IN THE SUPREME COURT OF FLORIDA

CASE NO. 80,376

ALAMO RENT-A-CAR, INC.,

Petitioner.

vs.

MICHAEL MANCUSI,

Respondent.
_____/

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

MICHAEL MANCUSI,

Cross-Petitioner,

ALAMO RENT-A-CAR,

Cross-Respondent.
_____/

CROSS-RESPONDENT
ALAMO RENT-A-CAR, INC.'S JURISDICTIONAL BRIEF

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TABLE OF AUTHORITIES

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STATEMENT OF THE CASE AND THE FACTS

Although Mancusi[1] acknowledges that Alamo's statement of the case and facts contained in Alamo's initial brief represents a true and correct rendition of events, Mancusi nonetheless sets forth detailed recitations from the dissenting judge's opinion. This presentation of extraneous material is made even though Mancusi and his counsel are well aware that well established authority specifically prohibits such a practice. Alamo could easily demonstrate in the record below how the dissenting opinion's factual statements are erroneous and why the conclusions are inaccurate, but that exercise ultimately would be irrelevant to aiding this Court in the performance of its jurisdictional evaluation. See, Reaves v. State, 485 So.2d 829 (Fla. 1986) ("conflict between decisions must be express and direct, i.e., it must appear within the four corners of the majority decision. Neither a dissenting opinion nor the record itself can be used to establish

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[1] The Petitioner/Cross-Respondent, Alamo Rent-A-Car, Inc., has sought 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). Its brief supporting review on another issue has already been submitted.

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. As to that petition, however, this Court does not have a jurisdictional basis for review because the conflict prerequisites required by Article V, Section 3(b)(3), Fla. Const. (1980) and Fla.R.App.P. 9.030(a)(2)(A)(iv) are totally absent.

The Petitioner/Cross-Respondent 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 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 brief in support of its prior brief will be designated by the letter "A".

jurisdiction"). Alamo's statement of the case and facts is derived exclusively from the Fourth District Court of Appeal's opinion below, Alamo Rent-A-Car, Inc. v. Mancusi, 599 So.2d 1010 (Fla. 4th DCA 1992) and represents a recitation of the only facts from which jurisdictional decisions can be made.

This was an appeal brought by Defendant Alamo from a final judgment awarding Plaintiff, Michael Mancusi, $300,000.00 in compensatory damages and $2,700,000.00 in punitive damages in a malicious prosecution action. Mancusi brought a malicious prosecution action against Alamo subsequent to the termination of a criminal case in which Mancusi was charged with and prosecuted for having violated § 817.52(3), Fla. Stat. (1985), for failure to redeliver a hired vehicle. (A. 2).

The facts leading up to Mancusi's arrest on the criminal charges were contested at trial. The Fourth District noted, however, that Mancusi rented a vehicle from Alamo with the alleged belief that his contract entitled him to use of the vehicle for one month, while the contract showed that the rental period was for one week only. Eventually, Alamo was able to contact Mancusi, who stated his belief that he had rented the vehicle for one month, and asked Alamo to retrieve the vehicle from his business location because it would not start. Alamo had the vehicle towed to its lot, and collected payment for only a portion of the time that Mancusi had used the vehicle. Although the vehicle had been returned, the Fort Lauderdale Police Department continued its investigation into

the incident, and approximately two weeks after the vehicle was returned, Mancusi was taken to the Fort Lauderdale Police Department, questioned, and arrested. (A. 2).

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 State would announce a nolle prosequi, and Mancusi would pay $364.00 to Alamo and execute a release of governmental entities. Alamo also proffered the testimony of Mancusi's criminal attorney, which indicated that the nolle prosequi was announced after a bargain had been struck. (A. 2-3).

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 received after jeopardy had attached in his criminal case constituted a bona fide termination in Mancusi's favor as a matter of law. In the Fourth District Court of Appeal, however, this ruling was found to be erroneous. (A. 3).

The Fourth District Court found that the trial court's ruling 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 a 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. The Fourth District stated that only after considering this evidence could the trier of fact determine whether the nolle prosequi Mancusi received was bargained for or bona fide. The Fourth District reversed the judgment in favor of Mancusi and remanded the cause for a new trial. (A. 3-4).[2]

SUMMARY OF THE ARGUMENT

There is no "telephone testimony" issue in this case. The appellate court's reference to a telephone proffer was simply factual in nature and did not form the basis of any holding by the Fourth District. When this court reviews the opinion below, it will note the obvious context in which the complained of reference was made and the fact that the Fourth District made no rulings which would support conflict jurisdiction on Mancusi's cross-petition for discretionary review.

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[2] In the event that this Court wishes to review, for any reason, the facts and argument presented by Alamo in the Fourth District below, a copy of Alamo's initial brief can be found at Appendix 6-91, which was filed with the Alamo brief supporting jurisdiction on the notice it filed.

ARGUMENT

THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL WAS NOT IN CONFLICT ON THE ISSUE OF TELEPHONE TESTIMONY SO AS TO PERMIT REVIEW BY THIS COURT PURSUANT TO ARTICLE V, SECTION 3(b) (3), FLA. CONST. (1980).

With utter disregard for the true holding of the Fourth District, Mancusi misrepresents what transpired below. Waiving the quintessential red-herring, Mancusi tells this court that the Fourth District "has now ruled that telephone testimony in lieu of live testimony must be admitted even over the objection of a party." Mancusi jurisdictional brief, p.5. When this court reviews the facts of this case and the holding of the Fourth District, it will be readily apparent that Mancusi mischaracterizes the Fourth District's holding in an attempt to manufacture a basis for review which does not otherwise exit.

The true issue in the Fourth District was whether the trial court erroneously excluded all evidence on the "bona fide termination" element of the malicious prosecution action once the court learned that a 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 a 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 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 determination of the criminal litigation in Mancusi's favor, as a matter of law. This ruling was in error.

* * *

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.

Mancusi, 599 So.2d at 1011-1013.

Footnote 2 of the opinion, on which Mancusi seeks to build his entire jurisdictional case, constitutes only a factual recitation by the court below of 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.

Mancusi, 599 So.2d at 1012 n.2.

What Mancusi disingenuously omits from his brief, however, is the fact that at the time of the testimonial proffer, the trial court had already ruled as a matter of law that no testimony would be taken on the bona fide termination issue. As the Fourth District correctly noted in footnote 1 of its opinion, the trial judge found the bona fide termination element to exist early in the Mancusi's case-in-chief and no testimony on this subject was thereafter 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).
>
> Mancusi, 599 So.2d at 1012 n.1.

As should be obvious in any reasonable review of the Fourth District's opinion, footnote 2, relied upon so heavily by Mancusi here, constitutes nothing more than a showing of 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.

On these facts, Alamo was not offering any telephone testimony for actual admission at trial -- the court already having refused all testimony on the issue -- when Alamo sought to preserve the record. The trial court, not wishing to delay the proceedings, stated that there was no necessity for a telephone proffer and that Alamo could simply read into the

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record a description of what the testimony would have been, which Alamo did.[3] The ultimate manner of proffer -- by trial counsel describing the excluded testimony -- was consistent with the long-recognized and accepted practice in this State of preserving an issue for review.[4]

This Court will find no assertion by Alamo that reversal was warranted because the trial court failed to take "telephone testimony" from the assistant state attorney. Nothing could be further from the truth. Alamo wanted to presented live testimony and other documentary proof to show the negotiated nature of the criminal case's resolution, but was precluded from doing so by the trial court. Footnote 2 of the opinion below is nothing more than an acknowledgment 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.

A district court of appeal decision is reviewable only if it expressly conflicts with a decision of this court or another district court of appeal. It is not enough to show that the district court decision is effectively in conflict with other appellate decisions. By definition, the term "expressly"

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[3] Notwithstanding Mancusi's suggestion to the contrary, this Court will find no objection of the Plaintiff to this proffer.

[4] Interestingly, Mancusi makes no challenge to the Fourth District's holding that these other sources of evidence were wrongfully excluded and thus necessitated re-trial.

requires some written representation or expression of the legal grounds supporting the decision under review. While it is not necessary that the district court of appeal explicitly identify a conflicting appellate opinion, the district court must at least address the legal principles which were applied as a basis for the decision. Ford Motor Company v. Kikis, 401 So.2d 1341 (Fla. 1981); Jenkins v. State, 385 So.2d 1356 (Fla. 1980); Padovano, Florida Appellate Practice, §2.10. The conflict must be of such magnitude that if both decisions were rendered by the same court, the later decision would have the effect of overruling the later decision. Kyle v. Kyle, 139 So.2d 885 (Fla. 1962). Mancusi's arguments meet none of the above-mentioned tests. See, also, Department of Revenue v. Johnston, 442 So.2d 950 (Fla. 1983) (conflict jurisdiction absent if the cause is distinguishable on its facts from purportedly conflicting cases.)

When this court takes all of the foregoing into consideration, it must conclude that there is no jurisdictional basis for reviewing the issues raised by Mancusi in his brief.

CONCLUSION

Based upon the foregoing rationale and authorities, Alamo Rent-A-Car, Inc. respectfully requests this Honorable Court to decline to exercise its discretionary jurisdiction over the issues raised by Mancusi in his brief. Mancusi has failed to make any showing to support conflict jurisdiction.

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 30th day of September, 1992 to: WALTER G. CAMPBELL, JR., ESQ., 700 Southeast 3rd Avenue, Suite 100, Fort Lauderdale, FL 33316; RICHARD D. HELLER, ESQ., Tripp, Scott, Conklin & Smith, 1110 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; and JOHN BERANEK, ESQ., Aurell, Radey, Hinkle & Thomas, 101 North Monroe Street, Suite 1000, P.O. Drawer 11307, Tallahassee, FL 32302; THOMAS M. BURKE, ESQ., and ADAM R. LITTMAN, ESQ., Cabaniss, Burke & Wagner, Post Office Box 2513, Orlando, Florida 32802.

Respectfully submitted,

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