[J-70-2004]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

HENRY MCNEIL, JR.,	:	No. 268 MAP 2003
	:	
Appellant	:	
	:	Appeal from the Order of the Superior
	:	Court entered on 12/20/02 at No. 399 EDA
v.	:	2002 affirming the Order of Montgomery
	:	County Court of Common Pleas, Civil
	:	Division, entered on 1/23/02 at No. 99-
BARBARA MCNEIL JORDAN AND	:	04287
HENRY A. JORDAN,	:	
	:	
Appellees	:	ARGUED: April 15, 2004

CONCURRING OPINION

MR. JUSTICE SAYLOR **DECIDED: March 21, 2006**

I join Parts I, II, III, and V of the majority opinion. Left to my own devices, however, I would direct that the trial court allow Appellant the opportunity to conduct meaningful discovery.

As to Part IV, in the first instance, I view the majority's efforts to establish principles to guide the trial courts' discretion relative to the availability of pre-complaint discovery in matters of general application as salutary.[1] However, I regard the facts and

[1] It should be noted, however, that amicus curiae, the Pennsylvania Trial Lawyers Association, presents a thoughtful position that, if the Court is to consider the possibility of narrowing the availability of pre-complaint discovery relative to that which is presently available under the existing Rules of Civil Procedure, this would be most appropriately addressed via the Court's rulemaking prerogative and procedures and on a prospective basis.

circumstances presented in this case as highly unusual and, as such, not readily amenable to a rule of general application. In particular, I agree with Appellant's argument that the trial court imposed a heightened burden upon him in connection with the pleadings, and, after having done so, abused its discretion by failing to afford him discovery to aid him in meeting such additional burden. My reasoning follows.

As indicated by the majority, the elements of the tort of intentional interference with testamentary expectancy are:

> (1) The testator indicated an intent to change her will to provide a described benefit for plaintiff;
>
> (2) The defendant used "fraud, misrepresentation or undue influence" to prevent execution of the intended will;
>
> (3) The defendant was successful in preventing the execution of a new will; and
>
> (4) But for the defendant's conduct, the testator would have changed his will.

Majority Opinion, slip op. at 5 n.3 (citing Cardenas v. Schober, 783 A.2d 317, 326 (Pa. Super. 2001)). In the present case, in his original, verified complaint, Appellant averred, inter alia, that:

> Mrs. McNeil decided to treat [Appellant] equally with his siblings in her Will and took steps to do so, but was thwarted by [Appellee's] scheme [to interfere with Mrs. McNeil's testamentary intent].
>
> * * *
>
> [Wife-Appellee], motivated by her personal animus against [Appellant] and his children as well as by her desire to maximize the economic benefit for herself and her family, embarked on a scheme, together with [Husband-Appellee] to exert undue influence on her mother and other family members in order to increase her own control over family

wealth. It was a central part of [Appellees'] scheme to prevent Mrs. McNeil from providing [Appellant] and his family with an equal share of the family wealth, despite Mrs. McNeil's desire to do so.

* * *

[Appellees] also embarked on a plan to control Mrs. McNeil and to interfere with the relationship between Mrs. McNeil and her son, [Appellant], including limiting his access to his mother and manipulating every aspect of Mrs. McNeil's daily affairs.

* * *

[Appellees] took advantage of Mrs. McNeil's vulnerability and frail heath to keep her in a position of physical and psychological dependency so that they could exert maximum control over the family's finances and could influence key decisions that would affect [Appellant] and his family.

* * *

[Appellees] were concerned that, despite their efforts, Mrs. McNeil might successfully implement her intention to treat [Appellant] and his family equally with her other children and their families, so [Appellees] documented Mrs. McNeil's declining mental condition and failed to take steps to halt or slow its progress in order to be able to challenge any subsequent action favorable to [Appellant] and his family which she was able to take.

* * *

In view of her reconciliation with [Appellant] and their continuing positive relationship, Mrs. McNeil intended to treat him and his family equally to her other children and their families in her Will, and took steps to do so.

Solely to benefit herself and her family and to continue to punish [Appellant], [Appellees] intentionally interfered with Mrs. McNeil's intention to treat [Appellant] and his family equally in her estate plan documents.

* * *

> . . . Mrs. McNeil was prevented from executing a Will treating [Appellant] and his family equally by virtue of [Appellees'] undue influence and control over Mrs. McNeil, which extended to matters relating to her estate planning.
>
> * * *
>
> Without ever saying so explicitly, or even hinting that this was Mrs. McNeil's intent, the December 21, 1989 Will excludes [Appellant] and his family from the vast bulk of the wealth controlled by the Will, estimated to exceed $650 million.
>
> * * *
>
> Mrs. McNeil's strong and positive relationship with [Appellant] continued up to the time of her death in 1998. When she was able to effectuate her own views in family matters, she demonstrated her affection for [Appellant] and her desire to have him and his family treated equally in family matters.

Complaint ¶¶22, 23, 25, 41, 53-54, 56, 63, 70, R.R. 16a-25a. Following the fairly detailed factual recitation from which the above is excerpted, each element of the intentional-interference claim is affirmatively asserted in the complaint, among its various counts. See id. ¶¶73-98, R.R. at 25a-29a.

The above, in my view, adequately sets forth a cause of action for intentional interference with testamentary intent. The trial court, however, required Appellant to detail the affirmative evidentiary support for one of the elemental factual allegations (namely, that Mrs. McNeil intended to equalize Appellant's inheritance), at the pleadings stage. See McNeil v. Jordan, No. 99-04287 (C.P. Montgomery Jul. 11, 2000) ("Plaintiff has given this Court and Defendant no way to know that the Complaint is based on

anything more than Plaintiff's speculation.").[2] In this respect, I believe that the trial court hybridized the standard governing resolution of a demurrer, which tests the legal sufficiency of a plaintiff's averments to state a cause of action assuming their truth, see MacElree v. Philadelphia Newspapers, Inc., 544 Pa. 117, 124, 674 A.2d 1050, 1056 (1996), with a summary judgment standard. Critically, however, in actual summary judgment proceedings predicated on a party's ability to prove essential elements of a claim or defense, discovery is generally available to such party. See Pa.R.C.P. No. 1035.2(2) (providing for an award of summary judgment "if, after the completion of discovery relevant to the motion, . . . an adverse party who will bear the burden of proof has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury" (emphasis added)).[3]

While the propriety of the trial court's order dismissing the original complaint is not directly before the Court at this juncture, Appellant persuasively argues that the order and its rationale serve as a factual circumstance that is relevant to appellate review of the trial court's discretionary decision concerning the availability of discovery

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[2] Appellant notes that, not only did he plead that Mrs. McNeil intended to allocate to him an equal share of the assets under her control, he also averred that she believed that she actually had done so. See Complaint ¶88, R.R. at 27a. Appellant also observes that all averments were made upon information and belief as required by the applicable Rules of Civil Procedure, which also indicate that "[t]he signer need not aver the source of the information or expectation of ability to prove the averment or denial at trial." Pa.R.C.P. No. 1024(a).

[3] The trial court's concern regarding the legitimacy and/or viability of Appellant's claims is not unfounded, particularly as this type of claim is readily subject to abuse in light of the unavailability of the testator to resolve questions concerning his or her intent. Nevertheless, the cause of action for intentional interference with testamentary intent has evolved in Pennsylvania to redress wrongful conduct where it is present, and this Court has put regular procedures into place to test factual averments and curb abuses, including the availability of summary judgment and sanctions where appropriate.

directed to the preparation of an amended complaint. In light of the trial court's order, which had the effect of precluding Appellant from proceeding to discovery in the ordinary course on the complaint that he filed, I believe that it was an abuse of discretion to deny him access to such discovery to attempt to supplement his factual allegations to meet the court's heightened requirements, again, in the unusual circumstances presented.[4]

In terms of the result in this case, I agree with the majority that the Court's mandate must entail a remand for further proceedings, since such result is supported by three of the five eligible Justices. Further, I support the application by the common pleas court of the probable cause standard on remand in this particular case, as I also agree with the majority that this approach embodies the narrower of the grounds offered to support the remand. See Majority Opinion, slip op. at 33-34 & n.26.

[4] Certainly, Appellant could have chosen to appeal the trial court's initial order dismissing the complaint. However, I do not believe that he should be penalized for attempting to comply with the trial court's additional requirements, particularly as the complaint was dismissed without prejudice, and it was (and is) Appellant's position that additional information could be obtained via discovery.