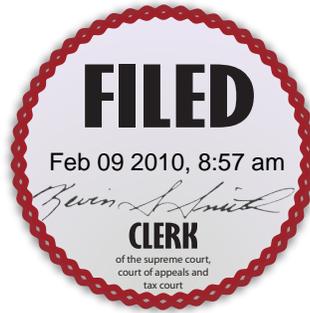


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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THREE LITTLE BIRDS, LLC, )  
)  
Appellant/Defendant/ )  
Counterclaim Plaintiff, )

vs. )

No. 71A05-0904-CV-187

STONE MANOR INVESTMENT CORP., )  
)  
Appellee/Plaintiff/ )  
Counterclaim Defendant, )

LINDA BEACHAM and DANIEL HANLEY, )  
)  
Appellees/Counterclaim Defendants. )

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APPEAL FROM THE ST. JOSEPH SUPERIOR COURT  
The Honorable Michael P. Scopelitis, Judge  
Cause No. 71D07-0708-PL-245

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**February 9, 2010**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BRADFORD, Judge**

On appeal, Appellant/Defendant/Counterclaim Plaintiff Three Little Birds, LLC (“Three Little Birds”) challenges the trial court’s order granting partial summary judgment in favor of Appellee/Plaintiff/Counterclaim Defendant Stone Manor Investment Corp. (“Stone Manor”) and Appellees/Counterclaim Defendants Linda Beacham and Daniel Hanley. Three Little Birds raises several issues on appeal which we restate as follows:

- I. Whether the trial court erred in determining that Stone Manor possesses an implied easement by necessity for the existing utilities servicing the Stone Manor building and for the existing porches, sidewalks, driveways, balconies, lamp posts and air conditioners (the “alleged encroachments”) to the extent that such utilities and encroachments are not covered by the express easement;
- II. Whether the trial court erred in determining the scope of the express easement;
- III. Whether the trial court erred in granting summary judgment in favor of Stone Manor, Hanley, and Beacham on Three Little Birds’s criminal and civil trespass claims; and
- IV. Whether the trial court erred in granting summary judgment in favor of Stone Manor on Three Little Birds’s tortious interference claim.

Upon review, we conclude that summary judgment is precluded on the claims relating to the existence of an implied easement by necessity, the scope of the express easement, and civil and criminal trespass because the fundamental factual question relating to ownership of the

strip of land at issue in each of these claims has yet to be determined. We further conclude that the trial court's order granting summary judgment in favor of Stone Manor on Three Little Birds's tortious interference claim is not erroneous. Therefore, we reverse in part, affirm in part, and remand for further proceedings.

## **FACTS AND PROCEDURAL HISTORY**

Our opinion in Three Little Birds and Stone Manor's prior appeal instructs us as to the underlying facts leading to this appeal:

On April 4, 2005, Irish Crossings Development, LLC ("Irish Crossings") recorded a document entitled "Declaration of Condominium Property Ownership for Irish Crossings Condominium" in the St. Joseph County Recorder's Office as Instrument Number 0513899 ("Instrument No. 899"). Appellant's App. p. 61. Instrument No. 899 contained the rules and regulations for condominium ownership in the Irish Crossings Condominium subdivision ("Condominium Project"). Exhibit C to Instrument No. 899 contained the building envelope diagram and legal description of a parcel referred to as Building Envelope F ("Building Envelope F").

On April 12, 2005, Irish Crossings recorded a document entitled "1<sup>st</sup> Amendment to Declaration of Condominium Property Ownership for Irish Crossings Condominium" in the St. Joseph County Recorder's Office as Instrument Number 0515408 ("Instrument No. 408"). Instrument No. 408 expressly withdrew Building Envelope F from the Condominium Project and granted Building Envelope F a "temporary easement for ingress and egress in and upon the Common Areas as defined in the Declaration which temporary easement shall automatically terminate when Building Envelope F is resubmitted to the Condominium." Appellant's App. pp. 132-33. Also on April 12, 2005, Irish Crossings recorded a "Warranty Deed" in the St. Joseph County Recorder's Office as Instrument Number 0515409 ("Instrument No. 409"). Instrument No. 409 transferred ownership of Building Envelope F along with the temporary easement described in the preceding paragraph to Weiss Homes, Inc. ("Weiss Homes").

On January 27, 2006, Weiss Homes recorded Instrument Number 0602720 ("Instrument No. 720") in which Weiss Homes attempted to resubmit Building Envelope F to the Condominium Project. Approximately seven days later, on February 3, 2006, Irish Crossings recorded Instrument Number 0603683 ("Instrument No. 683") which stated that "The purported 'Second

Amendment to the Declaration of Condominium Property Ownership for Irish Crossings Condominium' dated January 26, 2006 which was signed only by Weiss Homes, Inc. and recorded on January 27, 2006 as Instrument No. [720] is hereby deleted in its entirety and is void since it has been determined to be invalid by the Declarant [Foley]." Appellant's App. p. 144.

On August 4, 2006, Weiss Homes transferred ownership of Building Envelope F along with "a non-exclusive easement, created by a deed recorded as Instrument No. [409], for ingress and egress in and over so much of the Common Areas (as located on April 12, 2005) of Irish Crossing Condominium, per Declaration recorded as Instrument No. [899], as is reasonably necessary for access to and from, and service to, the subject premises" to Stone Manor. Appellant's App. p. 27.

On December 4, 2006, Irish Crossings transferred ownership of certain property located in the Condominium Project commonly known as vacant land located adjacent to Burdette Street to Three Little Birds. Irish Crossings subsequently recorded Instrument Number 0653374 ("Instrument No. 374"), which expressly withdrew from the Condominium Project "the portion of the Property referred to as 'Vacant land located adjacent to Burdette Street.'" Appellant's App. p. 149.

Stone Manor filed a verified complaint against Three Little Birds on August 29, 2007, seeking a declaratory judgment that:

Stone Manor has a valid non-exclusive, permanent and perpetual easement for ingress and egress in and over so much of the real property formerly known as the Common Areas of the Irish Crossings Condominium, per Declaration recorded as Instrument No. [899], as is reasonably necessary for access to and from, and service to, the fee portion of the Stone Manor Property, or alternatively an easement by implication or necessity.

Appellant's App. pp. 20-21. On March 19, 2008, Stone Manor filed a motion for partial summary judgment claiming that "the undisputed facts demonstrate that Stone Manor possesses an easement for ingress and egress to the Stone Manor property over the property allegedly owned by Three Little Birds, either by express grant of the easement, or, in the alternative, by necessity, implication, estoppel, or laches." Appellant's App. pp. 33-34. Three Little Birds filed its response to Stone Manor's motion for partial summary judgment on August 14, 2008.

The trial court conducted a hearing on Stone Manor's motion for partial summary judgment on August 22, 2008. On September 22, 2008, the trial court issued an order granting Stone Manor's motion for partial summary judgment. The parties filed a joint motion to amend the trial court's September

22, 2008 order by interlineation pursuant to Trial Rule 54(B) which was granted by the trial court on October 10, 2008.

*Three Little Birds, LLC v. Stone Manor Inv. Corp.*, No. 71A03-0811-CV-534 (Ind. Ct. App. May 11, 2009). On May 11, 2009, we concluded that “[b]ecause nothing in the record suggests that Building Envelope F has successfully been resubmitted to the Condominium Project, we conclude that the easement has not been automatically terminated pursuant to the express language of Instrument Nos. 408 or 409, and therefore the trial court did not err in granting partial summary judgment in favor of Stone Manor.” *Id.*

On March 3, 2009, the trial court issued an order regarding Stone Manor, Beacham, and Hanley’s motions for summary judgment filed on July 28, 2008, and Stone Manor’s motion to strike filed on October 27, 2008. In this order, the trial court, in relevant part, granted summary judgment in favor of Stone Manor on Three Little Birds’s tortious interference counterclaim, granted summary judgment in favor of Stone Manor on Stone Manor’s implied easement by necessity claim, and granted summary judgment in favor of Stone Manor, Beacham, and Hanley on Three Little Birds’s civil and criminal trespass counterclaims. Three Little Birds now appeals.

## **DISCUSSION AND DECISION**

### **I. Standard of Review**

Upon review of an order entering summary judgment, this court applies the same standard as the trial court. Summary judgment is appropriate where the evidentiary matter designated to the trial court shows both that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. We will affirm on appeal a trial court’s order granting summary judgment if it is sustainable under any theory or basis found in the evidentiary matter designated to the trial court. Additionally, when material

facts are not in dispute, our review is limited to the determination of whether the trial court correctly applied the law to the undisputed facts.

*Wright v. Am. States Ins. Co.*, 765 N.E.2d 690, 692 (Ind. Ct. App. 2002) (citations omitted).

When the material facts are undisputed with regard to a motion for summary judgment and the question presented is a pure question of law, we review the matter de novo. *Id.*

## **II. Whether the Trial Court's Order Granting Summary Judgment in Favor of Stone Manor is Erroneous**

Initially, we note that summary judgment is improper when a genuine question of material fact remains. *Id.* Here, the trial court determined that a genuine question of material fact remains regarding the ownership of the strip of land at issue in Stone Manor's claims relating to the existence of an implied easement of necessity, Stone Manor's claims relating to the scope of the express easement claimed by Stone Manor, and Three Little Birds's trespass claims against Stone Manor. Because ownership of the strip of land at issue is central to the easement and trespass claims, any questions relating to the ownership of the strip of land at issue must be resolved before these claims can be decided. For instance, if it is determined that Three Little Birds is not the rightful owner of the strip of land at issue, Three Little Birds would have no interest in Stone Manor's claims relating to the existence of an implied easement and the scope of the express easement over the strip of land in question and Three Little Birds would not have standing to bring the trespass claims against Stone Manor, Beacham, and Hanley. Therefore, we conclude that summary judgment is precluded on the claims relating to the existence of an implied easement of necessity, the scope of the

express easement, and civil and criminal trespass prior to a determination regarding ownership of the strip of land in question.<sup>1</sup>

### **A. Tortious Interference<sup>2</sup>**

On appeal, Three Little Birds contends that the trial court erred in granting summary judgment in favor of Stone Manor on Three Little Birds's tortious interference claim. A claim of intentional interference with a contract is established only when there is tortious conduct, *i.e.*, that which is intentional and unjustified. *Bilimoria Computer Sys., LLC, v. America Online, Inc.*, 829 N.E.2d 150, 156 (Ind. Ct. App. 2005). A party alleging tortious interference with a contractual relationship must establish five elements: (1) the existence of a valid and enforceable contract; (2) the defendant's knowledge of the existence of the contract; (3) the defendant's intentional inducement of breach of contract; (4) the absence of justification; and (5) damages resulting from the defendant's wrongful inducement of the breach. *Winkler v. V.G. Reed & Sons, Inc.*, 638 N.E.2d 1228, 1235 (Ind. 1994). In summary judgment proceedings, the burden is on the moving party to prove the non-existence of a genuine issue of material fact. *Id.* Movants may meet this burden by demonstrating that the

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<sup>1</sup> We reiterate that our opinion today has no effect upon our prior opinion regarding the express easement claimed by Stone Manor because our prior opinion was based solely upon our interpretation of the written documents relating to the parcel as a whole and not ownership of the strip of land at issue in the instant appeal.

<sup>2</sup> To the extent that Three Little Birds claims that the trial court was precluded from re-visiting its prior decision to deny summary judgment on Three Little Birds's tortious interference claim on the basis of the "law of the case" doctrine, we observe that the trial court has the inherent power to reconsider any of its previous rulings so long as the action remains *in fieri, i.e.*, until final judgment is entered. *Stephens v. Irvin*, 734 N.E.2d 1133, 1135 (Ind. Ct. App. 2000), *trans. denied*. Here, final judgment had not been entered on Three Little Birds's tortious interference claim prior to the trial court's order granting summary judgment on this claim. Therefore, Three Little Birds's claim that the trial court's order granting summary judgment in favor of Stone Manor on its tortious interference claim is barred by the "law of the case" doctrine is misplaced.

undisputed material facts negate at least one element of the plaintiff's claim. *Id.* If the movant sustains this burden, the opponent may not rest upon the pleadings, but must set forth specific facts showing that there is a genuine issue for trial. *Id.*

With regard to Three Little Birds's tortious interference claim against Stone Manor, the trial court concluded as follows:

2. On the issue of whether there is any material fact in dispute as to Three Little Birds' claim against Stone Manor for tortuous [sic] interference with contract contained in Count V of Three Little Birds' Counterclaim:

a. Stone Manor has met its burden of establishing that there are no material facts in dispute. Three Little Birds did not meet its burden of showing a dispute exists as to any material fact.

b. Stone Manor did not intentionally induce any breach of contract by Weiss Homes relating to the contractual relationship between Irish Crossings and Weiss Homes.

c. Stone Manor had legitimate personal and business interests in purchasing the Stone Manor building from Weiss Homes.

d. There are no material facts that show either an absence of justification or that Stone Manor was motivated by any malice or ill will toward Irish Crossings' property interests.

e. As a matter of law, Stone Manor did not tortuously [sic] interfere with the contract between Irish Crossings and Weiss Homes and therefore judgment should be entered in favor of Stone Manor and against Three Little Birds on Three Little Birds' claim of tortuous [sic] interference with contract contained in Count V of the Three Little Birds' counterclaim.

\* \* \* \*

2) Stone Manor's motion for summary judgment on Three Little Birds' claim of tortuous [sic] interference with contract is granted. Judgment is entered in favor of Stone Manor and against Three Little Birds on the claim of tortuous [sic] interference with contract.

Appellant's App. pp. 20-21, 27.

The trial court determined that Three Little Birds failed to set forth sufficient facts to create a genuine issue of material fact relating to the justification of Stone Manor's actions.

The justifiability of conduct involves consideration of the following factors: (1) the nature of

the defendant's conduct; (2) the defendant's motive; (3) the interests of the plaintiff with which the defendant's conduct interferes; (4) the interests sought to be advanced by the defendant; (5) the social interests in protecting the freedom of action of the defendant and the contractual interests of the plaintiff; (6) the proximity or remoteness of the defendant's conduct to the interference; and (7) the relations between the parties. *Bilimoria*, 829 N.E.2d at 156. The weight to be given each consideration may differ from case to case, but the overriding question is whether the defendant's conduct has been fair and reasonable under the circumstances. *Id.* A plaintiff must state more than a mere assertion that the defendant's conduct was unjustified. *Morgan Asset Holding Corp. v. CoBank, ACB*, 736 N.E.2d 1268, 1272 (Ind. Ct. App. 2000).

Here, the designated materials indicated that Stone Manor negated the element of absence of justification. "This element is established only if the interferer acted intentionally, without a legitimate business purpose, and the breach is malicious and exclusively directed to the injury and damage of another." *Bilimoria*, 829 N.E.2d at 156-57; *Morgan Asset Holding*, 736 N.E.2d 1272. The existence of a legitimate reason for the defendant's actions provides the necessary justification to avoid liability. *Bilimoria*, 829 N.E.2d at 157; *Morgan Asset Holding*, 736 N.E.2d 1272.

With regard to the absence of justification, the facts and circumstances presented in the record of designated materials demonstrate the reasonableness of Stone Manor's conduct. Stone Manor purchased the Stone Manor Property for personal use by its members and for rental income. The members of Stone Manor use two of the units in the Stone Manor

Property for accommodations when they are in the South Bend area for business or pleasure, including Notre Dame home football weekends. Stone Manor rents one of the available units to a tenant for premium short-term lodging for Notre Dame home football weekends. The remaining unit is available for tenant rental. In the absence of facts indicating otherwise, we conclude that the record demonstrates that a legitimate personal and business purpose for Stone Manor's purchase of the property from Weiss Homes existed, and Stone Manor's actions were not exclusively directed to the injury and damage of Three Little Birds. Moreover, Three Little Birds failed to provide more than an assertion that Stone Manor's conduct was unjustified. Therefore, the trial court properly granted summary judgment in favor of Stone Manor on Three Little Birds's claim of tortious interference with a contract.

In sum, we conclude that summary judgment is precluded on the claims relating to the scope of the express easement, the existence of an implied easement of necessity, and civil and criminal trespass prior to a determination regarding ownership of the strip of land in question and that the trial court properly granted summary judgment in favor of Stone Manor on Three Little Birds's claim of tortious interference with contract.

The judgment of the trial court is affirmed in part, reversed in part, and remanded for further proceedings.

KIRSCH, J., and MAY, J., concur.