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 AND APPENDIX TO PETITIONER'S JURISDICTIONAL BRIEF

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TOPICAL INDEX

CITATION OF AUTHORITIES

STATEMENT OF THE CASE AND FACTS

Respondent, General Electric Credit Corporation ("GECC") heartly disagrees with the Statement of Case and Facts set forth by Petitioner, Island City Flying Service ("ICFS"). Contrary to the assertions of ICFS, its employee, Steve Diezel was on duty at the time he converted the aircraft of the owner/lessor GECC. At the time of the theft the GECC aircraft was parked on the secured Customs/commercial ramp at Key West International Airport. Said ramp is fenced from the public and has a security guard 24-hours a day. The only reason ICFS employee, Steve Diezel was allowed on the Customs/commercial ramp was through his color of authority due to his employment with ICFS. The ICFS property is located immediately adjacent to the secured Customs/commercial ramp.

At trial, GECC objected to the jury being charged on the contributory negligence of GECC since there was not one scintilla of evidence at trial regarding any negligence of the owner/lessor, GECC.

The Third District Court of Appeal in its initial opinion found,

> "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 this defendant. We therefore see no merit in the defendant's cross appeal." (Emphasis added)

Further in support of its opinion that comparative negligence is not appropriate in this fact situation was the Court's finding that

> "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 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, (Cites omitted) and (b) the defendant, 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 nor more avail it of the owner's imputed comparative negligence and can the employee/thief." [A.1]

The Third District Court of Appeal in its modified opinion found

> "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 then 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." [A.2]

SUMMARY OF ARGUMENT

This Honorable Court should deny ICFS's Petition for Discretionary Review from the District Court of Appeal, Third District, since the opinion which is sought to be reviewed is not expressly and directly in conflict with Mallory v. O'Neil, Petrik v. New Hampshire Insurance Company, Garcia v. Duffy, or Hoffman v. Jones. Further, the result entered by the Third District Court of Appeal is proper and correct and does have a basis in law since the defense of contributory negligence is not available to the Petitioner, ICFS in this fact situation since that defense has been preempted by Federal legislation Title 40 U.S.C. Sec. 1404 as to owner/lessor's such as GECC.

The Petitioner, ICFS has not sustained its burden of showing this Honorable Court that the appeal being sought by Petitioner, ICFS comes

within the conflict jurisdiction of this Honorable Court. It is incumbent upon the Petitioner, ICFS to affirmatively show in its Jurisdictional Brief that there is a direct conflict between the decision in question in a previous ruling on the same point of law. Further, it is incumbent upon Petitioner, ICFS in its Jurisdictional Brief to show that the allegedly conflicting cases are on all fours factually in all material respects. The Petitioner, ICFS has failed to do this because the cases are not on all fours as evidenced above and further are not even in conflict.

ARGUMENT

The opinion of the Third District Court of Appeal [GECC opinion] which is the subject matter of this appeal is not in conflict with Mallory v. O'Neil, 69 So.2d 313 (Fla. 1954), Petrik v. New Hampshire Insurance Company, 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), nor Hoffman v. Jones, 280 So.2d 431 (Fla. 1973). Those cases are not in conflict with GECC opinion for the following reasons:

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 is 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 impose 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 with nor discusses 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 nor 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 her own 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, nor 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 Southern Express Airways, Inc, ("Southern"). Southern 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 Southern into this lawsuit as a party in any manner.

GECC is immune from liability including the defense of contributory negligence as to the actions or inactions of Southern because Federal legislation has superceded the area of law as to liability of an owner/lessor of an aircraft by Limitation of Security Owner's Liability,

Title 49 U.S.C. Sec. 1404 (1959). That section when paraphrased to its aspects which are applicable to our fact situation 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."

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). The Rogers court held,

> "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 fact 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." 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.' U.S. Congressional Code Service, 1948. 80th Congress, 2nd Session, p. 1836; House Report, No. 2091, 80th Congress, 2nd Session." (Emphasis added) Id. at 1392.

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. Thus, this will subvert the purpose of Title 49 U.S.C. Sec. 1404. 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 is inapplicable) then such an argument should be resolved in a separate action for contribution.

To allow ICFS the defense of contributory negligence would subvert public policy and the intent of Title 49 U.S.C. Section 1404 which was enacted to facilitate leasing and financing the purchase of aircraft. Therefore, that area of law covered by contributory negligence as to the owner/lessor of an aircraft is preempted by federal law.

The Petitioner, ICFS has not sustained its burden by showing this Honorable Court that the appeal being sought by Petitioner, ICFS comes within the conflict jurisdiction of this Honorable Court. It is incumbent upon the Petitioner, ICFS to affirmatively show in its Jurisdictional Brief that there is a direct conflict between the decision in question in a previous ruling on the same point of law. Further, it is incumbent upon Petitioner, ICFS in its Jurisdictional Brief to show that the allegedly conflicting cases are on all fours factually in all material respects. The Petitioner, ICFS has failed to do this. The cases are not on all fours as evidenced above and further are not even in conflict.

In support of the above, Respondent, GECC cites Florida Power and Light

Co. v. Bell, 113 So.2d 697 (Fla. 1959) wherein the court stated,

> "...it must be shown that the allegedly conflicting cases are 'on all fours' factually in all material respects. This the petitioner's have failed to do." Id. at 698.

The Carson v. Tanner, 101 So.2d 811 (Fla. 1958) court supports Respondent, GECC's position that ICFS's Petition should be denied since the GECC opinion in is not expressly and directly in conflict with any other opinion, and therefore, does not invoke the conflict jurisdiction of the Supreme Court of Florida. The Carson court denied the Writ for failure to show direct conflict between the decision in question and a previous ruling 'on the same point of law' and held the District Court's are not intended to be intermediate courts. Review by the District Court's in most instances shall be final and absolute. Further, the Kyle v. Kyle, 139 So.2d 885 (Fla. 1962) opinion affirms GECC's position that if the two cases are distinguishable in controlling factual elements or if the points of law settled by the two cases are not the same, then no conflict can arise.

CONCLUSION

The GECC opinion is not in conflict with the cases cited by the Petitioner, ICFS in its attempt to obtain review by the conflicts jurisdiction of this Honorable Court. The facts in the alleged conflicting cases involve entirely different circumstances and further, the basis of the Third District's decision is not even discussed in any of the alleged conflicting cases. Respondent, GECC respectfully requests this Honorable Court enter its Order denying the Petitioner, ICFS, Petition for Discretionary Review from the District Court of Appeal, Third District of Florida.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished, by mail, this 22 day of December, 1989 to: John Parsons, esq., PETERS, PICKLE, NIEMOLLER, ROBERTSON, LAX & PARSONS, 625 Ingraham Building, 25 S.E. Second Avenue, Miami, FL 33131-1691 and to Jeanne Heyward, Esq., 300 Roberts Building, 28 W. Flagler Street, Miami, FL 33130.

Respectfully submitted,

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