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

PETITIONER'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Petitioner/Appellee/Defendant,[1] ISLAND CITY FLYING SERVICE [ISLAND CITY], files this Brief on the Merits to review 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 (R.1585-1588).

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. GENERAL ELECTRIC alleged conversion against DIEZEL and a negligent hiring/retention action against ISLAND CITY (R.1-2,8-13).

After DIEZEL failed to answer, a default was entered against him on the conversion cause of action (R.1196,1569,1570). The cause proceeded to trial on the issues of damages against DIEZEL and negligent hiring and retention against ISLAND CITY (R. 1570).

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[1]The parties will be referred to as they stand before this Honorable Court and the symbol "R" signifies Record on Appeal.

The evidence established the following: GENERAL ELECTRIC owned the airplane that was destroyed and had leased it to Southern Express (R.1450). Southern Express is a small commuter airline which services Key West, Florida (R.1454).

On January 16, 1985, the Southern Express multi-engine airplane was left unlocked on the commercial ramp of the Key West International Airport (R.1298,1299,1305). Unlike other operators of similar aircraft at Key West International Airport, it was Southern Express' routine not to lock its planes (R.1465). There was no propeller lock or door lock on the airplane that was stolen and no key was required to start the aircraft (R.1310,1311).

In the early morning hours (2:00 a.m.) of January 17, 1985 and during his off-duty hours STEVEN DIEZEL walked through the unlocked pedestrian gate at Key West International Airport and on to the commercial ramp where the Southern Express plane was parked and in his own words, "misappropriated the aircraft" (R.1298,1309). He testified that his theft was not in any way connected with his employment (R.1316).

The gate DIEZEL walked through was always unlocked, day and night, and allowed access to the ramp area to anyone who chose to make use of it (R.1309,1310). He crashed into the ocean shortly after takeoff because he could not maintain altitude, destroying the plane (R.1314,1315).

DIEZEL went to work for ISLAND CITY sometime in 1984, helping out in the maintenance shop (R.1290). He learned how to start ISLAND CITY'S Navajo, which was similar to the plane that he stole

(R.1291). As an employee benefit, he started taking flying lessons, but had only about 20 hours of experience and no pilot's license (R.1304). All his training was in a single engine plane (R.1304). The plane he stole was multi-engine (R.1305). During his tenure at ISLAND CITY, he was reprimanded for failing to ground aircraft while refueling them (to prevent the danger of explosion and fire) (R.1342) and for taking time off from work without permission (R.1341). Otherwise, he was a good employee and a good worker (R.1341).

DIEZEL was hired by Mr. Brown (manager) at the request of Ray Vanyo, Sr., owner of ISLAND CITY (R.1339). DIEZEL had known the Vanyos family for years (R.1357). It was for this reason that his employment application was not completed (R.1340, 1341).

ISLAND CITY refueled planes from 8:00 a.m. - 6:00 p.m. (R.1336). After those hours, ISLAND CITY had a refueler on call (R.1336,1337). DIEZEL had no car and lived a distance from the airport so on his nights as refueler, he would spend the night at ISLAND CITY (R.1229,1343-1345). Depending on his refueling schedule, he stayed there one or two nights per week and had been doing this for about six months (R.1345). He was <u>not</u> the night refueler on the evening of January 16 - Paul DePoo was (R.1420).

On January 16, 1985, DIEZEL worked until about 6:00 p.m. and then the night shift refueler, Paul DePoo, took over (R.1420). Two planes came in after 9:35 p.m. DIEZEL appeared at the airport on his bike about the time the planes arrived (R.1420). DePoo let DIEZEL refuel to make some extra money (R.1420). It was customary

for night refuelers to collect a service charge of $10 - $15 which they were allowed to keep (R.1420).

After refueling two planes, DIEZEL, DePoo and Sanchez left the airport after 10:00 p.m. to go to the Calabash Lounge at the Marriott Hotel (R.1306,1307). DIEZEL had a beer and three cocktails before being returned to the airport about 1:00 a.m. to pick up his bicycle, which he used for transportation (R.1306, 1307). DIEZEL sat around for an hour, then walked across the ramp of the Key West International Airport and stole the aircraft that was sitting unlocked on the commercial ramp (R.1298,1299). DIEZEL was charged with stealing the airplane and pled guilty (R.1315, 1316).

At trial the airport security guard testified that the pedestrian gate was open all the time (R.1388). He also testified that people would jump the fence by the Conch Flyer bar and get on to the commercial ramp (R.1380). He had caught patrons of the bar standing on the commercial ramp looking at the planes and had reported this to the airport manager (R.1380,1389). The security guard testified that there was a substantial distance between the ISLAND CITY ramp and the commercial ramp (R.1379). If he had seen DIEZEL walking on the commercial ramp, he would have questioned him but he was unaware that the plane was stolen until the next day (R.1381,1391).

There was no direct testimony at trial regarding DIEZEL'S record and discharge from the military. Several witnesses testified that they had heard rumors but had never talked to DIEZEL

about it (R.1365,1369,1413). DIEZEL was not questioned about it when he testified (R.1319).

The testimony regarding his performance at his job for ISLAND CITY was consistent that he was a hard worker and did a good job (R.1288,1372,1390,1391,1416,1430). The testimony was unanimous that no one had any inkling that he would steal an airplane (R.1357,1358,1415).

The problems with DIEZEL occurred as a result of his failure to ground an airplane while refueling (R.1249,1251,1265,1400,1495); taking a one week leave of absence without permission (R.1321); tardiness (R.1321); riding people on running board of fuel truck (R.1399); and coming back from lunch late (R.1412). It was for these reasons that he was fired but rehired soon thereafter (R.1305,1322,1323).

At trial, ISLAND CITY moved for a directed verdict on the ground that the evidence failed to support negligent hiring and/or retention of DIEZEL and completely failed to support any proximate causation between DIEZEL'S failure to ground planes, his alleged "problems" with the military and the theft of the plane (R.1507-1509,1514). The motions for directed verdict were denied (R.1507-1509,1514).

GENERAL ELECTRIC'S counsel made a vague, general objection to the jury instruction on comparative negligence and did not object to the verdict form which asked the jury to determine whether GENERAL ELECTRIC was negligent in failing to lock the aircraft (R.1525,1526,1530).

The jury verdict in the conversion/negligent hiring or retention 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 (R.895,1581-1583).

Based on the jury verdict, the trial court entered a Final Judgment in favor of GENERAL ELECTRIC reduced by the 75% comparative negligence (R.1004,1109).

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) the trial court properly denied ISLAND CITY'S motion for a directed verdict because there was ample evidence to support GENERAL ELECTRIC'S claim of negligent hiring; (b) 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 (c) 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 (R.1585-1588).

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. The decision appears at 551 So.2d

520 (Fla. 3d DCA 1989).

ISLAND CITY based its jurisdictional argument on the portion of the decision concerning non-availability of the defense of comparative negligence in a negligent hiring cause of action. Nonetheless, in this Brief On The Merits ISLAND CITY will submit additional argument on its right to a directed verdict. Mark v. Hahn, 177 So.2d 5 (Fla. 1965); Hedges v. State, 172 So.2d 824 (Fla. 1965); Kelly v. Scussel, 167 So.2d 870 (Fla. 1964); and Adjmi v. State, 154 So.2d 812 (Fla. 1963).

SUMMARY OF ARGUMENT

Under Point I ISLAND CITY submits that it is entitled to a directed verdict on the negligent hiring or retention cause of action because there was nothing to put it on notice that DIEZEL, a non-pilot, would steal a plane. Neither his prior military record nor his failure to ground planes while refueling or tardiness or unannounced one week vacation constitute a sufficient basis to establish reasonable foreseeability or proximate cause. The cases cited under Point I support ISLAND CITY'S argument.

Under Point II ISLAND CITY 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~~ General Electric's lessee.

ISLAND CITY 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.

Since ISLAND CITY was charged with an independent tort of negligent hiring, which is not an intentional tort, and since the jury found that GENERAL ELECTRIC 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 I ON DISCRETIONARY REVIEW

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

ARGUMENT

ISLAND CITY submits that the trial court erred in refusing to grant its motion for directed verdict on GENERAL ELECTRIC'S claim for negligent hiring/retention. In the initial opinion the District Court held that the trial court properly denied ISLAND CITY'S motion for directed verdict because there was ample evidence introduced 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 ISLAND CITY was liable for the theft of Plaintiff's aircraft by said employee committed by virtue of latter's employment status with the Defendant.

This overlooks the following: 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 drugs and as a result had spent 13 months incarcerated in Fort Leavenworth prison (R.1369,1370,1413). At trial, DIEZEL was not questioned about his prior military prison record (R.1319).

DIEZEL'S prior military prison record for the possession of drugs 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 on notice that as a result of a conviction of possession of drugs 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 drugs 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."

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 (T.1438,1439). In addition, the testimony was unanimous and no one every had the idea that he would steal an airplane (R.1357,1358,1415).

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. This in and of itself was not sufficient to put ISLAND CITY on notice that DIEZEL who was not a pilot and who had received a minimal amount of training in a single engine airplane would suddenly attempt to fly a multi-engine plane without authority and without any type of warning.

NOT FORESEEABLE: Based upon this evidence, ISLAND CITY submits that it was not foreseeable as a matter of law that DIEZEL would suddenly, in the middle of the night, decide to steal or misappropriate a multi-engine plane and crash it. Assuming arguendo that ISLAND CITY was guilty of negligent hiring or retention [which it was not] it is axiomatic that the responsibility of a wrongdoer for the consequences of his negligent acts must end somewhere. Thus, his liability is only extended to "the reasonable and probable, not the merely possible, results of a dereliction of duty," Cone v. Inter County Telephone & Telegraph Co., 40 So.2d 148 (Fla. 1949). ". . . when the loss is not a direct result of the negligent act complained of, or does not follow in natural ordinary consequence . . . but is merely a possible, as distinguished from a natural and probable, result of the negligence, recovery will not

be allowed, . . ." Cone v. Inter County Telephone & Telegraph Co., supra.

Foreseeability of injury is a prerequisite to the imposition of a duty upon a Defendant. If the injury is not reasonably foreseeable there can be no recovery. A foreseeable consequence is one which a prudent man would anticipate as likely to result from an act. Foreseeable consequences are not "what might possibly occur," Firestone Tire & Rubber Co. v. Lippincott, 383 So.2d 1181 (Fla. 5th DCA 1980), pet. for rev. den., 392 So.2d 1376 (Fla. 1980). As aptly stated in Rawls v. Ziegler, 107 So.2d 601 (Fla. 1958) "reasonable foreseeable . . . does not encompass the far reaches of the pessimistic imagination."

Again, there was nothing to put ISLAND CITY on notice that DIEZEL would steal an airplane and crash it into the ocean. The evidence offered by GENERAL ELECTRIC concerning DIEZEL'S military record or tardiness or failure to ground an airplane while refueling did not make it "reasonably foreseeable" that he would steal the airplane.

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 DIEZEL, and in the theft of the airplane. If, as the jury found, there was negligence on the part of ISLAND CITY in hiring DIEZEL, the causal chain between the supposed negligence, and the theft of the aircraft was broken by the efficient intervening act of negligence by GENERAL ELECTRIC through its agent or servant, Southern Express in failing to lock

the plane.

Negligence is a legal cause of a 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. Florida Standard Jury Instruction 5.1(a); Commercial Carrier Corp. v. S.J.G. Corp, 409 So.2d 50 (Fla. 2d DCA 1981); Hendeles v. Sanford Auto Auction, Inc., 364 So.2d 467 (Fla. 1978); Vining v. Avis Rent-A-Car Systems, Inc., 354 So.2d 54 (Fla. 1977). In the present case there is no direct causal link between any supposed negligence on the part of ISLAND CITY and the theft of the aircraft.

In addition, in order to hold ISLAND CITY for negligently hiring DIEZEL, it is necessary that ISLAND CITY was required to make an appropriate investigation and failed to do so; and an appropriate investigation would have revealed DIEZEL'S propensity to steal airplanes; and it was unreasonable for the employer to hire DIEZEL in light of the information the employer knew or should have known. Garcia v. Duffy, supra; Nazareth v. Herndon Ambulance Service, 467 So.2d 1076 (Fla. 5th DCA 1985).

In the instant case there was no evidence presented from which it could be inferred that ISLAND CITY was required to make an appropriate investigation and failed to do so, or that an appropriate investigation would have revealed any propensity on the part of DIEZEL to steal airplanes, or that it was unreasonable to hire DIEZEL in light of information that could have been gained by

an investigation. It should be noted, there is no requirement that an employer make an inquiry with law enforcement agencies about an employee's possible criminal record. Even actual knowledge of an employee's criminal record does not establish the employer's negligence in hiring the employee, Garcia v. Duffy, supra.

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 Plaintiff 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. In the instant case, there was no evidence presented by GENERAL ELECTRIC to show a proximate causal connection between the negligence, if any, of ISLAND CITY in retaining DIEZEL and DIEZEL'S theft of the subject aircraft. Indeed, the testimony was only that DIEZEL acted on his own behalf in the theft of the aircraft and that no one anticipated such an action on the part of DIEZEL.

For all the reasons stated above, ISLAND CITY submits that it was entitled to a directed verdict and that the failure of the trial court to grant its motion and the affirmance by the District Court of Appeal are erroneous and must be reversed.

POINT II ON DISCRETIONARY REVIEW

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 ERRONEOUS AND 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

ISLAND CITY presents this argument without waiving any argument that it is entitled to a directed verdict because ISLAND CITY is not liable for negligent hiring and retention.

The decision of the District Court of Appeal, Third District, creates express and direct conflict with the above decisions and is erroneous on the merits. GENERAL ELECTRIC sued DIEZEL for conversion and ISLAND CITY for negligent hiring/retention. 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% 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.

This decision conflicts with the following 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 which is not an intentional tort, and therefore, GENERAL ELECTRIC'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.

Petitioner's argument finds support in the recent decision of Dunmore v. Eagle Motor Lines, 15 FLW D 1040 (Fla. 1st DCA, Case No.

88-1238, Opinion filed April 16, 1990) where Dunmore, Sr. sued Eagle F-B Truck Lines, Robert Pitts and Pitts Trucking for the wrongful death of his son arising out of a motor vehicle accident. The cause of action against Pitts was for negligent operation of the truck. The cause of action against Eagle was for negligent entrustment of the vehicle to Pitts who did not have the appropriate license and that Eagle knew or should have known of his past driving record which made him unfit to operate a motor vehicle. Prior to trial Eagle's motion for severance was granted.

The jury in the Pitts trial found Pitts 60% negligent and the deceased son 40% negligent. The Pitts judgment was paid. Thereafter Eagle moved for summary judgment on the grounds the doctrine of collateral estoppel, res judicata and satisfaction of judgment. The trial court granted a summary judgment for Eagle.

On appeal, the court reversed. Of import to this case is the following language from the decision which recognizes not only that negligent entrustment is a separate cause of action but that the comparative negligence of the deceased operator is a valid defense:

> ". . . Count two of the complaint alleged a cause of action against Eagle for negligent entrustment, which is a separate tort from the cause of action for negligent operation of the truck and vicarious liability alleged against the Pitts defendants. Under the circumstances of this case, it is clear that the negligent entrustment theory imposed additional liability on Eagle not available to plaintiff against Eagle under any other alleged legal theory. See Clooney v. Geeting, 352 So.2d 1216. Even though the measure of Dunmore's damages in this wrongful death action was the same in the actions against Eagle and the Pitts defendants, the defendants' allegations of the deceased

> son's comparative negligence as defenses to the separate causes of action created issues of fact for the jury as to the respective degree or percentage of fault on the part of the decedent vis-a-vis Eagle and the decedent vis-a-vis the Pitts defendants. Had the two counts been tried together it would have been the jury's function to assess the amount of plaintiff's damages and then assess the comparative responsibility of the decedent vis-a-vis all the respective defendants so as to total 100 percent. Hoffman v. Jones, 280 So.2d 431 (Fla. 1973). . . . The severance of the two counts for trial prevented the normal operation of the comparative negligence doctrine, . . ."

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 decisions which holds that comparative negligence is a valid defense in a negligence action and reduces the amount of damages.

It is also submitted that on the merits the decision is erroneous. A party who is guilty of negligent hiring/retention is not liable for an unforeseeable intentional theft of its employee during his off-duty hours.

CONCLUSION

Based upon the reasons and authorities set forth above, it is respectfully submitted that the decision of the District Court of Appeal is erroneous and must be reversed with directions to enter a final judgment in favor of Petitioner, ISLAND CITY FLYING SERVICE, or in the alternative with directions to enter a judgment based upon the jury verdict in favor of Respondent, GENERAL ELECTRIC CREDIT CORPORATION, diminished by its 75% comparative negligence.

Respectfully submitted,

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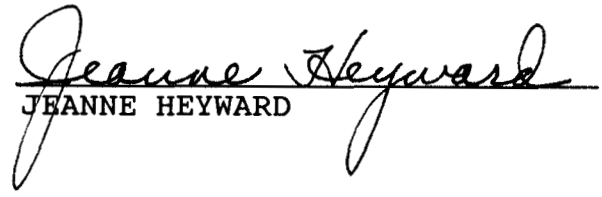

JEANNE HEYWARD

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished this 30th day of May, 1990 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

JEANNE HEYWARD
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