

**THE FIRST JUDICIAL DISTRICT OF PENNSYLVANIA, PHILADELPHIA COUNTY
IN THE COURT OF COMMON PLEAS**

<hr/>	:	TRIAL DIVISION - CIVIL
	:	
v.	:	MAY TERM, 2002
George L. Kelley, Esquire, Leonard, Tillery &	:	No. 2412
Sciolla, LLP and Wilk & Brand, P.C.	:	
	:	Superior Court Docket Nos.
	:	1625 EDA 2006
	:	1626 EDA 2006
	:	1551 EDA 2006
	:	1595 EDA 2006
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O P I N I O N

I. PROCEDURAL HISTORY

Plaintiffs, William Brown and Violet Brown (hereinafter the Browns) appeal from the Order dated February 7, 2006 denying the Browns' Motion for Reconsideration.

II. FACTUAL BACKGROUND

Prior to the incidents which became the basis for this lawsuit, the Browns and George Kelley both owned apartment buildings adjacent to one another located at the 2200 block of Bryn Mawr Avenue, Philadelphia. Each property contained apartment units and had a parking area for its tenants. (Complaint ¶9-12). The tenants of both properties, with the consent of the owners of both properties, parked in parking spots located behind the others' building. The Browns own 2252 Bryn Mawr Avenue, while Kelley owned¹ 2254 Bryn Mawr Avenue. The area directly behind the Browns' property was also used by tenants of the Kelley property going back into the 1920's. Their properties are separated by a common driveway running east and west between the buildings and that a 14 foot wide common driveway runs along the rear, or westerly border, of the two adjoining properties. (Kelley v. Brown Complaint, pg. 3). To the west

¹ Mr. Kelley was no longer the owner of 2254 Bryn Mawr Avenue effective December 1, 2000. (N.T. pg. 64).

of the rear common driveway, and outside of the property which is specifically deeded to the Browns and Kelley, there is a gravel-covered 22 foot wide area that has been used for many years as a common parking area. (Kelley v. Brown Complaint, pg. 4). The Complaint specifically refers to deeds and maps of the relevant area. While these deeds and maps do not make specific reference to the area described as an undeeded common parking area, the maps do disclose the common driveway running along the rear of the property owned by the Browns and Kelley. (Motion for Summary Judgment of LT&S pg. 4). In fact, it would not be anticipated that the maps of the properties in question would necessarily disclose the common parking area because that area was outside the deeded property of both parties. (Id.). The deeds describe the right of Kelley and the Browns to “the free and common use, right, liberty and privilege of the aforesaid driveways as and for driveways and passages at all times hereafter, forever in common with owners, tenants and occupiers of the other lots of ground bounding thereon and entitled to the use thereof.” (Kelley v. Brown Complaint, Exhibit A). The deeds and maps provide a detailed description of the basis upon which Kelley asserted his right to the common use of the common parking area outside the deed property of either party. (Motion for Summary Judgment of LT&S pg. 5).

The Browns would later dispute the fact that there was a “common parking area” outside of the deeded property, insisting rather that the “gravel parking area” was actually situated within the deeded boundaries of each adjacent landowner and was restricted by the owners and tenants of each of the respective properties. (Id.) This dispute would not arise until an incident occurred wherein the owner of a certain portion of the property where the accident occurred became involved in litigation.

In 1997, a Kelley tenant, Trellis Reynolds, brought an action against the Browns as a result of a slip and fall incident that allegedly occurred on the Brown’s property. George Kelley was later joined as an additional defendant by the Browns. The matter

was adjudicated with the Browns having been found liable to the Ms. Reynolds. After the Browns were found liable, their insurance carrier demanded of them that the Kelley's tenants stop parking in the Browns' area of the lot. After this incident, the relationship between the Browns and Kelley became strained.

The Browns advised Kelly that, contrary to prior practice, tenants of the Kelley building would no longer be permitted to park behind the Browns' building. It was at this time that a dispute between the owners arose as to the property boundaries and parking rights. Signs were then installed warning that unauthorized cars parked behind the Browns' building would be towed by their towing service, Stevens Towing.

On or about September 16, 2000, an incident occurred involving Mr. Brown and one of Mr. Kelley's tenants, Sofia Morales-Fiol. (N.T. dated 8/21/01, pg. 23).² Ms. Fiol stated that she was leaving the building in which she leased an apartment from Mr. Kelley. *Id.* As she opened the car door in an attempt to leave, Mr. Brown approached her, began berating her and repeatedly telling her that she was trespassing. *Id.* at 23-26. This confrontation continued for approximately 20-25 minutes. *Id.* at 26. According to Ms. Fiol, the incident was a result of Mr. Brown's belief that her car was trespassing upon his parking allotment for 2252 Bryn Mawr Avenue. *Id.* Ms. Fiol stated that she was parked in the gravel parking area behind her building, which is where she always parks. *Id.* 22-23. In addition, Mr. Brown never delineated what the boundaries of the rear lot of his property were to either Ms. Fiol or Mr. Kelley. After this incident, Ms. Fiol did not park behind the buildings for a couple of days until she was leaving for vacation. *Id.* at 28. Ms. Fiol stated that she parked at the rear of Mr. Kelley's building and made certain that she was on her side of the building. *Id.* at 29-30. When Ms. Fiol returned from vacation the car was missing and she later found out that it had been towed. *Id.* at 31. It took Ms. Fiol approximately three days and \$300 to retrieve the car

² The notes of testimony reference herein are from the bench trial of the underlying action by Mr. Kelley before Judge Cohen.

from the towing company. *Id.* Upon finding out of the incident Mr. Kelley attempted to resolve this parking issue with the Browns.

After unsuccessfully attempting to negotiate a solution with the Browns, Kelley initiated the underlying action in September 19, 2000 (September Term, 2000, No. 2193) against the Browns and Stevens Towing. The action involved claims for Intentional Interference with Contractual Relations. (See Complaint, September 2000, No. 2193).

The purpose of the underlying action was to ensure that Kelley's tenants had access to the parking spaces they were entitled pursuant to their lease agreement. Kelley contended that the Browns interfered with the lease agreements between him and his tenants, which agreements provided for parking behind the apartment building. Although a lawyer himself, Kelley's practice specializes in corporate law, thus he retained the services of the law firm of Leonard, Tillery & Sciolla to assist him in litigating this matter while acting as co-counsel in the case. The Browns also brought a counterclaim for abuse of process. Kelley's Motion for Summary Judgment was subsequently granted in part as to the abuse of process counterclaims as unripe for adjudication. (See Trial Court Docket, September Term, 2002 No.2193).

Kelley obtained a default judgment against Stevens Towing and subsequently settled that portion of the case thereafter. Stevens would stop towing cars for the Browns.

The case against the Browns went to trial before the Honorable Gene Cohen on August 20, 2001. Judge Cohen found in favor of the Browns and against Kelley on August 29, 2001. (See Docket). The law firm of Wilk & Brand, P.C. filed post-verdict motions on behalf of Kelley. These motions were subsequently denied by the Court.

On July 10, 2002, the Browns filed their Complaint against Kelley, the law firm of Leonard, Tillery & Sciolla, LLP and Wilk & Brand, P.C. The claims alleged against Kelley were for wrongful use of civil proceedings, trespass, intentional interference with

contractual relations, defamation and intentional infliction of emotional distress.

The claims against Leonard, Tillery & Sciolla, LLP (hereinafter LT&S) were for wrongful use of civil proceedings, intentional interference with contract relations and intentional infliction of emotional distress. The Wilk & Brand firm (hereinafter W&B) was sued for wrongful use of civil proceedings and intentional infliction of emotional distress. The Browns also made claims for punitive damages and attorney fees against all defendants. In their Complaint the Browns alleged that Kelley falsely claimed that a vehicle owned by one of his tenants was towed from Kelley's property by the Browns. (Brown Complaint, pg. 4). It is alleged that Kelley, along with counsel brought the underlying claim to harass the Browns. (Brown Complaint, pg. 10).

Kelley, LT&S and W&B filed their preliminary objections to the Browns' Complaint. On January 29, 2006, the trial court granted the LT&S's and W&B's preliminary objections dismissing the case with prejudice as to those claims. The trial court also sustained the preliminary objections of Kelley as to every claim but trespass. After settling on their trespass claim, the Browns' filed their appeal to these rulings. The Superior court reversed the trial court on the issue of wrongful use of civil proceedings, intentional interference with contractual relations, punitive damages and attorney fees and affirmed the trial court on the issue of intentional infliction of emotional distress and defamation. (See Superior Court Opinion, 751 EDA 2004, dated 2/28/05 pg.12). The case was then remanded to the trial court for further proceedings.

On October 3, 2005, Kelley filed his Motion for Summary Judgment. W&B also filed a separate Motion for Summary Judgment on the same date. (See Docket, May Term, 2002, No. 2412) However, on November 22, 2005 the Trial Court denied Kelley's Motion for Summary Judgment. The Court granted W&B's Motion for Summary Judgment on November 29, 2005. (See Docket).

Kelley filed his Motion for Reconsideration of the Trial Court's Order in denying

his Motion for Summary Judgment of Kelley. On December 28, 2005, this Court granted Kelley's Motion for Reconsideration, vacated the Order denying summary judgment and subsequently granted Summary Judgment thereby dismissing the Browns' case against Kelley with prejudice. (See Docket).

LT&S filed their Motion for Summary Judgment on March 15, 2006 and it was subsequently granted on May 4, 2006. (See Docket).

Brown filed their Notices of Appeal on June 5, 2006, appealing four (4) Order of the lower court and submitted their 1925(b) Statement accordingly. The Orders that this opinion will address are those granting Summary Judgment to W&B, granting reconsideration and entering Summary Judgment in favor of Kelley and the order denying the Browns' Motion for Reconsideration.³

The issues to be addressed by this Court are:

1. Whether the lower Court committed an error of law or abused its discretion in granting Kelley's Motion for Reconsideration, vacating its denial of summary judgment and granting summary judgment in favor of Kelley.

2. Whether the lower Court committed an error of law or abused its discretion in granting W&B's Motion for Summary Judgment.

LEGAL ANALYSIS

Preliminarily, this court will address the issued raised by appellants wherein they state that they did not have an opportunity to respond to Kelley's Motion for Reconsideration. Kelley filed his Motion for Reconsideration on December 7, 2005. The Court granted Kelley's motion on December 28, 2005, which is 21 days after the motion was filed. According to Pa.R.C.P. 208.3 and Local Rule 208.3(b)(3)(B), "[o]ther than as provided in Phila.Civ.R. 208.3 and except for Summary Judgment Motions (which have a thirty (30) day response period, all Motions have a twenty (20) day response period."

³ A separate opinion by the Honorable Joseph Papalini will address the Order granting summary judgment to LT&S.

Regardless of these rules, Local Rule 208.3(a)(3) which directly addresses this issue states “[m]otions for Reconsideration shall be forwarded to the appropriate judge *immediately upon filing*. (emphasis added).

According to Local Rule 208.3(a)(3) the Court was not required to hold the Motion for Reconsideration for any time period prior to its ruling. Despite this fact, the Court did hold it for twenty (20) day response period prior to ruling on the motion and the Browns still failed to file a response. Thus, the Browns have no merit to the argument that they were not given an opportunity to respond to the Motion for Reconsideration.

We begin analyzing the merits by discussing the applicable standard in reviewing Motions for Reconsideration. Under *42 Pa. Cons. Stat. § 5505*, the trial court has broad discretion to modify or rescind an order, and this power may be exercised *sua sponte* or invoked pursuant to a party's motion for reconsideration. *Haines v. Jones*, 2003 PA Super 283, 830 A.2d 579, 584 (citing *Verholek v. Verholek*, 1999 PA Super 282, 741 A.2d 792, 798 (Pa. Super. 1999)).

The Motion for Reconsideration was asking the Court to revisit its ruling on the Motion for Summary Judgment. The appellate court’s scope of review of the trial court's granting of summary judgment is plenary. *Basile v. H&R Block, Inc.*, 563 Pa. 359, 761 A.2d 1115, 1118 (Pa. 2000). The appellate standard of review is as follows

the trial court's order will be reversed only where it is established that the court committed an error of law or clearly abused its discretion...summary judgment is appropriate only in those cases where the record clearly demonstrates that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. The reviewing court must view the record in the light most favorable to the nonmoving party, resolving all doubts as to the existence of a genuine issue of material fact against the moving party. *Id.*

As previously stated, the Superior Court partially affirmed and partially reversed

the lower court. The basis for their reversal of the wrongful use of civil proceedings claim and the intentional interference with contract claim was that Kelley, along with counsel, knowingly and falsely claimed in the underlying action that a vehicle owned by one of his tenants was towed from Kelley's property by the Browns. (Superior Court Opinion, pg. 7). Although the Superior Court reversed the trial court's ruling to sustain the preliminary objections on these counts, it also stated that there was no evidence to support such claims at that stage of the litigation and all pleadings must be viewed as true. (Superior Court Opinion, pg. 6). Given that fact, the appellate court was without an opportunity to determine the validity of these admitted "bold allegation[s]." (Id. at 5,7).

When summary judgment relief is sought, it will be granted when "an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to a cause of action or defense in which a jury trial would require the issues to be submitted to a jury." *Pa.R.C.P.* 1035.2(2). The non-moving party may no longer "rest upon the mere allegations or denials of the pleadings, but must ...[i]dentify (1) one or more issues of fact arising from evidence in the record controverting the evidence cited in support of the motion....or (2) evidence in the record establishing the facts essential to the cause of action or defense which the motion cites as not having been produced." *Pa.R.C.P.* 1035.3(a).

Pursuant to 42 Pa.C.S. § 8351(a) a person who takes part in the procurement, initiation or continuation of civil proceedings against another is subject to liability to the other for wrongful use of civil proceedings if:

(1) He acts in a grossly negligent manner or without probable cause and primarily for a purpose other than that of securing the proper discovery, joinder of parties or adjudication of the claim in which the proceedings are based;and

(2) The proceedings have terminated in favor of the person against whom they are brought.

Based upon the statute the Browns are required to prove Kelley acted grossly negligent in pursuing the underlying action.

The Superior Court stated that what saved the Browns from dismissal on its previous appeal was the allegation that Kelley falsified evidence in the prior lawsuit and the law firms knew of the falsification. (Superior Court pg. 7). It is this allegation of falsification that the Browns are using as the basis for their intentional interference with contractual relations claim and their wrongful use of civil proceedings claim. However, the Browns have failed to show any evidence that falsification occurred on the part of either Kelley or W&B in this case.

In the underlying action, Ms. Fiol's testimony was the only witness testimony presented at trial other than Kelley and the Browns. It is the Browns' position that Kelley and W&B influenced her to falsify her testimony. Thus, the issue is whether during the discovery and trial phases of the underlying action, Kelley or W&B caused Fiol to commit perjury regarding the location of her vehicle when it was towed by the Browns.

Ms. Fiol only testified at trial in the underlying action. Her deposition was never taken by any party during the discovery stage. At trial, Ms. Fiol established that she was a tenant of 2254 Bryn Mawr Avenue for approximately two (2) years. (N.T. dated 8/21/01 pg. 17). It is noteworthy to mention that at the time that this testimony was given Mr. Kelley was no longer the owner of 2254 Bryn Mawr Avenue and therefore not the landlord of Ms. Fiol. (N.T. dated 8/21/01 pg. 64). She also did not have any relationship with Mr. Kelley other than landlord-tenant prior to his selling the building. (N.T. pgs. 33-34). She stated that she appeared for trial pursuant to subpoena that was served on her by Mr. Kelley. (N.T. pg. 33).

Ms. Fiol described the incident that occurred, wherein Mr. Brown approached her, became irate and boisterous with her about where she parked her car claiming that she was trespassing. (N.T. pg. 24-28). Mr. Brown continuously berated her for twenty

minutes for parking on what he believed to be his property, while having her pinned against her open door, not allow her to exit the parking lot in her vehicle. (N.T. pg. 24-28). Mr. Brown's actions and conduct brought Ms. Fiol to tears and she determined that she avoided parking in the rear of the building for a couple days thereafter. (N.T. pg. 28-29, 36).

Ms. Fiol eventually decided to park her vehicle in the lot because she was going away for on vacation and wanted the vehicle to be safe. (N.T. pgs. 29-31, 36-37). She specifically stated in her testimony that she "made very sure" that her car was parked solely behind Mr. Kelley's building only. (N.T. pgs. 29-31, 36-37). However, when she returned her car was not in the location where she parked it. (N.T. pg. 31). She found out after the fact that the car had been towed Stevens Towing at the request of the Browns. (N.T. pg. 30-31). Incidentally, no one from Stevens Towing gave a deposition or testified at trial in support of the Browns' theory of the case. Ms. Fiol's testimony was the only independent witness testimony presented at trial.

The cross-examination of Ms. Fiol regarding the positioning of her vehicle, no way eluded to the fact that Ms. Fiol's testimony was perjured on her part and particularly did not implicate either Kelley or W&B as coercing her to fabricate her testimony. (N.T. pgs. 33-37).

During her cross-examination, Ms. Fiol said she believed that the dividing line between the two buildings parking facilities was marked by a white line and signs posted by the Browns. (N.T. pg. 48). The testimony of Ms. Fiol established that her vehicle was properly parked completely behind this boundary line and on Mr. Kelley's property. (N.T. pg. 49). This indicates that the Browns had Ms. Fiol's vehicle improperly towed by Stevens Towing. No evidence was presented by the Browns to rebut Ms. Fiol's testimony.

Therefore the Browns have failed to prove that either Kelley or W&B coerced

Ms. Fiol's to commit perjury or fabricate her testimony at trial. The lack of any evidence of fabrication or perjury results in the Browns failure to satisfy the elements for either wrongful use of civil proceedings or the interference with contract claim.

As mentioned, in order to prevail on a claim of wrongful use of civil proceedings, the Browns would have to show that Kelley and W&B lacked probable cause to institute the proceedings, and that the proceedings terminated in favor of the Browns. *Kelley v. Local Union 249*, 544 A.2d 940, 518 Pa. 517 (1988). It is undisputed that the proceedings underlying the instant action were terminated in favor of appellant. However, absence of probable cause, an indispensable element of this action, is not conclusively established by a favorable verdict in the prior proceeding. *Wainauskis v. Howard Johnson Co.*, 339 Pa.Super. 266, 277, 488 A.2d 1117, 1122 (1985); Restatement (Second) of Torts §675 comment b (1977).

In this case, the Superior Court has directed the Court's attention to the essential element that the Browns must prove before they can successfully assert a case of wrongful use of civil proceedings against Kelley and W&B. The Browns must identify some admissible evidence indicating that the underlying lawsuit was instituted in a grossly negligent manner or without probable cause "and while in possession of evidence that contradicted the averments of the complaint." The record is devoid of any such information. Initially, the Browns have asserted that the deeds and maps attached to the underlying Complaint describing the properties in question contradict the averments of the Complaint. (Deposition of William Brown, pg.8) The Browns have been asked to identify the evidence to support their theory. However, there is no such evidence. Since none of the documents specifically identify a common parking area, either within metes and bounds of the respective properties or adjacent to the property boundaries, it is impossible for those documents to affirmatively contradict the averments in the Complaint. The information provided by Kelley asserts that the common parking area

was outside of the property of the parties. The Browns dispute this fact. Thus there is clearly a disputable issue which must be resolved by the Court. The fact that the Browns did not file a Motion for Judgment on the Pleading supports the theory that the dispute could not be resolved solely on the basis of the information contained in the Complaint itself. W&B took over the legal responsibilities of LT&S in representing Kelley at the trial in the underlying case and proceeded on the same basis as LT&S. Having provided the Court with documentation to support the theory that Ms. Fiol's car was parked in a common area existing between the two properties and illegally towed by Stevens Towing at the request of the Browns, defendants are without ability to prove that either Kelley or W&B procured an action without probable cause. The Browns has also failed to raise a general issue of material fact to support the allegation that Kelley and W&B falsified or fabricated testimony to pursue this cause of action. Therefore, the defendants cannot make out a case for wrongful use of civil proceedings.

For the same reasons the Browns cannot make a viable claim for interference with contract relations. The elements for intentional interference with contractual relations are as follows: (1) the existence of a contractual relationship; (2) an intent on the part of the defendant to harm the plaintiff by interfering with that contractual relationship; (3) the absence of a privilege or justification for such interference; and (4) damages resulting from the defendant's conduct. *Neish v. Beaver Newspapers, Inc.*, 398 Pa.Super. 588, 599, 581 A.2d 619, 625 (1990).

It is of significant import to mention that the Browns do not allege any facts supporting the claim that Kelley acted with specific intent to harm the contractual relationship between themselves and Stevens Towing. These claims were based on the allegations that Kelley knew that they had "no right, privilege, or justification that permitted him or provided him with an interest in the Browns property (Kelley v. Brown Complaint, ¶63). The requirement of intent to prove this claim has the Browns repeating

their argument of fabrication and falsification as the basis for proving interference with contract. However, as previously stated the representations of Kelley both in his Complaint and in his trial testimony are reasonably corroborated by the documentary evidence provided in his Complaint and the undisputed testimony of Ms. Fiol. Therefore, in absence of some evidence to the contrary which would prove that Kelley intentionally made false statements or coerced others to commit perjury; there are no genuine issues of material fact with respect to the Browns' claim for intentional interference with contract.

Lastly, the Browns also raise an extraneous issue that the Trial Court committed reversible error by granting Kelley's Motion for Reconsideration because it failed to state any newly discovered facts or law. The only appellate court case that the Browns cite to support this principle was *Electronic Laboratory Supply Co. v. Cullen*, 712 A.2d 304 (Pa.Super. 1998). However, in *Electronic Laboratory*, the facts involved two separate judges of equal jurisdiction ruling on a motion for summary judgment. *Id.* at 307-308.

Our Superior Court specifically stated:

where a motion has been preserved and decided and where no new facts are presented in a second motion seeking the same relief, the court's decision on the first motion should be followed based on considerations of judicial economy and efficiency. *Drapeau v. Joy Technologies, Inc.*, 447 Pa. Super. 560, 670 A.2d 165 (1996), citing *Harrity v. Medical College of Pennsylvania Hospital*, 439 Pa. Super. 10, 653 A.2d 5 (1994). *This rule prevents forum shopping because without this rule, the same issue could be raised repeatedly before different judges of the same court until a litigant finds a judge sympathetic to his or her position.* *Id.* See *Yudacufski v. Commonwealth of Pa. Dep't of Transportation*, 499 Pa. 605, 612, 454 A.2d 923, 926 (1982) ("absent the most compelling circumstances, a judge should follow the decision of a colleague on the same court when based on the same set of facts."). (emphasis added).

The policy of such a rule highlights the fact that it is meant to prevent forum shopping, which is not the case here. Judge Tereshko ruled on Kelley's Motion for Summary Judgment by denying the motion. Thereafter, the same judge granted

reconsideration in light of argument present by Kelley in his brief regarding specific trial testimony of Ms. Fiol, which addressed the critical issue of allegations of fabrication and perjury by Mr. Kelley.

CONCLUSION

In light of the foregoing analysis, this Court believes that the defendants' Kelley's Motion for Reconsideration and W&B's Motion for Summary Judgment were properly granted, and should be affirmed by the Court above.

BY THE COURT:

9-18-06

Date

ALLAN L. TERESHKO, J.

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