . . .

See Indictment in *United States of America v. Josh Brown, Jason Clark, Richard Ramsey, Keina Tate, and Phyllis Tate*, In the United States District Court for the Northern District of Mississippi, Criminal No. 1:07cr094, R. at 37-61.

On January 8, 2008, Tate pled guilty to conspiring with Josh Brown, Jason Clark and Keina Tate to steal funds under the HOME program from March 2004 through August 2005. *See* Count 47 of Indictment, R. at 59-61. *See also* Criminal Minutes of Change of Plea Hearing, R. at 62.

Akins was paid approximately $820,000 in HOME funds to construct certain houses identified in his Complaint. *See* Johnson Affidavit, R. at 32, ¶ 6. On December 14, 2006, more than a year after those houses were completed, Akins sued Golden Triangle claiming that he was underpaid by less than 10% – approximately $80,628.00. Akins alleges that Tate stole these monies by directing them to J-Max Construction Company.[4] *See* Complaint, R. at 4-6, ¶¶ VI, VII, VIII. *See also* Appellant's Brief at 6-7. Akins's sole theory of recovery is that Golden Triangle is vicariously liable for Tate's theft under the doctrine of *respondeat superior.*

The trial court granted Golden Triangle's Motion for Summary Judgment, ruling that Golden Triangle could not be held vicariously liable for any alleged theft because "stealing governmental monies was not the kind of work Tate was employed to perform" and Golden Triangle "did not receive any benefit from Tate's illegal actions." *See* Order Denying Plaintiff's Motion for Summary Judgment and Sustaining Defendant's Motion for Summary Judgment ("Order"), R. at 128.

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[4] Akins did not establish, and the trial court did not find, that Akins was actually underpaid as he alleges or that Tate actually stole some or all of the funds Akins claims should have been paid to him. But even if those allegations were true (Golden Triangle does not admit their truth), the trial court's ruling should nonetheless be affirmed because Golden Triangle cannot be held vicariously liable under the doctrine of *respondeat superior.*

SUMMARY OF THE ARGUMENT

Golden Triangle is not vicariously liable for Tate's alleged theft because she committed her illegal and unauthorized actions outside the scope of her employment. If Tate illegally directed money owed to Akins to J-Max Construction Company, she did so without the knowledge, permission, or participation of Golden Triangle.

Moreover, Golden Triangle gained nothing from Tate's actions. Her theft undermined and harmed the administration of the HOME program in this State and inflicted upon Golden Triangle hundreds of thousands of dollars in business losses, lawsuits and legal fees. Nor did Tate intend that Golden Triangle benefit from her actions. She stole as an individual on her own account – for her own financial benefit and personal enrichment. Tate was not acting on Golden Triangle's behalf but as a private actor seeking to accomplish her own corrupt private purpose.

The law in Mississippi is clear: An employer is not vicariously liable for the criminal acts of an employee committed in furtherance of the employee's own private purpose. While Akins may theoretically have a cause of action against Tate, he has none against Golden Triangle. Summary judgment was appropriately granted in favor of Golden Triangle and the decision of the trial court should be affirmed.

STANDARD OF REVIEW

An appellate court reviews *de novo* a trial court's grant or denial of summary judgment. *Commercial Bank v. Hearn*, 923 So. 2d 202, 204 (Miss. 2006). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Miss. R. Civ. P. 56(c); *Gordon v. National States Ins. Co.*, 851 So. 2d 363, 365 (Miss. 2003). To avoid summary judgment, the non-moving party must establish a genuine issue of material fact within the means allowable under the Rule. *Vaughn ex rel. Vaughn v. Estate of Worrell*, 828 So. 2d 780, 783 (Miss. 2002). Thus, a motion for summary

judgment "should be granted if the plaintiff has failed to prove one or more essential elements of his claim or if the quality of the proof offered is insufficient to sustain plaintiff's burden of proof." *PDN, Inc. v. Loring*, 843 So. 2d 685, 688 (Miss. 2003).

A claim of *respondeat superior* is subject to summary judgment just like any other claim. That is, if no genuine dispute exists as to the material fact that the employee was acting outside the scope of her employment, the employer is entitled to summary judgment as a matter of law. *See Commercial Bank*, 923 So. at 209-10; *Gulledge v. Shaw*, 880 So. 2d 288, 295-96 (Miss. 2004); *Adams v. Cinemark USA, Inc.*, 831 So. 2d 1156, 1161-62 (Miss. 2002).

ARGUMENT

I. Golden Triangle is Not Vicariously Liable For The Illegal and Unauthorized Theft of Its Former Employee Committed Outside The Scope of Employment.

A. Current Case Law

Akins misstates the trial court's ruling in the instant case when he states the court "appears to hold that any and all thefts by an employee are outside the scope of respondeat superior." Appellant's Brief at 10. In all fairness to the trial court, the Order does not state that an employer can never be found liable for an employee's theft. The trial court applied clearly established Mississippi precedent to the undisputed facts and ruled that Golden Triangle was not vicariously liable for Tate's theft because "stealing governmental monies was not the kind of work Tate was employed to perform" and because Triangle "did not receive any benefit from Tate's illegal actions." *See* Order, R. at 128.

Golden Triangle is simply asking this Court to apply Mississippi's well established case law which holds an employer is not vicariously liable for its employee's theft committed outside the scope of employment. *See Commercial Bank*, 923 So. 2d at 207. In determining whether an employee committed an act within the scope of employment:

> [t]he inquiry is not whether the act in question . . . was done, so far as time is concerned, while the servant was engaged in the master's business, nor as to mode or manner of doing it . . . but whether . . . it was ***an act done in the master's business, or wholly disconnected therefrom by the servant, not as servant, but as an individual on his own account.***

Id. (emphasis added). The Court must "**look to the act committed** by the employee, **rather than some indirect benefit the employer may have received** from a specific act not part of the duties of employment." *Id.* at 208 (emphasis added). In other words, "[i]f a servant, having completed his duty to his master, then proceeds to prosecute **some private purpose of his own**, the master is not liable . . . ." *Id.* (emphasis added).

This Court has also cited with approval § 228 RESTATEMENT (SECOND) OF AGENCY (hereinafter "Restatement"):

> (1) Conduct of a servant is within the scope of employment if, but only if:
> (a) it is of the kind he is employed to perform;
> (b) it occurs substantially within the authorized time and space limits;
> (c) it is actuated, at least in part, by a purpose to serve the master, and
> (d) if force is intentionally used by the servant against another, the use of force is not unexpected by the master.

The Restatement further provides that "[a]n act of a servant is **not within the scope of employment if it is done with no intention to perform it as a part of or incident to a service on account of which he is employed.**" Restatement at § 235 (emphasis added). "It is the state of the servant's mind which is material. . . . Conduct is within the scope of employment only if the servant is actuated to some extent by an intent to serve his master." *Id.* at cmt. (a).

In *Gulledge v. Shaw*, 880 So. 2d 288, 295-96 (Miss. 2004), this Court held that an employer was not vicariously liable for an employee's tortious act committed solely for the employee's "own private purpose." In *Gulledge*, an employee of Commercial Bank knowingly notarized a forged signature on a minor's driver's license application. *Id.* at 295. Thereafter, the plaintiff was killed in an automobile collision caused by the minor's negligence. *Id.* Plaintiff's

wrongful death beneficiaries sued the bank alleging that it was vicariously liable for its employee's act of notarizing the forged signature. *Id.*

This Court affirmed dismissal, finding the employee's act was not committed within the scope of employment: "While we have already unequivocally found [the employee's] job responsibilities at the Bank included her notary public duties, we find . . . [the employee's] act of notarizing a forged document was not in the furtherance of the Bank's business—rather, ***it was a personal act.*** When [the employee] notarized the application, ***she ceased to be an actor on the Bank's behalf and instead became a private actor seeking to accomplish her own private purpose.***" *Id.* at 296 (emphasis added).

The overwhelming majority of courts that have addressed employer liability for an employee's theft reject liability when the theft was solely for the employee's personal benefit. For example, in a case remarkably similar to the instant one, *Berhow v. The People's Bank*, 423 F. Supp. 2d 562, 564 (S.D. Miss. 2006), a senior loan officer and bank branch manager stole nearly $400,000.00 from sixty bank customers by using customers' names to divert funds to himself. *Id.* at 564-65. The employee eventually pled guilty to fraud and was sentenced to twenty four months imprisonment. *Id.*

A customer sued the bank alleging that it was vicariously liable for its employee's theft. *Id.* at 565. Similar to Akins's argument, the plaintiff argued the bank's employee was acting within the scope of employment because:

> [The employee] committed his fraudulent conduct while performing his daily duties and activities as a Peoples Bank loan officer, vice president and manager of the bank's headquarters office in downtown Biloxi. [The employee] testified he committed fraud as he was sitting at his desk in the bank's main lobby, a few feet from and in plain view of officers, tellers and his secretary. . . . [A high-ranking bank officer] confirmed under oath that [the employee] accomplished his fraud over four years, on hundreds of occasions, utilizing the very documents he was authorized to use and while performing loan duties he was authorized to perform. While the bank, of course, did not authorize [the employee] to commit fraud, it

> did authorize him to process loans-the exact job duty he used to prepare fraudulent documents.

Id. at 571. Applying Mississippi's "well established" law, the federal district court rejected the plaintiff's argument and granted summary judgment in favor of the bank, finding the employee's theft was committed for "**purely personal reasons**" and that plaintiff "**failed to show that [the employee's] conduct in stealing from the Bank was the kind of work that he was employed to perform, [or] that his conduct was done at least in part to serve the bank.**" *Id.* at 572-73 (emphasis added). *See also Mangum v. Cato Corp.*, 2008 WL 2512376, 14 (S.D. Miss. 2008) ("In the court's opinion, if [the employee] was a knowing participant in the forged check cashing scheme, so that she acted intentionally to effect and/or facilitate theft of funds from her employer, then she acted outside the course and scope of employment.") (citing *Berhow v. The Peoples Bank*, 423 F.Supp.2d 562 (S.D. Miss. 2006)).

Similarly, in *Insurance Co. of North America v. Federal Exp. Corp.*, 189 F.3d 914, 917 (9th Cir. 1999), an employee of Federal Express allegedly stole plaintiff's computer modules from a secure holding facility located in the Fed-Ex hub at the Memphis International Airport. In rejecting plaintiff's claim that Fed-Ex was vicariously liable for its employee's alleged theft, the Ninth Circuit reasoned:

> [W]e would be **hard-pressed to find that the employee's thievery served Federal Express' interests in any way. The theft exposed Federal Express to liability . . . , potential loss of business, damage to its reputation, legal fees, and other harms** that normally arise from employee theft. Moreover, the mere fact that the employee had access to the "secure" holding area by way of his employment with Federal Express does not change the result.

Id. at 917 (emphasis added). The court concluded: "[I]t is beyond dispute that the theft was a substantial deviation from the employee's duties and **served only the personal purposes of individual gain at the expense of the employer.** Accordingly, respondeat superior liability

does not obtain [and] the willful misconduct of the employee should not be imputed to Federal Express . . . ." *Id.* at 922-23.

In *Island Associated Coop., Inc. v. Hartmann*, 118 A.D.2d 830-31 (N.Y.A.D. 1986), a court held that an employer was not vicariously liable for its employee's theft of inventory from a customer's warehouse because the employee's actions were in "no way incidental to the furtherance of the employer's interest." In reaching its decision, the court employed the same principled distinction concerning employee conduct: "[w]hile torts committed by an employee who inartfully tries to carry out his employer's assignment may be found to be within the scope of employment, **torts committed for personal motives unrelated to the furtherance of the employer's business cannot,** especially if the tortious acts are serious in nature." *Id.* (citing Restatement at § 231, cmt. (a)) (internal citations omitted) (emphasis added).

Also, in *B.B. Walker Co. v. Burns Intern. Sec. Services, Inc.*, 424 S.E.2d 173 (N.C. Ct. App. 1993), security guards stole plaintiff's property at a manufacturing facility they were supposed to be guarding. Plaintiff argued the guards were acting within the scope of employment because:

> [D]efendant placed the guards in a unique position to steal plaintiff's property by hiring and assigning them to provide security at plaintiff's facility. The guards were alone on plaintiff's property at night and had access to the goods which they stole by nature of their employment. Therefore, plaintiff argues, in essence, that the thefts committed by the two security guards were so very closely connected to their employment duties that they were able to steal the very items they were employed to protect.

Id. at 555-65. In rejecting the plaintiff's theory of liability, the appellate court held:

> We disagree. . . . The security guards' acts of theft were clearly contrary to, and not in furtherance of, the business of defendant which was to provide security for the facility and the property contained therein. In fact, the employees' thefts were directly contrary to the principal's business. The thefts **resulted from the guards' personal motives; therefore, they cannot be deemed an act of their employer.**

Id. at 565 (emphasis added).[5]

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[5] In addition to the numerous cases discussed above, see also:

- **Connecticut:** *Rheaume v. FleetBoston Financial Corp.*, 2005 WL 3370493, 6 (Conn. Super. Ct. 2005) (Bank employee stole thousands of dollars from a customer's account. In denying plaintiff's claim against the bank, the court stated: "It is difficult to see how the theft of the customer's money, even if it had been established by the evidence (which it was not) could be found to be done 'in the service of the master.'").

- **Florida:** *Sunshine Sec. & Detective Agency v. Wells Fargo Armored Services Corp.*, 496 So. 2d 246, 247 (Fl. Ct. App. 1986) (A security guard who robbed bank employees making cash deposits not acting within scope of employment because "[t]he subject employee was hired . . . to guard the bank which he, in fact, conspired to rob. In this endeavor, . . . the employee was plainly off on a frolic of his own, was in no way furthering the interests of his employer, and, consequently, was not acting within the scope of his employment . . . .").

- **Georgia:** *Effort Enterprises, Inc. v. Crosta*, 391 S.E.2d 477, 479 (Ga. Ct. App. 1990) (Employee of moving company allegedly stole plaintiff's jewelry while moving her belongings. In reversing trial court's decision finding employer liable under *respondeat superior*, the appellate court stated: "The instant case is not one wherein an employee 'merely carried out the employer's business, although perhaps overzealously.' [Defendant's] business is to carry the goods of others. . . . The alleged theft was 'unrelated to the task of moving [plaintiff's] belongings and was completely personal in nature. The mere fact that the offense occurred during a time of ostensible employment in the [plaintiff's] home is not dispositive on the question of scope of employment.'") (internal citations and brackets omitted) (emphasis added). *Accord Travis Pruitt & Associates, P.C. v. Hooper*, 625 S.E.2d 445 (Ga. Ct. App. 2005).

- **Illinois:** *National Accident Ins. Underwriters, Inc. v. Citibank*, FSB, 333 F.Supp.2d 720, 728 (N.D. Ill. 2004) ("It strains reason to contend that an employee that steals millions of dollars worth of checks payable to his employer is somehow acting to serve that employer.").

- **New Hampshire:** *Searle v. Parke*, 68 N.H. 311, 34 A. 744 (1895) ("Theft was not the business for which [employees] were engaged, nor was it within the scope of their employment. The mere fact that the wrongdoers were their servants is not sufficient to make the [employers] answerable for the wrong.").

- **New York:** *Naegele v. Archdiocese of New York*, 39 A.D.3d 270, 270-71, (N.Y.A.D. 2007) (Priest's theft of approximately half a million dollars of elderly parishioner's money not committed within scope of employment because it "was a clear departure from the scope of his employment, having been committed for wholly personal motives.").

- *Compass Group, USA, Inc. v. Mazula*, 18 A.D.3d 1094, (N.Y.A.D. 2005) (Employee acted outside scope of employment when she appropriated refund checks without employer's knowledge, endorsed her own name on them, and deposited them into her personal bank account.).

- *State Farm Ins. Co. v. Central Parking Systems, Inc.*, 796 N.Y.S.2d 665, 666 (N.Y.A.D. 2005) (Employee's theft of customer's automobile not committed within scope of employment because theft of car outside scope of employee's duties as car attendant.).

- **Washington, D.C.:** *Schecter v. Merchants Home Delivery, Inc.*, 892 A.2d 415, 429 (D.C. 2006) (noting "[t]he parties have cited us to no decision, and we know of none, holding that a theft by an employee, made to enrich himself, was committed within the scope of his employment.").

- **11th Circuit:** *Muegge v. Heritage Oaks Golf and Country Club, Inc.*, 2006 WL 3591957, 3-4 (11th Cir. 2006) (Painters alleged theft of plaintiff's cash and jewelry not committed within scope of employment because they "were hired to paint the exterior of [plaintiff's residence] and were not authorized by [their employer] to enter any of the residences.").

Here, Akins alleges that Tate stole monies that were owed to him for constructing houses under the HOME program by directing the monies to J-Max Construction Company – Tate's personal shell corporation. Tate's theft was not committed in furtherance of Golden Triangle's business – rather, it was a selfish, illegal, and corrupt personal act perpetrated without the knowledge, permission or authority of Golden Triangle. Tate was not acting on Golden Triangle's behalf and instead became a private actor seeking to accomplish her own private purpose. Golden Triangle is not vicariously liable for Tate's felonious theft under the doctrine of *respondeat superior*.

B. No Blanket Rule

Contrary to Akins's assertion, Golden Triangle does not seek a blanket rule exempting an employer from vicarious liability for employee theft. Golden Triangle is simply asking this Court to apply Mississippi law to the undisputed facts of this case. Golden Triangle recognizes that there may be cases in which an employer could be held liable for employee theft – but this is not one of those cases.

In contrast to the facts of this case, an employer might possibly be liable under *respondeat superior* for employee theft committed for the **mutual benefit** of the employee and employer – that is, when the employee theft is **not a purely personal act.** For example, in *Ackerman v. Northwestern Mut. Life Ins. Co.*, 172 F.3d 467, 469 (7th Cir. 1999), plaintiffs alleged that Northwestern's insurance agents "persuaded them to use the cash values of their existing policies to pay premiums for new, larger policies, without telling them that by doing this the policyholder would be reducing the value of his existing policy [and] that part of the cash value would actually go to the agent as a commission rather than pay the first-year premium of

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7th Circuit: *Bremen State Bank v. Hartford Accident & Indem. Co.*, 427 F.2d 425, 428 (7th Cir. 1970) (Plaintiff "misinterpreted the applicable [] law" by claiming employer was vicariously liable for employee's theft because employee "stole the money during the performance of his employment . . . ." Instead, the applicable law is that "when the act is committed solely for the benefit of the employee, the employer is not liable to the injured third party.").

the new policy . . . ." The Court found Northwestern "derivatively liable because the agents were acting in part at least **to enrich the company as well as themselves**." *Id.* at 471 (emphasis added). *See also American Bankers Life Assur. Co. of Florida v. Tri City Bank & Trust Co.*, 677 F.2d 28, 30 (Tenn. Ct. App. 1982) (holding bank vicariously liable for employee theft because "bank received the benefit of premium commissions paid [to employee] . . . and received indirect benefit when [employee] used the fraudulently obtained and laundered funds to pay back the bank's accounts he had previously drawn from").

In *J.D. Edwards & Co. v. Podany*, 168 F.3d 1020, 1022 (7th Cir. 1999), a plaintiff had a lucrative contract to provide computer services. When the buyer of those computer services broke the contract, the plaintiff sued a consulting firm and its former employee for inducing the breach. *Id.* The plaintiff alleged the consulting firm's former employee advised the buyer to stop using plaintiff's software and to start using a different company's software. *Id.* The facts indicated the employee knew the new computer system would be "a flop", but nonetheless recommended it to enrich himself by landing a lucrative job with buyer overseeing the new system and to get more than $1 million in additional business for his former employer. *Id.* at 1024.

The Court held the consulting firm could be held vicariously liable if the employee's "object was to **enrich himself – and [his employer]**." *Id.* (emphasis added). The Court concluded "[the employee] **was acting to further [his employer's] interests as well as his own,** thus making [the employer] liable for [the employee's] intentional tort under the doctrine of respondeat superior." *Id.* (emphasis added).

An employer might also be found liable for its employee's theft of trade secrets that benefited both the employer and employee. *See, e.g., Tennant Co. v. Advance Mach. Co., Inc.*, 355 N.W.2d 720, 725-26 (Minn. Ct. App. 1984) ("Sales leads are of great value . . . . They

cost [plaintiff] considerable time and money to develop. By appropriating the lists [from plaintiff,] [defendant employer] could target its sales much more effectively and at less cost" and the employees who stole the lists could earn greater commissions.).[6]

The well established precedent in Mississippi recognizes that there are circumstances when an employer should not be held vicariously liable for the acts of its employees. This case presents such circumstances. Golden Triangle's former employee, Tate, secretly perpetrated her theft solely for her own financial gain and not for the benefit of Golden Triangle. In fact, her illegal actions caused Golden Triangle to suffer significant harm and financial loss. Under these undisputed facts, Mississippi law does not hold an employer vicariously liable for the unlawful act of its employee.

Indeed, it is Akins who appears to argue for a blanket rule that would hold employers vicariously liable for all employee theft. Akins would have this Court hold Golden Triangle vicariously liable for Tate's illegal and felonious theft when the facts show that Tate secretly stole HOME funds solely for her own private gain and at the expense of Golden Triangle suffering tremendous financial losses and harm. If Golden Triangle can be held vicariously liable under these facts, it is difficult to imagine a situation in which an employer could not be held vicariously liable for employee theft. Akins seemingly seeks a strict liability rule for employee theft, which is not, and should not be, the law in Mississippi.

C. Restatement Analysis

In his brief, Akins relies exclusively on § 228 of the Restatement in reaching his conclusion that Tate's theft was somehow within the scope of her employment. While this Court has cited § 228 of the Restatement with approval, it has crafted its own set of rules and factors to

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[6] *See also Dreamland Ball Room, Inc. v. Shapiro, Bernstein & Co.*, 36 F.2d 354, 355 (7th Cir. 1929) (owner of dance hall liable for copyright violations by band hired to entertain paying customers); *Famous Music Corp. v. Bay State Harness Horse Racing & Breeding Ass'n*, 554 F.2d 1213, 1215 (1st Cir. 1977) (owner of racetrack liable for copyright violations by company hired to supply music over public address system).

guide the "scope of employment" analysis. Akins has apparently chosen to ignore these rules or to simply gloss over them. In any event, Akins's legal analysis under the Restatement is flawed.

The first factor considered under § 228 is whether the subject act "is of the kind [the employee] is employed to perform." Akins argues this factor weighs in his favor because "Tate was employed to receive invoices and cash allotments from the governmental entity." Appellant's Brief at 11. Akins conveniently misconstrues the subject act, which is not the receiving of invoices or cash allotments from a governmental entity, but the *theft* of such monies. Akins did not sue Golden Triangle because Tate bungled some invoices and paperwork – he sued Golden Triangle because Tate allegedly stole his money. Once the applicable act is actually identified, the inescapable reality is that the alleged theft was in no way related to the kind of work that Tate was employed to perform at Golden Triangle.

The second factor is whether the subject act occurred "substantially within the authorized time and space limits." The comment to § 228 seemingly discounts the importance of this factor and focuses on whether the employee's act was committed in furtherance of the employer's business. *See* Restatement § 228 at cmt. (a) ("[N]ot all physical acts of the kind authorized [to be] performed within the time and at the place of service are within the scope of employment, since only those which the servant does in some part for the purpose of giving service to the master are included."); *accord Commercial Bank*, 923 So. 2d at 207 ("The inquiry is not whether the act in question . . . was done, so far as time is concerned, while the servant was engaged in the master's business, nor as to mode or manner of doing it . . . but whether . . . it was an act done in the master's business, or wholly disconnected therefrom . . . .").

The most important factor of § 228, the third factor, addresses this critical inquiry of whether the subject act was "actuated, at least in part, by a purpose to serve the master."

Absolutely nothing about Tate's theft can be construed as actuated or motivated in part to serve Golden Triangle.

Akins alleges this element is satisfied because Tate "was acting, in part, to build more low-income houses, which she did; she just stole money in doing it." *See* Appellant's Brief at 11. This argument strains all logic and common sense and is plainly contrary to the facts of the case. Tate's alleged theft in no way advanced the building of more low-income houses. It ***completely undermined*** that goal by depriving Mississippi cities, counties and participants of much needed funds and threatened the integrity and success of the HOME program within this State. Tate's theft damaged Golden Triangle's reputation within the business community and has caused it to suffer hundreds of thousands of dollars in business losses, lawsuits and legal fees. To argue that Tate's theft was somehow meant to "help" Golden Triangle betrays all rational thought and is contrary to the evidence.

Moreover, Tate was not employed at Golden Triangle to build houses. Golden Triangle is not a construction company. It is a non-profit corporation that employed Tate to administer the HOME program for participating counties and cities pursuant to all applicable laws, regulations, and guidelines. Her duties did not include establishing a shell-corporation, J-Max Construction Company, to siphon monies under the program. To the extent Akins is alleging that Tate built houses through J-Max Construction Company, such activity was not authorized by Golden Triangle and certainly did not fall within the scope of any of her duties at Golden Triangle.

Akins cites only two cases in support of his argument. One case, *Billups v. Hardin's Bakeries Corporation*, is from 1953. The other case, *Napp v. Liberty National Life Insurance Company*, is from 1963. The precedential value of these cases has been significantly – if not

totally – eroded by recent Mississippi Supreme Court decisions which have demonstrated a marked shift away from expansive employer vicarious liability.

In *Commercial Bank v. Hearn*, 923 So. 2d 202, 207 (Miss. 2006), a plaintiff similarly asked this Court to apply older case law which broadly interpreted an employee's scope of employment under *respondeat superior*. This Court declined and stated "[t]his Court's recent decision in *Gulledge v. Shaw,* 880 So. 2d 288 (Miss. 2004), more accurately addresse[s] the law regarding the scope of an employee's employment [under *respondeat superior*]." *Id.*

Golden Triangle relies on *Hearn, Gulledge* and their progeny which hold that an employer is not vicariously liable when an employee "having completed his duty to his [employer], then proceeds to prosecute some private purpose of his own . . . ." *Commercial Bank*, 923 So. 2d at 208. Based on this clear precedent, the trial court properly ruled that Golden Triangle is not vicariously liable for Tate's illegal acts committed in furtherance of her own private purposes.

CONCLUSION

The facts of this case are simple and the law is clear. Tate's alleged theft of funds owed to Akins was for her own selfish and corrupt purposes. She did not perpetrate her theft in whole or in part to serve Golden Triangle. She stole as an individual on her own account – for her own financial benefit and personal enrichment. As such, she ceased to be an actor on Golden Triangle's behalf and instead became a private actor seeking to accomplish her own private purpose. Accordingly, Golden Triangle is not vicariously liable under the doctrine of *respondeat superior* for Tate's alleged theft of Akins's money. While Akins may theoretically have a cause of action against Tate, he has none against Golden Triangle. Summary judgment was appropriately granted in favor of Golden Triangle and the decision of the trial court should be affirmed.

This, the 7th day of August, 2009.

Respectfully submitted,

GOLDEN TRIANGLE PLANNING &
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CERTIFICATE OF SERVICE

I, Tommie S. Cardin, one of the attorneys for the Appellee, do hereby certify that I have this day served a true and correct copy of the above and foregoing Brief of Appellee Golden Triangle Planning & Development District, Inc. by mailing same by United States Mail with postage fully prepaid thereon to the following:

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SO CERTIFIED, this, the 7th day of August, 2009.

Tommie S. Cardin

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CERTIFICATE OF FILING

I, Tommie S. Cardin, certify that I have had hand-delivered the original and three copies of the Brief of Appellee Golden Triangle Planning & Development District, Inc. and an electronic diskette containing same, addressed to Ms. Kathy Gillis, Clerk, Supreme Court of Mississippi, 450 High Street, Jackson, Mississippi 39201.

SO CERTIFIED, this, the 7th day of August, 2009.

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