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IN THE SUPREME COURT OF FLORIDA

ALAMO RENT-A-CAR, INC.,

Petitioners/Cross Respondent,

v. CASE NO. 80,376

MICHAEL MANCUSI,

Respondent/Cross Petitioner,
_____/

ANSWER BRIEF ON MERITS AND BRIEF ON MERITS SUPPORTING CROSS PETITION BY MICHAEL MANCUSI

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PREFACE

This brief on the merits by plaintiff/Michael Mancusi, is in response to the petitioner's brief of defendant/Alamo Rent-A-Car, Inc. and in support of Mancusi's cross petition. The parties will generally be referred to by name and the record is designated as (R.__). This court granted discretionary review of both the petition and cross petition by order of January 26, 1993. The cross petition will be argued first, followed by the argument in opposition to the Alamo petition.

STATEMENT OF THE CASE AND FACTS

This is a case where both the plaintiff and defendant have sought discretionary review of the decision of the Fourth District Court of Appeal of April 24, 1992. The defendant Alamo-Rent-A-Car is technically the petitioner and plaintiff Mancusi is the cross petitioner. After confusion in the initial filings, this court granted a motion to redesignate the parties on August 27, 1992. The jury trial resulted in a $3 million judgment for plaintiff against the defendant based on Alamo's malicious prosecution. The Fourth District Court of Appeal reversed and remanded for a new trial because certain evidence was excluded concerning the bona fide termination of the underlying criminal case in which Mancusi had been prosecuted. The District Court also ruled that certain telephone testimony should have been heard by the jury.

By cross-petition before this court, Mancusi seeks a reversal of the Fourth District opinion and reinstatement of the jury verdict and judgment in favor of Mancusi for $3 million. By its petition before this court Alamo Rent-A-Car seeks a reversal of the Fourth District's opinion and a directed verdict in its favor on liability. This brief is by Mancusi in support of his cross petition and in opposition to the Alamo petition.

Evidence at Trial

The Alamo brief on the merits neglects that the jury ruled in favor of Mancusi on liability for both compensatory and punitive damages and thus the facts must be taken in the light most favorable to Mancusi. It is therefore necessary to totally restate the facts.

The facts are generally reflected in the majority and dissenting opinions by the Fourth District Court of Appeal. There were numerous conflicts but there were also issues on which absolutely no conflict existed. It is unquestioned that Mancusi rented the car giving a valid and authorized credit card to insure payment. Mancusi then returned the car and left the credit card open to cover all payments due. Despite this, Alamo had him prosecuted for intentionally failing to redeliver the car under § 817.52(3), Florida Statutes (1985). At all times, Mancusi was ready, willing and able to pay all rental charges which Alamo chose to impose. There was no conflict of any nature on these facts concerning payment and Mancusi was never charged criminally for failing to pay the rental fee on the car.

This malicious prosecution action was filed after Alamo accused and prosecuted Mr. Mancusi for the theft of a car which he had rented, paid for and returned to Alamo. On July 15, 1986, Veronica Cronin and Mr. Mancusi both worked for the Mancusi's family-owned steel building fabrication business. Cronin telephoned Alamo and reserved a car which Mr. Mancusi intended to rent for a one-month period. (R.606, 609). Later that day, Mr. Mancusi and Ms. Cronin went to Alamo to pick up the rental car. Ms. Cronin's VISA credit card was used to secure payment for the car and Mancusi had her authority to use the card. Both Cronin and Mancusi were listed as drivers and the company intended to reimburse this as a business expense to Cronin. (R.571, 575). There was never any question as to the validity of the credit card

nor the fact that it was sufficient to cover full payment to Alamo nor the fact that Mancusi was authorized to use the card.

It was a little after 5:00 p.m. when they arrived at Alamo and the rental office was busy. (R.606-607). Ms. Cronin presented the credit card and Mr. Mancusi gave the rental agent his New York driver's license, as well as a New York telephone number. He also gave a local Florida telephone number and a Florida business address and telephone number. (R.302, 607-609). Mr. Mancusi's business office was located less than a mile from the Alamo office and ironically, the car he allegedly stole from Alamo was at his office most of the time and he drove by the Alamo office most every day.

Mancusi intended to rent the car for a one-month period but the contract stated one week. (R.609). Also unbeknownst to Mr. Mancusi, the rental agent incorrectly spelled his name in copying it from his license. Mancusi signed but did not read the rental documents. He had waited 45 minutes for his reservation and was in a hurry. (R.609,610). There was a great deal of confusion at this Alamo airport office with the clerks serving several customers at the same time.

Alamo Rent-A-Car expected the car to be returned one week later on July 22, 1986. Because Mr. Mancusi believed he had the car for a one-month period, he did not return it on that date. Alamo would later prosecute Mr. Mancusi for theft of the car <u>on July 22, 1986</u> or on August 28, 1986. The information alleges both dates. (See Alamo's Appendix p.2). It was conceded by Alamo that

the car was actually returned on August 27, 1986. (Alamo Brief 9-11).

It was Alamo's policy that, after a car was overdue, it would try to contact the person renting the car by calling at least once a day for ten days. (R.434, 534). Despite this policy, Alamo employees made only two telephone calls to Mr. Mancusi, one five days later on July 28, 1986, and another on July 29, 1986. Both telephone calls were made during the day to the local number in Florida and neither reached Mr. Mancusi. (R.536). No attempts were made then to call the New York number or to actually contact Mr. Mancusi at his business address which was less than one mile from the Alamo rental office. (R.606). No attempt was made to contact Ms. Cronin who was also shown as a driver of the car on the contract and whose local number Alamo also had. (R.567). As of August 1, 1986, Evelyn Parker, the Alamo employee responsible for contacting Mr. Mancusi went on vacation and there were no further calls. (R.350, 356).

On August 1, 1986, a certified letter was mailed to Mr. Mancusi at the New York address listed on his driver's license. (R.436). The letter requested him to call Alamo. Seven days later, on August 8, 1986, Mr. Mancusi's family actually received the certified letter, and they contacted him advising the contents of the letter. (R.612). Mr. Mancusi then telephoned Alamo and inquired why the car was overdue since he had rented it for a one-month period. (R.612). During this August 8, 1986 call, the rental agent first checked the credit card and verified that the card would hold further rental charges and then agreed to renew the

car for an additional one-month period. (R.613). Alamo allowed telephone renewals of rental cars at that time. (R.360, 384, 429). The clerk was supposed to simply type it into the computer and Mancusi said he even heard the clerk typing. Thinking that he had corrected the problem and had "reupped" the lease to early September, Mr. Mancusi continued driving the rental car. He often drove it by the Alamo office.

On August 13, 1986, Alamo received the return receipt for the certified letter. On that date, Desiree Feciskonin, an Alamo employee, put the car "on warrant" for Mr. Mancusi's arrest with the Fort Lauderdale police. (R.419-420). The police began looking for him based on the New York license address and on August 27, 1986, Mr. Mancusi received a telephone call from his mother advising that a Detective Bay from Ft. Lauderdale was trying to get in touch with him in New York. Mancusi called Officer Bay that same day and Bay told him that Alamo had placed the car "on warrant." Mr. Mancusi explained to Officer Bay that he had renewed the rental on the car and that he had left a credit card open with Alamo to cover all rental charges. Detective Bay gave him Desiree's name and suggested he call her and straighten out the matter. (R.613-614). By this time the car had developed mechanical problems and was sitting in Mancusi's office parking lot and could not be started without assistance. (R.615).

Mr. Mancusi immediately called Alamo employee, Desiree Feciskonin. She became irate upon discovering that Officer Bay had given her name and telephone number to a customer whom she had put "on warrant." She said that after putting a customer "on warrant"

it was no longer "her responsibility" and began screaming and eventually hung up without getting any information whatsoever from Mr. Mancusi. (R.615-616). She testified on deposition and accused Mancusi of screaming at her and said that Mancusi was prejudiced against her because she was a female. (R.446, 447). Mancusi stated she was "ranting and raving." Feciskonin said she was indeed "in a rampage" and that she went in and told her boss, Peter Perlman, about it. (R.447). Desiree Feciskonin still worked at Alamo at the time of trial but she was not called by Alamo as a witness. Plaintiff read her deposition to the jury which was substantially contradicted by Mancusi's testimony. (R.325, 416-452, 468). Apparently the jury believed Mancusi and disbelieved Feciskonin.

On August 27, 1986, Mr. Mancusi called the Alamo office back right away asking to speak with Ms. Feciskonin's supervisor. He was told the supervisor was out and left a message. The supervisor (Peter Perlman) then called back and apologized for Ms. Feciskonin. Mancusi explained the car rental situation to him, including the fact that he had already renewed the rental by telephone and that the open credit card secured all rental charges. He did not refuse to pay -- instead he continued offering to pay via the signed credit card. He also informed Mr. Perlman that the car had become inoperable two days earlier and that it would be necessary for the car to be towed back. Mancusi was still within the "reupped" one month period when this call occurred. The supervisor was given the address just down the street and agreed to have the car towed in. "Pete" Perlman or some other employee named "Bud" put a written

telephone message in the administrative file recording the content of the call and arranged for the towing. (R.515). The police would later be led to believe by another Alamo employee (McArdle) that Alamo went out and found the car and towed it back without the knowledge or assistance of the customer. (R.515, 617, 618). The police were not told that the car was inoperable and was towed for that reason.

Mr. Mancusi, at this point, thought the entire problem had been resolved. (R.617-618). He also thought his credit card would be billed for the rental charges. In short, he thought he had rented a car, returned it and paid for it.

Alamo received the car on August 27, 1986, and billed the rental charges against Mr. Mancusi's VISA card. The account showed a zero balance. However, for reasons known only to Alamo, it chose to bill the card for charges only up to August 13, 1986, and not for the days of August 14-27. Alamo did not tell Mancusi anything and simply sent out the zero balance. Alamo never sent a further bill to Mancusi or made any additional charges against the VISA card. At all times, Mancusi had assured Alamo that he had rented the car, expected to fully pay for it and that the card was available for the full charges. Alamo chose to take less than what it should have been owed.

On September 3, 1986, seven days after the car was returned, another Alamo employee, Edward McArdle, executed an affidavit charging Mr. Mancusi with "grand theft auto." Detective Bay testified that it was Mr. McArdle's decision to prosecute Mr. Mancusi. (R.1448). McArdle told Bay that Mancusi had not brought

the car back and that Alamo had to go out have it towed in. Bay was not told of Mancusi's call or that the car was inoperable and was towed for that reason. (R.515). This false statement was made despite the fact that Mr. Mancusi had explained to the Alamo supervisor, Peter Perlman, that he had rented and paid for the car by credit card for one month and that the car had mechanical problems and would thus have to be towed in by Alamo. (R.515). McArdle admitted at trial that there was such a telephone message from Peter Perlman saying that "customer had car towed in" but stated that the phone message "wasn't in my file" at the time.[1] (R.515). McArdle also said that the detective "wasn't particularly happy" with Mancusi's failure to return the car. (R.515).

The jury could certainly have concluded that McArdle misled the police. It was undisputed that the car would not run and had to be towed for that reason and that the police were not so advised despite Alamo's knowledge of this key fact. Alamo also had the inoperable car and the ability to test it during repairs.

Based on the false McArdle affidavit and the false towing information, Detective Bay had a capias issued for Mancusi's arrest. (R.1454-1455). On September 16, 1986, Bay approached Mancusi at his business and had him go to the Ft. Lauderdale Police Station. (R.613-619). There, Detective Bay questioned him about the Alamo car and Mancusi explained that <u>he</u> (Mancusi) had returned the car and full payment had been made. Officer Bay seemed

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[1] McArdle admitted the telephone memo was in the "administrative" file. There were two files. [R.260].

surprised, left the room and discussed it by phone with Alamo. He returned, telling Mancusi that Alamo still wanted to prosecute. (R.620-621).

At that point, Mr. Mancusi was put under arrest and read his Miranda rights. He was handcuffed and put in an outdoor cage in the parking lot. He was later moved inside and placed in a holding cell. His cell mates were in an appalling condition, unconscious and covered in vomit and fecal matter which they spread on him. (R.624). Hours later, he was taken from the cell and fingerprinted and photographed. Then, he was stripped and given an anal cavity search. All through this period of time, he had been requesting to make a phone call to a friend or attorney and was always refused. (R.622-626).

Later, he was transported, handcuffed and with waist restraints, to the county jail in a police van. At the county jail, Mr. Mancusi was again stripped and given another anal cavity search. He was then put in another holding cell. Finally, at approximately 11:00 p.m., he was allowed to make a telephone call. He contacted a friend and explained that he was at the Broward County Jail. He was then given a mattress and taken to a cell block. There was a pay phone in the cell block and he was able to call his father in New York who said that he had tried to contact the jail but had been told that Mancusi was not there. This was because of the misspelling of his name on the rental agreement as originally typed up. He was arrested under the wrong name. Mr. Mancusi spent the night in jail without food and under horrible and

frightening physical conditions. He was bailed out the next morning. (R.628-645).

Mr. Mancusi hired an attorney to represent him in the criminal case. (R.646). He was not charged with failing to pay for the car -- but instead with failure to return the car on August 28, 1986, the day after it was actually returned. Discovery was taken in the criminal case and at the deposition of Desiree Feciskonin, for the first time his lawyer discovered a new bill of $365 covering the period after August 13, 1986, which was the time Alamo had chosen not to bill on the VISA card. Mr. Mancusi had never previously been informed that there was any outstanding balance with Alamo. (R.650-651). Indeed, there was none. Mancusi had always agreed to pay the rental bill -- whatever amount it might be. Alamo admitted that it created this secret bill on the day of the deposition and put it in its own internal file and <u>never</u> sent it to Mr. Mancusi. (R.563). All of this was intentional and not a mere error or corporate glitch.

The criminal case proceeded to trial on the charge that Mancusi refused to return the car with the intent to defraud Alamo. (R.263-264). The date of the offense was stated to be August 28, 1986, the day after the car was returned as conceded by Alamo. (Alamo Brief p.9-11). Mancusi was never charged with not paying for the car which, of course, he had paid for. After the jury was empaneled and Officer Bay testified, the State nolle prosequied all charges. (R.672). The case was prosecuted by Mr. Stan Peacock, an assistant state attorney. He made the decision to nolle prosequi the case first and then called Alamo which requested that the

additional "secret" $365 charge be paid. (R.745). Mr. Mancusi had always agreed to pay the full rental charge despite the fact that Alamo had not billed beyond August 13, 1986. Consistent with this position, that he had rented the car and always intended and tried to pay for it, Mr. Mancusi agreed to pay these charges too. The case was nolle prosequied by State Attorney Peacock with a reservation of Mancusi's rights against Alamo. (Alamo's lawyers would eventually argue that this $365 constituted "restitution" to Alamo.)

After the nolle prosequi, Michael Mancusi filed suit against Alamo Rent-A-Car, Inc., and Edward McArdle. (R.1002-1003). The complaint alleged both malicious prosecution and negligence against both defendants. Just prior to trial, Edward McArdle was dropped as a defendant and the count for negligence was voluntarily dismissed. Trial began July 23, 1990, and the jury found malicious prosecution against Alamo and returned a verdict in favor of the plaintiff, awarding $300,000 in compensatory damages and $2,700,000 in punitive damages. (R.1258). Final Judgment was entered on July 31, 1990. (R.1743). The State of Florida appeared and claimed 60% of the punitive damages under § 768.73, Florida Statutes (1987).

Alamo appealed to the Fourth District Court of Appeal which reversed and remanded for a new trial. This ruling was based solely on the trial court's exclusion of three pieces of evidence relating to the underlying criminal trial. These three pieces of evidence were: (1) the proffered testimony of the prosecuting state

attorney which was offered by Alamo at trial by telephone,[2] (2) the proffered testimony of the criminal defense attorney and (3) the transcript of the underlying criminal trial. The District Court found that the jury should have been allowed to hear this proffered evidence to determine whether the nolle prosequi had "been bargained for and obtained by the accused on his promise of payment or restitution." (Opinion, p. 1012). The court also ruled that the § 768.73(1)(a), Florida Statutes (1989) limitation on punitive damages was not applicable because this malicious prosecution case was not misconduct in a commercial transaction. This ruling did not change the State's 60% interest.

The dissent by Judge Stone indicated that Alamo had failed to demonstrate reversible error with respect to the three proffered items of evidence. Judge Stone concluded that there had been no "restitution" or promise of payment quoting the trial court as follows:

> Defendant argues that the nolle prosequi was obtained by the accused upon a promise of restitution and therefore it is not a bona fide termination in plaintiff's favor. But the evidence shows that Alamo received nothing more than what Mr. Mancusi had been offering all along. Mr. Mancusi's rental bill had been paid in full as soon as it was charged to the credit card. Alamo did not produce a back-dated lost rental agreement evidencing additional charges until a couple of weeks before the criminal

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[2] Actually the trial judge tried to admit this evidence rather than exclude it and clearly would have allowed the state attorney to testify had he been present. The judge stated to defense counsel: " . . . You better be able to call the state attorney [Peacock]" [R.285]; "Peacock is the key to your defense. You need Peacock because of two vital issues . . . ." [R.287]; You going to get Mr. Peacock down here?" [defense counsel] "Can't tell you right now, judge." [R.289]; ". . . Without Peacock to say that [restitution] was the reason he nolle prossed it, then I'm not going to let it in." [R.290].

> trial. Nonetheless, Mr. Mancusi had agreed to pay those charges before trial. Given those circumstances, the nolle prosequi amounted to an abandonment of the criminal charges and was a bona fide termination of a case in plaintiff's favor. (Emphasis supplied).

Judge Stone also pointed out that Alamo had elected not to subpoena the prosecuting attorney and that his testimony was critical and essential on the issue of restitution. Further, the state attorney's testimony was crucial as to whether to admit the other two items of proffered evidence. Judge Stone stated that without the explanatory testimony from the prosecutor, the criminal transcript was inadmissible. Judge Stone also noted that the trial court had recognized that the issue in the criminal case did not involve a failure to pay money but instead concerned solely the failure to return the car on schedule. Judge Stone echoed the trial judge and stated:

> It is undisputed that the appellee (Mancusi) never refused to pay. Alamo had simply not billed him, and for their own purposes, elected not to charge the credit card.

In short, the dissent pointed out that the testimony of the state attorney was absolutely essential in the malicious prosecution case and that it was Alamo's fault that the state attorney was not present to testify. Since Mancusi had always offered to pay the full rental fee, Alamo received nothing more than what had always been offered. There was never a disagreement or controversy over payment and no "restitution" was being paid.

The most curious aspect of the District Court's opinion was its ruling that the testimony of the prosecutor as offered by Alamo by telephone should have been admitted before the jury. This

telephone testimony ruling was the subject of Mancusi's cross petition for review before this court which was granted by all members of the court. In view of this fact, Mancusi will reverse the order of argument and will initially argue the cross petition and thereafter argue the Alamo petition which seeks a directed verdict on liability and a further reversal of Liu v. Mandina, 396 So. 2d 1155 (Fla. 4th DCA 1981), an earlier opinion by the Fourth District on malicious prosecution.

SUMMARY OF ARGUMENT

This court granted review on both the Alamo petition and the Mancusi cross-petition. Under the cross-petition Mancusi/plaintiff seeks reversal of the District Court opinion and reinstatement of the trial court's judgment. In this malicious prosecution case, the jury heard and determined all issues including the question of whether there had been a bona fide termination of the underlying criminal prosecution. The court's instructions on bona fide termination were not raised on appeal. The fact that Mancusi paid the $365 to Alamo as the unbilled balance on the rental car was before the jury and they considered it under the unchallenged instructions on bona fide termination. Even though the trial judge expressed his view that a nolle prosequi after jeopardy was a bona fide termination as a matter of law, the judge did not direct a verdict and instead submitted the issue to the jury under proper instructions.

Mancusi's proof in his case-in-chief established a prima facie case of malicious prosecution because he showed a nolle prosequi which was not based on restitution. The payment to Alamo was simply money Mancusi had always agreed to pay and tried to pay but obviously could not pay before he had the slightest idea that he owed it. There was never any issue or disagreement concerning payment of the full rental bill and payment of that bill did not constitute restitution as a matter of fact or law.

The Fourth District Court of Appeal found error suggesting that three items of evidence were wrongly excluded. The testimony of the prosecuting attorney was not excluded because it was never

offered except by telephone. The District Court erred in finding that this telephone testimony was admissible. There was also no error in the exclusion of the criminal transcript nor in the exclusion of the testimony from the criminal defense lawyer. The transcript was not admissible without explanatory testimony from the state attorney. In any event, the transcript and the testimony of defense counsel as proffered, were helpful to Mancusi rather than to Alamo because this evidence showed that the $365 payment had absolutely nothing to do with the crime charged; failure to return the car. Since the District Court was in error as to all three pieces of evidence, the appeal should have been an affirmance rather than a reversal and the judgment should be reinstated.

Under its petition Alamo suggests that the District Court reverse the burden of proof as to bona fide termination. This argument is based upon Liu v. Mandina, supra, which states that it is the defendant's burden in a summary judgment context to establish that the nolle prosequi was solely the result of restitution. Liu did not affect this case because Mancusi did not pay restitution as a matter of law or fact. Alamo has never suggested any theory upon which payment of the bill constituted a compromise or a negotiated payment of restitution. The facts are absolutely uncontested and all of those facts were established in Mancusi's case-in-chief.

The District Court did not reverse the burden of proof on the overall issue of bona fide termination and merely held that once Mancusi established his cause of action by proving a nolle prosequi not based on restitution, then it became Alamo's burden to prove

the contrary if they chose to do so. Obviously Alamo never proved that the nolle prosequi was based on restitution and Alamo did not subpoena nor call the prosecuting attorney who was a crucial witness. Alamo confuses the analysis of civil and criminal cases in the context of malicious prosecution. There was absolutely no bargained for payment in the Mancusi situation because Mancusi had already paid with his credit card and the $365 payment was totally unrelated to the crime charged.

The evidence showed that Alamo acted in a reprehensible and totally outrageous manner in having Mancusi arrested and prosecuted. There was more than adequate evidence showing an absence of probable cause under the "cautious man" standard. There was also direct evidence that one Alamo employee was extremely angry at Mancusi and may have taken revenge on him and that another Alamo employee intentionally misled the police. There was overwhelming evidence from which this jury could and did find actual malice. Punitive damages were particularly proper in this case and the limitation imposed by § 768.73 was not applicable because tort reform did not apply to malicious prosecution cases and, in any event, Alamo's conduct did not constitute misconduct in a commercial transaction.

Mancusi's cross-petition should be granted and Alamo's petition should be denied. The judgment in the trial court should be reinstated.

ARGUMENT ON CROSS PETITION

I.

WHETHER THE DISTRICT COURT ERRED IN HOLDING TELEPHONE TESTIMONY TO BE ADMISSIBLE AND WHETHER, IN THE ABSENCE OF SUCH TESTIMONY, THE VERDICT AND JUDGMENT IN FAVOR OF PLAINTIFF MANCUSI SHOULD BE REINSTATED.

The Fourth District Court of Appeal ruled that Alamo was entitled to put in the proffered evidence of the testimony of the State Attorney, the testimony of the criminal defense attorney and the transcript of the underlying criminal trial. Mancusi will deal with each of these three pieces of evidence. Obviously, if the District Court was in error as to all three pieces of evidence, then the result should have been an affirmance rather than a reversal. Mancusi will demonstrate that the telephone testimony of the State Attorney was inadmissible and that the absence of this testimony should have also resulted in exclusion of the proffered trial transcript. In addition, exclusion of the transcript and the criminal defense attorney's testimony was at most harmless error. The Fourth District should have affirmed because the trial court's evidentiary rulings were all correct even if for the wrong reason. The District Court found that Judge Andrews erred in concluding that a nolle prosequi after attachment of jeopardy constituted a bona fide termination as a matter of law. However, if the three items of evidence were inadmissible for other reasons apparent on the record and which were also considered by the trial judge, there can be no reversal.

Telephone Testimony by the Prosecutor

The testimony of the state attorney was quite obviously inadmissible because he was not present to testify. The Fourth District Court of Appeal has blazed a new trail in holding the trial court in error for not allowing a necessary witness to testify before a jury by telephone. The court specifically found that the jury should have been permitted to hear this telephone testimony. The opinion states as follows:

> . . . to determine whether the nolle prosequi indicates the defendant's innocence, the jury should have been allowed to hear the circumstances surrounding the termination of Mancusi's criminal trial, including . . . the proffered testimony of the assistant state attorney who prosecuted the Mancusi's criminal case.[2]
>
> * * *
>
> [2] Alamo requested that it be allowed to offer the testimony of the Assistant State Attorney by phone; however, the trial court denied Alamo's request, allowing counsel for Alamo to proffer this testimony into the record. This proffer included a statement that the nolle prosequi was announced following negotiations with Mr. Mancusi.

During the cross examination of Mr. Mancusi questions came up as to whether his payment of the $365 could constitute "restitution" destroying the bona fide nature of the nolle prosequi. The trial judge repeatedly stated that he thought the State Attorney was a vital witness because only he knew why he nolle prosequied the case. Defense counsel even agreed that State Attorney Peacock was crucial and the judge continually asked trial counsel whether he intended to call Mr. Peacock. (R.285-90). Clearly, the court, at this early stage in the trial was not telling defense counsel that he would not allow Mr. Peacock to

testify. The judge was saying exactly the opposite and was warning defense counsel that Peacock was an absolutely necessary witness. Even at this point defense counsel did not tell the judge one way or the other whether Mr. Peacock was going to testify. Instead he said "Can't tell you right now judge". (R.298). See (R.285-290] as previously quoted in footnote 2, page 11 herein. In fact, prosecutor Peacock was away on vacation and not under subpoena. Any fair reading of the colloquy shows that the judge would definitely have allowed Peacock to testify had he been presented as a live witness rather than by telephone. (R.285-290).

We will not belabor the point that telephone testimony in a jury trial over objection is inadmissible. Even Alamo does not contend it is really admissible and in its jurisdictional brief simply argued that the District Court of Appeal did not really mean to say that it was proper. Telephone testimony is, as a matter of law, inadmissible. See Baker v. Baker, 388 So. 2d 233 (Fla. 5th DCA 1980); Bush v. Bush, 590 So. 2d 531 (Fla. 5th DCA 1991); Canakaris v. Canakaris, 382 So. 2d 1197 (Fla. 1980); Coplan Pipe and Supply Co., Inc. v. Ben-Frieda Corp., 256 So. 2d 218 (Fla. 3d DCA 1972); Gosby v. Third Judicial Circuit, 586 So. 2d 1056 (Fla. 1991); Outdoor Resorts at Orlando v. Hotz Management Company, 483 So. 2d 2 (Fla. 2d DCA 1985); The Florida Bar Re: Rules of Judicial Administration, 462 So. 2d 444 (Fla. 1985).

The District Court's opinion, on its face, is in plain error in approving the use of telephone testimony and must be reversed no matter what else happens in this case. In short, if prosecutor Peacock had been there live or if his deposition had been taken and

offered, then his testimony could have been presented to the jury. Since he was not there live and his deposition was not offered, the Fourth District should not have reversed based on the exclusion of his testimony. His testimony was never offered; other than by telephone.

The Mancusi case in chief was sufficient without testimony from prosecutor Peacock. Alamo's merits brief argues that:

> Mancusi needed to answer one additional question about whether he had participated in securing the dismissal in any way. If Mancusi could answer the question by saying that he had not, that there was no compromise, that there was no negotiated bargain, the prerequisites are met. Mancusi was not asked these questions because he could not give the right answers." (Alamo Brief, p. 27).

Alamo leaves out the fact that Alamo proffered the testimony of Mancusi on this issue. At (R.745), Mancusi testified in response to defense counsel's questions as follows:

> Q. (By Mr. Miertschin) Mr. Mancusi, you're down to trial in your criminal case. I believe it's February 1987; is that correct?
>
> MR. CAMPBELL: February 23rd.
>
> Q. February 23rd, 1987.
>
> A. Correct.
>
> Q. At that time was there an agreement reached between the State's Attorney's office and yourself that your repayment to Alamo of $368.14 or $364, something in that neighborhood, that in return for that payment, they would - they would do a nolle pros of your case?
>
> A. No.
>
> Q. That was not?
>
> A. That was not part of the nolle pros. Judge Henning said that she was filing a nolle pros. There were numerous phone calls made to Alamo at the time and that was kind of thrown in on top of the paper work at the end.

But, originally, Judge Henning told Peacock that she was going to nolle pros the case no matter what.

Clearly, Alamo did not want this testimony before the jury and clearly Mr. Mancusi was capable of giving the "right answers." In his earlier direct testimony Mancusi had stated as follows:

> Q. (By Mr. Campbell) We're up to trial. Could you tell these folks what was going through your mind at the time of trial?
>
> A. Well, I was very scared. And I thought if the trial went against me, that I would - I could have a possibility of being thrown in jail.
>
> Q. How was the trial concluded?
>
> A. Judge Henning told Peacock that he worked for the citizens of Florida, not Alamo and to nolle pros the case.
>
> Q. Was the case subsequently nolle prossed?
>
> A. Yes.
>
> Q. That occurred at the end of Bay's testimony or even in between Bay's testimony?
>
> A. It was in between Bay's testimony. (R.671-2).

If Alamo wanted to prove some other <u>real</u> reason in Peacock's mind as to why he dismissed the case, Alamo simply had to call him as a witness. Alamo obviously decided in advance of trial not to call prosecutor Peacock and not to call its own directly involved employee Desiree Feciskonin.

<u>The Criminal Trial Transcript</u>

The trial judge and Judge Stone both believed that the criminal trial transcript was not admissible without testimony from prosecutor Peacock. The trial court repeatedly expressed his view to defense counsel that only Mr. Peacock could testify to his own

real reason for the nolle prosequi of the criminal case. The jury was simply not in a position to read a trial transcript to decide what was in the mind of Mr. Peacock. Prosecutor Peacock's testimony as to why he dismissed was the key to the defense and once this element is correctly viewed, the reversal must fall. That transcript by itself did not show Peacock's intent and without that testimony the transcript should not have been admitted.

In addition, exclusion of the trial transcript was at most harmless error because the transcript was really favorable to Mancusi on the bona fide termination issue. The $365 payment was totally unrelated to the crime charged and Mr. Peacock made this abundantly clear in the trial transcript. He argued this over and over again and excerpts from the transcript and further discussion of this point are contained in the argument section under Alamo's Point I hereafter. In short, Mr. Peacock's position was that the money had absolutely nothing to do with the criminal prosecution. He said: "Well, my posture at this point . . . is that civil liability [for the $365], if there is any, is a question outside the scope of [this] criminal case . . ."

In conclusion under this issue, the criminal transcript was not admissible without the testimony of Mr. Peacock which was of course never properly offered. In addition, the criminal transcript helped Mancusi on the bona fide termination issue showing the money had nothing to do with the crime charged. Exclusion of the transcript from evidence was at most harmless error, if error at all.

Testimony of the Criminal Defense Attorney

The testimony of the criminal defense attorney was proffered in two pages. (R.293-4). This attorney agreed that $365 had been paid and indeed that Mancusi had more than that on deposit with him and that there would be no question whatsoever about the payment. Indeed, there has rarely been a situation where a customer has tried harder to pay a bill. Of course, it is absolutely impossible for a customer to pay what he does not know he owes. It is as though Mancusi laid the full amount of cash on the Alamo counter and Alamo chose to pick up and pocket only one-half of the money and now contends that Mancusi made "restitution" when he subsequently allowed Alamo to have the balance of the cash. Alamo never received anything other than what Mancusi had always offered -- to pay for the rental of the car. The proffer of the criminal defense attorney's testimony indicated that Mr. Peacock intended to nolle prosequi the case in any event. (R.293-4). Exclusion of this proffered testimony was proper or was at most harmless error.

POINTS ON ALAMO'S PETITION

I.

WHETHER THE FOURTH DISTRICT COURT REVERSED THE BURDEN OF PROOF ON THE MALICIOUS PROSECUTION CLAIM.

The District Court did not reverse the burden of proof and never suggested that the defendant Alamo had the burden of showing the absence of the bona fide termination of the underlying criminal case. Instead, the District Court merely quoted its own prior opinion in Liu v. Mandina, 396 So. 2d 1115 (Fla. 4th DCA 1981)

which holds that after the plaintiff proves that the underlying criminal case was nolle prosequied by the state, then it becomes the burden of the defendant to prove that the nolle prosequi was based on restitution. Of course, the context of the Liu opinion must be examined, it is apparent on the face of that case that there was a dispute between the State Attorney and the defense counsel as to whether the underlying criminal case had been terminated based on restitution. Obviously, there was no such dispute in the present case because the State Attorney was never called to testify.

As already pointed out, the Mancusi case in chief was sufficient to withstand a directed verdict and even if the judge was wrong in his ruling that a post jeopardy nolle prosequi was immediately effective and a bona fide termination as a matter of law, that ruling had no effect or influence on Alamo's failure to call State Attorney Peacock. As previously shown, the trial court would have allowed prosecutor Peacock to testify had he been appropriately presented as a witness.

Mr. Mancusi testified to the circumstances of the nolle prosequi and his testimony alone was sufficient. Mr. Mancusi's criminal defense attorney, Mr. Jaffee, also testified to those circumstances. Indeed, when Mr. Jaffee attempted to explain the circumstances surrounding the nolle prosequi, the defendant Alamo objected to his explanation that the trial judge "brought pressure" to cause the nolle prosequi and had his testimony stricken. At (R.277), with emphasis added, the following occurred:

> Q. Could you tell the jury - first of all, why don't you tell the jury what ultimately happened to this case.
>
> A. Okay. Ultimately, during the course of the trial, as a matter of fact, I think it was after the testimony of the first witness, Detective Bay, the court, more particularly Judge Henning, I believe it is on the record, some of it was on the record that is transcribed by the reporter, some of it was off the record, brought pressure --

Alamo's counsel objected and cut off the witness who was getting ready to explain how the trial judge "brought pressure" and forced this case of no merit to be nolle prosequied by the state. Mr. Mancusi himself later testified to the same effect and that testimony was not objected to. (R.671-2). Mancusi proved a bona fide termination by a nolle prosequi which was not based on "payment of restitution." It then was up to Alamo to prove that the nolle prosequi was based on restitution but Alamo totally failed in this effort.

Alamo now adopts a "pristine" nolle prosequi argument in its brief at page 26 and thereafter. Alamo urges that in the underlying criminal case the state and the defense cannot even talk. Alamo argues that if the state and the defendant discuss a nolle prosequi that it has become "negotiated" and cannot be bona fide and "pristine." There is no such requirement under the law and the state and the defendant in the criminal case can indeed discuss and agree on a dismissal which remains a bona fide termination for subsequent malicious prosecution purposes.

The Fourth District's opinion relied upon and quoted established case law which Alamo now cites in its brief against the decision of the Fourth District. The Third District's decision in

Gatto v. Publix Supermarkets, Inc., 387 So. 2d 377 (Fla. 3d DCA 1980) is an oft cited case and correctly states the law. At pages 380-382, the court stated:

> Gatto contends that the "no information" constituted a bona fide termination of the criminal prosecution against him and satisfied that requisite element of his malicious prosecution action. We agree.
>
> * * *
>
> The essential element of a bona fide termination . . . has been held to be satisfied if there has been an adjudication on the merits favorable to him or if there is a good faith nolle prosequi or declination to prosecution.
>
> * * *
>
> Prosser, Torts §119 (4th ed. 1977) at 839 "[I]t will be enough that the proceeding is terminated in such a manner that it cannot be revived, and the prosecutor, if he proceeds further, will be put to a new one. This is true, for example, . . . by . . . the entry of a nolle prosequi or a dismissal, abandonment of the prosecution by the prosecuting attorney . . . where any of these things have the effect of ending the particular proceeding and requiring new process or other official action to commence a new prosecution."

The trial court's instruction to the jury which were not objected to and indeed all of the trial court's rulings throughout the case on this issue were entirely consistent with Gatto v. Publix Supermarkets, Inc.. The Fourth District correctly relied upon and quoted Gatto in its opinion. A final good faith nolle prosequi was entered as to the crime actually charged in the Mancusi case and there was no "restitution." It is important to analyze the word "restitution." In the criminal sense it means that the defendant pays money to the victim of the crime in recompense for the victim's loss. Here Alamo lost nothing. It intentionally chose not to pick up the money from the VISA company

and it lost absolutely nothing. If Alamo had charged Mancusi with mail fraud it certainly could not assert that Mancusi's payment of his car rental bill constituted "restitution" in regard to that charge.

Civil v. Criminal Cases

Alamo's arguments are flawed because it does not recognize the distinctions between malicious prosecution based on an underlying civil action and malicious prosecution arising from the abandonment of an underlying criminal prosecution. It is much easier to tell who really won a criminal case than to tell who really won a civil case. It is much clearer who is innocent after a nolle prosequi than after the voluntary dismissal of a complex nulti-party civil case.

At page 29 of its brief, Alamo pursues its "pristine" nolle prosequi idea citing seven cases all of which involve underlying civil actions and none of which involve underlying criminal prosecutions. The same theme is argued extensively throughout the brief with numerous citations to many civil cases and almost no discussion of criminal cases. It is not necessary to analyze all of these cases.

Jones v. State Farm Mutual Automobile Insurance Company, 578 So. 2d 783 (Fla. 1st DCA 1991), heavily relied upon by Alamo, is an example of the fallacy in Alamo's approach. In Jones, a defendant was sued civilly based on negligence. The defendant raised the affirmative defense of release and obtained a summary judgment based on that defense. This summary judgment was held not to be a bona fide termination in favor of the defendant because the

affirmative defense of release effectively admitted the negligence. The release was both a confession and an avoidance. Alamo's reliance on Jones is misplaced. Obviously, the State did not dismiss the case against Mancusi because he confessed guilt. The dismissal of a civil case might not indicate the defendant's innocence at all. Civil cases involve claims and counter claims and a defendant may win a case based on a defense such as the statute of limitations or lack of clean hands by the plaintiff which has nothing to do with his own innocence. Obviously, defendants may not file counter claims in criminal cases.

In Union Oil of California v. Watson, 468 So. 2d 349 (Fla. 3d DCA), also cited by Alamo, a civil action was brought against an individual corporate officer and his corporation. The plaintiff got a judgment against the solvent corporation and chose to voluntarily dismiss the individual defendant who then sued for malicious prosecution. The court held this voluntary dismissal was not a bona fide termination of the underlying civil case. The distinctions between civil and criminal cases must be recognized. A voluntary dismissal of a civil case does not necessarily mean the defendant is innocent. However, the voluntary or "judge pressured" dismissal of a criminal prosecution after jeopardy attaches and not based on restitution for the crime charged means just that -- the defendant is innocent.

Alamo also goes to great lengths in citing numerous Florida and out-of-state cases all for the same "pristine" and "untainted" nolle prosequi argument. As stated above, the civil-criminal

distinctions are totally disregarded and these cases have no real application to the Mancusi situation.

Finally, at page 33 of the brief, Alamo refers to an underlying criminal proceeding in its citation to Restatement (Second) of Torts, § 659. This section actually supports Mancusi's argument. The Restatement provides:

> Criminal proceedings are terminated in favor of the accused by
>
> * * *
>
> (c) The formal abandonment of the proceedings by the public prosecutor.

All of the subsections in Section 659 are prefaced with the word "or" and are in the disjunctive rather than the conjunctive. A nolle prosequi is a formal abandonment by the prosecutor and the Mancusi situation is clearly within the Restatement definition.

There Was No Bargained for Payment -- Mancusi Paid with His Credit Card

The trial judge succinctly summarized the uncontested facts on this issue as follows:

> Defendant argues that the nolle prosequi was obtained by the accused upon a promise of restitution and therefore it is not a bona fide termination in plaintiff's favor. But the evidence shows that Alamo received nothing more than what Mr. Mancusi had been offering all along. Mr. Mancusi's rental bill had been paid in full as soon as it was charged to the credit card. Alamo did not produce a back-dated lost rental agreement evidencing additional charges until a couple of weeks before the criminal trial. Nonetheless, Mr. Mancusi had agreed to pay those charges before trial. Given those circumstances, the nolle prosequi amounted to an abandonment of the criminal charges and was a bona fide termination of a case in plaintiff's favor. See Shidlowsky v. National Car Rental Systems, Inc., 344 So.2d 903 (Fla. 3d DCA 1977), cert. denied, 355 So.2d 516 (Fla. 1978).

When the inoperable car was towed in on August 27, 1986, Alamo was holding Mancusi's signed credit card authorization and of its own volition, Alamo chose to charge Mr. Mancusi's credit card for the rental period up to August 13, 1986. Then, despite the fact that they had their car back and had all the money they wanted to charge the customer, Alamo thereafter made the decision to prosecute Mr. Mancusi not for the crime of not paying for the car but instead for the crime of intentionally not returning the car with intent to defraud. Mancusi had always been ready, willing and able to pay the rental charges which he always admitted that he owed. Alamo internally decided not to charge him for the time subsequent to August 13 until a few weeks before the criminal trial. For Alamo to now argue that the payment of this tardily and secretly charged rental fee constitutes restitution for the alleged prior crime is devoid of any logical connection.

Mancusi could not legally have made "restitution" for an amount which he had continually and repeatedly authorized Alamo to draw against his credit card. Rental car customers routinely drive off in cars having left a signed imprint of their credit cards. Rental car customers routinely return cars a day late or more than one day late and are not charged with "grand theft auto."

The $365 Payment Was Unrelated to the Crime Charged

Mr. Mancusi was charged under §817.52(3) with willfully refusing to redeliver a motor vehicle on August 28, 1986. The charge had nothing to do with money. It is absolutely undisputed that Alamo had been paid and affirmatively told Mr. Mancusi it had been paid by holding his credit card against the debt. The fact

that Alamo chose not to bill the card for the period after July 22 was Alamo's problem and not the result of any conduct by Mr. Mancusi. The transcript of the criminal trial even indicatesthat the state attorney, Mr. Peacock, argued very strongly to the trial judge that the money had absolutely nothing to do with the criminal charge. At p.94 of the criminal transcript, Mr. Peacock argued to the judge that the defense wanted to go into the late charges. State attorney Peacock said, "I don't think it's relevant to the failure to return the vehicle." In response, defense counsel stated:

> But as I understand this charge, they have to prove intent to defraud and the big issue in this case is we gave him a credit card, they had our credit card, they used the credit card, they billed it in full as of 8-13-86, when they closed out this contract and put it on warrant.
>
> They send us a slip or sent it to New York that shows a zero balance owed, saying that, "we have used your credit card for payment. It has been a pleasure serving you. Alamo No. 1 is America's greatest bargain."
>
> * * *
>
> Nobody ever presented that to us. Nobody ever billed it to Mr. Mancusi. Nobody ever billed it through VISA. And my point is: Darn it. They had our credit card. We're going to put on testimony of an oral extension that took place extending this rental agreement.

In response to this, at p.96, state attorney Peacock again responded that payment had nothing to do with the criminal charge. Peacock stated:

> He failed to return the hired vehicle as agreed under the contract that he signed. That is what we charged him with. That is what is pertinent to the criminal case.
>
> Whether he paid $200 or $1,000 to them at some point is irrelevant as to the charge of the fact that he failed to return the vehicle. He could have paid them all the

> money in the world, but if he failed to return the hired vehicle that is the criminal aspect of the case. That is the charge.
>
> I'm not wanting a criminal case to be setup for some sort of civil litigation. I don't like to be an arm of that aspect.

Mr. Peacock also responded, "Well, my posture at this point . . . is that civil liability [for the $365], if there is any, is a question outside the scope of a [this] criminal case . . . ."

Eventually, the state attorney agreed to nolle prosequi the case stating that he had talked with Alamo on the telephone about it and that Alamo wanted the $365. The court asked Mr. Mancusi if he was willing to pay and he certainly said "yes." This was in keeping with his position from the very beginning that he agreed to pay for the car.

The payment of the rental bill did not cast ambiguity on whether Mancusi was innocent of the crime charged. Mancusi was not guilty of that crime and did not pay any form of restitution, as a matter of law. The trial court was correct in so ruling.

Hypothetically, the unknowing customer who buys two articles with a credit card is not guilty of theft if the store clerk only writes down one article on the charge card receipt. This same customer does not pay <u>restitution</u> by subsequently giving cash for what he tried to previously pay for on his credit card. The hotel customer who checks in and signs his credit card telling the hotel clerk that he intends to stay two nights, does not commit theft when he checks out and the clerk only charges him for one night. If the hotel were to then maliciously have the guest prosecuted for defrauding an innkeeper, the guest is certainly not barred from

suing the hotel merely because he paid cash for the second night which he had already agreed to pay for. In short, Mr. Mancusi tried as hard as he could to pay for this rental car and that payment was not restitution as a matter of law.

This case should never have been filed as a criminal matter and the state would never have been able to prove that Mr. Mancusi willfully refused to return a car with intent to defraud on August 28, 1986. This was the crime he was formally charged with and payment of an unrelated and subsequent rental car bill was not restitution, as a matter of law. Obviously the criminal case would have been dismissed had it gotten beyond the first witness. Alamo had its car back on the day before the day charged in the information.

There is no necessity to deal with Liu v. Mandina at all. The case simply means that once the plaintiff has demonstrated a nolle prosequi not based on restitution, then it becomes the defendant's burden to show that the nolle prosequi was based on restitution. The court's use of the word "solely" in the initial Liu opinion is curious but was obviously warranted in the Liu case by issues not disclosed on the face of the opinion. All of the Alamo arguments concerning the word "solely" are of no consequence because the word made absolutely no difference in this case. As a matter of law, Mancusi's payment of the $365 did not constitute restitution nor the payment of any sort of compromise. The facts are absolutely undisputed on this issue and it is a question of law. Alamo was never prejudiced in the slightest because it had the burden of proving the nolle prosequi was based on restitution. The supposed

facts concerning the alleged restitution were always uncontested. The $365 payment was either restitution or not restitution and no one has ever asserted any factual scenario under which partially or solely on restitution the nolle prosequi was based. It was never an issue. Thus the word "solely" had no effect on this case in any way.

POINTS II & III ON ALAMO'S PETITION

WHETHER THE EVIDENCE PRESENTED JURY QUESTIONS ON PROBABLE CAUSE, MALICE AND PUNITIVE DAMAGES.

Probable Cause

Alamo argues that the existence or non-existence of probable cause is a question of law for the court to determine. However, where there is a dispute as to the facts underlying the malicious prosecution, this is no longer true. As this Court stated in City of Pensacola v. Owens, 369 So. 2d 328, 330 (Fla. 1979):

> What facts and circumstances amount to probable cause is a pure question of law. Whether they exist or not in any particular case is a pure question of fact. The former is exclusively for the court; the latter for the jury. This subject must necessarily be submitted to the jury when the facts are in controversy; the court instructing them what the law is [citations omitted] (quoted with approval Glass v. Parrish, 51 So.2d 717 (Fla. 1951).

Accordingly, where the facts regarding the issue of probable cause are in dispute, the question becomes one for the jury. For example, in Weissman v. K-Mart Corporation, 396 So. 2d 1164 (Fla. 3d DCA 1981), there was conflicting testimony regarding the circumstances of a K-Mart security guard's decision to detain and effect their arrest of Mr. Weissman. Mr. Weissman testified that he had purchased certain items, left the store, returned with the

items, opened his bag to verify he had purchased the correct items, and in doing so, the receipt became unstapled. He then reattached the receipt with a rubber band and then left the store. The store security guard testified to a different set of facts, stating that he saw Mr. Weissman take a paper bag, slip of paper and rubber band from his pocket and then place certain items in the bag, securing the slip of paper thereto with a rubber band. The security guard refused to verify with a cashier whether Mr. Weissman had purchased the items. Since the parties' testimony conflicted the Third District held that the existence of probable cause was a jury question. See also, Lashley v. Bowman, 561 So. 2d 406, 408 (Fla. 5th DCA 1990) (disputed issue of fact regarding whether food which customer refused to pay for was inedible as customer contended or was edible as restaurant contended); Gause v. First Bank of Marianna, 457 So. 2d 582, 584 (Fla. 1st DCA 1984) (disputed issue of fact surrounding whether Gause had signed a bank note).

Clearly in this case, there were disputed issues of fact regarding the existence or non-existence of probable cause to arrest Mancusi for grand theft auto. Mr. Mancusi testified that he had rented the car for a one-month period and that Alamo knew this. (R.609). He further testified that, upon learning that Alamo believed the car to be overdue, he contacted Alamo, clarified the situation and renewed the rental of the car for an additional one-month period. (R.612-613). He further testified that he explained these facts to an unnamed Alamo clerk on August 8 and then to both Desiree Feciskonin in an angry exchange and later to her supervisor when he apologized. (R.615-618). On the other hand, Alamo

contended that the rental car had never been renewed. There was also conflict regarding Alamo's attempts to contact Mr. Mancusi prior to placing the car on warrant. In particular, there was an issue as to whether Alamo's attempts were meaningful or simply half-hearted efforts which were not followed through.

The only undisputed facts are that Mr. Mancusi left a credit card open in order to pay for the entire rental period and also that the rental car was returned to Alamo. The facts on probable cause were in dispute and only the undisputed facts clearly point to a lack of probable cause.

Probable cause has been defined as "a reasonable ground of suspicion, supported by the circumstances, that the person accused is guilty of the offense charged." Harris v. Lewis State Bank, 482 So. 2d 1378 (Fla. 1st DCA 1986). The absence of probable cause exists "where it would appear to a 'cautious man' that further investigation is justified before instituting [criminal] proceedings." Silvia v. Zayre Corporation, 233 So. 2d 856 (Fla. 3d DCA 1970). A lack of probable cause may be established by proof that a criminal proceeding was instituted on facts that could as well be explained innocently. Harris v. Lewis State Bank, supra, at 1382.

The standard of a "cautious man" and further investigation has particular application here. By Alamo's own testimony, there were only two daytime telephone calls to only one of the telephone numbers left by Mr. Mancusi. (R.536). For the entire month of August, no person at Alamo attempted to call Mr. Mancusi or

otherwise contact him at his address less than a mile away. (R.356).

The name and address of the credit card holder and additional driver was in Alamo's possession but there was never an attempt to contact that person. Alamo violated its own internal policies on overdue vehicles. Alamo obviously chose to treat Mancusi much differently than its average rental car customer. Alamo's policies and mere common sense shows overdue rental cars are a commonplace event. Obviously, planes are delayed, ball games are rained out and travel plans involving rental cars are often changed.

More telling, of course, is the fact that Alamo pressed charges even though the car was entirely paid for and returned. Mr. Mancusi had an innocent explanation for why he had retained the car. At the time Edward McArdle signed the Probable Cause Affidavit, all of this information was available to him and he nevertheless had Mr. Mancusi arrested.

The jury could have found that McArdle lied to Officer Bay giving false information about Mancusi not returning the car when McArdle was on notice of those facts by virtue of a memo from an Alamo supervisor.

Malice

Alamo correctly states that malice may be shown either through actual malice or legal malice. Legal malice is inferable from the want of probable cause. Adams v. Whitfield, 290 So. 2d 49 (Fla. 1974). Alamo is incorrect in stating that neither existed in the instant case.

As to actual malice, the jury heard evidence from which it could find that the charges against Mancusi were brought in retribution for his run-in with Desiree Feciskonin, who stated that Mancusi screamed at her because he was prejudiced against her because she was a woman. If the jury believed that Ms. Feciskonin instigated the charges as revenge, then actual malice would have been clearly established. This Alamo employee's testimony was presented in the plaintiff's case by deposition. She was not even called by Alamo. Part of her testimony was re-read to the jury on closing argument as follows:

> Q. Did you put anything about the conversation other than he was screaming?
>
> A. No.
>
> Q. Let me ask you this question. Have you ever had customers call you when there has been, in fact, a mistake and you got upset and when they are being accused or when they got upset and they are - when they are being accused of stealing a car?
>
> No. To tell you the truth, I never had anybody call screaming at me.
>
> Let me ask you this question. A guy calls you screaming.
>
> A. Yes, sir.
>
> Q. Did you get on the phone and say something simple, like, Sir, there must be a problem. Regardless we want our car back. Could you please bring the car back so we don't have to have you arrested.
>
> Her answer:
>
> I don't recall. Besides, you know, I only could say to my best knowledge that I did inform him the car was placed on warrant because he failed to return the vehicle. We tried to contact him. I can't tell you when I went through all that. The guy was screaming at me. And I said the reason he was screaming at me was because he found out I was a female.

Q. You think he was upset because you were a lady:

A. Oh, yes.

Going on with my next questions, Question on Page 36:

Q. Okay. Well, I'm still trying to figure out, here is a guy who has a rental car that belongs to you that you think is stolen. Cop calls you and says, Wait a minute, there must be a problem. He will call you. We are going to have to straighten it out. Maybe it's just paper work.

Did you tell him, Call Ed McArdle, you know, call my supervisor if you don't like me because I'm a lady.

You know, there's a big guy by the name of McArdle you can call; but let's get the car back and clear this matter up.

A. I can't remember what I said to him. I mean, you're going back a year, a year ago, two years ago.

Q. Do you recall what you did after the phone call? I mean, did you get angry enough at him because he was a male chauvinist pig that you called Bay and said, Arrest the sucker?

A. No, I did not do that. I went back into my manager's office, city manager, Peter Perlman, and said, Yes, I was in a rampage.

Q. But you were very angry.

A. I was in a rampage. I probably said to him, Who the hell he thinks he is screaming at me like that.

Q. By the say, did you ask him where the car was?

A. Did I ask the customer?

Q. Yes.

A. No, I didn't. If you were on the other end of the phone, I don't think you would have wanted to speak to the guy either.

Q. But he stole your car.

A. Regardless of that. That's out of my hands now. Once I place the vehicle on warrant, that's out of my hands. To begin with Detective Bay should never have given him my name. I don't feel he should have.

> As far as I'm concerned, I did my job, I placed the vehicle on warrant. That's Mancusi's problem now. It's not mine. He has no right calling me. (R.947-950).

The jury also reasonably could have found that Edward McArdle intentionally gave false information to Officer Bay. Despite return of the car and payment of the rental bill McArdle still wanted him arrested. His nondisclosure of the inoperable condition of the car smacked of actual malice. The jury could have found all of this to be a continued attempt by Alamo to "get" Michael Mancusi.

Punitive Damages

The court correctly allowed the jury to consider punitive damages as punishment for Alamo's malicious prosecution of Michael Mancusi. Although punitive damages may not be awarded where legal malice was based solely on a want of probable cause, proof of legal malice may be sufficient to recovery of punitive damages, if it encompasses a showing of moral turpitude or willful and wanton disregard of the plaintiff's rights, which presupposes the defendant's knowledge or awareness of the risk to plaintiff's rights, or evidence of the excessive and reckless disregard of the plaintiff's rights. Jack Eckerd Corporation v. Smith, 558 So. 2d 1060 (Fla. 1st DCA 1990).

There was abundant evidence to justify a finding of willful and wanton disregard of the plaintiff's rights. Alamo was guilty of an intentional vendetta or an incredible lack of communication within its corporate structure amounting to more than gross negligence. Alamo's actions were especially heinous in light of Mr. Mancusi's innocent explanation as to why he did not return the car in one week and his continual communication of this explanation

to different Alamo employees. A corporation which instigates a criminal charge against another while knowing it has no basis, deserves punishment. A jury could reasonably view Alamo's actions as a malicious attempt to exact a pound of flesh from Mr. Mancusi. At least one Alamo employee admitted to being enraged at Mr. Mancusi because she thought he was prejudiced against her. (R.447-450). Another employee gave false information to the police stating the customer had not returned the car and that Alamo had to have it towed when Alamo had agreed to tow the car in at the customer's suggestion because it was inoperable.

Mr. Mancusi's arrest was not a simple corporate glitch. Whatever the cause of the initial misunderstanding over the length of the rental period, it was a conscious decision on the part of Alamo to prosecute Mr. Mancusi even after he returned the car and fully explained. Even if Alamo's version of the story is accepted, Alamo prosecuted a simple businessman for grand theft auto after the car had been willingly returned and the rental bill was fully paid. Mancusi tried to rent a car and pay for it -- not one shred of evidence exists to the contrary. Mancusi was formally charged with failing to return the car "on or about the 28th day of August, A.D. 1986". Alamo has conceded the car was actually returned on August 27, 1986.

POINT IV ON ALAMO'S PETITION

WHETHER THE §768.73 LIMITATION APPLIES TO MALICIOUS PROSECUTION.

The District Court correctly ruled that the Tort Reform limitations did not apply. Alamo fails to recognize that malicious prosecution is an intentional tort requiring malice and the statute (§768.73) simply has no application to intentional torts. If the Legislature had intended to include malicious prosecution in its limitations on punitive damages, it would have simply named this intentional tort which has existed from early English common law and is part of Florida's statutory law by adoption under §2.01, Florida Statutes (1987). See Jaye v. Royal Saxon, 573 So. 2d 425 (Fla. 4th DCA 1991).

The Tort Reform Act of 1986 Does Not Apply to Malicious Prosecution Cases

Subsection (1) of §768.73 as enacted in Section 52 of Ch. 86-160 limits punitive damages to three times the compensatory damages in civil actions based on negligence, strict liability, products liability, professional liability or breach of warranty. Later provisions of Ch. 86-160 go on to expressly define this same list of cases as "negligence cases."

The limitation of three times compensatory damages in subsection (1) was never intended to apply to intentional torts. The Tort Reform Act itself defines "negligence cases" in §768.81 as including "negligence, strict liability, products liability, professional malpractice" and "breach of warranty." This same list is in both §768.73 on punitive damages and §768.81(4)(a) on comparative fault. Further, §768.81(4)(b) states that the section

does not apply "to any action based upon an intentional tort." In view of the express definition of "negligence cases" on the face of the statute, it is hard to grasp the Alamo argument that the "statutory text does not lead to that conclusion." Obviously, "negligence cases" do not include intentional torts.

The wording of §768.73 includes all of the common negligence theories but does not mention torts such as assault and battery, false imprisonment, libel and slander or malicious prosecution. The Legislature obviously did not intend to include intentional torts because they were not named. By expressly including certain torts and not mentioning others, the Legislature excluded the unmentioned theories of action. Thayer v. State, 335 So. 2d 815 (Fla. 1976). The specific mention of one thing implies the exclusion of another which is not mentioned. This basic rule of construction has not been addressed by the Alamo brief.

The classic intentional torts do not even involve actual or compensatory damages as an element of the cause of action. Compensatory damages are an element of a cause of action for all negligence torts but actual damages are not necessary in most intentional torts.

In Alt v. Lohr, 538 So. 2d 454 (Fla. 1989), this Court specifically held that punitive damages were proper even when there was no award of compensatory or even nominal damages. Alt dealt with the tort of assault and battery and this tort was held not to require actual damages. Under such circumstances, Mr. Mancusi (who sustained $300,000 in actual compensatory damages) would have been

entitled to punitive damages even without those compensatory damages.

Legislative History

The reason why the Legislature did not include intentional torts is also clear from the legislative history. The Legislature was attempting to solve a problem regarding liability insurance. It is against public policy in Florida to buy or sell liability insurance to protect one from having to pay damages as a result of one's own intentional tortious conduct. Employers may be vicariously liable for punitive damages only under certain very isolated circumstances. However, most often an employer is not responsible when an employee goes out and commits an intentional tort which is almost never within the scope of the servant's employment. The Legislature did not intend to protect intentional tortfeasors from the penalty of punitive damages. There was no liability insurance crisis concerning punitive damages and intentional torts.

The statute as initially enacted did not mention commercial litigation. It was then amended effective October 1, 1987, by addition of the words "misconduct in commercial transactions." The 1987 amendment does not apply to the present cause of action for malicious prosecution which accrued in 1986, before the amendment's effective date. This is an additional reason supporting the ruling that the statute was not applicable.

Even assuming that the words "misconduct in a commercial transaction," could include malicious prosecution, the question remains as to when the Legislature intended the statute to go into

effect. The Legislature stated quite clearly that the effective date of the amendment was October 1, 1987. This was after the cause of action for malicious prosecution had accrued. Substantial judicial authority holds that Florida Statutes are presumed to have prospective effect only. If the statute is to have retrospective effect, the clear and definite intent of the Legislature must be stated on the face of the legislation. Thayer v. State, supra. There is not the slightest indication that the Legislature intended a retrospective application. The statute has prospective effect because there is nothing on the face of the statute indicating that it is to have retrospective effect. See 49 Fla. Jur.2d, Statutes, §107, citing numerous cases holding that statutes are presumed to have prospective application unless clearly stated otherwise on the face of the legislation.

The elements required for malicious prosecution have nothing to do with commercial transactions. Malicious prosecution can occur totally outside of a commercial setting. Certainly, the Legislature did not intend to limit punitive damages when a person is maliciously prosecuted for one type of commercial crime but not for another type of non-commercial crime. Nothing in the statute so indicates. The legislative history of the 1987 amendment states the amendment was necessary because of punitive awards in "business/commercial litigation." The present suit for malicious prosecution is simply not "business/commercial litigation." Again, if the Legislature had intended to, it would have simply said "malicious prosecution."

Tort Reform Did Not Change Existing Law

The punitive damages statute is also not applicable because the Tort Reform Act itself defers to all other conflicting provisions of the Florida Statutes. The 1986 Florida Tort Reform Act specifically provides in §768.71(3) on Applicability; conflicts that:

> If a provision of this part is in conflict with any other provision of the Florida Statutes, such other provision shall apply. (Emphasis supplied).

Thus, Tort Reform left intact every other conflicting statute. One wonders just what Tort Reform did change since it expressly did not supersede any other conflicting provision of any other Florida Statute.

The United States Supreme Court's decision in Browning-Ferris Industries v. Kelco Disposal, Inc., 109 S.Ct. 2909 (1989), makes it absolutely clear that punitive damages are founded in the British common law. Under §2.01 of the Florida Statutes, all general British common law existing as of July 4, 1776, has been adopted as a statute in the State of Florida. Thus, a common law right to punitive damages exists as a part of the Florida Statutes and the Tort Reform Act specifically deferred to this existing statutory law. The Tort Reform Act thus recognizes the existing statutory right to punitive damages.

The District Court correctly ruled that the statute did not apply to intentional torts and certainly had no application to malicious prosecution. The Tort Reform Act itself deferred to all other existing law on damages. The previously existing law of punitive damages was simply not abolished by Tort Reform.

CONCLUSION

The telephone testimony ruling by the District Court must be reversed. Without the state attorney's testimony the other two items of excluded evidence also became inadmissible or simply unimportant. The trial court's judgment for both compensatory and punitive damages should be reinstated based on the Mancusi cross petition. The Alamo petition should be denied.

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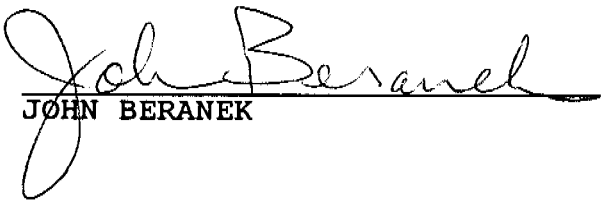
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to J. ROBERT MIERTSCHIN, JR., 4000 Hollywood Boulevard, Presidential Circle, 465 South Tower, Hollywood, FL 33020; G. BART BILLBROUGH, Walton, Lantaff, Schroeder & Carson, One Biscayne Tower, 25th Floor, 2 Biscayne Boulevard, Miami, FL 33131; RICK HELLER, Tripp, Scott, Conklin & Smith, 110 S. E. 6th Street, 28th Floor, Ft. Lauderdale, FL 33301; JEFFREY B. CROCKETT, Coffey, Aragon, Martin and Burlington, P.A., 2699 South Bayshore Drive, Penthouse, Miami, FL 33133; JACK W. SHAW, JR., 225 Water Street, Suite 1400, Jacksonville, FL 32202-5147; and CRAIG B. WILLIS, Assistant Attorney General, Department of Legal Affairs, The Capitol -- Suite 1601, Tallahassee, FL 32399-1050, this 5th day of April, 1993.



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