Date Submitted: April 17, 2001
Date Decided: July 31, 2001

David L Baumberger, Esquire
Three Mill Road, Suite 301
Wilmington, Delaware 19806

Clayton E. Bunting, Esquire
Wilson, Halbrook & Bayard
107 West Market Street
P.O. Box 690
Georgetown, Delaware 19947

Robert B. Young, Esquire
300 South State Street
P.O. Box 1191
Dover, Delaware 19903

RE: Reese v. Wheeler, et. al.
C.A. No. 99C-04-002

Dear Counsel:

This letter constitutes my decision regarding Defendants' Motion for Summary Judgment in a personal injury action.

Facts and Stage of the Proceedings

The action arose out of an incident at the Draper-King Cole business in Milton, Delaware, in which Defendant Roy Wheeler ("Wheeler"), an employee of Defendant Kaye Trucking & Leasing Co., Inc. ("Kaye"), struck Plaintiff Wayne Reese ("Reese"), with

a truck owned and/or controlled by Defendants Draper Canning and Draper-King Cole, Inc. ("Draper"). The injury-causing vehicle was a "jockey truck," which is a modified truck used to transport trailers around the Draper cannery, and only two employees of Draper are authorized to use it. Reese and Wheeler were non-Draper-employed truck drivers who had made deliveries of vegetables to the Draper facility. They were waiting near the receiving office while the employees of Draper unloaded the vegetables, when, for an unknown reason, Wheeler decided to get into the jockey truck and start it up. He lost control of the truck, which lunged forward, striking Reese and pinning him against the wall of the receiving office.

Reese and his wife are now suing Wheeler, Kaye, and Draper. Plaintiffs assert that Wheeler was negligent in his operation of the truck, but the parties have had difficulty finding Wheeler, who lives in his truck and has no known mailing address.[1] Defendant Kaye did not acknowledge the summons and did not respond to the complaint, so this Court

[1]By letter of April 18, 2001, an attorney for one of the parties in interest notified the Court that Mr. Wheeler had finally been located and that there would be efforts to reach him for information. Defendants informed the Court, by letter on May 8, 2001, that it is their view that discovery is complete for purposes of this motion.

entered a Default Judgment against Kaye. Finally, Plaintiffs allege that Draper was negligent in leaving the keys in the vehicle thereby creating an unsafe environment to its business invitees. This Court held an oral argument as to Draper's Motion to Dismiss, but the motion

was stayed pending the outcome of discovery and the efforts to find Wheeler. Now that discovery is closed with the submission of briefs, Draper's Motion for Summary Judgment may be decided.

Legal Standard that Controls this Court's Consideration

The present matter hinges on the foreseeability of a particular risk, and whether Draper's conduct created that risk. The pertinent questions this Court must decide include whether Draper's conduct in leaving the vehicle accessible to unauthorized use (viz., with the keys in the ignition) was reasonable, whether it created a foreseeable risk, and whether the intervening cause (the use of the vehicle by Wheeler) was normal or abnormal.[2] These questions are ordinarily left for the finder of fact, unless there can be no reasonable

[2]In most negligence actions based on an owner's leaving the keys in an unattended vehicle, plaintiffs could argue negligence *per se* based on 21 *Del. C.* § 4182, which forbids the owner from doing such. However, § 4182 does not apply as the accident at issue did not happen on the "highways" as required under 21 *Del. C.* § 4101. *Carter v. Haley*, Del. Super., C.A. No. 96C-12-124-JOH (Oct. 28, 1998). *Haley* also found a jury question existed on common law negligence grounds by the leaving of an unattended vehicle on private property. It was later

difference of opinion "as to the conclusion to be reached on such questions, should they be determined by the Court as a matter of law." *Vadala v. Henkels & McCoy, Inc.*, Del. Super., 397 A.2d 1381, 1383 (1979).

driven by an unauthorized person who caused an accident.

Discussion

A. Negligence of Defendants

The leading case in Delaware concerning the unauthorized use of a vehicle and the owner's liability is *Vadala v. Henkels & McCoy, Inc.*, *supra*. In *Vadala*, an employee of the defendant broke into the defendant's property and stole a dump truck which had the keys in the ignition. While driving the truck, he was involved in a collision that injured the plaintiff. The Court held that:

> [I]n light of recent empirical data indicating the risk to others involved in leaving ignition keys in unattended vehicles, several jurisdictions have held that a legal duty may exist under circumstances where the defendant should reasonably have anticipated that its conduct would create an unreasonably enhanced danger to one in the position of the injured plaintiff. If such danger is foreseeable, then "a duty arises toward the members of the public using the highways, its breach is negligence, and the injury is the proximate result of the breach, or so a jury should be permitted to find." *Hill v. Yaskin*, N.J. Supr., 380 A.2d 1107, 1110 (1977).

397 A.2d at 1383 (citations omitted). The Court noted that there are several factors a fact-finder might decide increased the foreseeability of risk, including: whether the type of vehicle is such that it would attract intermeddlers who would not have the skill and

knowledge to operate it, whether the type of vehicle would inflict more injury and damage than an ordinary vehicle, and whether certain conditions suggested that additional security

measures should have been undertaken by defendant. *Vadala*, at 1383. Thus, under the holding of *Vadala*, an owner of a misappropriated vehicle is not *per se* negligent, but if there are any facts that increase the likelihood of the vehicle being taken and causing injury, then any potential negligence is a question of fact for the jury.

In *Glass v. Freeman*, Pa. Supr., 240 A.2d 825 (1968), a Pennsylvania case with similar facts as here, recovery was allowed after the seven-year-old son of the defendant operated a tractor left running and unattended by defendant, causing injury to plaintiff. The Pennsylvania Supreme Court considered two of its own cases that reached opposite conclusions regarding the negligence of leaving a vehicle unattended but usable:

> [Defendant] cites *Liney v. Chestnut Motors, Inc.*, 218 A.2d 336 (1966) to support his position that he could not foresee danger to the plaintiff. In *Liney*, we held that a complaint was properly dismissed on preliminary objections in the nature of a demurrer. In that case, an automobile parked with its keys in the ignition was stolen from in front of the defendant's garage which was located in an area where car thefts were rather frequent. The thief later negligently injured the plaintiff. In holding that the complaint failed to state a cause of action, this Court reasoned that "assuming . . . the defendant should have foreseen the likelihood of the theft of the automobile, nothing existed in the present case to put it [i.e., the defendant] on notice that the thief would be an incompetent driver." And we went on to distinguish a similar case, *Anderson v. Bushong Pontiac Co.*, 171 A.2d 771 (1961), in which the opposite result had been reached. We noted that in *Anderson* "several salient facts . . . clearly put the defendant in that case on notice, not only that the automobile was likely to be stolen, but also that it was likely to be stolen . . . by an incompetent driver." For precisely this reason, *Anderson* controls this case.

> Since it was foreseeable that the boy might attempt to drive the tractor, it also was foreseeable that he would drive it negligently. A seven year old hardly can be expected to have the ability or judgment to operate a piece of heavy equipment safely.

Glass, supra., at 828-829. The Court concluded that because defendant knew the boy was in the area, a child is naturally attracted to equipment such as tractors, and a child would not have the skill to operate the tractor, the injury to plaintiff was reasonably foreseeable. This case demonstrates how important the precise facts of a situation are to the question of foreseeability.

The outcome of this present litigation centers on whether Reese's injury was a reasonably foreseeable result of Draper's actions in leaving the jockey truck available to unauthorized use. If the injury was reasonably foreseeable, then Draper was negligent and liable to Reese for his injuries. As demonstrated by the above cases, this Court must determine whether Plaintiffs have shown that there are any factors which increased the foreseeability of danger to Draper's business invitees. Draper argues that none of these factors exist:

> None of those answers in those discovery requests has led to any information that Wheeler was a permissive user of the vehicle at issue; that the vehicle was of a type that could attract potential intermeddlers; that the vehicle was capable of inflicting more serious damage than an ordinary vehicle; or that there was a

history of unauthorized use, thefts, or prior problems with the vehicle (and that Draper was aware of same).

Plaintiffs, on the other hand, argue that there are too many factual disputes that are the usual grist for the jury mill. These questions include whether the jockey truck was more alluring to potential unauthorized users than other vehicles, whether Draper could anticipate its unauthorized use and harm during produce unloading circumstances, whether restricting the authorized users to only two people permits an inference that a driver required special skills to operate the jockey truck, whether the customary practice to leave the jockey truck available during busy operations was reasonable, whether yard supervision was adequate, whether the absence of a policy on the truck's use was reasonable, whether the truck was inherently more dangerous than other vehicles, and why Wheeler was attempting to use the truck. A review of the record raises these points and the Plaintiffs are favored with all reasonable inferences at this stage of the proceedings. *See Sweetman v. Strescon Indus., Inc.*, Del. Super., 389 A.2d 1319, 1324 (1978).

Consequently, I conclude that issues of duty and proximate cause are fact intensive, are simply better left to the jury, and are not susceptible to disposition, as a matter of law, through summary judgment. *DiOssi v. Maroney*, Del. Supr., 548 A.2d 1361, 1368 (1988). Material questions of fact exist whether Draper acted in a reasonably prudent manner by

leaving the vehicle unattended and created an enhanced risk of harm to business visitors like Reese. There is a residual obligation of reasonable care to protect business invitees from the acts of third persons by providing a safe workplace or premises. *Jardel Co., Inc., v. Hughes*, Del. Supr., 523 A.2d 518, 524, 525 (1987). If negligence is established a jury would also have to decide whether the chain of causation was broken by Wheeler's conduct. In other words, was Wheeler's misuse of the jockey truck and ensuing injury to Reese foreseeable? *Sirmans v. Penn*, Del. Supr., 588 A.2d 1103, 1106-8 (1991).

B. Additional Claims Regarding Maintenance

Draper also alleges that Plaintiffs' Response to Draper's Motion for Summary Judgment included an affidavit from Reese and mentioned a request for maintenance records of the truck. Draper views that as an attempt to raise a claim that Draper negligently maintained the truck. Draper requests that the affidavit be stricken as "These claims and allegations are irrelevant to the averments alleged in Plaintiffs' Complaint, since Plaintiffs alleged no specific causes of action that indicate Draper negligently maintained the jockey truck."

Plaintiffs respond that the Complaint contained language that advanced a claim of negligent maintenance of the truck, including:

---

9. At the time and place aforesaid, Defendants Draper Canning and/or Draper King-Cole negligently left a 1993 Ford truck owned by one or both of said Defendants (the "Draper truck") unattended and unsecured next to the receiving office, **failing to adequately secure and keep the Draper truck from being operated in a negligent and/or reckless manner by said Defendants' business invitees.** (Emphasis added).

* * *

19. Defendants . . . , by and through their employees, agents and/or servants, negligently and recklessly failed to safeguard, attend and otherwise take reasonable measures to protect and secure the Draper truck and prevent its negligent and/or reckless operation by visitors and business invitees to their premises, including Defendant Wheeler.

* * *

20. Defendants Draper Canning and/or Draper-King Cole negligently failed to take reasonable measures and precautions and violated their duty to provide reasonably safe premises to and for the Plaintiff and others similarly situated.

Plaintiffs further argue that "pleadings are routinely and liberally granted amendment in the discretion of the Delaware courts, particularly where the factual situation upon which the action depends remains the same. *Mullen v. Alarm Guard of Delmarva, Inc.*, 625 A.2d 258 (1993)."

While Plaintiffs are correct that under Superior Court Civil Rule 15 (a), leave of the court will be given freely when justice so requires, Draper is correct that Plaintiffs have not attempted to amend the pleadings and have simply inserted the issue of negligent maintenance into its brief. Given the Court's ruling, this point is moot.

_____

Conclusion

For the foregoing reasons, this Court DENIES Draper's Motion for Summary Judgment. Should Plaintiffs desire to add a negligent maintenance claim, then a motion under Rule 15 will have to be presented with consideration given to the scheduling order as well.

IT IS SO ORDERED.

Very truly yours,

Richard F. Stokes
Judge

cc. Prothonotary