IN THE **SUPREME COURT OF FLORIDA**

CASE NO. 79,251

(Florida Bar #137172)

THE **HERTZ CORPORATION,**

Petitioner,

vs.

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

Respondents.

_____/

BRIEF OF RESPONDENTS ON THE MERITS

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INTRODUCTION

The respondents, BILLY JACKSON (a minor), by and through his mother and natural guardian, HENRIETTA WHITTAKER, and HENRIETTA WHITTAKER, individually, were the appellants in the District court of **Appeal,** Third District, and were the plaintiffs in the trial court. The petitioner, THE HERTZ CORPORATION, **was** the appellee/defendant. In this brief of respondents on the merits the parties will **be** referred to as the plaintiffs and the defendant and, alternatively, by name. The symbols "R" and "T" will refer to the record on appeal and the trial testimony, respectively. All emphasis has been supplied by counsel unless indicated to the contrary.

II.

PROLOGUE

Carlton Mattison married Linda Major. Together they resided at 2330 Northwest 155 Street in Miami, Dade County, Florida (T. 60-63). Problems **beset** them. Mail was being stolen from their mailbox (T. 79,80). Although they could not (then) prove it, they believed that a neighbor, Christopher Harris, was stealing the mail. They **spoke** several times to the police. Reports were made (T. 81)-85). In February of 1985 they were notified by the police that **a** VISA credit card issued to Linda Major **was,** on February 5, 1985, used to rent a vehicle from Hertz at the Miami Airport. The vehicle rented was a Lincoln Town Car, Tag No. ZAN 178.

III.

STATEMENT OF THE CASE

Plaintiffs appealed (to the Third District) an adverse final judgment entered after the trial court granted defendant's motion for a directed verdict, which motion was renewed after the jury was "hung" and a mistrial declared (R. 183, 184, 196; T. 600-606).

On December 4, 1990 a panel of the District Court, by majority decision, affirmed trial court ruling (R. 244-260). On December 24, 1991, on rehearing en banc, a majority of that court reversed and held (instead) that a directed verdict for the plaintiffs should have been entered. (The trial court erred in denying the plaintiffs' motion for a directed verdict). (R. 261). *See* also, as now reported: JACKSON v. THE HERTZ CORPORATION, 590 So. 2d 929 (Fla.App.3d 1991).

The District Court certified to this Court a question of great public importance and also noted apparent conflict between its opinion and this Court's opinion in **STUPAK v.** WINTER **PARK LEASING, INC., 585 So. 2d 283** (Fla. 1991).

IV.

STATEMENT OF THE FACTS

A.

Minor plaintiff was seriously injured on April 16, 1985 when a Hertz-owned vehicle ran a stop sign at the corner of Northwest 21st Avenue and 68th Street and struck him while he was riding his bicycle (T. 186-188). The vehicle's driver, a

tall black man, got out and attended to the plaintiff. The driver took the plaintiff home (T. 190,203,212, 236). The driver was ultimately identified as Christopher Harris (T. 203; Plaintiff's Exhibit No. 3 in Evidence).

On or about April 25, 1985 police stopped a Lincoln Town Car, Tag No. ZAN 178, and arrested the driver, Christopher Harris, for grand theft (T. 12-14).

B.

On February 5, 1985, David Siegfried, a Hertz employee with some 21 years experience as rental representative, was working at the Miami Airport from 3:00-10:00 o'clock P.M. There were two persons working the rental desk. Siegfried could not recall who they were or who rented cars on that particular date (T. 107-109). Siegfried did identify a rental agreement issued on that date to an individual named Linda Major, Driver's License No. K205 205 8046 (T. 112-113). Hertz had rented to her a Lincoln Town Car, Tag No. ZAN 178.

Hertz employees testified that the subject car was rented to a person without a valid driver's license. Hertz employees "justified" the action by saying that at the time (of rental) it was an "okay" Hertz procedure if someone without a license is accompanied by someone with a license (T. 117-122). It was further testified to (by Hertz employees) that this procedure & not in either the Hertz Training Manual or the Hertz Procedure Manual (T. 121, 122).

Hertz employees testified that if you do follow the above described procedure (i.e., renting to a "duo"), you must put down on the aqreement that the unlicensed person cannot drive! The same was not done in this case (T. 124).

Hector Nunez was, at the time of these events, senior station manager tor Hertz and was direct line supervisor for rental agents at Hertz' airport counter (T. 127, 128). Thoroughly familiar with rental procedures (T. 128), he testified:

1. If a person has no driver's license they are not allowed to rent (T. 131-133); and

2. If a person with no driver's license comes in with a friend who has a driver's license, and the person who does not have the driver's license has a credit card, rental should not be authorized (T. 131-132).

In this case two persons (supposedly) came to the Hertz counter. Rental was made to "Linda Major" who presented a VISA credit card (T. 134). The driver's license number given (and recorded) was K 205 2U5 8046. The driver's license number began with a K. That is supposed to be the first initial of the license holder's last name--certainly not Major (T. 134).

It was further established:

1. That in order to rent from Hertz a customer need present a driver's license in their own name (T. 135, 136);

2. That the age requirement be met and same be noted and placed on the rental agreement. No such notation was made in this case (T. 144-146);

3. That Hertz' procedure required that the state which issued the license and the license expiration date be noted. This was also not done here for the (supposed) renter, Linda Major (T. 145).

In this case, although the rental agreement listed an additional driver, the number on his driver's license had been altered (T. 136-138).

The rental forms did not list all of the Hertz persons who handled the transaction even though the Hertz procedure requires that same be listed (T. 141).

Mr. Nunez' name appears on the form as okaying the subject rental (T. 141, 142). Mr. Nunez established that whoever did this rental was acting for Hertz at the time (T. 148).

C.

Detective Shirley Gibson is with the Metro-Dade Economics Crime Unit (T. 57, 58). She investigated the (alleged) theft of the credit card of Linda Major (T. 58). She spoke with Linda Major's husband. Linda Major did not own the subject VISA credit card (T. 61, 62). Detective Gibson ascertained that it was not Linda Major's signature on the rental agreement (T. 61).

Detective Gibson notified Hertz several times about the credit card problem and did so specifically on March 14, 1985 (T. 64, 65). Detective Gibson spoke to Hertz' employee, Jean Ayers, who informed the detective that she would try and find out who at Hertz handled such matters and would get back to Detective Gibson. Ayers never did (T. 68).

Detective Gibson advised that if Hertz had reported the car stolen--which Hertz did not do--the detective could have had the car picked up (T. 69, 70).

Carlton Mattison and Linda (Major) Mattison were advised by Detective Gibson of the rental at the airport. Mr. Mattison saw the subject vehicle parked in the back of Christopher Harris's house (T. 84, 85). Be called the police. Be was told that Hertz owned the car and that until Hertz reported the car stolen there was nothing that the police could do (T. 83, 84). Mattison knew the car was the subject one because he checked the tag number against the (copy of the) rental agreement given to him by the police (T. 84, 85). These events occurred two weeks after (his) being advised by Detective Gibson (T. 85).

Clifton Crosby is (now) a Metro Dade Detective assigned to the Auto Theft Division (T. 171). In February of 1985 he was a Metro Dade uniformed police officer and was the person who wrote up the report of the theft of Linda Major's credit card (T. 171-173). He advised Hertz on February 17, 1985:

> ". . .that a vehicle which they owned at that time was involved in a fraudulent offense and explained to them the circumstances which the victim had advised me of, albeit that being the credit or credit cards that were stolen from him that were possibly used to rent a vehicle which the victim had at that time no knowledge of. The vehicle which was rented was not on the scene whenever I arrived.
>
> "The information I obtained from the victim to place in my report as far as the vehicle was from a rental agreement that the victim had obtained from an anonymous citizen who more or less got the victim involved as far as telling him what was taking place with his property. . ." (T. 174, 175).

Detective Crosby attempted to follow through on his investigation. Because he could not locate the (then) suspected perpetrator (Christopher Harris), he referred the matter to the Economic Crimes Unit (ultimately Detective Gibson). When Detective Crosby notified Hertz:

> "I. . .advised them that possibly a suspect was using a stolen card from the victim and had rented this particular vehicle, because I had the rental agreement in hand whenever I spoke to them. I was not just speaking about any vehicle they owned but about a specific vehicle I had the tag number and vehicle identification number on.
>
> "As far as them reporting it stolen, it is up to them to do that and not for me to say you must report this car stolen immediately, because I personally am not the victim in the case. I don't own the car, so then being the vehicle it is strictly up to them and what they do with the matter after they are contacted." (T. 176, 177).

D.

At pages 4 and 5 of the defendant's Statement of the Case and Facts, and at page 9 of its Summary of Argument, defendant suggests that:

> ". . .The parties stipulated to the fact that the Hertz' vehicle was obtained through fraud. . ."

concluding therefrom that:

> ". . .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,"

In truth, the undisputed evidence would establish that the credit card which was used to rent the vehicle was fraudulently obtained. It appears to also be undisputed that Hertz--within the course and scope of its business, to-wit: the leasing/rental

for profit of automobiles to the general public--entrusted the subject vehicle to the lessees, How this entrustment came about, if relevant at all, will be argued in a more appropriate section of this brief.

E.

The issues herein involved center on whether (as the District Court so found) plaintiffs are entitled to a directed verdict or whether a directed verdict for the plaintiffs is precluded by this Court's opinion in **STUPAK** v. WINTER **PARK** LEASING, INC., 585 So. 2d **283** (Fla. 1991). As the en banc majority noted:

* * *

> "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. Nonetheless, 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 through 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 employee'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 fortiari 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)." 590 So, 2d at p. 938, footnote 2.

Additionally, the District Court certified to this Court the question:

"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 that the vehicle was not timely returned." 590 So. 2d at p. 942.

Plaintiffs urge this Court to approve the en banc majority opinion as it is consistent with all Florida precedent on the same subject matter.

V.

QUESTIONS PRESENTED FOR REVIEW

A.

Assuming the existence of conflict between this case and STUPAK v. WINTER PARK LEASING, INC., supra [STUPAK is, however, factually distinguishable from the instant cause--See "B", infra], the better reasoned rule is found in the en banc majority opinion of the District Court of Appeal, Third District, herein being reviewed. To that extent this Court should hold:

> THE LIABILITY OF A CAR RENTAL COMPANY UNDER THE DANGEROUS INSTRUMENTALITY DOCTRINE WILL NOT BE 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 (C) THE CAR RENTAL COMPANY MADE EFFORTS TO RECOVER THE VEHICLE AFTER IT BECAME AWARE OF THE FRAUD AND THAT THE VEHICLE WAS NOT TIMELY RETURNED.

B.

The "conflict" between the instant cause and STUPAK is only "apparent" and not real. To that extent this Court should hold:

> THE DECISION HEREIN SOUGHT TO BE REVIEWED IS NOT IN CONFLICT WITH STUPAK v. WINTER PARK LEASING, INC., SUPRA.

VI.

SUMMARY OF ARGUMENT

A.

The liability of a car rental company under the dangerous instrumentality doctrine should not be affected by the facts that (1) the rental was secured by fraud, (2) the period for which the vehicle was rented was greatly exceeded or (3) the car rental company made efforts to recover the vehicle after it became aware of the fraud and that the vehicle was not timely returned. To allow the defendant to escape responsibility under the circumstances herein presented would create exceptions to the dangerous instrumentality doctrine neither contemplated under SUSCO v. LEONARD nor authorized under the District Court of Appeal cases of TILLMAN and BOSTIC. To allow any other result would encourage rental car companies to be sloppy, inattentive, lackadaisical and negligent in their renting procedures. This would be totally out of harmony with this Court's concerns in ANDERSON v. SOUTHERN COTTON OIL COMPANY and SUSCO.

The defendant's arguments opposing the public policy concerns of the District Court of Appeal, Third District, should be rejected and the en banc majority opinion be approved as the law for the State of Florida.

Although plaintiffs take no issue with the en banc majority opinion (and again urge its adoption and approval by this Court) still, in an abundance of appellate caution, should this Court

be hesitant to *go* as far as the majority opinion suggests, a directed verdict for the plaintiffs should be affirmed.

At the time the defendant decided to send letters (demanding return of the vehicle), the defenaant already knew that the real Linda Major did not have the car. The defendant also knew that the person wno rented the car was already determined not to be the credit card owner and was past the two-day rental time. Both the police and tne defendant already had been informed of the location of the vehicle and were merely waiting for the defendant's permission to pick it up. Given all of these circumstances it can be argued that assuming this Court were to hold that the liability of the car rental company could be affected by the facts that the period for which the vehicle was rented was "greatly" exceeded or the rental car company made efforts to recover the vehicle after it became aware of the fraud and that the vehicle was not timely returned, a directed verdict for the plaintiffs should still stand.

Plaintiffs would again urge this Court to not embrace a rule which would **allow** and/or encourage rental car companies to exonerate themselves through inclusion into their rental contracts of "conditions", "terms" and other exculpatory matters. This Court's opinion in SUSCO V. **LEONARD** should be adhered to, approved and reaffirmed as the law in the State of Florida.

B.

The decision herein sought to be reviewed is not in conflict with STUPAK. This Court's opinion in **STUPAK** does not

compel a result different than the District Court's majority en banc opinion suggests. What, as relevant here, appears to be the heart and soul of the STUPAK decision was the inclusion into that rental agreement of the condition:

> "that vehicles not returned by the due date are considered theft by conversion."

The STUPAK contract provision which provided the foundation for the defendant's ability there to generate a fact question is not present here. As such, no matter what this Court does, if anything, with STUPAK, plaintiffs here are still entitled to a directed verdict. This case does not fall within the STUPAK rule.

Because the reference in STUPAK to the particular condition of the rental agreement is directly contrary to the thrust of SUSCO and its progeny, that contract provision should be held against public policy as the keeping of a leased vehicle "overtime" should be deemed a breach of the bailment and not a conversion. See: SUSCO, supra. Plaintiffs would urge this Court to adhere to SUSCO and its progeny and to recede from that language in STUPAK which appears to be directly contrary to the thrust of SUSCO and those many similar cases which clearly hold that a rental caw company may not limit its liability to innocent persons by rhe restrictive terms of its contract with the renter or lessee.

For the reasons heretofore advanced, it is clear there exists no conflict between the instant cause and STUPAK.

VII.

ARGUMENT

A.

THE LIABILITY OF A CAR RENTAL COMPANY UNDER THE DANGEROUS INSTRUMENTALITY DOCTRINE SHOULD NOT BE AFFECTED BY THE FACTS THAT (A) THE RENTAL WAS SECURED BY FRAUD, (B) THE PERIOD FOR WHICH THE VEHICLE WAS RENTED WAS GREATLY EXCEEDED OR (C) THE CAR RENTAL COMPANY MADE EFFORTS TO RECOVER THE VEHICLE AFTER IT BECAME AWARE OF THE FRAUD AND THAT THE VEHICLE WAS NOT TIMELY RETURNED.

In SUSCO CAR RENTAL SYSTEM OF FLORIDA v. LEONARD, 112 So. 2d 832 (Fla. 1959), this Court, citing to its prior decision in ANDERSON v. SOUTHERN COTTON OIL CO., 74 So. 975 (Fla. 1917), had occasion to again discuss the dangerous instrumentality doctrine and, in so doing, held:

> "The prevailing rationale of the cases, is 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. The validity or effect of restrictions on such use, as between the parties, is a matter totally unrelated to the liabilities imposed by law upon one who owns and places in circulation an instrumentality of this nature." 112 So. 2d at pp. 835 and 836.

Explaining the rationale for its holding, this Court stated:

> "The Florida cases initially applying this doctrine in the field of automobile liability law clearly support this conclusion. 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." 112 So. 2d at p. 836.

After recognizing that the duty imposed upon the owner is non-delegable in nature, this Court concluded:

> "Responsibility under the law was accordingly attached to ownership of these instrumentalities, evinced first by registration laws and now by numerous provisions to assure financial responsibility of owners. It is plain that these provisions are based on the assumption that an owner cannot deliver a vehicle into the hands of another without assuming, or continuing, his full responsibility to the public. Such statutory provisions would, of course, be quite nugatory if ultimate liability could be escaped by contract of the owner.
>
> "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 incidence 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." 112 So. 2d **at p. 837.**

In NATIONAL CAR RENTAL SYSTEM, INC. v. BOSTIC, **423** So. 2d 913 (Fla.App.3d 1983), an automobile (owned by the defendant, National Car Rental System, Inc.), while being driven by Jackson, crossed the center line of the road and crashed head-on with Bostic's vehicle which was being driven in the opposite direction. As a result thereof, Bostic filed suit against Jackson and National Car Rental System, Inc. At the time of trial National moved to amend its answer to file an additional affirmative defense to allege that (subsequent to the filing of its answer) it found out that one, Spaulding (the person who origi-

nally rented the car) had obtained the car by fraudulent means, (to-wit: an altered credit card) and hence the car was a stolen vehicle which was being driven without valid consent. That motion was denied. The case was tried. Directed verdict for the plaintiff on the issues of negligence AND CONSENT TO OPERATE THE CAR was granted. After verdict for plaintiff, the defendant appealed. Many issues were presented on appeal. Pertinent here is the following defense contention:

> ". . .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. . ." 423 So. 2d at p. 917.

The District Court affirmed the granting of the plaintiff's motion for directed verdict. In affirming the trial court's ruling (denying the defendant leave to amend its answer), the Court cited to the cases of TILLMAN CHEVROLET COMPANY v. MOORE, 155 So. 2d 794 (Fla.App.1st 1965), and SUSCO CAR RENTAL SYSTEM OF FLORIDA v. LEONARD, supra.

These plaintiffs have already argued to this Court the significance of SUSCO CAR RENTAL SYSTEM OF FLORIDA v. LEONARD and its recognition of the fact that there exists a non-delegable duty on the part of the owner of a motor vehicle to have the vehicle properly operated when it is by his authority on the public highway! Plaintiffs' interpretation of the Court's opinion in NATIONAL CAR RENTAL SYSTEM, INC. v. BOSTIC is appropriate in light of that Court's citation (to SUSCO, supra and) to the case of TILLMAN CHEVROLET COMPANY v. MOORE, a decision upholding

vicarious liability upon the owner of a car lot who voluntarily surrendered possession of a vehicle to a person who later developed to be a thief. TILLMAN is especially appropriate to the facts and circumstances of this case in that in TILLMAN the court was called upon to determine:

> "Whether an automobile dealer is liable under the dangerous instrumentality doctrine when, as in this case, he enters into negotiations with a prospective customer and gives such prospect permission to drive dealer's automobile a limited distance of 12 blocks, and such person instead drives it to another county, changes the car plates therefrom, and otherwise manifests an intention of appropriating the automobile to his own possession with intention to permanently deprive the dealer of it." 175 *So.* 2d at p. 795.

The court in TILLMAN was further confronted with a second issue:

> "Assuming that the automobile dealer was negligent in permitting such person, who develops to be a thief, to have possession of his car, not knowing the larcenous intent, and it appears that the thief or someone with the thief's permission negligently drove the car into another, causing injury, is there 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 or by the one to whom the thief entrusted possession so as to render the car dealer liable under the dangerous instrumentality doctrine, or is the chain of causation broken and the doctrine rendered inapplicable by the subsequent willful, malicious or criminal larceny of the automobile by the person to whom the dealer in good faith entrusted possession on the assumption he was a prospective purchaser?" 175 So. 2d at p. 795.

The Court in TILLMAN affirmed a judgment for the plaintiff. In so doing the Court answered the above two questions contrary to the automobile dealer's position. In explaining the rationale for its holding, the Court stated:

> "The owner of the motor vehicle consented to the operation thereof by defendant Wills, who in turn consented to the operation thereof by defendant Smith. Under such circumstances, vicarious liability was properly visited upon the appellant owner." 175 So. 2d at p. 796.

In language highly applicable here, the TILLMAN court specifically stated:

> "Appellant cites section 811.021, Florida Statutes, (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 civii liability here involved." 175 So. 2d at p. 796.

The majority en banc opinion herein sought to be reviewed is totally consistent with the holding and rationale of TILLMAN!

In truth and in fact, the defendant was not entitled to a directed verdict on the issue of liability but the plaintiffs were. There can be no doubt that the subject automobile was on the streets of Dade County "by authority of" defendant, See: SUSCO, 112 So. 2d at p. 836. Likewise, defendant "delivered" this automobile "into the hands of another" (doing so for profit) and consented to the car's use and operation "beyond (its) own immediate control", SUSCO, 112 So. 2d at p. 837. To allow the defendant to escape responsibility under the circumstances herein presented would create exceptions to the dangerous instrumentality doctrine neither contemplated under SUSCO v. LEONARD nor authorized under either TILLMAN, supra, or BOSTIC, supra. To allow any other result would encourage rental car companies to be sloppy, inattentive, lackadaisical and negli-

gent in their renting procedures. Same would be totally out of harmony with this Court's concerns in **ANDERSON** v. **SOUTHERN COTTON OIL COMPANY** and SUSCO, supra:

> "Responsibility under the law was accordingly attached to ownership of these instrumentalities, evinced first by registration laws and now by numerous provisions to assure financial responsibility of owners. It is plain that these provisions are based on the assumption that an owner cannot deliver a vehicle into the hands of another without assuming, or continuing, his full responsibility to the public . . ." **112 So. 2d at p. 837.**

The en banc majority opinion is totally consistent with the opinions rendered in SUSCO, **TILLMAN** and **BOSTIC** and it should be approved by this Court:

> **". . .** 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, (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. . . (citations omitted). . .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 should affect the owner's tort liability for its automobile, See **TILLMAN,** 175 So. **2d at 796. . .**
>
> "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, See Section 812.012(2), 817.52(1), Fla. Stat.(1985). We will not endorse such a position." 590 So. 2d at pp. 939 and 940.

At pages 15-21 of its brief the defendant argues why it feels a violation or the criminal laws should serve to exonerate

it (a rental car company) from civil liability for damages/injuries caused by the vehicle's misuse. Plaintiffs suggest such arguments are (and should be deemed) **"unavailing."**

First, and foremost, there was an entrustment. No one snuck into the Hertz parking lot in the middle of the night and under cover of darkness hot-wired the vehicle and drove off into the night.

Second, under extant Florida law how the "entrustment" came about is irrelevant! As the majority opinion noted:

> "It would fatally compromise the interests of the innocent public if a rent-a-car agency. . .can avoid . . .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 should affect the owner's tort liability for its automobile." 590 So. 2d at p. 939.

In accord: TILLMAN, 175 So. 2d at **p. 796.**

At page 13 of the defendant's brief it is suggested:

> "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 ok 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. . ."

The "suggestion" is, of course, totally at odds with the decisions in this case, in BOSTIC, and in TILLMAN. More importantly, the suggestion ignores the obvious distinctions between "custody" and **"ownership."** Where, as here, the vehicle's owner entrusts the vehicle to a lessee, there occurs only a **"consent** to use." See: TILLMAN, supra, and SUSCO, supra. The person to whom the car was entrusted then **(and** only then) "has custody" of the

vehicle. If during that period of time the vehicle is (not further "entrusted") there certainly could occur a "breach of custody" sufficient, under extant law, to relieve the owner of responsibility. But that is not this case which involves the owner's consent to the lessee to use of the vehicle! The matter is one of public policy:

> "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 traveling public (citations omitted). This liability extends to the negligent act of whomever is subsequently allowed to drive the car (citations omitted). . .and 'no matter where the driver goes, starts or stops.'. . . (citations omitted). Furthermore, where '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. (Citation omitted). . . ." 590 So. 2d at p. 937.

The defendant's "suggestions" should be disapproved and the en bane majority opinion be approved as the law for the State of Florida.

Although plaintiffs take no issue with the en banc majority opinion (and again urge its adoption and approval by this Court) still, in an abundance of appellate caution, should this Court be hesitant to go as far as the majority opinion suggests [See, for example: JACKSON, 590 So. 2d 929 at p. 943 (HUBBART, Judge, partially dissenting)]:

> "I entirely agree with the court--and disagree with the panel majority--that where the owner of a motor vehicle voluntarily relinquishes control of the vehicle to another, the owner is liable for the subsequent neg-

ligent 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.' See page 941. . .

"I think. . .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.

"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. . ." 590 So. 2d at p. 943.

These plaintiffs would suggest to this Court that, under the subject facts, even under Judge Hubbart's "partial dissent", a directed verdict for the plaintiffs should be affirmed,

At the time the defendant ultimately decided to send letters (demanding return of the vehicle), the defendant already knew:

1. The real Linda Major did not have the car. Plaintiffs would posit that sending a letter to her demanding its return was useless (to say the least);

2. The person who rented the car was already determined not to be the credit card "owner" and was past the two-day rental time. Defendant's insistence on sending a letter (to "the thief") under this circumstance was a true exercise in illogic;

3. The police already had been informed of the location of the vehicle and were "merely waiting" for defendant's "permission" to pick it up;

4. Detective Crosby advised Hertz on February 17, 1985 that a vehicle which it owned was involved in a fraudulent offense. (T. 174, 175). When Detective Crosby notified Hertz, he informed it not about any vehicle they owned but about a specific vehicle of which he had the tag number and vehicle identification number. As he explained:

> "It is strictly up to them and what they do with the matter after they are contacted. . ." (T. 176, 177).

Given the above circumstances, it can be argued that assuming this Court were to hold that the liability of a car rental company could be affected by the facts that the period for which the vehicle was rented was "greatly" exceeded or the rental car company made efforts to recover the vehicle after it became aware of the fraud and that the vehicle was not timely returned, a directed verdict for the plaintiffs should still stand. However, plaintiffs would again urge this Court to not embrace a rule which would allow and/or encourage rental car companies to exonerate themselves through inclusion into their rental contracts of "conditions", "terms" and other exculpatory matters:

"Finally, we turn to the argued effect of Hertz' 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, (citation omitted) 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]. 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 being on the highway in a possession to injure the plaintiff.

"All in all, we consider, in the words of an early Florida case on the issue, that Hertz' 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.'

(Citation omitted). On the basis of the dangerous instrumentality doctrine, then, we hold that Hertz' liability has been established as a matter of law..." 590 So. 2d at pp. 941 and 942.

In arguing for a change in the law, in arguing aqainst the en banc majority opinion, in suggesting its entitlement to a directed verdict, and in urging a weakening of SUSCO and its progeny, defendant (sub silentio) pushes for a change in this State's public policy. The arguments advanced by the defendant are all premised upon applying principles of the criminal law to the circumstances of this (civil) case and are buttressed by out-of-state authorities whose jurisdictions are not public policy concerned with the dangerous instrumentality doctrine. The

defendant's arguments are obviously motivated by a desire to foster its own financial interests. The protestations directed against the majority opinion (while expected, and from the defendant's point of view are "appropriate") should be rejected by this Court. The en banc majority opinion is straightforward and well reasoned. No matter how the Court reached the result it did, the result it reached is fair, right and just. Equally as important is the fact that the result is consistent with, not contrary to, extant Florida public policy and case law. Because it is, it should be approved.

B.

THE DECISION HEREIN SOUGHT TO BE REVIEWED IS NOT IN CONFLICT WITH **STUPAK** V. WINTER PARK LEASING, INC., SUPRA.

The plaintiffs would respectfully suggest to this Court that there exists no conflict between the instant cause and STUPAK. Because there exists no conflict, the opinion of the District Court of **Appeal,** Third District, should be approved and discretionary review denied.

This Court's opinion in STUPAK does not compel a result different than the District Court's majority en banc opinion suggests. What, as relevant here, appears to be the heart and soul of the **STUPAK** decision was the inclusion into that rental agreement of the condition:

> "that vehicles not returned by the due date are considered theft by conversion." STUPAK, 585 So. 2d at p. 284.

The STUPAK contract provision which provided the foundation for the defendant's ability there to generate and establish a fact question is not present here. As such, no matter what this Court does, if anything, with STUPAK, plaintiffs here are still entitled to a directed verdict. This case does not fall within the "STUPAK rule."

The reference in STUPAK to the particular condition of the rental agreement is directly contrary to the thrust of SUSCO and its progeny! That contract provision should be held against public policy as the keeping of a leased vehicle "overtime" should be deemed to be a breach of the bailment and not a conversion. See: SUSCO, supra.

As the en banc majority opinion correctly recognized, the language in STUPAK is seemingly at variance with several of the principles and conclusions contained in the District Court's opinion which was almost completely prepared prior to STUPAK's release. However, as the District Court of Appeal, Third District, correctly noted:

> "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 ciaim 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." 590 So. 2d at p. 938.

There exists no real conflict between this case and STUPAK. Assuming the existence of conflict, plaintiffs would urge this

Court to adhere to SUSCO and its progeny and to recede from that language in STUPAK which appears to be directly contrary to the thrust of SUSCO and those many similar cases which clearly hold that a rental 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--anymore 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 employee'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. . ." 590 So. 2d at p. 938, footnote 2.

The plaintiffs would respectfully suggest to this Court that the District Court of Appeal, Third District, should be advised that its opinion is legally sound, consistent with prior opinions of this Court, and is not in conflict with STUPAK. To the extent that STUPAK conflicts with SUSCO, this Court should hold that STUPAK (as to this limited issue) was erroneously decided and does not accurately reflect the current state of Florida law on this subject matter.

Parenthetically, it should be noted that this Court's citation in STUPAK to TRIBBITT v. **CROWN** CONTRACTORS, INC., **513** So. 2d 1084 (Fla.App.1st 1987) (heavily relied upon by the defendant in its main brief) neither warrants a belief that there is a weakening of the public policy in this State on the subject issue nor that it is supportive of the defendant's position. TRIBBITT v. **CROWN** CONTRACTORS, INC. rejected the defendant's contention that the lease provision exonerated the defendants. The Court in TRIBBITT followed SUSCO and held:

> ". . .The real issue under the facts of this case . . .is whether a conversion occurred." 513 So. 2d at page 1087.

In TRIBBITT the car was owned by the defendant, Crown, and leased by Crown to derendant, Ensco. Ensco assigned the vehicle to an employee, Brashier, for his business and personal use. Brashier allowed Jacobs to drive the vehicle. Tribbitt, while riding **as** a passenger in a car driven by his wife, was injured when their car was struck from the rear by the car operated by Jacobs. Tribbitt is factually distinguishable from the instant cause for all of the reasons heretofore argued in Section "A", supra. Further, TRIBBITT was decided on motion for summary judgment and a summary judgment in favor of the defendants was reversed because:

> ". . .The thrust of the affidavits was that the driver was operating the vehicle without the knowledge and consent of the Crown and Ensco. However, the affidavits failed to eliminate as a genuine issue the question as to whether Jacobs' operation of the vehicle constituted a species of conversion or theft." 513 So. 2d at p. 1087.

The instant cause presents no such similar situation. To the extent that STUPAK relies upon TRIBBITT, it must be deemed limited to the holding that where the record fails to eliminate as a genuine issue the question of whether or not operation of the vehicle constituted a species of conversion or theft, a summary final judgment must be reversed, In point of fact, TRIBBITT itself would be in conflict with STUPAK as the opinion did, at all times pertinent, embrace SUSCO.

For the reasons heretofore advanced, it is clear there exists no conflict between the instant cause and STUPAK.

VIII.

CONCLUSION

Based upon the foregoing reasons and citations of authority the plaintiffs respectfully urge this Honorable Court to answer the certified question in the negative, to hold there exists no conflict between the instant cause and STUPAK, to recede from that portion of STUPAK which appears to be in conflict with SUSCO, and to approve the en banc majority opinion as the law in the State of Florida.

Respectfully submitted,

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IX.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief of Respondents on the Merits was served, by U.S. mail, this 23rd day of March, 1992, on opposing counsel:

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