IN THE SUPREME COURT OF FLORIDA

CASE NO. 80,376

ALAMO RENT-A-CAR, INC.,

Petitioner,

vs.

MICHAEL MANCUSI and STATE OF FLORIDA,

Respondents.

MICHAEL MANCUSI,

Cross-Petitioner,

vs.

ALAMO RENT-A-CAR,

Cross-Respondent.

---/

On Petitions For Discretionary Review From The District Court of Appeal of Florida, Fourth District.

PETITIONER/CROSS-RESPONDENT ALAMO RENT-A-CAR, INC.'S REPLY BRIEF ON THE MERITS OF ITS PETITION AND ANSWER BRIEF ON THE MERITS AS TO THE CROSS-PETITION

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INTRODUCTION

The Petitioner/Cross-Respondent, Alamo Rent-A-Car, Inc., seeks this Court's review of the April 22, 1992 opinion of the Fourth District Court of Appeal. Alamo Rent-A-Car, Inc. v. Mancusi, 599 So.2d 1010 (Fla. 4th DCA 1992).

The Respondent/Cross-Petitioner, Michael Mancusi, filed a cross-notice to invoke and also seeks this Court's review of the April 22, 1992 opinion.

By Order of this Court dated January 26, 1993, this Court accepted jurisdiction of both the petition and cross-petition. Oral argument is scheduled for May 3, 1993.

The Petitioner/Cross-Respondent, Alamo Rent-A-Car, Inc., was the Defendant in the trial court and will be referred to in this Court as the "Defendant" or as "Alamo".

The Respondent/Cross-Petitioner, Michael Mancusi, was the Plaintiff in the trial court and will be referred to in this Court as the Plaintiff or by name.

References to the Appendix filed with Alamo's initial brief will be designated by the letter "A". References to the record on appeal will be designated by the letter "R".

STATEMENT OF THE CASE AND THE FACTS

Mancusi's statement of the case and facts contains numerous glaring misstatements of record evidence. Indeed, on an extremely critical point, the evidence is not misstated, but invented. The following represents a clarification of the most glaring misstatements of importance to this Court's review.

First, Mancusi suggests that he had reserved a car with Alamo for a one-month period. In fact, Veronica Kronin, Mancusi's business associate, made the reservation for him and reserved the car for only one week. (R. 569; 694).

Had Mancusi elected to read his contract with Alamo, he would have seen what he described as an erroneous contract term; he would have seen any misspelling of his name; and he would have seen any other problems or incorrect information on the contract. (R. 694). Instead, he elected not to read his agreement.

No record citation is given to the statement on page 3 of Mancusi's brief concerning the fact that his car was at his office most of the time and that he drove by Alamo everyday. No such record evidence exists. The same is true for his description of confusion at Alamo at the time of his rental, as described on page 3.

Mancusi further incorrectly states that Alamo prosecuted Mancusi for theft of the car. First, Alamo never prosecuted Mancusi, the State of Florida did. Second, Mancusi was charged with failing to return a rented vehicle, not grand theft.

Accordingly, Alamo never "prosecuted" Mancusi for theft on July 22, 1986 or on August 28, 1986, as alleged by Mancusi.[1]

Mancusi also misstates Alamo's contact policy. There is no record evidence that Alamo attempts to contact a party within an overdue vehicle once a day for ten days. The record citations do not support this portrayal. In the ten day period, Alamo makes periodic attempts to contact renters. (R. 434).

At page 5, Mancusi misstates the record concerning Alamo's internal business practice of putting a car "on warrant". When a car is not returned on time, in Alamo jargon, it is put "on warrant". This does not mean that the local police department is contacted, but rather that a car is on warrant because it is overdue. After the car has been on warrant for ten days, the matter is referred to Mr. McArdle, who reviews the matter and then refers the situation to the local police department, if necessary. The local police department, upon a showing of sufficient probable cause, issues an arrest warrant for the person who has not delivered the vehicle. (T. 547-548).

At page 6-8, Mancusi contends that Alamo had an "open credit card" at all times relevant to this case. This statement is not supported by the record. The record shows that the maximum rental period of an Alamo vehicle was twenty-eight (28) days. If a car

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[1] Mancusi correctly notes that the information filed by the state alleged both dates. (A. 2). It is incorrect to suggest, however, that Alamo had any part in the drafting of the information. The record is also devoid of any evidence that the information was attacked on the basis that it contained a wrong date by Mancusi's criminal defense lawyer.

became overdue, attempts to contact the renter were unsuccessful, and the car is reported as stolen, the credit card is closed on the 28th day and charged for accrued monies owed. As testified by Mr. McArdle:

> When you -- when you go to report an automobile stolen, the anticipation is that you're not going to get the automobile back; so, you don't want to keep running a receivable for money that you're probably never going to get.
>
> So, the corporate decision had been made years ago to close the contract out as of the date we report it stolen for whatever we had in the way of a cash deposit or whatever we could get on the credit card.
>
> If we could get a hundred dollars that's what we close it out for. If we had a two-hundred dollar deposit, that's what we close it out for.
>
> It was to close the contract as of the day that the automobile is reported stolen.
>
> (R. 547-548).

Accordingly, the evidence did not show Alamo could charge some "open account", but instead that it billed for the period between June 15 and August 13, the 28-day period. The remaining time the car was outside of Alamo's possession remained due and owing until Mancusi agreed to pay the amount as a condition of the criminal case's dismissal.

Finally, and most importantly, references are made at pages 10 through 13 that Mancusi "had always agreed to pay the rental bill -- whatever amount it might be." Mancusi's brief is littered with such statements even though there is no record support or citation to indicate where that proof may be found. Mancusi never gave such

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testimony. His criminal defense attorney never gave such testimony. No other witness gave such testimony. In fact, the record description of Alamo's billing procedures reflects the exact opposite. (R. 546-553).

The remaining factual misstatements are discussed in the argument portion of this brief.

POINTS ON APPEAL

With regard to Alamo Rent-A-Car, Inc.'s petition for discretionary review, the following points on appeal have been raised:

I. WITH REGARD TO A MALICIOUS PROSECUTION ACTION'S BONA FIDE TERMINATION ELEMENT, DOES THE DEFENDANT BEAR THE BURDEN OF SHOWING A NOLLE PROSEQUI WAS BASED "SOLELY" ON RESTITUTION OR, ALTERNATIVELY, IS PROOF OF THE CIRCUMSTANCE OF DISMISSAL BORNE BY THE PLAINTIFF, LIKE THE CLAIM'S OTHER ESSENTIAL ELEMENTS?

II. WHETHER THE TRIAL COURT ERRED IN DENYING ALAMO'S MOTIONS FOR DIRECTED VERDICT ON THE PROBABLE CAUSE AND MALICE ELEMENTS OF THE PLAINTIFF'S MALICIOUS PROSECUTION CLAIM WHERE THERE IS NO EVIDENCE THAT CAN SUPPORT A JURY FINDING ON THOSE ISSUES IN THE RECORD?

III. WHETHER THE TRIAL COURT ERRED IN FAILING TO DIRECT A VERDICT ON THE ISSUE OF PUNITIVE DAMAGES?

IV. WHETHER THE TRIAL COURT ERRED IN FAILING TO LIMIT ANY PUNITIVE DAMAGE VERDICT TO THREE TIMES THE COMPENSATORY AWARD PURSUANT TO THE REQUIREMENTS OF SECTION 768.73, FLORIDA STATUTES?

With regard to the cross-petition for discretionary review filed by Michael Mancusi, the following point on appeal has been raised:

I. WHETHER THE DISTRICT COURT OF APPEAL, FOURTH DISTRICT, ERRED IN ORDERING A NEW TRIAL WHERE THE TRIAL COURT IMPROPERLY HELD A NOLLE PROSEQUI OF A CRIMINAL CASE AFTER JEOPARDY ATTACHED CONSTITUTED A BONA FIDE TERMINATION OF PROCEEDINGS AS A MATTER OF LAW? (Restated)

SUMMARY OF THE ARGUMENT

The following represents Alamo's summary of the arguments made both as to its petition and the cross-petition filed by Mancusi.

As To Alamo's Petition

I. The Fourth District erroneously placed the burden of proving the bona fide termination of proceedings on Alamo. Further, the Fourth District's requirement that Alamo prove the nolle prosequi was secured "solely for restitution" also conflicts with a substantial body of law in both this and other states. When this Court reviews the governing case authority and the relevant facts of record, it will conclude that the burden of proof belonged with the Plaintiff and that it was not met. Alamo was entitled to a directed verdict, not merely a new trial.

II. The record also shows that there was probable cause to institute criminal proceedings and there was no malice, in fact or as a matter of law.

III. Because there was no evidence of any malice in this case, Alamo's motion for a directed verdict as to the punitive damage claim should have been granted.

IV. The trial court's ruling that § 768.73, Fla. Stat. was inapplicable conflicts with the plain fact that this case was based on alleged misconduct in a commercial transaction, as required for the statute to apply.

As To Mancusi's Cross-Petition

I. Mancusi attempts to mislead this Court about the nature of the Fourth District's reversal in this case. The Fourth District did not merely reverse because 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," as described by Mancusi on page 18 of his Brief. What lead to the reversal in the Fourth District was not only the exclusion of that proof, but the trial court's refusal to permit any evidence or argument as to the bona fide termination element of Mancusi's malicious prosecution claim. The trial court made this ruling because it erroneously believed that a nolle prosequi after double jeopardy attaches constitutes a bona fide termination as a matter of law. Accordingly, the statement by Mancusi that "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," is not true at all. When this Court reviews the record in this case, it will become abundantly clear that Mancusi has misrepresented the ruling of the court below.

ARGUMENT ON ALAMO'S POINTS ON APPEAL

I. WITH REGARD TO A MALICIOUS PROSECUTION ACTION'S BONA FIDE TERMINATION ELEMENT, IT IS THE PLAINTIFF, NOT THE DEFENDANT, WHO BEARS THE BURDEN OF PROVING THE CIRCUMSTANCES OF THE CRIMINAL CASE'S DISMISSAL, INCLUDING THE FACT THAT THE RESOLUTION WAS NEITHER NEGOTIATED, BARGAINED FOR, NOR OTHERWISE PROCURED BY COMPROMISE.

A. The Burden Of Proving The Circumstances Of Dismissal.

In its initial brief on the merits, Alamo showed this Court the substantial body of case law which stands for the proposition that the "bona fide termination" element, like other elements of a malicious prosecution cause of action, must be proved by the plaintiff -- not the defendant. Dorf v. Usher, 514 So.2d 68 (Fla. 4th DCA 1987); Union Oil of California, Amsco Div. v. Watson, 468 So.2d 349 (Fla. 3d DCA), rev. denied, 479 So.2d 119 (Fla. 1985); Gatto v. Publix Supermarket, Inc., 387 So.2d 377 (Fla. 3d DCA 1980). Notwithstanding this body of law, however, the Fourth District has stated in its opinion below that Alamo, not Mancusi, bears the burden of proof on the bona fide termination issue:

> Further, in Liu v. Mandina, 396 So.2d 1155 (Fla. 4th DCA 1981), this court held that "[I]t is defendant's burden to establish that the decision to nolle prosequi was based solely on restitution. Id. at 1156.
>
> Alamo Rent-A-Car, Inc. v. Mancusi, supra, 599 So.2d at 1012.

When presented with Alamo's argument that (1) the Fourth District incorrectly interpreted who bears the burden of proof, and

(2) that the showing required is not a dismissal "solely for restitution", the Plaintiff has answered with little legal argument in response. In fact, the Plaintiff makes no challenge to these arguments at all. Rather than try to support the Fourth District's facially erroneous analysis, the Plaintiff has instead chosen to simply contend it did make the necessary showing of a bona fide termination, without condition and unbargained for, as a part of the Plaintiff's case. Accordingly, the Plaintiff suggests that "there is no necessity to deal with Liu v. Mandina at all." Brief of Mancusi at p. 34.

The Plaintiff would have this Court believe that the Fourth District's Alamo opinion and the Liu predecessor simply stand for the proposition that once the Plaintiff has demonstrated a nolle prosequi based on restitution, then it becomes the Defendant's burden to refute that fact and show that the nolle prosequi was based on restitution. As for the Court's use of the word "solely" in the initial Liu opinion, Mancusi describes the language as "curious but obviously warranted by issues not disclosed on the face of the opinion." Brief of Mancusi at p. 34.

While Mancusi would make light of this precedential language, this Court need only note that Mancusi sang a different song in the Fourth District and before that in the trial court. In the Fourth District, Mancusi argued:

> Alamo also goes to great lengths in citing out-of-state cases of questionable age and application. In doing so, Alamo refuses to deal with the clear and binding precedent written by this court in Liu v. Mandina, 396 So.2d 1155 (Fla. 4th DCA 1981). This case

recognizes the established law that, where a nolle prosequi is based upon restitution, it is not a bona fide termination citing Gatto v. Publix, supra. Mancusi agrees that this is the law. However, the Liu opinion goes further and specifically holds that:

> It is the Defendant's burden to establish that the decision to nolle prosequi was based solely on restitution.

Thus, this court has held that the Defendant Alamo had the burden to show that the admitted nolle prosequi "was based solely on restitution." Once Mancusi proved the nolle prosequi, the burden shifted to Alamo but Alamo refused to recognize this in the trial court or before this court [the Fourth District]. Alamo mentions the Liu opinion only in a footnote and argues that the opinion is simply wrong and that the trial court should not have relied upon it. Indeed, the trial court would have been in serious error had it announced that this court's Liu opinion was wrong. Instead, the trial judge correctly applied the decision and ruled that the nolle prosequi was a bona fide termination and that Alamo had not fulfilled its burden of showing the nolle prosequi to have been based solely on restitution.

Answer Brief of Appellee Michael Mancusi, Fourth District Court of Appeal, pp. 20-21.

Mancusi apparently now recedes from that position, and for good reason. It is axiomatic that the Plaintiff must show the termination of prior proceedings to have been "bona fide". Gatto v. Publix Supermarket, Inc., supra; Jackson v. Biscayne Medical Center, Inc., 347 So.2d 721 (Fla. 3d DCA 1977); Davis v. McCrory Corp., 262 So.2d 207 (Fla. 2d DCA 1972). "Bona fide", as used in this sense, means that the termination of proceedings was not bargained for or obtained by the accused upon a promise of payment or restitution. Jones v. State Farm Mut. Auto. Ins. Co., 578 So.2d

783, 785-86 (Fla. 1st DCA 1991); Union Oil of California, Amsco Div. v. Watson, supra, 468 So.2d at 353; DeMarie v. Jefferson Stores, Inc., 442 So.2d 1014 (Fla. 3d DCA 1983); Weissman v. K-Mart Corp., 396 So.2d 1164 (Fla. 3d DCA 1981); Freedman v. Crabro Motors, Inc., 199 So.2d 745 (Fla. 3d DCA 1967).

This Court should correct the Fourth District's misinterpretation of this element. The Plaintiff, not the Defendant, bears the burden of proof of the bona fide termination element of a malicious prosecution cause of action.[2] This includes requiring the Plaintiff to show that a termination of prior proceedings was not bargained for or obtained upon a promise of payment. As will be seen in the next section, Mancusi did not attempt to make such a showing at trial and for good reason -- he could not.

B. A Directed Verdict Was Warranted

Mancusi makes no meaningful challenge to the evidence showing the nolle prosequi was conditioned upon payment of money to Alamo as well as agreements not to prosecute government officials. He essentially concedes that he never asked any witness about whether the dismissal of the criminal charges had occurred "without strings." He admits no questions were asked of any witness for the Plaintiff to demonstrate that the nolle prosequi had occurred without negotiated conditions. No questions were asked of any

[2] In another part of Mancusi's brief, he suggests that the Liu holding was limited to the factual context of the summary judgment presented in that case. Brief of Mancusi at p. 16. Obviously, the Fourth District did not agree because it applied the same principle to the instant case, which was not a summary judgment matter.

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witness for the Plaintiff to show that the dismissal occurred without any requirement of repayment. The Plaintiff's brief only attempts to mislead this Court by the citation of nonexisting facts.

What the record evidence does show, however, cannot be refuted. Any fair review of the record in this case immediately demonstrates that the termination of the criminal case occurred as part of a negotiated conclusion which included, as a condition, the requirement of a payment to Alamo. The Plaintiff's first exhibit introduced at trial, the legal services statement of the Plaintiff's criminal defense attorney, plainly exposed the fact that the state's nolle prosequi had at least been taken in exchange for a promise of repayment or repayment:

> Money paid to Alamo pursuant to State's dismissal of nolle prosequi of all charges[.]
>
> Plaintiff's Exhibit 1.

Additionally, the proffered testimony of the criminal defense attorney clearly revealed the State's dismissal occurred with conditions, including the condition of reimbursement. (R. 283-284).[3]

The best evidence of the circumstances surrounding dismissal -- the trial transcript from the criminal case -- also explicitly

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[3] In addition to reimbursement, the State's dismissal of the criminal case was conditioned on the Plaintiff releasing all law enforcement personnel associated with Plaintiff's arrest and prosecution. (A. 4-7). The Plaintiff agreed, but then sought to pursue a claim against Alamo, the State's witness. But <u>see</u>, <u>Brothers v. Rosauer's Supermarkets, Inc.</u>, 545 F.Supp. 1041 (D. Mont. 1982) (plaintiff barred from bringing action after dismissal of criminal case in exchange for releases of government officials).

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showed that dismissal did not occur "outright". The colloquy between the criminal case's trial judge and its participants revealed the "negotiated" nature of the criminal case's disposition, including the feature of restitution or repayment:

> Mr. Peacock: We have a resolution, Judge. On the record. After a lengthy discussion with defense counsel and with supervisor Barry Goldstein and other Alamo representatives from out in the hall, the State is of the position that if $368 and change, whether it was --
>
> Mr. Jaffe: 364.
>
> Mr. Peacock: All right. 364.
>
> Mr. Jaffe: Even.
>
> Mr. Peacock: Even. Fine. -- 364 even, that would pay for the balance for which the vehicle was out of Alamo's custody, and in an abundance of fairness as a State Attorney trying to seek fairness and justice --
>
> Mr. Goldstein: Don't say too much.
>
> Mr. Peacock: -- I think that would be the appropriate resolution of this case and I think defense counsel is in agreement with that posture. Is that right?
>
> Mr. Jaffe: That is correct. As I understand what we're going to do, the State is going to nol-pros the charge. My client is going to pay to Alamo $364, representing the period of time form August 13th to August 27th.
>
> * * *
>
> The Court: Ready to pay? Does he have a check that he can write at this time? I just want to know how it goes because now we're going to have the State doesn't want to nol-pros it.
>
> Mr. Jaffe: I represent as an officer of the Court that I have from the client sufficient monies in my trust account to be able to pay the $364.

> The Court: Then you will take that money and write the check over to them from your trust account to Alamo?
>
> Mr. Jaffe: Well --
>
> The Court: Wait. Let me talk to the Defendant.
>
> Mr. Mancusi, we are in the midst of a jury trial at this time. Are you in agreement to the resolution that has been stated by the State Attorney and your attorney in this Case?
>
> The Defendant: Yes, ma'am.
>
> The Court: Anybody force you to go into this?
>
> The Defendant: No.
>
> The Court: Promise you anything?
>
> The Defendant: Not at all.
>
> The Court: This is what you want to do?
>
> The Defendant: Yes.
>
> The Court: Then with the representation that's been made by Mr. Jaffe that the money is in the account and he will make sure that a check is sent to Alamo Rent-a-car with a copy showing that has been done later filed with the Court, do you wish to make your announcement?
>
> Mr. Peacock: Yes, I do. Based on the representation of Mr. Jaffe that he will pay Alamo, we'll at this time announce a nol-pros of the case against Michael Mancusi. (A. 4-7).

The proof in this case overwhelmingly demonstrates that the Plaintiff did not and could not show a <u>bona fide</u> termination.

Mancusi suggests that the proof elicited during his case in chief was sufficient on this score without the testimony of the

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assistant state attorney who dismissed the case.[4] At page 21 of Mancusi's brief, he cites an exchange in which the Plaintiff states that the trial judge said "she was filing a nolle pros." Aside from the fact that a trial judge has absolutely no control over the prosecutorial decision to file a nolle prosequi, and no authority to order that it be done, this Court should more importantly note that the cited exchange was part of a defense proffer of proof which had been excluded from the hearing of the jury! (R. 745). Accordingly, this proof cannot possibly support the Plaintiff's assertion that the testimony adduced in his case at trial was sufficient to carry the burden of proof on the bona fide termination element.

A second passage found at R. 671-672 is cited by the Plaintiff where Mancusi states that the case was nolle prossed and that Judge Henning "told" the assistant state attorney to do so. Aside from the hearsay nature of this proof,[5] it once again does not address the critical question of the circumstances of the dismissal. Were there any conditions or requirements of payment to Alamo or releases to governmental agents before the case would be dismissed? Mancusi obviously could not answer that question in the negative.

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[4] It is incredibly ironic that the Plaintiff argues that his case was sufficiently proved through his own testimony as to the circumstances of dismissal, while at the same time arguing and arguing that Alamo could not present contrary proof from other sources due to the fact that such testimony had to come from the assistant state attorney.

[5] At every other juncture of the case where this testimony was raised, it was prohibited or stricken.

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The failure to either ask or elicit a negative answer defeats Mancusi's claim.

At pages 25 and 26 of Mancusi's brief, the Plaintiff suggests his criminal defense attorney "was getting ready to explain" how the trial judge brought pressure and forced a nolle prosequi. Alamo cannot fathom how this argument is made to this Court when what the witness was "getting ready to explain" was stricken from the record! (R. 277-278). It is ridiculous to suggest that Mancusi "proved a bona fide termination by a nolle prosequi which was not based on payment of restitution", Brief of Mancusi at p. 26, when the evidence to which Mancusi refers was never introduced. Once again, Mancusi would rather travel on misstatements than on the true record.

There is nothing "pristine" about the substantial body of law developed by the courts of this state concerning interpretation of the bona fide termination element. While it might be true that the state and a defendant in a criminal case can discuss and agree on a dismissal which would remain a bona fide termination for subsequent malicious prosecution purposes, the same cannot be said when those discussions and agreements include a "give and take" of substance. If those discussions result in an agreement to pay a victim in exchange for the dismissal, there has been no dismissal under circumstances fairly indicating the innocence of the accused. Della-Donna v. Nova University, Inc., 512 So.2d 1051 (Fla. 4th DCA 1987); Freedman v. Crabro Motors, Inc., 199 So.2d 745 (Fla. 3d DCA 1967).

At page 28 of Mancusi's brief, he argues that there is a distinction between malicious prosecution based on an underlying civil action and malicious prosecution arising from the abandonment of an underlying criminal prosecution. Nothing could be further from the truth. In either situation, a dismissal or other resolution of the underlying case in circumstances not reflective of the case's merits -- such as a dismissal after negotiations and conditioned upon payment to a victim -- defeats a subsequent malicious prosecution claim. The rule of law -- that bona fide termination favorable to a plaintiff does not encompass a termination resulting from negotiation, settlement, or consent -- is true whether it occurs in a civil or a criminal context. Jones v. State Farm Mut. Auto. Ins. Co., 578 So.2d 783 (Fla. 1st DCA 1991); Della-Donna v. Nova University, Inc., 512 So.2d 1051 (Fla. 4th DCA 1987); Union Oil of California, Amsco Div. v. Watson, 468 So.2d 349 (Fla. 3d DCA 1985); Weissman v. K-mart Corp., 396 So.2d 1164 (Fla. 3d DCA 1981); Shidlowsky v. National Car Rental Systems, Inc., 344 So.2d 903 (Fla. 3d DCA 1977); Calleja v. Wiley, 290 So.2d 123 (Fla. 2d DCA 1974); Davis v. McCrory Corp., 262 So.2d 207 (Fla. 2d DCA 1972); Freedman v. Crabro Motors, Inc., 199 So.2d 745 (Fla. 3d DCA 1967).[6]

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[6] At page 28 of Mancusi's brief, it is argued that Alamo cites seven cases that all "involve underlying civil actions and none of which involve underlying criminal prosecutions." This Court need only note that the Weissman, Shidlowsky, Calleja, Davis, and Freedman cases involve underlying criminal cases, contrary to Mancusi's misstatements.

It is truly disingenuous for Mancusi to suggest that Restatement (Second) of Torts Section 659 supports the proposition that a nolle prosequi, in and of itself, constitutes a bona fide termination. Section 659 does state that a nolle prosequi is a formal abandonment by the prosecutor, but cautions that the abandonment must be reviewed to determine the circumstances surrounding it. The comments to Section 659 reveal that the bases of terminations set forth in that paragraph must be read in conjunction with the text found in Section 660.

Section 660 makes clear that the resolution of criminal charges including a nolle prosequi -- through agreement or compromise is indecisive and cannot constitute a sufficient termination so as to serve as a basis for a malicious prosecution claim. According to Section 660:

> A termination of criminal proceedings in favor of the accused other than by acquittal is not a sufficient termination to meet the requirements of a cause of action for malicious prosecution if
>
> (a) The charge is withdrawn or the prosecution abandoned pursuant to an agreement of compromise with the accused[.]

As the Comments to Section 660 note, proceedings are "terminated in favor of the accused," as that phrase is used throughout the Restatement, only when the final disposition indicates the innocence of the accused. Consequently, a termination that is favorable to the accused to prevent any further prosecution of the proceedings will not support a malicious prosecution cause of action if that termination occurs under the circumstances described

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in Section 660 -- a compromised resolution. Indeed, the Comment to Section 660 is particularly instructive:

> The usual ways in which the private prosecutor's withdrawal of the charge against the accused may cause the termination of the criminal proceedings are, first, by causing the committing magistrate to discharge the accused at a preliminary hearing; second, by causing the public prosecutor to enter a nolle prosequi after an indictment has been found.
>
> There are two factors common to the situations dealt with in Clauses (a), (b) and (c): First, the charge is withdrawn for a cause not incompatible with the guilt of the accused or the possibility of obtaining his conviction; second, the withdrawal is at the request or with the consent of the accused or is due to something done by him or on his behalf for the purpose of preventing full and fair inquiry into his guilt or innocence.
>
> Compromise. Although the accused by his acceptance of a compromise does not admit his guilt, the fact of compromise indicates that the question of his guilt or innocence is left open. Having bought peace the accused may not thereafter assert that the proceedings have terminated in his favor.

These Restatement sections make eminently clear that as long as a resolution of a pending criminal case occurs through some negotiated conclusion, that resolution cannot constitute a termination favorable to the Plaintiff. These sections and comments further show the erroneous nature of the Mancusi's argument.

The rule of law is always the same. For a termination to be "a bona fide", it cannot be the product of bargaining, negotiation, or obtained upon a promise of payment or restitution. In the instant case, the undisputed material facts plainly show that the

dismissal of Mancusi's criminal case was in fact the product of such bargaining, negotiation, and promise of repayment.

As his final point in opposition to Alamo's argument, Mancusi argues at pages 30 through 34 that he was always ready, willing, and able to pay the remaining money owed to Alamo. The primary problem with this argument is that it has no record support. Mancusi never testified that he was ready, willing, and able to pay. Indeed, one might ask, if Mancusi was always ready to pay, why he did not do so when the outstanding debt came to his attention prior to his criminal trial. The obvious answer is that he did not want to make any payment until it became in his best interest to do so.[7]

Mancusi's contention that there was no relationship between the debt owed and the criminal charges ignores reality. Alamo was owed money for a part of the time Mancusi had Alamo's car in his possession. Mancusi was charged with failure to redeliver a rented vehicle, which necessarily implies that the car was kept beyond the agreed contract period. It makes eminent sense that the prosecutor

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[7] At page 34 of his brief, Mancusi contends that the state would never have been able to prove his criminal case because the information charged Mancusi with the crime as of August 28, 1986, the day after he returned the rental vehicle. The information, however, also alleged that the crime had occurred as of July 22, 1986, which was the due date for return of the vehicle with Alamo pursuant to the terms and conditions between the parties. Because Mancusi "took the deal", no one can ever know how the criminal case would have ended. But see, Smith v. State, 573 So.2d 1079 (Fla. 4th DCA 1991) (one-day discrepancy in information, to which defendant did not object, did not materially alter offenses charged, and did not compromise defendant's defense; thus, defendant was not entitled to acquittal).

would condition dismissal of the criminal case upon Mancusi's agreement to make Alamo whole.

The Fourth District erroneously placed the burden of proving the bona fide termination of proceedings on Alamo. Further, the Fourth District's requirement that Alamo prove the nolle prosequi was secured "solely for restitution" also conflicts with a substantial body of law in both this and other states. When this Court reviews the governing case authority and the relevant facts of record, it will conclude that the burden of proof belonged with the Plaintiff and that it was not met. Alamo was entitled to a directed verdict, not merely a new trial.

II. THE TRIAL COURT ERRED IN DENYING ALAMO'S MOTIONS FOR DIRECTED VERDICT ON THE PROBABLE CAUSE AND MALICE ELEMENTS OF THE PLAINTIFF'S MALICIOUS PROSECUTION CLAIM WHERE THERE WAS NO EVIDENCE THAT COULD SUPPORT A JURY FINDING ON THOSE ISSUES IN THE RECORD.

Before replying to the legal arguments of Mancusi concerning the probable cause and malice elements of his malicious prosecution claim, Alamo is again obligated to reply to numerous misstatements of fact. First, Mancusi was not charged or prosecuted by Alamo at all. He was prosecuted by the State of Florida. Second, Mancusi was not charged or prosecuted for "grand theft auto", but for "failure to deliver a hired vehicle." (T. 265, 998). Third, Mancusi did not return the rental car to Alamo at all, but instead simply told Alamo to pick it up. (T. 514, 525, 618). Fourth, the rental car bill was not entirely paid off because Alamo closed its file after the car was placed "on warrant". (T. 559-563). Fifth, McArdle did not have Mancusi arrested, Detective Bay did. Sixth, Mancusi's arrest could not have been in retribution for Mancusi's abusive treatment of Desiree Feciskonin because Feciskonin did not relate the incident to McArdle. Mancusi has made factual misstatements which are simply not supported by the record and must be disregarded by this Court.

Only through warping the facts can Mancusi contend that the issue of the existence or non-existence of probable cause can be turned into a jury question. The true facts clearly demonstrated that a reasonable ground of suspicion existed, supported by the

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circumstances, that Mancusi was guilty of failure to deliver a hired vehicle. Harris v. Lewis State Bank, 482 So.2d 1378 (Fla. 1st DCA 1986). Mancusi knew the car was overdue and did not return it -- he failed to deliver a hired vehicle.

Mancusi's statement that the McArdle affidavit was false is blatantly untrue. The McArdle affidavit was factually accurate based upon the information available to him. The vehicle had been rented for a one week period, had not been returned, and unsuccessful attempts to contact Mancusi had been made. On these facts, McArdle signed the affidavit, giving Detective Bay information from which Detective Bay formulated probable cause for Mancusi's arrest.

The most telling fact establishing that probable cause existed came from Detective Bay, who believed that he had probable cause based upon sufficient evidence that Mancusi committed the crime of failure to return a hired vehicle. (T. 916). Unfortunately, the court would not permit this clearly relevant evidence to be admitted at trial. Moreover, the record clearly demonstrates that the State of Florida reviewed the evidence and ultimately elected to issue criminal charges. Those facts alone should have resulted in a directed verdict for Alamo.

Mancusi contends that there was an issue as to whether or not Alamo's attempts to contact Mancusi were meaningful or half-hearted. This comment is erroneously addressed to the probable cause argument and is more related to the malice issue. Mancusi's statement completely contradicts any showing of malice because

half-hearted does not equal the standard of malicious intent. Even assuming Alamo's attempts to contact Mancusi could fairly be described as half-hearted, there is no evidence anywhere in the record which establishes ill-will or malicious intent on the part of Alamo.

The Plaintiff's contention that Mancusi was prosecuted because of his run-in with Feciskonin is specious. First, Feciskonin did not sign the warrant, McArdle did. Second, there is no evidence that Mancusi and Feciskonin had a heated verbal exchange that McArdle knew about. Thus, McArdle, acting on the truthful information provided to him -- car rental for seven days, car not returned, attempts to contact Mancusi unsuccessful -- could not have acted with ill-will or malicious intent.

Finally, Alamo did not manufacture a mysterious bill of additional charges. Rather, Alamo closed the credit card account after twenty-eight days because the car had not been returned and there was no reason to keep the account open when there was no indicia that the car had been or would be returned. The additional amount owed by Mancusi represents the charges he incurred between the closure date and the date on which Alamo retrieved the automobile. Mancusi always owed the additional money and Mancusi never -- ever -- offered to pay it.

The evidence in this record clearly establishes that, as a matter of law, the trial court should have directed a verdict in Alamo's favor on the probable cause issue. The filing of criminal charges by the state clearly demonstrates this fact.

The record shows no proof from which a trier of fact could conclude Alamo's representatives acted with actual malice when the overdue vehicle issue was referred to the police department for prosecution. Mr. McArdle, solely responsible for the referral of this case to the police, testified that there was no ill will or other malicious intent associated with swearing out a complaint affidavit. The testimony of each witness, from Alamo representatives to police department officials, uniformly stated that there was no association between any conversations Mr. Mancusi had with Ms. Feciskonin and the later complaint affidavit. In short, there is nothing in the record from which one could conclude Mr. McArdle acted with actual malice.

There was no proof of legal malice because probable cause existed. This court should note that there was no evidence that Alamo participated in the discretionary decision of the state attorney's office to file charges. When the state attorney's office did so, however, its action clearly established that a basis for the charges independently existed. Dorf v. Usher, 514 So.2d 68 (Fla. 4th DCA 1987). As such, a directed verdict was warranted on this point as well.

III. THE TRIAL COURT ERRED IN FAILING TO DIRECT A VERDICT ON THE ISSUE OF PUNITIVE DAMAGES.

On this point, Mancusi makes no attempt to explain how Alamo Rent-A-Car, Inc., as compared to some employee, engaged in conduct that rises to the level of willful, wanton, malicious, or outrageous behavior. Southern Bell Tel. & Tel. Co. v. Hanft, 436 So.2d 40 (Fla. 1983). In reviewing the arguments made by Mancusi on this issue, it becomes crystal clear that this record cannot support a jury finding of the kind of egregious conduct necessary to support punitive damages. Chrysler Corp. v. Wolmer, 499 So.2d 823 (Fla. 1986); White Const. Co. v. Dupont, 455 So.2d 1026 (Fla. 1984).

First, the contention that Alamo disregarded Mancusi's rights when "their rental car had been returned and full payment made", Mancusi Brief at pp. 10-14, ignores the true evidence in this record. Mancusi never made any attempt to return the rental vehicle until after law enforcement authorities became involved in this case. The record undisputedly shows that Alamo never received full payment until Mancusi's plea bargain in the criminal proceedings. Even if Alamo employees had suffered a "lack of communication", as contended by Mancusi, this fact, along with the others previously described, cannot serve as a basis for supporting a jury verdict on punitive damages.

Mancusi would have this Court believe that one Alamo employee became angry with Mancusi because she thought he was prejudiced against her and another employee purportedly gave false information

to the police.[8] Even if those two facts were true, however, there was absolutely now showing of connexity between those two purported events. When measured against the body of case law discussed in the initial brief on the punitive damage claim, Mancusi has simply failed to show the kind of evidence the courts of this state now require to sustain the draconian remedy of punitive damages.

Mancusi would have this Court believe that Alamo's version of events shows a "simple businessman" being prosecuted for grand theft auto "after the car had been willingly returned and the rental bill fully paid." Mancusi Brief at p. 42. If Mancusi were to accept the true facts in this case, he would note that this simple businessman was not prosecuted for grand theft auto, but for failure to return a rental vehicle; that the rental car was never willingly returned, but had to be towed in after police involvement in its recovery; and that the rental bill had not been fully paid. Given the record in this case, one must ask just how simple, willing or innocent Mancusi actually was.

As noted in the initial brief, there is no showing of actual malice on this record. Given the totality of the conduct charged against Alamo, it cannot be said that there was either willful or wanton disregard for the Plaintiff's rights. The best information available to Mr. McArdle at the time the arrest warrant was issued was that there had been a violation of the rental car statute. Accordingly, the issue of punitive damages should never have been

[8] As previously shown in this brief, there is no basis for the contention that Mr. McArdle gave any "false information" to the police.

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submitted to the jury. See, Jack Eckerd Corp. v. Smith, 558 So.2d 1060 (Fla. 1st DCA 1990), rev. denied, 577 So.2d 1321 (Fla. 1991); Winn Dixie Stores, Inc. v. Gazelle, 523 So.2d 648 (Fla. 1st DCA 1988).

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IV. THE TRIAL COURT ERRED IN FAILING TO LIMIT ANY PUNITIVE DAMAGE VERDICT TO THREE TIMES THE COMPENSATORY AWARD PURSUANT TO THE REQUIREMENTS OF SECTION 768.73, FLORIDA STATUTES.

Mancusi's sole contention concerning the inapplicability of Section 768.73, Fla. Stat., to the instant facts is that a malicious prosecution action is an intentional tort. Because the words "malicious prosecution" were not used in the text of Section 768.73, Mancusi argues that the section has no applicability. In making this argument, however, Mancusi ignores certain well-settled propositions concerning the construction and interpretation of legislative enactments.

The plain meaning of statutory language is the first consideration of statutory construction. St. Petersburg Bank & Trust Co. v. Hamm, 414 So.2d 1071 (Fla. 1982). Only when a statute is of doubtful meaning should matters extrinsic to the statute be considered in construing the language employed by the legislature. Florida State Racing Comm'n v. McLaughlin, 102 So.2d 574 (Fla. 1958). Courts may look to legislative history only to resolve ambiguity in the statute. Department of Legal Affairs v. Sanford-Orlando Kennel Club, Inc., 434 So.2d 879 (Fla. 1983). As the Florida Supreme Court noted in Heredia v. Allstate Ins. Co., 358 So.2d 1353, 1354-55 (Fla. 1978):

> In matters requiring statutory construction, courts always seek to effectuate legislative intent. Where the words selected by the Legislature are clear and unambiguous, however, judicial interpretation is not

> appropriate to displace the expressed intent. [Citations omitted]. It is neither the function or the prerogative of the courts to speculate on constructions more or less reasonable, when the language itself conveys an unequivocal meaning.

Where the text of a legislative enactment is clear and unambiguous, legislative staff pronouncements become superfluous. Shelby Mutual Ins. Co. of Shelby, Ohio v. Smith, 556 So.2d 393 (Fla. 1990).

Section 768.73(1), Fla. Stat., provides in pertinent part:

> In any civil action based on negligence, strict liability, products liability, misconduct in commercial transactions, professional liability, or breach of warranty that involves willful, wanton or gross misconduct, the judgment for the total amount of punitive damages awarded to the claimant shall not exceed three times the amount of compensatory damages awarded. . . .

The language of this statute is not limited to apply only to "negligence" cases. Instead, the provisions of Section 768.73 cover a wide range of claims. Contrary to Mancusi's contention, this statute does specifically cover "intentional tort" cases. Indeed, the statute unequivocally makes clear that causes of action involving "willfulness" are within Section 768.73's ambit.

This is not a situation where the Legislature included certain torts and did not mention others. Instead, the Legislature directed its efforts to enacting legislation that would cover "classes" of tortious conduct. The Legislature's efforts to address classes, as compared to specific torts, derived from the fact that the Legislature sought, as part of its tort reform act, to alleviate the pressure that punitive damages place on economic

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business activity. That goal would not have been served by limiting the construction of "misconduct in commercial transactions" to only particular torts. Instead, the goal was to provide certain reasonable limitations on those causes of actions arising out of the commercial context. In that regard, Section 768.73(1), when appropriately applied, fully accomplishes its purpose.

In the instant case, Mancusi and Alamo entered into a contract for the use of a rental vehicle. According to Mancusi, Alamo wrongfully prosecuted him for the criminal failure to deliver the hired vehicle. Obviously, any prosecution in that regard must derive from Mancusi's failure to have honored what Alamo contended was his contractual obligations under the rental agreement. Clearly, no better example of a cause of action arising out of purported misconduct "in a commercial transaction" can be alleged or shown.

Section 768.73(1), Fla. Stat., was clearly applicable in the instant case. The trial court's failure to apply its provisions deviated from the clear and unambiguous content of that statute. Under such circumstances, this Court should deem Section 768.73, to be applicable to further proceedings in this cause -- should further proceedings be necessary concerning punitive damages.

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ARGUMENT ON MANCUSI'S POINT ON APPEAL

I. THE DISTRICT COURT OF APPEAL, FOURTH DISTRICT, DID NOT ERR IN ORDERING A NEW TRIAL WHERE THE TRIAL COURT IMPROPERLY HELD A NOLLE PROSEQUI OF A CRIMINAL CASE AFTER JEOPARDY ATTACHED CONSTITUTED A BONA FIDE TERMINATION OF PROCEEDINGS AS A MATTER OF LAW. (Restated)

Mancusi attempts to mislead this Court about the nature of the Fourth District's reversal in this case. The Fourth District did not merely reverse because 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," as described by Mancusi on page 18 of his brief. What lead to the reversal in the Fourth District was not only the exclusion of that proof, but the trial court's refusal to permit any evidence or argument as to the bona fide termination element of Mancusi's malicious prosecution claim. The trial court made this ruling because it erroneously believed that a nolle prosequi after double jeopardy attaches constitutes a bona fide termination as a matter of law. Accordingly, the statement by Mancusi that "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," is not true at all. When this Court reviews the record in this case, it will become abundantly clear that Mancusi has misstated the nature of the ruling below.

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A. The Plaintiff's Portrayal Of This Case As A Reversal Based Upon The Improper Exclusion Of Telephone Testimony Is False.

While Mancusi would have this Court believe that the reversal was based on simple evidentiary rulings, the Fourth District rejected that argument -- and for good reason. In the jury trial of this cause, the error of the trial court involved what was excluded, why it was excluded, and the effect of the ruling on the remaining trial proceedings. Only after considering the procedural history of this case will this Court be able to understand, as did the Fourth District, that Mancusi's arguments are disingenuous.

Mancusi's first witness at trial was Howard Jaffe, the Plaintiff's criminal defense attorney. (R. 261-295). During Mr. Jaffe's testimony, the issue arose concerning whether the State's dismissal of its criminal case had been part of a negotiated bargain. At a sidebar conference, the defense argued that the dismissal by the State was not a bona fide termination of the criminal proceedings, an element of any civil malicious prosecution action, because the negotiated dismissal included a number of conditions and required restitution to Alamo, which was reflected on the lawyer's bill admitted into evidence by the Plaintiff. Accordingly, the defense sought to cross-examine the Plaintiff's criminal defense lawyer as to the specific terms and conditions. (R. 283-284). In fact, the defense proffered Mr. Jaffe's testimony, which indicated that the repayment of certain sums to Alamo was a condition of the State's negotiated

nolle prosequi. (R. 293-295). The Plaintiff, as part of the negotiated conclusion of the criminal case, also secured the dismissal after promising not to sue any governmental entities.

Notwithstanding the relevance of this line of inquiry, the trial court denied the request. Initially, the court stated that the evidence was not admissible during the Plaintiff's case, but instead could come in during the defense's proof.[9] The trial court first stated that the defense could not prove the reasons for the State's dismissal of the criminal case without testimony of the assistant state attorney who in fact dismissed the prosecution (R. 287-292), but subsequently abandoned such an analysis for a more hard and fast double jeopardy rule.

Before the time came for the defense to put on its proof of the negotiated nature of the criminal case's resolution, the trial court had decided that a bona fide termination had occurred as a matter of law. By the time the negotiated resolution issue again arose in the Plaintiff's case, the trial court announced its new reason to exclude all evidence on the bona fide termination question and made appearance of the assistant state attorney involved in the underlying criminal case moot.

As part of the Plaintiff's cross-examination in the Plaintiff's case-in-chief, Alamo sought to show the negotiated

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[9] Parenthetically, it should be noted that this initial ruling derived from the Fourth District's holding in Liu v. Mandina, 396 So.2d 1115 (Fla. 4th DCA 1981), which is discussed in other sections of this brief. Accordingly, the trial court was going to make Alamo, not Mancusi, make the showing of a negotiated resolution of the criminal case.

nature of the criminal case's dismissal. (R. 731-743). When the defense attempted to explore this line of inquiry, it was stopped dead in its tracks. The trial court appeared to acknowledge that a "bargained for" _nolle prosequi_ had occurred and typically could not constitute a _bona fide_ termination, but stated that the argument was _irrelevant_ in this case because double jeopardy had attached in the Plaintiff's underlying criminal case. According to the trial court, the dismissal -- after attachment of double jeopardy -- was a _bona fide_ termination on the merits as a matter of law, regardless of the circumstances surrounding it:

> The fact is, that this is not a nolle prosequi bargained for in light of the fact if you fail to keep the bargain, the state can revive the charge.
>
> This is a nolle prosequi that's entered after jeopardy attaches. And whether you keep the bargain or not, the state can never again prosecute you on that charge. It can never be revived.
>
> So it's a bona fide termination, not bargained for on his part. That's the problem.
>
> * * *
>
> Because once jeopardy attaches, no matter what he has said and the state has dismissed, it's a termination in his favor. The case can never be tried again and it's a bona fide termination in his favor.
>
> (R. 739-743).

The trial court continued its discussion of the fact that the circumstances surrounding the dismissal were irrelevant:

> THE COURT: It's not relevant. Been a termination he had a bona fide termination in his favor.

> If the nolle prosequi had been obtained before the double jeopardy attached, it would be quite relevant.
>
> The State of Florida dismissed the charge after jeopardy under the Constitution had attached. There can never again be a trial brought, any type of case. The old one could not have been revived. The -- a new charge could not have been revived. That constitutes a bona fide termination in [Mancusi's] favor.
>
> (R. 744).

From this point in the Plaintiff's case forward until the conclusion of the trial, the judge refused to permit the jury's consideration of <u>any evidence whatsoever</u> or <u>any argument</u> reflecting upon the <u>bona</u> <u>fide</u> termination element. Whether the burden was that of Mancusi or of Alamo, it did not matter to the trial court. No further proof would be entertained by the trial judge on this subject. (R. 770-775; 780-781).

Against this backdrop, Mancusi attempts to convince this Court that the holding of the Fourth District was that the trial court erred in failing to take telephone testimony from the assistant state attorney during the trial. Brief of Mancusi at p. 18. Nothing could be further from the truth. As previously noted, the trial judge had <u>already</u> concluded that it would accept <u>no proof whatsoever</u> on the issue of the negotiated nature of the criminal case's dismissal. This determination was made <u>before the defense even began its case</u>. As this case had procedurally developed, Alamo was not offering the telephone testimony for actual admission at trial -- the court already having refused to admit the substantive evidence on the negotiated dismissal -- but instead

sought to merely preserve the record by giving the court a proffer "from the horse's mouth." The trial court, not wishing to hear the specific testimony from the assistant state attorney himself about a subject rendered moot by the trial court's ruling, stated that there was no necessity for such a telephone proffer and that Alamo could simply read into the record a description of what the testimony was, which Alamo did.[10] The ultimate manner of proffer -- by trial counsel describing the testimony -- was consistent with the accepted practice for preserving an issue of excluded evidence in this state for years.

The true issue in the Fourth District was whether the trial court properly excluded all evidence and argument on the "bona fide termination" element of the malicious prosecution claim once it was established that the nolle prosequi was entered after double jeopardy had attached. According to the trial judge, the nolle prosequi established the "bona fide termination" element as a matter of law. The Fourth District, agreeing with Alamo's analysis, found that the trial court's ruling on the bona fide termination element was in error because the dismissal after jeopardy attaches does not indicate innocence as a matter of law:

> The transcript of Mancusi's criminal case, proffered by Alamo during the malicious prosecution trial, reveals that after approximately one-half day of testimony in Mancusi's criminal trial, the State announced a nolle prosequi following lengthy discussions between the State, Alamo, and Mancusi. During these discussions it was determined that the

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[10] The Plaintiff raised absolutely no objection to this procedure.

> State would announce a nolle prosequi, and Mancusi would pay $364.00 to Alamo and execute a release in favor of the City of Ft. Lauderdale, the State Attorney's Office, the State of Florida, and the City of Alamo. Alamo also proffered the testimony of Mancusi's criminal attorney, which tended to indicate that the nolle prosequi was announced after a bargain had been struck between the state and Mancusi.
>
> The trial court did not allow Alamo to admit testimony regarding the circumstances surrounding the nolle prosequi because the trial court ruled that the nolle prosequi Mancusi had received after jeopardy had attached in his criminal case constituted a bona fide termination of the criminal litigation in Mancusi's favor, as a matter of law. This ruling was in error.
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> *　　　*　　　*
>
> In the instant case, the trial court's ruling[1] was in error because a nolle prosequi entered after jeopardy attaches does not indicate the innocence of the accused, as a matter of law. Rather, 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 Mancusi's attorney, the criminal case transcript, and the proffered testimony of the assistant state attorney who prosecuted Mancusi's criminal case.[2] Only after considering this evidence could the trier of fact determine whether the nolle prosequi Mancusi received was bargained for or bona fide.
>
> Alamo Rent-A-Car, Inc. v. Mancusi, supra, 599 So.2d at 1011-1013.

Footnote 2 of the court's opinion, on which Mancusi seeks to build his entire cross-petition claim, unequivocally shows only a factual recitation by the Fourth District as to the manner by which the assistant state attorney's testimony was proffered:

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.

Alamo Rent-A-Car, Inc. v. Mancusi, supra, 599 So.2d at 1012 n.2.

When this Court reads the Fourth District's opinion in this case, the only reasonable conclusion to be drawn is that the Fourth District was describing the evidentiary proffer, not formulating some new rule concerning telephonic testimony in trials. Alamo never asserted such a position in the trial court, in the Fourth District Court of Appeal, and does not do so in this Court.[11]

Much of Mancusi's argument is structured around the dissent from the Fourth District's opinion. Indeed, Mancusi urges this Court to adopt the dissent's characterization of the trial court rulings as "evidentiary in nature." What the dissent missed, but the majority did not, was the fact that the trial court had already ruled as a matter of law that no testimony or argument would be had on the bona fide termination issue. The Fourth District correctly noted in footnote 1 of its opinion that the trial judge found the

[11] None of the cases cited by Mancusi specifically address the proposition they are cited for -- that telephonic testimony is impermissible. On the substantive point raised by Mancusi, the admissibility of telephonic testimony is governed by Florida Rule of Judicial Administration 2.071(c), which provides that a judge may, with the consent of all parties, direct the testimony of a witness be taken through communication equipment. Once again, however, this issue is a true "red herring." Alamo never advocated -- and the Fourth District never held -- that failure to take testimony by telephone during the jury trial was error.

bona fide termination element to exist early in the Plaintiff's case-in-chief and no testimony on this subject would thereafter be permitted:

> The dissent mischaracterizes the trial court's ruling as "evidentiary in nature," quoting from the trial court's post-judgment orders. In these post-judgment orders, the trial court sought to justify its earlier ruling that the bona fide termination element had been established as a matter of law. The court's ruling came during cross-examination of Mancusi as Alamo was attempting to introduce evidence that Mancusi paid restitution to Alamo:
>
> > THE COURT: It's not relevant. Been a determination he had a bona fide termination in his favor.
> >
> > If the nolle prosequi had been obtained before double jeopardy attached, it would be quite relevant.
> >
> > The State of Florida dismissed the charge after jeopardy under the Constitution had attached. There could never again be a trial brought, any type of case. The old one could not have been revived. The - a new charge could not have been revived. That constitutes a bona fide termination in [Mancusi's favor]. (R. 744).
>
> Alamo Rent-A-Car, Inc. v. Mancusi, supra, 599 So.2d at 1012 n.1.

Any reasonable review of the Fourth District's opinion, footnote 2, relied upon so heavily by Mancusi here, demonstrates that the majority did nothing more than show the proffer made to the court of what the assistant state attorney's testimony would have been had Alamo been permitted to call him at trial. The trial judge had already concluded that it would accept no proof whatsoever on the

issue of the negotiated nature of the criminal case's dismissal before the defense even began its proof.

This Court will find no assertion by Alamo that reversal was warranted in the Fourth District Court of Appeal because the trial court failed to take "telephone testimony" from the assistant state attorney. Alamo did object in the Fourth District that it was prohibited from presenting any testimony, other documentary proof, or argument to show the negotiated nature of the criminal case's resolution. It was precluded from doing so by the trial court's bona fide termination ruling. Footnote 2 of the Fourth District's opinion is nothing more than an acknowledgement of the manner by which Alamo made the proffer of the assistant state attorney's testimony and what his trial testimony would have been -- not some earth-shaking new rule of law on "telephone testimony", as Mancusi would mislead this Court to believe.

B. The Criminal Trial Transcript

With regard to the criminal trial transcript, the contents of that document was admissible and relevant to show the prosecution's state of mind at the time of the dismissal as well as to demonstrate admissions against interest by Mancusi. It would have also served as a basis for inquiry with Mancusi's criminal defense counsel. Contrary to the Plaintiff's suggestion, the assistant state attorney's testimony -- excluded by the trial court -- was not a necessary prerequisite to the transcript's admissibility.

It is amazing that the Plaintiff would characterize the exclusion of this evidence as "harmless error." While the

Plaintiff would like this Court to believe that the $365.00 payment was totally unrelated to the crime charged, it certainly was related to the dismissal of that prosecution. Regardless of what the assistant state attorney said earlier in the case, the dismissal of the prosecution clearly was contingent upon the payment:

> Mr. Peacock: We have a resolution, Judge. On the record. After a lengthy discussion with defense counsel and with supervisor Barry Goldstein and other Alamo representatives from out in the hall, the State is of the position that if $368 and change, whether it was --
>
> Mr. Jaffe: 364.
>
> Mr. Peacock: All right. 364.
>
> Mr. Jaffe: Even.
>
> Mr. Peacock: Even. Fine. -- 364 even, that would pay for the balance for which the vehicle was out of Alamo's custody, and in an abundance of fairness as a State Attorney trying to seek fairness and justice --
>
> Mr. Goldstein: Don't say too much.
>
> Mr. Peacock: -- I think that would be the appropriate resolution of this case and I think defense counsel is in agreement with that posture. Is that right?
>
> Mr. Jaffe: That is correct. As I understand what we're going to do, the State is going to nol-pros the charge. My client is going to pay to Alamo $364, representing the period of time form August 13th to August 27th.
>
> * * *
>
> The Court: Ready to pay? Does he have a check that he can write at this time? I just want to know how it goes because now we're going to have the State doesn't want to nol-pros it.

Mr. Jaffe: I represent as an officer of the Court that I have from the client sufficient monies in my trust account to be able to pay the $364.

The Court: Then you will take that money and write the check over to them from your trust account to Alamo?

Mr. Jaffe: Well --

The Court: Wait. Let me talk to the Defendant.

Mr. Mancusi, we are in the midst of a jury trial at this time. Are you in agreement to the resolution that has been stated by the State Attorney and your attorney in this Case?

The Defendant: Yes, ma'am.

The Court: Anybody force you to go into this?

The Defendant: No.

The Court: Promise you anything?

The Defendant: Not at all.

The Court: This is what you want to do?

The Defendant: Yes.

The Court: Then with the representation that's been made by Mr. Jaffe that the money is in the account and he will make sure that a check is sent to Alamo Rent-a-car with a copy showing that has been done later filed with the Court, do you wish to make your announcement?

Mr. Peacock: Yes, I do. Based on the representation of Mr. Jaffe that he will pay Alamo, we'll at this time announce a nol-pros of the case against Michael Mancusi. (A. 4-7). [emphasis added].

The exclusion of this evidence was devastating to the defense. It unequivocally showed that the dismissal was conditioned and bargained for, but the jury could not be so told. Had the evidence

been admitted, Alamo would have been entitled to a directed verdict. The evidence's exclusion was not "harmless error".

C. Criminal Defense Attorney

With regard to the testimony of Mr. Mancusi's criminal defense attorney, the Plaintiff again plays fast and loose with the facts. Mancusi never offered to pay the remaining money owed to Alamo, as demonstrated in the statement of the case and facts portion of this brief. That statement bears reiterating. There is nothing in this record to show Mancusi ever offered to pay the additional money owed to Alamo for the time the car was out of Alamo's custody. The Plaintiff has never been able to cite to one place in the record where his offer to pay is demonstrated. No such record citation exists because no such evidence exists in this record. That plain and that simple.

The proffered testimony of the criminal defense attorney, like the criminal trial transcript, totally demolished Mancusi's case. The attorney's testimony -- by direct question and answer -- showed Mancusi's dismissal was negotiated and bargained for:

> Q. Mr. Jaffe, was it part of the nolle pros by the State of Florida that you would pay Alamo $364 and in turn for your payment of $364 on behalf of Mr. Michael Mancusi that they would nolle pros the case?
>
> A. The $364 was added at the very tail end of things. The State was going to nolle pros the charges.
>
> They communicated with Alamo. Alamo was insistent upon getting this money back, the $360; and ultimately that was announced as one of the conditions, as well as the fact that we agreed not to

bring charges against the police department, a civil claim, and release the City and the State Attorney's office, that kind of thing.

Q. But the bottom line is that they would nolle pros as one of the conditions that Mr. Mancusi pay back $364 back to Alamo. That is one of the conditions as was agreed to by you for part of the nolle pros?

A. That was --

Q. One of the conditions?

A. Ultimately that was one of the conditions. If you don't want me to testify as to what happened earlier, that's fine. But that was one of the conditions that we agreed to.

* * *

Q. Also, were you present when Mr. Mancusi was asked by the Court if he agreed to this stipulation and he stated that he agreed to this stipulation?

A. I - I have a recollection of that, of our appearing in front of the Judge, yes.

(T. 293-294).

The record does not indicate that the State was going to dismiss the case anyway, as Mancusi would have this Court believe. The record <u>does</u> indicate that the dismissal was secured after Mancusi promised to repay Alamo the money owed for its loss of use of its vehicle. On that condition, the state agreed to drop the charges. The negotiated nature of the resolution, however, was precluded from being presented to the jury by way of proof or argument by the trial court's erroneous double jeopardy ruling.

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The trial court's holding that the criminal case's dismissal was a _bona fide_ termination as a matter of law precluded the jury from examining the evidence in the criminal case trial transcript, the testimony of Mancusi, the testimony of his criminal defense attorney, the testimony of the assistant state attorney, and all other evidence on the bona fide termination question. No argument was permitted to support the defense's contention that the dismissal had been negotiated. Under such circumstances, a new trial, at the very least, was mandated by the erroneous nature of the trial court's rulings and its impact on the defense's case. The Fourth District plainly recognized this fact and this Court should not disturb that ruling.

CONCLUSION

Based upon the foregoing rationale and authorities, Alamo Rent-A-Car, Inc., respectfully requests this Honorable Court to modify the Fourth District's opinion in this case so as to require that judgment be entered in favor of Alamo. In the alternative, should this Court find that Alamo's directed verdict arguments are not supported by this record, Alamo is nonetheless entitled to its new trial with the burden of proof, on all issues, placed on the party who must appropriately bear it on a malicious prosecution claim -- the Plaintiff.

With regard to the cross-petition filed by Michael Mancusi, Alamo Rent-A-Car, Inc. respectfully requests this Honorable Court to reject, in all respects, those arguments. They constitute "red herrings" and are not based on true record evidence. The Fourth District correctly concluded, at the very least, that a new trial was warranted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 26 day of April, 1993 to: RICHARD D. HELLER, ESQ., Tripp, Scott, Conklin & Smith, 110 Southeast 6th Street, 28th Floor, Ft. Lauderdale, FL 33301; CRAIG WILLIS, ESQ., Assistant Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, FL 32399-1050; ROBERT MIERTSCHIN, JR., ESQ., 4000 Hollywood Boulevard, Presidential Circle, 465 South Tower, Hollywood, FL 33020; THOMAS M. BURKE, ESQ. and ADAM R. LITTMAN, ESQ., Cabaniss, Burke & Wagner, Post Office Box 2513, Orlando, Florida 32802; and Federal Express mailing to: JOHN BERANEK, ESQ., Aurell, Radey, Hinkle & Thomas, 101 North Monroe Street, Suite 1000, P.O. Drawer 11307, Tallahassee, FL 32302; and WALTER G. CAMPBELL, JR., ESQ., 700 Southeast 3rd Avenue, Suite 100, Fort Lauderdale, FL 33316.

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