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IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
AUG 27 1992
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

ALAMO RENT-A-CAR, INC.,

Petitioner/Cross-Respondent,

v.

MICHAEL MANCUSI,

Respondent/Cross-Petitioner.
_____/

CASE NO. 80,376

MICHAEL MANCUSI'S JURISDICTIONAL BRIEF IN SUPPORT OF MANCUSI'S APPLICATION FOR REVIEW AND IN OPPOSITION TO ALAMO'S APPLICATION FOR REVIEW

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that the dissent may properly be considered under these circumstances.

The facts, as relevant to the decisional conflict asserted by Mancusi, require certain additions. The Fourth District held that the trial court erred in excluding the testimony of the assistant state attorney who prosecuted the underlying criminal case and eventually nolle prossed that case. The Fourth District held that the jury was entitled to consider all of the circumstances surrounding the nolle pros to determine whether or not it was based solely on restitution. Alamo had not subpoenaed the assistant state attorney and he was not present for the trial. Alamo attempted to present his testimony by telephone and when the trial court denied that request Alamo proffered that testimony by telephone. The Fourth District held that the jury should have been allowed to hear the telephone testimony of the assistant state attorney. The opinion states as follows:

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

The assistant state attorney was an absolutely crucial witness, the trial court had always told Alamo's counsel that this witness was

essential and Alamo elected not to subpoena this witness. Of the three pieces of excluded evidence on which reversal was based, the state attorney's testimony was obviously the most important.

We believe this is the first case in Florida jurisprudence finding a trial judge in error for rejecting telephone testimony in any case and certainly in a jury trial. It is also the first case holding that testimony of an absent witness can be proffered by the party who chose not to call the witness. Alamo has managed to get the trial court reversed for not allowing the absent witness to testify by phone and the "error" has somehow been preserved by the proffer.

SUMMARY OF ARGUMENT

The Fourth District Court of Appeal held that defensive testimony can be presented by telephone in a jury trial over the objection of the plaintiff. The court also held that a proffer of what the absent witness would have testified to could be made by the party who chose not to call the witness. Substantial conflict exists with a myriad of cases holding that witnesses may testify in jury trials only in person or by deposition. Conflict exists and this Court should accept jurisdiction, consider the matter on the merits and reverse the opinion of the Fourth District Court of Appeal. The absence of the testimony of the assistant state attorney who prosecuted and nolle prossed the underlying criminal case was fatal to the defense of Alamo below.

The Alamo assertion of a conflict concerning the burden of proof issue is non-existent and jurisdiction should not be granted on that ground.

ARGUMENT

I. WHETHER THE DECISION OF THE FOURTH DISTRICT COURT WAS IN CONFLICT ON THE ISSUE OF TELEPHONE TESTIMONY OR THE ISSUE OF BURDEN OF PROOF.

(A) TELEPHONE TESTIMONY -- CONFLICT EXISTS

The Fourth District Court of Appeal has blazed a new trail in holding a trial court in error for not allowing a necessary witness to testify before a jury by telephone. The court specifically found that the jury should have been permitted to hear this telephone testimony. On the retrial ordered by the Fourth District, Alamo Rent-A-Car will be allowed to call this witness and indeed any other witness by telephone. This opinion will unquestionably be used by lawyers in the Fourth District whenever counsel forgets or neglects to subpoena a witness. Every other remotely relevant case holds that witnesses must testify in jury trials in person or by deposition. This case did not involve a deposition in any way.

This decision conflicts with the many cases holding credibility of a witness can only be evaluated based on the live appearance of that witness before the fact finder. As an example, see Bush v. Bush, 590 So.2d 531 (Fla. 5th DCA 1991), Baker v. Baker, 388 So.2d 233 (Fla. 5th DCA 1980) and Canakaris v. Canakaris, 382 So.2d 1197 (Fla. 1980). There are many cases so

holding and these are merely illustrative. Bush was a divorce and child custody case where both sides stipulated that testimony would be taken in a "shortcut" manner before a court reporter who merely typed the transcript. Because the parties stipulated in writing to the procedure, the trial court was allowed to judge the credibility of the witnesses based on the cold record alone, but even under these circumstances the District Court held:

> It should also be emphasized that a conscientious trial judge is under no legal compulsion whatsoever to grant a joint motion of the parties which results in dispensing with the live testimony before the fact finder at trial.

The Fourth District has now ruled that telephone testimony in lieu of live testimony must be admitted even over the objection of a party. Trial judges in the Fourth District are now under "legal compulsion" to dispense with live testimony if any party requests it during the actual trial. Parties who forget to subpoena witnesses will suffer no penalty so long as they can reach the witness by telephone.

The Baker and Canakaris opinions both reaffirm the time honored rule of law that credibility can only be judged when the fact finder sees and hears the witness in person.

A trial court may properly refuse to force a witness to testify who is not present in the courtroom or under subpoena even though the party seeking the admission of the evidence shows that the witness is present in the courthouse. This was the express holding of the Third District Court of Appeal in Coplan Pipe and

Supply Co., Inc. v. Ben-Frieda Corp., 256 So.2d 218 (Fla. 3d DCA 1972).

Conflict also arises with the cases holding that the only way an absent witness's testimony can be considered is by deposition or some other established discovery/preservation method. In Gosby v. Third Judicial Circuit, 586 So.2d 1056 (Fla. 1991) this Court considered whether a prisoner could be forced to personally attend a hearing on his petition for name change. The opinion discusses Rule of Judicial Administration 2.071 which allows certain non-evidentiary hearings by telephone. The Gosby opinion sets out the alternatives listed in the Florida Rules of Civil Procedure under which a witness may present testimony when "their physical presence is not possible at a civil trial or hearing". The opinion holds that depositions are the established method of preserving testimony and presenting it in lieu of live testimony. It must be recognized that the present opinion by the Fourth District does not concern deposition testimony in any way. Conflict also exists with Outdoor Resorts at Orlando v. Hotz Management Company, 483 So.2d 2 (Fla. 2d DCA 1985) which again lists the only two permissible alternatives of (1) testifying live at trial or (2) being deposed so that the testimony can be preserved and used as substantive evidence.

The Fourth District is also in conflict with this Court's opinion adopting Rule of Judicial Administration 2.071. See The Florida Bar Re: Rules of Judicial Administration, 462 So.2d 444 (Fla. 1985) where this Court adopted Rule 2.071 which permits

telephone hearings and conferences. In adopting the rule this Court's opinion stated:

> It should be noted that none of the authorized [telephone] usages involve the presence of a jury ... and that all parties have an absolute right to prohibit the taking of testimony of a witness by communication equipment.

The Fourth District is in substantial conflict with the overwhelming established law of this state requiring that witnesses either appear live and testify or that a party voluntarily chooses to present a witness' testimony as taken during a proper deposition under the established Rules of Civil Procedure. This conflict will prove embarrassing to the administration of justice and must be remedied by this Court by accepting jurisdiction and reviewing the matter on the merits. The District Court's ruling regarding the proffer is truly strange. The ruling seems to approve a party choosing not to call an essential witness and then being able to proffer what the witness would have said had he chosen to call him. Somehow the District Court reasoned that this proffer preserved the "error" of excluding testimony from the absent witness.

An additional reason for accepting jurisdiction of this case is because the trial court declared the punitive damage 40% - 60% provisions of Tort Reform in § 768.73 to be unconstitutional. The District Court expressly chose not to reach those constitutional issues which remain pending before it. Similar constitutional questions are presented in Gordon v. State, Case No. 78,638.

(B) BURDEN OF PROOF -- NO CONFLICT EXISTS

Alamo Rent-A-Car argues that the Fourth District's opinion is in conflict regarding the burden of proof as to the element of a bona fide termination of the underlying criminal prosecution. Alamo argues that a conflict exists with Gotto v. Publix Supermarkets, Inc., 387 So.2d 377 (Fla. 3d DCA 1980); Jones v. State Farm Mutual Automobile Insurance Company, 578 So.2d 783 (Fla. 1st DCA 1991); Union Oil of California v. Watson, 468 So.2d 349 (Fla. 3d DCA 1985) and Freedman v. Crabro Motors, Inc., 199 So.2d 745 (Fla. 3d DCA 1967). Alamo does not specifically say what parts of the opinions in these four cases actually conflict with the Fourth District's opinion which merely holds that after plaintiff establishes that the underlying criminal prosecution against him was nolle prossed, that the defendant has the burden of showing that the nolle pros was based on restitution.

Although Mancusi is extremely desirous of this Court taking jurisdiction it does not appear that a conflict exists on this issue. None of the four cases relied upon for conflict address the specific issue of burden of proof. In fact, the Gotto case, the Union Oil case and the Freedman case are cited and relied upon in the Fourth District's opinion. The Fourth District cited and quoted from these cases for exactly the same proposition of law which Alamo cites them for.

The only case not specifically relied upon in the Fourth District's opinion is the Jones case which is easily distinguishable. In Jones the underlying action was a civil suit

which was dismissed based upon the defendant's affirmative defense of release which technically admitted the defendant's negligence in the underlying action. The distinction between an underlying criminal case and an underlying civil action is not noted or discussed by Alamo. Obviously there was no nolle pros in the underlying civil action in Jones and the facts of the two cases are not remotely similar. Conflict should not be found on this issue as asserted by Alamo.

CONCLUSION

Michael Mancusi suggests that a direct conflict exists based on the ruling of the Fourth District Court of Appeal that telephone testimony was admissible and that the proffer of the absent witness by phone was sufficient to preserve the error of excluding the testimony because the witness was absent. This is contrary to every case ever decided in Florida dealing with the appearances of witnesses at trials. A true conflict does not exist on the burden of proof issue. This Court should accept jurisdiction and review the case on the merits based upon the Mancusi application.

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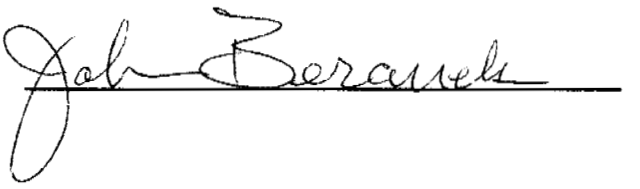
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to J. ROBERT MIERTSCHIN, JR., 4000 Hollywood Boulevard, Presidential Circle, 465 South Tower, Hollywood, FL 33020; G. BART BILLBROUGH, Walton, Lantaff, Schroeder & Carson, One Biscayne Tower, 25th Floor, 2 Biscayne Boulevard, Miami, FL 33131; RICHARD D. HELLER, Tripp, Scott, Conklin & Smith, 1110 S. E. 6th Street, 28th Floor, Ft. Lauderdale, FL 33301; JEFFREY B. CROCKETT, Coffey, Aragon, Martin and Burlington, P.A., 2699 South Bayshore Drive, Penthouse, Miami, FL 33133; JACK W. SHAW, JR., 225 Water Street, Suite 1400, Jacksonville, FL 32202-5147; THOMAS M. BURKE and ADAM R. LITTMAN, Cabaniss, Burke & Wagner, P.A., 800 N. Magnolia Avenue, #1800, Orlando, FL 32802; and CRAIG B. WILLIS, Assistant Attorney General, Department of Legal Affairs, The Capitol -- Suite 1601, Tallahassee, FL 32399-1050, this 27th day of August, 1992.



mercial premises, even though a more circuitous route to the premises remained. In a restatement of the law on this issue, the court declared:

> Several principles emerge from an analysis of these and other cases.* There is a right to be compensated through inverse condemnation when governmental action causes a substantial loss of access to one's property even though there is no physical appropriation of the property itself. It is not necessary that there be a complete loss of access to the property. However, the fact that a portion or even all of one's access to an abutting road is destroyed does not constitute a taking unless, when considered in light of the remaining access to the property, it can be said that the property owner's right of access was substantially diminished. The loss of the most convenient access is not compensable where other suitable access continues to exist. A taking has not occurred when governmental action causes the flow of traffic on an abutting road to be diminished. The extent of the access which remains after a taking is properly considered in determining the amount of the compensation. In any event, the damages which are recoverable are limited to the reduction in the value of the property which was caused by the loss of access. Business damages continue to be controlled by section 73.-071, Florida Statutes (1987).

*We acknowledge that some of the cases we have considered involved a partial taking of land as well as the destruction of access. However, because Florida recognizes that the destruction of the right of access is compensable even where land is not taken, we believe the reasoning of those cases may be appropriately considered in our analysis.

Id. at 849–50.

The test for a taking by inverse condemnation in *Tessler* is described as "a substantial impairment of access." Under this test it is apparent that trial courts are left with the real line-drawing as to what constitutes "substantial impairment." In this case, while ingress to the appellee's restaurant was not substantially impaired, egress from the restaurant and back to the main road (State Road 84 in Broward County) was limited to a lengthy circuitous route through the adjacent neighborhood. Does this qualify as a "substantial impairment" of access, or is it merely leaving the property owner with a less convenient method of access and a reduction in traffic flow? Because the issue is so close and the need for clearer guidelines great, I would certify the issue to the Florida Supreme Court as one of great public importance.

ALAMO RENT-A-CAR, INC., Appellant,

v.

Michael MANCUSI, Appellee.

No. 91-0149.

District Court of Appeal of Florida, Fourth District.

April 22, 1992.

Rehearing and Rehearing En Banc Denied July 2, 1992.

Driver brought action against car rental agency for damages based upon malicious prosecution after the termination of criminal case against driver for failing to redeliver hired vehicle. The Circuit Court, Broward County, Robert Lance Andrews, J., entered judgment in favor of driver and agency appealed. The Court of Appeals, Polen, J., held that: (1) nolle prosequi entered after jeopardy attached did not indicate the innocence of the driver as a matter of law, and (2) the intentional tort of malicious prosecution was not intended to be included among those civil actions for which punitive damages were limited by statute.

Reversed and remanded.

Stone, J., dissented and filed opinion.

1. Malicious Prosecution ⇐16

The following six elements must be proven to succeed on a claim for malicious prosecution: the commencement of a judicial proceeding; its legal causation by present defendant against plaintiff; its bona fide termination in favor of plaintiff; the absence of probable cause for prosecution; malice; and damages.

2. Malicious Prosecution ⇐35(2)

A bona fide or good-faith termination of judicial proceeding in favor of the present plaintiff for purposes of malicious prosecution claim is not one which has been bargained for or obtained by the plaintiff on his promise of payment or restitution.

3. Malicious Prosecution ⇐35(1)

Nolle prosequi entered after jeopardy attached did not indicate the innocence of the accused, as a matter of law, so as to support later malicious prosecution claim; the jury should have been allowed to hear the circumstances surrounding the termination of the criminal trial, including the proffered testimony of accused's attorney, the criminal case transcript, and the proffered testimony of the assistant state attorney who prosecuted the criminal case.

4. Malicious Prosecution ⇐68

The intentional tort of malicious prosecution was not intended to be included among those civil actions for which punitive damages are limited by statute to three times compensatory damage award. West's F.S.A. § 768.73(1)(a).

G. Bart Billbrough of Walton Lantaff Schroeder & Carson, Miami, for appellant.

John Beranek of Aurell, Radey, Hinkle & Thomas, Tallahassee, and Walter G. Campbell and Kelly Gelb of Krupnick, Campbell, Malone & Roselli, Fort Lauderdale, for appellee.

POLEN, Judge.

This is an appeal from a final judgment awarding appellee, Michael Mancusi, $300,000.00 in compensatory damages and $2,700,000.00 in punitive damages in his malicious prosecution action against appellant, Alamo Rent-A-Car [hereinafter Alamo]. We reverse and remand for a new trial.

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 section 817.52(3), Florida Statutes (1985), failure to redeliver a hired vehicle. The state brought criminal charges against Mancusi after an Alamo employee signed an affidavit that was utilized as part of a probable cause affidavit against Mancusi. The facts leading up to Mancusi's arrest on the criminal charges were in dispute; however, it appears that Mancusi rented a vehicle from Alamo believing that his contract entitled him to use 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 (2) weeks after the vehicle was returned to Alamo, Mancusi was taken to the Fort Lauderdale police department, questioned, and arrested.

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 Fort Lauderdale, the State Attorney's Office, the State of Florida, and the City of Dania. 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 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.

[1] 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 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;

6) damages.

Dorf v. Usher, 514 So.2d 68, 69 (Fla. 4th DCA 1987).

[2] 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 *Lui 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.

[3] 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 af-

1. 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 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).

2. Alamo requested that it be allowed to offer the testimony of the Assistant State Attorney by phone; however, the trial court denied Alamo's request, allowing Counsel for Alamo to proffer this testimony into the record. This proffer included a statement that the nolle prosequi was announced following negotiations with Mr. Mancusi.

ter considering this evidence could the trier of fact determine whether the nolle prosequi Mancusi received was bargained for or bona fide.

[4] We also address Alamo's argument on appeal 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). This section provides in pertinent part:

> **768.73 Punitive damages; limitation.**
>
> (1)(a) 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....

(emphasis added). We agree with the trial court's conclusion that the instant malicious prosecution case was not *based on* misconduct in a commercial transaction. Rather, the instant action for which Mancusi may have been entitled to punitive damages was based on Alamo's alleged malicious prosecution of Mancusi. There is no indication from the plain meaning of section 768.73 that the legislature intended the intentional tort of malicious prosecution to be included among those civil actions for which punitive damages are limited under this statute.

We do not address the distinct issue regarding the constitutionality of section 768.73, currently pending before this court in *State v. Mancusi*, No. 91-0186.

We reverse the final judgment in favor of Mancusi and remand for a new trial in accordance with this opinion.

REVERSED AND REMANDED.

DOWNEY, J., concurs.

STONE, J., dissents with opinion.

STONE, Judge, dissenting.

I dissent because in my judgment the trial court's rulings were evidentiary in nature. The court did not actually direct a verdict on the question of bona fide termination of the criminal proceeding. Rather, the court excluded the proffered evidence for several reasons, which the court summarized during and after the trial:

> Defendant argues that the nolle prosequi was obtained by the accused upon a promise of restitution and therefore it is not a bona fide termination in plaintiff's favor. But the evidence shows that Alamo received nothing more than what Mr. Mancusi had been offering all along. Mr. Mancusi's rental bill had been paid in full as soon as it was charged to the credit card. Alamo did not produce a back-dated lost rental agreement evidencing additional charges until a couple of weeks before the criminal trial. Nonetheless, Mr. Mancusi had agreed to pay those charges before trial. Given those circumstances, the nolle prosequi amounted to an abandonment of the criminal charges and was a bona fide termination of a case in plaintiff's favor. See *Shidlowsky v. National Car Rental Systems, Inc.*, 344 So.2d 903 (Fla. 3d DCA 1977), *cert. denied*, 355 So.2d 516 (Fla.1978).
>
> ... [In ruling on the motion for new trial and other post-trial motions] In addition, the Fourth District Court of Appeal has stated that the defendant [Alamo] has the burden to establish that the nolle prosequi was based solely on restitution. *Liu v. Mandina*, 396 So.2d 1155, 1156 (Fla. 4th DCA 1981). The assistant state attorney who prosecuted this case, Mr. Peacock, was a critical witness as to this issue. The court informed the defendant early in the trial that this was the case. The defendant failed to subpoena this witness and he was unavailable for trial. Also, defendant failed to ask for a continuance at the conclusion of the trial despite his earlier statement that he would do so. Given the defendant's failure to meet its burden, the court found that the nolle prosequi was in fact a bona fide termination in plaintiff's favor.

Alamo, for its own reasons, elected not to subpoena the prosecuting attorney. The

court determined that his testimony was critical and essential to its determination of whether it should admit the proffered evidence. The trial court recognized that the issue in the earlier criminal case did not involve a failure to pay the money in question, but solely the failure to return the car on schedule. It is undisputed that the appellee never refused to pay. Alamo had simply not billed him and, for their own purposes, elected not to charge the credit card. The prosecutor's statements to the court at the time of the nolle pros clarified that there were arrangements for the payment in question. Without explanatory testimony by the prosecutor, the statements are meaningless as evidence on the issue of whether such payment was required by the state as a *quid pro quo* for a nolle pros. I also note that the record shows that at the time the criminal case was dismissed, it was expressly stated that the appellee did not waive his claims against the appellant.

Therefore, notwithstanding the trial court's statement that it found the nolle pros to be a bona fide termination, I believe the appellant has failed to demonstrate reversible error or an abuse of discretion with respect to the proffered evidence. In all other respects I concur with the majority opinion.

UNITED AMERICAN BANK OF CENTRAL FLORIDA, INC., Appellant,

v.

Donald SELIGMAN and John G. Pierce, Appellees.

No. 91-1316.

District Court of Appeal of Florida, Fifth District.

April 24, 1992.

Rehearing Denied June 17, 1992.

Bank brought suit against escrow agent and his client. The Circuit Court for Orange County, Rom W. Powell, J., granted summary judgment for agent, and bank appealed. The District Court of Appeal, Cowart, J., held that: (1) agent breached his duty under modified escrow agreement; (2) complaint failed to state cause of action on theory of conversion; and (3) facts alleged in complaint were sufficient to state cause of action in debt.

Reversed and remanded.

1. Deposits and Escrows ⇐13, 24

In absence of express agreement, written or oral, law will imply from circumstances of escrow that agent has undertaken legal obligation to know provisions and conditions of principal agreement concerning escrowed property, and to exercise reasonable skill and ordinary diligence in holding and delivering possession of escrowed property in strict accordance with principal's agreement.

2. Deposits and Escrows ⇐24

Escrow agent breached his duty under modified escrow agreement when he disbursed escrowed funds directly to his client, rather than bank, which had become third-party beneficiary to client's rights by virtue of assignment of client's interests in the escrow funds.

3. Trover and Conversion ⇐4

Tort of "conversion" constitutes exercise of wrongful dominion or control of property to detriment of rights of its actual owner.

See publication Words and Phrases for other judicial constructions and definitions.

4. Trover and Conversion ⇐1

Essence of tort cause of action of conversion is disseisin of the owner or interference with legal rights incident to ownership, such as right to possession.

5. Deposits and Escrows ⇐24

Complaint failed to state cause of action in favor of bank against escrow agent