IN THE SUPREME COURT OF FLORIDA

CASE NO. 80,376

ALAMO RENT-A-CAR, INC.,

Petitioner.

vs.

MICHAEL MANCUSI and STATE OF, FLORIDA,

Respondents.
_____/

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.
_____/

PETITIONER ALAMO RENT-A-CAR, INC.'S INITIAL BRIEF ON THE MERITS

(With Separately Bound Appendix)

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INTRODUCTION

The Petitioner, 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). This Court has jurisdiction because the opinion below expressly and directly conflicts with a decision of another district court of appeal or of the Supreme Court on the same question of law. Article V, Section 3(b)(3), Fla. Const. (1980); Fla.R.App.P. 9.030(a)(2)(A)(iv).

The Petitioner, Alamo Rent-A-Car, Inc., was the Defendant in the trial court, the Appellant in the Fourth District Court of Appeal, and will be referred to as the Petitioner, the Defendant, or as "Alamo".

The Respondent, Michael Mancusi, was the Plaintiff in the trial court, the Appellee in the Fourth District Court of Appeal, and will be referred to in this brief as the Plaintiff or by name.

Respondent State of Florida became a party to this lawsuit when it intervened in post-trial proceedings to seek a portion of a punitive damage award pursuant to § 768.73(2), Florida Statutes. This party will be referenced as the Intervenor or the State of Florida.

References to the record and appendix will be designated by the letters "R" and "A", respectively.

STATEMENT OF THE CASE AND THE FACTS

In order to develop a full understanding of the legal issues raised by both sides in this case, it is necessary to understand not only the case's complex underlying facts, but its procedural history as well. Simply stated, it is important to understand both what was said and when the statement was made. In light of the foregoing, Alamo presents the following detailed statement of the case and facts:

In his amended complaint, the Plaintiff, Michael Mancusi, sued Defendants Edward McArdle and Alamo Rent-A-Car, Inc. (R. 1029-1034). According to that pleading, the Plaintiff entered into an automobile rental agreement with Alamo on July 15, 1986 for a twenty-eight (28) day period, but the contract itself reflected that the agreement was for a period of only one week, which would have made the car's return due on July 22, 1986. The Plaintiff further alleged that the car was subsequently listed in Alamo's overdue filing system and that a warrant issued for the Plaintiff's arrest, even though Alamo had the Plaintiff's local telephone numbers and addresses. According to the Plaintiff, the Defendants failed to conduct a proper and thorough factual investigation prior to referring the overdue vehicle to the police for handling. McArdle, it was alleged, was an Alamo employee.

In Count I, the Plaintiff sued both Defendants for malicious prosecution. The Plaintiff asserted that the

Defendants falsely accused the Plaintiff of criminal conduct in the State's prosecution of the Plaintiff for failure to return a hired vehicle, a third degree felony violation of § 817.52, Fla. Stat., in the case of State of Florida v. Michael Mancusi, Seventeenth Judicial Circuit Case No. 86-13706-CF. The Plaintiff further contended that the criminal proceedings, which ultimately resulted in a nolle prosequi, were maliciously instituted by the Defendants. As a result, the Plaintiff sought damages.

In Count II, the Plaintiff sued the Defendants for negligence. According to the allegations in Count II, the Defendants owed a duty of reasonable care under the automobile rental agreement and breached that duty by failing to ensure that the Plaintiff understood the terms of the rental agreement; failing to ascertain whether payment had been made for the use of the rental vehicle before issuing a warrant and instituting a criminal complaint; failing to contact the Plaintiff prior to issuance of the complaint; and failing to make a reasonable determination as to whether Plaintiff had been granted an extension on his rental period. The Plaintiff's amended complaint concluded by alleging that the Plaintiff had been proximately caused harm. (R. 1029-1034).

After the Defendants denied the material allegations in the amended complaint, a jury trial was conducted before the Honorable Robert Lance Andrews, Circuit Court Judge of the Seventeenth Judicial Circuit in and for Broward County, Florida

on July 23 through 27, 1990, solely as to Defendant Alamo on the malicious prosecution claim.[1]

The Plaintiff's first witness was Howard Jaffe, the Plaintiff's criminal defense attorney. (R. 261-295). Mr. Jaffe advised the jury that the Plaintiff had been charged with a violation of Section 817.52, Florida Statutes, which provides that:

> Failure to Deliver Hired Vehicle -- Whoever, after hiring a motor vehicle under an agreement to redeliver the same to the person letting such motor vehicle or his agent, at the termination of the period for which it was let, shall, without the consent of such person or persons and with intent to defraud, abandon or willfully refuse to redeliver such vehicle as agreed shall, upon commission, be guilty of a felony of the third degree[.]

Mr. Jaffe also described the various stages in a criminal proceeding and told the jury about the kind of professional services which are rendered by a criminal defense attorney. (R. 264-267). After describing his services and his unsuccessful attempts to convince the assistant state attorney that the State did not have a case, Mr. Jaffe said the matter proceeded to trial. In the midst of trial, however, Mr. Jaffe testified that the State announced it was no longer going to prosecute the charges against the Plaintiff and dismissed the case. (R. 296-298). Mr. Jaffe concluded his testimony by

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[1] Prior to trial, the Plaintiff abandoned all claims against Edward McArdle and the negligence claim against Alamo was dismissed. (R. 3; 1211-1212).

describing the Plaintiff's mental condition during the time criminal charges were pending. (R. 299).

In the midst of Mr. Jaffe's testimony, an 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 in the lawyer's bill that the Plaintiff placed in evidence. The defense wanted to cross-examine the Plaintiff's criminal defense lawyer to show those terms and conditions. (R. 283-284). In fact, the defense proffered Mr. Jaffe's testimony, which showed that the repayment of certain sums to Alamo was a substantial condition of the State's negotiated nolle prosequi. (R. 293-295).

The trial court, however, 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. (R. 284-285). The court also 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). Ultimately, the court stated that proof of the negotiated dismissal would not be permitted without first obtaining the

testimony of the assistant state attorney who made that decision. (R. 292; 301-302).

The next witness at trial was Anita Howard, Alamo's corporate representative. Ms. Howard provided testimony concerning the automobile rental process and the interplay of the computer system. The witness described the contents of each computer screen and how information is imputed into the computer system. (R. 308-312).

With regard to oral extensions of rental contracts, which the Plaintiff said had been granted for a period of weeks, Ms. Howard stated that a contract period would be extended up to 48 hours under unusual circumstances and that vehicles were rented for no more than twenty-eight (28) days under any circumstances. (R. 312-313). In the event that an extension was requested, a contract number would have to be provided to an Alamo representative, the contract pulled up on the computer screen, and notations made of the additional revision information. (R. 313-315). Once such a revision is made, prior information is not deleted. The revision is simply noted in the computer file. (R. 315).

Evelyn Penker, an Alamo administrative clerk, was also called to testify by Plaintiff at trial. (R. 343). According to this witness, Alamo spends the first ten (10) days after a car becomes overdue attempting to make contact with the customer involved. Depending upon workload, efforts to contact customers are to be repeated. (R. 350-351). With regard to

Mr. Mancusi's overdue vehicle, Ms. Penker said that she made two attempts to contact Mr. Mancusi herself and had been unsuccessful after his car became overdue. (R. 355-356). On the issue of oral extensions of rental contracts, Ms. Penker also stated that they were not permitted and that customers were requested to make any revisions or extensions in person. (R. 361). The witness did state, however, that in "extreme emergencies", a telephone extension may be given. (R. 361).

Linda Gibbons was the Alamo rental agent for the Plaintiff's car. (R. 377-390). In taking down his information, Ms. Gibbons copied the Plaintiff's name from his driver's license, but spelled his last name "M-A-N-C-U-S-A." The car was rented from July 15, 1986 to July 22, 1986. (R. 381). Payment was secured by the credit card of Veronica Cronin, the Plaintiff's friend. (R. 381-382). Ms. Gibbons took down the Plaintiff's address, his place of employment, his work telephone, his home telephone, and his local place of stay. On the issue of telephonic rental extensions, Ms. Gibbons testified that one could be secured by providing a rental agent with the contract number. When such extensions were requested, the rental agents would obtain another credit approval from the credit card company. (R. 382-384).

Desiree Feciskonin also was a rental agent for Alamo. Ms. Feciskonin testified that an oral extension of a rental contract could have been secured in 1986 so long as the driver's credit card would approve an extension and provided

that the maximum rental was not more than 28 days. To obtain an extension, the agreement number would have to be provided to the agent and a new time and date for return entered into the computer. (R. 429-431).

Ms. Feciskonin further testified that her files reflected the vehicle's due date as July 22, 1986. (R. 424). According to office procedure, rental agents attempt to contact the customer when a vehicle becomes overdue. If no contact is received from the customer, a demand letter is sent. (R. 426-436). In the instant case, the files reflected a number of attempts to contact the Plaintiff before the demand letter was sent on August 1, 1986. (R. 434-437).

The demand letter still did not result in any contact by the Plaintiff and, upon the witness learning that there were no new developments, the car was placed "on warrant", which meant that it was reported to the police. In the instant case, the Plaintiff's overdue vehicle was reported to the Ft. Lauderdale Police on August 13, 1986. (R. 437-438).

On August 27, 1986, Ft. Lauderdale Police Department Detective Charles Bay contacted Ms. Feciskonin and advised her that he had a local address for the Plaintiff and had spoken with him. Detective Bay told Ms. Feciskonin that the Plaintiff had been told to contact Alamo and that the Plaintiff seemed like a "nice guy". (R. 440-441).

On or about that same date, Ms. Feciskonin received a telephone call from the Plaintiff, who was asking for a "Mr.

Desiree." According to Ms. Feciskonin, she told the Plaintiff that she was the only Desiree in the office. At that point, the Plaintiff began screaming and yelling that Ms. Feciskonin had no right to put the Plaintiff's vehicle on warrant and that his credit card would hold any charges. The Plaintiff told Ms. Feciskonin that he could keep the car as long as he wanted. The witness believed the Plaintiff lost his temper when he found out she was a woman. (R. 442-446). Ms. Feciskonin, upset that the customer was screaming at her, did not get any information from the customer as to the whereabouts of the overdue car. (R. 448).

The Alamo files indicated that the Plaintiff called Alamo again on the evening of August 27, 1986. At that time, the Plaintiff told Alamo representatives where the car was located, that the car had mechanical difficulties and that the car could be retrieved. (R. 449-450).

Ms. Feciskonin's testimony concluded with her explaining that she was the one who took the car off warrant after it was towed in by Alamo. (R. 452-455). Ms. Feciskonin stated she never took a position about whether the Plaintiff should be arrested and, in fact, had no knowledge that the Plaintiff had in fact been incarcerated. (R. 447-449). According to this witness, Detective Bay contacted her, inquired if Alamo had received its car, and wanted to know if Alamo would be pressing charges. Ms. Feciskonin had no input in the decision and

simply gave him the Alamo corporate department's telephone number. (R. 464-466).

Edward McArdle, another Alamo employee, testified that his office location was separate from the rental offices. When a car becomes overdue and rental agents have been unable to establish contact with the customer, Mr. McArdle becomes involved. (R. 467-480). It was Mr. McArdle's responsibility to send the demand letters. (R. 488).

Upon receiving the request for a demand letter in this case, Mr. McArdle reviewed the rental contract, determined that there had been no revisions, and checked to make sure that the rental agents had attempted to contact the customer. He then sent a certified letter to the customer's contract address and requested that the customer get in touch with Alamo concerning the overdue vehicle. (R. 505-507). The demand letter was sent by certified mail on August 1, 1986, and was signed for approximately a week later. When the receipt was returned to his office, Mr. McArdle reviewed his file again to determine if there had been any change in circumstances and, noting none, the rental location was advised to report the car as missing with the police. (R. 506-507).

On or about August 27, 1986, Detective Bay called Mr. McArdle and asked if the Plaintiff's overdue vehicle had been returned. Mr. McArdle reviewed the file information, discerned that the car had been retrieved, and noted that the Plaintiff did not physically return the car. (R. 513-515). Detective

Bay was advised that Mr. Mancusi himself did not bring the car back and that it was towed in by Hal's Towing Service. (R. 515). According to Mr. McArdle, Detective Bay "wasn't particularly happy with that." (R. 515).

The next contact that Mr. McArdle had with Detective Bay was when Bay called and advised that he needed an affidavit on Mancusi. (R. 515). Mr. McArdle met with the detective a few days later and executed a criminal complaint affidavit. According to the witness, it was his understanding that the State was doing the prosecuting and that Alamo was merely a witness. When a police officer called and stated an affidavit was needed, the witness felt compelled to provide it. (R. 523; 532). The witness stated that there was no relationship between any encounter the Plaintiff had with Ms. Feciskonin and the prosecution of the Plaintiff. (R. 518; 522).

Detective Charles Bay also presented testimony at trial. (R. 1421-1498). Detective Bay, assigned to stolen vehicle division, first became involved on August 27, 1986. After several demanding telephone calls from the detective, the Plaintiff told the detective that the car would be returned immediately. The Plaintiff told Detective Bay that he had trouble with the car. (R. 1432).

On the next day, Detective Bay contacted Alamo and learned that the car had been retrieved. In speaking with Mr. McArdle, the detective stated that Mr. McArdle expressed a willingness to sign the necessary papers to file charges. (R. 1437-1438).

When Mr. McArdle and Detective Bay ultimately met on September 3, 1986, the following affidavit was executed:

> This contract was due to be returned on 7/22/86. This vehicle was not returned as scheduled. Numerous phone calls were made in an attempt to obtain the return of our car with no results. On 8/1/86, we sent a demand letter via certified mail. The letter was signed for on 8/13/86. The customer did not respond to the instructions in the letter. It was our belief that he had no intention of returning the car and that without the intervention of the police, we would still not have our car.[2] (A. 1).

On September 16, 1986, Detective Bay made contact with the Plaintiff to get his version of events. (R. 1481). The Plaintiff agreed to accompany the police officer to the station to discuss the Alamo matter. (R. 1482). Upon arriving there, the detective and the Plaintiff entered an interview room and the Plaintiff was read his rights. (R. 1485). At the conclusion of the reading, the Plaintiff stated he wanted to speak to his attorney. The detective then placed the Plaintiff under arrest and put him through the booking procedure. (R. 1485-1486).

According to the detective, he was not compelled to make an arrest once Alamo had completed its affidavit. Additionally, the detective testified that the state attorney's office also had discretion on the issue of whether or not to

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[2] Mr. McArdle's reference to August 13, 1986 as the certified mail's signing date was incorrect. The actual signing date for receipt was August 8, 1986.

prosecute. (R. 1487). The detective thought he had probable cause to arrest. (R. 916).

The Plaintiff was the last witness in the Plaintiff's case. On July 15, 1986, the Plaintiff and Veronica Cronin visited Alamo to rent a car. (R. 608-610). Ms. Cronin had previously telephoned Alamo and reserved a car for a period of one week. When they arrived, the rental agents were busy and the Plaintiff had to wait for approximately 45 minutes before getting his car. (R. 609).

When the rental contract was filled out, the Plaintiff gave the agent the correct spelling of his name, his New York driver's license, and both New York and Florida telephone numbers. (R. 607-608). The Plaintiff also provided the agent with a business address. (R. 609). Payment for the vehicle was secured on Ms. Cronin's credit card. (R. 692-693). When the Plaintiff was notified that his car was ready, he initialed the car return date of July 22, 1986, the week's rental rate of $211.73, and signed for the car. (R. 694-696). According to the Plaintiff, he simply initialed and signed the contract without reading it. (R. 695). As far as the Plaintiff was concerned, he thought the car had been rented for one month. (R. 609).

The Plaintiff testified that he received a telephone call from his father on August 8, 1986. His father said that he had received a letter from Alamo, that there was a problem with the car, and that the Plaintiff should take care of it. (R. 612).

Rather than contact Alamo at the number given on the letter, the Plaintiff telephoned the local Alamo office and spoke with an agent. The Plaintiff gave his name, said that there was "apparently a problem" regarding his car, and advised the agent that he was under the impression that the rental was for a one-month period. (R. 612). After being put on hold, the agent returned and advised the Plaintiff that there was no problem and that the credit card would hold the rental for that period of time. The Plaintiff testified that he heard the rental agent typing the information into the computer. When the agent advised him that he was "re-upped," the conversation was concluded. The Plaintiff did not get the rental agent's name. (R. 611-614). According to the Plaintiff, he was not requested to fill out additional paper work.

On August 27, 1986, the Plaintiff was contacted by Detective Bay. When the detective advised the Plaintiff that he was driving a "hot car", the Plaintiff said there must be some mistake because Alamo had the Plaintiff's contact numbers, an open credit card, and the car had been "re-upped". Detective Bay advised the Plaintiff to contact Ms. Feciskonin, who had put the car on warrant. (R. 612-614).

The Plaintiff then called Ms. Feciskonin. As soon as the Plaintiff told Ms. Feciskonin why he was calling, the Plaintiff said she "flew off the handle." According to the Plaintiff, Ms. Feciskonin complained about Detective Bay giving out her

number, stated that the problem was not her responsibility, and hung up the phone. (R. 616).

Assuming that Ms. Feciskonin was having "some other problems going on at her place of business", the Plaintiff then called back and asked to speak with Ms. Feciskonin's supervisor. The Plaintiff complained about Ms. Feciskonin's rudeness and explained to the supervisor that the Plaintiff had car trouble. (R. 616-617). The Plaintiff invited Alamo to retrieve the car and take care of the problem. (R. 617-618).

On September 16, 1986, the Plaintiff met Detective Bay outside of the Plaintiff's place of business. Detective Bay requested that the Plaintiff accompany him to the police station for some questioning and the Plaintiff agreed. (R. 618-620). Once they arrived, the Plaintiff said Detective Bay asked Plaintiff if he had ever rented a car from Alamo. The Plaintiff said that he had, that it had been returned, and that it was paid for. When the detective heard this information, the Plaintiff testified he acted surprised and left the room for approximately three or four minutes. When the detective returned, the Plaintiff said he was told that Alamo admitted they had their car and had been paid, but still wanted to prosecute. At that point, the Plaintiff testified Detective Bay read him his rights. (R. 620-621). After requesting counsel, the Plaintiff was handcuffed and booked. (R. 622).

The Plaintiff then testified that he was in the Broward County jail system for approximately 15 hours. During that

time, the Plaintiff testified he was horrified and in fear for his safety. The Plaintiff said he was twice searched rectally by law enforcement officials and that it felt like he had "been raped" in that process. During his incarceration, the Plaintiff testified he was physically threatened, was splashed with vomit and fecal matter, and harassed by prison inmates. Throughout each stage of the processing, the Plaintiff complained to law enforcement officials that he was in jail by mistake and had not been provided any telephone calls, but no one listened. Finally, a law enforcement official permitted him to contact a friend, who in turn contacted Plaintiff's family members. Ultimately, arrangements were made for the Plaintiff's bail and he was released. (R. 624-646).

The Plaintiff next testified about the period of time when criminal charges were pending. According to the Plaintiff, he was extremely concerned about his plight and became more concerned when he found out that an executive vice president of Alamo was the former district attorney of Broward County and that the president of Alamo was his brother-in-law.[3] (R. 650). The Plaintiff concluded his testimony by stating the criminal case was ultimately nolle prossed. According to the Plaintiff, the experience had made him much more introverted and bitter. (R. 670-673).

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[3] An objection was made to this testimony and it was permitted on Plaintiff counsel's representation that it would be "connected up", but it was not.

During the Plaintiff's cross-examination, Alamo was precluded from eliciting any testimony on the negotiated nature of the criminal case's dismissal. (R. 731-743). In doing so, the trial court recognized that a nolle prosequi could not be "bargained for" and still meet the bona fide termination requirement of a malicious prosecution action, but distinguished this situation because double jeopardy had attached. According to the trial court, a dismissal after jeopardy attached was a bona fide termination on the merits as a matter of law:

> The fact is, that this is not a nolle prosequi bargained for in light of the fact that 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. Case can never be tried again and it's a bona fide termination in his favor. (R. 739-743).

After the denial of Alamo's motion for directed verdict (R. 753-764), the Defendant presented its case. During that case, the trial court precluded any evidence of the negotiated nature of the criminal case's dismissal. On this issue, the defense proffered the criminal case trial transcript, the

assistant state attorney's testimony, and the criminal defense attorney's testimony. (R. 770-775; 780-781).

The trial court also refused any testimony from National Rent-A-Car representatives concerning the Plaintiff's rental practices with them during 1986. (R. 781-792; 807-809). While the defense sought to introduce the evidence to show the Plaintiff often had overdue cars and that the information was known to Detective Bay, the trial court found the evidence irrelevant, not reflective of the Plaintiff's state of mind or practices, and stated that Detective Bay's state of mind was not at issue.

The defense did present testimony from Attilio Mancusi, the Plaintiff's father. (R. 927-935). The Plaintiff's father stated, contrary to his son's version of events, that his first knowledge of a problem with Alamo occurred when Detective Bay contacted him regarding his son's overdue car. (R. 928-932). The Plaintiff's father also testified that the first time he talked to his son about the Alamo problem was when his son called him from jail. (R. 932-934).

After the renewed motions for directed verdict were denied, the closing arguments were concluded, and the jury instructed, the jury deliberated and returned a verdict of Three Hundred Thousand ($300,000.00) Dollars in compensatory damages and Two Million Seven Hundred Thousand ($2,700,000.00) Dollars in punitive damages. (R. 1258). Final judgment was entered on July 31, 1986. (R. 1743).

In its post-trial motions, Alamo renewed its request for a directed verdict, moved to set aside the verdict in accordance with its motion for a new trial, and sought a remittitur. (R. 1747-1776). Intervenor State of Florida appeared in the post-trial proceedings to seek a portion of the punitive damages pursuant to § 768.73 Fla. Stat. (R. 1782-1784). After hearing argument on the post-trial matters and receiving supplemental memoranda of law on the issues raised by Alamo and the State of Florida, the trial court denied all post-trial motions. (R. 1828-1833; 1852-1860).

After a number of directed verdict and new trial issues were presented on appeal, the Fourth District Court of Appeal reversed. Alamo Rent-A-Car, Inc. v. Mancusi, 599 So.2d 1010 (Fla. 4th DCA 1992). In its opinion, the Fourth District reviewed the evidence presented at trial and rejected the trial court ruling that the nolle prosequi received after jeopardy had attached constituted a bona fide termination as a matter of law:

> In order for a plaintiff to succeed on a claim of malicious prosecution, the following six (6) elements must be proven: 1) the commencement of a judicial proceeding; 2) its legal causation by the present defendants against the plaintiff; 3) its bona fide termination in favor of the plaintiff; 4) the absence of probable cause for the prosection; 5) malice; 6) damages. Dorf v. Usher, 514 So.2d 68, 69 (Fla. 4th DCA 1987).
>
> In Gatto v. Publix Supermarket, Inc., 387 So.2d 377 (Fla. 3d DCA 1980), the court discussed the "bona fide termination" element of malicious prosecution stating:

The essential element of a bona fide termination of the criminal prosecution in favor of the person bringing the malicious prosecution action 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 prosecute. Id. at 380-81 (emphasis in original). A bona fide or good faith termination is not one which has been bargained for and obtained by the accused on his promise of payment or restitution. Freedman v. Crabro Motors, Inc., 199 So.2d 745 (Fla. 3d DCA 1967). Where dismissal is on technical grounds, for procedural reasons, or any other reason not inconsistent with the guilt of the accused, it does not constitute a favorable termination. The converse of that rule is that a favorable termination exists where a dismissal is of such a nature as to indicate the innocence of the accused. Union Oil v. Watson, 468 So.2d 349, 353 (Fla. 3d DCA 1985) (citations omitted). 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.

In the instant case, 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 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. Only after considering this evidence could the trier of fact determine whether the nolle prosequi Mancusi received was

> bargained for or bona fide. [footnotes omitted].[4]
>
> Alamo Rent-A-Car, Inc. v. Mancusi, supra, 599 So.2d at 1012-1013.

The Fourth District therefore reversed and remanded for a new trial in accordance with its opinion.

After Alamo and Mancusi both filed notices of discretionary review, this Court accepted jurisdiction in an order dated January 26, 1993.

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[4] Although a new trial was ordered, the Fourth District rejected Alamo's argument regarding the trial court's ruling that punitive damages should not be limited to three times the compensatory damage award pursuant to Section 768.73(1)(a), Florida Statutes (1989). The Fourth District agreed with the trial court's conclusion that the instant malicious prosecution case was not based on misconduct in a commercial transaction.

POINTS ON APPEAL

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?

SUMMARY OF THE ARGUMENT

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.

ARGUMENT

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.

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.

The Burden Of Proving The Circumstances Of Dismissal

In order for a plaintiff to succeed on a claim of malicious prosecution in Florida, it is axiomatic that a plaintiff must prove the following six (6) elements:

(1) The commencement of a judicial proceeding;

(2) Its legal causation by the present defendant against the plaintiff;

(3) Its bona fide termination in favor of the plaintiff;

(4) The absence of probable cause for the prosecution;

(5) Malice; and

(6) Damages.

Dorf v. Usher, 514 So.2d 68, 69 (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).

As to the "bona fide termination" element, the courts of this state have recognized that it can be established in one of two ways:

> The essential element of a bona fide termination of the criminal prosecution in favor of the persons bringing the malicious prosecution action 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 prosecute.

Gatto v. Publix Supermarket, Inc., 387 So.2d 377, 380-81 (Fla. 3d DCA 1980).[5] Evidence of a dismissal or termination of proceedings - in and of itself - is insufficient to meet the third element of the malicious prosecution cause of action. Instead, the Plaintiff must show the termination of the 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).

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[5] It is undisputed that no "favorable termination on the merits" occurred in this case.

"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.

There is nothing unusual about the legion of cases requiring the Plaintiff to prove the bona fide termination of proceedings. Establishment of this fact, in a nolle prosequi setting, is certainly no more difficult than proving the cause of action's other elements of malice or lack of probable cause. Indeed, on this latter score, even the Fourth District acknowledges that "proving the negative" on probable cause is the Plaintiff's burden. See, Fee, Parker & Lloyd, P.A. v. Sullivan, 379 So.2d 412 (Fla. 4th DCA 1980). Accordingly, the Plaintiff's bearing of the burden to show a pristine dismissal, untainted by negotiation, compromise, or bargain, places no greater burden on the Plaintiff than the other elements which must be shown to succeed in a malicious prosecution claim.

Practically speaking, however, a plaintiff bearing the burden on this point need only be asked an additional question or two to meet the essential element of a bona fide termination where a dismissal occurs. According to Mancusi, he needed only

to testify that the criminal case was dismissed by the prosecutor. To comport with the burden of proof, 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.[6]

In the context of the instant case, it is absolutely clear that Mancusi was required to show that the termination of the criminal proceedings was "bona fide". To satisfy this essential element, Mancusi needed to show that the termination was not bargained for or obtained by him upon a promise of payment or restitution. Since Mancusi could not carry the burden on this element, the above-cited cases mandate judgment for Alamo.

The Fourth District, however, has stated in its opinion that Alamo, not Mancusi, bears the burden of proof on the bona fide termination issue. In addressing the bona fide termination element, the panel below stated:

> 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.

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[6] In fact, the Plaintiff flatly objected to any such evidence or lines of inquiry. (R. 730-731).

Mancusi, supra, 599 So.2d at 1012. Interestingly, a review of the Liu opinion finds no citation of authority to support that assertion. Neither Liu nor Mancusi discussed why the Fourth District panels believed the burden of proof should be on the Defendant. Simply stated, this ruling, which places the burden of proof on the defendant, is in direct and express conflict with numerous other court decisions requiring the plaintiff to establish this aspect of an essential element. Gatto v. Publix Supermarket, Inc., supra; Jones v. State Farm Mut. Auto. Ins. Co., supra; Union Oil of California, Amsco Div. v. Watson, supra; Freedman v. Crabro Motors, Inc., supra.

It is well settled that malicious prosecution actions are not favored by the courts. Glass v. Parrish, 51 So.2d 717 (Fla. 1951); Mitchell v. Time Finance Service, Inc., 102 So.2d 733 (Fla. 3d DCA 1958). This tort necessarily allows a wide latitude for honest action on the part of the citizen who purports to assist the public officials in their task of law enforcement. In a democratic society that abhors the restrictions and supervision of the "police state," it is recognized that public officers must rely heavily on the cooperation of the law-abiding members of the community, and although it is seldom that a premium is placed on information leading to the apprehension of offenders, such as rewards to informers, the common law has been solicitous lest undue penalties should be attached to those who seek to further the public welfare. Kimbley v. City of Green River, 663 P.2d 871

(Wyo. 1983); 1 Harper and James, The Law of Torts 4.2 (1956); Prosser and Keeton on The Law of Torts § 119, at 870-74 (5th ed. 1984).

With these principles in mind, there is no legal support for the proposition that the bona fide termination element, on these facts, should be treated any differently than the general rule concerning this element. All information which will satisfy this element is as available to a plaintiff as it would be to a defendant. Mancusi should have been expected to carry forward this aspect of this case as much as any other. Accordingly, there is no support in the law for the Fourth District's specially carved exception on the burden of proof in this case.

Any Conditional, Negotiated, Or Bargained For Dismissal Defeats A Malicious Prosecution Claim, Not Merely One Which Was Secured "Solely For Restitution".

In addition to wrongfully placing the burden of proof on the Defendant, the Fourth District has held that a nolle prosequi will satisfy the bona fide termination element unless it is shown that the dismissal was secured "solely for restitution." This interpretation of the bona fide termination element is erroneously restrictive and runs contrary to the better reasoned cases which have discussed this subject, including one decision from the Fourth District itself.

It is well settled in this state that a dismissal which is secured through bargaining, negotiation, or obtained upon a promise of payment or restitution cannot constitute bona fide termination. 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).

The Third District Court of Appeal recently discussed the "bona fide termination" element of a malicious prosecution claim in the case of Jones v. State Farm Mut. Auto. Ins. Co., 578 So.2d 783 (Fla. 1st DCA 1991). In discussing what constitutes a bona fide termination of previous proceedings, the First District noted the underlying cases's dismissal must have been fairly reflective of the case's merits, and not the product of negotiations or a bargain:

> Appellants failed to prove that there was a favorable decision on the merits or a bona fide termination of the previous proceedings in their favor. In Union Oil v. Watson, 468 So.2d 349, 353 (Fla. 3d DCA), rev. denied, 479 So.2d 119 (1985), the court discussed the nature of the required showing on this element in the following words:

> Where dismissal is on technical grounds, for procedural reasons, or for any other reason not inconsistent with the guilt of the accused, it does not constitute a favorable termination. [Citations omitted]. The converse of that rule is that a favorable termination exists where a dismissal is of such a nature as to indicate the innocence of the accused. [Citations omitted]. For example, where a dismissal is taken because of insufficiency of the evidence, the requirement of a favorable termination is met. [Citations omitted]. In order to determine whether the termination of an action prior to a determination on the merits tends to indicate innocence on the part of the defendant one must look to whether the manner of termination reflects on the merits of the case. [Citations omitted].

468 So.2d at 353-54. Although that case involved a voluntary dismissal, the general principles are applicable in determining whether the nature of the termination of the prior proceeding satisfies the essential element of malicious prosecution. Among several illustrative cases cited in that opinion is Webb v. Youmans, 248 Cal. App. 2d 851, 853, 57 Cal. Rptr. 11 (Cal. Ct. App. 1967), for the proposition that "a dismissal resulting from negotiation, settlement or consent is generally not deemed a favorable termination of the proceedings because it reflects ambiguously on the merits of the action." 468 So.2d at 354.

Jones v. State Farm Mutual Automobile Ins. Co., supra, 578 So.2d at 785-786.

Indeed, even the Fourth District itself has recognized the issue to be one not only of restitution, but of the broader issue of negotiated settlement, compromise, and bargain:

> [A] bona fide termination favorable to plaintiff does not encompass a termination resulting from negotiation, settlement, or consent. Union Oil of California, Amsco Div. v. Watson, 468 So.2d 349, 353 (Fla. 3d DCA), review denied, 479 So.2d 119 (Fla. 1985). This case was terminable upon considerations entirely apart from the merits or probable cause for prosecution, thus was not a bona fide termination favorable to Della-Donna. See, Davis v. McCrory Corp., 262 So.2d 207, 210 (Fla. 2d DCA 1972). The voluntary dismissal of litigation as a result of settlement is neutral to favorable termination and, in the instant case, is fatal to the malicious prosecution claim.
>
> Della-Donna v. Nova University, Inc., supra, 512 So.2d at 1055.

See, also, Freedman v. Crabro Motors, Inc., supra.

Like Florida, other jurisdictions in this country also recognize that negotiated or bargained for dismissals, not merely agreements for restitution, destroy the viability of a malicious prosecution claim. See, e.g., Texas Skaggs, Inc. v. Graves, 582 S.W.2d 863 (Tex. App. 1979); Land v. Hill, 644 P.2d 43 (Colo. App. 1981); Hatcher v. Moree, 133 Ga. App. 14, 209 S.E.2d 708 (1974); Campbell v. Bank & Trust Co., 30 Idaho 552, 166 P. 258 (1917); Joiner v. Benton Community Bank, 82 Ill.2d 40, 44 Ill. Dec. 260, 411 N.E.2d 229 (1980); Fitzwater v. Tasker, 259 Md. 266, 269 A.2d 588 (1970); McKinney v. Soetebier's, Inc., 620 S.W.2d 18 (Mo. App. 1981); Cimino v. Rosen, 193 Neb. 162, 225 N.W.2d 567 (1975); Robinson v. Fimbel

Door Co., 113 N.H. 348, 306 A.2d 768 (1973); Halberstadt v. New York Life Ins. Co., 194 NY 1, 86 N.E. 801 (1909); Alianell v. Hoffman, 317 Pa. 148, 176 A. 207 (1935); Jaffe v. Stone, 18 Cal.2d 146, 114 P.2d 335 (1941); Junod v. Bader, 458 A.2d 251 (Pa. Super. 1983). See, also, Annot., 26 A.L.R.4th 565 (1983).

A review of the Restatement (Second) of Torts supports Alamo's analysis and further reflects the erroneous nature of the Fourth District's "restitution only" ruling. Section 659 of the Restatement defines the circumstances under which criminal proceedings can be deemed "terminated in favor of the accused":

> Criminal proceedings are terminated in favor of the accused by
>
> (a) A discharge by a magistrate at a preliminary hearing, or
>
> (b) The refusal of a grand jury to indict, or
>
> (c) The formal abandonment of the proceedings by the public prosecutor, or
>
> (d) The quashing of an indictment or information, or
>
> (e) An acquittal, or
>
> (f) A final order in favor of the accused by a trial or appellate court.

The comments to Section 659 reveal, however, that the bases of termination set forth in Section 659 must be read in conjunction with the text found in Section 660.

Section 660 makes clear that a resolution of criminal charges by agreement or compromise is indecisive and cannot

constitute a sufficient termination so as to serve as a basis for a malicious prosecution claim:

> 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 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 further show the erroneous nature of the lower court's analysis.

In sum, the great body of Florida law, including the Fourth District's opinion in Della-Donna, makes clear that a bona fide termination cannot exist where there is a showing of negotiated compromise or a bargained for dismissal. It is not what was given in exchange for the dismissal which is important, but instead simply that any consideration was given at all. Accordingly, the Fourth District's requirement of a dismissal "solely for restitution" represents an erroneously restrictive interpretation of common law requirements that must be vacated.

A Directed Verdict Should Have Been Granted.

Other than introducing into evidence the fact that the previous criminal proceedings were dismissed by the assistant state attorney, the Plaintiff presented no proof on the issue

of whether there had been a bona fide termination in the Plaintiff's favor. No questions were asked of any witness on the issue of whether that dismissal had occurred "without strings." No questions were asked of any witness to demonstrate that the nolle prosequi had occurred without negotiation or condition. No questions were asked of any witness to show that the dismissal occurred without any requirement of restitution. Quite frankly, these questions were never asked because the answers clearly would have exposed the deficient nature of the Plaintiff's case on this issue.

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 restitution 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:

> 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 restitution. (R. 283-284).[7]

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

> 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

---

[7] In addition to restitution, 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 see, Brothers v. Rosauer's Supermarkets, Inc., 545 F.Supp. 1041 (D. Mont. 1982) (plaintiff barred from bringing action after dismissal of criminal case in exchange for releases of government officials).

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).

Under such circumstances, the proof in this case overwhelmingly demonstrates that the Plaintiff did not and could not show a bona fide termination of those previous proceedings. This Court should remand this matter with instruction to enter judgment in favor of Alamo.

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.

In its post-trial order, the trial court stated that the issue of whether probable cause existed for the criminal proceedings was "a close one". (R. 1854). When this court reviews the probable cause question and the inter-related issue of malice, Alamo submits the question will not be as close as the trial court thought and that a directed verdict was in order on this issue as well.

Probable Cause

The existence or non-existence of probable cause is a question of law for the court to determine. The City of Pensacola v. Owens, 369 So.2d 328 (Fla. 1979); Scozari v. Barone, 546 So.2d 750 (Fla. 3d DCA 1989). The trial court, however, viewed this question as purely one for the jury to determine. (R. 1854-1855). In doing so, the trial court abdicated its duty on the probable cause issue.

Under existing case law standards, the trial court should have first determined the issue of probable cause. If probable cause existed, the malicious prosecution case should have ended. If, however, the trial court felt the criminal case proceeded without probable cause, it would have then been the jury's responsibility to determine whether the other malicious prosecution elements existed. Scozari v. Barone, supra, 546 So.2d at 751.

The failure of the trial court to follow this procedure was particularly detrimental where the court stated in its post-trial order that it might have resolved the case differently if it had been the trier of fact, but found the evidence sufficient to present the case to the jury. (R. 1856-1857). Under such circumstances, it is clear that the trial court fully and completely deferred to the trier of fact on the probable cause question.

Had the trial court engaged in the proper analysis of the probable cause issue, it would have concluded that there was no

evidence of its absence. While there is a dispute in the record concerning whether Detective Bay or Mr. McArdle initiated the execution of the complaint affidavit, there is no dispute that the police department had discretion in whether to refer the matter to the state attorney's office for prosecution and no dispute that the state attorney's office had discretion in whether to actually prosecute. (R. 1487). Other than an erroneous return receipt date, all material facts in the complaint affidavit were true to the best of Mr. McArdle's knowledge. All information available to Alamo indicated that the vehicle was rented for a one-week period, it had not been returned, and that attempts to establish contact with the customer had been unsuccessful. The record makes clear that the State of Florida reviewed the evidence and ultimately elected to file criminal charges. (A. 2-3). Regardless of the relative strength or weakness of the case against the Plaintiff, the filing of the criminal action by the State, in and of itself, demonstrated the existence of probable cause. Colonial Stores, Inc. v. Scarbrough, 355 So.2d 1181 (Fla. 1977); Dorf v. Usher, 514 So.2d 68 (Fla. 4th DCA 1987). The trial court and the Fourth District should have granted a directed verdict on this issue as well.

Malice

Malice, as required for a malicious prosecution action, may be shown either through actual malice or legal malice, which is inferred from the want of probable cause. Jack Eckerd

Corp. v. Smith, 558 So.2d 1060 (Fla. 1st DCA 1990), rev. den. 577 So.2d 1321 (Fla. 1991). In the instant case, neither existed.

The record shows no proof from which a trier of fact could conclude Alamo's representatives acted with actual malice when the overdue vehicle matter was referred to the police department for prosecution. Mr. McArdle, solely responsible for referral of this case to the police, testified that there was no ill will or other malicious intent associated with swearing out of the 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 simply nothing in the record from which one could conclude Mr. McArdle acted with actual malice.

As has been discussed in the preceding section, there was no proof of legal malice because probable cause existed. Without reiterating the previous discussion, this court need only note that there was no evidence 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 actions clearly established that a basis for the charges independently existed. Dorf v. Usher, 514 so.2d 68 (Fla. 4th DCA 1987). As such, reversal for a directed verdict is also warranted on this point.

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

Both this Court and the Fourth District have made it clear that punitive damages can be awarded only where the defendant's conduct rises to the level of willful, wanton, malicious, or outrageous misconduct. Southern Bell Tel. & Tel. Co. v. Hanft, 436 So.2d 40 (Fla. 1983); Mobil Oil Corp. v. Patrick, 442 So.2d 242 (Fla. 4th DCA 1983) (punitive damages allowable only where there has been "willful and wanton disregard for the rights of others").

Even for intentional torts, punitive damages are allowable solely as punishment, or "smart money", to be inflicted for the malicious or wanton state of mind with which the defendant violated plaintiff's legal right. Schief v. Life Supply, Inc., 431 So.2d 602 (Fla. 4th DCA) rev. den., 440 So.2d 352 (Fla. 1983).

In recent decisions, this Court has strongly urged "restraint upon the courts in ensuring that a defendant's behavior represents more than even gross negligence prior to allowing the imposition of punitive damages, in order to ensure that the damages serve their proper function." American Cyanamid Co. v. Roy, 498 So.2d 859 (Fla. 1986); Chrysler Corp. v. Wolmer, 499 So.2d 823 (Fla. 1986) (punitive damages are warranted only where the egregious wrongdoing of the defendant, although perhaps not covered by criminal law, nevertheless

constitutes a public wrong); White Const. Co. v. DuPont, 455 So.2d 1026 (Fla. 1984).

This theme carries through in cases discussing punitive damages in malicious prosecution claims. While actual malice, as distinguished from legal malice, is a proper basis for the recovery of punitive damages in a malicious prosecution action, malice established solely from an absence of probable cause will not support a punitive damages verdict. See, Jack Eckerd Corp. v. Smith, 558 So.2d 1060 (Fla. 1st DCA 1990), rev. den. 577 So.2d 1321 (Fla. 1991); Winn Dixie Stores, Inc. v. Gazelle, 523 So.2d 648 (Fla. 1st DCA 1988); Harris v. Lewis State Bank, 482 So.2d 1378 (Fla. 1st DCA 1986). In legal malice cases, a plaintiff must make an additional showing to get the issue of punitive damages to the jury. In particular, a plaintiff must show evidence of moral turpitude or willful and wanton disregard for the plaintiff's rights, which presupposes the defendant's knowledge or awareness of the risk to the plaintiff's rights, or evidence of excessive and reckless disregard of the plaintiff's rights. Jack Eckerd Corp. v. Smith, supra.

In the instant case, the record is devoid of any proof regarding actual malice. Mr. McArdle observed that all standard office procedures were complied with in the handling of this overdue vehicle case and referred the matter to the police. Mr. McArdle had no knowledge of the Plaintiff's

mechanical problems or other contractual difficulties. In short, his conduct was not malicious in fact.

If the Plaintiff contends this case could get to the jury on punitive damages simply because there was a lack of probable cause (R. 755-759), Florida law states to the contrary. See, Winn Lovett Grocery Co. v. Archer, 171 So. 214, 223 (Fla. 1936); Jack Eckerd Corp. v. Smith, supra. Given the totality of conduct charged to Alamo, it cannot be said that there was evidence of either moral turpitude or willful and wanton disregard for the Plaintiff's rights. Accordingly, the punitive damages issue should have never been submitted to the jury.

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.

Although the Fourth District reversed the instant matter for a new trial, the issue of the appropriate application of Section 768.73, Florida Statutes, to the instant facts warrants review by this Court.

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 a claimant shall not exceed three times the amount of compensatory damages awarded to

each person entitled thereto by the trier of fact, except as provided in (b).

Section 768.73(1)(b) states that punitive damages in excess of the limitation set forth in paragraph (a) are presumed excessive and the claimant must show the award is not excessive by clear and convincing evidence to recover a greater amount.

The trial court denied Alamo's request to reduce the punitive damages awarded by the jury pursuant to Section 768.73, Fla. Stat., because it found this case did not fall within the kinds of civil actions to which Section 768.73 applied. In particular, the trial court concluded that the instant case did not involve "misconduct in a commercial transaction." (R. 1828-1833). Alamo submits this conclusion is amply refuted by the Plaintiff's allegations and the facts of this case.

Mr. Mancusi and Alamo entered into a contract for the rental of a vehicle. While the record reflects the parties contested the facts and circumstances which developed after the rental agreement was made, it is at least clear that the Plaintiff's malicious prosecution claim was "based on . . . misconduct in commercial transactions." According to the Plaintiff, Alamo wrongfully instituted a criminal failure to deliver hired vehicle case due to Mr. Mancusi's failure to honor what Alamo contended was his contractual obligations under the rental agreement. Plaintiff suggested Alamo's actions arose from its failure to correctly memorialize the contract terms and that the criminal prosecution was in

response to an argument the Plaintiff had with an Alamo employee with the contract terms were being discussed. Additionally, the Plaintiff took the position that Alamo demanded "additional" dollars to pay for monies owed under the rental agreement before Alamo would agree to participate in the disposition of the criminal prosecution. Under such circumstances, Alamo is at a loss to understand how the allegations against it could have been anything other than ones based on misconduct in a commercial transaction.

The very criminal section with which the Plaintiff was charged makes absolutely clear that the "crime" is one which must arise out of a commercial transaction. Section 817.52(3), Fla. Stat., provides:

> Failure to Deliver Hired Vehicle -- Whoever, after hiring a motor vehicle under an agreement to redeliver the same to the person letting such motor vehicle or his agent, at the termination of the period for which it was let, shall, without the consent of such person or persons and with intent to defraud, abandon or willfully refuse to redeliver such vehicle as agreed shall, upon commission, be guilty of a felony of the third degree[.]

The gravamen of the criminal case which served as the basis for the malicious prosecution claim was that Mr. Mancusi had committed a crime deriving from his commercial relationship with Alamo under the car rental contract. Given that fact, it

is clear that any wrongful conduct of Alamo had to have been based on the commercial relationship.[8]

While the trial court also suggested in its order that intentional torts "appear to be excluded" from Section 768.73, Fla. Stat., a review of the statutory text does not lead to that conclusion and nothing about the legislative history supports such a construction. In fact, the Legislature's inclusion of language making Section 768.73 applicable to actions involving "willful, wanton or gross misconduct" suggests the contrary. Section 768.73 was enacted as part of a comprehensive package of tort reform legislation in an attempt to address the perceived crisis in the area of liability insurance and in an attempt to gain some measure of control over "windfall" recoveries in the area of punitive damages. See Smith v. Department of Ins., 507 So.2d 1080, 1084 (Fla. 1987); The House of Representatives Committee on Judiciary Staff Analysis, Bill No. HB 343, March 30, 1987; Senate Staff Analysis and Economic Impact Settlement, Report, CS/CS/SB 465, July 23, 1986. These principles apply to the

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[8] Interestingly, the trial court apparently drew a distinction between claims "arising out of" misconduct in a commercial transaction and claims "based on" misconduct in a commercial transaction. The trial court seemed to suggest it would have agreed with Alamo's argument regarding applicability of Section 768.73 if the statute had contained the "arising out of" language. (R. 1828-1833). Alamo has found no support for the court's distinction and the two phrases would seem to suggest that the opposite would be true under the trial court's definitional analysis.

instant case and provide a rational basis for application of Section 768.73 to these facts.

The failure of the trial court and the Fourth District to apply the plain and unambiguous language of Section 768.73, Fla. Stat., in this case was clearly error. In the event that this Court remands this matter for a new trial, the trial court should be instructed that if punitive damages are awarded, the provisions in Section 768.73, Fla. Stat. apply to these facts.

CONCLUSION

Based upon the foregoing rationale and authorities, Alamo Rent-A-Car, Inc., respectfully requests this Honorable Court to modify the Fourth District Court of Appeal's opinion in this case so as to require that judgment be entered in favor of Alamo. In the alternative, should this Court find 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.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 20 day of February, 1993 to: WALTER G. CAMPBELL, JR., ESQ., 700 Southeast 3rd Avenue, Suite 100, Fort Lauderdale, FL 33316; 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; 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.

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