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IN THE SUPREME COURT OF FLORIDA

CASE NO. 75,103

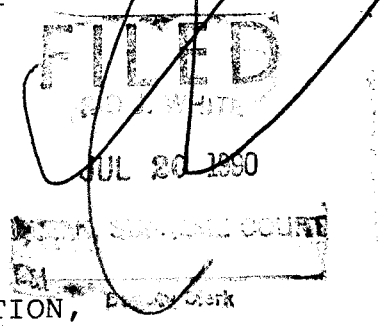
ISLAND CITY FLYING SERVICE,

Petitioner,

vs.

GENERAL ELECTRIC CREDIT CORPORATION,

Respondent.



ON PETITION FOR DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

In the late afternoon of January 16, 1985, Southern Express Airways, Inc. ("So. Express") flew aircraft N70CZ into the Key West International Airport on one of its commuter flights. The aircraft was parked behind the main terminal building in the So. Express area of the airport which is a part of the commercial/customs ramp; an area restricted to authorized personnel. [T.Vol.I-p.93,142-143/Vol.II-p.48-49] So. Express personnel then contacted ICFS to have aircraft N70CZ fueled so that it would be full of fuel for its early morning flight leaving Key West. [T.Vol.II-p.122] ICFS is the only entity selling fuel at the airport [T.Vol.II-p.5] ICFS sent its employee, Steve Diezel, to refuel the aircraft which was parked on the So. Express portion of the commercial/customs ramp. [T.Vol.I-p.128] Steve Diezel, as an employee of Island City Flying Service ("ICFS"), fueled the aircraft in the late afternoon prior to 6:00 P.M. on January 16, 1985. [T.Vol.I-p.127-128/Vol.II-p.5-6]

On January 16, 1985, Steve Diezel ("Diezel") worked the day shift starting at 8:00 A.M. and ending at 6:00 P.M. [T.Vol.I-p.126] Diezel then worked the evening shift starting at 6:00 P.M. and ending at 8:00 A.M. the next morning. [T.Vol.II-p.90] Diezel had been drinking alcoholic beverages during the early evening hours of his evening shift on the day of the accident. [T.Vol.I.107-108,130,140/Vol.II.90-92] At approximately 11:00 P.M. Diezel along with another ICFS employee, left the airport and went to a local hotel's bar and continued to drink alcoholic beverages until approximately 12:30 A.M. or 1:00

A.M. [T.Vol.I-p.130/Vol.II- p.90-94] The other employee then returned Diezel to the airport, in an obviously drunk condition. [T.Vol.I-p.130/Vol.II-p.90-93] Diezel then went to ICFS's leasehold to spend the night there so that, should any aircraft arriving or departing the airport require fuel from ICFS, he would be available to fuel those aircraft and make extra money. [T.Vol.I-p.130] ICFS knew that Diezel regularly spent the night at ICFS for the purpose of fueling ICFS's customers in the hours between 11:00 P.M. and 8:00 A.M. and authorized this conduct. [T.Vol.I-p.151-152/Vol.II-p.11-13] The manager of ICFS, Roland Brown, felt that Diezel's spending the night at ICFS provided a service for ICFS. [T.Vol.I-p.133/Vol.II-p.13]

The Court, during the charge conference, advised Plaintiff's counsel that the following jury instruction [A.1] would be given:

> "The Court has determined and now instructs you as a matter of law, that GENERAL ELECTRIC CREDIT CORPORATION, as owner of the aircraft, is responsible for any negligence of the operator, SOUTHERN EXPRESS in failing to lock the Piper Navajo aircraft." (Emphasis added). [T.Vol.III-p.55] [A.1]

Plaintiff's counsel objected to that instruction, and the instruction was given to the jury over the Plaintiff's objections. [T.Vol.III-p.9] There was not a scintilla of evidence placed before the jury by anyone that GECC was in any manner negligent. [T.Vol.I-p.1-161/Vol.II-p.1-184/Vol.III-p.1-66] Further, the jury instruction [A.1] is in error since there is no basis at law for holding GECC responsible for it's sub-lessee under our facts.

Arthur Skelly, Airport Director at Key West International Airport, states that he felt that the airport area was a secured area on January 16 and 17 of 1985, especially the commercial/customs ramp since there was a security guard on duty twenty-four hours a day. [T.Vol.I,p.96] Further, ICFS felt there was adequate security at the airport, and in fact, prior to January 17, 1985, they did not use prop locks on their aircraft because they assumed the security at the airport was sufficient to guard and secure the area from any theft. [T.Vol.II,p.15-16] It should be noted that the ICFS area where the ICFS aircraft were located was the general aviation area where the general public was allowed and was not the secured commercial/customs area which is restricted to authorized personnel of the airport only.

ICFS through its General Manager, Roland Brown, at the request of the owner, Ray Vanyo, Sr., hired Diezel to work in the maintenance shop on the premises of ICFS. [T.Vol.II, p.8,78] Ralph L. Sanders was the shop manager, at the time Diezel was hired. [T.Vol.I-p.154/Vol.II-p.78-79] Due to Diezel unreliability, Mr. Sanders twice fired Diezel. [T.Vol.I-p.154-157/Vol.II-p.79-80] Both times that Diezel was fired, he was rehired by Roland Brown at the request of owner, Ray Vanyo Sr. [T.Vol.II-p.80-81] Ray Vanyo, Jr. and Diezel were close high school friends. [T.Vol.II-p.31,40-41] The third time that Diezel was rehired, he was transferred from the maintenance department to the line refueling department because the maintenance department supervisor, Ralph Sanders, advised Mr. Brown that he did not want Diezel working in the maintenance

department anymore. [T.Vol.I-p.155-156/Vol.II-p.80-81] Thus, instead of refusing to rehire this unrealiable employee, ICFS chose to rehire him and place him in a job capacity which would require the entire airport to deal with, or be exposed to Diezel as a refueler. [T.Vol.I-p.82,123-157] During the time that Diezel worked in the maintenance department he did not deal with the rest of the airport, but only with the maintenance department on the ICFS leasehold. [T.Vol.II-p.4-6,123-157] When Diezel was originally hired there was no background check performed on him. [T.Vol.II- p.81-82] In fact, the application for employment was not even filled out in the areas regarding prior job experience and references. [T.Vol.II-p.81-82] Diezel, prior to his employment with ICFS, had received a bad conduct discharge from the United States Military Service as a result of possession of 199 grams of hashish and theft of government property. [T.Vol.II-p.38-39,82]

Diezel, testified that had he not been on the airport that night as an employee of ICFS to refuel aircraft that might come in later in the evening, he would not have come back to the airport to steal the aircraft. [T.Vol.I,p.130-133] Further, if Diezel had not been on the premises under color of authority due to his position as an employee of ICFS, the security guard would have paid more attention to Diezel's activities. Further, Diezel testified that he took this aircraft because it was full of fuel. The reason Diezel knew this aircraft was full of fuel was because in his capacity as the employee for ICFS, he had personally filled this aircraft's tanks a few hours prior to the theft. Diezel was

aware of this aircraft and chose this aircraft because of information he obtained through his employment with ICFS. [T.Vol.I-p.131/ Vol.II-p.122]

Further, ICFS did not lock its aircraft as it felt the airport was secured enough to prevent theft. [T.Vol.II-p.15-16]

Diezel's failing to ground the aircraft is no minor indiscretion. Failing to ground the aircraft and the fueling truck is a violation of the Federal Aviation Regulations. Diezel was warned repeatedly about this violation over a six (6) month period and continued to refuse to follow the FARs and refused to ground the aircraft. [T.Vol.I-p.82-82] The director of airport testified that Diezel acted like it was a game. [T.Vol.I-p.83-84] Further Mr. Steve Stoddard testified that he had to tell Diezel to ground the aircraft at least three times in one hour. [T.Vol.II,p.68-69]

SUMMARY OF ARGUMENT

The Trial Court erred in instructing the jury in accordance with ICFS's requested jury instruction [A.1] since the Federal Aviation Act has superseded the area of the law as to the liability of an owner/lessor of an aircraft by Limitation of Security Owner's Liability, Title 49 U.S.C.S. Sec. 1404 (1959). [A.2] That section when paraphrased to its aspects which are applicable to our fact situation, 49 U.S.C.S. Sec. 1404 reads,

> "...no lessor of any such aircraft ...under a bona fide lease of thirty days or more, shall be liable by reason of such interest or title, or by reason of his interest as lessor or owner of the aircraft ...so leased, for any injury...or damage to or loss of property...caused by such aircraft..."

General Electric Credit Corporation ("GECC"), pursuant to a lease, had not had this aircraft in its care, custody, or control since 1979. The sub-lease of that aircraft to So. Express was entered into on November 10, 1984. Since GECC's only nexus to the loss of this aircraft was by virtue of its owner/lessor interest in the aircraft, GECC is an entity that this Statute covers and protects. This position is confirmed by Rogers v. Ray Gardner Flying Service, 435 F.2d 1389 (5th Cir. 1970).

The Rogers court, supra, stated:

> "This provision appears clearly and forthrightly to preempt any contrary state law which might subject holders of security interest to liability for injuries so incurred." Id. at 1394.

The giving of the above jury instruction [A.1] was the only possible way the jury could have found GECC negligent since there is not one scintilla of evidence or testimony in the entire trial transcript of negligence by GECC.

Further, contributory negligence is not a defense available to ICFS in our fact situation based on the court's rationale in the case of McArthur Dairy, Inc. v. Original Kielbs, Inc., 481 So.2d 535 (Fla. 3d DCA 1986). In that case the court found that the employee's conversion of produce was done in the course of his employment. Likewise, the conversion of this aircraft was done in the scope of Diezel's employment. As such, the doctrine of respondeat superior is applicable to hold ICFS fully liable for the acts of its employee Diezel. Where the doctrine of respondeat superior is applicable, the employer is vicariously liable and the defense of contributory negligence is not available.

The Trial Court further erred in giving the jury instruction [A.1] since it was not based on any evidence presented at trial. The jury instruction [A.1] was inappropriate in our trial for at least five different reasons, any of which constitute reversible error for the giving of this jury instruction. [A.1]

The first reason for finding that the giving of this jury instruction [A.1] was error by the Trial Court is the aircraft was not in operation or in use immediately before or at the time of the theft/conversion by Co-Defendant, Steve Diezel and therefore, was not a dangerous instrumentality.

The second reason is the fact that this loss arose from a conversion of the aircraft. In our fact situation, when an airplane or a car is stolen, the owner is relieved from liability for damages to third parties as a result of that theft; therefore, if the owner is relieved from liability for damages to third parties, the owner should likewise be relieved from liability under the affirmative defense of comparative negligence when used against the owner to reduce the owner's damages.

Thirdly, the instruction was inapplicable to the fact situation in our case since ICFS, as employer of Diezel, stands in the shoes of their employee Diezel. If the wrongdoer had the affirmative defense of comparative negligence available to him, then a thief would never have to reimburse an owner for what he stole if he could argue that the owner made the theft too easy, even though he may have sold the booty and pocketed the money. Even if there had been any evidence put on by ICFS of negligent acts of GECC, the Defendants would still not be able to argue that GECC was comparatively negligent, and thus have their damages reduced because Steve Diezel's act was an intentional tort. It must be remembered that in our case there was not one scintilla of evidence presented which reflected, showed, or even hinted that GECC was negligent.

Fourth, reversible error in giving ICFS's Requested Jury Instruction [A.1] arises from the fact that a person has a right to rely on the presumption that people will obey the law. GECC's sub-lessee parked the aircraft on the commercial/customs ramp of the Key West International Airport ("International Airport").

That airport is fenced as required by the Federal Aviation Regulations. Further, there is a 24 hour security staff to insure that only authorized persons are allowed on the commercial/customs ramp. The acts of ICFS's employee, Diezel, in converting the aircraft were in violation of the laws of the State of Florida and therefore, neither GECC, nor even their sub-lessee, So. Express, should be required to anticipate that an employee of ICFS would enter the secured commercial/customs ramp of the Intern.'l Airport and convert the aircraft while the security guard was on duty. Since a person does not have to anticipate and determine what unlawful acts the rest of the world may do at every given moment of a person's life in order to make sure that he is not injured, a defendant who has damaged a Plaintiff by an intentional act should not be able to reduce the Plaintiff's damages under a theory of comparative negligence.

The undersigned was unable to find any aviation cases on the point that a person has a right to believe that others will obey the law. However, there are numerous cases involving automobiles wherein the Court has followed this principal.

That same rationale should apply to other aspects of life including aviation. A person should be entitled to assume that others will obey the law and should not be found to be comparatively negligent for not foreseeing that an intentional tortfeasor would perform an intentional tort, especially where the aircraft is parked in its usual place on a commercial/customs ramp, which is guarded twenty-four hours per day by a security guard and is in an area restricted to authorized personnel only.

Fifth, the verdict found GECC the only Plaintiff in this lawsuit, contributorily negligent. A detailed review of the Trial Transcript evidences that there was not one scintilla of evidence placed before the jury evidencing any negligent act on the part of GECC. Since the jury's verdict, as it relates to GECC, is not based on the evidence presented at trial, that jury verdict [R.895] as to its finding of negligence on the part of GECC, must be overturned by this Honorable Court.

Finally, the circumstances causing GECC's damages were created by ICFS in twice rehiring Diezel and giving him full authority and capacity as ICFS' employee to be on the airport premises, thereby the Harmony Homes, Inc. v. Zeit, 260 So.2d 218 (Fla. 1st DCA 1972) principle that "where one of two persons must suffer through the act or negligence of a third person, the one who creates the circumstances which made the wrongful act possible must suffer the loss" should be applied to the case at bar.

ARGUMENT

POINT I

THE TRIAL COURT WAS CORRECT IN DENYING ISLAND CITY'S MOTION FOR DIRECTED VERDICT ON THE CAUSE OF ACTION FOR NEGLIGENT HIRING/RETENTION AND THE DISTRICT COURT WAS CORRECT IN AFFIRMING THE TRIAL COURT'S DECISION.

The Trial Court was correct in denying, ICFS's Motion for Directed Verdict. The jury was correct in finding that ICFS, was negligent and that negligence was the proximate cause of GECC's damages. The Third District Court of Appeals was correct in affirming the Trial Court's denial of ICFS's Motion for Directed Verdict.

The Trial Court and jury had ample testimony placed before it to support their determination of negligence on the part of ICFS. Steve Diezel had been convicted of stealing government property while in the military as well as possession of 199 grams of hashish. Steve Diezel had twice been fired by ICFS. ICFS's Manager, Roland Brown, had received many complaints by the airport manager, Mr. Skelly, and by Airport Safety Officers and by Mr. Ben Gibson, Manager of So. Express, regarding repeated problems with the manner in which Diezel performed his work for ICFS on the airport property. Diezel was twice fired, but Roland Brown was forced by the owner, whose son was a personal friend of Diezel, to rehire Diezel. Thus there was ample testimony to support a finding that ICFS was negligent.

Further, under the Restatement of Torts Second, Section 317, as adopted in Florida ICFS was liable for the intentional

torts of Diezel since the only reason Diezel was on the property was through his apparent authority as an employee of ICFS. Diezel testified that had he not been at the airport on that evening in order to refuel aircraft should an aircraft come in between midnight and 6:00 a.m., he would not have come back to the airport simply to steal this aircraft. [T.Vol.I,p.130-133] Further, the security guard testified that had he seen Diezel that evening he would not have questioned him being on the commercial/customs ramp because he was an employee of ICFS and was authorized to be on that commercial/customs ramp. However, the security guard would not have allowed unauthorized persons to have access to the secured restricted commercial/customs ramp. The ICFS argument that Diezel was not on duty at the time he stole the aircraft is contradicted by his own testimony wherein Diezel stated he stayed at the airport so that he could make extra money fueling ICFS's customers aircraft in the late night hours and that had an aircraft come in that night he would have fueled it. Further, Roland Brown, ICFS's Manager, admitted he was aware of Diezel's spending the night on the ICFS premises and had authorized it as it provided a service for the customers of ICFS. Mr. Diezel was spending the night at ICFS so he could fuel aircraft, thus, Diezel was not off duty at the time of this conversion. ICFS's argument that Diezel had been drinking at a hotel bar is only partially correct. The true story is that Diezel and Paul DePoo had been drinking from approximately 7:00 p.m. to 10:00 p.m. They were drinking while performing fueling duties for ICFS. They continued to drink at a local hotel bar after 10:00 p.m.

ICFS statement, "Furthermore, the disparity between the possession of drugs and conversion of an aircraft in 1985 is an obvious non sequitur" is refutted by the testimony of the current owner of ICFS, Paul DePoo. Paul DePoo the employee working that evening Steve Diezel, at trial stated,

> "Q. When you heard that Steve Diezel took that aircraft, did you think anything to yourself about it?
>
> A. As far as what?
>
> Q. As far as, well, that sounds like something Steve would have done.
>
> A. I may have thought that.
>
> Q. If you had thought that sounds like something Steve would have done, what would you have meant by that?
>
> A. I don't know. He's, I know he was very anxious to fly different kinds of aircraft. It's just hard to tell, you know, I heard he did it and I said, <u>well, sounds like Steve</u>.
>
> Q. Let me refresh your memory a bit, going back to that deposition that was taken April 21st last year, page 20, sorry, I think that's page, well, it starts on page 20.
>
> 'The next morning when I heard there was a plane crash, <u>I kind of figured, well, that sounds like something Steve would have done.</u>'
>
> I then ask you the question: 'Why do you say that sounds like something Steve would have done?'
>
> You answered to me: '<u>He is just that kind of person, no common sense at all.</u>'
>
> Does that refresh your memory?
>
> A: Yes it does. Steve --
>
> MR. PARSONS: Your Honor, I would like for him to read the rest of the answer.

MR. PALMER: I'll go ahead.

THE COURT: Read it.

Q: 'To this day, if it would have been me that would have taken the airplane, I would have been locked up, you know, he's just that kind of person. He can get away with anything, it seems like.'

That's the rest.

Going back to my question, which was when you said it sounded like something he would have done, does that answer he is just that kind of person, no common sense at all, does that refresh your memory?

A: He's that kind of person. What can I say? I'm not responsible for Steve. He's that type of person. I feel he does not have any common sense." (Emphasis ours.) [T.Vol.II-p.97-99]

Thus, it is obviously not a non sequitur. Further, Diezel was not simply in the "possession of drugs", but was in the possession of 199 kilograms of drugs.

ICFS's argument that "even actual knowledge of an employee's criminal record does not establish, as a matter of law, the employer's negligence in hiring him" is not persuasive here where this employer had twice fired Diezel and where the manager of ICFS's maintenance department told the manager of ICFS that he did not want Diezel back in the maintenance department.

ICFS's statement, "Furthermore, there was a plethora of evidence that Diezel was a good worker and even after this incident he obtained employment with other local companies" is not consistent with the fact that ICFS twice fired Steve Diezel and it should be further noted that the other employments he obtained was

working at a welding shop and working on a road crew paving streets. He was not placed by these subsequent employers in a position where he could steal or damage millions of dollars of aircraft as ICFS did by hiring and giving him full access to the airport under the color of his employment with ICFS and endangering the public.

The ICFS statement, "In addition, the testimony was unanimous and no one ever had the idea he would steal an airplane" is a total misrepresentation of the testimony since Paul DePoo, stated it sounded exactly like something Diezel would have done. [T.Vol.II-p.97-99]

ICFS statement, "The only complaints against Diezel was that he failed to ground the planes when refueling, was tardy and had taken off from his employment for one week" are no small complaints. The complaints were sufficient for ICFS to fire him twice. Further, failing to ground aircraft is no minor indiscretion as it is a violation of the Federal Aviation Regulations. Diezel was warned repeatedly about this violation over a six (6) month period but continued to refuse to follow the Federal Aviation Regulations and ground the aircraft. [T.Vol.I-p.82-82] Pursuant to the director of the airport's testimony, Diezel acted like it was a game. [T.Vol.I-p.83-84] Further, Steve Stoddard testified that he had to tell Diezel to ground the aircraft at least three times in one hour. [T.Vol.II,p.68-69] Had an explosion occurred, substantial property damage, as well as injury to personnel and passengers using the airport would have occurred. The fuel truck Diezel

operated contained five thousand (5,000) gallons of aircraft fuel. ICFS was fully aware of the dangers this employee posed to the persons and property of users of the airport facility and yet, refused to terminate this employee permanently. ICFS should be held 100% responsible for the acts of this employee since they chose to keep him and in doing so, chose to expose other users of the airport to Diezel's whims and actions.

ICFS's argument that this employee's conduct "was not forseeable" to ICFS is flatly refutted by the testimony of ICFS's employees and owner. Paul DePoo stated it sounded exactly like something Diezel would have done. Further, the starting of this airplane is a complicated procedure that only someone with training in this aircraft could do. The only way Diezel was able to start the aircraft was because ICFS had the same aircraft and ICFS had taught him how to start it. A common "Joe" off the street would not have been able to start this aircraft which gives an additional reason why there was no need to lock the aircraft.

The ICFS states "NO PROXIMATE CAUSE: Furthermore, there is no proximate causal connection between any supposed negligence on the part of Island City in the hiring and retaining of Diezel, and in the theft of the airplane" is totally without merit. Diezel, testified that had he not been on the airport that night as an employee of ICFS to fuel aircraft that might come in later in the evening, he would not have returned back to the airport to steal the aircraft. [T.Vol.I,p.130-133] Further, if Diezel had not been on the premises under color of authority due to his position as an employee of ICFS, the security guard would have

paid more attention to Mr. Diezel's activities. Diezel testified that he took this aircraft because it was full of fuel. The reason Diezel knew this aircraft was full of fuel was because in his capacity as the employee for ICFS, he had personally fueled this aircraft in the late afternoon on the day of the theft. Thus, Diezel was aware of this and chose this aircraft because of information he obtained through his employment with ICFS, and he was on duty at the time he converted the aircraft and was given access to the secured commercial/customs ramp under the color of authority given him through his status as an ICFS employee. [T.Vol.I-p.131/ Vol.II-p.122]

ICFS referred to So. Express as the agent or servant of GECC. It should be remembered that So. Express was not the agent nor the servant of GECC, but was merely a sub-lessee of an aircraft being leased by GECC.

ICFS argues that negligence is a legal cause of loss if it directly and in a natural and continuance sequence produces or contributes substantially to producing such loss so that it can reasonably be said that but for the negligence the loss would not have occurred. GECC points out to the Court that but for the negligent hiring and rehiring and retention of Diezel he would not have fueled this aircraft in the scope and course of his employ and would not have been on duty that night in the scope and course of his employ and therefore would not have converted this aircraft in the scope and course of his employ. Thus, the negligence of ICFS is the legal cause of GECC's loss. Thus, in the present

case, there is a direct causal link between the negligence on the part of ICFS and the conversion of the aircraft.

Further, ICFS cites Garcia v. Duffy, 492 So.2d 435 (Fla. 2d DCA 1986) for the proposition that "an employer has a duty to exercise reasonable care and retention of an employee and a breach of this duty occurs only when it is shown by the Plaitiff that the employer received actual or constructive notice of problems with an employee's fitness, and that it was unreasonable for the employer not to investigate or to take corrective action such as discharge or reassignment, Garcia v. Duffy, supra". The employer was under constructive notice and had actual notice of this employee's unfitness. This is evidenced by their firing of this employee; therefore, ICFS breached their duty to take corrective action. Wherefore, ICFS is responsible for this loss to GECC.

The argument that this was caused by So. Express' failure to lock the aircraft is ludicrious since testimony was given at trial that even if the aircraft door's lock had been locked it was not a substantial lock and anyone with a screwdriver could open it. The lack of the lock not being substantial is not anything inherent to this particular aircraft but is related to the manner in which aircraft locks are made by the aircraft manufacturers. Further, none of the commercial operators locked their aircraft as they felt the aircraft were adequately secured by the twenty-four hour security and due to the aircraft being parked on the restricted commercial/customs ramp. [T.Vol.II,p.169-174] Further, ICFS itself did not lock its aircraft as it felt the airport was secure enough to prevent

theft. [T.Vol.II-p.15-16] It should be noted that the ICFS property was not a restricted area as was the location where GECC's aircraft was stolen. Thus, anyone of the public had authority to be by the ICFS aircraft, but no one, except authorized personnel were allowed in the are of the GECC aircraft. Further, the alleged negligence, if any, of So. Express is not imputted to GECC. As such, there was no breaking of the causal chain from ICFS to Diezel as a result of any activity by GECC.

ICFS's citation of caselaw regarding the duties necessary and reasonable as to investigation are irrelevant to the facts in this case because ICFS performed no investigation whatsoever. ICFS did not even require that Diezel fill in the application in its entirety. Diezel was hired because he was a friend of the owner's son for many years. The owner was fully aware of Diezel's criminal record in the military for hashish and theft of government property, but chose to ignore it. ICFS's firing of Steve Diezel on two occasions and then rehired him evidences that ICFS was fully aware of his unfitness as an employee, however chose to keep him as an employee. ICFS chose to rehire Diezel on two occasions and ICFS should be the one to bear the costs of that decision not GECC.

Based on all of the above, this Honorable Court should affirm the decision of the Trial Court to deny directed verdict.

POINT II

THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL WHICH HELD THAT ISLAND CITY WAS NOT ENTITLED TO A REDUCTION OF DAMAGES BASED ON GENERAL ELECTRIC'S COMPARATIVE NEGLIGENCE IS CORRECT AND DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH MALLORY V. O'NEIL, 69 So.2d 313 (Fla. 1954); PETRIK V. NEW HAMPSHIRE INS. CO., 379 So.2d 1287 (Fla. 1st DCA 1979), Pet. den., 400 So.2d 8 (Fla. 1981); GARCIA V. DUFFY, 492 So. 2d 435 (Fla. 2d DCA 1986); HOFFMAN V. JONES, 280 So.2d 431 (Fla. 1973), FURTHER THE DECISION IS CORRECT FOR OTHER REASONS.

As stated in GECC's Answer to Petitioner's Jurisdictional Brief, there is no conflict between the decision of the Third District Court of Appeal and Mallory v. O'Neil, 69 So.2d 313 (Fla. 1954), Petrik v. New Hampshire Ins. Co., 379 So.2d 1287 (Fla. 1st DCA 1979), Pet.den., 400 So.2d 8 (Fla. 1981), Garcia v. Duffy, 492 So.2d 435 (Fla. 2d DCA 1986), and Hoffman v. Jones, 280 So.2d 431 (Fla. 1973). The Initial Brief of ICFS fails to set forth how the facts in GECC's case are on point with any of those other cases; nor does ICFS evidence or set forth affirmatively how or in what manner GECC's case conflicts with those cases. None of the cases which are alleged to conflict with the GECC case conflict because none of those cases discuss the issues and the holding of the Third District's decision in GECC. The Third District's decision in GECC is that the employer stands in the shoes of his employee and as such, where the employee does not have available to it the affirmative defense of comparative negligence, the employer, likewise, does not have available to it that defense. Nowhere does the Mallory, Petrik, Garcia, or

Hoffman cases, supra. even discuss that issue much less conflict with it.

Garcia v. Duffy, supra., involves an entirely different set of facts from the GECC opinion's case. In Garcia, the court found the Second Amended Complaint failed to establish a) that the Defendant/Employer owed a duty to the Plaintiff to exercise reasonable care in hiring and retaining safe and competent employees, and b) that the Defendant/Employer breached such a duty. The Court further noted that the employer in Garcia had not breached any duty since there was nothing alleged to have occurred subsequent to hiring which placed the employer on actual or constructive notice of the employee's dangerous character. Those are not the facts in our case. The Garcia opinion simply sets forth the principal of law relating to an action for negligent hiring and negligent retention as it applies to whether the Plaintiff's Second Amended Complaint states a cause of action. The Garcia court, supra. did not address whether or not the employer by virtue of its negligent hiring of the aforesaid employee-thief, stands in the shoes of said employee, being legally responsible for his acts of theft, and therefore, can no more avail it of the owner's imputed comparatory negligence than can the employee-thief. Thus, there is no conflict between the Garcia opinion and the GECC opinion.

The Petrik v. New Hampshire Insurance Company decision, supra., is not in conflict with the GECC opinion. The Petrik facts were a man and woman who were passengers in a car driven by their son brought an action for personal injuries suffered in an

automobile collision with a truck against the truck driver, his employer and the employer's insurer. The Plaintiffs filed a Third Party Complaint against the son and his insured, who denied the coverage to the son based on the family exclusion clause. The Circuit Court for Duval County entered Summary Judgment against Plaintiffs on their complaint alleging the employer's negligence in hiring the driver and against the son's insurer on the issue of coverage. Plaintiffs and their son's insurer appealed. The District Court held that,

> "The appellants' evidence and allegations, that Superior Dairies had actual or constructive knowledge of Charles' history of traffic tickets and accidents, did not amount to a 'reasonable basis for an inference of wantonness, actual malice, deliberation, gross negligence, or utter disregard of law ...,' on the part of Superior Dairies. (Cites omitted)
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> . . . .
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> The claim for compensatory damages against Superior and its employee Williams, based on negligent hiring, was also properly dismissed, since those negligence theories imposed no liability on Superior Dairies different from that arising out of counts I and II of the complaint which alleged Superior's responsibility for Charles' driving under the doctrine of respondeat superior. Clooney v. Geeting, 352 So.2d 1216 (Fla. 2d DCA 1977). The Clooney court explained that allowing a plaintiff to sue the employer under those additional negligence theories would be unduly prejudicial to the defendant employer, since the employee-driver's past driving record would be admissible to show negligent hiring or employment, but not to show the driver's negligence which the employer's liability is based under the theory of respondeat superior. Clooney, supra at 1220; citing Dade County v. Carucci, 349 So.2d 734, 735 (Fla. 3d DCA

> 1977). The trial court did not err in granting summary judgment against count III of the appellants' complaint." Id. at 1289.

The Florida Supreme Court in the above quoted Petrik case, originally affirmed the decision of the District Court of Appeal, however, on Petition for Rehearing the Supreme Court granted in part and vacated in part its opinion of April 26, 1979 insofar as it conflicted with the earlier opinion cited at 379 So.2d 1287. The only area which appears in any way to even relate to the GECC case is found in the rehearing section of the opinion. In that section the Court held,

> "Negligent hiring and employment are legitimate bases for recovery; Mallory v. O'Neil, 69 So.2d 313 (Fla. 1954), McArthur Jersey Farm Dairy, Inc. v. Burke, 240 So.2d 198 (Fla. 4th DCA 1970). Moreover, both the agent and the principal are subject to suit for their own respective negligence. Greenburg v. Post, 155 Fla. 135, 19 So.2d 714 (1944)."

This language is not in conflict with the GECC opinion. The fact situation is entirely different in Petrik than the facts in the GECC case at bar. Further, the Petrik case does not deal or discuss whether the defendant/employer, by virtue of its negligent hiring of the aforesaid employee-thief, stands in the shoes of said employee, being legally responsible for his act of theft, and therefore can no more avail it of the owner's imputed comparative negligence than can the employee-thief.

The Third District Court of Appeal's opinion in GECC is not in conflict with Mallory v. O'Neil, 69 So.2d 313, (Fla. 1954). In Mallory, an apartment complex tenant was shot by a caretaker

employed by the apartment complex owner. The case was appealed to the Supreme Court on the issues of whether the complaint was sufficient to state a cause of action. The Supreme Court reversed the District Court of Appeal by finding that the Second Amended Complaint did state a cause of action. The opinion of the Supreme Court in Mallory simply relates to and deals with whether the Second Amended Complaint stated a cause of action. Thus Mallory opinion is not in conflict with the GECC opinion. The GECC opinion is based on an entirely different fact situation. The Mallory opinion does not address or discuss the rationale of the GECC opinion that the employer/defendant by virtue of his negligent hiring of the aforesaid employee-thief stands in the shoes of said employee, being legally responsible for his acts of theft, and therefore, can no more avail it of the owner's imputed comparative negligence than can the employee-thief.

The GECC opinion is consistent with the Mallory case in that the Mallory court held,

> "Other jurisdictions have considered the negligence of the master in knowingly keeping a dangerous servant on the premises and have held the master liable for the acts of his servant outside the scope of his authority if trespassing on the rights of those legally on the master's premises whether the servant acted wilfully, maliciously, or negligently." (Cites omitted) Id. at 315.
>
> "The doctrine of these cases was approved in Restatement of Torts, Section 317. It seems to be a sound rule and should be applied in this case." Id. at 315.

The decision in Hoffman v. Jones, 280 So.2d 431 (Fla. 1973) is not in conflict with the GECC opinion. In Hoffman, supra., the Supreme Court determined that where a widow brought a death suit, both in her individual capacity and administrative capacity of her husband's estate, the action was not barred by the contributory negligence rule and adopted the comparative negligence rule. The Hoffman court had discussed comparative negligence and set forth parameters for its applicability. Prior to the Hoffman opinion the rule in Florida was that contributory negligence was an absolute bar to recovery.

The Hoffman opinion is not in conflict with the GECC opinion since the Hoffman opinion does not address, or deal with the GECC opinion's rationale that the defendant, by virtue of his negligent hiring of the aforesaid employee-thief, stands in the shoes of said employee, being legally responsible for his act of theft, and therefore, can no more avail it of the owner's imputed comparative negligence than can the employee-thief.

Even if the Hoffman case had been in direct conflict with the GECC Court's holding, the Hoffman rationale would not be applicable to the facts in this case since there was not one scintilla of evidence which evidenced that GECC had in any way been negligent. In fact, the testimony with reference to GECC evidenced that GECC had not had this aircraft in its care, custody or control since October 1, 1979, the date GECC as owner/lessor leased the aircraft to lessee Com Air, Inc. who later sub-leased the aircraft to So. Express. So. Express as sub-lessee had all physical control and custody of the aircraft at the time of

conversion. It should be noted that Petitioner, ICFS, never brought So. Express into this lawsuit as a party in any manner.

ICFS has not cited a single case which states that where an employer is held to be responsible for the intentional acts of his employee, the employer is allowed the defense of contributory negligence. Further, it should be remembered that there is not one scintilla of evidence in the record of any negligent action on the part of GECC. In fact, GECC as Lessor of this aircraft had not had custody or control of the aircraft for the five years preceding the theft. GECC's sole nexus to this aircraft was its ownership interest in the aircraft through its financing agreements and thus, as a result of Federal Statute, Title 49, U.S.C.S. Sec. 1404 (1959), GECC is immune from liability based on or arising from the Florida state law theory of contributory negligence.

The only way that the jury found GECC seventy five (75) percent liable was under the jury instruction which was based on the dangerous instrumentality doctrine which is not applicable to the GECC case based on the rationale of Commercial Carrier Corporation v. S.J.G. Corp., 409 So.2d 50 (Fla. 2d DCA 1981). In Commercial Carrier Corp. the court noted

> "We conclude that the dangerous instrumentality doctrine, by its terms, is inapplicable here, and we are not inclined to extend that doctrine to cover the circumstances here." Id. at 52.

In the Commercial Carrier case, the lessee left the keys in the car. This is similar circumstances as the case at bar and therefore the doctrine should not be extended because Diezel's

theft was a form of conversion; therefore the dangerous instrumentality doctrine is inapplicable, therefore, the jury instruction is inapplicable.

Federal legislation has superseded the area of the law as to the liability of an owner/lessor of an aircraft by Limitation of Security Owner's Liability, Title 49 U.S.C.S. Sec. 1404 (1959). [A.2] That section states:

> "No person having a security interest in, or security title to, any civil aircraft, aircraft engine, or propeller under contract of conditional sale, equipment trust, chattel or corporate mortgage, or other instrument of similar nature, and no lessor of any such aircraft, aircraft engine, or propeller under a bonafide lease of thirty days or more, shall be liable by reason of such interest or title, or by reason of his interest as lessor or owner of the aircraft, aircraft engine, or propeller so leased, for any injury to or death of persons, or damage to or loss of property, on the surface of the earth, (whether on land or water) caused by such aircraft, aircraft engine, or propeller or by the dropping or falling of an object therefrom, unless such aircraft, aircraft engine, or propeller is in the actual possession or control of such person at the time of such injury, death, damage or loss."

Thus, by reducing the wording of that section to its aspects which are applicable to our fact situation, 49 U.S.C.S. Sec. 1404 [A.2] reads,

> "...no lessor of any such aircraft ...under a bonafide lease of thirty days or more, shall be liable by reason of such interest or title, or by reason of his interest as lessor

> or owner of the aircraft ...so leased, for any injury ... or damage to or loss of property ... caused by such aircraft ..."

Pursuant to its lease, GECC had not had this aircraft in its care, custody, or control since 1979. The sub-lease of that aircraft to So. Express was entered into by GECC's lessee, Com-Air, and sub-lessee, So. Express on November 10, 1984. Since GECC's only nexus to the loss of this aircraft was by virtue of its owner/lessor interest in the aircraft, it is obvious that GECC is an entity that this Statute is intended to cover and protect. This position is confirmed by the case of Rogers v. Ray Gardner Flying Service, 435 F.2d 1389 (5th Cir. 1970). In the Rogers case the court held that

> "We are not unsettled by the 1948 amendment, Title 49 U.S.C. Sec. 1404. That section excludes certain persons from liability for injuries on the surface of the earth. On its face it was enacted to facilitate financing for the purchase of aircraft by providing that those holding security interests would not be liable for injuries caused by falling planes or the parts thereof. This provision appears clearly and forthrightly to preempt any contrary state law which might subject holders of security interest to liability for injuries so incurred." (Emphasis added.) Id. at 1394.

The Rogers court, supra, also noted in footnote 6 that

> "The House Committee Report on the amendment, as to reason for exempting security holders and certain lessors, stated:
> 'Provisions of present Federal and State law might be constructed to

> impose upon persons who are owners of aircraft for security purposes only, or who are lessors of aircraft, liability for damages caused by the operation of such aircraft even though they have no control over the operation of the aircraft. This bill would remove this doubt by providing clearly that such persons have no liability under such circumstances.'" (Cites Ommitted), (Emphasis added). Id. at 1392.

As evidenced by the House Committee Report quote, the bill is intended to remove all doubt by providing clearly that persons, such as GECC, would have no liability under such circumstances. The circumstances which were referenced to were owner/lessor liability to injured innocent third parties. Public policy dictates that that if an owner/lessor were to have any liability for a loss caused by the operations by others of the owner/lessor's aircraft, then liability would be to an innocent third party plaintiff. Thus, it is unrealistic to assume that Congress intended to insulate the owner/lessor from liability to an innocent injured third party, and yet allow an owner/lessor to have his own damages reduced by way of a comparative negligence theory based on the negligence of the lessee, thus resulting in the owner/lessor incurring a substantial loss of monetary damages, instead of receiving payment for the full value of the aircraft.

As the Rogers court stated, supra at page 1394 with reference to Limitation of Security Owner's Liability, Title 49 U.S.C. Sec. 1404 (1959) [A.2]

> "On its face value it was enacted to facilitate leasing and financing of the purchase of aircraft by

providing that those holding security interests would not be liable for the injury caused by falling planes or the parts thereof."

To hold that the owner/lessor, whose aircraft has been stolen and damaged, will have his damage recovery reduced by his lessee's comparative negligence will hinder leasing and financing of the purchase of aircraft due to the financial loss exposure from the doctrine of contributory negligence. This will subvert the purpose of Title 49 U.S.C. Sec. 1404. [A.2] A company such as GECC will not as readily purchase and lease or finance an aircraft if the court allows a thief or his legally liable employer to use the comparative negligence of a lessee to reduce the owner/lessor's damage award. If there is any merit to an argument by the thief or his legally liable employer that the lessee should contribute to the loss because they made the theft too easy, (which we think inapplicable) then such an argument should be resolved in a separate action for contribution. Further, there was not one scintilla of evidence of any negligence on the part of GECC, thus GECC is the innocent party in this case. In the Harmony Homes case, supra., the court noted that "where one of two persons must suffer through the act or negligence of a third person, the one who creates the circumstances which made the wrongful act possible must suffer the loss". This rationale of the Harmony Homes case should be applied to the case at bar.

Owners and lessors, under extended term leases of aircraft, are unable to monitor all acts of their lessees. This was obvious to the House Committee and was one of the reasons for

the enactment of 49 U.S.C. Sec. 1404. [A.2] The Trial Court's jury instruction as set forth above will result in the owner/lessor being liable for the acts of a lessee. The jury instruction [A.1] therefore subverts public policy and intent of Title 49 U.S.C. Sec. 1404 [A.2] which was enacted to facilitate leasing and financing of the purchase of aircraft and therefore, that area of the law covered by the jury instruction has been preempted by Federal law.

If Title 49 U.S.C. Sec. 1404, supra, [A.2] excludes GECC from liability for all injuries on the surface of the earth, which injuries were to other persons, then it is reasonable that it also excludes GECC from an exposure to a claim that the damages which GECC suffered should be reduced by the comparative negligence of it's lessee being imputed to GECC. Since that area has been preempted by Federal law, the Trial Court erred in instructing the jury with ICFS's Requested Jury Instruction. [A.1] This Honorable Court should therefore affirm the decision of Third District Court of Appeal since the result of that decision was correct.

The giving of the above jury instruction [A.1] was the only possible way the jury could have found GECC negligent in this case. The rationale for this statement is that there is not one scintilla of evidence or testimony in the entire trial transcript which evidenced any negligence on the part of GECC. In fact, this aircraft had not been in the care, custody, or control of GECC for five years. Since there was no evidence offered to the jury that GECC was negligent the Trial Court erred in submitting the issue

of comparative negligence to the jury and erred in instructing the jury on comparative negligence.

The Trial Court further erred in giving the jury instruction since it was not based on the evidence presented at trial. The jury instruction was inappropriate for at least five different reasons, any of which would make it reversible error to give this jury instruction. [A.1]

The first reason is that the aircraft was not in operation or in use immediately before or at the time of the theft/conversion by Co-Defendant, Diezel and therefore, was not a dangerous instrumentality. At the time of conversion this aircraft had been parked for at least eight hours at the Intern.'l Airport. For ICFS's Requested Jury Instruction [A.1] to be appropriate the aircraft would have to be a dangerous instrumentality. In reviewing the citations which were typed below the jury instruction [A.1] by ICFS, that being Watts v. National Insurance Underwriters, 540 F.Supp. 488 (S.D. Fla. 1982) and 5 Fla.Jur.2d Aviation and Airports Sec. 37, it is obvious that the aircraft was not a dangerous instrumentality at the time of conversion. Review of 5 Fla.Jur.2d Aviation and Airports Sec. 37, evidences the following information;

> "By analogy to the law relating to automobiles, which, while not considered instrumentalities dangerous per se, are considered dangerous in operation, airplanes have been similarly classified as dangerous instrumentalities when in operation, ..." (Emphasis added)

At the time of the theft of the aircraft, it was not in operation and was therefore not a dangerous instrumentality. Since it was

not a dangerous instrumentality at the time of conversion, GECC cannot be held liable for the alleged comparatively negligent act of the sub-lessee, So. Express, where such liability is based solely on GECC's owner/lessor interest in the aircraft.

A review of Watts v. National Insurance Underwriters, 540 F.Supp. 488 (S.D. Fla. 1982) submitted by Defendant, ICFS, as authority for the correctness of instructing the jury on the Requested Jury Instruction [A.1] evidences that it is inapplicable to the evidence in our case. The Watts case, supra, was an action brought by plaintiff-passengers injured in an airplane crash. The plaintiffs sued the pilot and the owner of the aircraft on a negligence theory. The plaintiffs in Watts only sued an owner not an owner/lessor, such as GECC, since there was no lease. The Watts court noted;

> "The plaintiffs assert that Florida law should apply to vicarious liability. Florida law incorporates the 'Dangerous Instrumentality Rule', which states in essence that an owner is vicariously liable for any negligence of the operator of said dangerous instrumentality. An airplane is considered a dangerous instrumentality by virtue of Florida law. See Orefice v. Albert, 237 So.2d 142, conformed to 239 So.2d 46 (1970); F.S.A. Sec. 330.01 et seq." Id. at 488, 489.

In the Orefice case, cited by the Watts court, the Orefice court stated

> "Additional grounds of liability were noted, when this Court called attention to the fact that enactment of statutes regarding vehicle registration, condition, minimum ages for operators, and other requirements, evinced a legislative awareness of the inherent

> dangerousness of motor vehicles while in use. The doctrine of respondeat superior was evolved in these and later cases, grounded on the theory that since a vehicle must be licensed to its owner, the owner must stand responsible for injuries resulting from misuse while the vehicle is operated with the owner's knowledge or express or implied consent." (Emphasis added) Id. at 144.

The Orefice court confirmed that an aircraft, like an automobile, is a dangerous instrumentality, but only when in operation. The Orefice court, supra, further stated;

> "In the case sub judice, the dangerous instrumentality involved was an airplane, and not an automobile. In view of the fact that an airplane, like an automobile, is a dangerous instrumentality when in operation, and in view of the fact that Ch. 330, F.S.A., reflects a specific policy by the State of Florida to license and otherwise see after aircraft safety, we concluded that the rules of law enunciated to govern owners' liability for automobiles when in operation also govern the liability of owners of airplanes while in operation." (Emphasis added) Id. at 145.

Thus, it is apparent that the Orefice court found that an aircraft was a dangerous instrumentality only when it is in operation. This rationale is obvious since a person who, when walking across an airport, walks into the wing of a parked, non-running aircraft, would not have an action against the owner under a theory of Dangerous Instrumentality. It is only when the aircraft is in operation, either by being taxied, started or flown, that it then becomes a dangerous instrumentality.

The Doctrine of Dangerous Instrumentality arose in Florida out of a need to protect the unsuspecting public from

injury and, therefore, the Doctrine of Dangerous Instrumentality has no application in a lawsuit by an owner for economic damages brought against a thief or his negligent employer for the intentional acts of the thief in stealing an aircraft.

As noted above, the Watts v. National Insurance Underwriters, 540 F.Supp. 488 (S.D. Fla. 1982) court cited Sec. 330.27 Fla.Stat. (Supp. 1984) as authority for their determination that an airplane is considered a dangerous instrumentality by virtue of Florida law. Sec. 330.27 Fla.Stat. (Supp. 1984) is the Definitions section of Chapter 330. F.S.A. 330.27(8) states

> "'Operation of aircraft' or 'operate aircraft' means the use, navigation, or piloting of aircraft in the airspace over this state or upon any airport within this state."

Thus, at the time of this conversion neither GECC nor the sub-lessee, So. Express, were operating this aircraft pursuant to F.S.A. 330.27(8), and they were not performing any of the acts defined or described above. In fact, no one, at the time the theft commenced was navigating, or piloting or using the aircraft, as the aircraft was parked, motionless, in its usual place at the Intern.'l Airport commercial/customs ramp. Thus, the aircraft was not in operation, nor in navigation, nor in use, at the time of the theft by Diezel. It was not a dangerous instrumentality; therefore, neither 5 Fla.Jur.2d Aviation and Airports Sec. 37 nor Watts v. National Insurance Underwriters, surpa. were authorities for giving the ICFS Requested Jury Instruction. [A.1] As such, the Trial Court erred in giving ICFS's Requested Jury Instruction [A.1]

It is apparent that the Trial Court was mislead by ICFS's counsel in that the citations of authority for the giving of the jury instruction in this case was incorrect; thus, the judge's decision to charge the jury on ICFS's jury instruction was based on or influenced by an inapplicable rule of law. Thus, the Trial Court's giving of this jury instruction was reversible error. [A.1]

In Traub v. Traub, 102 So.2d 157 (Fla. 2d DCA 1958), the Traub court noted;

> "It follows that the decree must be affirmed unless some inapplicable rule of law is shown to have influenced the Chancellor's consideration as to the conclusion reached." Id. at 158.

Since the Trial Court's decision to give ICFS's Requested Jury Instruction was influenced by inapplicable rules of law, this Honorable Court should find and rule that the Trial Court's decision to give ICFS's jury instruction was reversible error. [A.1] Since the giving of that jury instruction is the only basis under which the jury could have found GECC negligent, then this error was prejudicial and this Honorable Court should enter its Order striking the jury's finding of negligence as to GECC from the jury verdict, and require the Trial Court to enter a judgment in favor of GECC against ICFS for the full amount of its damages. [R.895]

The second reason the giving of this jury instruction was error is that this loss arose from conversion of the aircraft. When an airplane or a car is converted, the owner is relieved from liability for damages to third parties as a result of that

conversion; therefore, if the owner is relieved from liability for damages to third parties, the owner should likewise be relieved from liability under the affirmative defense of comparative negligence when used against the owner to reduce the owner's damages. In Susco Car Rental System of Florida v. Leonard, 112 So.2d 832 (Fla. 1959), the court noted

> "To this we might add an observation that, whatever may have been the deviations from this course, the logical rule, and, we think, the prevailing rationale of the cases, is that when control of such a vehicle is voluntarily relinquished to another, only a breach of custody amounting to a species of conversion or theft will relieve an owner of responsibility for its use or misuse." (Emphasis added) Id. at 835, 836.
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> . . . . . .
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> "... and only in a situation where the vehicle is not in operation pursuant to his authority, or where he has in fact been deprived of the incidents of ownership, can such an owner escape responsibility." Id. at 837.

Here GECC was deprived of the incidences of ownership of this aircraft by an ICFS's employee's action. Therefore, GECC cannot be held liable for its damages through the application of an affirmative defense of comparative negligence by ICFS.

The third reason the jury instruction was reversible error is that the purpose of the vicarious liability theory, as set forth in Watts v. National Insurance Underwriters, supra. and 5 Fla.Jur.2d Aviation and Airports Sec. 37, is for the sole purpose of protecting innocent third parties. It is not, and was never intended to provide a basis for an affirmative defense of comparative negligence for an intentional tort-feasor Defendant.

A review of the wording of 5 Fla.Jur.2d Aviation and Airports Sec. 37 confirms the above. That appropriate wording is

> "In Florida, the owner of a dangerous instrumentality is liable for injuries caused by such instrumentality under the control of a third person, by permission of the owner, without regard to any application of the doctrine of respondeat superior."

That wording is intended to, and does provide, dangerous instrumentality protection to an injured innocent person such as a passenger or any other person injured by the aircraft when in operation. An example of where this vicarious liability is intended to apply would be where a passive passenger on an aircraft operated for hire is injured in a crash. That passenger as first party Plaintiff would bring an action against the owner second party defendant due to the negligence of the owner's third party pilot that was allowed to use the aircraft by the owner. That scenario; however, would not apply if the second party owner had leased the aircraft to someone else for a lease period exceeding thirty days and the owner did not have custody of the aircraft at the time of the incident due to the Federal statute.

5 Fla.Jur.2d Aviation and Airports Sec. 37's vicarious liability does not respond to and does not apply to the facts in our case where the owner, GECC as the first party plaintiff sues ICFS, the second party co-defendant and its employee, Diezel, a co-second party co-defendant, for the intentional acts of the second party defendant, Diezel. In this scenario there is no third party and; therefore, the vicarious liability theory does not apply. Since the vicarious liability theory as evidenced in

the Watts case, supra, and in 5 Fla.Jur.2d, Aviation and Airports Sec. 37 was never intended to apply to the facts situation in our case, but was merely a theory of law used to protect innocent plaintiffs, the Trial Court erred in charging the jury with the ICFS's Requested Jury Instruction. [A.1] The vicarious liability created here is for the protection of an injured innocent plaintiff. It is not for application or use in actions between an owner and an intentional tort-feasor, and his negligent employer, who has injured the owner. Neither the law or the intent of the law is to shield the intentional tort-feasor, and his neligent employer, and the law should not apply so as to condone any attempt to create such an onerous situation.

The Trial Court erred in giving this instruction because the instruction was not appropriate to the fact situation in our case since ICFS, as employer of Diezel, stands in the shoes of their employee, since Diezel's act, which caused GECC's damages, was an intentional act. Where the defendant is sued for an intentional act, the defendant does not have available to him the defense of comparative negligence. If a wrongdoer has the comparative negligence defense available, then a thief would never have to reimburse an owner for what he stole if he argued the owner made the theft too easy, eventhough he may have sold the loot and pocketed the money. Even if there had been any evidence put on by ICFS of negligent acts of GECC, they would still not be able to argue that GECC was comparatively negligent and reduce GECC's damages because Diezel's act was intentional. There was

not one scintilla of evidence presented which reflected, showed, or even hinted that GECC was negligent.

The theory that comparative negligence is not a defense to an action for an intentional tort is repeatedly set forth and affirmed in Florida law. In the recent case of Mazzili v. Doud, 485 So.2d 477 (Fla. 3d DCA 1986), the court reaffirmed that:

> "Even as contributory negligence did not under former law bar an action for a tort legally classified as intentional, Deane v. Johnston, 104 So.2d 3 (Fla. 1958), comparative negligence is not a defense to such a tort action under present law." Id. at 480.

The Trial Court directed a verdict against Diezel for the intentional tort of conversion. The jury in its verdict found the Defendant, ICFS, responsible for the damages sustained to GECC by Diezel's intentional tort. [R.895] Therefore, the defense of comparative negligence was not available to Diezel nor ICFS and the Trial Court was in error in reducing GECC's damages.

If ICFS is liable in any part for the intentional acts of their employee, Steve Diezel, then ICFS is responsible for the full amount of Plaintiff's damages and they are not subject to reduction by the affirmative defense of comparative negligence.

The conversion of this aircraft was an act committed by Diezel within the course and scope of his employment for ICFS. As such, ICFS does not have available to it a defense of comparative negligence. This rationale is supported by the case of McArthur Dairy, Inc. v. Original Kielbs, Inc., 481 So.2d 535 (Fla. 3d DCA 1986). The McArthur case involves a delivery man that converted a portion of the produce he was delivering to the Plaintiff. The

Court found that the conversion of the produce was in the scope of the delivery man's employ for the defendant McArthur. If the conduct of the delivery man in converting the produce was in the scope of his employ, then the conduct of Diezel was also within the scope of his employ. The McArthur Dairy delivery man was delivering produce and while delivering produce, decided to convert a portion of that produce. Steve Diezel was on the premises of ICFS so that he could fuel aircraft. While on the premises about the business of ICFS and for the sole purpose of providing a service to ICFS and its patrons, Diezel decided to convert the aircraft to his own use. There is no logical difference between the delivery man's decision to convert the produce and his conversion of same, and Diezel's decision to convert the aircraft and his conversion of same. In the McArthur case the court noted that the conversion of the produce was in the scope and course of the delivery man's employ. Therefore, Diezel should be found within the scope and course of his employ when he converted this aircraft.

When an employee performs a conversion in the scope of his employ, the employer is responsible for that conversion under the doctrine of respondeat superior. Where the doctrine of respondeat superior is applicable, the employer is vicariously liable for the conversion of its employee. Where the employer is vicariously liable for the acts of his employee, the employer does not have available the defense of contributory negligence. As such, the Trial Court was again in error in instructing the jury that GECC was responsible for the negligent act of ICFS and in

fact, should not have submitted to the jury the issue of contributory negligence since it was not a proper defense in this lawsuit.

In the Harmony Homes, Inc. v. Zeit, 260 So.2d 218 (Fla. 1st DCA 1972), the court stated the principle that,

> "...where one of two persons must suffer through the act or negligence of a third person, the one who created the circumstances which made the wrongful act possible must suffer the loss." (Emphasis added) Id. at 220.

In the case at bar, the circumstances were created by ICFS in twice rehiring and giving Diezel authority and capacity as ICFS's employee to be on the airport property. Therefore, the Harmony Homes principle is applicable to the case at hand and ICFS should be held fully responsible for creating such circumstances.

Evidence of reversible error in giving ICFS's Requested Jury Instruction [A.1] arises from the fact that a person has a right to rely on the presumption that people will obey the law. GECC's sub-lessee parked their aircraft on the Intern.'l Airport commercial/customs ramp. That airport is fenced as required by the Federal Aviation Regulations and a 24 hour security staff insures only authorized persons are allowed in the restricted commercial/customs ramp. The acts of ICFS's employee, Diezel, in converting the aircraft violated Florida law, therefore, neither GECC, nor even their sub-lessee, So. Express, should be required to anticipate that ICFS's employee would enter the Intern.'l Airport secured commercial/customs ramp and convert the aircraft while the security guard was on duty. Since a person does not

have to anticipate and determine what unlawful acts the rest of the world may do at every given moment of a person's life in order to make sure that he is not injured, a defendant who has damaged a Plaintiff by an intentional act should not be able, by way of an affirmative defense, to reduce the Plaintiff's damages under a theory of comparative negligence.

The undersigned was unable to find any aviation cases on the point that a person has a right to believe that others will obey the law. However, there are numerous cases involving automobiles wherein the Court has followed this principal. One such case is MacNeill v. Neal, 253 So.2d 263 (Fla. 2d DCA 1971). In that case the court noted,

> "He also has a right to assume others will obey the law and exercise due care to avoid an accident, Kerr v. Caraway, (Fla. 1955) 78 So.2d 571." Id. at 264.

That same rationale should apply to other aspects of life including aviation. A person should be entitled to assume that others will obey the law and should not be found to be comparatively negligent for not foreseeing that an intentional tort-feasor would perform an intentional tort, especially where the aircraft is parked in its usual place on a commercial/customs ramp, which is guarded twenty-four hours per day by a security guard and is in an area restricted to authorized personnel only. This principal is followed by Sterling v. Sapp, 229 So.2d 850 (Fla. 1969), wherein that Court stated:

> "The Plaintiff driver, having the right-of-way, could legally assume that the approaching motorist on the

intersecting street would yield the right-of-way, as this Court has approved the following principle of law:

> 'A person operating a vehicle along a roadway in compliance with the law has a right to assume that the person operating a vehicle upon an intersecting street will observe the rules of the road, will obey the laws governing the operation of automobiles and that such approaching driver will exercise due care to avoid an accident, and he has a right to act upon this assumption; and if such motorist has the right-of-way under the law and circumstances of the case, he has the right to assume that the approaching motorist on the intersecting street will yield the right-of-way to him, and it would not be contributory negligence on his part to act on such assumption in proceeding into the intersection, unless and until he became aware of the fact that such right-of-way would not be given, and unless he then had a clear opportunity to act in such emergency to avoid the collision after the emergency arose'. Kerr v. Caraway, 78 So.2d 571 (Fla. 1955)." Id. at 852. (Emphasis added.)

As noted by the court in Wagner v. Willis, 208 So.2d 673 (Fla. 2d DCA 1968):

> "The operator of a motor vehicle who proceeds in compliance with the law has the right to assume that others will obey the law and exercise due care to avoid an accident." Id. at 674.

If that law is correct as to a person driving a motor vehicle, it should also be correct as to other aspects of life. People who obey the laws should be entitled to assume that other persons will likewise obey the law. There is no law in Florida

that requires that an aircraft parked in a secured airport watched twenty-four (24) hours a day by a security guard must be locked and since there is no such law requiring the above, then a person who is damaged should not have their damages reduced by the affirmative defense of comparative negligence alleged by a thief and his negligent employer. This is especially so where the Plaintiff is the owner of the aircraft who is not legally responsible for the acts of the sub-lessee.

The jury verdict found GECC, the only Plaintiff in this lawsuit, contributorily negligent. [R.895] A detailed review of the Trial Transcript reveals no scintilla of evidence placed before the jury of any negligence by GECC. Since the jury's finding GECC negligent is not based on the evidence presented at trial, that jury verdict as to its finding GECC negligent, must be overturned by this Honorable Court. [R.895] The case of Sifford v. Trans Air Inc., 492 So.2d 407 (Fla. 4th DCA 1986) supports the above position. The Sifford Court found:

> "However, an appellate court should reverse a jury verdict when there is no rational basis in the evidence to support the verdict of the jury. Clements v. Plummer, 250 So.2d 287 (Fla. 1st DCA 1971); Food Fair Stores of Florida, Inc. v. Sommer, 111 So.2d 743 (Fla. 3d DCA 1959.)" Id. at 408.

The Court in Food Fair Stores of Florida, Inc. v. Sommer, 111 So.2d 743 (Fla. 3d DCA 1959) stated

> "A jury's verdict can not rest on a mere probability or guess, and we can not affirm a verdict where it has no rational predicate in the evidence." Id. at 746.

In the case of Caranci v. Miami Glass and Engineering Company, 99 So.2d 252 (Fla. 3d DCA 1957) the Caranci court noted,

> "It is not the province of an appellate court to reverse findings where they are supported by competent substantial evidence ... However, we are not faced with a situation where there is presented some competent evidence or even conflicting evidence, but a situation where there was no evidence to support the findings. ... Findings wholly inadequate or not supported by the evidence will not be permitted to stand." Id. at 254.

In the GECC case as in the Caranci case, supra, there was no competent evidence or even conflicting evidence as to any negligence on the part of GECC. Therefore, this Honorable Appellate Court should affirm the decision of the Third District.

It is obvious that the jury's finding of negligence on the part of GECC was not based upon the evidence. Further, the verdict, wherein it finds GECC negligent, was contrary to all of the evidence at trial, not just the manifest weight of the evidence, and did not result in justice in this case; so that aspect of the verdict which found GECC negligent, should be overturned and a judgment entered in favor of GECC for the full amount of its damages based on the jury's finding ICFS negligent. [R.895]

CONCLUSION

ICFS should be fully responsible for the acts of its employee since they chose to keep him and in doing so, chose to expose other users of the airport to actions of Diezel and thus, created the circumstances causing GECC's damages. Therefore,

based on the reasons and authorities set forth above it is respectfully submitted that this Honorable Court must affirm the decision of the District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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