SUPREME COURT OF FLORIDA

CASE NO.: 84,060

STARR TYME, INC.,

Defendant/Petitioner,

v.

DAVID COHEN,

Plaintiff/Respondent.

_____/

Accepted

RESPONDENT'S ANSWER BRIEF

JOSEPH A MURPHY III
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Section 772.14 Florida Statute (1991)

Section 775.089(8) Florida Statute (1991)

Florida Evidence Code 90410

18 U.S.C. §3580 (e) (renumbered to §3664 (e))

Rule 410 of the Florida Evidence Code

STATEMENT OF THE CASE

Petitioner sued the Respondent for Civil Theft, Unauthorized Use of Company Credit Cards and Treble Damages.

The Respondent filed a Counter-claim or Breach of Contract and Accounting.

The Trial Court found against the Petitioner, on all counts, except as to Count IV, (credit card charge) which the Respondent, conceded.

The Court awarded Respondent in the amount of $7,986.49 on his Counterclaim for Breach of Contract and ordered an Offset in favor of the Petitioner, for the credit card charges and several other charges, net Judgment to Respondent, $4,597.36.

The Petitioner filed an appeal to the District Court of Appeals as to the issue of estoppel therefore the District Court upheld the verdict of the trial court.

STATEMENT OF FACTS

The Petitioner, Bruce J. Benenfeld, an attorney, was the sole owner of the Petitioner Corporation.(R. 87-88) Benenfeld went to a personal friend (David Cohen) Respondent as to the failing shoe business.(R. 141)

The Petitioner agreed to pay the Respondent compensation for his services, five percent, (5%) override of gross sales, ten percent, (10%) of South Florida Sales, (Tampa South). (R.188) The Respondent was never paid for his services and the Petitioner refused to give an Accounting to the Respondent. The Respondent on

behalf of said business made two trips to the Philippines, two trips to New York, and one trip to Atlanta and performed numerous duties from lay outs to negotiations of contracts. (R.196-197)

The company made over $160,000.00 in sales, when the Respondent made periodic requests for payment and an accounting, he was continuously stalled by Petitioner. The Respondent collected the accounts receivable from Future Nails. The Respondent retained $3,000.00 and paid the balance to Petitioner. The Respondent kept the $3,000.00 in cash, intact, in his safe, and never spent it. (R.204)

The Respondent refused to return the money without being paid, Petitioner threatened to "get" the Respondent (R. 205), and used his knowledge and position as an attorney in order to have charges filed against the Respondent.

The Respondent pleaded nolo not to a felony, but to a misdemeanor, which by definition is an amount under $300.00. This plea was accepted by the Respondent in order to avoid the costs of a trial.

The Civil Trial Court upon hearing all the evidence found that there was no theft or conversion by the Petitioner.

The Petitioner seeks to have the Court blindly apply the Florida Statute 772.14 and 775.089 against the Respondent when in fact the Petitioner was the wrongdoer. The Petitioner was unable to prove his case under the lesser burden of the preponderance of the evidence and it is crystal clear that the Petitioner had systematically cheated the Respondent hence judgment was rendered

in favor of the Respondent on his Counterclaim.

ISSUE

WHETHER THE DEFENDANT SHOULD HAVE BEEN ESTOPPED FROM DENYING THE ESSENTIAL ALLEGATIONS IN A SUBSEQUENT CIVIL PROCEEDING WHEN HE HAS ENTERED A NO-CONTEST PLEA TO A MISDEMEANOR IN A FELONY CASE

In all of the cases supporting the Petitioner's position the Defendant was either found guilty at trial in the criminal proceeding or pled guilty to the criminal charge thereby admitting the underlying facts. When a Defendant in a criminal proceeding is found guilty at trial or pleads guilty admitting to the facts and to his guilt he is afforded due process and fundamental fairness under the law.

Florida Evidence Code 90.410 provides:

> Evidence of a plea of guilty later withdrawn; a plea of nolo contender; or an offer to plea guilty or nolo contender to a criminal charge or any other crime is inadmissable in any civil or criminal proceeding. Evidence of this statement made in connection with any of these pleas or offers is inadmissable, except when such statements are offered in a prosection under Chapter 837.

Florida Statute 775.089(8) is based and is almost identical to Federal Statute 18 U.S.C. § 3580 (e) (renumbered in '987 to §3664 (e)), which provides:

> A conviction of a Defendant for an offense involving the act giving rise to restitution under this section shall estop the Defendant from denying the essential allegations of that offense in any subsequent Federal Civil proceeding or State civil proceeding to the extent consistent with the State law, brought by the victim.

The Florida Evidence code 90.410 is based on Rule 410 of the Federal Evidence Code.

Rule 410 of the Florida Evidence Code provides:

> Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against he Defendant who made the plea or was a participant in the plea discussions:

In United States v. Satterfield, 743 F2d 827 (11th Cir. 1984), wherein the Court stated that a Defendant would be estopped under 18 U.S.C. §3580(e) from denying the essential allegations of the offense in a subsequent proceeding where the following occurred:

> The facts underlying a criminal offence that give rise to restitution order will be given collateral estoppel effect only if they were fully and fairly litigated at the criminal trial, or stipulated through a guilty plea. See Raiford 695 F2d at 523 (guilty plea given same collateral estoppel effect as any other criminal conviction; plea of nolo contendere distinguished). (Emphasis added.)

In Paterno v. Fernandez, 569 So2d (Fla. 3rd DCA 1990), involving the issue of whether a guilty plea resulting in a conviction giving rise to a restitution order estopped the Defendant from denying the essential allegations of the offense in a subsequent proceeding. There the Court cited United States v. Satterfield, 743 F2d 827 (11th Cir. 1984), and stated:

> In pleading guilty to an information charge to the crime of grand theft in the first degree, the Defendant admitted all the facts contained in the information, that she committed the crime of grand theft in the first degree, that she took $20,000.00 or more from the Plaintiffs with the intent to deprive them of the right to their property and appropriated the property for her own use or for the use of others. Thus we find that facts underlying the criminal offense were stipulated through a guilty plea.

Smith v. Barlett, 577 So2d 360 (Fla. 5th DCA 1990), involved a guilty plea to aggravated battery where adjudication was withheld. The Fifth District held:

> We hold that one who pleads guilty or is found guilty by

a jury has been "convicted" under the provisions of 775.089 (08) even in absence of an adjudication.

The theory underlying the Florida Statutes relied on by Petitioner is: 1) at trial a jury made a finding of guilty and the Defendant had a full and fair opportunity to litigate the facts, or 2) the Defendant enters a guilty plea and in doing so stipulates that all of the underlying facts all the true and correct.

In the instant case the Petitioner attempts to equate a nolo plea to a misdemeanor as to be the statutory equivalent of a guilty plea to a felony. In fact in her argument Counsel for the Petitioner wrongly tries to set forth the Respondent was adjudicated for stealing $3,000.00 when in fact he was not.

In the instant case, the Respondent never stipulated to the underlying facts, nor were the facts ever litigated in the criminal proceeding and but rather only a nolo plea to a misdemeanor in order that the Respondent could avoid the cost of a felony criminal trial.

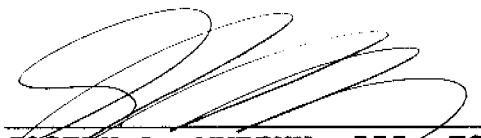
At the time of the civil trial when the facts were fully litigated, the Petitioner was unable to prove his case even by the preponderance of the evidence much less by the much higher standard of beyond and to the exclusion of every reasonable doubt which would have been required in the criminal prosecution. In fact, it became abundantly clear and was proven by the preponderance of the evidence the Petitioner had attempted to avoid and to date has avoided compensating the Respondent for his services. As a result the trial Court rendered Judgment in favor of the Respondent on his Counter-claim.

CONCLUSION

It would deny the Respondent due process of law and violate the doctrine of fundamental fairness if respondent is estopped from denying the essential allegations in a subsequent civil proceeding when he has merely entered a no-contest plea to a misdemeanor in a felony case.

To grant the relief sought by the Petitioner would be ludicrous since this would totally deny the Respondent due process of law and require the Court to render judgment against the Respondent. This is dramatically demonstrated in the instant case when the Respondent was afforded due process in the Trial Court, the Petitioner was unable to prove his case by the mere preponderance of the evidence.

The trial Court was correct. The Fourth District Court of Appeals was correct and should be affirmed.



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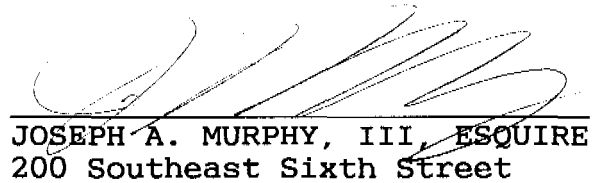
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent to Lauri Waldman Ross, Two Datran Center, Suite 1209, 9130 S. Dadeland Boulevard, Miami, Florida 33156 and Bruce J. Benenfeld, 7800 W. Oakland Park Boulevard, Suite 109, Sunrise, Florida 33351 by U.S. Mail on this 16 day of November, 1994.



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