IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

SUZANNE H. PFEIFFER,)
GORDON PFEIFFER,)
)
Plaintiffs Below, Appellants,) C.A. No.: N10A-12-006 JRS
)
v.)
)
STATE FARM MUTUAL)
AUTOMOBILE INSURANCE CO.,)
as Subrogee of ALBERT L. WATSON,)
and ALBERT L. WATSON, and)
BRUCE W. MCCULLOUGH)
)
Defendants Below, Appellees.)

Date Submitted: October 3, 2011
Date Decided: December 20, 2011

MEMORANDUM OPINION

Upon Appeal from the Court of Common Pleas.

AFFIRMED.

Elwyn Evans, Jr., Esquire, Law Firm of Elwyn Evans, Jr., Wilmington, Delaware.
Attorney for the Appellants - Plaintiffs Below.

Sherry Ruggiero Fallon, Esquire, Brian D. Ahern, Esquire, Tybout, Redfearn & Pell, Wilmington, Delaware; Patrick M. McGrory, Esquire, Tighe & Cottrell, P.A., Wilmington, Delaware.
Attorneys for the Appellees - Defendants Below.

SLIGHTS, J.

I.

This is an appeal, pursuant to 10 *Del. C.* § 1326 and Superior Court Civil Procedure Rule 72, of a decision by the Court of Common Pleas granting summary judgment in favor of Appellees, Bruce W. McCullough ("Mr. McCullough"), State Farm Mutual Automobile Insurance Co. ("State Farm") and Albert L. Watson ("Mr. Watson") (collectively, the "Appellees"), and against Appellants, Suzanne H. Pfeiffer and Gordon Pfeiffer (collectively, the "Pfeiffers"). On appeal, the Court must determine whether the trial court correctly concluded that the Pfeiffers could not sustain a viable claim for malicious prosecution or abuse of process against the Appellees. Because the Court finds no error, the decision must be **AFFIRMED**.

II.

On March 20, 2002, Mr. Watson was in a motor vehicle accident in the parking lot of St. Mark's High School.[1] The collision occurred between Mr. Watson's vehicle and a vehicle being operated by Susan Peiffer.[2] At the time of the collision, Mr. Watson's vehicle was insured by State Farm. Mr. Watson provided State Farm with Susan Peiffer's name and address with which he was familiar because Susan Peiffer

[1] Appellants' Opening Brief on Appeal ("Appellants' Opening Br.") at ¶ 1, State Farm Investigative Report.

[2] *Id. See also* Affidavit of Albert L. Watson ("Watson Aff.") at BWM020-026; Affidavit of Bruce W. McCullough ("McCullough Aff.") at Ex. 13, BWM124.

was his daughter's teacher and lived near him.[3] State Farm accurately recorded the address that Mr. Watson provided: 2093 Old Kirkwood Road, Bear, Delaware 19701.[4] Susan Peiffer's name, however, was mistakenly recorded by State Farm as "Su<u>z</u>anne P<u>f</u>eiffer."[5]

Starting on March 17, 2002, State Farm directed three letters to Susan Peiffer, referring to her as "Suzanne Pfeiffer." Two of those letters were addressed to 2093 Old Kirkwood Road.[6] According to State Farm's Activity Log, Susan Peiffer contacted State Farm on April 9, 2002 regarding the accident and informed State Farm that she did not have insurance.[7] On or about July 22, 2002, State Farm engaged Mr. McCullough to pursue recovery against "Suzanne Pfeiffer."[8] State Farm's engagement letter to Mr. McCullough and corresponding file spelled the tortfeasor's name as "Suzanne Pfeiffer" and provided the address of 2093 Old Kirkwood Road, Bear, Delaware 19701.[9]

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[3] Watson Aff. at BWM020.

[4] *See* Appellants' Opening Br., State Farm Investigative Report. *See also* McCullough Aff. at Ex. 1, BWM179, BWM189, BWM190.

[5] *Id.*

[6] McCullough Aff. at Ex. 1, BWM189, BWM190. The third letter was inexplicably mailed to a Newark address. Apellants' Opening Br. at ¶ 2.

[7] Appellants' Opening Br. at ¶ 3, State Farm Investigative Report; McCullough Aff. at Ex. 1, BWM184.

[8] McCullough Aff. at Ex. 1, BWM178.

[9] *Id.* at BWM179.

Based on the information provided by State Farm, Mr. McCullough filed a civil action on July 25, 2003 against "Suzanne Pfeiffer" in the Court of Common Pleas (the "subrogation action").[10] The Return of the Process Server showed personal service on "Suzanne Pfeiffer" at 2093 Old Kirkwood Road on August 11, 2003.[11] Susan Peiffer did reside at 2093 Old Kirkwood Road at the time of service and subsequently failed to appear to defend the claim.

On March 1, 2006, the trial court issued a rule to show cause why the action should not be dismissed for failure to prosecute under CCP Civil Rule 41(e).[12] On March 31, 2006, the court entered a default judgment against defendant, Suzanne Pfeiffer, under CCP Civil Rule 55(b)(1) per Mr. McCullough's request.[13]

Attempting to collect on the default judgment, on July 31, 2006, Mr. McCullough engaged an independent investigator, Michael T. O'Rourke ("Mr. O'Rourke"), to ascertain Suzanne Pfeiffer's driver's license number.[14] Based on State Farm's files, Mr. O'Rourke was investigating Suzanne Pfeiffer of 2093 Old Kirkwood Road, Bear, Delaware 19701. Because there is only one "Suzanne Pfeiffer" with a driver's license in the State of Delaware, the Department of Motor

[10] Appellants' Opening Br. at ¶ 6, State Farm Complaint (Docket Entry 2).

[11] *Id.* at ¶ 8, Writ of Summons Returned (Docket Entry 4); McCullough Aff. at Ex. 2, BWM008.

[12] Appellants' Opening Br. at ¶ 10, 41(e) Notice Sent (Docket Entries 5, 6).

[13] *Id.* at ¶ 10, Default Judgment (Docket Entry 7).

[14] Deposition of Michael T. O'Rourke ("O'Rourke Dep.") at Ex. 3.

Vehicles (DMV) provided Mr. O'Rourke with Appellant, Suzanne Pfeiffer's information, which included an address of 213 Edgewood Road, Wilmington, Delaware 19803.[15]

On August 1, 2006, Mr. O'Rourke emailed Mr. McCullough's paralegal to provide the driver's license number and date of birth for Suzanne Pfeiffer as received from the DMV.[16] Mr. O'Rourke also created a Confidential Investigative Report for Mr. McCullough with Suzanne Pfeiffer's driver's license number and date of birth; however, he combined that information with the address originally provided to him, 2093 Old Kirkwood Road.[17] In other words, Mr. O'Rourke did not include the Wilmington address received from the DMV in his report, but rather included the address he received from Mr. McCullough's file.[18]

Based on the driver's license number provided by Mr. O'Rourke, Mr. McCullough requested that the DMV suspend the license of Suzanne Pfeiffer with the last known address of 2093 Old Kirkwood Road.[19] On November 8, 2006, the DMV sent out a notice of suspension to Suzanne Pfeiffer at 2<u>90</u>3 Old Kirkwood Road, Bear, Delaware 19701.[20] The DMV failed to note the difference in Suzanne

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[15] O'Rourke Dep. at Ex. 4.

[16] *Id*. at BWM167.

[17] *Id.* at Ex. 1.

[18] *Id.* at 9:11-15 ("Q. So the address on file was Edgewood Road, but in your report to Mr. McCullough you didn't mention that. A. Did not. It was expired. The license was expired.").

[19] McCullough Aff. at Ex. 5.

[20] McCullough Aff. at Ex. 6.

Pfeiffer's address of 213 Edgewood Road supposedly in its file and the address provided by Mr. McCullough, 2093 Old Kirkwood Road. In addition, the DMV transposed the zero and the nine in the Old Kirkwood Road address.[21] As a result, the letter was returned, the error was not detected and the license of Appellant Suzanne Pfeiffer at 213 Edgewood Road was suspended.[22]

Mr. McCullough and State Farm took no further action to collect on the default judgment in the subrogation action, which amounted to approximately $3,807.48.[23] Thus, State Farm did not attempt to attach or garnish any bank accounts or record the default judgment against any real property owned by either Susan Peiffer or Suzanne Pfeiffer.

On or around May 15, 2009, almost three years later, Suzanne Pfeiffer discovered that her driver's license was suspended. Within three days, Suzanne Pfeiffer contacted the DMV and Mr. McCullough's office, claiming that she was not responsible for the judgment against her.[24] In response, Mr. McCullough's office provided the information they had on file. On June 15, 2009, Suzanne Pfeiffer's counsel again contacted the DMV and Mr. McCullough about the mistaken judgment

[21] McCullough Aff. at Ex. 6; Appellants' Opening Br., DMV Records at 15. *See also* Affidavit of Carol A. Trice at BWM048.

[22] Appellants' Opening Br., DMV Records at 15.

[23] Appellee Bruce W. McCullough's Response Brief in Opposition to Appellants' Notice of Appeal and Opening Brief ("McCullough Resp.") at 7.

[24] McCullough Resp. at Ex. D; McCullough Aff. at Ex. 7.

and, on the following day, delivered to Mr. McCullough a stipulated order vacating the judgment rendered against her for lack of personal service.[25] Mr. McCullough refused to vacate the judgment or lift the suspension at that time.

On June 24, 2009, Suzanne Pfeiffer's counsel requested an expedited hearing on her motion to vacate a void judgment and, on June 25, 2009, noticed an emergency motion at the convenience of the court.[26] State Farm and Mr. McCullough filed oppositions to the motion. Based on the opposition, Suzanne Pfeiffer's motion was denied, but an evidentiary hearing was scheduled for August 17, 2009.[27]

On August 3, 2009, in preparation for the evidentiary hearing, Mr. McCullough met with Mr. Watson who positively identified the driver of the vehicle that struck him as Susan Peiffer, not Suzanne Pfeiffer.[28] From that information, Mr. McCullough realized that the name in the original complaint was misspelled and contacted the DMV to restore Suzanne Pfeiffer's license.[29] In addition, Mr. McCullough informed the trial court that the default judgment was entered against the wrong person and that opposition to the motion to vacate the judgment was withdrawn.[30] The court then entered an Order vacating the default judgment against Suzanne Pfeiffer on August

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[25] Appellants' Opening Br. at ¶¶ 21, 22.
[26] *Id.* at ¶ 25.
[27] *Id.* at ¶¶ 27, 29 (Docket Entries 18-19).
[28] McCullough Aff. at Ex. 9, BWM134-136; Ex. 10, BWM022-026.
[29] *Id.* at Ex. 11.
[30] *Id.* at Exs. 12, 13.

10, 2009.[31]

On or about October 29, 2009, the Pfeiffers filed a complaint against State Farm, as subrogee of Watson, Mr. McCullough and Mr. Watson. The Pfeiffers' complaint contained one count of malicious prosecution and one count of abuse of civil process. State Farm, Mr. McCullough and Mr. Watson each filed separate answers. Following the close of discovery each defendant filed a motion for summary judgment on the Pfeiffers' claims.[32]

A hearing was held on defendants' motions immediately prior to the scheduled start of trial on November 30, 2010. The trial court granted summary judgment in favor of the defendants at the conclusion of the hearing and followed its oral ruling with a written decision on January 3, 2011.[33]

The Pfeiffers filed a Notice of Appeal in this Court on December 15, 2010, and filed their opening brief on April 20, 2011. Mr. McCullough and State Farm, filed answering briefs on May 10, 2011. Mr. Watson failed to file an answering brief. Based on that failure, on September 22, 2011, this Court notified the parties that a decision would be rendered on the papers already filed pursuant to Superior Court

[31] Appellants' Opening Br. at ¶ 3, Order Vacating Judgment (Docket Entry 22).

[32] Mr. Watson initially filed a motion to dismiss which was denied. Mr. Watson later submitted a motion to dismiss accompanied by evidentiary documentation which the trial court construed as a motion for summary judgment under CCP Civil Rules 12(b) and 56.

[33] *See Pfeiffer v. State Farm Mut. Auto. Ins. Co., et al.*, C.A. No. CPU-4-09-008380 (Del. Com. Pl. Jan. 3, 2011) ("CCP Op.").

Civil Rule 107(e).[34]

III.

In an appeal from the Court of Common Pleas, the Superior Court is afforded the same scope of review as appeals from the Superior Court to the Supreme Court.[35] Since the trial court granted a motion for summary judgment, the issue on appeal presents a matter of law which this Court will review *de novo*.[36] The trial court's decision granting summary judgment will be affirmed if it appears from the record, in a light most favorable to the non-moving party, that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.[37] The decision below will not be affirmed, however, if the record indicates that a material fact is in dispute, or if judgment as a matter of law is not appropriate.[38]

IV.

In their opening brief, the Pfeiffers argue that the trial court erred in granting summary judgment in favor of Appellees on two grounds. First, the court allegedly erred in finding that defendants below lacked the requisite malice. In this regard, they

[34] The Court notes that Rule 107(f) speaks more directly to the Court's discretion in moving forward with a case as it sees fit when briefs have not been filed.

[35] *State v. Cagle*, 332 A.2d 140, 142-43 (Del. 1974); *Baker v. Connell*, 488 A.2d 1303, 1309 (Del. 1985).

[36] *Newtowne Village Serv. Co. v. Newtowne Road Dev. Co.*, 772 A.2d 172, 175 (Del. 2001); *Baldwin v. Connor*, 1999 WL 743276, at *2 (Del. Super. July 16, 1999); *Montgomery v. Aventis Pharmaceuticals*, 2007 WL 4577625, at *2 (Del. Super. Dec. 14, 2007).

[37] *Newtowne Village Serv. Co.*, 772 A.2d at 175; *Baldwin*, 1999 WL 743276, at *2.

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

argue that there was disputed evidence in the record, specifically with respect to Mr. McCullough, to raise an issue regarding his malicious intent, improper motive or wanton disregard for the rights of Suzanne Pfeiffer. More specifically, the Pfeiffers contend that the court did not give "careful consideration" to "the documents" showing Appellees' intent. Second, the court allegedly failed to recognize the constitutional due process violation stemming from defendants' failure to serve Suzanne Pfeiffer before enforcing the default judgment against her. The Pfeiffers contend that the violation of due process is *per se* an abuse of process.

With regards to malicious prosecution and abuse of process, State Farm and Mr. McCullough argue that the court correctly found that the subrogation action was instituted against Susan Peiffer, albeit with a misspelling of her name, and not Suzanne Pfeiffer. Such an error, although regrettable, negates the allegation that there was malice or an improper motive in filing the subrogation action and later enforcing the suspension of Suzanne Pfeiffer's license. They also note that Appellants' vague references to evidence of malice in "the documents" are not supported by any specific citation to those documents in the record or by the documents themselves. Further, they argue that the record fails to show any ulterior motive or willful act in pursuing the action against Susan Peiffer or Suzanne Pfeiffer to its authorized conclusion. They argue that Mr. McCullough's withdrawal of

opposition to Suzanne Pfeiffer's motion to vacate upon learning of the mistaken identity directly contradicts the Pfeiffers' claim of malice.

In response to the Pfeiffers' constitutional argument, State Farm and Mr. McCullough argue that the Pfeiffers failed to raise the issue of due process before the Court of Common Pleas and, therefore, they may not raise the issue in this appeal. Additionally, they argue that even if the Court was to consider the due process claim, there have been no due process violations. They note that Suzanne Pfeiffer was not served with notice of the subrogation action for good reason - - she was not meant to be a party to the litigation. Any steps taken by Mr. McCullough and State Farm to prosecute the action to completion were authorized based on their belief that the action had been brought against Susan Peiffer, the actual tortfeasor. Mr. McCullough also notes that there is no case law supporting appellants' claim that a violation of due process is an abuse of process *per se*, and argues that, under settled law, violations of constitutional rights are only actionable if committed under the color of state authority. Counsel notes that attorneys may be "officers of the court" but that status is insufficient to find that a lawyer's acts are performed under color of state law.

V.

After a thorough review of the record, the Court must affirm the trial court's decision to grant summary judgment in favor of State Farm, Mr. McCullough and Mr. Watson. First, the Court finds no error in the trial court's legal analysis and its determination that no genuine issues of material fact existed to litigate in connection with the Pfeiffer's claims of malicious prosecution and abuse of process. Second, the Court finds that the Pfeiffers' claim that failure to serve Suzanne Pfeiffer before seeking a default judgment was a due process violation, as well as an abuse of process, was never raised in the trial court and may not, therefore, be considered on appeal.

A. The Trial Court Correctly Held That There Was No Evidence of Malice In The Record

On a motion for summary judgment, the moving party bears the initial burden of demonstrating that the undisputed facts support his claim for dispositive relief.[39] If the motion is properly supported, then the burden shifts to the non-moving party to demonstrate that there are material issues of fact for resolution by the ultimate fact-finder.[40] When reviewing the record, the Court must view the evidence in the light most favorable to the non-moving party.[41] That evidence, however, must be more

[39] *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979) (citing *Ebersole*, 180 A.2d at 470).
[40] *See Brzoska v. Olson*, 668 A.2d 1355, 1364 (Del. 1995).
[41] *Id.*

than bare assertions without supporting facts.[42]

In its decision, the Court of Common Pleas accurately addressed the requisite elements of each claim.[43] In *Beckett v. Trice*,[44] cited by the trial court, this Court summarized the six elements that must be established to maintain a claim for malicious prosecution:

> (1) There must have been a prior institution or continuation of [some regular judicial] proceeding against the plaintiff . . . . (2) Such former proceedings must have been by, or at the instance of the defendant in [this] action for malicious prosecution. (3) The former proceedings must have terminated in favor of the defendant therein, the plaintiff in the action for malicious prosecution. (4) There must have been malice in instituting the former proceedings. (5) There must have been want of probable cause for the institution of the former proceedings. (6) There must have been injury or damage resulting to the plaintiff from the former proceedings.[45]

The trial court correctly emphasized that the essential basis of a suit for malicious prosecution is an act "done with a wrongful or improper motive or with a wanton

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[42] *See, e.g.*, *Martin v. Nealis Motors, Inc.*, 247 A.2d 831, 833 (Del. 1968) ("Unverified allegations in the complaint do not suffice as substitute for evidence to preclude summary judgment; nor do assertions made in briefs as to the probable existence of undemonstrated evidence that may be adduced later at trial."); *In re Cencom Cable Income Partners*, 1997 WL 666970, at *2 (Del. Ch. Oct. 15, 1997) ("[P]laintiffs' bare assertion without supporting facts in this case is insufficient to survive a motion for summary judgment where the defendants, as they have here, negate these bald assertions and plaintiffs fail to submit countervailing evidence.").

[43] CCP Op. at 6-8.

[44] CCP Op. at 6-7 (citing *Beckett v. Trice*, 1994 WL 710874 (Del. Super. Nov. 4, 1994)).

[45] *Beckett*, 1994 WL 710874, at *3 (adopting the elements of an action for malicious prosecution first appearing in *Stidham v. Diamond State Brewery*, 21 A.2d 283, 284 (Del. Super. 1941)).

disregard for the rights of that person against whom the act is directed."[46] In addition, the trial court correctly noted that claims for malicious prosecution are viewed with disfavor by the Delaware courts and should be evaluated with careful scrutiny.[47]

In *Nix v. Sawyer*, the court summarized the *prima facie* elements of abuse of process: "1) an ulterior purpose; and 2) a willful act in the use of the process not proper in the regular conduct of the proceedings."[48] The improper conduct giving rise to a claim is usually a "form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself."[49] Abuse of process is concerned with "perversion of the process after it has been issued," in comparison to malicious prosecution which focuses on the initiation of that process.[50] Here again, the trial court correctly articulated the legal framework within which the Pfeiffers' abuse of process claim must be analyzed.[51]

After summarizing the elements of the claims brought by the Pfeiffers, the trial court then applied the law to the facts and found that:

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[46] *Stidham*, 21 A.2d at 285.

[47] CCP Op. at 6. *See also Nix v. Sawyer*, 466 A.2d 407, 411 (Del. Super. 1983) (following a long line of cases recognizing that public policy encourages parties freely to enter the courts to seek redress and relief and to enforce their rights without the peril of a suit for damages in the event of an unfavorable judgment) (citations omitted).

[48] *Nix*, 466 A.2d at 411 (citing *Unit, Inc. v. Kentucky Fried Chicken Corp.*, 304 A.2d 320 (Del. Super. 1973)).

[49] *Id. See also Toll Brothers, Inc. and TB Proprietary Corp. v. General Accident Ins. Co.*, 1999 WL 744426, at *5 (Del. Super. Aug. 4, 1999).

[50] *Toll Brothers*, 1999 WL 744426, at *5.

[51] CCP Op. at 7-8.

> The facts viewed in a light most favorable to Plaintiffs do not support claims for abuse of process or malicious prosecution against the Defendants. Neither State Farm nor Mr. McCullough acted with the required malice, improper motive or wanton disregard for the rights of Plaintiffs.[52]

Additionally, the trial court noted that Mr. Watson "does not seem to have done anything but provide correct information regarding the facts of the related subrogation action giving rise to the instant case."[53]

The trial court identified two mistakes made by defendants that led to the incorrect suspension of Suzanne Pfeiffer's driver's license: "(i) State Farm incorrectly spelling the intended Defendant's name in the subrogation action as Suzanne Pfeiffer, not Susan Peiffer; and (ii) the investigator used by Mr. McCullough retrieving the incorrect individual's driver's license number."[54] According to the trial court, although the evidence of the mistakes was clear and undisputed, equally clear and not meaningfully disputed was the fact that these mistakes, while unfortunate, were not accompanied by any evidence indicating that defendants "targeted Suzanne Pfeiffer by commencing the subrogation action" or initiating proceedings to collect on the judgment.[55] Rather, the defendants' intent was to target Susan Peiffer for damages she caused in the automobile accident on March 20, 2002. The trial court noted that

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[52] CCP Op. at 8.
[53] *Id.*
[54] *Id.* at 8-9.
[55] *Id.* at 9.

the complaint "was served upon the intended Defendant and the address was listed as the intended Defendant's current address" and that, once the mistakes regarding the tortfeasor's name and address were realized, State Farm and Mr. McCullough immediately withdrew their opposition to vacate the default judgment against Suzanne Pfeiffer.[56] In addition, neither State Farm nor Mr. McCullough used Suzanne Pfeiffer's address during the initial litigation to garnish or attach any of her property or wages.[57]

In both its oral and written decision, the trial court recognized that there were mistakes made in the litigation and that "there appear[ed] to be a wrong" done against Suzanne Pfeiffer.[58] The trial court determined, however, that the appropriate remedy was not to be found in a malicious prosecution or abuse of process action.[59]

This Court finds no error in the trial court's legal analysis or its determination that no genuine issues of material fact existed to sustain either of the Pfeiffers' claims. First, this Court recognizes that, as a general rule, issues of intent should not be decided at the motion for summary judgment stage.[60]

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[56] *Id.*

[57] *Id.*

[58] *Pfeiffer v. State Farm Mut. Auto. Ins. Co., et al.*, C.A. No. CPU-4-09-008380, at 2 (Del. Com. Pl. Jan. 3, 2011) (TRANSCRIPT).

[59] *Id.* at 4-5. The trial court suggested that the proper action may have been to proceed under CCP Civ. R. 11 for sanctions based on negligence in due diligence, expedience or the like. *See* CCP Op. at 10.

[60] *Murphy v. Godwin*, 303 A.2d 668, 672 (Del. Super. 1973).

> [T]he general rule[, however,] necessarily supposes that there is some evidence of the required intent. If a plaintiff opposing defendant's motion for summary judgment has had fair opportunity to utilize discovery to explore his defendant's subjective state of mind and yet cannot point to anything tangible which indicates that defendant had the intent to deceive or to interfere, plaintiff cannot prevail and the defense motion must be granted.[61]

Defendants/Appellees in this case have relied upon a full record consisting of depositions, affidavits and document production. Plaintiffs/Appellants have been a party to that same discovery and have had an opportunity to explore the defendants' subjective state of mind. As a result, the Court is satisfied that the Pfeiffers have put forward all of the evidence that exists and, nevertheless, have failed to point to anything tangible that would suggest malice, an ulterior motive or coercion in initiating and pursuing the subrogation action and license suspension to completion.[62]

The Pfeiffers suggest that Mr. McCullough, a member of the Delaware Bar, planned and carried out a full-blown conspiracy to extort approximately $3,900 from Suzanne Pfeiffer to recover for an automobile accident in which she was not involved more than four (4) years before the DMV initiated the suspension of Ms. Pfeiffer's driving privileges (Appellants' "scheme of extortion"). None of the purported facts

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[61] *Id.* at 673.

[62] *See Burkhardt v. Davies*, 602 A.2d 56, 60 (Del. 1991) ("[If] after an adequate time for discovery, the nonmoving party has failed to make a sufficient showing on an essential element of its case, the standard for a motion for summary judgment mirrors the standard for a directed verdict.") (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)).

supporting this scheme are supported with reference to any specific documents or other evidence in the record. For example, in their opening brief, the Pfeiffers state that "an [Accurint][63] inquiry about Suzanne's residence" was made in March 2006, around the time the court contacted Mr. McCullough about dismissing the case.[64] The Pfeiffers go on to postulate: "*If* defendant McCullough was the person who initiated that search he would have learned that Suzanne had never lived there and that service had been made on the wrong person."[65] The Pfeiffers then ask this Court to take dramatic leaps with this inference, suggesting that Mr. McCullough *did* initiate this inquiry with Accurint, learned that Suzanne Pfeiffer did not live on Kirkwood Road and then began a complicated scheme to execute a default judgment against Suzanne Pfeiffer, knowing that she was not the correct defendant, including conspiring with Mr. O'Rourke and the DMV.[66] None of these contentions were supported with citations to the record, and none of them find support in the documents or other

[63] Based on the Court's understanding, "Accurint" is an online investigative tool which can run address searches.

[64] Appellants' Opening Br. at 4.

[65] *Id.* at 4. (emphasis supplied).

[66] *Id.* at 4-5. This "scheme of extortion" included Mr. McCullough, in concert with Mr. O'Rourke, fabricating Mr. O'Rourke's Confidential Investigative Report to "convey the impression [to his paralegal and the DMV] that, on August 8, 2006, Mr. O'Rourke had verified Suzanne's address as 2093 Old Kirkwood Road, Bear, Delaware 19701." *Id.* at 5. Furthermore, Mr. McCullough and Mr. O'Rourke allegedly used their relationship with Carol A. Trice ("Ms. Trice"), an employee of the DMV, to get the DMV involved in the scheme. *Id.* Presumably, all of this would have been done so that three years later, when Suzanne Pfeiffer actually realized that her license was suspended, State Farm could be compensated in the amount of $3,900.

evidence that have been supplied to the Court.

Indeed, as the trial court correctly observed, there is no factual basis or evidence to support the Pfeiffers' conspiracy theory flowing from the Accurint inquiry. The Pfeiffers do not support the contention that Mr. McCullough ran the Accurint inquiry with any specific facts from the record. Nor do they provide evidence that Mr. McCullough recognized the mistake he was making, conspired with Mr. O'Rourke, wrote the Confidential Investigative Report, or used Ms. Trice and the DMV to accomplish his "scheme."[67] Although the Court must view the evidence in the light most favorable to the non-moving party on a motion for summary judgment, the Court need not accept bare allegations.[68] Furthermore, Mr. McCullough filed an affidavit in this case in which he details the actions he took from initiation of the subrogation action through withdrawal of his opposition to vacate the default

[67] And unless the Court misreads the Accurint exhibit provided, it is not necessarily true that Mr. McCullough would have learned from the inquiry that Suzanne Pfeiffer never lived at 2093 Old Kirkwood Road. The very entry to which the Pfeiffers direct the Court shows a Susan M. Peiffer at 2093 Old Kirkwood Road, with dates Aug. 99 - Oct. 07 listed, which the Pfeiffers suggest are the dates of Susan Peiffer's residence there. On the following page of the Accurint report, Suzanne Pfeiffer is listed at 2093 Old Kirkwood Road, with the date Mar. 06 listed, which the Pfeiffers suggest is the date an Accurint inquiry was made. Whether the dates listed are the dates of residence or the dates of inquiry, neither, or both, the Court is not satisfied that the Accurint report is clear or provides any factual support for the Pfeiffers' claim that the Appellees acted with malice.

[68] *See, e.g.*, *Nealis Motors, Inc.*, 247 A.2d at 833 ("Unverified allegations in the complaint do not suffice as substitute for evidence to preclude summary judgment; nor do assertions made in briefs as to the probable existence of undemonstrated evidence that may be adduced later at trial."); *In re Cencom Cable Income Partners*, 1997 WL 666970, at *2 ("[P]laintiffs' bare assertion without supporting facts in this case is insufficient to survive a motion for summary judgment where the defendants, as they have here, negate these bald assertions and plaintiffs fail to submit countervailing evidence.").

judgment. The Pfeiffers' failure to contradict the affidavit with competent evidence leaves the affidavit uncontroverted. Uncontroverted evidence, like Mr. McCullough's affidavit, when provided to the Court in support of a motion for summary judgment will be accepted as true.[69] Moreover, the Court need only draw "*rational* inferences" from the non-movant's version of any disputed facts.[70] The unsupported "facts," relied upon heavily by the Pfeiffers and presented to this Court as true, are purely hypothetical. Consequently, this Court cannot draw any "rational inference" from these facts that would support the the Pfeiffers' claims.[71]

Finally, the "scheme of extortion" presented by the Pfeiffers does not implicate any actions taken by State Farm or Mr. Watson.[72] No facts suggest that Mr. Watson had any involvement whatsoever in the purported "scheme" - - he had no influence upon or part in the subrogation action or subsequent license suspension. In addition, the factual allegations against State Farm amount to complaints that State Farm

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[69] *Meades v. Wilmington Housing Authority*, 2006 WL 1174005, at *4 n.27 (Del. Super. Apr. 28, 2006) (citing *Battista v. Chrysler Corp.*, 454 A.2d 286, 290 (Del. Super. 1982)). *See also Moore*, 405 A.2d at 680-81 (holding that upon a properly supported motion for summary judgment the burden shifts to the "non moving party to demonstrate that there are material issues of fact").

[70] *Merrill v. Crothall-American, Inc.*, 606 A.2d 96, 99-100 (Del. 1992) (emphasis supplied).

[71] *See, e.g.*, Appellants' Opening Br. at 4 ("*If* defendant McCullough was the person who initiated that [Accurint] search he would have learned that Suzanne had never lived there [at 2093 Old Kirkwood Road] and that service had been made on the wrong person.") (emphasis supplied); *id.* at 4-5 ("*If* [Mr. McCullough], however, could connect Suzanne with the Bear address in DMV's records he might be able to negotiate a price for removing the suspension.") (emphasis supplied); *id.* at 5 ("At the direction of attorneys [acquainted with her], [Ms. Trice] *would* lift the defendant's license suspension when a suitable payment plan had been negotiated . . . .") (emphasis supplied).

[72] The Pfeiffers admit that "[t]he principal wrongdoer in this case was defendant McCullough who did his best to conceal his intent." Appellants' Opening Br. at 8.

provided a poor incident report, misidentified the tortfeasor and lacked concern for details, all of which are far from sufficient to uphold a claim for malicious prosecution and abuse of process.

After a thorough review of the entire record, this Court is satisfied that the trial court did not summarily dismiss or ignore the Pfeiffers' factual allegations, but rather logically focused on those undisputed material facts supported by evidence in the light most favorable to the non-moving party. From this logical deductive process, the trial court found no facts to support claims against Appellees based in malice, improper motive or coercion. This Court agrees with the trial court's assessment of the undisputed factual record and its application of the law to those facts. Defendants' motions for summary judgment were correctly granted.

B. Appellants' Argument That Defendants Violated Suzanne Pfeiffer's Constitutional Right to Due Process Were Not Raised In The Trial Court And Will Not Be Considered Here

Arguments that are not raised in the court below ordinarily cannot be raised for the first time on appeal.[73] Based on the record, the Court finds that the Pfeiffers' argument that failure to serve Suzanne Pfeiffer somehow constituted a violation of her constitutional rights to due process was not raised before the trial court. It is not

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[73] *See* Supreme Court Civil Rule 8 ("Only questions fairly presented to the trial court may be presented for review [unless the interests of justice otherwise so require] . . . ."). *See also Equitable Trust Co. v. Gallagher*, 77 A.2d 548, 550 (Del. 1950) ("Appellate Courts generally will refuse to review matters on appeal not raised in the Court below.").

surprising, then, that the trial court did not at any point in its oral decision of November 30, 2010, or its written decision of January 3, 2011, address the Pfeiffers' newly-conceived due process claims. The issue simply was not litigated.

At best, the Court has found only nominal references to Suzanne Pfeiffer's constitutional rights scattered in the record. The most significant reference is in the Pfeiffers' complaint against State Farm, Mr. McCullough and Mr. Watson. Surprisingly, however, the vague due process reference appears in the "Damages" section of the complaint:

> Defendants' wrongful actions violated [Suzanne Pfeiffer's] due process rights to notice and opportunity for hearing prior to interference with her property rights, caused her to incur legal expenses, and prevented her from relying on her insurance carrier to insulate her from the expense and hassle of resolving a motor vehicle property damage claim.[74]

The Pfeiffers' counsel did not include that constitutional claim within the broader "abuse of process" section of the complaint. Nor did counsel later flesh out the merits of any constitutional argument. In Plaintiffs' Supplementary Response to the Defendants' Motion for Summary Judgment, the Pfeiffers note that Mr. McCullough's failure immediately to vacate the default judgment after receiving Suzanne Pfeiffer's affidavit and motion to vacate "shows contempt" for her "rights

[74] Pfeiffers' Compl. ¶ 27.

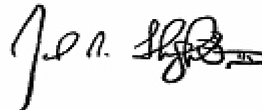
to notice an[d] [sic] opportunity for hearing prior to the entry of judgment."[75] No legal argument or analysis follows this broad and summary statement and the record reveals no further effort to develop or even argue the point.

The Pfeiffers have failed to preserve their due process claim on appeal because they did not properly present the claim to the trial court. This basic rule of appellate procedure applies with full force here.[76]

VI.

For all of the foregoing reasons, the decision of the Court of Common Pleas granting defendants' motions for summary judgment is **AFFIRMED.**

IT IS SO ORDERED.



Judge Joseph R. Slights, III

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[75] Plaintiffs' Supplementary Response to the Defendants' Motion for Summary Judgment at 2; *see also* McCullough Resp. at Ex. G, BWM141 (including a single sentence email from Suzanne Pfeiffers' counsel to Mr. McCullough that states: "Might as well define the real issue: my client's constitutional rights to notice and opportunity for hearing").

[76] Del. Super. Ct. R. 8.