

IN THE CIRCUIT COURT OF THE
11TH JUDICIAL CIRCUIT, IN AND
FOR MIAMI-DADE COUNTY, FLORIDA
CASE No.: 2020-009953-CA-01

Dole Chile, S.A.,

Plaintiff,

vs.

Frutafino, S.A.S. et al.,
Defendants.

Transcript of Proceedings
Before the Honorable William Thomas,
Circuit Court Judge

DATE TAKEN: Friday, September 16, 2022

TIME: Commenced at 1:08 p.m.
Concluded at 2:07 p.m.

LOCATION: VIA VIDEOCONFERENCE

REPORTED BY: ALYSSA ZUMPARO,
Stenograph Shorthand Reporter and
Notary Public, State of Florida at Large

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On behalf of the Defendants

P R O C E E D I N G S

1
2 Thereupon,
3 the following proceedings began at 1:08 p.m.:

4 THE COURT: Good morning, everyone. This is
5 2020-009953. Who's here for the plaintiff?

6 MR. OSORIO: Pardon me, your Honor, on behalf
7 of the plaintiff, Carlos Osorio, as well as my
8 co-counsel, Mr. George Vila, Mr. Andres Rey and
9 Mr. Prado.

10 THE COURT: Who's here for the defense?

11 MR. LAGE: Gus Lage, your Honor.

12 THE COURT: All right. You may proceed,
13 partial motion for summary judgment.

14 MR. OSORIO: Thank you, your Honor. This is
15 my motion I'll try to reserve a few minutes for
16 rebuttal if possible, and I'll be as brief as I can
17 be. My client is Dole Chile, we had sold fruit to
18 Mr. Gustavo Lage's client Frutafino.

19 Mr. Danilo Garcia is the principal of Frutafino.
20 Frutafino and Danilo Garcia are both defendants in
21 this case. We've raised various counts for bad
22 check, for fraud, for fraudulent transfer and civil
23 theft. There are counterclaims that have been
24 raised by Mr. Lage's client for a supposed oral
25 agreement, where we owe them 3.5 million

1 supposedly. And there's a third party claim for
2 malicious prosecution that was filed against my
3 colleague Mr. Vila and also my client Dole for
4 having reported some bad checks, as they allege.

5 The motion for summary judgment today, your
6 Honor, is not on all the claims. It's partial, as
7 your Honor mentioned. The motion as to my claims
8 are on the bad check count. And I'll show you the
9 various straightforward facts that establish
10 there's no genuine issue of material fact and for
11 your Honor to award summary judgment on behalf of
12 my client on the bad check claim.

13 I'm also moving for summary judgment against
14 Mr. Lage on the supposed oral agreement for \$3.5
15 million. That's a counterclaim of his for breach
16 of contract and unjust enrichment. And I'll show
17 you there's no genuine issue of material fact, that
18 there is absolutely no evidence to support the oral
19 agreement, we've completed discovery. And your
20 Honor can rule accordingly on the supposed oral
21 agreement.

22 And, lastly, I am moving for summary judgment
23 on the malicious prosecution claim on two grounds.
24 First of all, immunity. Mr. Vila merely reported
25 the bad checks. He did nothing further. We took

1 the depositions of the police officer who handled
2 the intake, and of the detective who investigated.
3 The detective said that there was probable cause in
4 his opinion. So the first basis is there's case
5 law that you can't sue an attorney or anyone just
6 for reporting a crime. And the second basis is
7 Mr. Lage's client is unable to establish the
8 elements for malicious prosecution that Mr. Vila or
9 Dole acted with malice and that they were the cause
10 of the arrest. The cause of the arrest was the
11 investigation, independent investigation, by the
12 detective and by the state attorney's office.

13 If your Honor were to grant my motion the
14 following is what would remain for trial. None of
15 Mr. Lage's client's claims would remain and my
16 client's fraud claim on the -- not on the bad
17 checks but on having deceived my client to sell
18 fruit would remain. And I'm not moving for summary
19 judgment on that since it can be an intent or
20 triable issue there. I am not moving for summary
21 judgment on civil theft and I'm not moving for
22 judgment on fraudulent transfer.

23 So, your Honor, if I may have permission to
24 share my screen.

25 THE COURT: Who are you sharing your screen

1 for?

2 MR. OSORIO: I'm going to show some statutes
3 and some of the record, your Honor.

4 THE COURT: I don't need you to show statutes
5 just read what you need to read.

6 MR. OSORIO: Okay. Well, then, I can -- once
7 I pass the statutes, if I can share on the screen
8 some of the key documents in this case that aren't
9 in dispute.

10 All right. Judge, well, the bad check
11 statute is 68.605, Judge, and it says you can seek
12 treble damages if you're paid with a bad check.
13 And that statute cites to 832.07 which is the
14 criminal statute on bad checks. And there's a
15 provision in there that says -- 832.07, that says
16 there's a presumption that if an account is closed
17 that the checks were issued with fraudulent intent.
18 And that is the case here, Judge. The bad checks
19 that we got -- it wasn't a stop payment situation.
20 It wasn't an insufficient funds situation. It was
21 a, they close the account on September 6, 2019 and
22 on September 9th, 2019, they gave us three bad
23 checks, written on a closed account. This is what
24 the detective had investigated and concluded that
25 there was probable cause. And that's what led to

1 the arrest of Mr. Lage's client. So on my bad
2 check claim, Judge, those are the statutes and
3 those are the facts. There were bad checks written
4 on a closed account.

5 Now, there is a defense that was raised by
6 Mr. Lage's client that we knew that we were never
7 supposed to deposit those checks. The records
8 shows, Judge, the accounts were closed, whether you
9 deposited them or not the checks were bad.

10 May I share my screen briefly, Judge, just to
11 show you the account closure date and the issuance
12 of the bad checks or would you like me to proceed
13 and hustle?

14 THE COURT: You can just proceed.

15 MR. OSORIO: Thank you, your Honor.

16 Well, your Honor, so those are the facts and
17 that's the law on the bad check claim. There's no
18 issue that's triable as to whether there's a need
19 to prove intent or no intent. There is no genuine
20 issue of material dispute as to the account was
21 closed. We took the deposition of the bank rep,
22 the bank rep said, "Yes, this account was closed on
23 September 6th, 2019." My client has testified that
24 they received the checks written on a closed
25 account on September 9th, three days later. And

1 Mr. Lage's client has admitted that he wrote the
2 checks on September 9th, 2019. We were given bad
3 checks, Judge. We have never been paid for the
4 debt. And so therefore, Judge, I respectfully
5 request that you enter summary judgment on the bad
6 check count. We have satisfied the pre-suit
7 statutory demand that you sent a letter and that
8 letter was not met with payment.

9 So, your Honor, those are the facts and law
10 on --

11 THE COURT: Well, let's let him respond to
12 the bad check claim.

13 MR. OSORIO: Yes, your Honor.

14 MR. LAGE: Your Honor, as far as the bad
15 check claim is concerned, there's no dispute,
16 actually, that my client didn't close the account.
17 The account was at the behest of BB&T. The record
18 evidence shows that there was a letter issued by
19 BB&T on August 16th, 2019, saying:

20 "Dear, client, you're hereby notified that
21 you have 45 days from the date of the letter to
22 withdraw your available funds and close the above
23 listed deposit account. The decision was based on
24 our review of your current relationship with us.
25 And is not based on credit reporting information.

1 Furthermore, the decision is in accordance with our
2 BB&T bank services agreement, which states we may
3 at any time close an account you have with us and
4 may do so with or without cause."

5 "What you need to do: Immediately cease
6 writing checks on the above and do not make any
7 further deposits, contact any third parties," so on
8 and so forth.

9 So they're saying that our client
10 unilaterally decided to close the account, that's
11 not true. What the testimony of the individual
12 from BB&T was, was that he doesn't know why the
13 account was closed.

14 THE COURT: Why does it matter why the
15 account was closed? The question is, did your
16 client know that the account was closed and after
17 knowledge that the account was closed, did your
18 client write a check to cover goods or services
19 knowing that the account was closed and the check
20 would not be honored?

21 MR. LAGE: Well, that's not entirely the
22 case, your Honor, because there are issues that
23 would preclude their ability to get treble damages
24 on this. And that goes to the facts surrounding
25 the closure of the account. It's not an automatic

1 that you get treble damages on it as a matter of
2 law. And what they're asking for would be a
3 judgment against Frutafino and against
4 Danilo Garcia for that matter. So against
5 Danilo Garcia, you signed it as an officer, so
6 there would be no judgment against him pursuant to
7 longstanding law in this district. The issue of
8 whether they'd be entitled to treble damages is
9 something that would have to be decided as well.

10 And as cited to you in our response, your
11 Honor, the issue on bad check isn't as cut and dry
12 as the -- as Mr. Osorio would want to make it seem.
13 As a matter of fact what the Court said is that --
14 hold on -- that given the nature of the claims, if
15 they're intertwined with other issues, the final
16 judgment would be premature and should not have
17 been issued until conclusion of the entire case.

18 We cited to other cases that talk about the
19 ability to get a judgment on the bad check. If we
20 were talking about just the face amount of the
21 check, that would be sufficient against Frutafino
22 but only against Frutafino. And the issue of
23 whether there was sufficient facts to warrant the
24 trebling of the damages would be something that has
25 to go to the jury.

1 THE COURT: Why? I mean, I don't understand
2 why. Did they send you a notice letting you know
3 that the checks were not honored?

4 MR. LAGE: Are you talking about the bank
5 subsequently sending us a notice?

6 THE COURT: No. Did you know -- well, let me
7 ask another way. What evidence is there in the
8 record that you did not know that this account was
9 closed at the time that you wrote the checks?

10 MR. LAGE: The checks were written before
11 they were delivered, Judge. So the checks came
12 from Colombia, they were sent to the client. What
13 happened is, there was a discussion between the
14 representative of the plaintiff and the
15 representative of Frutafino, that these checks were
16 only supposed to be placeholders for a subsequent
17 agreement. These were checks that were never
18 supposed to be cashed. They were in the e-mails
19 that have gone back and forth even after the
20 issuance of the checks.

21 THE COURT: I don't understand why would you
22 write a check that was not supposed to be cashed.
23 I mean, it makes no sense. And if you're writing a
24 check on an account that is closed, then you might
25 as well not write a check because you're

1 basically -- I mean, it's the same as zero. And my
2 question is -- is that you say that if the checks
3 were written before the account was closed -- but
4 my question is, were the checks delivered before
5 the account was closed?

6 MR. LAGE: No, Judge, I can't say that that's
7 the case. I can say that the testimony of the Dole
8 representative is that they knew that these checks
9 were never supposed to be cashed. They were never
10 meant to be cashed, that they were being held as
11 good faith for entry of a subsequent agreement
12 regarding the payment plan.

13 THE COURT: Well, the checks had a value.
14 The checks had a value.

15 MR. LAGE: Ostensibly, no, Judge, because
16 they were all postdated to begin with.

17 THE COURT: Yeah, but you just said, sir,
18 that they were supposed to be held. What would be
19 the purpose of giving somebody a check? If you
20 give somebody three checks and you're saying that
21 it was supposed to be -- you know, I'm assuming
22 like it was collateral, but it has no value because
23 you --

24 MR. LAGE: They don't.

25 THE COURT: -- because you closed the account

1 and you knew the account was closed.

2 MR. LAGE: They had no value intrinsic even
3 before that, Judge. Why? Because they were
4 postdated to begin with. And as we all know under
5 Florida law a postdated check has no value because
6 you have no reasonable expectation of ever cashing
7 it, because a postdated check -- you can't assume
8 that there's ever going to be that money in the
9 account. You know, when you're taking that check
10 that you're --

11 THE COURT: No, sir. That's not the law.

12 MR. LAGE: That is the law.

13 THE COURT: You're really telling me that the
14 law says, that you can write a check to somebody,
15 postdate it, and if you then take all the money out
16 of the account after you write the check, because
17 you write the check -- let's say you write the
18 check on the 1st of the month, you postdate it
19 though for the 10th of the month, and then you go
20 on the 4th of the month and take all of the money
21 out of the account. You're telling me the law is,
22 well, it was a postdated check and so you never
23 really anticipated that there was going to be money
24 in the account when you went to cash it. Where
25 does that come from?

1 MR. LAGE: I'll find you the case law, Judge,
2 because we cited it to you before. The motion to
3 dismiss --

4 THE COURT: Yeah, I need that. I need the
5 cite to that case.

6 MR. LAGE: Okay. Hold on.

7 MR. OSORIO: Brief response, Judge. The
8 record is clear that the account was closed on
9 September 6, 2019, by Mr. Lage's client, his client
10 testified to that. The bank officer testified to
11 that. The record is clear that the checks were
12 tendered three days later, to answer your question
13 directly, Judge, on a closed account. The record
14 is also clear that we were not told that the
15 account was closed. That's in the record. My
16 client's testified to that. And the record is
17 clear that it was collateral, as your Honor said,
18 and it would be worthless. Had we known, we would
19 not have accepted these checks.

20 THE COURT: What's the cite to the case that
21 you're relying on that says that they should have
22 known that the check had no value because it was
23 postdated and you understood that the money could
24 be withdrawn from that account any time, which
25 would be insufficient to cover the amounts of the

1 check?

2 MR. LAGE: Florida Desk versus Mitchell, is
3 one of the cases, Judge.

4 THE COURT: Give me the cite.

5 MR. LAGE: Hold on a second. 817 So.2d 1059.

6 THE COURT: Give me one minute to pull it up.

7 MR. LAGE: Let me see if -- that's the civil
8 theft case, your Honor, I'm sorry. Hold on. As a
9 matter of fact I think the statute itself talks
10 about it, so hold on.

11 THE COURT: While he's doing that, I'm trying
12 to understand what happened. How did you know that
13 the check was on a bad account or closed account?

14 MR. OSORIO: Is this directed to me, your
15 Honor?

16 THE COURT: Yes.

17 MR. OSORIO: We did not know at the time that
18 they were handed to us. When we tried to cash the
19 checks, they were no good. And then the result
20 was -- well, we tried to work out a payment plan
21 with Mr. Lage's client, it didn't come to fruition,
22 hence, the lawsuit.

23 THE COURT: Well, did you ever send them a
24 communication that said something like, "Look, I'm
25 notifying you that you gave me a check, it was in

1 this amount, it was drawn on this bank and payable
2 for this and it was not honored pursuant to Florida
3 law, you know, you need to make this check good.
4 Failure to do so will result in..."

5 MR. OSORIO: Yes, we satisfied the pre-suit
6 requirement, that shouldn't be an issue.

7 THE COURT: And after doing that, giving that
8 notice, they never made good on the checks?

9 MR. OSORIO: Precisely, your Honor, and
10 that's why we're here today. They haven't made
11 good on their debt to my client Dole.

12 THE COURT: All right. So what's the case
13 that you're relying upon?

14 MR. LAGE: Just a moment, your Honor, I just
15 pulled up this --

16 THE COURT: All right. Mr. Osorio, you can
17 go to the next argument.

18 MR. OSORIO: Yes, your Honor. If I may jump
19 to the end since it's of great importance to my
20 client who's been sued for malicious prosecution.
21 The record is clear, Judge, and the detective has
22 testified that Mr. Vila only reported this bad
23 check -- imagine, Judge, if any time a lawyer
24 reports a bad check, they get sued for malicious
25 prosecution. Detective Greg (ph) reported that

1 there was no undue influence or anything of that
2 sort by Mr. Vila. He merely reported the bad check
3 mentioned that there's a civil lawsuit, this case.
4 And the detective testified, and this is all of
5 record, that he concluded that because the account
6 was closed and checks were written on a closed
7 account that there was probable cause to arrest
8 Mr. Lage's client. Mr. Lage's -- that matter was
9 referred to the state attorney's office, who the
10 detective said conducted their own review and the
11 arrest occurred after the -- after Mr. Lage's
12 client was prosecuted and charged --

13 THE COURT: That's the basis for the
14 malicious prosecution?

15 MR. OSORIO: The basis for the malicious
16 prosecution is allegedly that George Vila used
17 undue influence to cause the arrest of Mr. Lage's
18 client. There's no evidence in the record to
19 support that. The record evidence is to the
20 contrary that Mr. Vila and my client also sued them
21 for malicious prosecution. The record evidence is
22 that we merely reported a crime. Mr. Lage has not
23 comported with any evidence to indicate any of the
24 elements of malicious prosecution, like, malice --

25 THE COURT: What happened in the case against

1 Mr. Lage's client, the malicious prosecution case?

2 MR. OSORIO: Well, there was no malicious
3 prosecution case, that case was on the bad check
4 statute and the case was eventually dropped. We
5 respectfully suggest under a misunderstanding,
6 misapprehension by the state attorney on the bad
7 check statute being satisfied criminally. We think
8 that the state attorney didn't understand that the
9 checks were issued on a closed account. That case
10 was dropped. There has been no malicious
11 prosecution ensued until now by Mr. Lage's client
12 against Mr. Vila, who's with you, and Dole. So
13 we're asking you that you enter summary judgment
14 since the record evidence shows that all that was
15 done was reporting a bad check and nothing further.
16 That doesn't satisfy the elements for malicious
17 prosecution.

18 THE COURT: I'm trying to understand,
19 Mr. Lage, you just -- you acknowledged that your
20 client wrote a check on a closed account.

21 MR. LAGE: No, I acknowledge that Frutafino,
22 which is one of the defendants, wrote a bad check
23 on a closed account.

24 THE COURT: Who wrote the check -- okay. Who
25 wrote the check on behalf of Frutafino?

1 MR. LAGE: I believe it was Ramona Rezu (ph)
2 that wrote the checks and forwarded them, your
3 Honor.

4 But as far as your initial question, I found
5 the answer for you. It's -- the postdated checks
6 at issue preclude charges against Mr. Garcia --
7 okay. The, Anderson versus Bryson, postdated
8 checks --

9 THE COURT: What's the cite?

10 MR. LAGE: Let me see, 94 Florida 1165. And
11 a pertinent part it pulled, when the check in
12 question is issued, delivered prior to the date of
13 affairs, and it is stated that a subsequent date at
14 which it is to be paid, the drawer informing the
15 payee at the time of delivering the checks, that he
16 did not then have sufficient funds in the dry bank
17 to pay the check, but promising that he would have
18 such funds in the future date formed (ph) by the
19 check. And the payee with such knowledge chooses
20 to rely upon the drawers promise to provide funds
21 upon the date stated in the check. The issuance of
22 such a check or order under those circumstances,
23 and it's subsequent dishonor, when presented by the
24 payee on or after the date it bears, does not
25 constitute the defense announced by Chapter 9328,

1 an intent to defraud in the issuance of such a
2 check is effectually negative by the attended
3 circumstances.

4 THE COURT: I don't understand, sir. What is
5 the evidence in this case that at the time that you
6 wrote the check that you told the plaintiff that
7 there was not going to be any money in that account
8 to honor the check?

9 MR. LAGE: If you'd let me finish, your
10 Honor, it's implied. Because it says, the payee
11 knows when he accepts, if that drawer has
12 insufficient funds to pay the check, and that its
13 payment depends on the performance of the drawers
14 promise to subsequently provide funds for that
15 purpose, under those circumstances, the payee
16 voluntarily elects to rely, not upon the check but
17 upon the promise. There is nothing in the statute
18 under consideration which makes them lawful to
19 promise to fail to pay at a future date.

20 Another case that deals with that is Banderas
21 versus State, in which the Third District Court of
22 Appeals held that any postdated check --

23 THE COURT: What's the cite?

24 MR. LAGE: Let me give you, Banderas, 372
25 So.2d 489.

1 THE COURT: One minute. One minute.

2 MR. LAGE: Sorry.

3 THE COURT: 372 --

4 MR. LAGE: So.2d --

5 THE COURT: Yes.

6 MR. LAGE: 489.

7 THE COURT: Go ahead.

8 MR. LAGE: The ruling was in keeping with the
9 general theory that a postdated check implies on
10 its face a present insufficiency of funds. Here,
11 although not exactly analysis, we're presented with
12 a situation of interpretation regarding the meaning
13 of most -- any postdated checks as written within
14 Florida statute 832.052. It is important to note
15 that the statute includes the word "any," given
16 that it's dated -- there is no carve out within the
17 statute for postdated checks drawn on closed
18 accounts. In the instant case, the fact that the
19 check was postdated as was the case in Banderas,
20 puts the recipient on notice that there were no
21 funds available for payment of the checks at the
22 time they were made and delivered.

23 MR. OSORIO: Brief response, your Honor?

24 THE COURT: Let me read this case. Give me a
25 minute. Well, factually, that's distinguishable

1 from here because the case -- and they said, "We
2 are presented with an apparently unique question,
3 that is under the facts of this case, because the
4 appellant's use of an impossible date on the check,
5 i.e., September 31st, 1976, brought it within the
6 definition of the phrase "any postdated check" as
7 that term is used in Section 832.05(2)." And they
8 also said in this case, "that the section shall not
9 apply to any check where the payee or the holder
10 knows or has been expressly notified," not
11 implicitly, "expressly notified prior to the
12 drawing or uttering" of the check that there would
13 be insufficient funds to cover the check when
14 tendered.

15 So my question again is, did you tell them
16 I'm giving you a check but there's not going to be
17 money to cover the check?

18 MR. LAGE: As a matter of fact, your Honor,
19 the testimony of Mr. Garcia was that he met at the
20 golf course with Mr. Bacunha, he told them that the
21 account had been closed, that he was giving them
22 the checks. The reason why Mr. Bacunha wanted them
23 was -- "Well, I'm getting a very hard time from my
24 other colleagues at Dole, I need to have something
25 to hold on. We'll come into this payment plan."

1 And so on and so forth, that's the testimony of
2 Mr. Garcia. The testimony of Mr. Bacunha is that,
3 yes, he had been told that they were to be held and
4 they weren't to be cashed. He denies that there
5 was a statement by Mr. Garcia telling him that the
6 account had been closed, but that he was trying to
7 reopen the account with BB&T. So on that alone
8 there's an issue of fact created, your Honor.

9 THE COURT: Mr. Osorio?

10 MR. OSORIO: Yes, your Honor. Well, you
11 can't engineer issues of fact. The facts show that
12 they wrote a check on a closed account and Florida
13 statute 832.07 says that in that circumstance
14 there's a presumption of fraud.

15 THE COURT: What he's saying is that if he
16 told you -- and the case that he citing is that,
17 "Well, we told you" -- "Look, I'm going to give you
18 a check and there's no money in the account to
19 cover it, but I'm going to give you a check and you
20 can do with it what you will. But I'm telling you
21 now that there's no money in the account for the
22 check." And you just need something to show to
23 your higher ups, so that they leave you alone. And
24 you say, "Just give me the checks and we'll just
25 deal with it."

1 MR. OSORIO: Well, Judge, first of all there
2 is no case to support any of that. The cases that
3 Mr. Lage cited weren't closed account cases they
4 were insufficient fund cases. Second of all, what
5 they're saying is, we need a trial as to whether or
6 not it was said verbally, "Hey, I'm giving you
7 worthless checks on a closed account," then there
8 may be consequences for those lies. But we have
9 evidence in the record showing that that was not
10 what we were told, that we were given some checks,
11 we were told to hold onto them as part of a payment
12 plan.

13 THE COURT: Okay. Go to the next issue. Do
14 you want to respond to the malicious prosecution?

15 MR. OSORIO: Judge, I haven't finished, very
16 quickly, malicious prosecution. There's two
17 citations I want to give you as to why there should
18 be summary judgment entered on behalf of Mr. Vila
19 and Dole. The first one is 442 So.2d 1019,
20 Scientific Products. And the second one is Dorf,
21 that's 514 So.2d 68. What these cases stand for is
22 simply reporting a crime is not a cause for a
23 malicious prosecution suit, that's the point. I
24 don't want to belabor that.

25 THE COURT: Do you want to respond?

1 MR. LAGE: Yes, I do, your Honor. As a
2 matter of fact, that is an incorrect proposition
3 because those cases are post a Florida Supreme
4 Court case that came out in 2017 that lays out what
5 the elements for malicious prosecution --

6 THE COURT: What's the cite?

7 MR. LAGE: I will give it to you in a second,
8 your Honor. It's called Fischer versus Debrincat
9 [sic]. And the cite for the Fischer case, your
10 Honor, is -- I'm sorry, it's 217 So.3d 68.

11 THE COURT: Go ahead.

12 MR. LAGE: What Debrincat says is that, the
13 Court held that the litigation privilege is not
14 part of the filing of a malicious prosecution claim
15 that was based on adding, and later dropping, a
16 party defendant to the civil suit because
17 "malicious prosecution can never be established if
18 causing the commencement or continuation of an
19 original proceeding against the plaintiff were
20 afforded absolute immunity under litigation
21 privilege." So --

22 THE COURT: Give me a moment.

23 Tell me what is the malicious prosecution.
24 This is the individual who is suing for malicious
25 prosecution, yes?

1 MR. LAGE: Yes, your Honor, it's an
2 individual. What happened is they made a complaint
3 against Mr. Garcia himself as the principal of the
4 entity Frutafino. First of all, as the principal
5 he's not responsible for the debts of Frutafino.
6 They knew that. There had been litigation that had
7 been ongoing for quite some time. Judge Fine had
8 dismissed two of their complaints against
9 Mr. Garcia previously. He also initially found
10 that there was no basis for a worthless check,
11 well, they were aware of this. And what they're
12 trying to say is that you can never have a
13 malicious prosecution claim against the person that
14 initiates the complaint with the police department
15 because the police departments are independent.
16 And that's not entirely true because what happens
17 is, is the elements of the claim for malicious
18 prosecution are an original criminal or civil
19 judicial proceeding against the present
20 plaintiff -- was commenced or continued, that
21 happened with Mr. Garcia. There is no doubt that
22 he was arrested for alleged grand theft, which they
23 knew at the time was not viable because of the
24 Florida Desk case. And that their case had been
25 dismissed on two prior occasions. They failed to

1 disclose those dismissals to the police department.

2 The present defendant was the legal cause of
3 the original proceeding against the present
4 plaintiff as the defendant in the original
5 proceeding. So what they're saying is, is that the
6 police -- in order for them to them to be excused,
7 the police would have had to have stumbled across
8 this issue on their own. The truth of the matter
9 is, in the police reports that are part of the
10 record, that are included with the depositions that
11 have been filed, it's clear that Mr. Vila, on
12 behalf of Dole Chile, as their representative,
13 initiated the contact with the police department,
14 met with police department on numerous occasions,
15 which is the basis for giving them the information
16 which they were allegedly relying on for this
17 purpose. And there's an absence of disclosure by
18 Mr. Vila which would make a malicious prosecution
19 case viable. There has to be termination of the
20 original proceeding which constituted a bonafide
21 termination of the proceeding in favor of the
22 present plaintiff, that occurred. James Camaro
23 (ph) from the state attorney's office filed a no
24 action and elected not to proceed. The statute of
25 limitations for the filing of the complaint --

1 filing of information that was run. So that's in
2 favor. You don't have to have a trial and a not
3 guilty verdict, a no cross (ph) by itself could
4 have been enough -- a no action by itself is
5 enough. There was an absence of probable cause for
6 the initial proceeding, clearly, there's no cause
7 of action for grand theft as he was charged with.
8 Why? Because Mr. Vila and Dole --

9 THE COURT: I'm sorry, he was arrested?

10 MR. LAGE: Yes, he was.

11 THE COURT: So how do you say there was an
12 absence of probable cause?

13 MR. LAGE: I'll tell you why. Okay. In what
14 happened as far as the grand theft, okay, which he
15 was arrested for -- well, probable cause isn't
16 determinative just because of the arrest, your
17 Honor, but that's what they believe they have.

18 THE COURT: Well, no, probable cause is. I
19 mean, that's the whole purpose, an officer cannot
20 arrest you unless it is based upon probable cause
21 that a crime was committed, was about to be
22 committed or was going to be committed. And so
23 you're saying -- you're saying that the probable
24 cause stems from what?

25 MR. LAGE: A misapprehension of what the

1 facts were based on a failure to adequately and
2 completely disclose all of the facts surrounding
3 the case.

4 THE COURT: What did he tell the police?

5 MR. LAGE: What did he tell the --

6 THE COURT: For example, what has he told the
7 police, the following -- if he told to the police,
8 "My name is X and I have this company, I entered
9 into a contract with this company by the name of Y,
10 the principal that I was dealing with is this
11 gentleman named Z. And he gave me three checks
12 written on an account from the company and the
13 three checks were on accounts that were closed, he
14 signed -- he signed them. And he must have known
15 that when he wrote the checks that there was no
16 money in the accounts. And I would like to file a
17 formal complaint." And the officer says, "Okay.
18 Thank you. I'm taking down your information." The
19 officers go and look, they say, "Okay. Here is the
20 date on the check. Here is -- when they were
21 delivered. Here's the date the account was
22 closed." And they say, "Here's the person who
23 wrote the check." So the officer says, "Okay. I
24 think there's probable cause for an arrest." They
25 decide what to charge him with. Mr. Osorio's

1 client doesn't decide what the charge is. The
2 police decide what the charge is. So whether the
3 police want to charge them with civil theft or
4 grand theft, because of the amount, face value of
5 the checks -- but apparently they charged him with
6 grand theft.

7 What you're saying is Mr. Osorio's clients
8 should have told them that your client was just a
9 principal. And even though he signed the check, he
10 didn't sign it in his individual capacity but
11 simply as a principal and then your client should
12 have never been arrested.

13 MR. LAGE: Well, he also should have told
14 them what came out during discovery during the
15 deposition of the three officers of Dole, which all
16 uniformly testified that there was no intent that
17 they know of by Danilo Garcia to steal their
18 merchandise or to defraud them in any fashion. So
19 if that were the case, if that had been disclosed,
20 as was needed to be disclosed, you can't admit
21 salient facts for the purposes of those issues and
22 then hide behind the litigation privilege and say,
23 "Well, anything I say is privileged." I think
24 that's for a jury to decide.

25 THE COURT: I don't understand what you just

1 said. Are you telling me that if somebody calls
2 the police and says, "Somebody is" -- they call the
3 police and say, "My brother stole my car." So you
4 call the police and say your brother stole your
5 car. And then they say, "Well, do you think he had
6 an intent to permanently deprive you of it?" You
7 say, "No, he's probably going to come back but I
8 didn't give permission to take it." Or he
9 basically says, "I don't know." But the brother
10 wrote down on the note that said, you know, "I took
11 your car. I'm not going to keep it long." And if
12 he just simply -- and the police ask him, "Well, do
13 you think he had the intent to permanently deprive
14 you of it?" And he says, "You know what, I don't
15 know." Malicious prosecution -- because he wrote a
16 note and said he was going to be back. I mean, why
17 does he have to tell him what your client's state
18 of mind was? And that's the basis of a malicious
19 prosecution.

20 MR. LAGE: It negates everything else that
21 he's telling them, which is that these goods were
22 stolen. In order for their to be a theft, Judge,
23 there has to be intent to steal it.

24 THE COURT: Did he tell the police that the
25 goods were stolen or did he tell the police that he

1 provided your client with goods, your client gave
2 him a check in support of those goods on an account
3 that was closed, and he notified you -- he notified
4 you that the account was closed and you did nothing
5 to remedy the check? You didn't give him a new
6 check. You didn't give him a money order. You
7 didn't give him a cashier's check.

8 MR. LAGE: It's the latter. What you just
9 said is what took place as far as what the
10 testimony is. As far as that, your Honor, there
11 are more facts that go into that, which is that
12 it's not just the checks that were given it's also
13 the failure to say that there was a line of credit,
14 that there was a prior business relationship. That
15 the checks -- that the goods weren't stolen.
16 Because you're not stealing the checks, you're not
17 stealing the money. What the implication has been
18 is that they stole the merchandise, which wasn't
19 true.

20 THE COURT: He can't control what conclusions
21 the police arrive at. The question is, if he calls
22 the police and says, "I want to report that someone
23 gave me a bad check -- I mean, gave me a check on
24 an account that has been closed in exchange for
25 goods. We gave them the goods, they didn't give me

1 a check. I notified them that the checks were on a
2 bad account, gave them an opportunity to correct
3 the error and they didn't correct it." And the
4 police conclude that that's a theft. I don't --
5 what did he report that was inaccurate?

6 MR. LAGE: Your Honor, it's not just the
7 accuracy, it's also the failure to completely
8 disclose. So going back to your hypothetical,
9 Judge. If you say, "Oh, my brother stole my car,"
10 and that's all you say -- and you tell them, "Well,
11 I gave him the keys and I didn't tell him when the
12 car needed to be back and it's only been gone for
13 two hours," there, of course, can be malicious
14 prosecution on those failures to disclose.

15 THE COURT: That's not what we have here.
16 This is not a situation where somebody -- where
17 they give you the goods and knowing that you gave
18 them a bad check, that's not what we have here. We
19 have a situation where they gave you the goods and
20 you gave them a check that everybody thought was a
21 good check. I agree with you, if somebody -- if I
22 give my brother my keys to my car and I tell him he
23 can use the car, and he drives off with the car and
24 then I call the police and tell the police that,
25 "Oh, my brother has my car and I don't think he's

1 going to bring it back." And I don't tell the
2 police that I gave him the keys to the car and let
3 him use the car and he just left two hours ago,
4 well, I would agree with you. But that's not what
5 we have here. You got the goods and you gave them
6 a check that was supposed to be collateral for the
7 goods even though they weren't going to cash it. I
8 think there was an understanding that you weren't
9 going cash it.

10 But by the way, did they call the police
11 prior to sending you a letter telling you that your
12 check was drawn on account that was closed, and
13 giving you an opportunity to make good on it.

14 MR. LAGE: That was after the litigation had
15 taken place, so...

16 THE COURT: So you didn't contact them prior
17 to calling the police and telling them that the
18 check was no good?

19 MR. OSORIO: We had, your Honor. We had sent
20 the statutory letter saying the checks were no good
21 and they didn't honor it and the litigation ensued,
22 and we did report the crime, your Honor. And we
23 don't necessarily have to deal with hypotheticals,
24 we took the deposition of the detective who said
25 he -- and I can put it on the screen, conducted his

1 own investigation and concluded there was PC and
2 the state attorney did that as well. And he also
3 testified that Mr. Vila didn't report anything
4 other than "here are the checks and here the
5 facts," and didn't have any undue influence. So
6 everything you're hearing from Mr. Lage is purely
7 speculative. And now is the time to grant summary
8 judgment not have to have a trial where we drag in
9 the detective, potentially the state attorney and
10 other folks. Frankly, it was a vindictive
11 counterclaim.

12 THE COURT: My question is -- I think
13 Mr. Lage brought this up, but my question is, why
14 was the individual who signed the check arrested?

15 MR. OSORIO: Well, your Honor, the thing is
16 that there may be civil liability only against the
17 company. And to respectfully correct Mr. Lage, I'm
18 not trying to get treble damages against Mr. Garcia
19 on the bad check claim. I'm trying to get it
20 against the corporation, the maker of the check.
21 Under criminal law Mr. Garcia is not insulated from
22 having committed a crime for uttering a bad check
23 simply because it was written on a corporate
24 account.

25 MR. LAGE: That's actually an incorrect

1 statement of the law, Judge. If you look at the
2 BEO Management versus Horta case, Third DCA, 314
3 So.3d 434, Florida Third DCA 2020. He is insulated
4 from having signed the check as a corporate
5 officer, plain and simple.

6 MR. OSORIO: Judge, whether he committed
7 fraud or issuing a statutory violation of a bad
8 check, no individual can form corporations and feel
9 free to issue bad checks until insulated.

10 THE COURT: Everybody would -- basically, all
11 they would do is form these companies, they would
12 make themselves principles and just sign as an
13 officer of the company. And then when -- after the
14 crime is discovered say, "Go ahead, go criminally
15 after the company but leave me alone because I just
16 signed the checks."

17 MR. LAGE: Well, that would normally be
18 interesting except Mr. Osorio's own clients, the
19 representatives said they've had a relationship
20 with this company for five years or more that they
21 never had a problem with any other payments
22 previously, that they know of no evidence that
23 would show in any way that this corporation was
24 formed with any intent to defraud Dole Chile or
25 anybody else. And that they themselves don't think

1 that the purchase of the fruit itself or anything
2 thereafter was done with the intent to defraud Dole
3 Chile, that came from there three offers. It
4 wasn't just one, it was all three. Mr. Ramirez
5 Mr. Bacunha and I forget the other individual, your
6 Honor.

7 MR. OSORIO: Your Honor, I had three parts to
8 my argument today, but I mean to be respectful of
9 the other colleagues who are here. The remaining
10 argument was on the counterclaim for \$3.5 million
11 that Mr. Lage filed against us on supposedly an
12 oral agreement. I don't know if that's to be
13 continued to another date.

14 THE COURT: No, go ahead. Make your
15 argument.

16 MR. OSORIO: Okay. The nature of the
17 transaction here, Judge, the relationship was you
18 order fruit, we ship you fruit, you pay for the
19 fruit. It wasn't a contract per se that we were
20 supposed to supply X per year. It was your
21 commercial relationship of purchase orders,
22 invoices, that has a running balance over the life
23 of the relationship. There came a time where the
24 relationship basically ended because they failed to
25 pay. We sued them. They then counterclaim and

1 say, "You agreed long ago on a \$3.5 million credit
2 for spoiled fruit, but it was an orally agreed deal
3 between us." Stunning to us that they had never
4 mentioned that before. Bazaar that why would they
5 be issuing checks to us and saying, "I'm going to
6 pay you," if we owe them \$3.5 million, so it also
7 defies logic. But we took discovery on it. We
8 said, "Where are the facts? Where are the
9 documents to support this supposed oral agreement?"
10 There are none, Judge, so I move for summary
11 judgment on a no evidence standard. They haven't
12 come forward with any proof --

13 THE COURT: What is the evidence of the oral
14 agreement, sir?

15 MR. LAGE: Your Honor, the evidence of the
16 oral agreement is, I don't know how many e-mails,
17 hundreds of the e-mails back and forth between the
18 parties. But what happens here, Judge, is they
19 provide fruit, when the fruit gets --

20 THE COURT: No. No. No. I'll let you tell
21 me what you want to tell me, but you said that
22 there are hundreds of e-mails that show -- that is
23 evidence of the credit?

24 MR. LAGE: Evidence of the discussions about
25 the credit and that the credits were going to be

1 issued that they were going to negotiate the
2 amounts of the credits, that it was subject to
3 further discussion.

4 THE COURT: But where is the evidence that
5 there was \$3 million in credit? Go ahead, share
6 your screen, show me some of these e-mails that
7 show the credit.

8 And I'm assuming what you're going to show me
9 is already record evidence?

10 MR. LAGE: It is, Judge, and they deposed my
11 client about it extensively.

12 THE COURT: The 1:30 hearing just be patient,
13 I'll be with you in a minute.

14 MR. LAGE: Keeps popping up the
15 interrogatories, Judge, I'm sorry. I'm having a
16 problem finding the link to the Dropbox that we
17 sent them, your Honor.

18 MR. OSORIO: Judge, while we wait, can I
19 round out my argument in this area?

20 THE COURT: Go ahead.

21 MR. OSORIO: Okay. Judge, besides there not
22 being evidence, even if there were it would be
23 unenforceable under the statute of frauds. They're
24 saying that there's an oral agreement for us to
25 credit them \$3.5 million and that we breached that

1 agreement. Well, the case law that I've cited and
2 I'll put it on the screen, says that, if it was to
3 be performed in a span longer than a year, which is
4 what they're alleging, that we agreed on this
5 credit long ago, it's unenforceable. And this is
6 why statute of fraud exists. Because where is the
7 evidence? We're here waiting for it. I took
8 depositions and document requests. Nothing, Judge.
9 I can cite the case to you, it is -- one moment,
10 Viscito, V-I-S-C-I-T-O, 717 So.2d 586. And in that
11 case it was undisputed that the parties oral
12 agreement created a business relationship that
13 lasted over an extended and indefinite period of
14 time. As such, the Court concluded that the
15 enforcement of the agreement was barred by the
16 statute of frauds.

17 So since they have no contractor agreement as
18 to that, there's no obligation on the part of my
19 client to provide 3.5 million. We also supplied an
20 affidavit on summary judgment stating there was no
21 oral agreement. We gave them all the credits that
22 were due. They ended up owing us money. That's
23 why they give us those checks. And there's no
24 contrary affidavit, Judge. So the record, I think,
25 is sufficient to enter summary judgment on this

1 counterclaim.

2 MR. LAGE: Your Honor, I can't find the link
3 but we provided Bates numbers Frutafino 01 through
4 1396, which included the photographs and all the
5 e-mails. I'm happy to send it to, your Honor. It
6 included every single e-mail back and forth and it
7 went through the claims process, which their own
8 people recognize that there was a claims process
9 that my client sent them e-mails, that they
10 received e-mail. And that they were subject to
11 negotiation and that they decide what amount of
12 credit they wanted to give. I don't think it's up
13 to them to decide what amount of credit they want
14 to give under those circumstances for spoiled fruit
15 or fruit that was substandard. They recognize that
16 it's an industry standard to provide credits for
17 substandard fruit or damaged fruit. With all
18 inferences being drawn on in our favor at this
19 time, those admissions alone are enough.

20 And as far as the statute of frauds or
21 statute of limitations, it's from the time that it
22 takes place. All of this is taken place post 2019.
23 And also, your Honor, it's whether it can be
24 performed within a year. If there's no definite
25 time, it's presumed that it can be performed within

1 a year. And it would be on Mr. Osorio to show that
2 you couldn't agree or give a credit within a year
3 after receiving those e-mail claims, the
4 photographs and everything else.

5 THE COURT: Anything else?

6 MR. LAGE: No --

7 MR. OSORIO: Nothing further, your Honor.

8 THE COURT: All right. Court having heard
9 from all parties fully consider the arguments of
10 all counsel, the motion for partial summary
11 judgment is granted as to -- what count is the bad
12 check count?

13 MR. OSORIO: It's Count Number One of my
14 claim, your Honor.

15 THE COURT: As to Count One. It's granted as
16 to -- what's the malicious prosecution count?
17 That's a counterclaim.

18 MR. OSORIO: That is a third party claim and
19 counterclaim, correct, Judge.

20 THE COURT: It's granted as to the malicious
21 prosecution. And I'm going to deny it as to the --

22 MR. OSORIO: The \$3.5 million counterclaim?

23 THE COURT: The counterclaim, yes.

24 Anything else?

25 MR. OSORIO: Well, your Honor, no. We'll

1 prepare an order, circulate it to opposing counsel
2 and submit it. We are on your trial calendar,
3 Judge, that starts on Monday, so it will shorten
4 the length of trial.

5 THE COURT: Okay.

6 MR. OSORIO: Thank you, Judge.

7 THE COURT: Thank you, gentlemen. Have a
8 good day.

9 MR. LAGE: Thank you.

10 (The proceedings concluded at 2:07 p.m.)

CERTIFICATE OF REPORTER

STATE OF FLORIDA:

COUNTY OF BROWARD:

I, Alyssa Zumpano, Stenograph Shorthand Reporter, certify that I was authorized to and did stenographically report the foregoing proceedings and that the foregoing Pages 3 through 43, inclusive, are a true and complete record of my stenograph notes.

I further certify that I am not a relative or employee of any of the parties, nor am I a relative or counsel connected with the parties' attorneys or counsel connected with the action, nor am I financially interested in the outcome of the action.

DATED this 3rd day of October, 2022.



Alyssa Zumpano,
Stenograph Shorthand Reporter

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FLORIDA RULES OF CIVIL PROCEDURE

Rule 1.310

(e) Witness Review. If the testimony is transcribed, the transcript shall be furnished to the witness for examination and shall be read to or by the witness unless the examination and reading are waived by the witness and by the parties. Any changes in form or substance that the witness wants to make shall be listed in writing by the officer with a statement of the reasons given by the witness for making the changes. The changes shall be attached to the transcript. It shall then be signed by the witness unless the parties waived the signing or the witness is ill, cannot be found, or refuses to sign. If the transcript is not signed by the witness within a reasonable time after it is furnished to the witness, the officer shall sign the transcript and state on the transcript the waiver, illness, absence of the witness, or refusal to sign with any reasons given therefor. The deposition may then be used as fully as though signed unless the court holds that the reasons given for the refusal to sign require rejection of

the deposition wholly or partly, on motion under
rule 1.330(d)(4).

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2019. PLEASE REFER TO THE APPLICABLE STATE RULES
OF CIVIL PROCEDURE FOR UP-TO-DATE INFORMATION.

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