IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

ANDREA L. MOORE, a minor, by her next friend, JUDITH A. MOORE, and ESTATE OF EDWARD V. MURPHY, by its personal representative, PATRICIA BOESENBERG,	:	C.A. No. 05C-03-029 WLW
Plaintiffs,	:	
v.	:	
GARY E. EMEIGH and TOD H EMEIGH,	:	
Defendants.	:	

Submitted: July 26, 2006
Decided: November 1, 2006

OPINION AND ORDER

Upon Defendants' Motion for Summary Judgment. Granted.

William D. Fletcher, Jr., Esquire of Schmittinger and Rodriguez, P.A., Dover, Delaware; attorneys for the Plaintiffs.

James F. Harker, Esquire of Herlihy Harker & Karvanaugh, Wilmington, Delaware and J. Bruce McKissock, Esquire (of counsel), McKissock & Hoffman, P.C., Philadelphia, Pennsylvania; attorneys for the Defendants.

WITHAM, R.J.

Defendants, Gary E. Emeigh ("G. Emeigh") and Tod H. Emeigh ("T. Emeigh"), filed a Motion for Summary Judgment arguing that the Workers Compensation Act bars Plaintiffs' claim against G. Emeigh, and that T. Emeigh cannot be held vicariously liable. Plaintiffs[1] oppose the Defendants' Motion for Summary Judgment arguing that G. Emeigh's actions in piloting the plane were not within the course and scope of the Defendant's employment with the Delaware News Journal. Further, Plaintiffs argue that T. Emeigh is liable for his failure to inspect the airplane prior to letting G. Emeigh pilot the plane, in order to make certain it was airworthy.

In Defendants' response to Plaintiffs' opposition, they reiterate their argument that the Workers Compensation Act bars Plaintiffs' claim, because G. Emeigh was within the scope of his employment at the time of the accident. Defendants' response further points out that vicarious liability is the only liability allegation set forth in the Complaint against T. Emeigh , and the Plaintiffs cannot now assert new facts and legal theories in their Opposition Motion, not already alleged in the Complaint. Defendants also argue that even if Plaintiffs' new allegations concerning T. Emeigh are considered, the claims would be barred by the statute of limitations, T. Emeigh had no notice of any problems with the airplane and the Defendant owed no duty to Edward Murphy ("the Decedent" or "Mr. Murphy").

The salient facts are as follows: This cause of action arises from the death of Mr. Murphy in an accident involving a small aircraft owned by T. Emeigh and piloted

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[1]Plaintiffs are Andrea L. Moore, a minor, By Her Next Friend, Judith A. Moore, and the Estate of Edward V. Murphy, by its Personal Representative, Patricia Boesenberg.

by G. Emeigh. As of the date of the accident, Mr. Murphy was employed by the Delaware News Journal as a sports writer, and G. Emeigh was employed by the News Journal as a photographer. The two were assigned to cover the Delaware State University men's and women's basketball teams, in a tournament in Richmond, VA, during the week of March 10, 2003. On March 12, 2003, the two drove to Richmond for the first round games of the tournament and returned to Delaware following the conclusion of the games. On their return trip, G. Emeigh and Mr. Murphy discussed flying to Virginia for the next round of games, due to the lengthy return trip from Richmond. Mr. Murphy and G. Emeigh had covered over 100 sporting events together, but they had never flown to any of those events.

G. Emeigh asked his cousin, T. Emeigh, if he could borrow his plane to commute to Richmond for the second round games, and T. Emeigh consented. On March 14, 2003, both News Journal employees flew to Richmond on T. Emeigh's plane, which was piloted by G. Emeigh. Following the games, G. Emeigh conducted a pre-flight inspection of the plane, entered the plane and started the plane's engine. G. Emeigh noticed a wheel chock in front of the left wheel of the airplane, after both he and Mr. Murphy were seated in the plane. G. Emeigh and Mr. Murphy agreed that Mr. Murphy would remove the chock. Plaintiffs claim that G. Emeigh wanted Mr. Murphy to remove the chock, because the Defendant thought the plane might not start again, if the engine were shut down. Also, G. Emeigh did not want Mr. Murphy alone in the plane. Defendants claim that G. Emeigh instructed Mr. Murphy to go around the back of the airplane to get the chock. Mr. Murphy apparently instead

chose to walk towards the front of the airplane to remove the chock, and he tragically walked or fell into the plane's spinning propeller. Mr. Murphy died as a result.

For the reasons set forth below, Defendants' Motion for Summary Judgment is *granted*.

Standard of Review

Summary Judgment should be rendered if the record shows that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.[2] The facts must be viewed in the light most favorable to the non-moving party.[3] Summary judgment may not be granted if the record indicates that a material fact is in dispute, or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of the law to the circumstances.[4] However, when the facts permit a reasonable person to draw but one inference, the question becomes one for a decision as a matter of law.[5] When a moving party through affidavits or other admissible evidence shows that there is no genuine issue as to any material fact, the burden shifts to the non-moving party to demonstrate that there are material issues of fact.[6]

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[2]Superior Court Civil Rule 56(c).

[3]*Guy v. Judicial Nominating Comm'n*, 649 A.2d 777, 780 (Del. Super. 1995).

[4]*Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962).

[5]*Wooten v. Kiger*, 226 A.2d 238, 239 (Del. 1967).

[6]*Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).

Discussion

The Worker's compensation statute provides the exclusive remedy for claimants for work-related injuries.[7] Title 19 *Del. C.* §2304 (Compensation as Exclusive Remedy) provides:

> Every employer and employee, adult and minor, except as expressly excluded in this chapter, shall be bound by this chapter respectively to pay and to accept compensation for personal injury or death by accident arising out of and in the course of employment, regardless of the question of negligence and to the exclusion of all other rights and remedies.[8]

Workers' Compensation guarantees employees compensation for work-related injuries without regard to fault and relieves the expense and uncertainty of civil litigation.[9] Since its inception, Workers' Compensation has been compulsory and has covered every employer and employee.[10] An employee's action against an employer for work related injuries based on any degree of negligence, from slight to gross, are within the exclusive coverage of Workers' Compensation Law and may not be maintained under common law.[11]

An employee may recover, under §2304, in a common law tort action from a

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[7] *Showell v. Langston*, 2003 Del. Super. LEXIS 95, *6.
[8] 19 *Del. C.* §2304 (2006).

[9] *Murdoch v. Camp Arrowhead Church Camp, et. al.*, 2003 Del. Super. LEXIS 246, *9.

[10] *Id.*

[11] *Showell v. Langston*, 2003 Del. Super. LEXIS 95, *8.

third person whose negligence injures the employee.[12] On the other hand, a co-employee is immune from suit, when employed by the same employer and acting within the course of employment at the time of the injury.[13] Generally, an employee acts within the course of employment when the act is in furtherance of the employer's business.[14]

For an employee to receive Workers' Compensation benefits, a causal relationship between the injury and the employment must exist.[15] There are two prongs that must be satisfied for an injury to be compensable under Workers' Compensation law.[16] The injury must occur "in the course of employment" and "arise out of the employment."[17] In order for an injury to arise "in the course of employment," the offending act must arise from those things that an employee may reasonably do or be expected to do within a time during which he is employed, and at a place where he may reasonably be during that time.[18] An injury arises "out of employment" if the injury relates to the nature, conditions, obligations or incidents

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[12] *Id*. at *10.

[13] *Id*.

[14] *Id*.

[15] *Murdoch*, 2003 Del. Super. LEXIS 246 at *11.

[16] *Id*.

[17] *Id*.

[18] *Id*.

of the employment, or has a reasonable relation to it.[19]

Under the "going and coming" rule, an employee may not recover for injuries occurring in the course of an employee's regular travel to and from work.[20] When the special errand exception applies, an employee may still be entitled to compensation for such injuries.[21] The exception applies when an employee with identifiable time and space limitations on his or her employment makes a journey under circumstances of special inconvenience, hazard or urgency.[22] The key factors to consider in making this determination are whether the travel is outside the employee's normal routine or involves an increased risk.[23] In contrast, travel is likely outside of this exception when the employee is paid an identifiable amount as compensation for time spent traveling to and from work.[24] The United States District Court, District of Delaware, recognized the need for a flexible approach when dealing with an employee who serves his employer's interests at various times and various places, since the "going and coming" rule is geared to a usual place of work in normal working hours and is intended to limit an employer's liability for his employee's acts to a specific place

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[19]*Id*. at *12.

[20]*Showell*, 2003 Del. Super. LEXIS 95 at *8 - *9.

[21]*Id*. at *9.

[22]*Id*.
[23]*Id*.

[24]*Id*.

during specific hours.[25] In *Fitzpatrick*, the District Court articulated that Sergeant Davis, the tortfeasor, was regularly required to travel to Maryland, Delaware and Virginia, sometimes for overnight or weekend trips, in his capacity as a medical advisor for the National Guard and the Army Reserves.[26] In finding Sergeant Davis acted within the scope of employment while on a weekend trip, the Court further articulated that it was those type of situations that warrant a broad and flexible approach in defining the scope of employment.[27]

Service to the employer must, at least, be a concurrent cause of the injury.[28] Where a private purpose and service to the employer coexist, the facts of the case must permit the inference that the journey would have been made even though the private purpose had been abandoned.[29] The test is whether it is the employment or something else that compels the journey and exposes the traveler to its risk.[30] If the service creates the necessity for the travel, the employee is in the course and scope of his employment, even though, at the same time, he is serving some purpose of his

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[25] *Fitzpatrick v. United States of America*, 754 F.Supp. 1023, 1035 (D. Del. 1991).

[26] *Id.*

[27] *Id.*

[28] *Children's Bureau of Delaware v. Nissen*, 29 A.2d 603, 607 (Del. Super. 1942).

[29] *Id.*

[30] *Id.*

own.[31] On the other hand, if the service has not created the necessity for the journey, if it would not have been made at all except for the private purpose, and would have been cancelled upon its abandonment, the travel and the risk are personal.[32]

I. *Plaintiffs are barred by Workman's Compensation Law from bringing a tort action against Defendant G. Emeigh.*

Plaintiffs' oppose G. Emeigh's Motion for Summary Judgment arguing that G. Emeigh was outside the scope of his employment as a photographer for the News Journal, when he piloted an aircraft to and from Richmond, VA. Plaintiffs take a narrow view concerning G. Emeigh's scope of employment. Further, Plaintiffs claim that the issue of agency should be left to the trier of fact concerning the question of agency. In support of this position, Plaintiffs point to *Fisher*, where the Delaware Supreme Court overturned this Court's grant of summary judgment because the issue of agency should have been left to the trier of fact.[33] In *Fisher*, the Supreme Court articulated that when the determination of whether a worker was an agent or a non-agent independent contractor is critical to the disposition of the case and is dependent upon a reconciliation of the facts, summary judgment must be denied.[34] In the case *sub judice*, G. Emeigh was an agent of the News Journal (for reasons set forth below),

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[31] *Id.*

[32] *Id.*

[33] *Fisher v. Townsends, Inc.*, 695 A.2d 53, 61 (Del. Supr. 1997).

[34] *Id.*

and it is not dependent upon the reconciliation of facts. Consequently, it is not imperative that the issue be left to the trier of fact.

Defendants take a broader view concerning the scope of employment issue arguing that G. Emeigh was within the scope of employment while on his trip to Richmond to cover a basketball tournament for the News Journal. Defendants argue that Plaintiffs are collaterally estopped from asserting a tort claim against G. Emeigh, as a co-employee, for an incident which occurred within the scope of employment. Further, Defendants point out that Plaintiffs have already recovered under the Workman's Compensation Act for the death of Mr. Murphy, and Plaintiffs expressly admitted that Mr. Murphy was within the scope of employment when the tragic accident occurred.[35]

One is immune from suit as a co-employee, when employed by the same employer and acting within the course of employment at the time of the injury.[36] G. Emeigh and Mr. Murphy were both employed by the Delaware News Journal and attended the basketball tournament in order to report on the games for the News Journal. Consequently, G. Emeigh was a co-employee of the Decedent at the time of the injury. The issue becomes whether G. Emeigh was acting within the course of employment at the time of the injury.

Plaintiffs received Workers Compensation benefits for the accident that took Mr. Murphy's life. In the Workers Compensation Settlement Agreement, Plaintiffs

[35]Plaintiffs were awarded $57,513.17 in Workers Compensation due to Mr. Murphy's fatal accident.

[36]*Showell*, 2003 Del. Super. LEXIS 95 at *10.

admitted that the Decedent sustained personal injury "by an accident arising out of and in the course and scope of his employment with The News Journal in whose service the said Edward Murphy was employed at the time of said injury." Plaintiffs admit that Mr. Murphy was within the course and scope of employment at the time he tragically fell into the airplane's propeller, and they have already recovered under the Workers Compensation Act for the incident. Plaintiffs now argue that G. Emeigh, who piloted the plane, was somehow outside of the scope and course of employment, even though the passenger, Mr. Murphy, was within the scope. Mr. Murphy was a passenger on a plane owned by T. Emeigh and piloted by G. Emeigh. The two Co-employees flew to Richmond together, without incident, so they could report on the tournament in their capacity as employees for the News Journal. At the time of the accident, G. Emeigh and the Decedent were attempting to return to Delaware following the conclusion of the basketball tournament. The only difference in the conduct of G. Emeigh and Mr. Murphy was that G. Emeigh piloted the plane, and the Decedent was a passenger in the plane. It is illogical to find G. Emeigh outside the scope of employment, as compared to Mr. Murphy, when the only distinction in the Co-employees' conduct was that G. Emeigh piloted the plane instead of flying as a passenger in the plane. If, as Plaintiffs admitted, Mr. Murphy was within the scope of employment while the incident resulting in his death occurred, then G. Emeigh must also have been within the scope of employment. Therefore, G. Emeigh is immune from suit as a co-employee, because he was in the same employ as Mr. Murphy, and he was acting within the scope of employment at the time of the accident.

Even if this Court were to find that it is unclear whether the accident arose out of or occurred within the course of employment, summary judgment in favor of G. Emeigh is still appropriate.[37] The reasoning employed by this Court, in *Showell*, is analogous to the situation at hand. In *Showell*, Mr. Showell was employed by Mountaire Farms, Inc. as a chicken catcher.[38] He reported to work on the morning of January 18, 2000 to pick up his orders for the day.[39] Showell left the plant in a truck driven by Briddell and owned by Langston, and both Briddell and Langston were agents of Mountaire.[40] Showell was seated in the rear (bed) of the pickup truck, and Briddell drove to a gas station.[41] Briddell got a propane tank filled at the station and put it in the rear of the cab, next to Showell.[42] There was a propane heating unit in the rear of the cab, which had been leaking, and Briddell and Langston were aware that the leaky unit was in the bed of the truck.[43] An explosion occurred injuring Showell, and he filed a claim for Workers' Compensation.[44] Mountaire initially

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[37]See *Showell*, 2003 Del. Super. LEXIS 95 at *11.

[38]*Id*. at *1.

[39]*Id*

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[40]*Id*.

[41]*Id*.

[42]*Id*. at *2.

[43]*Id*.

[44]*Id*.

denied benefits on the grounds that Showell was not within the course and scope of employment at the time of the incident, and Showell requested a hearing on the issue with the Industrial Accident Board ("Board").[45] In the meantime, Showell filed a tort suit in this Court seeking recovery for his injuries arising out of the accident.[46] Mountaire later notified the Board that it was withdrawing its course and scope of employment defense.[47]

The issue before the *Showell* Court was whether Summary Judgement should be granted in favor of Defendants Mountaire, Langston and Briddell on the grounds that Plaintiff's claims were barred by the exclusivity provision of 19 *Del. C.* §2304.[48] In granting Summary Judgement in favor of the Defendants, this Court pointed out that Mountaire was the employer of the Plaintiff, Briddell and Langston at the time of the incident.[49] This Court articulated that the injury must both arise out of and occur within the course and scope of employment, and it was unclear whether or not both of the prongs had been satisfied in Mr. Showell's case.[50] Even though it remained unclear, this Court stated that it was unnecessary for the Court to resolve

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[45] *Id.* at *3.

[46] *Id.*

[47] *Id.*

[48] *Id.* at *4.

[49] *Id.* at * 11.

[50] *Id.*

the issue, as Mountaire had conceded that the accident occurred within the course and scope of employment (after Mr. Showell had already filed for Workers' Compensation for injuries arising out of and in the course of employment).[51] Thus, the exclusivity provision of §2304 barred Showell's common law suit for negligence against Mountaire.[52] The Court reasoned that: "it follows that Langston and Briddell, as employees of Mountaire were also acting within the course and scope of their employment, at the time of Showell's incident."[53] Accordingly, this Court also barred Showell from maintaining an action against his co-employees, Langston and Briddell, since they were acting within the course and scope of employment at the time of the accident.[54]

As discussed above, Plaintiffs conceded that Mr. Murphy was within the course and scope of employment at the time of the accident, when they filed for and received Workers' Compensation. G. Emeigh and Mr. Murphy were both employed by the News Journal at the time of the incident, much like Showell, Langston and Briddell were all in the employ of Mountaire. In *Showell*, this Court reasoned that Langston and Briddell were within the scope of employment due to the fact that Mountaire had agreed that Showell was within the scope, after he had filed for Workers Compensation. The only distinction in the actions of Langston and Briddell as

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[51] *Id.*

[52] *Id.* at *12.

[53] *Id.*

[54] *Id.*

compared to Showell was that Langston owned the truck, Briddell drove the truck and Showell was a passenger in the truck. In the case *sub judice*, the distinction between G. Emeigh and Mr. Murphy is analogous to the *Showell* case, in that Mr. Murphy was a passenger in the plane, while G. Emeigh piloted the plane. Therefore, it logically follows that G. Emeigh was also within the scope and course of employment, since both the News Journal and the Plaintiffs previously agreed that Mr. Murphy was within the course and scope of employment at the time of the accident. Consequently, the exclusivity provision would bar Plaintiffs tort suit against his Co-employee, as it did in *Showell*, and Summary Judgment is appropriate.

Viewing the facts in a light most favorable to the Plaintiffs, G. Emeigh's Motion for Summary Judgment should be granted. G. Emeigh, like Mr. Murphy, was acting within the course and scope of employment. Therefore, the exclusivity provision (§2304) bars Plaintiffs' tort action against Mr. Murphy's co-employee, G. Emeigh, and Plaintiffs only remedy is recovery under the Workers Compensation Act. Plaintiffs have already recovered $57,513.17 under the Workers Compensation Act, as a result of the incident. Even if the Court were to determine that it remained unclear whether G. Emeigh was within the course and scope of employment, Summary Judgment is still appropriate based on the reasoning this Court utilized in *Showell*.

For the reasons stated above, the Defendants' Motion for Summary Judgment with respect to G. Emeigh is *granted.*

II. *T. Emeigh is not vicariously liable for the alleged negligence of G.*

Emeigh, and the new independent claim proffered against T. Emeigh is barred by the Statute of Limitations.

T. Emeigh owned the airplane piloted by G. Emeigh, his cousin. T. Emeigh allowed his cousin to borrow the plane, so that G. Emeigh and Mr. Murphy could fly to Richmond, VA in order to attend a basketball tournament. Plaintiffs claim that T. Emeigh is vicariously liable for the death of Mr. Murphy due to G. Emeigh's negligent operation of the airplane. Further, Plaintiffs argue, in their Opposition to Defendants' Summary Judgment Motion, that T. Emeigh was negligent in failing to inspect the plane before allowing his cousin to operate the airplane. Defendants seek summary judgment with respect to T. Emeigh arguing that the Defendant is not vicariously liable for G. Emeigh's alleged negligence. Further, Defendants argue that Plaintiffs' new independent claim asserted against T. Emeigh is barred by the Statute of Limitations, the Defendant owed no duty to Mr. Murphy and T. Emeigh had no notice that the plane had any defects.[55]

A party injured by the driver of another's vehicle may recover from the owner under a theory of vicarious liability.[56] Thus, an owner is liable for the negligent operation of the vehicle by his agent or servant who at the time of the accident was engaged in the master's business or pleasure, with the master's knowledge and

[55]Defendants' second and third contentions in support of their Motion for Summary Judgment with respect to the new independent claim against T. Emeigh will not be addressed due to the Court's finding concerning Defendants' Statute of Limitations claim.

[56]*Lang v. Morant*, 867 A.2d 182, 185 (Del. 2005).

direction.[57] No principal-agent relationship exists, however where an owner merely permits the other to use the vehicle for the latter's own purposes.[58] The requisite indicia of agency in the automobile-negligence context are ownership and control.[59] In general, an agency is the fiduciary relation which results from the manifestation of consent from one person to another that the other shall act on his behalf and subject to his control and consent by the other so to act.[60]

Delaware law is clear with respect to what is required in order to hold the owner of an automobile vicariously liable for the acts of another who operated the owner's vehicle. The legal principles embodying the theory of vicarious liability in the context of an owner and operator of an automobile can logically apply to the airplane situation in the case *sub judice*.

Therefore, a prerequisite to finding T. Emeigh vicariously liable for G. Emeigh's alleged negligent conduct is the existence of an agency relationship between the Co-Defendants. It is clear that G. Emeigh was in no way acting on behalf of or subject to the control of T. Emeigh. The purpose of the flight was, at the very least, to serve the interest of G. Emeigh and Mr. Murphy. T. Emeigh merely permitted use of his airplane, because G. Emeigh and Mr. Murphy wanted a quicker means of transportation to get to Richmond. Therefore, T. Emeigh cannot be held

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[57] *Id.* at 185.

[58] *Id.* at 186.

[59] *Lang,* 867 A.2d at 186, *citing Finkbiner*, 532 A.2d at 615.

[60] *Cox,* 1994 Del. Super LEXIS 351.

vicariously liable for the alleged negligent conduct of G. Emeigh.

In Plaintiffs' Response to Defendants' Motion for Summary Judgment, Plaintiffs claim that T. Emeigh is primarily liable due to his failure to inspect the airplane before letting G. Emeigh pilot it, in order to make certain the plane was airworthy. Specifically, Plaintiffs claim that G. Emeigh asked the Decedent to exit the plane and remove the chock from underneath the left wheel partly because the Defendant was concerned that the plane may have trouble restarting, if the engine were shut down. G. Emeigh's engine concerns arose from his belief that the battery may not have been acting properly. Plaintiffs argue that if T. Emeigh had inspected the plane thoroughly and discovered the alleged defective battery, he could have prevented G. Emeigh's concern about the battery. Consequently, Mr. Murphy's death may have been prevented.

Defendants contend that Plaintiffs should be barred from arguing that T. Emeigh was primarily negligent due to his alleged failure to inspect the plane prior to its use. Defendants argue that Plaintiffs are improperly attempting to argue a theory which could not be added in a properly amended complaint, because the two year statute of limitations for wrongful death and personal injuries has run, pursuant to 10 Del. C. §§ 8107, 8119.[61] The theory hinges on whether the new primary negligence claim would relate back to the Original Complaint, which contained the vicarious liability claim against T. Emeigh.

Count II of Plaintiffs' Complaint, dated March 11, 2005, makes a claim against

[61]Del. Code. Ann. tit. 10, §§ 8107, 8119 (2006).

T. Emeigh on a theory of vicarious liability, due to the alleged negligence of G. Emeigh, which occurred on March 14, 2003. The first time Plaintiffs argued that T. Emeigh was primarily negligent for his failure to inspect the plane is in their Response to Defendants' Motion for Summary Judgment, dated April 11, 2006. April 11, 2006 is well beyond the statute of limitations period for a claim of this type. Therefore, it is necessary to determine if the claim can relate back to the Original Complaint.

Superior Court Civil Rule 15(c) allows a claim asserted in the amended pleading to relate back to the original pleading when it arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading.[62] In this instance, the only claim against T. Emeigh in the Original Complaint was based on a vicarious liability theory. The original claim against T. Emeigh states that the Defendant was liable to Plaintiffs merely because of G. Emeigh's alleged negligence. There is no factual basis in the Original Complaint articulated by Plaintiffs in support of a primary liability claim against T. Emiegh. Plaintiffs are now attempting to allege that T. Emeigh is primarily liable because of his own negligence in failing to inspect the plane prior to its use. The new claim is an independent theory of liability concerning T. Emeigh, which differs from the vicarious theory of liability asserted against the Defendant in the Original Complaint.

[62]Superior Court Civil Rule 15(c) states in relevant part: Relation back of amendments. An amendment of a pleading relates back to the date of the original pleading when: (1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading.

The new independent claim against T. Emeigh does not relate back to the original pleading. Therefore, the new Claim against T. Emeigh will not be heard, because the Statute of Limitations has run.

Based on the reasons set forth above, the Defendants' Motion for Summary Judgment concerning Defendant T. Emeigh is *granted*.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.
R.J.

WLW/dmh
oc: Prothonotary
xc: Order Distribution