A. Defendants' motion to strike No. 3 and motions for more specific pleadings Nos. 1 and 4, are dismissed. All other preliminary objections are sustained.

B. Plaintiff's motions for sanctions and to disqualify defense counsel are dismissed.

Plaintiff is granted leave to file an amended complaint within twenty (20) days of date hereof.

Exceptions are granted Plaintiff and Defendants.

COUNTY OF FRANKLIN V. L.B.T. CORPORATION, C.P., Franklin County Branch, No. 219, Civil, 1980

Trespass - Non-suit - Negligence - Forseeability harm.

1. A non-suit on the question of liability is granted when plaintiffs evidence, together with all reasonable inferences of fact arising therefrom, viewed in a light most favorable to the plaintiff is insufficient to make out a prima facie case of negligence.

2. The controlling factor in a negligence case involving theft of a vehicle is whether the action of the thief could have been forseen by the defendant.

3. Where defendant had not left keys to a truck in the ignition and the area where the truck was parked had not experienced a number of thefts, defendant could not be expected to forsee the actions of a thief.

James Flower, Jr., Esquire, Attorney for County of Franklin

Jeffrey Rettig, Esquire, Attorney for Chambersburg Area Jaycees

Walter Swartzkopf, Jr., Esquire, Attorney for L.B.T. Corporation d/b/a Hoxie Brothers Circus

OPINION AND ORDER

EPPINGER, P.J., March 4, 1983:

In July of 1978 the Chambersburg Area Jaycees sponsored the Hoxie Bros. Circus. The Jaycees borrowed a dump truck from a local contractor and delivered it on July 14, 1978. Early in the morning of July 15, 1978, William Anderson, a former employee of the Circus, took the truck without permission from the Circus grounds and led the Chambersburg police on a high speed chase which ended when the dump truck struck the corner of the Farmers and Merchants Trust Company and the Franklin County Courthouse. William Anderson died as a result of the injuries sustained in the accident.

The case went to the jury on the question of whether the Defendants were negligent for violation of a statute. The Court entered a verdict for the Defendants based on the jury's answers to the interrogatories. The Court granted a nonsuit on the issue of whether Defendants were liable under general negligence theories, finding that harm to third parties as a result of the theft was not forseeable. The Plaintiffs filed a motion to remove the nonsuit.

The Court may properly refuse to allow the jury to consider the liability question and grant a nonsuit only when the Plaintiff's evidence, together with all reasonable inferences of fact arising therefrom, viewed in a light most favorable to the Plaintiff, is insufficient to make out a prima facie case of negligence. *Quirk v. Girard Trust Bank,* 98 Montg. 17 (1974).

Plaintiffs allege that William Anderson was intoxicated at the time of the accident to such a degree as to have impaired his driving ability, that he was an irresponsible employee, and that after he was fired the circus employees did not follow up to be sure that he had collected his belongings and left. These factual allegations are not supported by the evidence. A prima facie case was not made out by the Plaintiffs and accordingly the trial court did not err by refusing to let the question go to the jury.

The Court properly granted the nonsuit. Plaintiffs rely upon *Anderson v. Bushong Pontiac Co.,* 404 Pa. 382, 171 A.2d 771 (1961), citing it as the leading case in the area of liability where keys have been left in the ignition. That case is not controlling and can be distinguished from the case at bar in that the jury found that the keys were not left in the ignition.

The controlling factor for determining negligence is whether the actions could have been forseen by the Defendant. The Court in *Liney v. Chestnut Motors, Inc.,* 421 Pa. 26, 218 A.2d 336 (1966), held that although the automobile had been left in the street with

the keys in the ignition in an area that had experienced a number of automobile thefts, the Defendant was not negligent because he could not have forseen the thief's actions. The Supreme Court distinguished the *Liney* and *Anderson* cases upon the grounds of forseeability. In *Anderson,* the Defendants could have forseen the fact that the car might be stolen by an incompetent and careless driver because juveniles were known to play in the area and only two days prior to the incident, keys had been stolen from one of the cars and no precautions had been taken to remove that car from the open and unattended lot. The facts in the case at bar are closer to those in *Liney,* and even then, they are not as severe. Here, the keys had not been left in the ignition and the area was not one that had experienced a number of thefts. The actions of William Anderson could not have been forseen by the Circus.

ORDER OF COURT

March 4, 1983, Plaintiff's motion to remove the nonsuit is dismissed.

FITTRY V. HOUPT, C.P. Franklin County Branch, No. A.D. 1982 - 174

Declaratory Judgment - Agreement of Sale - Mortgage Contingency - Return of Down payment - Time of Essence

1. The waiver of a contractual right must be clear, unequivocal and the decisive act of a party.

2. A provision declaring a contract null and void if mortgage arrangements are not completed by a certain date is a sufficient expression of intent of the parties to make the specified date the essence of the agreement.

3. A purchaser has the right to seek his own mortgage and cannot be compelled to accept the type of financing which the vendor happens to think reasonable.

Forest N. Myers, Esquire, Attorney for Plaintiff

Thomas B. Steiger, Esquire, Attorney for Defendant