IN THE SUPREME COURT

OF FLORIDA

CASE NO.

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

PETITIONER'S JURISDICTIONAL BRIEF AND APPENDIX

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TOPICAL INDEX

CITATION OF AUTHORITIES

STATEMENT OF THE CASE AND FACTS

Petitioner/Appellee/Defendant,[1] ISLAND CITY FLYING SERVICE [ISLAND CITY], seeks review of the decision of the Third District Court of Appeal which partially reversed the Final Judgment in favor of Respondent/Appellant/Plaintiff, GENERAL ELECTRIC CREDIT CORPORATION [GENERAL ELECTRIC], by striking the 75% finding of comparative negligence and remanding with directions to enter a judgment in favor of GENERAL ELECTRIC for the full amount of the damages undiminished by the 75% comparative negligence finding (A.1-3,12).

GENERAL ELECTRIC sued STEVE DIEZEL and ISLAND CITY to recover damages arising out of the destruction of GENERAL ELECTRIC'S aircraft by DIEZEL, an employee of ISLAND CITY. GENERAL ELECTRIC'S lessee, Southern Express, failed to lock the aircraft and DIEZEL, while off duty, in the early morning hours unexpectedly took the plane for a ride resulting in its destruction.

The cause proceeded to trial and the jury verdict in a conversion/negligent hiring action found that ISLAND CITY was negligent but also found that GENERAL ELECTRIC was guilty of 75% comparative negligence because its lessee left the aircraft unlocked which enabled DIEZEL to steal and crash the aircraft.

Based on the jury verdict, the trial court entered a Final

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[1]The parties will be referred to as they stand before this Honorable Court and the symbol "A" signifies Petitioner's Appendix.

Judgment in favor of GENERAL ELECTRIC reduced by the 75% comparative negligence.

The District Court of Appeal, Third District, partially reversed the Final Judgment in favor of GENERAL ELECTRIC by holding that the judgment should not be diminished by the 75% comparative negligence finding. The District Court concluded that: (a) DIEZEL the employee-thief could not, himself, rely upon GENERAL ELECTRIC'S imputed comparative negligence for leaving the aircraft unlocked prior to the sued-upon theft because comparative negligence is not a good defense to an intentional tort; and (b) ISLAND CITY by virtue of its negligent hiring of the aforesaid employee-thief stands in his shoes and is legally responsible for his act of theft. Therefore, ISLAND CITY can no more avail it of the owner's imputed comparative negligence than can DIEZEL.

The District Court denied ISLAND CITY'S Motion For Rehearing, Motion For Rehearing En Banc, and Motion To Certify but modified their Opinion on other grounds (A.4-11). The decision appears at 14 F.L.W. 2069 (Opinion filed September 5, 1989) and Opinion On Rehearing at 14 F.L.W. 2534 (Opinion filed October 31, 1989).

SUMMARY OF ARGUMENT

Petitioner contends that the decision of the District Court of Appeal, Third District, conflicts 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). These decisions hold that the cause of action for negligent hiring constitutes a separate and independent tort or act of negligence. It is separate from, and is not the tort of conversion alleged and proved against the employee, DIEZEL. Therefore, ISLAND CITY, who has been charged and found guilty of negligent hiring, which is not an intentional tort, is entitled to rely upon the comparative negligence of ISLAND CITY'S lessee.

Petitioner contends that the decision of the District Court of Appeal, Third District, also conflicts with Hoffman v. Jones, 280 So.2d 431 (Fla. 1973) which held that in a negligence action the defense of comparative negligence is proper and is to be utilized to allow a jury to apportion fault as it sees fit between the negligent parties and to apportion the total damages resulting from the loss or injury according to the proportionate fault of each party.

Thus, inasmuch as ISLAND CITY was charged with an independent tort of negligent hiring, which is not an intentional tort, and since the jury found that Plaintiff's lessee was guilty of 75% comparative negligence, ISLAND CITY is entitled to have the Final

Judgment against it reduced by the 75% comparative negligence finding of the jury. This finding of comparative negligence was never questioned by GENERAL ELECTRIC as being unsupported by the evidence.

POINT ON DISCRETIONARY REVIEW

WHETHER THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS 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)

ARGUMENT

The decision of the District Court of Appeal, Third District, creates express and direct conflict with the above decisions. GENERAL ELECTRIC sued DIEZEL for conversion and ISLAND CITY for negligent hiring. The action was based upon DIEZEL'S theft of the unlocked aircraft while he was off duty and crashing the aircraft because of his inability to fly it.

The trial court instructed the jury that GENERAL ELECTRIC as owner of the aircraft was responsible for any comparative negligence of its lessee, Southern Express, in failing to lock the aircraft prior to its theft. The jury found that ISLAND CITY was negligent and that GENERAL ELECTRIC was also guilty of 75 per cent comparative negligence because its lessee left the aircraft unlocked which enabled DIEZEL to steal and crash the subject aircraft. GENERAL ELECTRIC did not dispute the existence of evidence to support this jury finding but rather contended that the final judgment should not be diminished by its lessee's comparative negligence.

The District Court of Appeal held that the trial court erred in instructing the jury that GENERAL ELECTRIC, as owner of the aircraft, was responsible for any comparative negligence of its lessee in failing to lock the subject aircraft prior to its theft. The Court said that (a) the employee-thief could not, himself, rely upon Plaintiff's imputed comparative negligence for leaving the aircraft unlocked prior to the sued-upon theft, as comparative negligence is not a good defense to an intentional tort; (b) the Defendant, ISLAND CITY, by virtue of its negligent hiring of the aforesaid employee-thief stands in the shoes of the 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 present decision conflicts with the above cited decisions.

Mallory v. O'Neil, supra clearly held that the tort of negligent retention of an incompetent servant is a separate cause of action not to be confused with the doctrine of respondeat superior.

Garcia v. Duffy, supra also clearly drew the distinction between the doctrine of respondeat superior where the employee's acts are committed within the scope or course of his employment and the theory of liability of negligent hiring or retention which allows recovery against an employer for acts of an employee committed outside the scope and course of his employment.

Regardless of whether the theory alleged against ISLAND CITY is negligent hiring, as it is in the present case, or negligent

retention, it is an action based upon the employer's own negligence. It is a different and an independent tort, separate from the doctrine of respondeat superior. It is not the intentional tort of DIEZEL.

Therefore, it is immaterial that DIEZEL, who was guilty of an intentional tort of stealing the unlocked aircraft or conversion, is not entitled to defend on the ground of comparative negligence. ISLAND CITY was found guilty of negligent hiring. This is not an intentional tort, and Plaintiff's imputed comparative negligence **is** a valid defense.

The decision of the District Court of Appeal held that the cause of action for negligent hiring has the effect of placing the employer in the shoes of the employee who committed the intentional tort. Therefore, the employer is also guilty of an intentional tort. This conflicts with the decisions which hold that the doctrine of negligent hiring is a separate, independent cause of action, distinguished from respondeat superior. Since it is an independent tort of negligence the doctrine of comparative negligence set forth in Hoffman v. Jones, supra applies with equal force and reduces the amount of damages awarded.

In summary, the present decision conflicts with the above decisions which hold that tort of negligent hiring is a separate act of negligence and the decision which holds that comparative negligence is a valid defense in a negligence action and reduces the amount of damages.

CONCLUSION

Based upon the reasons and authorities set forth above, it is respectfully submitted that an express and direct conflict exists and this Honorable Court should accept jurisdiction.

Respectfully submitted,

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Jeanne Heyward
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished this 7th day of December, 1989 to: H. C. PALMER, III, ESQ., McDonald & McDonald, Suite 200, 1393 S.W. First Street, Miami, Florida 33135 and to MR. STEVE DIEZEL, 27 Robyn Lane, Key West, Florida 33040.

Jeanne Heyward
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APPENDIX

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1989

GENERAL ELECTRIC CREDIT CORPORATION,

Appellant,

vs.

STEVE DIEZEL and ISLAND CITY FLYING SERVICE,

Appellees.

CASE NO. 88-566

Opinion filed September 5, 1989.

An appeal from the Circuit Court of Monroe County, M. Ignatius Lester, Judge.

McDonald & McDonald and H.C. Palmer, III, for appellant.

Peters, Pickel, Niemoeller, Robertson, Lax & Parsons and Donna C. Hurtak, for appellees.

Before SCHWARTZ, C.J. and HUBBART and BASKIN, JJ.

PER CURIAM.

This is an appeal by the plaintiff General Electric Credit Corporation from a partially adverse final judgment entered upon a jury verdict in a conversion/negligent hiring action arising out of the destruction of the plaintiff's aircraft by an employee of the defendant Island City Flying Service; this is also a cross

appeal by the defendant Island Flying Service from the same judgment. The jury found that the defendant was negligent, but also found that the plaintiff was guilty of 75% comparative negligence because its lessee left the aircraft unlocked, which thus enabled the defendant's employee to steal and crash the subject aircraft. We affirm in part and reverse in part based on the following briefly stated legal analysis.

First, we conclude that the trial court properly denied the defendant Island Flying Service's motion for a directed verdict at trial. There was ample evidence adduced below upon which a jury could have concluded that this defendant was negligent in hiring an employee who had a prior military prison record, and that therefore the defendant was liable for the theft of the plaintiff's aircraft by the said employee committed by virtue of the latter's employment status with the defendant. Contrary to the argument of the defendant, we conclude that the jury on this record could have reasonably concluded, as it undoubtedly did, that such a theft was reasonably foreseeable by the defendant. We therefore see no merit in the defendant's cross appeal. See Harrison v. Tallahassee Furniture Co., 529 So.2d 790 (Fla. 1st DCA 1988); Abbott v. Payne, 457 So.2d 1156, 1157 (Fla. 4th DCA 1984); Williams v. Feather Sound, Inc., 386 So.2d 1238 (Fla. 2d DCA 1980), rev. denied, 392 So.2d 1374 (Fla. 1981); see also Garcia v. Duffy, 492 So.2d 435 (Fla. 2d DCA 1986).

Second, we conclude that the trial court committed reversible error in instructing the jury that the plaintiff, as the owner of the aircraft, was responsible for any comparative negligence of its lessee, Southern Express, in failing to lock the subject aircraft prior to its theft by the defendant's employee. We reach this result because (a) the employee-thief could not, himself, rely on the plaintiff's imputed comparative negligence for leaving the aircraft unlocked prior to the sued-upon theft, as comparative negligence is not a good defense to an intentional tort, see Federal Deposit Ins. Corp. v. Marine Nat'l Bank, 431 So.2d 341, 344-45 (5th Cir. 1970)(trover & conversion; contributory

negligence); Deane v. Johnston, 104 So.2d 3 (Fla. 1958)(public nuisance; same); Prosser and Keeton on The Law of Torts § 67, at 477-78 (W. Keeton ed. 5th ed. 1984); accord 4 F. Harper, F. James, O. Gray, The Law of Torts § 22.5, at 294-95 (1986), and (b) the defendant, by virtue of its negligent hiring of the aforesaid employee-thief, stands in the shoes of the 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 final judgment under review is affirmed save for the 75% finding of comparative negligence which is hereby stricken, and the cause is remanded to the trial court with directions to enter judgment in favor of the plaintiff and against the defendant Island Flying Service for the full amount of the damages returned by the jury, undiminished by the 75% comparative negligence finding.

Affirmed in part; reversed in part and remanded.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA THIRD DISTRICT

CASE NO. 88-566

GENERAL ELECTRIC CREDIT CORPORATION,

Appellant,

vs.

STEVE DIEZEL and ISLAND CITY FLYING SERVICE,

Appellees.

PETITION FOR REHEARING

Appellee, ISLAND CITY FLYING SERVICE, by and through its undersigned counsel, respectfully files this its Petition for Rehearing from the decision and states that the decision overlooks the following:

I

First, this Court concluded that there was ample evidence adduced below from which a jury could have concluded that ISLAND CITY FLYING SERVICE was negligent in hiring DIEZEL who had a prior military prison record and that therefore defendant was liable for the theft of the plaintiff's aircraft by said employee committed by virtue of the latter's employment status with the defendant. This Court held that the jury could have reasonably concluded that such a theft was reasonably foreseeable by the defendant.

This overlooks the following:

a. DIEZEL'S criminal record was not admitted into evidence. The only evidence introduced was that DIEZEL had received a bad conduct discharge from the United States Military Service as a result of the possession of 199 grams of hashish and as a result had spent 13 months incarcerated in Fort Levenworth prison [T.Vol.II pgs. 38,39,82]. At trial, DIEZEL was not questioned about his prior military prison record [T.1 pg. 152].

b. DIEZEL'S prior military prison record for the possession of hashish logically cannot be made the basis of a claim of negligent hiring arising out of DIEZEL'S conversion of plaintiff's

aircraft. The conversion took place in the early morning hours of January 17, 1985 during non working hours after DIEZEL had been drinking at a hotel bar. There was nothing to put ISLAND CITY FLYING SERVICE on notice that as a result of a conviction of possession of hashish more than 4 years prior to the conversion that DIEZEL, who was not a licensed pilot, would attempt to convert and fly an unlocked multi-engine aircraft parked at the airport. Furthermore, the disparity between the possession of hashish and conversion of an aircraft in 1985 is an obvious non sequitur. Strawder v. Harrall, 251 So.2d 514 (La. App. 1971); 48 ALR3d 359 [Employer's Liability -- Employee's Tort].

Additionally, the following statement from Williams v. Feather Sound, Inc., 386 So.2d 1238 (Fla. 2d DCA 1980) applies with equal force to the case at bar:

> . . . Pertinent to this consideration is the fact that there are many persons in Florida with prior criminal records who are now good citizens. To say that an employer can never hire a person with a criminal record at the risk of being held liable for his tortious assault flies in the face of the premise that society must make a reasonable effort to rehabilitate those who have gone astray. . . .

Williams v. Feather Sound was cited with approval in Garcia v. Duffy, 492 So.2d 435 (Fla. 2d DCA 1986) which stated 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."

In summary, ISLAND CITY FLYING SERVICE submits that there was nothing in DIEZEL'S background which would have put it on notice that DIEZEL after drinking at a local bar would during his off duty hours attempt to fly an unlocked aircraft parked at the airport.

II

Second, this Court held the trial court erred in instructing the jury that plaintiff, as owner of the aircraft, was responsible for any comparative negligence of its lessee, Southern Express, in failing to lock the subject aircraft prior to its theft by the

defendant's employee. This Court said that DIEZEL, the employee/thief, could not rely upon plaintiff's imputed comparative negligence for leaving the aircraft unlocked prior to the theft because comparative negligence is not a good defense to an intentional act. Therefore, ISLAND CITY FLYING SERVICE by virtue of its negligent hiring of DIEZEL, stands in the shoes of DIEZEL, is legally responsible for his act and cannot avail itself of the plaintiff's imputed comparative negligence just as DIEZEL cannot.

This overlooks the following:

a. The doctrine of negligent hiring is a separate, different and independent tort, separate from the doctrine of respondeat superior. Mallory v. O'Neil, 69 So.2d 313 (Fla. 1954); Sixty-Six, Inc. v. Finley, 224 So.2d 381 (Fla. 3d DCA 1969); Garcia v. Duffy, supra; Petrik v. New Hampshire Ins. Co., 379 So.2d 1287 (Fla. 1st DCA 1979), Pet. denied, 400 So.2d 8 (Fla. 1981).

b. Since ISLAND CITY FLYING SERVICE has been charged solely with negligent hiring and this constitutes a separate, independent tort from the tort of conversion alleged and proved against DIEZEL, it logically follows that the imputed comparative negligence of the lessee of the plane in leaving the aircraft unlocked constitutes a good defense to the independent tort.

c. The decision which bars ISLAND CITY FLYING SERVICE from raising the defense of comparative negligence overlooks the fact that the tort alleged against ISLAND CITY FLYING SERVICE is negligent hiring, not respondeat superior, and not an intentional tort. Therefore the sub lessee's comparative negligence in leaving the aircraft unlocked is a valid defense. It does **not** violate the rule that contributory negligence is not a defense to willful and wanton misconduct Johnson v. Rinesmith, 238 So.2d 659 (Fla. 2d DCA 1969), cert. den., 241 So.2d 857 (Fla. 1970); Williams v. Seaboard Airline Railroad Company, 268 So.2d 459 (Fla. 4th DCA 1972).

d. 48 ALR 3d 359 [Employer's Liability -- Employee's Tort] holds that the theory of holding an employer independently liable to third persons for the acts of his employees in negligently hiring them is that such negligence is a wrong to a third person

entirely independent of the employer's liability under the doctrine of respondeat superior. The annotation points out that in the cause of action for negligently hiring injured persons may establish liability upon the part of the employer where none would exist under the doctrine of respondeat superior.

Appellee was unable to find any Florida decision directly on point. However, the decision of Lomonte v. A & P Food Stores, 438 N.Y.S.2d 54 (107 Misc. 2d 1988) is strikingly similar. In Lomonte plaintiff while a customer at the defendant's super market was involved in an altercation with defendant's employee after the latter attempted to stop plaintiff from taking a cart off the parking lot.

Plaintiff sued A & P, asserting one cause of action against A & P for assault allegedly committed by its employee and a second cause of action against A & P for negligently hiring and training the employee.

At the conclusion of the case a special verdict was submitted to the jury. The jury found inter alia that A & P was negligent; plaintiff Lomonte contributed to the incident, plaintiff Lomonte was 75% negligent; defendant A & P was 25% negligent; the employee did not jump on plaintiff in order to cause the injury and the employee was not acting within the scope of his employment at the time of the incident; the actions of A & P employee were justifiable self defense; the damages plaintiff was entitled to receive was $800 without considering any negligence of plaintiff (if any); and plaintiff's damages were not to be reduced because the actions of defendant's employee were provoked by plaintiff's words or actions prior to the incident.

On appeal the Court held that plaintiff/customer who was found 75% negligent in contributing to an altercation could recover on the basis of the 25% of negligence which the jury ascribed to A & P. Thus plaintiff's comparative negligence reduced the amount of the recovery against A & P who had been charged with negligent hiring.

By the same token, ISLAND CITY FLYING SERVICE which has been

charged with negligent hiring is entitled to rely upon the comparative negligence of plaintiff's lessee. This is because ISLAND CITY FLYING SERVICE has been charged with an independent tort of negligent hiring [not an intentional tort] and comparative negligence of plaintiff's sublessee is a valid defense. This does not violate the rule that comparative negligence or contributory negligence is not a valid defense to an intentional tort.

WHEREFORE, Appellee, ISLAND CITY FLYING SERVICE, respectfully requests this Honorable Court to grant this petition for rehearing and vacate its decision and either (1) hold that the trial court erred in denying ISLAND CITY FLYING SERVICE'S motion for directed verdict; or (2) affirm the final judgment under review and allow the finding of 75% comparative negligence to reduce the amount of judgment in favor of plaintiff against ISLAND CITY FLYING SERVICE; or (3) grant the Motion for Rehearing En Banc or Motion to Certify to the Supreme Court of Florida which is simultaneously filed herewith.

Respectfully submitted,

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BY Jeanne Heyward
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Island City Flying Service

A.8

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by mail this 20th day of September 1989 to: H. C. Palmer, III, Esq., McDonald & McDonald, Suite 200, 1393 S.W. First Street, Miami, Florida 33135 and to Mr. Steve Diezel, 27 Robyn Lane, Key West, Florida 33040.

Jeanne Heyward

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Florida Bar No. 035812

A.9

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA THIRD DISTRICT

CASE NO. 88-566

GENERAL ELECTRIC CREDIT CORPORATION,

Appellant,

vs.

STEVE DIEZEL and ISLAND CITY FLYING SERVICE,

Appellees.

MOTION FOR REHEARING EN BANC
AND/OR
MOTION TO CERTIFY

Appellee, ISLAND CITY FLYING SERVICE, by and through its undersigned counsel respectfully files this its Motion for Rehearing En Banc and Motion to Certify this decision on the basis that it is of exceptional importance and states:

1. The decision holds that where an employee commits an intentional tort [conversion of an aircraft] and the employer is charged with negligent hiring which is an independent tort separate and apart from the act of the employee, the comparative negligence of the plaintiff is not a valid defense. This is because the employer stands in the shoes of the employee even though the cause of action based on negligent hiring is a separate and independent tort and not as stated by the Supreme Court to be confused with respondeat superior Mallory v. O'Neil, 69 So.2d 313 (Fla. 1954).

2. The principle as set forth in this decision is of exceptional importance because it constitutes a guide or mandate to all trial courts that in a case involving negligent hiring, if the employee is not entitled to assert the defense of comparative negligence, the employer is also not entitled to assert the defense of comparative negligence even though the employer is only being charged with negligent hiring, not an intentional tort.

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is of exceptional importance.

Respectfully submitted,

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Jeanne Heyward
JEANNE HEYWARD

A.11

11-1-89

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1989

GENERAL ELECTRIC CREDIT CORPORATION,

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STEVE DIEZEL and ISLAND CITY FLYING SERVICE,

Appellees.

CASE NO. 88-566

Opinion filed October 31, 1989.

An Appeal from the Circuit Court of Monroe County, M. Ignatius Lester, Judge.

McDonald & McDonald and H. C. Palmer, III, for appellant.

Peters, Pickle, Niemoeller, Robertson, Lax & Parsons and Donna C. Hurtak; Jeanne Heyward, for appellees.

Before SCHWARTZ, C.J. and HUBBART and BASKIN, JJ.

ON REHEARING

PER CURIAM.

The defendant Island Flying Service has filed a motion for rehearing, a motion for rehearing en banc, and a motion to certify. We deny the motion for rehearing, but modify our opinion to note that there was other evidence in the record to support the plaintiff's negligent hiring claim besides the employee's prior military prison record. Indeed, the defendant itself had fired the subject employee on two prior occasions and thereafter negligently rehired and retained him prior to the sued-upon aircraft theft. Plainly, there was ample evidence to send the negligent hiring claim to the jury. We further decline to grant the remaining motions.