047

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 WHITAKER and HENRIETTA WHITAKER, individually,

Respondent.

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

REPLY BRIEF ON THE MERITS OF PETITIONER THE HERTZ CORPORATION

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SUMMARY OF THE ARGUMENT

JACKSON has included several misstatements of fact in his Brief on the Merits, which need to be corrected. In his Argument, JACKSON has requested that this Court reject the definitions of "conversion" and "theft" **as** set forth in the criminal statutes, which request should be denied and disregarded. This Court's decisions in **Susco**, Thomas, and Stupak should then be followed **and** HERTZ should be relieved of any liability in this case.

ARGUMENT

In its Initial Brief on the Merits, HERTZ adopted the District Court's Statement of the Facts because it honestly and succinctly set forth the primary facts at issue. JACKSON, however, appears to have rejected the District Court's statement in toto, as well **as** the additional facts which HERTZ had added. This is evident in that JACKSON has restated the entire facts of the **case**, which would appear to be a violation of Fla.R.App.P. 9.210(c).

Moreover, the Statement of the Facts, as set forth by JACKSON, is in fact an "Argument" that is masquerading as a Statement of the Facts,[1] and it further contains several incorrect statements, and improperly distorts others.

Throughout the litigation, and during the appellate process, JACKSON has attempted to claim that HERTZ rented the vehicle to someone who did not have a valid driver's license. Admittedly, the HERTZ agent who rented the vehicle did not write down the driver's license number of the individual who presented herself as Linda Major, but there was absolutely no evidence or testimony presented at trial which would support a conclusion that she did not have a valid driver's license. The Record and the Transcript are totally devoid of any such testimony or evidence.

After extensively reviewing the record, the briefs, and the arguments of counsel, the District Court recognized this, noting that:

> 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 (A 2, 19).[2]

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[1] The fact that JACKSON has included argument throughout his Brief on the Merits is evident from the extent of underlining the points that he wishes to emphasize, and the editorial comments that are included.

[2] In actuality, Lawrence King's correct driver's license number, K52052058048, was listed on the Additional Authorized Operator attachment, and its substantial equivalent, K2052058048, was listed on the front of the Rental Agreement (Plaintiff's Exhibit "6").

JACKSON, however, is unwilling to accept the evidence presented at trial, and has incorrectly stated in his brief that: "Hertz employees testified that the subject car was rented to a person without a valid driver's license'' (JACKSON Brief on the Merits, p. **2**). **A** review of T 117-122, the authority cited by JACKSON, makes it clear that this statement is incorrect. There is nothing in the record to support or justify this. Further, no HERTZ employee, or anyone else at trial, ever testified that the vehicle was rented to a person without a valid driver's license.

Further, the question of whether the woman who presented herself as Linda Major did or did not have a valid driver's license, is totally irrelevant and immaterial. At trial **JACKSON** went to considerable lengths to establish that it was a "man" who operated the vehicle at the time of the accident, and not the woman who rented it. This is also emphasized in his Brief on the Merits:

> 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). **(JACKSON** Brief on the Merits, pp. 2-3).

JACKSON also attempts to claim that the failure of the HERTZ rental agent to write down the driver's license number for "Linda Major" was a violation of the procedures that HERTZ utilized to rent its vehicles, and that this somehow resulted in the damages alleged. Even if JACKSON is correct in this assumption, which **HERTZ** denies, there still is no causal relation to the accident. In the original Panel Opinion, the District Court recognized that:

> 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). (A 4).

The En Banc opinion appears to agree with this:

> 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 "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. (A 31).

Whether HERTZ failed to write down the driver's license number of "Linda Major" on its Rental Agreement, and whether such failure violated HERTZ' procedures, clearly have nothing to do with the

accident. If the accident was caused by negligence, than such negligence occurred in the operation of the vehicle at the time of the accident, and not when the vehicle was rented.

JACKSON has also attempted to distort the facts of the case, with respect to the time sequence when events occurred, and the effect of the Joint Pre-Trial Stipulation of the Parties.

The correct sequence of events were as follows:

2-5-85 Vehicle rented from HERTZ by "Linda Major" with "Lawrence King" listed as Additional Authorized Operator (T 7, **10, 109-114).**

2-17-85 Detective Clifton Crosby advises HERTZ that its vehicle had been rented with a stolen credit card (T **173-174),** and then turns file over to Detective Gibson in the Economic Crimes Unit (T **58-60).**

2-26-85 HERTZ sends certified mail letters to "Linda Major" and to "Lawrence King" (R **72, ¶ 6; 213-214).**

3-1-85 HERTZ sends second set of certified mail letters to "Linda Major" and to "Lawrence King" (Id.).

3-14-85 Detective Gibson contacts HERTZ and advises that Carlton Mattison, who claimed to be the real Linda Major's husband, had reported that his neighbor, Christopher Harris had obtained a credit card in Linda Major's name, and that the card had been used to rent the HERTZ vehicle (T **62-64, 80).**

3-31-85 The Post Office makes the last attempt to deliver the HERTZ letters to "Linda Major" and to "Lawrence King", and thereafter returns the letters to HERTZ **(R 72, ¶7).**

4-5-85 HERTZ reports the vehicle stolen (R **72, ¶ 8, 211),** and the vehicle is entered into the police computer system (R 217).

4-16-85 Accident date (T **185-188).**

4-25-85 The HERTZ vehicle recovered by City of Miami Police while occupied by Christopher Harris (R **218,** T **13).**

In his Brief on the Merits (p. 6), JACKSON argues [again in his Statement of the Facts, p. 6] that: "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)." This argument is a misleading distortion of the facts, and totally contradicts the parties' Stipulation of Facts.

In actuality, Detective Gibson worked for the Metro-Dade Police, Economic Crimes Unit, and her involvement in this case was limited to an investigation of the stolen credit card (T 57-58). Detective Gibson testified that the HERTZ' vehicle could not be picked up because the only report that had been filed related to the credit card fraud, and that the car could only be picked up if it was reported stolen (T 69-70). The testimony of Officer Julia Moore, the detective who handled the investigation of the theft of the HERTZ' vehicle, however, clearly established that the Metro-Dade Police department would not accept a stolen vehicle report from a rental car company until certified mail letters were sent (R 212, 233), which explains the delay in filing the stolen vehicle report. This testimony from Offices Moore is totally consistent with the parties' Stipulation of Facts, as follows:

> 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.[3]

[3] As was emphasized in footnote 1 of HERTZ Brief on the Merits (p. 4), the Stipulation is binding on the parties and on the courts, and JACKSON's attempts to circumvent such stipulation should avail him naught. JACKSON should clearly be precluded from claiming that it was not necessary for HERTZ to send the certified mail notices, which the parties stipulated were required.

5. The larger rental car companies normally send two such certified letters before reporting the vehicle stolen. (R 72).

HERTZ was fully aware of the certified mail requirement, and no evidence was presented which indicated that the Police Department was willing to waive such requirement in this particular case. Consequently, JACKSON's attempts to avoid the effects of the parties' stipulation should be rejected.

It is clear that in this case the HERTZ vehicle was rented through the use of a fraudulently obtained credit card, as was stipulated by the parties (R 72, ¶ 9). The parties also stipulated that the HERTZ vehicle was rented to a person who represented herself to be "Linda Major" (R 72, ¶ 2), but who clearly was not. Under such circumstances, HERTZ would submit that there is no question but that its vehicle was obtained through fraud, bringing the present case clearly within the ambit of 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).

This Court's succinct statement in Susco, which was followed in Thomas and Stupak, to the effect 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, forms the crux of this entire case.

What did this Court intend that the phrase "species of conversion or theft" should encompass? The terms are defined by §§ 812.012 and 812.014 Fla.Stats., which were cited in HERTZ' Initial

Brief on the Merits. **JACKSON** argues, however, that the statutory definitions of "conversion" and "theft", should be rejected, as was done by the Court in Tillman Chevrolet Co. v. Moore, 155 So.2d 794 (Fla. 1st DCA 1965). No reasonable alternative is offered. The closest **JACKSON** comes to providing a definition is the following comment: "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." (JACKSON Brief on the Merits, p. 18).

It is doubted that, in deciding Susco, this Court intended to limit the definitions of "conversion" and "theft" as **JACKSON** suggests. Certainly, such a limited definition is contrary to this Court's decision in **Thomas** v. **Atlantic Associates, Inc.**, 226 So.2d 100 (Fla. 1969), wherein a question of fact was presented as to whether a 13 year old girl's taking keys to a vehicle, which her father had left on his dresser, constituted a species of "conversion" or "theft"; and in the very recent decision in **Stupak v. Winter Park Leasing, Inc.**, **585** So.2d 283 (Fla. 1991), wherein a question of fact existed as to whether an accident that occurred two (2) hours after a rental vehicle was required to be returned, involved a species of "conversion" or "theft".

It should be recognized that the Florida Legislature has established the fact that definitions contained in the criminal statutes, and more specifically in the "theft" statute [**§§812.012** and 812.014 **Fla.Stats.**], are equally applicable in civil matters. Florida's "Civil Remedies for Criminal Practices Act", Chapter 772, **Fla.Stats.**, provides a civil remedy for violation of various

criminal statutes. Included in this Chapter is a section entitled "Civil Remedy for Theft",[4] which provides, **inter alia, as** follows:

> **772.11 Civil remedy for theft.-** Any person who proves by clear and convincing evidence that he has been injured in any fashion by reason of any violation of the provisions of **ss. 812.012-812-037** has a cause of action for threefold the actual damages sustained in any such action, is entitled to minimum damages in the amount of **$200,** and reasonable attorney's fees and court costs in the trial and appellate courts. . . .

AS is evident from the above, **§§ 812.012** and **812.014 Fla.Stats. are** specifically included in **§ 772.11 Fla.Stat.**

The "Civil Remedy for Theft" statute has been uniformly applied by each District Court of Appeal in Florida: **Warren v. Monahan Beaches Jewelry Center, Inc., 548** So.2d **870 (Fla. 1st DCA** 1989) [Jeweler fraudulently sold "diamond" ring, which was actually cubic zirconia rather than diamond]; **Miller v. Wallace Internat'l Trucks, Inc., 532 So.2d 1276** (Fla. 2d DCA 1988) [Owner of truck, who had given the title **as** a lien to the vehicle's repairman, committed civil theft by depriving the repairman of the right to property oK "a benefit therefrom" (theft under **§ 812.014**

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[4] The Civil Theft Statute was originally enacted **as §812.035(7) Fla.Stat.** [effective 10-1-77], and provided that:

> (7) Any person who is injured in any fashion by reason of any violation of the provisions of **ss. 812.012-812.037** shall have a cause of action for three-fold the actual damages sustained and, when appropriate, punitive damages. Such person shall also recover attorney's **fees** in the trial and appellate courts and costs of investigation and litigation.

Effective October 1, **1986,** this provision was amended to limit treble damages to the State or its agencies; but simultaneously therewith, Section **772.011 Fla.Stat.** was created **to** provide individual claimants with a treble damages remedy for Civil Theft.

Fla.Stat.), when he obtained a duplicate title from the State, and sold the truck to a third party]; **Auerbach v. McKinney, 549** So.2d **1022** (Fla. **3d** DCA **1989)** [Attorneys who accepted settlement payments on behalf of brain damaged minor child, which defendant's insurers made payable to attorneys, without leave of court, committed conversion and theft, and were subject to suit for compensatory and treble damages under **§ 772.11** Fla.Stat.]; **Aagaard-Juergensen v.** Lettelier, **579** So.2d 404 (Fla. 4th DCA **1991)** [Award of treble damages mandatory where plaintiff alleged breach of contract, fraud, statutory embezzlement, negligence, conspiracy, and civil theft, and jury returned special verdict, finding, **inter alia,** that defendants committed civil theft]; Aspen **Investments Corp. v.** Holzworth, **587** So.2d 1374 (Fla. 5th **DCA 1991)** [Jury question presented as to whether corporate director and shareholder, who secretly mortgaged corporate property, and ultimately deposited proceeds into his personal account, committed civil theft by fraudulent conversion, embezzlement, or similar act].

If this Court were to adopt JACKSON's argument, and reject the definitions which have been established by the legislature and the governor on behalf of the people of Florida, what alternative definitions of "conversion" and "theft" should be adopted? Webster's THIRD NEW INTERNATIONAL DICTIONARY [Unabridged] (1986), provides the following definitions:

> **con-ver-sion** * * * **1** * * * **c** : an appropriation of and dealing with the property of another as if it were one's own without right (the ~ of a horse) * * *
>
> **theft** * * * **1 a** the act **of** stealing; specif: the felonious taking and removing of personal property with

> intent to deprive the rightful owner of it b : an instance of such an act 2 : **the taking of** property unlawfully (as by robbery, embezzlement, **fraud)** ⟨**has just** ruled that ~ from a spouse is possible – Jour. of the Amer. Judicature Society) * * * [Emphasis supplied].

It should also be noted **that the term** "larceny", which **is** included as part of the statutory definition of "theft", is defined in Webster's as follows:

> **lar-ce-ny** * * * 1 common law: the unlawful taking and carrying away of personal property without the consent of its lawful possessor whereby every part of the property stolen is removed however slightly from its former position and is at least momentarily in the complete possession of the thief and with intent to steal or to deprive the rightful owner of his property permanently – compare EMBEZZLEMENT; see AGGRAVATED LARCENY, GRAND LARCENY, PETTY LARCENY, SIMPLE LARCENY; **2**: any of **various statutory offenses whereby property is** obtained by embezzlement, trick, false pretenses, fraud, breach of trust, or theft [Emphasis supplied].

These definitions clearly are not limited in any way as suggested by JACKSON. The definitions include the same type of activities that are in the statutory definitions of "conversion" and "theft", and further, they clearly include the same type of deprivation that HERTZ was the victim of in the present case.

JACKSON's request that this Court reject the statutory definitions of "conversion" and "theft" also appears to be a request that this Court throw out reams of legal precedent which include larceny, embezzlement, trick, deception, false pretenses, fraud, willful misrepresentation, false promise and breach of trust as means by which the property of a victim can be "obtained" or "used" by a person who commits a "conversion" or "theft". **See Bussart v. State, 128 Fla. 891, 176 So. 32 (1937); Ex parte Stirrup, 155 Fla. 173, 19 So.2d 712 (1944); Campbell v. State, 155**

Fla. 359, 20 So.2d 127 (1944); Casso v. State, 182 So.2d 252 (Fla. 2d DCA 1966); Rosengarten v. State, 171 So.2d 591 (Fla. 2d DCA 1965); Green v. State , 190 So.2d 614 (Fla. 3d DCA 1966); State v. Oates, 330 So.2d 556 (Fla. 4th DCA 1976).

JACKSON alleges that he was a victim of Negligence, and repeatedly claims that HERTZ is responsible because it entrusted its vehicle to a thief. He argues that entrustment is the same as consent by HERTZ to the use and operation of its vehicle. Such argument, however, is in direct conflict with this Court's holding in Bussart v. State, 128 Fla. 891, 176 So. 32 (1937), that:

> . . . where one obtains possession of property by means of fraud or 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 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); Rosengarten v. State, 171 So.2d 591 (Fla. 2d DCA 1965); Green v. State , 190 So.2d 614 (Fla. 3d DCA 1966); State v. Oates, 330 So.2d 556 (Fla. 4th DCA 1976); and the Civil Theft cases cited supra, at pages 9-10.

In this case, HERTZ was the victim of a crime. To suggest otherwise is to blindfold ones eyes, so that the obvious cannot be seen. The HERTZ vehicle was "rented" by people who misrepresented their identities, who utilized a fraudulently obtained credit card to procure the vehicle, and who never returned the vehicle. Surely this constitutes a "species of conversion or theft", which is also a crime in Florida. Consequently, if this

Court were to follow JACKSON's request that it reject the criminal definitions of "theft", new law would be created, which would make the victims of crimes in Florida, responsible for the actions of the perpetrators of such crimes. Public policy should clearly dictate otherwise.

JACKSON also argues that there is a difference between the terms "entrustment" and "custody" (JACKSON Brief on the Merits, pp. 18-19). He claims that custody is obtained only after there has been an entrustment, and that consequently a "breach of custody" as referred to in Susco, supra, can only occur after there has been an entrustment. obviously this is begging the question. The HERTZ vehicle was entrusted to the renter when custody of such vehicle was given over. The two events occurred simultaneously. Moreover, as indicated in Bussart v. State, supra, where the custody was obtained through fraud, as in the present case, "the fraud vitiates the transaction and the owner is still deemed to retain constructive possession of the property" 176 So. at 32. In other words, in the present case there was a breach of custody at the time that the HERTZ vehicle was "rented".

JACKSON's final argument addresses Stupak v. Winter Park Leasing, Inc., 585 So.2d 283 (Fla. 1991). It is first argued that Stupak involved a contractual provision which does not exist in the present case, and as such there is no conflict. It is then argue that this Court should recede from Stupak, which contains its most recent statement on the law in question, because of conflict.

In actuality Stupak is totally consistent with Susco, and there is no need for this Court to revisit it. The decision merely indicated that a question of fact was presented, as to whether a "species of conversion or theft" had occurred. The question admittedly arose as a consequence of a contractual provision that does not exist in the present case. However, the facts involved herein present the same question of whether a "species of conversion or theft" occurred with the rental of the HERTZ vehicle, and the failure to return same, so that it was reported stolen. This is the same question which was raised, not only in Susco, but also in Thomas v. Atlantic Associates, Inc., supra,[5]

The Stupak decision merely reiterates and reinforces this Court's prior holdings in Susco and Thomas, to the effect that "a breach of custody amounting to a species of conversion or theft" will relieve the owner of a vehicle from vicarious liability for its negligent operation. Clearly this is proper, since it would be totally unreasonable to hold the owner of a stolen vehicle responsible for the actions of the thieves who obtained custody of it. It is equally clear that HERTZ was the victim of a "species of conversion or theft" as referred to in Susco, Thomas and Stupak, and as such should be relieved from any liability herein.

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[5] In Thomas, this Court held that the failure to consider whether a "a breach of custody amounting to a species of conversion or theft" had occurred, created conflict with Susco. 226 So.2d at 102. The facts of the case are discussed, supra, at page 8 of this Brief, and at pages 11-12 of HERTZ Initial Brief on the Merits [a 13 year old girl took the keys to a vehicle, that her father had left on his dresser].

CONCLUSION

From the above, HERTZ respectfully requests that this Court accept jurisdiction of this Cause, and that it answer the Question Certified by the District Court in the affirmative. It would then request 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.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Petitioner's Reply Brief On The Merits was hand delivered this 7th day of April, 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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