STATE OF MAINE
CUMBERLAND, ss.

BUSINESS & CONSUMER DOCKET
DOCKET NO. BCD-RE-19-09

KINDERHAUS NORTH LLC,
PRIME PROPERTIES ME LLC, &
KAREN and BRIAN FULLERTON

Plaintiffs/ Counterclaim Defendants

v.

KARL NICOLAS and
STEPHANIE R. NICOLAS,

Defendants/ Counterclaim Plaintiffs

KINDERHAUS NORTH LLC, PRIME PROPERTIES ME LLC, KAREN FULLERTON, and BRIAN FULLERTON

Third-Party Plaintiffs

v.

H. ALLEN RYAN and DIANNE E. RYAN

Third-Party Defendants

ORDER GRANTING DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

This case arises out of a contentious dispute regarding a right-of-way depicted on the Plan of Abner's Point Lots on Baily Island, Harpswell, Maine, recorded in September 1979. By separate Order, this Court granted Plaintiffs' Motion for Partial Summary Judgment, determining that Plaintiffs have deeded easement rights in the disputed way. *See Order Granting Plaintiffs' Motion for Partial Summary Judgment and Denying Defendants' Motion for Partial Summary*

Judgment, April 24, 2020. In conjunction with their easement claims, Plaintiffs brought a number of tort claims. Now before the Court is the Motion for Partial Summary Judgment brought by Defendants Karl and Stephanie Nicolas (the "Nicolases") on those tort claims.[1] The Nicolases move the Court for summary judgment on Count X (Slander of Title), Count XI (Abuse of Process-3033 Notice), Count XII (Abuse of Process- Report to Law Enforcement), Count XIII (Nuisance), Count XIV (Conversion), and Count XV (Punitive Damages). The Nicolases contend there are no genuine issues of material fact and they are entitled to judgment as a matter of law. The Court agrees, and for the reasons set forth below grants the Nicolases' Motion for Partial Summary Judgment.

STANDARD OF REVIEW

Summary Judgment is a procedural device for obtaining judicial resolution of matters that may be decided without fact-finding. *Curtis v. Porter*, 2001 ME 158, ¶ 7, 784 A.2d 18. Thus, summary judgment is appropriate if, viewing all factual disputes in the light most favorable to the non-moving party, there are no genuine issues of material fact that prevent judgment for the moving party as a matter of law. M.R. Civ. P. 56(c). A material fact exists when the fact is one that could affect the outcome of the case. *Farrington's Owners Ass'n v. Conway Lake Resorts, Inc.*, 2005 ME 93 ¶ 9, 878 A.2d 504. A genuine issue of material fact exists when there is sufficient evidence to require a fact-finder to choose between competing versions of the truth. *Id.* When a defendant moves for summary judgment, the plaintiff must proffer evidence sufficient to prove the essential elements of their claims without requiring the Court to speculate. However, the Court gives the party opposing summary judgment the benefit of any reasonable inferences that can be

[1] The Nicolases' Motion for Partial Summary Judgment is opposed not only by Plaintiffs, but also by Third Party Defendant Dianne E. Ryan, who filed a short Memorandum in Opposition of about two pages.

drawn from the presented facts. *Kobritz v. Severance,* 2007 ME 3, ¶ 11, 912 A.2d 1237 (citing *Perkins v. Blake,* 2004 ME 86, ¶ 7, 853 A.2d 752). The Court only considers "those portions of the record referred to, and material facts set forth in the Rule [56(h)] statements." *Longley v. Knapp,* 1998 ME 142, ¶ 16, 713 S.2d 939.

UNDISPUTED FACTS

The parties to this action are record fee owners of certain lots depicted on the Plan of Abner's Point Lots on Bailey Island, Harpswell, Maine for Bruce Allen dated August 1979 and recorded September 29, 1979 in the Cumberland County Registry of Deeds, Book of Plans, Volume 124, Page 60 ("the Plan"). Plaintiff Prime Properties ME LLC ("Prime") is the owner of Lot 1 identified on the Plan, and Plaintiff Kinderhaus North LLC ("Kinderhaus") is the owner of Lot 2. Plaintiffs Karen L. Fullerton and Brian Fullerton co-own Lots 5 and 6. Karen Fullerton is also a member and Manager of Prime and of Kinderhaus. The Nicolases own Lot 4 as identified on the Plan.

The dispute arises over competing claims to a 20-foot-wide right-of-way that runs over the Nicolases' real estate (Lot 4) and along the easterly sideline of Lots 1 and 2 to the shore of Merriconeag Sound. On May 10, 2018, the Nicolases received copies of an email from Plaintiffs' real estate broker, leading them to believe Plaintiffs claimed a vehicular and pedestrian easement over Lot 4. (Pls.' S.M.F. ¶ 6). On May 16, 2018, Karl Nicolas expressed to his broker a plan to convince Plaintiffs to negotiate the release of their easement rights, by sending along a legal opinion and offering other compromises. (Pls.' S.M.F. ¶ 17). On that same day, Stephane Nicolas used her Wilmer Hale email to send along the legal opinion to Plaintiffs' broker, and invite Plaintiffs to work out a solution. (Pls.' S.M.F. ¶ 19). Plaintiffs felt wary about receiving the email. (Pls.' S.M.F. ¶ 22).

On or about May 23, 2018, the Nicolases received a letter from an attorney representing Prime Properties ME LLC and Kinderhaus North LLC as owners of Lots 1 and 2. (Defs.' S.M.F. ¶ 1). The letter claimed that the owners of Lots 1 and 2 had a right to use the disputed right-of-way, but that there was a lamp post and series of trees blocking it. (Defs.' S.M.F. ¶ 2). Plaintiffs also informed the Nicolases that they planned to construct a gravel drive on the right-of-way, requiring the removal of the aforementioned obstructions. (Pls.' S.M.F. ¶ 24). Plaintiffs provided the Nicolases the opportunity to remove the obstructions themselves before beginning construction on the gravel right-of-way but stated the Nicolases did not have an obligation to do so. (Pls.' S.M.F. ¶ 24, Defs.' S.M.F. ¶ 2). On June 5, 2018, Karl Nicolas wrote to his broker: "Quick update, we're going to war unless they decide to come to the table and negotiate." (Pls.' S.M.F. ¶ 26).

In early June, the Nicolases learned that the Town of Harpswell recorded notices in the Cumberland County Registry of Deeds to extend the deadline for automatic vacation of "paper streets" pursuant to 23 M.R.S. § 3032. (Pls.' S.M.F. 27; Defs.' S.M.F. ¶¶ 3, 5). The first notice included the disputed right-of-way as a paper street whose deadline for automatic vacation was extended 20 years, but the second notice omitted the disputed right-of-way from the list. The Nicolases understood the omission to mean that the public right to the disputed right-of-way had been vacated. (Pls.' S.M.F. 27; Defs.' S.M.F. ¶ 6). On June 14, 2018, the Nicolases recorded a Notice pursuant to 23 M.R.S. § 3033 ("the 3033 Notice") in the Cumberland Country Registry of Deeds to invoke the statutory procedure for vacating private rights over the disputed right-of-way. (Pls.' S.M.F. ¶ 29; Defs.' S.M.F. ¶ 7). A copy of the 3033 Notice was provided to Plaintiffs' attorney by email on June 20, 2018. (Pls.' S.M.F. ¶ 33; Defs.' S.M.F. ¶ 8). On June 28, 2018, through counsel, Plaintiffs acknowledged receipt of the Section 3033 Notice and explained to the

Nicolases their belief that for various reasons the recording of the Section 3033 was in error. (Pls.' S.M.F. ¶ 34).

On June 29, 2018, the Nicolases arrived at their property (Lot 4) and found Plaintiff Karen Fullerton in the process of removing three ornamental trees and a juniper bush located within the right-of-way. (Pls.' S.M.F. ¶ 35; Defs.' S.M.F. ¶ 10). The trees and bush were the obstructions previously described in Plaintiffs' May 23, 2018 notice to the Nicolases. (Pls.' S.M.F. ¶ 35). As Karen Fullerton finished removing the juniper bush a verbal altercation ensued. (Pls.' S.M.F. ¶ 36; Defs.' S.M.F. ¶ 11). Karen Fullerton eventually left the property still believing she had a right to use the disputed right-of-way. (Defs.' S.M.F. ¶¶ 12, 13). In response to the altercation, Defendant Stephanie Nicolas contacted law enforcement, resulting in the Cumberland County Sherriff visiting the Fullertons' home to serve a no trespassing notice. (Defs.' S.M.F. ¶ 14). Karen Fullerton informed the Sherriff's Deputy that she owned land accessed by an easement over the Nicolases' property, and as a result the Deputy did not serve the no trespass notice. (Pls.' S.M.F. ¶ 43). The Fullertons then agreed to attend pre-trial mediation with the Nicholases on the condition that the no trespass order was withdrawn. (Pls.' S.M.F. ¶ 44). On July 16, 2018, through counsel, the Nicolases withdrew their request of the Sherriff to serve Ms. Fullerton with an order prohibiting her from entering the Nicolases' property or the disputed right-of-way. (Pls.' S.M.F. ¶ 45). The Nicolases' have not since placed obstructions in the way, nor tried to prevent Plaintiffs' use of the disputed right-of-way. (Defs.' S.M.F. ¶ 24).

In July of 2018, the Nicolases learned that the previously recorded 3033 Notice misidentified the owner of Lot 3 on the Plan. The Nicolases responded by recording a corrected notice in the Cumberland County Registry of Deeds, attempting to continue the process for vacating certain private rights over the disputed right-of-way. (Defs.' S.M.F. ¶ 23).

Plaintiffs initially intended to sell Lot 1, and in preparation planned to install a well and construct a gravel access drive for vehicular access to Lots 1 and 2. (Pls.' S.M.F. ¶ 2). Plaintiffs ultimately decided to postpone or minimize their plans until after the dispute was resolved, on advice of counsel, to avoid getting the police involved, and for good conscience.[2] (Defs.' Additional S.M.F. ¶¶ 15, 16.) Plaintiffs nevertheless removed trees and bushes in the way, and used the way to access the shore and Lots 1 and 2. (Pls.' S.M.F. ¶¶ 35, 52.) Further, Plaintiffs' surveyor and landscapers entered and utilized the disputed way to prepare for constructing a limited gravel surface and to access Lots 1 and 2. (Pls.' S.M.F. ¶¶ 48, 53.)

Plaintiffs continue to pay taxes and an equity loan to carry the property longer than they wished. (Pls.' S.M.F. ¶ 60). Plaintiffs incurred the cost of remediating ruts on Lots 1 and 2 caused by tire tracks left by their agents using temporary access across Lot 2. (Pls.' S.M.F. ¶ 60). Plaintiffs also incurred legal fees. (Pls.' S.M.F. ¶ 60.) On September 21, 2018, Plaintiffs filed their Complaint with the Superior Court.

DISCUSSION

The Nicolases seek summary judgment on all of the tort claims in the Complaint. The Court addresses each of the claims in the order in which they are pled in the Complaint.

Count X: Slander of Title

Plaintiffs assert that the Nicolases slandered the title to their property when they filed a notice pursuant to 23 M.R.S. § 3033 in the Cumberland County Registry of Deeds. Section 3033, in conjunction with 23 M.R.S. § 3032, sets up a process for claimants to contest the existence of

[2] Plaintiffs' efforts to create a genuine dispute of fact regarding these points is unavailing. First, Karen Fullerton's deposition testimony is clear. Second, Fullerton's later affidavit, prepared specifically for summary judgment purposes, doesn't substantively change her testimony. Her affidavit adds that one of the reasons Plaintiffs reduced or avoided use of the easement was because the Nicolases threatened a lawsuit, but that is subsumed within her deposition testimony, and as discussed later doesn't change the analysis.

private rights in proposed, unaccepted ways. *See* 23 M.R.S. §§ 3032, 3033. Plaintiffs contend that the Section 3033 notice was false, published with malice, and resulted in damages.

To prove slander of title, a claimant must establish (1) there was a publication of a slanderous statement disparaging claimant's title; (2) the statement was false; (3) the statement was made with malice or made with reckless disregard of its falsity; and (4) the statement caused actual or special damages. *Rose v. Parsons,* 2013 ME 77, ¶ 13, 76 A.3d 343, 347 (quoting *Colquhoun v. Webber,* 684 A.2d 405, 409 (Me. 1996). The title interest required to maintain a claim for slander of title is generally considered to be some legally enforceable degree of ownership. RESTATEMENT (SECOND) OF TORTS § 624.

In this case, Plaintiffs contend the Section 3033 notice was false, both as a whole, and in its reference to an unaccepted way, because under Maine law the Section 3033 notice could not be used to extinguish the Plaintiffs' deeded easement rights to a used, constructed way. Plaintiffs further assert that the Section 3033 notice was so manifestly false under Maine law, that (in concert with certain alleged conduct on the part of the Nicolases) the Section 3033 notice was made with malice or reckless disregard for its falsity. The Nicolases counter that they had a plausible basis for recording the Section 3033 notice, and in any event, a Section 3033 notice cannot as a matter of law give rise to a slander of title claim.

In slander of title cases, falsity and malice are usually analyzed based on the extent to which an allegedly slanderous title statement finds support in Maine law. In *Fischer v. Bar Harbor,* 673 F. Supp. 622, 624 (D. Me. 1987), for example, a bank placed a lien on a boat hull. The Court's analysis of the slander of title claim focused on whether, under the circumstances of that case, the bank had a good faith basis for placing a lien on the hull. *Id.* at 625-626. It was implicitly accepted that if the lack of grounds for recording the lien were sufficiently "false," meaning unsupported by

the law, the lien constituted an actionable statement. *See also Colquhoun*, 684 A.2d at 410 (frivolous recorded quitclaim deed was actionable).

In the present case, setting aside for the moment whether the Nicolases' had plausible grounds for recording a Section 3033 notice as a part of their easement dispute (and hence whether the notice was false or not), the Court agrees with Defendants that as a matter of law, a Section 3033 notice cannot give rise to a slander of title action. At its heart, slander of title is "a form of the tort of injurious falsehood . . . " *Colquhoun*, 684 A.2d at 409. Not all false statements are actionable. With regard to the tort of defamation, for instance, statements of opinion are not actionable. *See Ballard v. Wagner*, 2005 ME 86, ¶ 10, 877 A.2d 1083 (statements of opinion not actionable). A Section 3033 notice is analogous to an opinion. The notice announces to owners of lots in a subdivision, that one of the owners claims ownership of an unaccepted way. The notice is not the final say on the matter, but rather the first step in a process that gives all potentially affected parties an opportunity to assert their own claims to ownership in the way.[3] Unlike the lien in *Fischer*, or the quitclaim deed in *Colquhoun*, a Section 3033 notice in and of itself does not diminish anyone's property interest, or undermine their claim to a property interest.

Even if a Section 3033 notice can serve as the basis for a slander of title action, its use by the Nicolases in this case was not so improbable as to make the notice, in whole or in part, false. At the time Defendants' filed their Section 3033 notice, they were under the impression that in 2017, public rights to the disputed way had been vacated by the Town of Harpswell pursuant to 23 M.R.S. § 3032. A person claiming to own a proposed, unaccepted way or portion of a proposed

[3] Maine's Paper Streets Act, 23 M.R.S. §§ 3027, 3031-3035; 33 M.R.S. §§ 460, 469-A, was enacted by the Legislature to address ancient claims to land, and clarify title to public or private rights featured on recorded subdivision plans. Should every arguably erroneous filing of a Section 3033 notice be challenged with a slander of title claim, a chilling effect may result, causing parties to avoid addressing old claims to land for fear of tort liability. Such a result would frustrate the legislative purpose of the Paper Streets Act. *See* 23 M.R.S. § 3035.

unaccepted way deemed vacated under Section 3032 may record, in the registry of deeds where the subdivision plan is recorded, a confirmed copy of the notice set forth in Section 3033. 23 M.R.S. § 3033(1). The existence of Plaintiffs' deeded easement rights, and the issue of whether the way was constructed and used, were disputed by the Nicolases. Because the Nicolases followed the statutory process to assert a claim of ownership after the Town of Harspwell's decision to allow public rights in the Disputed Way to be vacated, and because the Nicolases disputed the issues which Plaintiffs argued rendered the Section 3033 notice in error, the Court concludes that the Nicolases' use of the Section 3033 notice was not so improbable as to make the notice, in and of itself, false.[4]

Accordingly, the Court grants the Nicolases' Motion for Partial Summary Judgment with regard to Count X.

Count XI: Abuse of Process— §3033 Notice

In Count XI, Plaintiffs similarly assert that the Nicolases engaged in an abuse of process when they filed the notice pursuant to 23 M.R.S. § 3033 in the Cumberland County Registry of Deeds. As discussed above, Section 3033, in conjunction with 23 M.R.S. § 3032, provides a process for claimants to contest the existence of private rights in proposed, unaccepted ways. *See* 23 M.R.S. §§ 3032 & 3033. Plaintiffs contend that the Nicolases knew or should have known that they could not satisfy § 3032, and by extension § 3033's requirements to vacate Plaintiffs' rights to the disputed right-of-way. In Plaintiffs' view, the § 3033 notice was filed in bad faith, with the intent of forcing Plaintiffs to bring suit to defend their express deeded easement rights, or otherwise to force Plaintiffs to make concessions with regard to their easement rights.

[4] Further, the Section 3033 notice in this case does not mention Plaintiffs' properties, nor make any statements regarding the existence of Plaintiffs' deeded easement rights. Rather, the Section 3033 notice asserted a claim of ownership to the land burdened by the Disputed Way, subject to potential claims of private right by other owners of lots in the subdivision plan.

In Maine, abuse of process claims arise when litigants misuse individual legal procedures after a lawsuit has been filed,[5] and when contractors misuse the procedures for obtaining a mechanics lien. *Advanced Constr. Corp v. Pilecki*, 2006 ME 84, ¶ 23, 901 A.2d 189. In either context, a claimant must show two elements: (1) the use of process in a manner improper in the regular conduct of the proceeding, and (2) the existence of an ulterior motive. *Id.* In this case, whatever the Nicolases ulterior motive, the Section 3033 notice they filed preceded the initiation of a lawsuit, and was not filed in connection with a mechanics lien. As a matter of law, therefore, Plaintiffs' abuse of process claim must fail.

Plaintiffs object that this reading of the case law is too cramped. Plaintiffs point to *Pilecki* and *Kleinschmidt v. Morrow*, 642 A.2d 161, 164 (Me. 1994), for the proposition that the Law Court has evolved the abuse of process tort beyond abuse of procedures in litigation. Abuse of mechanics lien procedures, argue Plaintiffs, is but one example of abuse of process prior to the initiation of a lawsuit. According to Plaintiffs, abuse of the Section 3033 notice represents a natural pre-lawsuit extension of the tort, akin to abuse of mechanics lien procedures.

The problem for Plaintiffs is that the Law Court has not explained its mechanics lien case law according to this evolutionary paradigm. In *Kleinschmidt*, the Law Court declined to second guess a jury verdict award for damages. *Id.* at 164. In *Pilecki*, the Law Court acknowledged *Kleinschmidt* but merely noted that, along with misuse of procedures during a lawsuit, misuse of mechanics lien procedures could give rise to an abuse of process claim. The Law Court did not explain its conclusion in evolutionary terms, and did not suggest that the elements of abuse of

[5]Abuse of process claims are distinguished from claims of malicious prosecution, *see Pepperell Trust Co. v. Mountain Heir Financial Corp*, 1998 ME 46, ¶ 16, 708 A.2d 651 (treating abuse of process and malicious prosecution as "distinct causes of action related to the misuse of the legal system"). Malicious prosecution applies when a party wrongfully initiates, continues, or procures legal proceedings. *Id.* at ¶ 17. Plaintiffs have not alleged malicious prosecution.

process could be generalized to any pre-lawsuit abuse of process. It may very well be that abuse of process claims based on abuse of mechanics lien procedures are the tip of the spear, but that is for the Law Court to decide. Based on the current development of the precedent, the Court grants Defendants' Motion for Partial Summary Judgment with regard to Count XI.

Count XII: Abuse of Process— Complaint to Law Enforcement

Count XII of Plaintiffs' complaint asserts that the Nicolases engaged in an abuse of process when they made a report to law enforcement after the parties' June 29, 2018 altercation regarding the disputed right-of-way. The elements of an abuse of process action are discussed above. *See also Tanguay v. Asen*, 1998 ME 277, ¶ 5, 722 A.2d 49. A complaint to law enforcement is not, by itself, a court document or process. In order to avoid this dispositive deficiency, Plaintiffs point to the fact that the Nicolases called the Sheriff's office to serve Ms. Fullerton with a No Trespass Order pursuant to 17-A M.R.S. § 402(1)(e). Plaintiffs assert that a No Trespass Order serves a notice function similar to that of a lien filed in the Registry of Deeds, and that when abused as in *Kleinschmidt* and *Advanced Constr. Corp.*, supports a claim for abuse of process. However, it is undisputed that upon speaking with Ms. Fullerton, the Sheriff's Deputy took back the No Trespass Notice he originally planned to serve. (Pls.' S.M.F. ¶ 43; Defs.' S.M.F. ¶ 14). Further, Maine Courts have consistently held that the act of making a complaint to law enforcement causes process to issue but does not constitute a misuse of process itself. *Deangelis v. Maine Educ. Ass'n*, No. CV-03-493, 2004 WL 1925543, at *1 (Me. Super. June 30, 2004) (citing *Nadeau v. State*, 395 A.2d 107, 116 (Me. 1978); *Packard v. Central Maine Power Co*., 477 A.2d 264, 265 (Me. 1984)[6]. The Court grants the Nicolases' Motion for Partial Summary Judgment with regard to Count XII.

[6] In *Packard v. Central Maine Power Co.,* the Court also noted that "even if the plaintiff could prove [Defendant] acted wrongfully in reporting the matter to law enforcement officials, such evidence is not relevant to an allegation of abuse of process." *Packard*, 477 A.2d 264, 267 (Me. 1984).

Count XIII: Nuisance

In Count XIII of their Complaint, Plaintiffs contend that the Nicolases' conduct in challenging the easement constitutes a common law, private nuisance. A private nuisance "consists in a use of one's own property in such a manner as to cause injury to the property, or other right, or interest of another. *Norcross v. Thoms,* 51 ME 503, 504 (1863). To succeed on a private nuisance claim, a plaintiff must prove: 1) the defendant acted with the intent of interfering with the use and enjoyment of the land by those entitled to that use; 2) there was some interference of the kind intended; 3) the interference was substantial such that it caused a reduction in the value of the land; and 4) the interference was of such a nature, duration or amount as to constitute unreasonable interference with the use and enjoyment of the land. *West v. Jewett and Noonan Transportation, Inc.*, 2018 ME 98, ¶ 14, 189 A.3d 277 (citing *Charlton v. Town of Oxford*, 2001 ME 104, ¶ 36, 774 A.2d 366). The Nicolases contend that Plaintiffs fail to satisfy these elements because they cannot establish that the Nicholases impeded or obstructed their use of the disputed right-of-way, or that the interference caused a reduction in the value of their land.

The undisputed facts show that the Nicolases tried to persuade Plaintiffs to negotiate the release of their easement rights; used their law firm email; filed a Section 3033 notice; exchanged harsh words; and on one occasion reported Plaintiffs to the police, all as part of challenging Plaintiffs' rights to the disputed easement. In the face of this conduct, Plaintiffs decided to postpone their plan to construct a full gravel surface over the way, or to market Lots 1 or 2, until after the dispute was resolved. Plaintiffs choose to minimize their use of the easement on advice of counsel, to avoid getting the police involved, and for good conscience. Plaintiffs nevertheless removed trees and bushes in the way, and used the way to access the shore and Lots 1 and 2.

Further, Plaintiffs' surveyor and landscapers entered and utilized the disputed way to prepare for constructing a gravel surface and to access Lots 1 and 2.

Plaintiffs argue that in order to survive summary judgment, all they need to do is generate a dispute about whether the Nicolases caused "some interference" with their right to use the easement. Plaintiffs' emphasis on the "some interference" element of the tort is understandable. There is indeed no dispute that the Nicolases acted with the intent of interfering with (indeed terminating) Plaintiffs' use and enjoyment of the disputed way, and that there was some interference of the kind intended. Plaintiffs nevertheless fall short of satisfying the remaining two elements of the tort: substantiality, and unreasonableness. The Court first addresses the unreasonableness element.

In order to provide the basis for a private nuisance claim, the interference must be of such a nature, duration or amount as to constitute unreasonable interference. *West*, 2018 ME 98, ¶ 14. Not all interference qualifies. "Life in organized society, and especially in populous communities, involves an unavoidable clash of individual interests." Keeton, W.P. et al., *Prosser and Keeton on The Law of Torts*, § 88 (West Publishing, Fifth Edition, 1984) p. 629, quoting *Restatement (Second) of Torts*, § 822, Comment j. In this case, the Nicolases engaged in a legal strategy intended to persuade Plaintiffs to release their easement claims, or to refrain from exercising their rights to use the disputed easement until the issue was decided in court. In the unfortunate vernacular of Karl Nicolas, the Nicolases mounted a legal "war" against Plaintiffs. The legal dispute took time, and the parties were somewhat stalemated on the ground during the pendency of the legal proceedings. But a distinction must be made between conduct, and the interference itself; in order to be actionable, the interference itself must be unreasonable, irrespective of the conduct. Keeton, et al., *Prosser and Keeton on The Law of Torts* § 87 at 623 (5th ed. 1984). In

this case, the Nicolases conduct was objectionable to Plaintiffs, and caused them to be wary. But the interference that resulted—delay and stalemate until the legal dispute was decided in court—was not unreasonable.

This Court has now decided the right-of-way issue, and (at least at the trial court level) Plaintiffs have won, and the Nicolases have lost, the easement war. As offensive and costly to Plaintiffs as the Nicolases' war undoubtedly was, no court has declared the Nicolases' theories or claims frivolous, and neither the Nicolases (as attorneys) nor their legal counsel have been sanctioned. Delay and frustration while legal issues are sorted out in court are a normal part of life in our society. On these facts, the interference caused by the Nicolases (in contradistinction to their conduct) was not of such a nature, duration or amount as to constitute unreasonable interference for purposes of establishing a nuisance claim.[7]

Even if it was, Plaintiffs have not generated a genuine dispute of material fact as to substantiality. In order to support a claim for private nuisance, the interference complained of must be substantial. *West*, 2018 ME 98, ¶ 14. When considering the substantiality element, there is a distinction between interference that "'affects the physical condition of the plaintiff's land' and conduct that involves 'mere physical discomfort or mental annoyance.'" *West*, 2018 ME 98, ¶ 15, quoting Keeton, et al., *Prosser and Keeton on the Law of Torts* § 88 at 627 (5th ed. 1984). For the former, the substantial nature of the interference is not in doubt because of the physicality of the invasion.[8] *Id.* For the latter, substantiality must by shown by a deprivation in the market or rental

[7] Even if the Nicolases' conduct was worse, as alleged by Plaintiffs but controverted by the Nicolases, it would not change the analysis, because the resulting interference was the same.

[8] An example of such interference occurred in *West,* 2018 ME 98, when an oil tanker overturned, leaking oil onto the plaintiffs' property. The Law Court held that the spill "affected the physical condition" of the plaintiffs' property sufficient to meet the substantiality element of private nuisance. Interference affecting the physical condition of land has also been found when defendants were responsible for flooding plaintiffs' land with water. *See McRae v. Camden & Rockland Water Co*., 138 Me. 110, 22 A.2d 133 (1941); *Goodwin v. Texas Co.,* 134 ME 266, 185. A. 695, 696 (1936).

value of the land. *Id.; see also Charlton, 2001 ME 104*, ¶ 36. In this case, the conduct complained of falls into the latter category. The Nicolases have not affected the physical condition of the disputed way, nor have they physically obstructed the way. Rather, the Nicholases engaged in a legal strategy Plaintiffs found objectionable; which made Plaintiffs wary; and which caused delays on the ground while the legal claims were resolved in court. Accordingly, in order to survive summary judgment, Plaintiffs must provide evidence that their land has been reduced in value because of the Nicolases' interference.

Plaintiffs provide no such evidence. Instead, Plaintiffs provide evidence of legal expenses, and of costs to remediate tire ruts on Lot 2. Plaintiffs also point to a delay in marketing their property. However, Plaintiffs provide no evidence that their land has been reduced in value. It follows, therefore, that Plaintiffs have failed to generate a genuine dispute of material fact on substantiality. The Court grants Defendants' Motion for Partial Summary Judgment with regard to Count XI.

Count XIV: Conversion

Defendants also request summary judgment on Plaintiffs' conversion claim in Count XIV. Generally, conversion is the invasion of a party's possession or right to possession of property. *Barron v. Shapiro & Morley,* LLC, 2017 ME 51, ¶ 14, 157 A.3d 799 (citing *Withers v. Hackett,* 1998 ME 164, ¶ 7, 714 A.2d 798). The elements of a conversion claim require (1) the person claiming that his or her property was converted has a property interest in the property; (2) the person had the right to possession of at the time of the alleged conversion; (3) the party with the right to possession made a demand for its return that was denied by the holder. *Id.*

Maine law has long limited the tort of conversion to claims relating to personal, rather than real property. In *Whidden v. Seelye,* a Plaintiff brought an action in trover[9] against a defendant who had cut trees on the plaintiff's real estate. The Court affirmed that trover is inapplicable to injuries to land or other real property. *Whidden v. Seelye,* 40 Me. 247, 255 (1855). Maine Courts have since maintained this approach, applying it directly to claims of conversion. *See Breen v. Lucas,* No. RE-03-19, 2005 WL 6013511 (Me. Super. July 04, 2005) (Granting summary judgment "Given that the tort of conversion, by its very nature, deals with personal and not real property. . ."); *Morton v. Burr,* No. BCD-RE-13-03, 2014 WL 380895, at *7 (Me. B.C.D. Jan. 16, 2014 (Granting motion to dismiss on grounds that real property is not subject to the tort of conversion). Regardless of whether Defendants denied Plaintiffs access to the disputed right-of-way or hindered their ability to effectively market their real property, the tort of conversion does not apply to such facts. Accordingly, summary judgment is granted in favor of Defendants on Count XIV.

Count XV: Punitive Damages

Since none of the tort claims have survived that could support punitive damages, the Court grants the Nicolases' Motion for Partial Summary Judgment on Count XV.

[9] At the time, trover was the action by which a party could maintain a claim of conversion in a foreign jurisdiction.

CONCLUSION

For all the foregoing reasons, summary judgment is entered in favor of the Nicolases on Counts X, XI, XII, XIII, XIV, and XV of the Complaint.

The Clerk is instructed to enter this Order on the docket for this case by incorporating it by reference. M.R. Civ. P. 79(a).

So Ordered.

Dated: May 1, 2020

_____/s_____
Michael A. Duddy Judge,
Business and Consumer Court