

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

ROSA PEREZ-MELCHOR, Individually)
and as Personal Representative of JOSE) C.A. No. 04C-05-269 RRC
ALFREDO TOVAR-CASTILLO, and as)
Parent and Natural Guardian of Her Minor)
Children, NORAYDE TOVAR PEREZ and)
ANDRES TOVAR PEREZ; MARTHA)
MARTINEZ, and her husband, ANGEL)
MARTINEZ,)
)
Plaintiffs,)
)
v.)
)
MEHDI C. BALAKHANI;)
Dr. MEHDI BALAKHANI; and)
LYNN BALAKHANI, his wife,)
)
Defendants.)

Submitted: October 7, 2005
Decided: October 17, 2005

Upon Defendants Dr. Mehdi Balakhani's and Lynn Balakhani's Application for
Certification of Interlocutory Appeal.

DENIED.

ORDER DENYING LEAVE TO APPEAL FROM
INTERLOCUTORY ORDER

This 17th day of October, 2005, the Defendants Dr. Mehdi Balakhani and
Lynn Balakhani ("Moving Defendants") having made application pursuant to Rule

42 of the Supreme Court for an order certifying an appeal from the interlocutory order of this Court, dated September 21, 2005, denying Moving Defendants Dr. Mehdi Balakhani's and Lynn Balakhani's "Motion for Dismissal," it appears to the Court that:

1. An interlocutory appeal will be certified by the trial court only where the order satisfies certain threshold requirements. First, the order of the trial court must determine a substantial issue and establish a legal right.¹ Additionally, the order must meet at least one of the following criteria:

- (i) **Same as certified question.** Any of the criteria applicable to proceedings for certification of questions of law set forth in Rule 41; or
- (ii) **Controverted jurisdiction.** The interlocutory order has sustained the controverted jurisdiction of the trial court; or
- (iii) **Substantial issue.** An order of the trial court has reversed or set aside a prior decision of the court, a jury, or an administrative agency from which an appeal was taken to the trial court which had determined a substantial issue and established a legal right,² and a review of the interlocutory order may terminate the litigation, substantially reduce further litigation, or otherwise serve considerations of justice; or
- (iv) **Prior judgment opened.** The interlocutory order has vacated or opened a judgment of the trial court; or
- (v) **Case dispositive issue.** A review of the interlocutory order may terminate the litigation or may otherwise serve considerations of

¹ Supr. Ct. R. 42(b).

² This language, although similar to that of the first two threshold requirements of Rule 42(b) described above, refers only to a prior decision of the court, jury, or administrative agency that determined a substantial issue and established a legal right that is overturned by an order of this Court, which is the subject of the application for certification of an interlocutory appeal. This subsection is not invoked by Moving Defendants nor is it implicated by the procedural history of this action.

justice.³

Further, the criteria in subsection (i) above are to be read in conjunction with Rule 41(b), which lists the following reasons for accepting certification of questions of law:

(i) **Original question of law.** The question of law is of first instance in this State;[or]

(ii) **Conflicting decision.** The decisions of the trial courts are conflicting upon the question of law;[or]

(iii) **Unsettled question.** The question of law relates to the constitutionality, construction or application of a statute of this State which has not been, but should be, settled by the Court.⁴

2. The entirety of Moving Defendant's proffered legal basis for certification of this interlocutory appeal is that

[u]nder Supr. Ct. R. 42(b), the criteria to be applied for determining certification of an interlocutory appeal include an 'original question of law' when the 'question of law is of first instance in this State,' (citing to Supr. Ct. R. 41(b)(i)) and this criterion is applicable to the Court's reasoning for denying Dr. & Mrs. Balakhani's motion for dismissal in this matter.⁵

Further, Moving Defendants contend that this Court's Memorandum Opinion, dated September 21, 2005 ("Order" or "Opinion"), determined a substantial issue by finding that an action for negligent entrustment may go forward against Moving

³ Supr. Ct. R. 42(b)(i)-(v).

⁴ Supr. Ct. R. 41(b).

⁵ Defs. Application ¶ 10.

Defendants and that the order established the legal rights of the Plaintiffs to this action by holding that the issue of whether the furnishing of funds by the Moving Defendants to their son for the purchase of an automobile could have foreseeably led to Plaintiffs' harm is an issue for the jury. In response, Plaintiffs acknowledge that the order determined a substantial issue and established a legal right. Thus, the first two requirements for certification of an interlocutory appeal – determining a substantial issue and establishing a legal right – are met.

3. However, Moving Defendants fail to show that the order additionally satisfies any one of the criteria enumerated in Rule 42(b)(i)-(v).

4. Moving Defendants attempt to distinguish two Delaware cases from the case at bar to show that this Court's order "articulated a new rule under Delaware law."⁶ Moving Defendants argue that this Order expands potential liability beyond that which has been previously recognized in Delaware by *Bennett* and *Sanchez-Caza*.⁷ According to the Moving Defendants, liability can only

⁶ Defs. Application ¶ 8 (citing *Bennet v. Foulk* 1979 WL 185840 (Del. Super.) (denying defendant's motion for summary judgment in a wrongful death action because Delaware recognizes a cause of action for negligent entrustment against a donor who had entrusted an automobile to a known incompetent driver) and *Sanchez-Caza v. Estate of Susan Gordon Lloyd Whetstone* 2005 WL 1953179 (Del. Super.) (denying defendant-father's motion for summary judgment in a wrongful death case as it was a question of fact whether the father's entrustment of his automobile to his daughter was negligent based on his level of knowledge of his daughter's drug and alcohol abuse and stating that such an issue "should be left to the jury to decide...")).

⁷ Defs. Application ¶ 9.

potentially attach in a case such as the one at bar when a parent directly transfers ownership of the automobile to the adult child, and not when (as here) the parent gives the adult child the money to purchase the automobile.⁸ Moving Defendants contend that prior Delaware case law limited a plaintiff's right to recover damages for negligent conduct of another to those defendants who "possessed, or at one time possessed, the right to control the injury-causing instrumentality."⁹ The concept of "control" of the dangerous instrumentality at the time of the negligent entrustment was key to Moving Defendants' legal position, a concept rejected by this Court.

The arguments set forth by Moving Defendants are unavailing. The question of negligent entrustment as applied to donors of automobiles is not one of first instance in Delaware; in fact, the applicable standard of Restatement (Second) § 390 was expressly adopted in *Bennett*.¹⁰ This Court's order followed the holding of *Bennett*.

Furthermore, the critical analysis of negligent entrustment liability does not involve a question of law, but a question of fact. As noted by Plaintiffs, at least two Delaware decisions have held that the negligent entrustment of a vehicle to an

⁸ Defs. Application ¶ 4.

⁹ *Id.*

adult child is a fact based issue.¹¹ The key issue in the present negligent entrustment action is whether the Plaintiffs' harm was foreseeable in light of the Defendants' knowledge of any unreasonable risk posed by the entrustment of the vehicle. That is a purely factual analysis and not appropriate for certification as an interlocutory appeal.

5. Because Moving Defendants do not contend that the interlocutory order satisfied any of the other criteria set forth in Rule 42(b)(i)-(v), it is unnecessary for this Court to analyze the remaining criteria.

For the foregoing reasons, Moving Defendants Dr. Mehdi Balakhani's and Lynn Balakhani's Application for Certification of Interlocutory Appeal is **DENIED.**

IT IS SO ORDERED.

cc: Prothonotary

¹⁰ 1979 WL 185840 at *1.

¹¹ Pls. Resp. at 3 (citing *Niemann v. Rogers*, 802 F.Supp. 1154 (Del. 1992)(stating that the inquiry into whether the Defendant-parents were negligent in entrusting their automobile to their adult son is fact based, thus precluding a grant of summary judgment in favor of the Defendant-parents); *Sanchez-Caza*, 2005 WL 1953179, *2).