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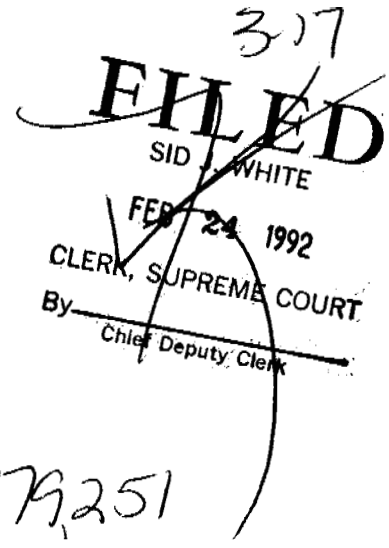

IN THE SUPREME COURT OF FLORIDA

CASE NO. 88-2261

79,251

THE HERTZ CORPORATION,

Petitioner,

vs.

BILLY JACKSON, by and through his Mother and natural guardian, HENRIETTA WHITTAKER and HENRIETTA WHITAKKER, individually,

Respondent.

PETITION FOR REVIEW OF DECISION OF THE DISTRICT COURT OF APPEAL OF FLORIDA THIRD DISTRICT

BRIEF ON THE MERITS OF PETITIONER THE HERTZ CORPORATION

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STATEMENT OF THE CASE

This was an action for damages in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida. Respondent, BILLY **JACKSON,** by and through his Mother and natural guardian, **HENRIETTA WHITAKER** and **HENRIETTA WHITAKER,** individually, were the Plaintiffs. Petitioner, THE **HERTZ CORPORATION,** was the Defendant. In the Brief, the following symbols will be used:

"HERTZ" for THE **HERTZ CORPORATION.**

"JACKSON" for BILLY JACKSON, by and through his Mother and natural guardian, **HENRIETTA** WHITAKER and **HENRIETTA** WHITAKER, individually.

"R" for Record on Appeal, with appropriate pagination.

"T" for Transcript of Testimony and Proceedings, with appropriate pagination.

"A" for Appendix, which includes the original panel opinion and the opinion On Rehearing En Banc, in Jackson v. The Hertz Corp., ____ So. 2d ____ (Fla. 3d DCA 1991), 15 FLW D2927 (December 4, 1990), On Rehearing En Banc, 17 FLW D70 (December 24, 1991) [In the Brief, citations to such opinions will be made to the Appendix, with appropriate pagination, rather than to Florida Law Weekly].

This was a negligence cause of action brought against HERTZ for vicarious liability, relating to the operation of one of its motor vehicles (R 1-2). During the course of the proceedings, the Complaint was amended, to also claim that HERTZ was negligent in renting the motor vehicle in question (R 33-37).

The Cause of Action proceeded to trial on June 20, 1988. During the trial, the Court withheld ruling on the HERTZ' Motions for Directed Verdict (T 470, 604), and denied JACKSON's Motion for Directed Verdict (T 509-512). The trial concluded with a deadlocked jury (T 602).

After the conclusion of the trial, additional argument was presented on HERTZ' Motion for Directed Verdict. Ultimately, the Trial Court entered an Order Granting Motion for Directed Verdict (R 183), and a Final Judgment in favor of HERTZ (R 196). The Final Judgment was appealed to the District Court of Appeal of Florida, Third District, Case No. 88-2261.

The appeal was initially argued before a Three-Judge panel of the District Court, which affirmed the Trial Court in a two (2) to one (1) decision (A 1-17). The District Court, however, granted Rehearing En Banc, and reversed the Trial Court; with six (6) Judges in the Majority holding that a directed verdict should be entered in favor of JACKSON; four (4) Judges partially

dissenting with opinion indicating that the cause of action should be remanded for a new trial on all issues; and one (1) Judge dissenting entirely, indicating adherence to the original panel opinion (A 18-39). The majority opinion included the following certification:

> We certify to the supreme court that this decision involves questions of great public importance as to whether the liability of a car rental company under the dangerous instrumentality doctrine is affected by the facts that (a) the rental was secured by fraud, (b) the period for which the vehicle was rented was greatly exceeded and/or (c) the car rental company made efforts to recover the vehicle after it became aware of the fraud and the vehicle was not timely returned (A 32, En Banc Opinion, p. 15).

This Petition for Review follows.

STATEMENT OF THE FACTS

The primary facts of the case were summarized by the District Court in the opinion of the original panel. That summary was adopted by the majority in the En Banc opinion, and is set forth verbatim as follows:

> On February 5, 1985, Hertz entered into a two-day rental agreement with a woman purporting to be Linda Major, and her companion, Lawrence King. The woman presented Hertz with a Visa credit card issued in Linda Major's name. Mr. King's driver's license number, the license expiration date, the issuing state, and King's age were entered on the additional authorized operator attachment of the rental agreement. No separate driver's license information was written on the rental agreement for the woman identifying herself as Linda Major. Before relinquishing possession of the vehicle, Hertz ran a credit check on the Visa card presented. Upon receipt of a favorable credit check, Hertz released the vehicle to the above individuals.
>
> Hertz was informed on February 17, 1985, by Metro-Dade Police that the Hertz-owned vehicle had been fraudulently leased with a stolen credit card and that the woman who gave her name as Linda Major was an impostor,

> Thereafter, on February 26, 1985, and March 1, 1985, respectively, Hertz sent certified letters to both renters demanding the return of the automobile. On March 31, 1985 both letters were returned to Hertz as undeliverable. On April 5, 1985, Hertz reported the vehicle as stolen to the police. Eleven days after the Hertz vehicle was reported stolen, the vehicle, operated by Christopher Harris, an alleged participant in the fraud, was involved in an accident, injuring Billy Jackson (A 19, En Banc Opinion, p. 2).

The above summary of the facts, is partially derived from the Parties' Joint Pre-Trial Stipulation (R 70-78).[1], which included the following list of "Stipulated Facts Which Require No Proof At Trial":

> 1. Ownership of the 1984 Lincoln Town Car bearing the license tag ZAN 178 by The Hertz Corporation.

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[1] Stipulations of parties or their attorneys relating to the conduct or the control of their rights, in the trial of a cause or the conduct of litigation, are enforced by the courts, if such stipulations are not unreasonable, nor against good morals or sound public policy. **Smith** v. **Smith, 90 Fla. 824, 107 So. 257, 260 (1925). Esch v. Forster, 123** Fla. **905, 168 So. 229, 231 (1936).**

> This court is committed to the rule that it not only approves but favors stipulations and agreements on the part of litigants and counsel designed to simplify, shorten or settle litigation and save costs to the parties, and the time of the Court, and when such stipulations or agreements are entered into between parties litigant or their counsel, the same should be enforced by the court, unless good cause is shown to the contrary. **Dunscombe v. Smith, 139 Fla. 497, 190 So. 796, 799 (1939).**

Accord: Federal Land Bank of Columbia v. **Brooks, 139** Fla. **506, 190 So. 737 (1939); Welch** v. **Gray Moss Bondholders Corp. 128** Fla. **722,** 175 **So. 529 (1937).** Further to this, proper stipulations are binding agreements both upon the parties and the courts:

> A stipulation properly entered into and relating to a matter upon which it is appropriate to stipulate is binding upon the parties and upon the court. **Gunn Plumbing, Inc.** v. **Dania Bank, 252** So.2d **1, 4 (Fla. 1971).**

2. Rental of said vehicle to a person representing herself to be Linda Major on February 5, 1985.

3. That pursuant to the terms of said rental the vehicle was to be returned on February 7, 1985.

4. That the Metro Dade Police Department Auto Theft Division requires that rental car companies send a certified letter to the rentor of a vehicle before it may be reported as stolen.

5. That the larger rental car companies normally send two such certified letters before reporting the vehicle stolen.

6. That The Hertz Corporation did in fact send two certified letters to Linda Major and Lawrence King on February 26, 1985 and March 1, 1985.

7. That the last attempted delivery of said certified letters by the Post Office was on March 31, 1985; thereafter, the Post Office returned said letters to The Hertz Corporation.

8. That the vehicle was reported as stolen by The Hertz Corporation on April 5, 1985 for the first time.

9. That the credit card bearing the name Linda Major, which was used to rent the vehicle, was fraudulently obtained.

10. That The Hertz Corporation does not know who the rental representative was that rented the vehicle to the person presenting herself as Linda Major.

11. On April 25, 1985, Christopher Harris was arrested while in possession of the Hertz vehicle. (R 72).

Some additional facts that were presented at trial are also pertinent, but were not included in either the District Court's opinion or the Parties' Stipulation of Facts. Such facts were provided principally by Metro Dade Police Officer Julia Moore, who testified by deposition at trial. Officer Moore was in charge of the automobile theft investigation relating to the HERTZ vehicle (R 206-238). As part of her investigation, she contacted the real Linda Major (R 215-216), who advised her that Lawrence King was a relation, either a brother or the father of her children. Linda

children. Linda Major then told Officer Moore that Lawrence King lived with her for a long time, and that he stole from her (R 216). Linda Major did not go with Lawrence King to rent the HERTZ car, and she knew nothing about it. With regard to Lawrence King, Ms. Major advised Officer Moore that: "He does this to me all the time. I am constantly getting bills where he goes and uses my credit card in my name and buys stuff." (R 227-228).

Significantly, while Officer Moore was investigating the theft of the HERTZ vehicle, she was also investigating a similar theft of a National Car Rental vehicle. The National vehicle had been rented by a Linda Major and a Lawrence King at 8:33 P.M. on February 5, 1985 [the same day as the HERTZ vehicle was rented]. The National vehicle had been rented through the use of the same credit card that was used in the rental of the stolen HERTZ vehicle (Plaintiffs' Exhibit 1; R 213, 219-220). The National Rental Agreement listed Lawrence King as an additional driver, with the Same Driver's License as was included on the HERTZ Additional Authorized Driver Attachment (Plaintiffs' Exhibit 1; R 225).

On April 16, 1985, eleven (11) days after the HERTZ vehicle was reported stolen and was entered into the police computer as a stolen vehicle, the accident alleged by JACKSON occurred (T 185-188). The accident occurred when BILLY JACKSON, who was riding a bicycle, was struck by the vehicle (T 188-189).

After the Accident occurred, the driver of the HERTZ vehicle picked BILLY up, put him in the back seat of the car, and drove him to his grandmother's house, where his mother was waiting

for him (T 191, 202, 210-211). The driver was a six foot, black male with an afro haircut, who then drove BILLY and his mother to Jackson Memorial Hospital (T 8, 239-240).

Ultimately, the stolen National Car Rental vehicle was recovered by the Highland County Police Department on April 15, 1985 (R 219-220); and the HERTZ vehicle was recovered by the City of Miami Police Department on April 25, 1985 (R 218). At the time that the HERTZ vehicle was recovered, it was occupied by Christopher Harris, who was initially arrested for grand theft, but later released (T 13). Christopher Harris was a neighbor of Linda Major, and he had been previously identified as being involved in obtaining the fraudulent credit card which had Linda Major's name on it (T 80-81).

No one was ever able to help the police identify who the driver of the HERTZ vehicle was at the time of the accident (T 10). Neither HENRIETTA WHITAKER, BILLY's mother, nor BILLY himself, were able to identify Christopher Harris in police photo line-ups as the operator of the vehicle (T 13-14, 238; Plaintiffs' Exhibit 1). At trial, however, BILLY's sister, Marcie Jackson, indicated that she saw the man who was driving the HERTZ vehicle, and identified a photograph of Christopher Harris as that man (T 203).

POINTS INVOLVED ON APPEAL

I

WHETHER THIS COURT HAS JURISDICTION OF THIS CAUSE BASED UPON A CERTIFIED QUESTION AND UPON THE EXISTENCE OF A CONFLICT BETWEEN THE DISTRICT COURT'S OPINION AND OPINIONS OF THIS COURT.

II

WHETHER THE OPINION OF THE DISTRICT COURT SHOULD BE QUASHED AS BEING IN CONFLICT WITH EXISTING FLORIDA LAW.

SUMMARY OF THE ARGUMENT

Since this Court has postponed its decision on jurisdiction, HERTZ has briefly addressed this issue, pointing out that jurisdiction exists for two reasons: (1) the existence of certified questions; and (2) the existence of conflict between the District Court opinion and decisions of this Court.

With respect to the merits of this Petition for Review, HERTZ has pointed out conflicts between the District Court's En Banc Opinion, which directed that judgment on liability be entered for JACKSON, and this Court's decisions in Susco Car Rental System of Fla. v. Leonard, 112 So.2d 832 (Fla. 1959), Thomas v. Atlantic Associates, Inc., 226 So.2d 100 (Fla. 1969), and Stupak v. Winter Park Leasing, Inc., 585 So.2d 283 (Fla. 1991). In so doing, HERTZ has cited to numerous statutes and cases defining what this Court intended by language in Susco that "only a breach of custody amounting to a species of conversion or theft will relieve an owner" of a motor vehicle of responsibility for its negligent operation. The District Court's rejection of such statutes is a misapplication of Florida law. Further, the District Court's discussion of whether an action for "conversion" can be maintained by the owner of a motor vehicle as against a bona fide purchaser is intellectually interesting, but is in total conflict with decisions

of all other Florida appellate courts relating to the rights of owners of motor vehicles which have been stolen.

HERTZ has pointed out that there is no factual issue presented, since the parties stipulated to the fact that the HERTZ vehicle was obtained through fraud, that HERTZ complied with the requirements of the local police authorities by sending out certified letters before reporting its vehicle stolen, and that it subsequently reported the vehicle stolen eleven (11) days prior to the alleged accident. As a consequence, not only should there be no directed verdict for JACKSON, but the original decision of the trial court, directing a verdict for HERTZ, should be reinstated.

ARGUMENT

I

THIS COURT HAS JURISDICTION OF THIS CAUSE BASED UPON A CERTIFIED QUESTION AND UPON THE EXISTENCE OF A CONFLICT BETWEEN THE DISTRICT COURT'S OPINION AND OPINIONS OF THIS COURT.

Jurisdiction of this Court exists pursuant to Art. V, §§3(b)(3) and (4), Fla. Const. and Fla.R.App.P. 9.030(a)(2)(A)(iv) and (v). Jurisdiction pursuant to Art. V, §3(b)(4) Fla. Const. and Fla.R.App.P. 9.030(a)(2)(A)(v) vests, based upon questions certified by the District Court of Appeal, Third District, to be of great public importance. In its Notice to Invoke Discretionary Jurisdiction, HERTZ pointed out that jurisdiction also vests pursuant to Art. V, §3(b)(3) Fla. Const. and Fla.R.App.P. 9.030(a)(2)(A)(iv), based upon the fact that the majority opinion

of the District Court expressly and directly conflicts with the decisions of this Court in Susco Car Rental System of Fla. v. Leonard, 112 So.2d 832 (Fla. 1959), in Thomas v. Atlantic Associates, Inc., 226 So.2d 100 (Fla. 1969), and in Stupak v. Winter Park Leasing, Inc., 585 So.2d 283 (Fla. 1991).[2] The extent of such conflicts is discussed throughout the brief.

II

THE OPINION OF THE DISTRICT COURT SHOULD BE QUASHED AS BEING IN CONFLICT WITH EXISTING FLORIDA LAW.

Florida's dangerous instrumentality doctrine, which imposes non-delegable vicarious liability upon the owner of a motor vehicle who voluntarily entrusts it to another, was originally described in **Anderson** v. **Southern Cotton Oil Co., 73 Fla. 432, 74 So. 975 (1917)** and **Southern Cotton Oil Co. v. Anderson, 80 Fla. 441, 86 So. 629 (1920).** In **Susco Car Rental System of Fla. v.**

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[2] The District Court, in Note 2 to the En Banc Opinion, recognized potential conflict between the present case and **Stupak v. Winter Park Leasing, Inc., supra:**

> It must be acknowledged that language in Stupak v. Winter Park Leasing, Inc., **585 So.2d** 283 (Fla. **1991)** is seemingly at variance with several of the principles and conclusions contained in this opinion, which was almost completely prepared prior to Stupak's release * * *
>
> Finally, if we are wrong about any of this, including our view of Stupak, the supreme court will tell us so in answer to the certified question posed in this opinion (or on the basis of its taking jurisdiction because this decision is in conflict with Stupak)(A **22,** En Banc Opinion, **p. 5,** N. **2).**

Leonard, 112 So.2d 832 (Fla. 1959), this Court clarified the doctrine as follows:

> In the final analysis, while the rule governing liability of an owner of a dangerous agency who permits it to be used by another is based on consent, the essential authority or consent is simply consent to the use or operation of such an instrumentality beyond his own immediate control. Only to that limited extent is the issue pertinent when members of the public are injured by its operation, and only in a situation where the vehicle is not in operation pursuant to his authority, or where he has in fact been deprived of the incidents of ownership, can such an owner escape responsibility. 112 So.2d at 837.

It was recognized that while contracts between a rental car company or agency and the lessee of a motor vehicle may place restrictions on the use of the vehicle, such limitations are totally unrelated to the liabilities imposed by law upon the owner of the motor vehicle for its negligent operation.

In deciding Susco, supra, however, this Court also recognized that where rental vehicles are concerned, there is an exception to the dangerous instrumentality-entrustment doctrine in Florida, as follows:

> the logical rule, and, we think, the prevailing rationale of the cases, is that when control of such a [rental] vehicle is voluntarily relinquished to another, only a breach of custody amounting to a species of conversion or theft will relieve an owner of responsibility for its use or misuse. 112 So.2d at 835-836.

This language was subsequently se-adopted by this Court in Thomas v. Atlantic Associates, Inc., 226 So.2d 100 (Fla. 1969), an accident case where an employee was given unrestricted use of his employer's motor vehicle, and his 13 year old daughter took the keys to the vehicle, which her father had left on his dresser. It

was recognized that the owner of the vehicle had given its consent to the use or operation of the vehicle beyond its immediate control, as a consequence of which the Court indicated that:

> the only real issue was whether the owner had "in fact been deprived of the incidents of ownership" or, as stated elsewhere in Susco, there had been "a breach of custody amounting to a species of conversion or theft." Insofar as the decision here reviewed may have failed to take into consideration this question, it is in direct conflict with Susco, supra, 112 So.2d 832. 226 So.2d at 102.

Most recently, the language of Susco, supra, was adopted in **Stupak v. Winter Park** Leasing, **Inc.,** 585 So.2d 283 (Fla. 1991). In Stupak, a motor vehicle was rented pursuant to an agreement which contained a provision indicating that the failure to return the vehicle by the due date would be considered theft by conversion. The alleged accident occurred approximately two (2) hours after the rental agreement expired.[3] Recognizing the existence of conflicting evidence, and citing Susco's language, this Court quashed the affirmance of a summary judgment for the Leasing company, indicating that:

> The question of whether Flory's use of the car beyond the expiration date of the rental agreement constituted a theft or conversion is a genuine issue of material fact which precludes summary judgment in this case. See Tribbitt v. Crown Contractors, Inc., 513 So.2d 1084 (Fla. 1st DCA 1987). 585 So.2d at 284.

Despite the fact that this Court has adopted the language of Susco as the law in Florida, the District Court in the present case, has characterized such language as 'loften-cited dictum" (A

[3] The rental agreement expired on November 1, p.m., 1987, and the accident occurred at approximately 2 a.m. on November 2, 1987.

26, En Banc Opinion, p. 9), and has refused to accept or follow it. In so doing, the opinion of the District Court "is in direct conflict with **Susco,** supra, 112 So.2d 832", Thomas **v. Atlantic Associates, Inc., supra** at **102,** as well as being in conflict with Thomas **v. Atlantic Associates, Inc.** and **Stupak v. Winter Park Leasing, Inc.,** supra.

In the present case, there is no question that the HERTZ vehicle was the subject of "a breach of custody amounting to a species of conversion or theft". The parties specifically stipulated that the vehicle was rented to a person purporting to be someone else, and that a fraudulently obtained credit card was used to effectuate the rental. Moreover, the evidence at trial clearly indicated that on the same day, an identical fraud was perpetrated on National Car Rental, which rented a vehicle to the same individuals, with the same license and credit card, under the same circumstances.

Subsequently to the fraudulent rental of the HERTZ vehicle: (1) there was a complete failure on the part of the renters to return the vehicle when due; (2) HERTZ mailed two certifed mail letters to the renters requesting return of the HERTZ vehicle, which were required to be sent by the Metro Dade Police Department, as a condition precedent, before the police would accept a stolen vehicle report from a rental car company; (3) the renters failed to respond to the two certified mail requests for return of the HERTZ vehicle; (4) HERTZ reported the vehicle to the police authorities as a stolen vehicle; and (5) the HERTZ vehicle

was listed and recorded by the police as a stolen vehicle. All of this occurred prior to the alleged accident.[4] Ultimately, the HERTZ vehicle was recovered on April 25, 1985, more then two and one half (2½) months after it was due to be returned.[5]

Section 812.014 Fla.Stats., defines "Theft" as follows:

> (1) A person is guilty of theft if he knowingly obtains or uses, or endeavors to obtain or use, the property of another with intent to, either temporarily or permanently:

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[4] The majority of the District Court in the En Banc Opinion, held that whatever efforts HERTZ utilized to recover the vehicle after it learned that it had been obtained by fraud, were insignificant:

> . . . we do not pursue the issue because we are convinced that no such efforts, even heroic ones, can be effective to obviate the owner's liability under the [dangerous instrumentality] doctrine (A 30, En Banc Opinion, p. 13).

The partially dissenting minority [four (4) judges], however, has disagreed with this statement, and has indicated that the totality of the circumstances concerning the efforts made by HERTZ to recover its vehicle, together with the length of time that the vehicle was kept beyond the rental period, present a question of fact for a jury, as to whether HERTZ should be exonerated from liability. HERTZ would agree that the above statement of the majority is not an accurate statement of law, and that at the very least, in accordance with the minority opinion, this case should be remanded for a new trial as to all issues. Beyond this, however, HERTZ would emphasize that there is no question of fact presented in the present case, since all such facts were either stipulated to, or were established by the evidence. Consequently, it was the responsibility of the trial court to have applied the law to the facts, which was done. The directed verdict was properly entered in favor of HERTZ, and the same should be reinstated.

[5] The two and one half (2½) month period of time in recovery of the HERTZ vehicle in the present case, contrasts sharply with the two (2) hour delay in the recovery of the vehicle in Stupak v. Winter Park Leasing, Inc., 585 So.2d 283 (Fla. 1991). In Stupak this Court indicated that there was a question of fact presented as to whether such delay constituted a conversion or theft of the vehicle. In the present case, the District Court determined that no such question existed, and that no conversion or theft occurred.

(a) Deprive the other person of a right to the property or a benefit therefrom.

(b) Appropriate the property to his own use or to the use of any person not entitled thereto.[6]

The key phrase in this provision is "obtains or uses", which is defined in §812.012 Fla.Stats., as follows:

(2) "Obtains or uses" means any manner of:

(a) Taking or Exercising control over property.

(b) Making any unauthorized use, disposition, or transfer of property.

(c) Obtaining property by fraud, willful misrepresentation of a future act, or false promise.

(d)(1) Conduct previously known as stealing; larceny; purloining; abstracting; embezzlement; misapplication; misappropriation; conversion; or obtaining money or property by false pretenses, fraud, or deception; or

2. Other conduct similar in nature. [Emphasis supplied].[7]

In **Bissart** v. State, **128 Fla. 891, 176 So. 32 (1937),** this Court held that:

> . . . where one obtains possession of property by means of fraud ok trickery with the preconceived design to appropriate the property to his own use, the taking amounts to larceny because the fraud vitiates the transaction and the owner is still deemed to

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[6] The statute also delineates the degrees of theft, the designation of the crime, and how it is to be punished.

[7] In *C.G.* **v.** State, **560** So.2d **1186** (Fla. **3d DCA 1990),** it was held that, as it pertains to **5812.014 Fla.Stats.,** the phrase "obtains or uses" is "broadly defined to encompass any use, including unauthorized use."

> retain constructive possession of the property. The conversion of it by the defendant is such a trespass to that possession as to constitute a larceny. 176 So. at 32-33.

See also: Campbell v. State, 155 Fla. 359, 20 So.2d 127 (1944); Casso v. State, 182 So.2d 252 (Fla. 2d DCA 1966).

A more detailed statement of what constitutes theft by fraud, false pretenses, or trickery was set out in Ex parte Stirrup, 155 Fla. 173, 19 So.2d 712 (Fla. 1944):

> To constitute the criminal offense denounced by the statute [a predecessor to the present statute], there must be a representation of a past or existing fact or circumstance by the defendant to another for the purpose of obtaining property from the latter; the representation must be false in fact; it must have been made with knowledge of its falsity; it must have been made with intent to deceive the other party; it must have been believed by the other party; he must have parted with his property to the defendant because of it. [Citations omitted].
>
> It is also necessary that a false statement or representation of an existing fact or circumstance by one person to another for the purpose of obtaining property from the latter be of such nature or character that if the fact was as represented it would place upon the latter a duty, obligation or desire to part with the property demanded. Inasmuch as deception is the essence of the crime, there must be a causal relation between the representation or statement made and the delivery of the property. 19 So.2d at 713.

Later, in Rosengarten v. State, 171 So.2d 591 (Fla. 2d DCA 1965), the Court recognized that:

> A man is defrauded if, by intentionally false representations of fact he has been induced to make a donation, or has been induced to pay money or to deliver property upon receipt of something quite different from what he

> understood he was getting or has been **induced to lend money upon the strength of a security which is not what it is represented to be.** [Emphasis by the Court] **171 So.2d** at **595.**

The elements of theft by false pretenses were subsequently restated in **Green v. State, 190** So.2d **614** (Fla. 3d **DCA 1966), as** follows:

> The elements of the crime of obtaining property by false pretense are: false representation of past or existing fact; knowledge of its falsity; intent to defraud; reliance on the misstatement by the other party; surrender by the other party of property because of the representation; the intent to defraud in connection with the crime has been stated to be "the intent to induce another to part with his property by the use of false **and** deceptive means, when otherwise the owner would not have done **so." 190 So.2d** at **616.**

Further to this, in **State v. Oates, 330** So.2d **554** (Fla. 4th **DCA** 1976), the Court held that:

> One obtaining personal property by trick, device, or fraud, intending to appropriate it, is guilty of larceny on subsequent appropriation. **A** person is guilty of larceny who gets possession of money of another by means of fraud or trickery with the preconceived purpose to appropriate the money to his own use, on the theory that the fraud vitiates the consent of the owner who is held to retain constructive possession up to the time of conversion by the taker. **330** So.2d at ***556.***

In the present case, it is undisputed that the **HERTZ** vehicle was obtained through the use of a fraudulently obtained or stolen credit card; and that before renting the vehicle, **HERTZ** first obtained approval for the acceptance of such credit card. Under the above cases, it is clear that the **HERTZ** vehicle was

obtained through fraud, trickery, false pretenses or false representations, and that the manner in which the vehicle was obtained invalidated the permissive use of the vehicle by HERTZ.

Applying this Court's holding in Bissart v. State, Supra, to the present case, "the fraud vitiates the transaction and the owner [HERTZ] is still deemed to retain constructive possession of the property [the vehicle]. The conversion of [the HERTZ VEHICLE] . . . is such a trespass to that possession as to constitute a larceny." 176 so. at 32-33. See also: State v. Oates, 330 So.2d 554, 556 (Fla. 4th DCA 1976).

The use of the fraudulently obtained or stolen credit card to rent the HERTZ vehicle, together with the failure to timely return the vehicle, the failure to respond to two certified mail letters as required by the police authorities, the reporting of the vehicle as stolen to the police authorities, and the listing of the vehicle as stolen by the police at least eleven (11) days prior to the alleged accident, clearly establishes that the HERTZ vehicle was the subject of a "species of conversion or theft", prior to the accident occurring.

In effect, when the HERTZ vehicle was obtained through the use of a fraudulently obtained or stolen credit card, there was a breach of custody amounting to a species of theft OK conversion; and consequently, there was no permissive use of the vehicle thereafter.

Significantly, it should be noted that S817.52 Fla.Stat., makes it a crime for anyone to obtain a rental vehicle with the

intent to defraud the owner; or to obtain custody of such a rental vehicle from the owner or the owner's agents, by trick, deceit or fraudulent or willful false representation; or, with intent to defraud, to fail to redeliver a rental vehicle to the owner or his agent at the termination of the rental period.[8]

It should also be noted that Florida law generally will not impose liability upon the owner of a vehicle when it is being **used** without the owner's express or implied consent at the time the vehicle is involved in an accident. **Keller** v. Florida **Power & Light Co., 156** So.2d **775** (Fla. **3d DCA 1963): Fideli v. Colson, 165** So.2d 794 (Fla. 3d **DCA 1964); Hankersan v. Wilcox, 173** So.2d **747** (Fla. 3d DCA 1965); **Pearson** v. **St. Paul Fire** & **Marine Ins. Co., 187** So.2d **343** (Fla. **1st DCA** 1966); **Martinez** v. Hart, **270** So.2d **439** (Fla. 3d DCA 1972); **Slitkin v. Avis Rent-A-Car System, Inc., 382** So.2d **883** (Fla. 3d DCA **1980); Commercial Carrier Corp v. S.J.G. Corp., 409** So.2d **50** (Fla. 2d **DCA 1981), Rev. denied, 417** So.2d 328 (Fla. **1982); Anderson v. Cannon,** 562 So.2d **857** (Fla. 1st **DCA 1990).**

Pursuant to the applicable Florida Statutes, relating to theft and conversion, and the cases which have interpreted such

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[8] The District Court has indicated in Note **5** to its En Banc Opinion **(A 26,** En Bank Opinion, p. **9,** N. **5),** that:

> the fact that it may be a crime to fail timely to redeliver a hired vehicle, **§817.52(3)** Fla.Stat **(1985),** should not alter the renter's tort responsibility even when, **as** in this case it is used well **beyond** the period of the lease. Susco, **112** So.2d **at 832.** But **See** Stupak.

This statement totally overlooks the fact that the cited statutory provision only makes it a crime to fail to timely redeliver **a** hired vehicle, if such failure is without consent, "and with intent to defraud" [Emphasis supplied].

statutes, it is clear that the fraudulent rental of its vehicle should relieve HERTZ of any liability in the present case. Section 817.481 Fla.Stat., which pertains to credit cards, however, emphasizes this even further:

> **817.481** Credit cards; obtaining **goods** by use of false, expired, ***etc.;*** penalty.--
>
> (1) It shall be unlawful for any person knowingly to obtain or attempt to obtain credit, or to purchase or attempt to purchase any goads, property or service, by the use of any false, fictitious, counterfeit, or expired credit **card,** telephone number, credit number, ok other credit device, or by the use of any credit card, telephone number, credit number, or other credit device of another without the authority of the person to whom such card, number, or device was issued, or by the use of any credit card, telephone number, credit number, or other credit device in any case where such card, number or device has been revoked and notice of revocation has been given to the person to whom issued.

Section **817.481** Fla.Stats., further specifies that if the value of the property, **goods** or services involved is **$100** or more, the offender is guilty of "grand larceny"; and if the value is less than $100, the offender is guilty of "petit larceny".[9]

The use of a false, fictitious or counterfeit credit **card, as** described in **S817.481** Fla.Stats., is precisely what occurred in the present case, i.e., a fraudulently obtained or stolen credit card was used to rent the HERTZ vehicle. Patently, the **HERTZ** vehicle was converted or stolen, which clearly brings the situation within the holding of Susco Car Rental System of Fla. **v.**

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[9] It must be rememberedthat, pursuant to **$812.012(2)(d)(1)** Fla.Stats., "larceny" is included as part of the definition of "obtains or uses" in the "**Theft**" statute, S812.014 Fla.Stats.

Leonard, supra, and its progeny; **i.e.,** that where there has been a breach of custody of the rental vehicle, amounting to a species of conversion or theft, the owner [HERTZ] will be relieved of responsibility for the use or misuse of the vehicle.

As has been previously indicated, the District Court in the present case has refused to follow the language used by this Court in **Susco, Thomas** v. **Atlantic Associates, Inc., supra,** and **Stupak** v. **Winter Park Leasing, Inc., supra.** Instead, the Court has relied upon the decision in **Tillman Chevrolet Co. v. Moore, 175 So.2d 794** (Fla. **1st DCA 1965), Cert. discharged, 184 So.2d 175 (Fla. 1966),** and its own decision in **National** Car **Rental System, Inc. v. Bostic, 423** So.2d **915** (Fla. **3d DCA** 1966), **Rev. denied, 436** So.2d **97** (Fla. 1983).

In the **Tillman Chevrolet** case, an automobile dealership permitted a "prospective buyer" to take sole possession of a vehicle that was for sale, and to drive it for **a** lfmited distance. The "prospective buyer" took the car, changed the license **tags** and drove it to another county, where it was involved in an accident. Under these facts, the court held that the dealership was vicariously liable to the parties injured in the accident.

The District Court's reliance on the Tillman Chevrolet is unwarranted. First, there is a great distinction between **a** dealership which is trying to sell an automobile, and in so doing gives sole custody of the automobile to a "prospective purchaser", **and a** company which rents cars under formal rental agreements. In the former instance there is no contractual relationship present,

whereas in the latter, the contract is supported by consideration, and reliance by the rental company on the validity of the renter's credit, which is verified before the rental is approved.[10] Additionally, despite the fact that it **was** decided subsequently, the **Tillman** Chevrolet opinion makes no reference to this Court's decision in Susco, which established the foundation for determining whether there has been a breach of custody of a vehicle amounting to a "species of conversion or theft". Consequently, it appears that there is a conflict present between Tillman Chevrolet and Susco. Lastly, since deciding **Tillman** Chevrolet, the First District Court of Appeal appears to have receded from that decision, by adopting Susco's language in Tribbitt **v. Crown** Contractors, **Inc.,** 513 So.2d 1084 (Fla. 1st **DCA** 1987):

> Susco establishes that where an owner has consented to the use of his vehicle beyond his own immediate control, he is responsible for its use or misuse unless there has been a breach of custody amounting to a species of conversion or theft. 513 So.2d at 1086.

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[10] The District Court has indicated in Note **4** to its En Banc Opinion that, regardless of how the HERTZ vehicle was obtained, the lessees remain liable to **HERTZ** for the rental charges. The Court reasons that because of this: **(1)** HERTZ is not deprived of the incidents of ownership of its vehicle; (2) that the initial or continued possession of the vehicle was not inconsistent with the initial terms of its rental; and **(3)** that it is incongruous to permit **HERTZ** to reap the economic benefits of **a** violation of the rental agreement, while relieving itself of tort liability **(A 25**, En Banc Opinion, p. **8)**. This abstract reasoning overlooks the common sense realities of the situation. The District Court has failed to consider who would remain liable to HERTZ for the rental charges. Is it the real Linda Major, whose credit card was used, but who did not enter into any agreement with HERTZ? Is it some other female, whose identity is unknown, but who misrepresented herself **as** being Linda Major? Or is it some other unknown individual? With respect to any of these persons, there is virtually no likelihood that **HERTZ** would ever recover payment for the rental of its vehicle.

It should be noted that the First District Court's decision in **Tribbitt v. Crown Contractors, Inc.,** was cited favorably by this Court, in Stupak v. **WLinter Park Leasing, Inc.,** its most recent statement concerning the application of Susco.

The District Court's reliance upon its prior decision in **National Car Rental System, Inc. v. Bostic, supra,** is also inappropriate. The **Bostic** case involved the denial of a motion made at time of trial for leave to amend the pleadings **so** as to include an additional affirmative defense. **The** affirmative defense sought to be added was that the vehicle had been rented through the use of a fraudulently altered credit **card.** In reviewing the denial of the motion, the District Court indicated that "We find this point to be without merit", **423** So.2d at 917, citing to **Tillman and Susco.** In the present case, the District Court has indicated that:

> Bostic's citation of Tillman and Susco demonstrates that the claim that the rental car had been procured, as here, by a fraudulent credit card was held substantively insufficient as **a** matter of law. This was and is true because, as Tillman holds, the effect of an original consent is not abrogated by the obvious misrepresentations of **a** potential thief as to his intentions in using the car, or as Susco holds, by any subsequent deviation from the terms of entrustment (Appendix **24-25**, En Banc Opinion, **pp. 7-8).**

By this statement, the District Court has clearly indicated that the actions of a thief in obtaining and using a vehicle owned by another, will not relieve the owner of liability. In effect, the District Court has held that a victim of the crime of theft, is now responsible for the consequences of the crime, and the subsequent actions of the thief. This clearly conflicts with the language in

Susco, that a "species of conversion or theft" will relieve the owner of a vehicle of liability.

Insofar as the facts of the present case are concerned, two out of state cases, which the District Court majority attempted to distinguish, are analogous. In Zuppa v. Hertz Corporation, 111 N.J.Super. 419, 268 A.2d 364 (1970), the Court held that The Hertz Corporation, as the owner of a rental vehicle, was not liable for damages caused in a collision where the driver wrongfully came into possession of the Hertz vehicle through the use of another's credit card. Further, in Matter of Utica Mutual Ins. Co., 95 A.D.2d 150, 465 N.Y.S.2d 553 (N.Y.S.Ct. 1983), it was held that the attempts of an automobile lessor, which had tried to contact its lessee by telephone, by certified mail and in person, and which had notified the local police and filed a criminal complaint against the lessee, were sufficient to constitute a revocation of the consent that the lessee had to operate the vehicle. As such, persons injured as a result of the negligent operation of the vehicle by the lessee, who was guilty of the unauthorized use of the vehicle for 21 days beyond the term of the rental agreement, were not entitled to any recovery from the lessor or its insurer.

As has been emphasized throughout this Brief, the District Court has declined to follow the language of Susco, Thomas and Stupak, which establish the "species of conversion or theft" exception to vicarious liability in Florida. Rather, the District Court has questioned what was intended by Susco's statement that "only a breach of custody amounting to a species of conversion or

theft will relieve an owner of responsibility" for the negligent use or misuse of the owners motor vehicle. In attempting to answer this question, the District Court has refused to accept the statutes and **cases** cited above, as defining what the **Susco** Court meant by the terms "conversion" and "theft". The District Court specifically stated that:

> We do not accept the statutory definition of larceny as having any bearing upon the question of civil liability here involved. **(A 26**, En Banc Opinion, p. **9)**.

By refusing to accept such definition, however, the District Court has apparently also rejected the definitions and holdings of this Court in Bissart v. **State, 128** Fla. **891**, 176 So. **32 (1937); Campbell v. State, 155 Fla. 359, 20 So.2d 127 (1944);** and **Ex Parte Stirrup, 155** Fla. **173, 19 So.2d 712 (1944),** which are **discussed, supra,** at **pp. 14-15** of this Brief. Further, while the District Court has refused to accept this settled law, it has offered no reasonable alternative definitions.

In its opinion, the District Court acknowledged that the term "conversion" refers to the wrongful taking of another's right to possession of property, and that an action for "conversion" will lie against **a** person who obtains goods by fraud or duress **(A 27-28**, En Banc Opinion, **pp.** 10-11). Thereafter, however, the opinion digresses into a discussion of whether an action for conversion would lie against a bona fide purchaser of a chattel, which clearly has nothing whatsoever to do with the present case. Instead of considering the issues that were presented, the District Court embarked upon an intellectual discussion and application of, what

it described as, an "arcane law school doctrine" (A 28, En Banc Opinion, p. 11).

The present case involves a motor vehicle that was obtained from HERTZ, by individuals who misrepresented their identities, and who used a fraudulently obtained credit card. In directing its attention to bona fide purchasers of "chattels", the District Court totally disregarded Florida's "Title Certificate Law", Chapter 319 Fla.Stats., which applies exclusively to motor vehicles required to be registered and licensed in this State.[11] Such "Title Certificate Law" does not apply to any other type of "chattel", other than motor vehicles. By discussing the rights of a bona fide purchaser of a "chattel", rather than of a motor vehicle, the District Court has totally disregarded a broad body of existing Florida law. Its opinion consequently conflicts with the holdings of all the other appellate courts of this State.

In Dicks v. Colonial Finance Corp., 85 So.2d 874 (Fla. 1956), this Court affirmed a judgment for the plaintiff in a replevin action involving a motor vehicle, based upon the provisions of 55319.15, 319.23(5) and 319.27(2) Fla.Stats. The Court specifically recognized that "In the absence of some

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[11] The District Court cited five cases in support of its conclusion that an owner cannot maintain an action for "conversion" against a bona fide purchaser of a chattel. Four of the cases do not involve motor vehicles: McCullen v. Hereford State Bank, 214 F.2d 185 (5th Cir. 1954) [Stock Certificates]; Martin v. Green, 117 Me. 138, 102 A. 977 (1918) [a horse]; Porell v. Cavanaugh, 69 N.H. 364, 41 A. 860 (1898) [a horse]; Hoffman v. Alpern, 193 Misc. 695, 85 N.Y.S.2d 561 (City Ct. 1948) [merchandise]. One case cited, Parr v. Helfrich, 108 Neb. 801, 189 N.W. 281 (1922) involved an automobile, but it was decided long before Florida first adopted Chapter 319 Fla.Stats. the "Title Certificate Law", in the 1940s.

intervening principle of estoppel, no one can convey better title than he has. . ." 85 So.2d at 876. Accord: Castner v. Ziemer, 125 So.2d 134 (Fla. 2d DCA 1960). See also: James Talcott, Inc. v. Eckert 220 So.2d 17 (Fla. 1st DCA 1969).

In R.S. Evans Motors of Jacksonville, Inc. v. Hanson, 130 So.2d 297 (Fla. 2d DCA 1961), the Court specifically held that:

> The trial court found that the appellants were not chargeable with any negligence in exercising their rights, but held that they should not prevail because Nicholas was a bona fide purchaser for value without notice of any defect or infirmity of title. This holding is erroneous since it is supported by none of the recognized exceptions to the settled law that the possession of personal property in good faith by a purchaser for value is only prima facie evidence of title, that no one can transfer better title than he has, and that one who is in possession under a defective or incomplete title cannot defeat recovery of the property by the true owner. And it is a general principle applicable to traffic in personal property that no one can transfer or confer a better title than he has, unless some principle of estoppel operates to bar a claim under an otherwise better title.
>
> See Glass v. Continental Guaranty Corp., 81 Fla. 687, 88 So. 876, 25 A.L.R. 312; Commercial Credit Co. v. Parker, 101 Fla. 928, 132 So. 640; and Dicks v. Colonial Finance Corp. Fla., 85 So.2d 874. 130 So.2d at 299.

In Avis Rent-A-Car System, Inc. v. Harrison Motor Co., 151 So. 855 (Fla. 2d DCA 1963), the Court considered a case where a vehicle that was rented in New York was not returned timely, and was reported as stolen to the New York State Police, the F.B.I., and the local police in New York. The title certificate to the vehicle was required by law to be in the vehicle when it was rented. The stolen vehicle was transported to Florida, where the title certificate was altered, and the vehicle was thereafter sold

to a "bona fide purchaser for value, without notice". The Court held that:

> Ferrucci feloniously brought the automobile to Florida where he altered the registration title into his name and obtained a Florida title. It is elementary that no one can transfer or confer better title to chattels than he himself has. Ferrucci had never legally obtained title to the car, but had illegally forged the title, and hence he could not convey title which he himself did not have. 151 So.2d at 856.

In reaching this conclusion, the Court relied upon the review of how Florida law has been modified with respect to motor vehicle sales, as set forth in **Trumbull** Chevrolet **Sales Co. v. Seawright,** 134 **So.2d 829, 837** (Fla. 1st **DCA** 1961):

> Motor vehicles constitute a special class of personalty which, because of considerations too numerous to recite, has had thrown up around transactions for the sale thereof and transfer of title thereto a distinct body of case and statutory law differing in many important respects from that generally governing sales of other types of personalty. And although it varies to some extent in the several states, the underlying trend and objective is to protect the interest and title of the rightful owner against fraudulent sales **of** such property, to establish a uniform method of transfer, and to insure, as far as practicable, the validity of title and possessory rights of the ultimate owner. To accomplish this, certain duties and limitations have been placed on the purchasers as well **as** the seller, and courts generally require strict compliance therewith. 151 So.2d at 856-857.

Other Florida Courts have also held that in stolen vehicle cases, the actual owner of the vehicle will prevail over bona fide purchasers, for value, without notice. **Federal Ins. Co.** v. **Mercer,** 237 **So.2d 243** (Fla. 4th **DCA 1970);** Home **Ins. Co. v. Small, 389** So.2d **1255** (Fla. 1st **DCA 1980); Brown** & **Root, Inc. v. Ring Power Corp.,** 450 **So.2d 1245** (Fla. 5th **DCA 1984).**

From the above authorities, it is clear that, in its En Banc Opinion, the District Court has totally misjudged the law in Florida as it pertains to bona fide purchasers of stolen motor vehicles.

In addition to misapplying the term "conversion" as set forth in Susco, supra, the District Court has also misapplied the term "theft". The Court correctly notes that Susco was decided in 1959, and that the term "theft" did not become a statutory crime until 1977, with the enactment of the Florida Anti-Fencing Act, Ch. 77-342, §§ 3-4, Laws of Florida [§§ 812.012, 812.014 Fla.Stats. (1988)]. Accordingly, it looked to "common law larceny" as a means of determining what the term "theft", as used in Susco, refered to.

In looking to "larceny", however, the District Court relied solely upon a 1975 Illinois decision, **People v. Sims, 29** Ill.App.3d 815, 331 N.E.2d 178 (1975) [also decided after Susco], and totally neglected Florida statutory[12] and case law. Of specific significance, the District Court completely refused to consider this Courts decision in **Bissart v. State, 128 Fla. 891, 176 So. 32 (1937),** which had been cited by HERTZ in its Brief. In Bissart, the Court indicated that if possession of property is obtained by fraud or trickery with the preconceived idea of appropriating such property, the taking amounts to "larceny".

[12] The District Court recognized in Note 9 to its En Banc Opinion (A 29, On Banc Opinion, p. 12, N. 9), that as of 1951, Florida had a statutory definition of "larceny", which included embezzlement and false pretenses, Ch. 26912, Laws of Fla. (1951), but indicated that for the purposes of its line of reasoning, it was unnecessary to refer to this.

Moreover, in Bissart, the Court indicated that the "fraud vitiates the transaction and the owner is still deemed to retain constructive possession of the property." 176 So. at 32-33. The District Court, however, held to the contrary, and concluded that:

> . . . considered in the light of what it was seeking to accomplish by the adoption of the doctrine, it is apparent that by "theft" the supreme court meant a larceny or a wrongful non-consensual taking from the possession of the true owner; such a theft has always precluded liability under the doctrine. See 4 Fla.Jur.2d Automobiles and Other Vehicles § 285 (1978). The expression did not encompass the fraudulent or other criminal inducement of consent which, as we have seen, cannot be deemed a cognizable defense (A 30, En Banc Opinion, p. 13).

Such a conclusion is obviously unjustified. Ultimately, the District Court speculated that this Court's holding that "only a breach of custody amounting to a species of conversion or theft will relieve an owner" of liability, as set forth in Susco, might have referred to "a break in the chain of responsibility by a 'conversion or theft' from the renters or their permittees" (A 30, En Banc Opinion, p. 13, N. 10). The Court concluded, however, that:

> . . . whatever "species" of the genera "conversion" and "theft" the supreme court meant in Susco, it did not include this one. (A 30, En Banc Opinion, p. 13)

It would be submitted that such a conclusion is clearly erroneous. Throughout this Brief, HERTZ has pointed to this Court's decisions in Susco, Thomas and Stupak, as establishing the law in Florida with respect to vehicles that have been the subject of a "breach of custody amounting to a species of conversion or theft". In its En Banc Opinion, the District Court has specifically rejected the law

which was delineated in Susco, Thomas and Stupak. As a consequence, the decision of the District Court should be quashed, and the original directed verdict, which was entered by the trial court, should be reinstated. Alternatively, in the event that this Court determines that HERTZ was not entitled to a directed verdict, the cause should be remanded for a new trial on all issues.

CONCLUSION

From the facts of this case and the authorities presented herein, **THE HERTZ CORPORATION** respectfully requests that this Court accept jurisdiction of this Cause in accordance with the Question Certified by the District Court, and because of the direct conflict between the opinion of the District Court and decisions of this Court; and that the decision of the District Court then be quashed, and the original Order Granting Directed Verdict in favor of **HERTZ**, and the Final Judgment entered thereon, by the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida, be reinstated. Alternatively, in the event that this Court determines that HERTZ was not entitled to a directed verdict, the cause should be remanded for a new trial on all issues.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief On The Merits of Petitioner THE HERTZ CORPORATION was hand delivered this 21st day of February, 1992 to: Arnold R. Ginsberg, Esq., HORTON, PERSE & GINSBERG, and JAY ROTHLEIN, ESQUIRE, 410 Concord Building, 66 West Flager Street, Miami, FL 33130.

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APPENDIX

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

THIRD DISTRICT

JULY TERM, A.D. 1990

BILLY JACKSON, by and through his mother and natural guardian HENRIETTA WHITAKER, and HENRIETTA WHITAKER, individually

Appellants,

vs.

THE HERTZ CORPORATION,

Appellee,

CASE NO. 88-2261

Opinion filed December 4, 1990.

An Appeal from the Circuit Court for Dade County, Francis X. Knuck, Judge,

Horton, *Perse* & Ginsberg and Jay Rothlein and Arnold Ginsberg, for appellants.

Roland Gomez and Steven A. Edelstein, for appellee.

Before BARKDULL, FERGUSON, and JORGENSON, JJ.

JORGENSON, Judge.

Billy Jackson and his mother, Henrietta Whitaker, appeal from a filial judgment in favor of the Hertz Corporation in an action for negligence. We affirm.

On February 5, 1985, Hertz entered into a twa-day rental agreement with a woman purporting to be Linda Major, and her companion, Lawrence King. The woman presented Hertz with a Visa credit card issued in Linda Major's name. Mr. King's driver's license number, the license expiration date, the issuing state, and King's age were entered on the additional authorized operator attachment of the rental agreement. Additionally, King's driver's license number and the license expiration date were entered on the front of the Hertz rental agreement. No separate driver's license information was written on tho rental agreement for the woman identifying herself as Linda Major. Before relinquishiny possession of the vehicle, Hertz ran a credit check on the Visa card presented. Upon receipt of a favorable credit check, Hertz released the vehicle to the above individuals.

Hertz was informed on February 17, 1985, by Metro-Dade Police that the Hertz-owned vehicle had been fraudulently leased with a stolen credit card and that the woman who gave her name as Linda Major was an imposter. Thereafter, on February 26, 1985, and March 1, 1985, respectively, Hertz sent certified letters[1/] to both renters demanding the return of the automobile. On March 31, 1985, both letters were returned to Hertz as undeliverable. On April 5, 1985, Hertz reported the vehicle as stolen to the police. Eleven days after the Hertz vehicle was reported stolen, the vehicle, operated by Christopher Harris, an alleged

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[1/] The Metro Dade Police Department Auto Theft Division requires that rental car companies send a certified letter to the renter of each vehicle before any vehicle can be reported as stolen.

Participant in the fraud, was involved in an accident, injuring Billy Jackson.

Dilly and his mother brought this action against Hertz as the owner of the vehicle involved in th accident, alleging that Hertz was liable for Billy's damages because its employees had negligently entrusted the car to a person who (1) did not present a valid driver's license; (2) obtained the vehicle by fraud, and (3) negligently operated the vehicle causing the accident. After the jury deadlocked on the issue of liablity, the trial court directed a verdict for Hertz.

NEGLIGENT ENTRUSTMENT

Although the Hertz agent who handled the rental transaction failed to note on the rental agreement the relevant driver's license information, if such information existed, for the woman purporting to be Linda Major, Hertz's handling *of* the transaction as a matter of law did not constitute negligence. At trial, Hertz presented credible testimony establishing a common industry practice permitting rental to a person with a credit card but no driver's license when accompanied by someone with a valid driver's license. Hertz further established that its policy and procedure manuals do not prohibit this particular rental procedure. Based on the evidence presented, even if the woman posing as Linda Major did not possess a valid driver's license, Hertz's handling of the transaction was not negligent.

We likewise conclude that Hertz was not negligent under the terms of section 322.38(2), Florida Statutes (1985).[2] There is no evidence that a rental car company has ever been charged with a violation of section 322.38(2) in a case where, as here, rental was made to a person with a credit card but no driver's license who was accompanied by someone with a valid license. Moreover, based on the uncontroverted testimony regarding a common rental industry practice and because a valid driver's license was presented and inspected, we conclude that Hertz complied with section 322.38(2) and was not negligent.[3]

NEGLIGENT DELAY IN REGAINING POSSESSION

Hertz also acted reasonably upon learning that its vehicle had been fraudulently obtained. Nine days after learning of the fraud, Hertz, in compliance with Metro Dade police procedures, sent two certified letters to "Linda Major" and Lawrence King demanding return of its vehicle. Five days after the last

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[2] Section 322.38(2) provides that: "No person shall rent a motor vehicle to another, until he has inspected the operator's or chauffeur's license of the person to whom the vehicle is to be rented, and compared and verified the signature thereon with the signature of such person written in his presence."

[3] Even if Hertz had violated the terms of section 322.38(2), its failure to comply with this penal statute was not the proximate cause of the plaintiff's injury. Christy v. Baker, 7 Ariz. App. 354, 439 P.2d 517 (1968)(violation of statute prohibiting rental of automobile without inspection of operator's license not negligence because rental of automobile to person without license was not proximate cause of injury; lack of license did not make driver incompetent to drive and accident would have occurred whether or not driver had valid license in his possession). Therefore, no reasonable jury could have found Hertz negligent here. See de Jesus v. Seaboard Coast Line R.R. Co., 281 So. 2d 198 (Fla. 1973)(proof of violation of traffic ordinance is only prima facie evidence of negligence; proximate cause and other elements of negligence must be proven independently); Brightwell v. Beem, 90 So. 2d 320 (Fla. 1956)(if minds of reasonable men could not differ as to cause of injury, issue of proximate cause is question of law for court).

attempted delivery by the post office, Hertz reported the vehicle as stolen to the police.

Contrary to the dissent's opinion, there was no evidence that Hertz was guilty of inaction upon notification by Metro Dade Police that the Hertz vehicle had been fradulently obtained. We cannot find Hertz negligent for delay in regaining possession when Hertz was merely following Metro Dade rules requiring rental companies to refrain from reporting vehicles as stolen until after certified letters are sent to the renters demanding return of the vehicle. On the contrary, we conclude that Hertz acted reasonably and with due diligence to regain possession of its vehicle.

DANGEROUS INSTRUMENTALITY DOCTRINE

Hertz was not liable under the dangerous instrumentality doctrine. There is no dispute that the owner of the vehicle must voluntarily relinquish possession of its vehicle in order to be held liable under the dangerous instrumentality doctrine. In Susco Car Rental Sys. of Fla. v. Leonard, 112 So. 2d 832, 837 (Fla. 1959), the Florida Supreme Court emphasized that "the rule governing liability of an owner of a dangerous agency who permits it to be used by another is based on consent. . . [O]nly in a situation where the vehicle is not in operation pursuant to his authority, or where he has in fact been deprived of the incidents of ownership, can such an owner escape responsibility." In Susco, there was no doubt that the automobile was being used with the owner's consent. Here, however, it is undisputed that Hertz's consent to rent the vehicle was procured by fraud,

through the use of a stolen credit card. This fraud vitiated Hertz's consent from the outset. See Padgett v. State, 82 So. 2d 372 (Fla. 1955)(where owner's consent procured by false pretense with intent to defraud, fraud vitiated owner's consent and taking amounted to larceny); State v. Oates, 330 So. 2d 554 (Fla. 4th DCA 1976)(same). Because the plaintiff has the burden of proving that possession of the vehicle was relinquished with the owner's consent, Slitkin v. Avis Rent-a-Car Sys., 382 So. 2d 883 (Fla. 3d DCA 1980), and because plaintiffs here have not met this burden, Hertz, as a matter of law, is relieved from liability for the negligent operation of its vehicle under the dangerous instrumentality doctrine.

Even if Hertz had voluntarily relinquished possession of its vehicle, Hertz is still relieved from liability under the dangerous instrumentality doctrine. The Florida Supreme Court in Susco held that "when control of such a vehicle is voluntarily relinquished to another, only a breach of custody amounting to a species of conversion or theft will relieve an owner of responsibility for its use or misuse." Susco, 112 So. 2d at 835-836. The events that occurred here clearly constituted a "species of conversion or theft" within the meaning of Susco, both initially by the use of a stolen credit card to obtain possession[4/] and,

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4/ Section 012.014, Florida Statutes (1985), entitled "Theft" provides, inter alia, that:

> (1) a person is guilty of theft if he knowingly obtains or uses . . . the property of another with intent to, either temporarily or permanently: (a) Deprive the other person of a right to the property or a benefit therefrom. (b) Appropriate the property to his own use

subsequently, when the vehicle was not returned to Hertz after demand for its return had been made. See Senfeld v. Bank of Scotia Trust CO., 450 So. 2d 1157 (Fla. 3d DCA 1984)(where person having right to possession of property makes demand for its return and property is not relinquished, conversion has occurred, and it is not necessary to prove demand and refusal where the act complained of amounts to conversion regardless of whether demand is made); United States v. Edwards, 576 F.2d 1152 (5th Cir. 1970) (vehicle rented with stolen credit card and not returned to rental agency exceeded scope of rental agreement and constituted interstate transportation of stolen vehicle). Under these circumstances, Hertz cannot be liable.

Appellants' reliance on Tillman Chevrolet Co. v. Moore, 175 so. 2d 794 (Fla. 1st DCA 1965), is misplaced. In Tillman, the court found that the owner of an automobile dealership was negligent in permitting a "prospective buyer" who developed to be a thief to take sole possession of a vehicle for sale to drive it a limited distance. Id. at 795. The salesman's negligence in Tillman was critical to the court's finding of liability. Second, in Tillman, the dealer was in tho business of selling, rather than renting, automobiles. In contrast to a rental

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or the use of any person not entitled thereto.

The term "obtains or uses" found within the theft statute includes "conduct previously known as . . . larceny, . . . obtaining money or property by false pretenses, fraud, or deception. . . . § 812.012(2), Fla. Stat. (1985). In Richardson v. State, 193 So. 2d 637 (Fla. 3d DCA 1967), this court held that a defendant who rented an automobile from a rental agency with a stolen credit card was guilty of grand larceny, where the value of the property obtained exceeded $100. Based on the foregoing authorities, the Hertz vehicle clearly was obtained by theft.

agreement in which there is a formerly executed contrac supported by consideration and reliance by the rental company on the validity of the renter's credit, there is no such contractual relationship in the case *of* a "test drive" by a prospective customer. Lastly, Tillman omitted any reference to the Florida Supreme Court's decision in Susco which established the foundation for determining whether the owner *of* a vehicle can be held liable for its negligent use by a third party. Tillman, therefore, does not control this case.

Other jurisdictions have held that rental and leasing companies were not liable for injuries sustained by third parsons *from the* negligent use *of* the renter/lessor's vehicle when the vehicle is obtained by fraud. In Zuppa V. Hertz Corp., 111 N.J. Super. 419, ____, 2GU A.2d 364, 3G5 (1970), the court held that Hertz was not liable as the owner of a rental vehicle for damage caused in a collision involving a rented automobile because the driver came into possession wrongfully, through the use of another's credit card. Further, in Matter *of* Utica Mut. Ins. Co., 95 A.D.2d 150, ____, 465 N.Y.S.2d 553, *555* (1983), the court held that "where the lessee of a vehicle was guilty *of* the unauthorized use of a vehicle for a period of. . .21 days beyond the term of his rental agreement" and where the lessor/owner diligently attempted to retake possession, the lessor/owner effectively revoked its consent to the lessee and the victims could not recover. In Utica, the court reasoned that "[a]n innocent victim of an accident may not recover from a lessor or other owner when *the* offending vehicle was being operated without the owner's permission." Id. (citation omitted).

For the reasons stated and after careful review of the record, we conclude that there was no reasonable evidence upon which a jury could legally predicate a verdict in appellants' favor. Tiny's Liquors, Inc. v. Davis, 353 So. 2d 168 (Fla. 3d DCA 1978). Accordingly, we affirm the directed verdict in Hertz's favor,

Affirmed.

BARKDULL, J., concurs.

'FERGUSON, Judge (dissenting).

After denying a defense motion for a directed verdict, on the theory that reasonable persons could disagree whether Hertz was negligent, the court submitted this negligence action to a jury. The jury of presumptively reasonable persons could not reach a unanimous verdict, therefore, a mistrial was declared. Instead of setting the matter for a new trial, the trial judge granted the defendant's post-trial motion for a directed verdict on a finding, ostensibly, and contrary to what was established in the aborted trial--that a jury of reasonable persons could not disagree on the issue of negligence by Hertz.

The first issue is simply whether there was any evidence of negligent entrustment on the part of Hertz to present a jury question. A separate question, on which liability could turn, is whether there was any evidence of a lack of diligent action on the part of Hertz to regain possession of its vehicle after discovering that it had been fraudulently obtained. I respectfully dissent because there was sufficient evidence to reach the jury as to the issue of Hertz's liability on both points. The defendant's motion for a directed verdict should have been denied. 1

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1 A directed verdict should only be issued if after reviewing the evidence and testimony in a light most favorable to the non-moving party, a jury could not reasonably differ as to the existence of a material fact or a material inference and that the movant is entitled to judgment as a matter of law. Put another way, such motions should not be granted when there is any reasonable

There are three legal flaws in the majority opinion. First, a court reviewing a judgment entered on a directed verdict should not engage in weighing conflicting evidence. Hendricks v. Dailey, 208 So.2d 101 (Fla. 1968). Second, the majority holding stands for the cataclysmic proposition that a court may find a defendant not negligent, as a matter of law, where there is a violation of a legislative enactment so long as the unlawful conduct is consistent with common industry practice. Compare Tanenbaum v. Biscayne Osteopathic Hosp., Inc., 190 So.2d 777 (Fla. 1966)(court will not adopt a theory which will judicially counteract a legislative enactment). Third, where an owner-lessor of a dangerous instrumentality negligently entrusts the instrument to an imposter, the borrower's fraud does not shield the owner from liability for his own negligence where harm is caused to innocent third persons by the imposter-borrower. See Tillman Chevrolet Co. v. Moore, 175 So.2d 794 (Fla. 1st DCA 1965), cert. discharged, 184 So.2d 175 (Fla. 1966)(there is a causal relation between the negligence of the dealer in allowing the thief to take possession of the car and the injuries inflicted by the thief so as to render the dealer liable).

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1 (contd.) evidence upon which a jury could legally predicate a verdict in favor of the non-moving party. Tiny's Liquors, Inc. v. Davis 353 So.2d 168 (Fla. 3d DCA 1978)(Emphasis added)., See also Hendricks v. Dailey, 208 So.2d 101 (Fla. 1968); Dandashi v. Fine, 397 So.2d 442 (Fla. 3d DCA 1981); Behar v. Root, 393 So.2d 1169 (Fla. 3d DCA 1981).

Violation Of Statute Is Prima Facie Evidence Of Negligence

Section 322.38(2), Florida Statutes (1985), mandates that "[n]o person shall rent a motor vehicle to another, until he has inspected the operator's or chauffeur's license of the person to whom the vehicle is to be rented, and compared and verified the signature thereon with the signature of such person written in his presence." (Emphasis added). In this case, Hertz did not check the driver's license of the woman purporting to be Linda Major; rather, Hertz recorded only the driver's license of the woman's companion, Mr. Lawrence King.[2] There is no question that Hertz's handling of the transaction violated section 322.38(2).

In de Jesus v. Seaboard Coast Line R.R., 281 So.2d 198 (Fla. 1973), the Florida supreme court divided statutory violations into three categories: (1) violation of a strict liability statute designed to protect a particular class of persons who are unable to protect themselves, constituting negligence per se; (2) violation of a statute establishing a duty to take precautions to protect a particular class of persons from a particular injury or type of injury, also constituting negligence per se; (3) violation of any other kind of statute, constituting mere prima facie evidence of negligence. Because the express legislative intent behind chapter 322 is the promotion of "public safety,"[3]

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2 Hertz rented the automobile to only the person purporting to be Linda Major. The majority suggests, perhaps unintentionally, that the vehicle was rented to two persons. The person posing as Linda Major is the "customer" to whom the car was rented. On the second page of the contract, Lawrence King signed as an "Additional Authorized Operator," not as the principal customer.

3 Section 322.42, Florida Statutes (1985) provides: "This chapter shall be liberally construed to the end that the greatest force and effect may be given to its provisions for the promotion of public safety."

promotion of "public safety,"[3] the statutory violation in this case would fit into the third category. As such, Hertz's statutory violation is prima facie evidence of negligence.

A prima facie showing of negligence, by evidence of a statutory violation, is, ordinarily, sufficient to require submission of all the facts to the jury. Booth v. Mary Carter Paint Co., 182 So.2d 292 (Fla. 2d DCA 1966); Lister v. Campbell, 371 So.2d 133 (Fla. 1st DCA), cert. denied, 378 So.2d 346 (Fla. 1979).[4]

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[3] Section 322.42, Florida Statutes (1985) provides: "This chapter shall be liberally construed to the end that the greatest force and effect may be given to its provisions for the promotion of public safety."

[4] There is no disagreement with the statement of law in note three of the majority opinion that the issue of proximate causation, although ordinarily a fact question for the jury, may be decided as a matter of law where reasonable people could not differ. Banat v. Armando, 430 So.2d 503 (Fla. 3d DCA 1983), rev. denied, 446 So.2d 99 (Fla. 1984). The question here is whether reasonable people could differ. On the evidence they could, and in the first trial they probably did. Nevertheless, the case is before us on the easier question: Whether there was so little as a reasonable inference to be drawn from the evidence which supported the plaintiffs' theory of the case. Hendricks, 208 So.2d 101. Given the statutory violation by Hertz, I believe the plaintiffs here satisfied this minimal burden.

The majority cites Christy v. Baker, 7 Ariz.App. 354, 439 P.2d 517 (1968), which holds that violation of a similar Arizona statute was not the proximate cause of injury. That case is distinguishable. There, the plaintiff "placed all of his eggs in one basket," proceeding on a theory of negligence per se. In ruling for the defendant, the court narrowed the issue to "whether a person in the automobile rental business who violates the statute ... was strictly liable to a third person injured by the borrower's negligent operation of the vehicle." (Emphasis added). If this case had been brought in strict liability under Florida law, the plaintiff might have suffered the same fate. Absent proof that the injured person was in the particular class the statute was designed to protect, there is no negligence per se. On the other hand, under Florida law, where it is established that the injured plaintiff was within the protected class, it is not necessary to prove a causal relationship. Sloan v. Coit Int'l, 292 So.2d 15 (Fla. 1974).

Both the legal theory of the plaintiff in Christy v. Baker and the Arizona law of negligence per se are different from the plaintiffs' theory in this case and the Florida law of negligence per se.

Evidence Of Negligent Delay In Regaining Possession

The majority states the facts as presented by the defendant and concludes that there was "no evidence that Hertz was guilty of inaction". In testing a motion for a directed verdict, however, the movant admits all of the facts shown in the evidence and admits to every reasonable inference favorable to the adverse party. Tiny's Liquors, Inc. v. Davis, 353 So.2d 168 (Fla. 3d DCA 1978). A materially different version of the facts was presented by the plaintiffs.

On February 5, 1985, Hertz released its automobile to imposters pursuant to a two-day rental agreement. A few days later, the real Linda Major and her husband, Carleton Mattison, reported the theft of her VISA credit card and other mail to the police. They also accused their neighbor, Christopher Harris, of being the perpetrator. Both Clifton Crosby, the uniformed officer who wrote up the original credit card theft report, and Detective Shirley Gibson, an investigator from the Metro Dade Economics Crime Unit, testified that they specifically notified Hertz on February 17th and March 14th about the credit card problem with the Lincoln Town car, and that Hertz took no action.

Detective Gibson also advised the Mattisons of the fraudulent car rental. Two weeks later, Mr. Mattison observed the subject Lincoln parked in the back of Christopher Harris's house. He called the police and was told that Hertz had not reported the car as stolen, or that it was otherwise illegally out of its possession, and that until the company did so there was nothing that the police could do.

On April 16, 1985, over two months after Hertz was put on notice that its vehicle had been fraudulently leased, the minor plaintiff was injured when struck by the vehicle operated by Christopher Harris, an alleged participant in the fraud, who ran a stop sign and knocked the child from his bicycle. Nine days later, police stopped the same car and arrested Harris for grand theft.

Negligent Entrustment Of Dangerous Instrumentality

Susco Car Rental Sys. of Fla. v. Leonard, 112 So.2d 832 (Fla. 1959) and Tillman Chevrolet Co. v. Moore, 175 So.2d 794 (Fla. 1st DCA 1965), cert. discharged, 184 So.2d 175 (Fla. 1966), although factually different, are instructive. Susco involved an entrustment by the lessee to another operator, in violation of the express terms of the lease contract. There it was held that when control of a rental automobile is voluntarily relinquished to another, only a breach of that custody amounting to a specie of conversion or theft by a third person will relieve the owner of responsibility for its use or misuse. Invoking the "non-delegable" duty imposed by the dangerous instrumentality doctrine, the court held:

> The principles of the common law do not permit the owner of an instrumentality that is * * * peculiarly dangerous in its operation, to authorize another to use such instrumentality on the public highways without imposing upon such owner liability for negligent use. The liability grows out of the obligation of the owner to have the vehicle * * * properly operated when it is by his authority on the public highway.

Susco, 112 So.2d at 836 (quoting Anderson v. Southern Cotton Oil Co., 73 Fla. 432, 74 So. 975 (1917)). There is no evidence in

this case that on the date of the accident the rented vehicle was being operated without the authority of the person to whom the vehicle had been negligently entrusted by Hertz.

Tillman, cited by this court with approval in National Car Rental Sys., Inc. v. Bostic, 423 So.2d 915 (Fla. 3d DCA 1982), rev. denied, 436 So.2d 99 (Fla. 1983), is even more on point. There, it was held that where one with larcenous intent, posing as a prospective buyer, obtained permission to drive the automobile a limited distance, the owner was liable for injury caused to a third person by the operation of the vehicle by the thief's permittee, where the original entrustment by the owner was negligent. The rationale of the Tillman court, which is applicable to the facts of this case, is that there is a causal relationship between the negligence of the dealer in allowing the thief to take possession of the car and the injuries inflicted by the thief, or one to whom the thief entrusted possession, so as to render the dealer liable under the dangerous instrumentality doctrine. In this case, the doctrine may apply with greater force since there is evidence of negligence on the part of the owner in two phases--the initial entrustment and the failure to act immediately to regain possession of the dangerous instrumentality after the fact of the fraud became known.

Those Florida cases relied upon by the defendant, which absolve a rental car company of vicarious responsibility for damages sustained by third parties where the leased vehicle is stolen from one to whom it is properly entrusted by the rental agency and misused by one who steals it from the lessee, are not

controlling. Those cases where harm is caused to innocent third persons by one who comes into possession of a dangerous instrumentality by fraud, do not hold that the lessee's fraud completely absolves the owner from liability for its own negligence. In fact none of the cases relied on by the majority support its conclusion on the negligent entrustment issue.

Conclusion

Based on the evidence in the record, Hertz was not entitled to a directed verdict. Hertz's violation of a statute, in combination with a fraud by an imposter lessee, caused a dangerous instrumentality to reach the hands of a user who ultimately injured the minor plaintiff. There is substantial evidence as well that timely action by Hertz to recover its vehicle might have prevented the accident. Evidence of a statutory violation and delay, as shown by these facts, was more than sufficient to create a jury question on the issue of Hertz's negligence.

A new trial should have been ordered.

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. 1991

BILLY JACKSON, by and through his mother and natural guardian HENRIETTA WHITAKER, and HENRIETTA WHITAKER, individually,

Appellants,

vs.

THE HERTZ CORPORATION,

Appellee.

** CASE NO. 88-2261

Opinion filed December 24, 1991.

An Appeal from the Circuit Court for Dade County, Francis X. Knuck, Judge.

Horton, Perse & Ginsberg and Jay Rothlein and Arnold Ginsberg, for appellants.

Roland Gomez and Steven A. Edelstein, for appellee.

Before SCHWARTZ, C.J., and BARKDULL, HUBBART, NESBITT, BASKIN, FERGUSON, JORGENSON, COPE, LEVY, GERSTEN and GODERICH, JJ.

On Rehearing En Banc

SCHWARTZ, Chief Judge.

We have considered this case en banc pursuant to Fla.R.App.P. 9.331(a) both because it is of exceptional

importance and to maintain uniformity in the court's decisions concerning the dangerous instrumentality doctrine.

The facts are those correctly stated in the panel opinion:

> On February 5, 1985, Hertz entered into a two-day rental agreement with a woman purporting to be Linda Major, and her companion, Lawrence King. The woman presented Hertz with a Visa credit card issued in Linda Major's name. Mr. King's driver's license number, the license expiration date, the issuing state, and King's age were entered on the additional authorized operator attachment of the rental agreement. Additionally, King's driver's license number and the license expiration date were entered on the front of the Hertz rental agreement. No separate driver's license information was written on the rental agreement for the woman identifying herself as Linda Major. Before relinquishing possession of the vehicle, Hertz ran a credit check on the Visa card presented. Upon receipt of a favorable credit check, Hertz released the vehicle to the above individuals.
>
> Hertz was informed on February 17, 1985, by Metro-Dade Police that the Hertz-owned vehicle had been fraudulently leased with a stolen credit card and that the woman who gave her name as Linda Major was an impostor. Thereafter, on February 26, 1985, and March 1, 1985, respectively, Hertz sent certified letters to both renters demanding the return of the automobile. On March 31, 1985, both letters were returned to Hertz as undeliverable. On April 5, 1985, Hertz reported the vehicle as stolen to the police. Eleven days after the Hertz vehicle was reported stolen, the vehicle, operated by Christopher Harris, an alleged participant in the fraud, was involved in an accident, injuring Billy Jackson.

We conclude that, in these circumstances, Hertz is liable as a matter of law for the negligent operation of its vehicle and that the plaintiffs' motion for directed verdict on liability should have been granted below.

The dangerous instrumentality doctrine is a unique contribution of the Florida judiciary to the common law of this

state. In its broad outlines, it imposes strict, vicarious responsibility upon the owner or other possessor of a motor vehicle who voluntarily entrusts it to another for any subsequent negligent operation which injures a member of the travelling public. Kraemer v. General Motors Acceptance Corp., 572 So.2d 1363 (Fla. 1990); Susco Car Rental Sys. v. Leonard, 112 So.2d 832 (Fla. 1959); Lynch v. Walker, 159 Fla. 188, 31 So.2d 268 (1947); Anderson v. Southern Cotton Oil Co. v. Anderson, 80 Fla. 441, 86 So.2d 629 (1920); Southern Cotton Oil Co., 73 Fla. 432, 74 So. 975 (1917). This liability extends to the negligent act of whomever is subsequently allowed to drive the car, see Avis Rent-A-Car Sys., Inc. v. Garmas, 440 So.2d 1311 (Fla. 3d DCA 1983), pet. for review denied, 451 So.2d 848 (Fla. 1984); Susco, 112 So.2d at 836, and "no matter where the driver goes, starts or stops." Crenshaw Bros. Produce Co. v. Harper, 142 Fla. 27, 57 194 So. 353, 365 (1940); Boggs v. Butler, 129 Fla. 324, 327, 176 So. 174, 176 (1937); Whalen v. Hill, 219 So.2d 727, 730 (Fla. 3d DCA 1969); American Fire & Casualty v. Blanton, 182 So.2d 36, 39 (Fla. 1st DCA 1966). Furthermore,

> [W]here "original entrustment" is shown to exist, liability thus imposed on the owner will not be altered because of a departure beyond the scope of authority.

American Fire & Casualty Co., 182 So.2d at 39. In accordance with these rules, liability has been imposed in a variety of situations in which the operation of the car has been in obvious violation of the terms of its entrustment. These range from the violation of specific agreements, that, for example, a car renter not permit another to drive, Susco, 112 So.2d at 832, that

he not himself drive, Garmas, 440 So.2d at 1311, and that he not operate the vehicle outside a stated area, Bowman v. Atlanta Baggage & Cab Co., 173 F.Supp. 282 (N.D.Fla. 1959), to what seem to be no less than outrageous deviations from the scope of the original consent. Among the latter is Tillman Chevrolet Co. v. Moore, 175 So.2d 794 (Fla. 1st DCA 1965), cert. discharged, 184 So.2d 175 (Fla. 1986), in which a car dealer allowed a supposed customer to drive its vehicle a few blocks to show it to his wife. It was held liable under the dangerous instrumentality doctrine[1] notwithstanding that the customer--who was convicted of stealing the car--had taken off with it, and that it was negligently driven by a hitchhiker whom the customer permitted to drive it after he picked him up several days later and several hundred miles away. Accord Ivey v. National Fisheries, Inc., 215 So.2d 74 (Fla. 3d DCA 1968)(employer who permitted truck driver to use vehicle for delivery only between home and work liable for driving by drinking buddy given truck after worker stopped at bar and became intoxicated). See generally Thomas v. Atlantic Assocs., Inc., 226 So.2d 100 (Fla. 1969); Tribbitt v. Crown Contractors, Inc., 513 So.2d 1084 (Fla. 1st DCA 1987); Union Air Conditioning, Inc. v. Troxtell, 445 So.2d 1057 (Fla. 3d DCA

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[1] We believe, contrary to the views of both panel opinions, that Tillman is a pure dangerous instrumentality case, in which liability was imposed on the basis of the original entrustment of the vehicle, not upon a so-called "negligent" entrustment at all.

1984), pet. for review denied, 453 So.2d 45 (Fla. 1984). But see Stupak v. Winter Park Leasing, Inc., 585 So.2d 283 (Fla. 1991).[2]

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[2] It must be acknowledged that language in Stupak v. Winter Park Leasing, Inc., 585 So.2d 283 (Fla. 1991) is seemingly at variance with several of the principles and conclusions contained in this opinion, which was almost completely prepared prior to Stupak's release. Nevertheless, we do not consider that Stupak requires a contrary result because (1) the rental agreement before us does not contain the provisions concerning theft and conversion which were present in that case and (2) very much more important, the case was decided only upon the claim of the owner of the vehicle to a summary judgment in its favor. Thus, the rejection of that contention did not require or even involve a determination that the plaintiff was entitled to judgment in his favor on the dangerous instrumentality issue.

Even beyond this, however, it must be said that the reference to the term of the rental agreement "that vehicles not returned by the due date are considered theft by conversion," Stupak, 585 So.2d at 284, appears to be directly contrary to the thrust of Susco, 112 So.2d at 832, and many similar cases which clearly hold that a rent-a-car company may not limit its liability to innocent persons by the restrictive terms of its contract with the renter or lessee. It does not stand to reason that, if a rental company is liable notwithstanding the breach of a specific agreement as to the driver, the state, or the length of time in which the car is to be used, it may nevertheless achieve a contrary result simply by unilaterally calling such a breach a "conversion" or "theft." No company should be permitted to use such a ploy, one obviously drafted with the language of Susco in mind, as a means of evading its responsibility--any more than it could claim that a "conversion" has occurred when the driver exceeds the speed limit or an employer could evade respondeat superior liability by stating that any violation of the traffic laws is beyond the employer's scope of employment. See Susco, id. Instead, the existence of an exculpatory species of conversion or theft must be one for the courts alone to decide on the basis of the underlying policies the dangerous instrumentality doctrine is designed to vindicate. As we hold in this opinion, no such "species" occurred here. (We must add that in our view, on a fortiori basis, none occurred in Stupak either.)

Finally, if we are wrong about any of this, including our view of Stupak, the supreme court will tell us so in answer to the certified question posed in this opinion (or on the basis of its taking jurisdiction because this decision is in conflict with Stupak).

In very recent years, our supreme court, in the course of re-endorsing the validity of the doctrine, has set forth its essential basis:

> The dangerous instrumentality doctrine seeks to provide greater financial responsibility to pay for the carnage on our roads. It is premised upon the theory that the one who originates the danger by entrusting the automobile to another is in the best position to make certain that there will be adequate resources with which to pay the damages caused by its negligent operation. If Florida's traffic problems were sufficient to prompt its adoption in 1920, there is all the more reason for its application to today's high-speed travel upon crowded highways. [e.s.]

Kraemer, 572 So.2d at 1365. It has also expressly characterized the legal nature of the initial "consent" or "entrustment" which is the basis of, and indeed establishes, liability under the doctrine:

> In the final analysis, while the rule governing liability of an owner of a dangerous agency who permits it to be used by another is based on consent, the essential authority or consent is simply consent to the use or operation of such an instrumentality beyond his own immediate control. Only to that limited extent is the issue pertinent when members of the public are injured by its operation, and only in a situation where the vehicle is not in operation pursuant to his authority, or where he has in fact been deprived of the incidents of ownership, can such an owner escape responsibility. Certainly the terms of a bailment, either restricted or general, can have no bearing upon that question. [e.s.]

Susco, 112 So.2d at 837. But see Stupak.[3] It is plain from these principles and the cases which have applied them, that the dangerous instrumentality doctrine applies here: Hertz clearly consented to the use of its vehicle beyond its immediate control

[3] See supra note 2.

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by one who later negligently drove it and injured another. The primary wrinkle lies in Hertz's claim that the principle does not apply because its consent was procured by an act which was both fraudulent and a violation of a criminal law of the state. See §§ 812.012(2), 812.014, Fla. Stat. (1985).

But we have already rejected this argument. National Car Rental Sys., Inc. v. Bostic, 423 So.2d 915 (Fla. 3d DCA 1982), pet. for review denied, 436 So.2d 97, 99 (Fla. 1983) involved a virtually identical factual and, insofar as the dangerous instrumentality doctrine is concerned, legal situation. That case arose out of an accident caused by the negligent operation of a National Car Rental vehicle by Laverne Jackson. During the course of the proceeding,

> National and Travelers also moved to amend their answer to file an additional affirmative defense of non-liability alleging that subsequent to filing their answer they found out that...[the person who originally rented the car] had obtained the car by fraudulent means [to wit: an altered credit card] and the car was in fact a stolen vehicle which was being driven without valid consent. That motion was...denied.

Bostic, 423 So.2d at 916. We held that the motion had been correctly denied:

> Secondly the appellants contend the trial court erred in refusing to allow them to amend their affirmative defenses prior to trial and to assert at trial the defense of lack of consent to drive the car. We find this point to be without merit. See Tillman Chevrolet Company v. Moore, 175 So.2d 794 (Fla. 1st DCA 1965); Susco Car Rental System of Florida v. Leonard, 112 So.2d 832 (Fla. 1959).

Id., at 917. Bostic's citation of Tillman and Susco demonstrates that the claim that the rental car had been

procured, as here, by a fraudulent credit card was held substantively insufficient as a matter of law. This was and is true because, as Tillman holds, the effect of an original consent is not abrogated by the obvious misrepresentations of a potential thief as to his intentions in using the car, or as Susco holds, by any subsequent deviation from the terms of entrustment. See also Boggs v. Butler, 129 Fla. at 324 176 So. at 174 (consent not affected by owner's intoxication and unconsciousness). Bostic alone thus compels rejection of Hertz's claim of non-responsibility.

Nor is there any question that Bostic was correctly decided. It would fatally compromise the interests of the innocent public if a rent-a-car agency (even more than a private owner) which (a) is in the very business of leasing cars for a profit,[4] (b) has extensive and elaborate means to safeguard itself against fraud or other misconduct and (c) is certainly "in the best position to make certain that there will be adequate resources" to pay damages caused by its vehicle, Kraemer, 572 So.2d at 1365, can avoid that liability if it is given a bad check, a counterfeit bill or a fraudulent driver's license--all of which involve violations of the criminal law, but none of which

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[4] It should be noted that, no matter how the car is secured or when it is recovered, the lessees remain liable to Hertz for the rental charges. This shows at once (1) that neither the initial or continued possession of the vehicle "deprived [Hertz] of the incidents of ownership," Susco, 112 So.2d at 837, nor (2) was inconsistent with the initial terms of the rental, id., (3) and the incongruity of simultaneously permitting Hertz to reap the economic benefits of a violation of the agreement while relieving it of the burden of tort liability.

should affect the owner's tort liability for its automobile. See Tillman, 175 So.2d at 796 ("Appellant cites Section 811.021, Florida Statutes, F.S.A. (the general larceny act), for the proposition that a bailee is guilty of larceny if he appropriates property in his possession with an intent permanently to deprive the owner of it. We do not accept the statutory definition of larceny as having any bearing upon the question of civil liability here involved.").[5] Indeed, a contrary rule would require a finding of non-responsibility contrary to the decided cases whenever it could be shown--as is likely often the case--that the prospective renter intended to violate the restrictions as to the vehicle's use at the time he rented it and had thus perpetrated a criminal fraud.[6] See §§ 812.012(2), 817.52(1) Fla.Stat. (1985). We will not endorse such a position.

Hertz places great reliance upon the often-cited dictum in Susco that an owner may be insulated from liability when the vehicle is obtained through a "species of conversion or theft." 112 So.2d at 836; see Stupak.[7] A careful analysis of these terms in their historical context reveals, however, not only that the supreme court did not imply that a fraudulent inducement of

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[5] The same should be true of the other end of the entrustment-possession continuum. The fact that it may be a crime to fail timely to redeliver a hired vehicle, § 817.52(3), Fla.Stat. (1985), should not alter the renter's tort responsibility even when, as in this case, it is used well beyond the period of the lease. Susco, 112 So.2d at 832. But see Stupak.

[6] Thus, for example, Susco itself would have come out the other way if the actual lessee intended all along to let someone else drive.

[7] See supra note 2.

consent would constitute a defense, but that the exact opposite is true.

1. The term "conversion" refers, of course, to the wrongful taking of another's right to possession of the property in question. See 18 Am.Jur.2d Conversion § 24 (1985); 12 Fla.Jur.2d Conversion & Replevin § 1 (1979). While it is apparently true that an action for conversion--which was usually enforced by the form of action at law of trover--will lie against a person who obtains goods by fraud or duress, see 18 Am.Jur.2d Conversion § 32, it is altogether clear that such an action may not be maintained against one who innocently buys the chattel in question from the defrauder. See Restatement (Second) of Torts § 252A (1965)("Consent to possession of a chattel obtained by fraud or duress is not effective to prevent recovery for trespass to the chattel or for conversion against any one other than a bona fide purchaser of the chattel."[e.s.]); Restatement (Second) of Torts § 252A Illustration 3 ("A [a defrauder] sells and delivers the car to C, a purchaser for value without notice of the fraud. B cannot maintain an action for trespass or for conversion against C."); McCullen v. Hereford State Bank, 214 F.2d 185 (5th Cir. 1954); Martin v. Green, 117 Me. 138, 102 A. 977 (1918); Parr v. Helfrich, 108 Neb. 801, 189 N.W. 281 (1922); ; Porell v. Cavanaugh, 69 N.H. 364, 41 A. 860 (1898); Hoffman v. Alpern, 193 Misc. 695, 85

N.Y.S.2d 561 (City Ct. 1948).[8] We think this perhaps arcane law school doctrine is directly applicable to this case. A bona fide purchaser who buys goods for value, who does not know of the interests of a person who has given the goods to his seller, is in a legal position exactly equivalent to a member of the public struck by a negligently driven vehicle, who does not know or care about the manner in which the owner was led to permit the use of that dangerous instrumentality on the public streets. Since it is for the plaintiff's protection that the doctrine of liability based on consensual use was formulated in the first place, he surely cannot be subject to such a defense--most specifically, not as a matter of the law of "conversion."

2. The proposed application of the term "theft" to a fraudulent taking is similarly insupportable. "Theft," considered as it was used in Susco in 1959, well before "theft" became a statutory crime in 1977, see the Florida Anti-Fencing Act, Ch. 77-342, §§ 3-4, Laws of Fla. (§§ 812.012, 812.014, Fla.Stat. (1989)); see also Thompson v. State, ____ So.2d ____ (Fla. 5th

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[8] This result is founded on the theory that one who sells to another under false pretenses ordinarily has the intent to transfer legal title to the defrauder and retains only an equitable interest which is "cut off" by the superior legal rights of a bona fide purchaser. See generally Ames, Purchase for Value Without Notice, 1 Harv.L.Rev. 1 (1887); see also Appendix.

DCA Case no. 90-2074, opinion filed, September 12, 1991), is primarily defined as the equivalent of common law larceny, that is, the taking of property without the consent of the owner. People v. Sims, 29 Ill.App.3d 815, 331 N.E.2d 178 (1975). Common law larceny, in turn, as its very definition suggests, does not include either of the traditionally separate crimes of embezzlement and false pretenses--which respectively involve a taking after property had initially lawfully come into one's possession, and the obtaining of title by consent through the perpetration of a fraud. See 20 Fla.Jur. Larceny §§ 8-9 (1958).[9] But it is the last category--and not common law larceny and thus not Susco-type "theft"--into which the conduct before us falls. In other words, considered in the light of what it was seeking to accomplish by the adoption of the doctrine, it is apparent that by "theft" the supreme court meant a larceny or a wrongful non-consensual taking from the possession of the true owner; such a "theft" has always precluded liability under the doctrine. See 4 Fla.Jur.2d Automobiles and Other Vehicles § 285 (1978). The expression did not encompass the fraudulent or other criminal inducement of consent,

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[9] For the purpose of this line of reasoning, it does not matter that, as of 1951, see Ch. 26912, Laws of Fla. (1951), the Florida statutory definition of larceny included embezzlement and false pretenses. See § 811.021, Fla.Stat. (1951).

which, as we have seen, cannot be deemed a cognizable defense.

Thus, whatever "species" of the genera "conversion" and "theft" the supreme court meant in Susco, it did not include this one.[10]

Finally, we turn to the argued effect of Hertz's attempts to reclaim its vehicle after it became aware of the fraud and the fact that the car had not been returned on time. While we may share the view that these efforts were desultory at best, we do not pursue the issue because we are convinced that no such efforts, even heroic ones, can be effective to obviate the owner's liability under the doctrine. We have seen in this regard that that liability both arises and is complete when the owner consents to the use of the vehicle "beyond his own immediate control," Susco, 112 So.2d at 835-36, and that this liability continues for any negligent operation of the car no matter who does it or where or when it occurs. But see Stupak.[11] It would be, again, contrary to the very nature of the liability to suggest that it may be avoided by a subsequent attempt to revoke the irrevocable--the owner's responsibility for the car's being on the highway in a position to injure the plaintiff.[12]

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[10] It may be that the court was actually referring to a break in the chain of responsibility by a "conversion or theft" from the renters or their permittees. But see Stupak. No such thing occurred here.

[11] See supra note 2.

[12] The only case cited by the panel majority for the contrary proposition is Matter of Utica Mutual Ins. Co., 95 A.D.2d 150, 465 N.Y.S.2d 553 (1983). Utica involves the interpretation of a New York statutory provision which is not in accord with the thrust of the Florida dangerous instrumentality law. We much

All in all, we consider, in the words of an early Florida case on the issue, that Hertz's attempts to avoid liability under the facts presented are

> entirely beyond our conception of the responsibility one should assume where he is in the business of entrusting vehicles of such character to another for a price.

Fleming v. Alter, 69 So.2d 185, 186 (Fla. 1953).

On the basis of the dangerous instrumentality doctrine,[13]

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prefer the opinion of the trial court, which is virtually identical to the language of Susco:

> The Court finds that the evidence herein is insufficient to rebut the presumption which holds the owner of the vehicle liable. The general public must be protected in accidents involving rental cars even where there is a deviation from private contract between the lessor and lessee.

Utica, 95 A.D.2d at _____, 465 N.Y.S.2d at 555. The other out-of-state decision cited by the majority, Zuppa v. Hertz Corp., 111 N.J.Super. 419, 268 A.2d 364 (1970), is a nisi prius interpretation of the term "bailee" in a similarly non-analogous New Jersey statute.

[13] Although we are inclined to agree with the view expressed in footnote 3 of the majority panel opinion that no action arises out of an alleged violation of § 322.38(2) because the harm or risk sought to be prevented by the statute does not include the fact that the defrauder may operate the vehicle negligently and thus damage the plaintiff, see deJesus v. Seaboard Coastline R.R., 281 So.2d 198 (Fla. 1973); but see Vining v. Avis-Rent-A-Car Sys., Inc., 354 So.2d 54 (Fla. 1977), the basis of our decision makes it unnecessary to resolve the question.

We do indicate, however, that, for the reasons stated, it is unlikely that there are such things in these circumstances as actions for "negligent" entrustment of a motor vehicle or for "negligent delay in regaining possession" of one. This is because (a) there either is liability or there is not depending only on the existence of an entrustment, however secured, see McLin v. Grady, 363 So.2d 395 (Fla. 1st DCA 1978); and (b) liability continues until possession is successfully retaken regardless of the efforts to secure it.

then, we hold that Hertz's liability has been established as a matter of law. The judgment below is therefore reversed and the cause remanded for a new trial on damages only.

> We certify to the supreme court that this decision involves questions of great public importance as to whether the liability of a car rental company under the dangerous instrumentality doctrine is affected by the facts that (a) the rental was secured by fraud, (b) the period for which the vehicle was rented was greatly exceeded and/or (c) the car rental company made efforts to recover the vehicle after it became aware of the fraud and the vehicle was not timely returned.

Reversed and remanded, question certified.

NESBITT, BASKIN, LEVY, GERSTEN and GODERICH, JJ., concur.

APPENDIX*

Many of the principles discussed at note 8 and accompanying text were quite fortuitously expressed in the following operetta composed by the author in 1955 in Professor Charles M. Haar's Property I class at Harvard Law School. See generally A. J. Casner & W. B. Leach, Cases and Text on Property 179-212 (1951).

A, Most Happy Sella

The curtain rises to reveal three persons wearing tee shirts prominently labeled A, B, and C, respectively.

C (carrying various boxes of unknown contents, sings to the tune of "I'm an Old Cowhand")

I'm a B F P
On a buying spree
When I get the yen
I buy from con men
'Cause a con man
Seems a trustworthy B
When I buy from him
I'm a bona fide C
All of poor A's rights are in equity
And are lost to me - ee,
No trover for me.

B (wearing a serape and a sombrero, then comes forward, and sings to the tune of "South of the Border")

South of the Border
Down Mexico way
That's where I spend the dough
I get for goods
I steal from A
C was so happy
He got such a buy
But he is so sappy
A converter am I

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* I am authorized, indeed directed, by my colleagues to state that none of them has anything to do with, let alone joins, this Appendix.

C (Hearing this, the previously joyful C becomes noticeably concerned and asks B) "Just a minute, when you snookered these goods from A, you were there in person, weren't you?"[1]

B (snickers in response) "No" (and continues his song)

I sent A a letter
And said to him please
Send me the goods right quick
And you will see
I'll pay with ease
But I didn't sign my name
I'm too smart a guy
I said to him "A, pal,
J.P. Morgan am I"[2]

(C slinks off in defeat)

A (previously morose, now-victorious sings to the tune of "Happy Days are Here Again")

Happy A will rise again
A case in trover lies again
C will have no starry eyes again
Happy A will rise again

The BFP is defeated
He'll win no suit from now on
His legal rights are unseated
So I am singing this song

Happy A will rise again
A case in trover lies again
C will have no starry eyes again
Happy A will rise again

Curtain

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1 E.g., Phelps v. McQuade, 220 N.Y. 232,_____, 115 N.E. 441, 442 (1917)(vendor dealing personally with defrauder, as Hertz did with "Major" and "King," deemed to intend to pass title to that person "even though he [is] deceived as to that person's identity or responsibility"; subsequent bona fide purchaser from impostor prevails over vendor, as Jackson does over Hertz).

2 E.g., Mercantile Nat'l Bank v. Silverman, 148 A.D. 1, 132 N.Y.S. 1017 (1911), aff'd, 210 N.Y. 567, 104 N.E. 1134 (1914) (vendor dealing with defrauder by mail deemed to intend to pass title only to person identified; subsequent bona fide purchaser from impostor does not prevail over vendor).

HUBBART, Judge (partially dissenting)

I concur in the court's reversal of the final judgment under review which was entered below for Hertz based on a directed verdict, but dissent from the court's remand directions to the trial court that a directed verdict be entered for the plaintiff on the issue of liability as to the negligence action based on dangerous instrumentality doctrine. I would reverse and remand for a trial on this claim as to the issues of both liability and damages; in my view, a directed verdict for either party to this action is inappropriate.

I entirely agree with the court -- and disagree with the panel majority -- that where the owner of a motor vehicle voluntarily relinquishes control over the vehicle to another, the owner is liable for the subsequent negligent operation of such vehicle under the dangerous instrumentality doctrine -- even though the vehicle was initially procured from the owner, as here, through fraud. I disagree with the court, however, that "this liability continues [indefinitely] for any negligent operation of the [vehicle] no matter who does it or where or when it occurs." ___ So.2d at ____ (slip op.at 13).

In accord with the leading case of Susco Car Rental Sys. of Fla. v. Leonard, 112 So.2d 832, 835-36 (Fla. 1959), it is clear that "when control of ... a vehicle is voluntarily relinquished [by the owner] to another, only a breach of custody amounting to a species of conversion or theft will relieve an owner of

responsibility for its use or misuse." I think this necessarily means that at some point in time a vehicle, which is procured from the owner by fraud and not returned, must be considered as converted or stolen, so as to absolve the owner of legal responsibility under the dangerous instrumentality doctrine for the vehicle's subsequent negligent operation. I would hold that such a point is reached after a reasonable length of time has elapsed from the date the vehicle is relinquished by the owner, without the vehicle having been returned, so that it may be inferred that the vehicle has been appropriated by another without the consent of the owner; in no event, however, should such a reasonable time exceed one year from the date the owner relinquishes possession of the vehicle, as by then an inference of theft or conversion would be irresistible.[1]

In determining what constitutes a reasonable time within this one-year period after which a vehicle secured by fraud may properly be considered converted or stolen, I think the totality of the circumstances of the case should be taken into account -- including what efforts, if any, the owner has made to recover the vehicle. In this connection, I disagree with the court that "no such efforts, even heroic ones, can be effective to obviate the owner's liability under [the dangerous instrumentality]

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[1] As an aside, I think a one-year cut off date is also needed so that an owner, who has been fraudulently induced to relinquish his motor vehicle to another, has a date certain beyond which he will no longer be obliged to carry liability insurance on the vehicle; any other rule, including the court's holding herein, would require the owner to carry liability insurance on the vehicle indefinitely.

doctrine." ___ So.2d ____ (slip op. at 13)(emphasis omitted). If indeed such heroic efforts are made over a period of, say, six months, I think a jury could reasonably conclude that the vehicle had been converted or stolen if not recovered during this time despite such pervasive efforts; certainly, this would be an important factor in weighing all the circumstances as to whether a reasonable time has elapsed from the taking of the vehicle so as to consider vehicle converted or stolen.

The Florida Supreme Court in Stupak v. Winter Park Leasing, Inc., 585 So.2d 283 (Fla. 1991), has recently concluded that another important factor -- in determining what constitutes a reasonable time after which a vehicle procured from a rental car company may be considered converted or stolen under the dangerous instrumentality doctrine -- is a provision in the rental contract between the parties that the rental vehicle will be considered stolen or converted if not returned by the due date. Thus, the Court held that under such a contract a jury question was presented as to whether the rental vehicle therein was stolen or converted when it was not returned by the contractual due date -- and a summary judgment for the rental car company was reversed for a trial in a negligence suit based on the dangerous instrumentality doctrine brought by a party injured in an accident involving the rental vehicle, which accident had occurred subsequent to the due date.

Similarly, in the instant case, I think a jury question is presented as to whether or not the rental vehicle herein was stolen or converted at the time of the accident sued upon under

the dangerous instrumentality doctrine. Prior to the accident, Hertz had sent registered letters to the renters of the subject vehicle demanding that the vehicle be returned after discovering that a stolen credit card had been used to rent the vehicle; these letters were returned as undeliverable because false addresses had been given by the renters. Subsequently, Hertz reported the vehicle to the police as stolen eleven days prior to the accident sued upon. On the other hand, the rental contract contained no provision that the vehicle would be considered stolen or converted if not returned on its due date, and, indeed, contained daily rental charges for overdue days. Moreover, Hertz had made no personal efforts on its own to search for and recover the vehicle -- and, as the court notes, its efforts in sending out letters to the renters and in notifying the police were arguably desultory. Nonetheless, two months had elapsed from the rental date to the date of the accident involving the subject vehicle on a two-day rental contract. Given the totality of this conflicting evidence, I think Hertz may reasonably be held liable or exonerated by a jury for the negligent operation of the subject vehicle based on the dangerous instrumentality doctrine; a directed verdict for either party is clearly inappropriate.

I would reverse and remand for a trial as to the issues of liability and damages based on the negligence action founded on the dangerous instrumentality doctrine. I agree, however, with the court that no other cause of action is viable on this record.

BARKDULL, FERGUSON and COPE, JJ., concur.

JORGENSON, Judge, dissenting.

I respectfully dissent and would adhere to the panel opinion for the reasons stated therein. Furthermore, since oral argument the supreme court has decided Stupak v. Winter Park Leasing, Inc., 585 So. 2d 283 (Fla. 1991), which in my view determines the outcome in this cause.

I agree with the court that the question certified is one of great public importance.