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 REPLY BRIEF ON THE MERITS

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CITATION OF AUTHORITIES

OTHER CITATIONS

STATEMENT OF THE FACTS

Petitioner ISLAND CITY FLYING SERVICE [ICFS] makes the following corrections in the Statement of Facts of Respondent GENERAL ELECTRIC CREDIT CORPORATION [GECC]:

1. GECC states that on January 16, 1985, DIEZEL worked the evening shift starting at 6:00 p.m. and ending at 8:00 a.m. the next morning (pg 1). This is incorrect. Paul Depoo testified that he was on duty that night and allowed DIEZEL to fuel the last two aircraft in order to make extra money (R.1421). Nonetheless, Depoo remained on duty by staying in the truck with DIEZEL while the latter fueled the planes (R.1421) DIEZEL confirmed this fact (R.1301-1302).

2. GECC states that DIEZEL drank during the early evening hours of his evening shift (pg 1). This is incorrect. As stated above, he was not on duty that evening - Paul Depoo was.

3. GECC states that upon DIEZEL'S return to the airport, he went to ICFS'S leasehold in order to be available to refuel any aircraft (pg 2). This is incorrect. DIEZEL went back to the airport to pick up his bike and sat in a lounge chair near a soda machine behind ICFS'S building for an hour or more (R.1307,1309).

4. GECC states that DIEZEL said that if he had not been at the airport that night as an employee of ICFS to refuel aircraft "he would not have come back to the airport to steal the aircraft" (pg 4). This is incorrect. DIEZEL was not on duty that night (R.1301,1302). DIEZEL merely said it was "not likely" he would have stolen the airplane if he had not been there that night (R.1300).

GECC'S sudden attempt during these proceedings to characterize DIEZEL as being on duty that night - when all the evidence proves to

the contrary - is also refuted by the fact that GECC alleged negligent hiring/retention - which is entirely separate and apart from respondeat superior. A cause of action based upon negligent hiring/retention admits that the employee's act was outside the scope and course of his employment, Garcia v. Duffy, 492 So.2d 435 (Fla. 2d DCA 1986). Therefore, GECC'S erroneous attempt to place DIEZEL on the job at the time of the theft are also irrelevant.

5. GECC'S description of the "secured commercial/custom's ramp" area as if it were completely secured and separated from the general aviation area is erroneous (pg 3). There were no fences dividing the areas (R.1379). Only the borders (90% to 95%) of the airport were fenced with a six foot high chain link fence (R.1258). There was easy access to the airport. There were four gates into the airport - two gates were open from 7:00 a.m. until 7:00 p.m. - the other two were locked all the time - and the pedestrian gate was open 24 hours a day (R.1258-1259). The tower was the imaginary dividing line between the ICFS general aviation ramp and the commercial ramp (R.1379). ICFS'S building was approximately 1,000 feet from where commercial aircraft parked (R.1266). At the east end of the terminal was the Conch Flyer Restaurant, Lounge and outdoor patio (R.1265). A small chain link fence separated the patio from the aircraft (R.1265). It was so open that sometimes bar customers jumped the fence and walked over to the commercial airplanes to look at them (R.1379,1380).

6. GECC states that "there was not a scintilla of evidence" that GECC was negligent and there is no basis at law for holding GECC responsible for its sublessee (pg 2). This is incorrect. There was an abundance of evidence that prior to DIEZEL'S theft others locked

their aircraft to prevent a theft: ICFS routinely locked its planes (R.1311,1345,1346,1353,1426,1427,1434,1435) and, noncommercial operators also locked their planes, sometimes using a prop lock as additional security (R.1354,1358,1448,1449). Paul Depoo, flight instructor and night fueler for ICFS, said "It's ridiculous not to." (R.1435). Therefore, GECC'S sublessee, Southern Express was negligent in failing to exercise even the slightest degree of care to protect this aircraft by not locking it. GECC was negligent in entrusting this plane to Southern Express and the latter's negligence is imputed to GECC as lessor.

7. GECC states that Mr. Sanders twice fired DIEZEL (pg 3). This is incorrect. Sanders was an employee in charge of the maintenance department and did not have authority to hire and fire (R.1321). Ronald Brown, vice-president and general manager of ICFS, testified that DIEZEL was never formally fired - when he returned after an unannounced absence "we rehired him. Very good worker" (R.1341).

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

ICFS contends that there was nothing to put it on notice that DIEZEL, who did not know how to fly a plane, would steal an aircraft.

The fact that DIEZEL had received a bad conduct discharge from military service and was sentenced to 13 months at Fort Leavenworth for possession of drugs does not establish a cause of action for negligent hiring or retention. As stated in Garcia v. Duffy, supra, actual know-

ledge of an employee's criminal record does not establish as a matter of law an employer's negligence in hiring and; an employer who hires a person with a criminal record does not expose himself to the risk of being held liable for a tortious assault by the employee. This would conflict with the public policy that "society must make a reasonable effort to rehabilitate those who have gone astray."

In Garcia, the court held that: (1) there is no requirement as a matter of law that the employer inquire with law enforcement agencies about an employee's possible criminal record; and (2) an employee's conviction for petit theft cannot constitute a sufficient basis for negligent retention based on the subsequent rape of a customer.

Based upon these principles the Garcia court held that had the employer known of the employee's conviction for night-prowling and assault-and-battery charge it would not have made it foreseeable that the employee would attack a person who accidentally caused his security dog's death.

By the same token, DIEZEL'S prior military prison record (whether investigated or not, or known or unknown to his employer ICFS) would not constitute a sufficient basis for a negligent hiring claim.[1]

Nor did DIEZEL'S failure to ground planes while refueling,[2] or his nonscheduled one week vacation, or his tardiness constitute a

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[1]Roland Brown, Vice-President and General Manager of ICFS, said it was not customary to perform a background check on a job applicant for a refueler because it was a menial type job (R.1357). Additionally, DIEZEL was a home town boy whom the owners had known for years (R.1302,1335,1357).

[2]GECC has over emphasized this fact. Paul Depoo testified that many times it was impossible to ground a plane while refueling because of the limited number of grounding rods - he often refueled without grounding and incidents very rarely happened without grounding (R.1436-1439).

sufficient basis for a claim for negligent retention. There was nothing to put ICFS on notice that after working there for almost a year, DIEZEL would steal a plane (R.1290). ICFS submits it is entitled to a directed verdict.

In response, GECC has set forth the following invalid arguments:

1. DIEZEL had been convicted of stealing government property (pgs 11,19). Incorrect. His military prison record was drug related (R.1369,1370,1413,1543). However, his military record was not even introduced into evidence and at trial GECC'S counsel never asked DIEZEL about this (R.1319). Therefore, GECC'S continuous reference to the alleged details of his record and 199 kilograms of drugs is outside the record and improper.

2. GECC'S reliance upon Restatement of Torts Second, §317 concerning liability for DIEZEL'S intentional tort is totally irrelevant (pgs 11,12,26). GECC'S Amended Complaint against ICFS alleged negligent hiring and retention, not respondeat superior, and therefore only ICFS'S alleged negligence is relevant, not DIEZEL'S intentional tort.

3. GECC'S reliance upon Paul Depoo's casual remark to the effect it "sounds like Steve" does not prove foreseeability or proximate (pgs 13-16). This was but a hindsight personal opinion of one individual concerning the likelihood of a theft which had never occurred before and which no one anticipated. Stated otherwise, the opinion was not legally probative of any fact - it was his own personal opinion and conclusion - it invaded the province of the jury and was without evidentiary value Atlantic Coast Line R. Co. v. Shouse, 83 Fla. 156, 91 So. 90 (1922); Camp v. Hall, 39 Fla. 535, 22 So. 792 (1897).

4. GECC states that DIEZEL was able to steal the aircraft because ICFS had the same aircraft and had taught him how to start it (pg 16). On the contrary, DIEZEL'S sole training was on a single engine plane and the airplane he stole was multi-engine (R.1304,1305).

5. GECC'S argument concerning foreseeability and proximate cause (pgs 16,17) overlooks Garcia v. Duffy, supra.

6. GECC'S argument that DIEZEL converted the plane in the scope and course of his employ has been completely answered on pages 1-2 of this reply brief. Suffice it to say his theft was not reasonably foreseeable [Cone v. Inter County Telephone & Telegraph Co., 40 So.2d 148 (Fla. 1949); Firestone Tire & Rubber Co. v. Lippincott, 383 So.2d 1181 (Fla. 5th DCA 1980), pet for rev. den., 392 So.2d 1376 (Fla. 1980); Rawls v. Ziegler, 107 So.2d 601 (Fla. 1958)]. Further, any alleged negligence of ICFS in hiring and retaining DIEZEL was not the proximate cause of the theft - the intervening negligence of Southern Express in failing to lock the plane broke any causal connection, Lingefelt v. Hanner, 125 So.2d 325 (Fla. 3d DCA 1960).

7. GECC has failed to distinguish Garcia v. Duffy, supra (pg 18). Its argument that the failure to lock was immaterial overlooks the fact that many owners locked their planes at the airport to prevent a theft.

8. Lastly, GECC'S statement that Southern Express was its sub-lessee and not its agent (pg 17) and that the latter's negligence is not imputed to it (pg 19) is unsupported by and citations and is incorrect. Suffice it to say, an airplane is a dangerous instrumentality [Orefice v. Albert, 237 So.2d 142 (Fla. 1970)] and the negligence of its lessee is imputed to it as a matter of law.

Accordingly, GECC is not allowed to disavow its lessee's negligence in leaving the plane unlocked and to charge ICFS, who had no control over the aircraft, with the negligence of its lessee. GECC'S remedy is to sue Southern Express, the active tortfeasor for its negligence.

ICFS submits it is entitled to a directed verdict - GECC'S arguments have been refuted.

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

ICFS contends that the decision 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, supra; Hoffman v. Jones, 280 So.2d 431 (Fla. 1973) and the recent decision of Dunmore v. Eagle Motor Lines, 560 So.2d 1261 (Fla. 1st DCA 1990)[3].

These decisions hold that causes of action based on negligent hiring and/or negligent retention are separate and distinct torts from the negligent or the intentional tort of the employee. Thus, the employer does not stand in the shoes of his employee and, it is

[3]GECC has not even attempted to distinguish Dunmore. The reason is obvious - Dunmore directly conflicts with the decision in the case at bar.

immaterial that the employee as an intentional tortfeasor cannot avail himself of the injured party's comparative negligence to reduce the amount of recovery - the employer can because his tort is a negligent tort, separate and distinct.

GECC ineffectually attempts to erase the conflict in the decisions by stating that the facts in the cited decisions are different from the facts in the present case (pgs 20-24)[4]. However, the conflict arises from the pronouncement of a conflicting rule of law or "point of law" rather than a conflict in the facts based upon Nielsen v. City of Sarasota, 117 So.2d 731 (Fla. 1960); Florida Power & Light Co. v. Bell, 113 So.2d 697 (Fla. 1959). The facts are immaterial.

The present case incorrectly holds that the negligent tort of hiring and retention is governed by the tort of the employee and if the employee commits an intentional tort and cannot avail himself of the defense of comparative negligence, then the employer is also precluded from asserting the comparative negligence even though he is only guilty of simple negligence. Somehow the employer's negligence is transformed into an intentional tort.

This patently conflicts with the better reasoned cited decisions which hold that the tort of the employer of negligent hiring/retention is separate and distinct from the tort of the employee - each pays for his own negligence - [Dunmore v. Eagle Motor Lines, supra; Walsingham v. Browning, 525 So.2d 996 (Fla. 1st DCA 1988); Petrik v. New Hampshire, supra], and as stated in Dunmore the jury is to assess the comparative negligence of the plaintiff vis-a-vis the defendant. To

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[4]GECC even quotes at length from Petrik v. New Hampshire, supra (pages 21-22) even though the only pertinent quote is set forth on page 23 of its brief.

deprive a negligent defendant from asserting the defense of comparative negligence conflicts with Hoffman v. Jones, supra.

In response, GECC has set forth the following invalid arguments:

1. There was not one scintilla of evidence to prove that GECC was negligent. Incorrect. It entrusted an expensive aircraft to Southern Express which took absolutely no precautions to secure or lock the aircraft at an airport where many owners locked their planes with a key and sometimes the additional security of a prop lock. In addition, Southern Express's negligence in leaving the plane unlocked is GECC'S negligence, not ICFS, who had no control over it. GECC'S argument is really an attempt to force ICFS to pay for GECC'S sublessee's negligence. This is devoid of logic. GECC must look to Southern Express for reimbursement of this 75% comparative negligence.

2. ICFS never brought Southern Express into this lawsuit (pg 20). Correct. ICFS is not responsible for Southern Express' negligence, is not required to reimburse GECC for its own lessee's negligence and, therefore, did not third party in Southern Express. On the contrary, GECC'S remedy is to seek reimbursement from Southern Express whose negligence in leaving the aircraft unlocked caused the loss.

3. GECC states that ICFS has not cited a single case which holds that where an employer is held responsible for the intentional acts of his employee, the employer is allowed the defense of contributory negligence (pg 26). This is misleading and irrelevant. ICFS was not sued under the theory of respondeat superior but rather for its own alleged negligence in hiring and retaining DIEZEL. This is not an intentional tort but rather a negligent tort and the defense of comparative negligence applies.

4. GECC'S reliance upon Title 49, USCS §1404 (1959)(pgs 6,26-31) is misplaced and is a "red herring". This federal statute plainly pertains to liability to a third party. It does not allow an owner [in a lawsuit to recover damages to its leased property] to pass on the negligence of its own lessee to a third party in order to force the latter to reimburse the owner for the lessee's negligence.

5. GECC'S reliance upon Rogers v. Roy Gardner Flying Service, Inc., 435 F.2d 1389 (5th Cir 1970) which discusses Title 49, USCS §1404 is also misplaced (pgs 28-30). Rogers held that Title 49 USCS §1404 preempted any contrary state law which might subject holders of security interests to liability for injuries so incurred. It is plainly irrelevant -- this lawsuit concerns an owner's right to recover damages for the loss of his own aircraft caused in the major part (75%) by the negligence of its own lessee or sublessee and an improper attempt to tack this negligence (75%) onto a party who was not in privity and did not control the lessee. To state the basis of GECC'S argument is to refute it.

6. GECC'S reliance upon Commercial Carrier Corporation v. S.J.G. Corp., 409 So.2d 50 (Fla. 2d DCA 1981)(pg 26) is misplaced. Commercial Carrier also dealt with liability to a third person arising out of the negligent operation of a stolen vehicle. It does not concern itself with an owner's lawsuit to recover damages to its leased property primarily caused by its own lessee's negligence.

7. GECC sets forth five reasons why the court erred in instructing the jury that GECC as owner is responsible for any negligence of lessee Southern Express in failing to lock and to secure the aircraft (pgs 7-

10.32-46)[5]. None has any merit:

First reason: GECC argues that the aircraft not in use at time of conversion (pgs 32-36). Incorrect. The plane could not have been stolen or taken "for a joyride" and destroyed [as stated in the Amended Complaint R.8-13] unless it was in operation and use. Assuming DIEZEL had been able to fly the plane and returned it, a conversion would not have occurred. An airplane, as an automobile, is a dangerous instrumentality when in operation, Orefice v. Albert, supra; Watts v. National Ins. Underwriters, 540 F.Supp 488 (S.D. Fla. 1982).

Second reason: GECC states when an airplane or automobile is converted, the owner is relieved of liability for damages to third parties as a result of that conversion (pgs 8, 36-37). Immaterial. A third party is not involved. GECC who leased the aircraft for its own financial benefit is seeking to impose liability on ICFS for its own bailee's negligence. This is incongruous! Surely, the lease agreement between GECC and Southern Express explicitly provided for care of the aircraft while in the latter's possession and insurance for GECC'S benefit to cover any loss as a result of the bailee's negligence.

Third reason: Vicarious liability is to protect third parties and not to be utilized as a basis for an affirmative defense of comparative negligence for an intentional tortfeasor. The jury found ICFS responsible for DIEZEL'S intentional tort and ICFS stands in DIEZEL'S shoes (pgs 8, 37-42). Incorrect. ICFS was sued for its own negligent

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[5]It must be noted that the District Court held that it could not be imputed because DIEZEL was guilty of an intentional tort and ICFS stood in his shoes. This, of course, is erroneous. However, the District Court did not hold that under other circumstances the comparative negligence could not be imputed.

hiring/retention (R.8-13) and the jury found ICFS guilty of negligent hiring/retention, not an intentional tort. On the other hand, DIEZEL was charged with conversion. ICFS is responsible, if at all, only for its own negligence, Petrik v. New Hampshire, supra. Therefore, the trial court properly instructed the jury on comparative negligence.

GECC relies upon McArthur Dairy, Inc. v. Original Kielbs, Inc., 481 So.2d 535 (Fla. 3d DCA 1986)(pgs 7,40,41) but it is clearly distinguishable - it involved a conversion by a non-managerial employee. Both McArthur Dairy and the employee were charged with conversion of certain dairy products - it was alleged that plaintiff purchased dairy products from McArthur Dairy through the latter's agent Tejeda (driver/salesman), that Tejeda was supposed to deliver these products to plaintiff on a daily basis, and that instead Tejeda kept the products for himself and remitted plaintiff's monies to McArthur - all within the scope of his employment. It was alleged that McArthur Dairy was at fault in these large-scale conversions because it long had a problem with its deliverymen converting merchandize sold to customers, but failed to take any reasonable steps to prevent such acts of conversion from occurring.

Both parties were charged with conversion and statutory conversion §812.0134(1) Fla. Stat. (1983). The jury found both guilty of conversion which finding was not contested on appeal. The only issue raised on appeal was the propriety of the order trebling the compensatory damage award against McArthur Dairy. The court affirmed stating inter alia that treble damages are plainly a substitute for punitive damages and that a corporate employer is liable where the theft occurred within the scope of the employee's employment and the

corporate management was guilty of some fault which foreseeably contributed to plaintiff's injury. McArthur is clearly distinguishable. DIEZEL was hired to refuel planes, not fly them. He was clearly outside the scope of his employment when without any prior warning he attempted to fly the aircraft while off duty. Nothing he did was to further his employment duties and nothing benefited ICFS. This was even admitted by GECC'S choice of negligent hiring/retention count against ICFS, not respondeat superior. Plainly, the conversion did not occur within the scope and course of DIEZEL'S employment and the defense of comparative negligence is applicable.

Fourth reason: People have a right to rely on the presumption that others will obey the law and not steal (pgs 8,9,42-45). Immaterial. This might be a proper subject for closing argument or a jury instruction but certainly does not erase the obvious comparative negligence of leaving a expensive aircraft unlocked for anyone to steal.

Fifth reason: No evidence of negligence of GECC (pgs 10,45-46). Incorrect. GECC entrusted an expensive aircraft to a lessee who carelessly left it unlocked at the airport. In addition, its lessee's negligence is imputed to it. GECC is not allowed to impose its lessee's negligence on ICFS who was not in privity with the lessee.

Lastly, GECC mistakenly relies upon Harmony Homes, Inc. v. Zeit, 260 So.2d 218 (Fla. 1st DCA 1972) to the effect 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 (pgs 10,42). This rule cannot make ICFS responsible for GECC'S lessee's negligence. GECC'S remedy is simple - sue Southern Express to recover the 75% reduction of damages caused by

its negligence. ICFS is not responsible for it.

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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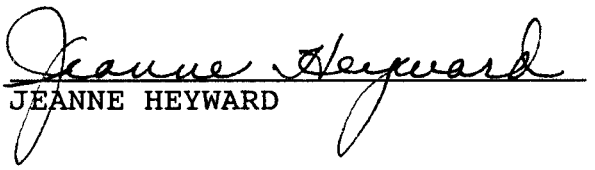

JEANNE HEYWARD

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished this 16th day of August, 1990 by Hand Delivery to: H. C. PALMER, III, ESQ., McDonald & McDonald, Suite 200, 1393 S.W. First Street, Miami, Florida 33135 and by mail to MR. STEVE DIEZEL, 27 Robyn Lane, Key West, Florida 33040.

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