DA 5-3-93 047

FILED
SID J. WHITE
APR 30 1993
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

14

IN THE SUPREME COURT OF FLORIDA

ALAMO RENT-A-CAR, INC.,

Petitioners/Cross Respondent,

v. CASE NO. 80,376

MICHAEL MANCUSI,

Respondent/Cross Petitioner,
_____/

REPLY BRIEF ON MERITS ON CROSS-PETITION BY MICHAEL MANCUSI

JOHN BERANEK
Florida Bar No. 005419
Aurell, Radey, Hinkle & Thomas
101 North Monroe Street
Suite 1000 -- Monroe-Park Tower
Post Office Drawer 11307
Tallahassee, FL 32302
904/681-7766

and

WALTER G. CAMPBELL
Krupnick, Campbell, Malone
& Roselli
700 S. E. Third Avenue
Suite 100
Ft. Lauderdale, FL 33316

TABLE OF CONTENTS

STATEMENT OF CASE AND FACTS

The Alamo brief accuses counsel of misstating facts and inventing evidence. The first accusation concerns the one month period which Mancusi thought was the rental time on the car. Alamo criticizes page 3 of the Mancusi brief which said: "... Mr. Mancusi intended to rent the car for a one month period". Alamo says this was a misstatement. The Fourth District opinion stated: "Mancusi rented a vehicle from Alamo believing that his contract entitled him to use the vehicle for one month". (See opinion at page 1011). This is what the District Court thought the evidence showed. Alamo is guilty of the misstatements.

Alamo accuses the brief writer of misrepresenting the evidence regarding confusion at the Alamo counter contending "No such record exists". At R.692 Mr. Mancusi testified:

> But you have to realize that there was confusion in that station at the time. There was a lot of people coming in, a plane had just landed. They had no cars. Each agent was waiting on three or four people.

Alamo should have read the record before accusing counsel of misstatements.

Alamo next accuses Mancusi of misstating the evidence concerning putting a car "on warrant". Alamo says this is merely "Alamo jargon" and that putting a car on warrant "does not mean that the local police department is contacted". Again, Alamo should have read the testimony given by its own employee who actually put this car "on warrant". At R.419 she stated as follows:

Q. Okay. When you use the term 'placed vehicle on warrant' what do you refer to?

A. It means I called up the Fort Lauderdale Police Department after all the procedures were handled and the car went on warrant.

Apparently the Alamo employee did not know the "jargon". She put the car "on warrant" on August 13, 1986 and called the police the same day. (R.437-8).

Alamo next contends that Mancusi's statement that he had an "open credit card" at all times is not supported by the record. The trial judge, as quoted by Judge Stone in his opinion clearly stated that Mancusi's credit card was in the hands of Alamo and completely accessible to Alamo. Obviously, Mancusi did not call Alamo and offer to pay the secret charges he did not know about which Alamo manufactured on the day the Alamo employee was being deposed in the criminal case. Mancusi always offered to pay for the rental by giving a valid credit card for the complete payment.

Indeed, Alamo charged the credit card for whatever sum it chose to charge. The fact that Alamo may have had an internal 28 day policy which customers knew anything about cannot possible mean that Mancusi stole the car because he was beyond that internal policy. The 28 day period argument at page 4 of the opposing brief is inconsistent on its face. Alamo argues that the credit card should have been closed out on the 28th day but at the same page quotes testimony from its employee McArdle where he stated that Alamo collects "whatever we could get on the credit card". It is uncontested that Alamo charged this card for whatever amount it wanted. Alamo could have charged the card for the full amount and

was certainly authorized by Mancusi to do so. Alamo certainly never told Mancusi it was only charging for some limited portion of the time the car had been gone.

Next Alamo accuses Mancusi of a misstatement concerning his assertion that he had always agreed to pay the full rental bill. Indeed, the trial judge said it quite succinctly: "Mr. Mancusi had agreed to pay those charges before trial". (R.1853). There was actually no dispute whatsoever in the evidence concerning this fact. Judge Stone's dissent stated: "It is undisputed that the appellee never refused to pay".

On the question of where Mancusi's office was located, at R.606, Mancusi testified: "Alamo is literally a quarter of a mile away from my company". At R.609 Mancusi stated that he gave Alamo his business address and at R.612 he stated that:

> I called the Alamo station right down the road from me and I got a young lady on the phone, a rental agent. And I told her I was - that there was apparently a problem, that I was under the impression I had rented the car for a month and she told me to hold on. She put me on hold. She came back. She said that the credit card would hold it and no problem. She said, okay, fine. It was that simple.

Alamo's arguments that no such record evidence existed are not supported by the record.

SUMMARY OF ARGUMENT

Mancusi has moved to strike the excess pages from the Alamo reply brief on the Alamo petition. Mancusi is not allowed by the applicable Appellate Rule of Procedure to file a further responsive brief to the reply brief of Alamo on the merits of Alamo's petition.

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

ARGUMENT ON ALAMO'S PETITION

I.

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

POINTS II & III

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

POINT IV

WHETHER THE §768.73 LIMITATION APPLIES TO MALICIOUS PROSECUTION

Under the appropriate appellate rules Mancusi is not given the opportunity of filing a responsive brief directed to the Alamo reply brief on Alamo's petition. Therefore the above points may not be addressed by Mancusi. Alamo has devoted 32 pages of its reply brief to these points whereas the rules provide for a 15 page reply brief. Mancusi has moved to strike the Alamo brief to the extent that it exceeds the 15 page limitation or in the alternative to be allowed to file a responsive brief.

ARGUMENT ON MANCUSI'S CROSS-PETITION

I.

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

The argument in the Mancusi brief in support of cross-petition at pages 18-24 concerns the admissibility of telephone testimony, the admissibility of the criminal trial transcript and the admissibility of the testimony of the criminal defense attorney.

Despite the specific arguments made in that brief, Alamo has chosen simply not to respond. In pursuing the continual theme of personal attacks on counsel Alamo contends at page 34 of its brief that the Mancusi "arguments are disingenuous". The argument which is referred to as disingenuous is the assertion that the trial court really made evidentiary rulings and that no reversal based on those evidentiary rulings was appropriate. Alamo chooses to participate in name calling rather than legal analysis. Indeed, the evidentiary ruling argument was specifically adopted by Judge Stone in his dissent and was responded to by the majority in footnotes to their opinion. Obviously, analyzing the evidentiary ruling argument is not disingenuous when it was the subject of the opinion in the Fourth District Court of Appeal. Frankly, the disingenuous assertions by Alamo are irritating but since the Fourth District Court of Appeal found the argument worthwhile exploring, we will not take the bait and will instead stick to legal analyses.

The Fourth District's opinion stated that:

> 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, ...

This was not a mere description of the procedure by which a proffer was attempted. The court also used the word "proffer" in describing counsel's recital of what the testimony would have been. The Fourth District Court of Appeal knew the difference between the word "testimony" and the word "proffer". The court also went on to specifically hold the jury should have been allowed to hear the <u>testimony</u> of the assistant state attorney and that <u>testimony</u> was

only offered by telephone. Again, Alamo even goes so far as to suggest that perhaps telephone testimony is really admissible. See footnote 11 at page 40.

Alamo urges that it never argued to the Fourth District that the failure to take telephone testimony constituted error. This may be true but despite the absence of an argument, the Fourth District so ruled. As Mancusi has previously argued, no matter what result occurs in this case on the other issues, the telephone testimony ruling must be reversed.

As also previously argued, Alamo chose not to subpoena the state attorney and he was away from the State of Florida on vacation and totally unavailable for testimony in the trial.

Alamo has totally failed to respond to Mancusi's assertions that the trial court would definitely have allowed state attorney Peacock to testify had he been present live in the courtroom or had his deposition been taken. As stated at page 19 of the Mancusi brief, defense counsel even agreed that state attorney Peacock was a crucial witness and the judge continually asked defense counsel whether he intended to call Mr. Peacock. (R.285-290). The judge did not say he would exclude the testimony of Peacock. He stated exactly the opposite and was warning defense counsel that Peacock was an absolutely necessary witness. Again, Mancusi previously argued that any fair reading of the extensive colloquy on this subject shows that the trial court would definitely have allowed Peacock to testify had he been present. (R.285-290).

At page 42 of the current Alamo brief it is argued that:

> Contrary to the plaintiff's suggestion, the assistant state attorney's testimony -- excluded by the trial court -- was not a necessary prerequisite to the transcript's admissibility.

It is hard to understand Alamo's argument that the trial court excluded Mr. Peacock's testimony. Clearly he did not except to the extent that that testimony was offered by telephone. The Alamo brief is facially inconsistent. Alamo cannot have it both ways. It cannot offer testimony by telephone and gain a reversal in part because of its exclusion and then argue to this court that the trial court excluded it and at the same time assert that the district court's opinion was merely a very technical description of the mode by which the proffer was made.

The criminal trial transcript was inadmissible because the state attorney's testimony was a necessary predicate. The intention of the state attorney as to why he nolle prossed the underlying criminal case could not be gleaned from the transcript in the absence of the testimony of the person who made the decision. This was an "evidentiary ruling" within the discretion of the trial court and the district court erred in failing to accept this evidentiary ruling rationale as urged by the dissent.

The fact that the trial judge may have wrongly concluded that a nolle pross after jeopardy attached constituted a bona fide termination does not mean that a reversal is required. As Mancusi previously pointed out, if the three pieces of evidence in question were not admissible on other grounds apparent on the record then the trial judge was right for the wrong reason. This is precisely

the situation presented herein. The telephone testimony was inadmissible. The transcript of the criminal trial was inadmissible without the testimony of the state attorney and in addition to these reasons, the content of the trial transcript showed that the $365 payment had absolutely nothing to do with the crime charged and thus could not constitute restitution as a matter of law. The same harmless error argument is applicable to the testimony of the criminal defense attorney.

Alamo's argument as to this testimony is long on rhetoric but short on analysis and detail. We invite this court's attention to the two page proffer of the criminal defense attorney's testimony. Had this testimony been admitted it would have hurt rather than have helped Alamo.

The same is true regarding the proffered testimony from Mr. Mancusi which did not go before the jury. Alamo argues that Mancusi could not have answered any of the questions concerning bona fide termination correctly and for that reason those questions were not asked. However, Alamo proffered Mancusi's testimony and that testimony was that the nolle pross was <u>not bargained for</u>. At R.745 Mancusi testified in response to defense counsel questions in a proffer that the $365 payment was not really a part of the nolle pross, that Judge Henning would have forced the nolle pross in any event and that it was "kind of thrown in on top of the paperwork at the end". Alamo cannot complain that this proffered evidence cannot be looked at on appeal. This is the evidence which Alamo

asserts it should have been allowed to present to the jury and this evidence would have hurt not helped Alamo.

Once the telephone testimony is removed from this case as error, the reversal must be vacated.

Alamo also repeats and underlines its assertion that the record does not show that Mancusi ever offered "to pay the additional money owed to Alamo for the time the car was out of Alamo's custody". (See Alamo brief, page 45). Of course Mancusi never offered to pay Alamo's secret bill which it did not create until the moment before the deposition of Ms. Feciskonin in the criminal case. Mancusi has never argued that he called up or otherwise contacted Alamo to assure them that he would pay whatever secret bills they might generate that he knew nothing about. This assertion by Alamo is ridiculous.

What is clear and uncontested from the facts is that Mancusi gave Alamo his credit card and always agreed to pay the rental car bill whatever it might be. He never argued about it or contested it in any way whatsoever. When a customer gives his credit card to a merchant and the merchant writes down the amount of the charge the customer cannot be accused of stealing the merchandise if the merchant underpays himself. This is precisely what occurred here. As a matter of law, the payment of the new recomputed amount was not restitution. This amount had nothing to do with the crime charged and the state attorney so indicated.

CONCLUSION

The ruling of the District Court of Appeal must be reversed with directions to reinstate the verdict and judgment in favor of Mancusi. The evidence in question which the court found wrongly excluded was not in fact excluded from evidence because it was never validly offered into evidence. The District Court's reversal is unwarranted and the judgment should be affirmed.

JOHN BERANEK
Florida Bar No. 005419
Aurell, Radey, Hinkle & Thomas
101 North Monroe Street
Suite 1000 -- Monroe-Park Tower
Post Office Drawer 11307
Tallahassee, FL 32302
904/681-7766

and

WALTER G. CAMPBELL
Krupnick, Campbell, Malone
& Roselli
700 Southeast Third Avenue
Suite 100
Fort Lauderdale, FL 33316

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to J. ROBERT MIERTSCHIN, JR., 4000 Hollywood Boulevard, Presidential Circle, 465 South Tower, Hollywood, FL 33020; G. BART BILLBROUGH, Walton, Lantaff, Schroeder & Carson, One Biscayne Tower, 25th Floor, 2 Biscayne Boulevard, Miami, FL 33131; RICK HELLER, Tripp, Scott, Conklin & Smith, 110 S. E. 6th Street, 28th Floor, Ft. Lauderdale, FL 33301; JEFFREY B. CROCKETT, Coffey, Aragon, Martin and Burlington, P.A., 2699 South Bayshore Drive, Penthouse, Miami, FL 33133; JACK W. SHAW, JR., 225 Water Street, Suite 1400, Jacksonville, FL 32202-5147; and CRAIG B. WILLIS, Assistant Attorney General, Department of Legal Affairs, The Capitol -- Suite 1601, Tallahassee, FL 32399-1050, this 30th day of April, 1993.

JOHN BERANEK