

IN THE SUPERIOR COURT OF COBB COUNTY
STATE OF GEORGIA

COBB COUNTY, GA
FILED IN OFFICE

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Opheesa Keaton

COBB SUPERIOR COURT CLERK

MELISSA ATKINS,

Plaintiff,

v.

TFP COMPANY, LLC.

Defendant.

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CIVIL ACTION

FILE NO. 15-1-5289-53

ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The above-styled case having come before the Court on September 14, 2016, on the Defendant's *Motion for Summary Judgment*, and after argument of counsel having been heard, and after review of the Record and the applicable law;

IT IS HEREBY ORDERED as follows:

FINDINGS OF FACT

1.

The facts of the case are mostly undisputed. Robert Lewis filed for divorce from his wife, Michele Lewis in Walton County Superior Court. The Plaintiff in the present case is alleged to have had an extra martial affair with Robert Lewis. Plaintiff alleges that Michele Lewis hired the Defendant, a private investigation company, to place a hidden GPS tracking device on Plaintiff's vehicle while it was parked in a public place.¹ Plaintiff alleges Defendant placed the hidden GPS tracking device on her vehicle without her knowledge, consent or permission and monitored and recorded the movements of her and her family and shared that

¹ Plaintiff sued Michele Lewis in a companion case in Walton County Superior Court, but later dismissed the case.

information with third parties.² Further, it is undisputed that neither Defendant nor Michele Lewis had an ownership interest in the vehicle and did not have permission to place the GPS tracking device on Plaintiff's vehicle.

2.

No Statute Prohibits Defendant's Conduct

Defendant's overarching argument in this motion is that Georgia law does not prohibit Defendant's actions of placing the GPS tracking device on Plaintiff's vehicle without her knowledge or consent, therefore it must be legal. While there is currently no criminal statute that prohibits Defendant's actions, that does not necessarily mean this Court should grant summary judgment in this civil suit solely because there is no statute governing Defendant's conduct. From a public policy perspective, the problem with Defendant's legal position is that, if correct, anybody can put a GPS tracking device on anyone else's vehicle and long as it is done in a public place it is not a crime and no private cause of action can be maintained. It is this Court's concern that causes it to pause from consideration of the questions presented to raise a point of personal privilege.

3.

This case represents a classic situation where our jurisprudence and legislation have not kept up with rapidly changing technology that is widely available and cheaply obtained. This Court invites the Georgia General Assembly to take up this issue of GPS tracking in a healthy debate and potentially pass legislation that it deems necessary to provide Georgians with proper protection of their right to privacy. Indeed, Justice Alito writes in his concurrence in United

² The parties have conducted very little discovery in this case and discovery closed in March 2016. No depositions have been taken. Defendant filed Plaintiff's deposition from the Lewis divorce case in Walton County in this case. It has also filed interrogatories and request for production that were sent in the companion case Plaintiff filed against Michele Lewis in Walton County, which has since been dismissed.

States v Jones, 132 S.Ct. 945, 964 (2012), “In circumstances involving dramatic technological change, the best solution to privacy concerns may be legislative.” A legislative body is well suited to gauge changing public attitudes, to draw detailed lines, and to balance privacy and public safety in a comprehensive way.”

4.

The Defendant noted in oral argument that it is only seeking a ruling that holds that it is permissible for a private investigator to place a GPS device on someone’s vehicle, not all citizens. However, it is not this Court’s function to create from whole cloth, protection for such a group and hold that this conduct is permissible. That would be for the legislature to do, if they felt it appropriate. What is clear from Justice Scalia’s opinion in Jones, is that the Supreme Court of the United States has already held that what happened here, if done by the Government, is a “search” and that a vehicle is an “effect” within the meaning of the Fourth Amendment. Therefore, if a police officer were to put a GPS on someone’s car, they would be required to obtain a warrant first. However, the Fourth Amendment doesn’t apply to the actions of private citizens, so there are plenty of considerations that the General Assembly should consider in crafting legislation, including but not limited to:

1. Should they authorize private citizens to do what the police are prohibited from doing?
2. Should they authorize certain groups, like private investigators, and not others to put GPS devices on automobiles?
3. If certain groups are authorized, what restrictions should be placed on them?
4. Should the act of placing a GPS device on a car, without permission from an owner, be a crime?

5. If it is to be criminal, what exceptions, if any, should apply?
6. Should there be a private cause of action available, as well as criminal consequences, to enforce any proposed legislation?

5.

This Court recognizes that most Georgians would be upset to learn that there is no law restricting the use of GPS tracking devices to obtain, compile and potentially disseminate to their detriment, a great deal of data about what our citizens are doing. It only takes a little imagination to conjure up what sort of information could be obtained from indisputably private trips to: the psychiatrist, the plastic surgeon, the abortion clinic, the AIDS treatment center, the strip club, the criminal defense attorney, the divorce attorney, the by-the-hour motel, the AA meeting, the mosque, synagogue or church, the gay bar and on and on.

6.

With no criminal recourse and no statute specifically authorizing a private cause of action for this conduct, Plaintiff brought the instant civil case primarily comprised of common law tort claims. In her complaint Plaintiff has alleged (1) invasion of privacy, (2) trespass to personal property, (3) intentional infliction of emotional distress, (4) punitive damages and (5) attorney's fees. Defendant has filed a *Motion for Summary Judgment* as to counts one, two, three and four of Plaintiff's complaint.³ Defendant has also moved for attorney's fees pursuant to O.C.G.A. §9-15-14. This case is one of first impression in Georgia and this Court will look to each allegation in Plaintiff's complaint to determine if the Defendant is entitled to summary judgment.

³ The Defendant failed to file its Statements of Material Undisputed Facts pursuant to Uniform Superior Court Rule 6.5. However, there is no authority that requires a trial court to deny a motion for summary judgment on the sole ground the Defendant violated Uniform Superior Court Rule 6.5. See Ahmad v. Excell Petroleum, Inc., 276 Ga. App. 167, 169 (2005)

CONCLUSIONS OF LAW

7.

To prevail at summary judgment under OCGA § 9-11-56, the moving party must demonstrate that there is no genuine issue of material fact and that the undisputed facts, viewed in the light most favorable to the nonmoving party, warrant judgment as a matter of law. “A defendant who will not bear the burden of proof at trial need not affirmatively disprove the nonmoving party's case; instead, the burden on the moving party may be discharged by pointing out by reference to the affidavits, depositions and other documents in the record that there is an absence of evidence to support the nonmoving party's case.” Henson v. Ga.-Pacific Corp., 289 Ga.App. 777, 777-778 (2008). “If the moving party discharges this burden, the nonmoving party cannot rest on its pleadings, but rather must point to specific evidence giving rise to a triable issue.” Id.

8.

Count One- Invasion of Privacy

In count one of the complaint Plaintiff alleges the Defendant intruded upon Plaintiff's reasonable expectation of privacy by placing a GPS tracking device on Plaintiff's vehicle. Defendant argues the Plaintiff has not shown any facts to support this claim. Defendant argues its action of attempting to obtain information that is public is not highly offensive and Plaintiff has no reasonable expectation of privacy on the public roadways. The Defendant also argues GPS surveillance is generally permissible because it is another means to watch someone as he or she travels on public roadway. Defendant referenced several cases from other states which have found that tracking a vehicle by GPS did not constitute a private matter or private fact. *See Troeckler v. Zeiser, et al*, 2015 WL 1042187 (U.S. District Court S.D. Illinois).

9.

Plaintiff argues that by placing a GPS tracking device on Plaintiff's car, the Defendant went well-beyond the type of routine surveillance conducted by a private investigator who may follow a car for a limited period of time. Plaintiff argues this routine surveillance differs from the GPS tracking device in that it allows unfettered access to a person's movement every second of the day and this intrusion is a much more personal and intimate intrusion.

10.

The tort of invasion of privacy is broken down into four categories: (1) intrusion upon the plaintiff's seclusion or solitude, or into his private affairs; (2) public disclosure of embarrassing facts about the plaintiff; (3) publicity which places the plaintiff in a false light in the public eye; (4) appropriation for the defendant's advantage, of the plaintiff's name or likeness. Yarbray v. Southern Bell Tel. & Tel. Co., 261 Ga. 703, 704–05 (1991) *citing* Cabaniss v. Hipsley, 114 Ga.App. 367, 370 (1966). Plaintiff's claim falls into the first category, intrusion upon the seclusion or solitude. "The 'unreasonable intrusion' aspect of the invasion of privacy involves a prying or intrusion, which would be offensive or objectionable to a reasonable person, into a person's private concerns." Id. citing Keeton, Prosser & Keeton on Torts § 117 at pp. 855-856 (5th ed. 1984).

11.

The issue of placing a GPS tracking device on another's vehicle has not been dealt with in Georgia before. However, Georgia law is clear that while something that may be ordinarily permissible, such as observing or even taking photographs of another person, a claim for invasion of privacy can be created when the conduct or surveillance is unreasonable in light of the circumstances or was intended to frighten or torment the Plaintiff. *See* Anderson v.

Mergenhausen, 283 Ga. App. 546 (2007), Summers v. Bailey, 55 F3d. 1564 (11th Cir. 1995), Pinkerton Nat. Detective Agency v. Stevens, 108 Ga. App. 159 (1963), Ass'n Servs., Inc. v. Smith, 249 Ga. App. 629 (2001), and Ellenberg v. Pinkerton's, 130 Ga. App. 254, 256-257 (1973).

12.

In Pinkerton, the Plaintiff sued a private investigation company alleging it invaded her right of privacy by the manner in which an investigation of her activities by private detectives was conducted. The Court held,

[O]pen and repeated acts of surveillance were sufficient of themselves to publicly proclaim the plaintiff suspect and subject him to public disrepute so as to constitute "the analogue of libel." This petition does not limit the defendants' acts to that reasonable and unobtrusive observation which would ordinarily be used to catch one in normal activities unaware, but sets out a course of conduct beyond what would be sufficient for the purpose intended, and certainly one which would disturb an ordinary person without hypersensitive reactions. 108 Ga. App at 168.

Also, in Summers v. Bailey, the 11th Circuit Court of Appeals noted,

Traditionally, watching or observing a person in a public place is not an intrusion upon one's privacy. However, Georgia courts have held that surveillance of an individual on public thoroughfares, where such surveillance aims to frighten or torment a person, is an unreasonable intrusion upon a person's privacy. 55 F.3d at 1566.

13.

Finally, in Ellenberg, the Court of Appeals found the surveillance of a husband at his house and on public roads to investigate his disability claim did not constitute an intrusion upon seclusion or solitude into his wife's private affairs. The Court noted,

Reasonable surveillance is recognized as a common method to obtain evidence to defend a lawsuit. It is only when such is conducted in a vicious or malicious manner not reasonably limited and designated to obtain information needed for the defense of a lawsuit or deliberately

calculated to frighten or torment the plaintiff, that the courts will not countenance it. 130 Ga. App. at 256-257.

14.

The Anderson case involved allegations of stalking, invasion of privacy and intentional infliction of emotional distress. 283 Ga. App. at 546. This case arose from the campaign of an ex-wife (Karyn Anderson) and her new boyfriend (Paul Mergenhagen) to harass Karyn Anderson's ex-husband's second wife (Maureen Anderson). Mergenhagen allegedly followed Maureen Anderson in his vehicle while she was driving or walking in her neighborhood with her children and took pictures of her, made gestures and otherwise was "letting her know he was there." Id. at 546-547. She detailed at least 15 occasions when Mergenhagen followed her and took pictures of her. Id. Each side moved for summary judgment and for the purposes of this Order, the trial court granted summary judgment in favor of Mergenhagen as to Anderson's claims of invasion of privacy. Id. at 546.

15.

The Court of Appeals looked to the cases cited above as well as the Second Restatement of Torts to determine whether someone following the Plaintiff in her car and taking repeated photographs created a jury question as to whether the Defendant's conduct amounted to 'a course of hounding the plaintiff' that intruded upon her privacy." Id. at 552. The Court, citing the Second Restatement of Torts, stated "[w]hile the Restatement of Tort suggests that a driver may have no cause of action for mere observation or even for having her photograph taken, a relatively harmless activity can become tortious with repetition, as when, for example telephone calls 'are repeated with such persistence and frequently as to amount to a course of hounding the plaintiff' and becoming 'a substantial burden to his existence.'" Id. The Court found a jury

question existed and reversed the trial court's grant of summary judgment on the invasion of privacy claim. Anderson, 283 Ga. App. at 552.

16.

Again, while the issue of placing a GPS tracking device on another person's vehicle where no ownership interest exists has not specifically been dealt with in Georgia, it is clear from the cases cited above that an intrusion upon seclusion claim can be established when the surveillance tactics are unreasonable in light of the circumstances. This could also apply to GPS tracking devices placed on a person's vehicle without their consent or knowledge by someone else who has no ownership interest in the vehicle.

17.

Plaintiff can therefore make a claim for intrusion upon seclusion based upon the Defendant's conduct. Whether Defendant's conduct is reasonable would be for a jury to determine. No depositions have been taken in this case and no affidavits were filed in support of the *Motion for Summary Judgment*. Defendant filed a deposition of the Plaintiff from Robert Lewis and Michele Lewis's Walton County divorce case, but Defendant has pointed to no testimony in that deposition or otherwise that would warrant summary judgment for the Defendant. The Defendant has failed to meet its burden, therefore Defendant's summary judgment motion as to Count One of the complaint is Denied.

18.

Count Two-Trespass to Property

In count two of her complaint, the Plaintiff alleges the Defendant trespassed on her personal property by unlawfully placing a GPS tracking device on her vehicle. Defendant argues that Plaintiff has shown no facts to support a claim for trespass to property, including damages.

Defendant also argues that its actions were not illegal. While it would be difficult to see how attaching a GPS tracking device to a vehicle would cause damage sufficient to establish a trespass to property claim, the Defendant again has not pointed to any evidence that would negate Plaintiff's claim of trespass to property and therefore has not met its burden on summary judgment and the same is **Denied**.

19.

Count Three- Intentional Infliction of Emotional Distress

In count three of her complaint, the Plaintiff alleges the Defendant's intentional placing of the GPS tracking device on her vehicle without permission was intentional or reckless, extreme and outrageous and caused Plaintiff emotional distress which was severe. Defendant again argues that Plaintiff has shown no facts to support this claim, including damages.

20.

To recover on an intentional infliction of emotional distress claim, a plaintiff must show evidence that: (1) defendants' conduct was intentional or reckless; (2) defendants' conduct was extreme and outrageous; (3) a causal connection existed between the wrongful conduct and the emotional distress; and (4) the emotional harm was severe. Abdul-Malik v. AirTran Airways, Inc., 297 Ga. App. 852, 855–56 (2009). Further,

It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by malice, or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been extreme and outrageous. Extreme and outrageous conduct is that which is so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Whether actions rise to the level of extreme and outrageous conduct necessary to support a claim of intentional infliction of emotional distress is generally a question of

law. If there is evidence from which a reasonable person could find severe emotional distress resulting from extreme and outrageous conduct, then the issue is for the jury. Abdul-Malik, 297 Ga. App. at 855–856 (internal citations omitted).

21.

Defendant points to Plaintiff's testimony in the unrelated divorce action between Mr. Lewis and Ms. Lewis to support its argument for summary judgment on this count of the complaint. Defendant argues in Plaintiff's deposition she never mentioned emotional distress or any disability or debilitation resulting from the Defendant's actions, but rather dismissed her companion lawsuit against Ms. Michele Lewis who is the "mastermind" of her distress and whom she has accused of stalking and tormenting her for at least two years. However, as Plaintiff points out, Plaintiff was not being deposed regarding her damages in the present case and was never asked directly about her emotional distress that resulted from Defendant's actions. The Court again finds the Defendant has not met its burden of pointing to evidence that negates Plaintiff's claim of intentional infliction of emotional distress and Defendant's *Motion for Summary Judgment* as to this count is **Denied**.


22.

Count Four- Punitive Damages

This Court has already denied Defendant's *Motion for Summary Judgment* on Counts One, Two and Three of Plaintiff's complaint, Defendant's motion with respect to Count four is also **Denied**.

Defendant has requested attorney's fees pursuant to O.C.G.A. §9-15-14(a) and (b). Given the Court has denied its *Motion for Summary Judgment*, the Defendant's request for attorney's fees is likewise **Denied**.

SO ORDERED, this 29 day of Sept., 2016.



ROBERT D. LEONARD II
Judge, Superior Court of Cobb County
Cobb Judicial Circuit

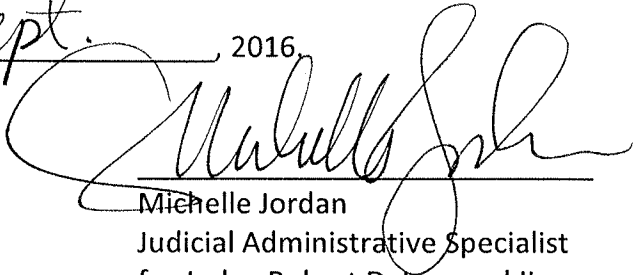
CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the within and foregoing ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT all parties to this matter by depositing a true copy of same in the U.S. Mail proper postage prepaid, addressed to the following:

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This the 29 day of Sept., 2016.



Michelle Jordan
Judicial Administrative Specialist
for Judge Robert D. Leonard II