IN THE SUPREME COURT OF MISSISSIPPI

WALTER AKINS d/b/a
AKINS CONSTRUCTION COMPANY — APPELLANT

VS. — NO.2009-CA-00182

GOLDEN TRIANGLE PLANNING AND
DEVELOPMENT DISTRICT, INC. — APPELLEE

APPEAL FROM THE CIRCUIT COURT OF OKTIBBEHA COUNTY

BRIEF OF APPELLANT

APPELLANT REQUESTS ORAL ARGUMENT

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I. CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court are/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

a. Walter Akins d/b/a Akins Construction Company — Appellant

b. Golden Triangle Planning and Development District, Inc. — Appellee

c. Phyllis Tate

d. J. Niles McNeel, McNeel and Ballard — Counsel for Appellant

e. Paul M. Ellis, Butler, Snow, O'Mara, Stevens & Cannada, PLLC — Counsel for Appellee

f. Tommie S. Cardin - Butler, Snow, O'Mara, Stevens & Cannada, PLLC — Counsel for Appellee

g. Maison Heidelberg - Maison Heidelberg P. A. - Counsel for Appellee

h. Robert B. Ireland, III. - Watkins & Eager - Counsel for U.S. Specialty Insurance Company

i. Honorable Lee J. Howard - Circuit Court Judge

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STATEMENT OF THE ISSUES

The Circuit Court Erroneously Granted Golden Triangle Planning and Development District, Inc.'s ("Golden Triangle") Motion for Summary Judgment.

STATEMENT OF THE CASE

Walter Akins filed his Complaint on December 12, 2006, against Golden Triangle for monies owed to him that were directed by Phyllis Tate to J-Max Construction. The Complaint was answered by Golden Triangle.

Subsequently, Golden Triangle filed a Motion for Summary Judgment arguing Tate was not acting within the scope of her employment at Golden Triangle when she directed monies Akins' money to J-Max. Akins answered Golden Triangle's Motion for Summary Judgment and filed on April 18, 2008, his own Motion for Summary Judgment on the basis there were no genuine issues of disputed fact or law that Tate was acting within the scope of her employment.

The attorneys appeared before Honorable Lee J. Howard and, thereafter, Judge Howard entered an Order on December 18, 2008, in which Golden Triangle's Motion for Summary Judgment was granted and Akins Motion for Summary Judgment was denied.

Walter Akins filed his notice of appeal on January 14, 2009.

SUMMARY OF THE FACTS

Golden Triangle is a non-profit economic development corporation working with state and local governments to coordinate and deliver services to residents in a seven county area. Its headquarters are in Starkville, Mississippi. One of the programs Golden Triangle administers is the Federal HOME program which helps create housing for low income households. Phyllis Tate ("Tate") was employed as the home grant administrator for Golden Triangle. In that capacity she assisted the local governments in the seven county district apply for funding to build the low-income housing. Once funding was granted to a city or county, Tate would work with a prospective homeowner to obtain a contractor and select the specific home the homeowner wanted. As the actual construction commenced, Tate received invoices from the contractor and, in turn, requested cash allotments from the respective local government entity.

Walter Akins d/b/a Akins Construction ("Akins") was a contractor on many of the homes Tate administered under the HOME program. At some point in Tate's employment as administrator, she began a scheme to direct some of Akins cash allotments to J-Max Construction Company, which was owned by her daughter's then boyfriend, Jason Clark. Although J-Max would not perform any work on the house, Tate instructed the county or city involved to write checks to J-Max on monies due to Akins. Carpenters, electricians, etc. (subcontractors) were paid from the J-Max account and Tate kept the profits for herself. (See Transcript of Change of Plea of Phyllis Tate, Appellant's R.E. pages 9-24). The total amount of Akins funds which Tate converted to her own use was $80,628.00. Akins has filed his Complaint against Golden Triangle for the recovery of funds belonging to him under the doctrine of *respondent superior*.

SUMMARY OF THE ARGUMENT

The trial court's reasoning that an employer is never liable for employee theft is not supported by the case law. When Tate embezzled monies belonging to Akins her actions fall squarely within the guidelines of §228 Restatement (Second) of Agency in determining her conduct was within the scope of her employment. As such Golden Triangle was responsible for monitoring her conduct and is liable to Akins for his loss.

ARGUMENT

Standard of Review

The standard for summary judgment is governed by Rule 56 of the Mississippi Rules of Civil Procedure. Miss R. Civ. P. 56.

> "The judgement sought shall be rendered... if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgement as a matter of law."

A grant of summary judgment by the trial court is reviewed *de Novo* on appeal. In applying the review, the appellate court looks at all evidentiary matters, including admissions in pleadings, answers to interrogatories, depositions and affidavits. *Hataway v. Nicholls*, 893 So. 2d 1054 (Miss. 2005)

The evidence should be viewed most favorably to the party against whom the motion is made. Viewing the evidence in that light, if the moving party is entitled to judgment as a matter of law, summary judgment should be granted. However, the motion should be denied if the evidence falls short. *Paymaster Oil Co. v. Mitchell*, 319 So. 2d 652, 657 (Miss. 1975).

Furthermore, summary judgment should be denied where full presentation of the evidence would result in a triable issue. *Stranz v. Pinion*, 652 So. 2d 738 (Miss. 1995).

In the case of *Brown v. Credit Center*, Inc., 444 So. 2d 358 (Miss. 1983), it is stated:

> "We recognize that reasonable minds may often differ on the question of whether there is a genuine issue of material fact. In this context we find appropriate the admonition in a leading commentary on Federal Rule 56:
>
> If there is to be error at the trial level it should be in denying summary judgment and in favor of a full live trial. And the problem of overcrowded calendars is not to be solved by summary deposition of issues of fact fairly presented in an action."
> 6 Moore's *Federal Practice* §56.15{1.-2.} p. 56-436 (1982).

The Circuit Court Erroneously Granted Golden Triangle Planning and Development District's Motion for Summary Judgment.

Golden Triangle is liable for the action of Tate in stealing monies belonging to Akins because her embezzlement was committed within the scope of her employment. The primary basis for the trial court's ruling is that stealing is not "the kind of work Tate was employed to perform". The trial court referred to two cases to support its decision. Both cases are not only distinguishable from the present case but also contain language supporting Akins position Golden Triangle is liable for Tate's actions.

The first case is *Commercial Bank v. Hearn*, 923 So 2d 202 (Miss. 2006). An employee of the bank, during his work hours, left the bank to solicit pledges to the United Way Campaign. On his way to drop off a pledge package to a local business he was involved in an automobile accident in his own vehicle. The injured parties filed suit against the employee and the bank, alleging *respondent superior*. The Supreme Court noted the Bank was not a member of the United Way and neither ordered or approved of their employee's activities for the charity. The Bank argued the employee's accident occurred on a personal errand. The Supreme Court agreed and found, at most

the Bank may have indirectly benefitted from their employee's activities. *Id* at 206. The Court quoted with the approval the comment to §228 Restatement (Second) of Agency (1958) that "not all physical acts of the kind authorized performed within the time and at the place of services 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"*. Emphasis added. *Id* at 208.

The second case relied on by the trial court also involved a bank as employer. In *Berhow v. The People's Bank*, 423 F. Supp. 2d 562, (S.D. Miss. 2006) a loan officer, Ralph Seymour, devised a scheme that used the names of bank customers to create fictitious loans and obtain the funds for himself. (See Complaint in *Berhow v. The People's Bank*, Appellant's R.E., pages 25-29). One of those customers was the plaintiff, Mary Berhow, who filed a complaint against the Bank and its loan officer. As to the Bank, she alleged, among other theories, vicarious liability for compensatory and other damages. The Bank had prior to suit re-paid Ms. Berhow's account plus interest, thus made her whole for the compensatory damages. The Court then considered in a summary judgment motion whether the Bank was liable for other damages under *respondent superior*. The Bank contended that "Seymour converted the Bank's funds in furtherance of his own purpose, not in furtherance of the Bank's business of making a profit while providing a service to its customers." *Id* at 571-572. The trial court agreed and found the employee (Seymour) had abandoned his employment when he created the fictitious loans and "was about some purpose of his own not incidental to the employment." The employee did not steal money while in the business of making legitimate loans for the Bank, he created fictitious loans for which the Bank realized no gain or profit.

Although the trial court did not refer to it, Golden Triangle has also mentioned the case of *Gulledge v. Shaw*, 880 So. 2d 288, 295-296 (Miss. 2004) as supporting its position. In *Gulledge* a bank employee knowingly notarized a forged father's signature on a driver's license application for a co-employee's minor daughter. The family of the motorist killed in an accident with a vehicle operated by the minor sued the notary and the bank, alleging the father of the minor was dismissed from the underlying wrongful death action which resulted in the survivors being unable to collect any portion of a judgment in the wrongful death action. The employee bank was named as a defendant on the doctrine of *respondent superior*. The Supreme Court found the notarization of the driver's license application was not part of the employment of the bank.

> "While we have already unequivocally found that Shaw's job responsibilities at the Bank included her notary public duties, we find from the record before us, and for the foregoing reasons, that Shaw's act of notarizing a forged document was not in furtherance of the Bank's business-rather it was a personal act." *Id* at 296.

The common thread of all three of the above cases is the employee was "performing an entirely personal act." In *Hearn* the employee was delivering a United Way pledge package; in *Berhow* the employee created fictional loan accounts; in *Gulledge* the employee was notarizing a driver's license application. On none of these cases did the employer receive any direct benefits and the employee's actions were not actuated, even in part to serve the employer.

The trial court's ruling in the instant case appears to hold that any and all thefts by an employee are outside of the scope of *respondent superior*. If that were the status of the law then courts would simply say all theft is outside the job description of the employee and not go through an involved analysis of "within the scope of employment". Certainly, no duty of any employee involves stealing. But our courts have never issued such a blanket exception to *respondent superior*. Instead the test, as outlined by §228 Restatement (Second) of Agency. (1958), provides:

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.
Hearn at 208.

Applying the above test to Tate's actions, we find (a) Tate was employed to receive invoices and request cash allotments from the governmental entity (b) her action occurred within the authorized time and space limits of her job and (c) she was acting, in part, to build more low-income houses, which she did; she just stole money in doing it.

Our Supreme Court has recognized employer's liability in employee theft. In *Billups v. Hardin's Bakeries Corp.*, 217 Miss. 24, 63 So. 2d 543 (1953) a salesman for Hardin's overcharged Billups for bread and kept the difference for himself. The Supreme Court held Hardin's was liable for its employee stealing. Likewise, in *Napp v. Liberty National Life Ins. Co.*, 248 Miss. 320, 159 So. 2d 164 (1963) an insurance agent persuaded a beneficiary her husband's policy had lapsed and she would only receive one-half of the benefits. The policy had not lapsed and the agent pocketed the other one-half. The Supreme Court reiterated that a principal is liable for the fraudulent misrepresentation of an agent within the scope of the authority and employment of the agent.

Again, in the instant case Tate was performing the work of Golden Triangle in making loans and building homes. When she diverted Akins monies to J-Max she actually paid subcontractors and kept Akins profits for herself. Contrary to *Hearn* this was not a personal mission separated from her normal work; contrary to *Berhow* she did not create separate home accounts for which Golden Triangle was not benefitting and contrary to *Gulledge* she was not performing a task not connected to her work.

All of the three factors of §228 Restatement (Second) of Agency referred to in *Hearn* are present. The trial court did not find the 3rd prong was satisfied, i.e., that Tate's actions were actuated, at least in part, by a purpose to serve the master. But the facts are that Golden Triangle was served by Tate continuing to build the homes.

If an employee's theft of monies from others can never make an employer liable, then this court should, in all due respect, simply say so. But that is not the status of the law at this point. This case is an example of a situation where an employer can be liable. It certainly does not qualify for summary judgment against Akins.

Golden Triangle was in the only position to monitor Tate's actions. Akins could not. For Golden Triangle to be summarily dismissed does not encourage Tate's employer to establish better oversight of its employees. Tate was about her employer's business and Golden Triangle should not be immune. Akins deserves his day in court.

CONCLUSION

Simply because Tate was stealing does not repudiate the doctrine of *respondent superior*. Her conduct satisfies each of the three requirements of the Restatement that she was within the scope of her employment when she was embezzling funds. Notably, the 3rd requirement of the Restatement (at least partly serving Golden Triangle in her actions) was present throughout her scheme.

There are genuine issues as to *respondent superior*. The trial court's grant of summary judgment in favor of Golden Triangle should be reversed.

Respectfully submitted on this the 5th day of May, 2009.

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CERTIFICATE OF SERVICE

This is to certify that I, J. Niles McNeel, attorney for Appellant, have this day mailed by U. S. Mail, postage prepaid, a true and correct copy of the above and foregoing **BRIEF OF APPELLANT** to the following:

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Honorable Lee J. Howard
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This the 5th day of May, 2009.

J. NILES McNEEL