IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON

DAVID CHENAULT,

Plaintiff-Appellee,

Vs.

JEFF L. WALKER, JO BURSEY, JACK L. MOORE, OCEAN INN, INC., and DIMENSION III FINANCIAL, INC.,

Defendants-Appellants.

Shelby Circuit No. 94214 T.D.
C.A. No. W1998-00769-COA-RM-CV

FILED

February 9, 2000

Cecil Crowson, Jr.
Appellate Court Clerk

FROM THE SHELBY COUNTY CIRCUIT COURT
THE HONORABLE JOHN R. McCARROLL, JUDGE

Les Jones; Scott J. Crosby; Burch, Porter & Johnson of Memphis
For Appellee

Allan B. Thorp; Thorp and Jones, PLC of Memphis
For Appellants, Bursey, Ocean Inn, Inc., and
Dimension III Financial, Inc.

Rex L. Brasher, Jr.; Brown, Brasher & Smith of Memphis
For Jack L. Moore

AFFIRMED AND REMANDED

Opinion filed:

W. FRANK CRAWFORD,
PRESIDING JUDGE, W.S.

CONCUR:

ALAN E. HIGHERS, JUDGE

DAVID R. FARMER, JUDGE

This case deals with in personam jurisdiction under the Tennessee Long Arm

Statute and comes to this Court as a T.R.A.P. interlocutory appeal.[1] Defendants, Jo Bursey (Bursey), Jack L. Moore (Moore), Ocean Inn, Inc. (Ocean Inn), and Dimension III Financial, Inc. (Dimension III)[2], appeal the order of the trial court denying their motions to dismiss for lack of jurisdiction.

PLEADINGS

Plaintiff, David Chenault (Chenault), filed his circuit court complaint April 22, 1998, seeking compensatory, punitive, and treble damages. The complaint avers that both Chenault and defendant Walker are residents of Shelby County, Tennessee, and that the remaining defendants are nonresidents of the State of Tennessee, but all have sufficient minimal contacts with Tennessee to be subject to the jurisdiction of the court. The complaint alleges that in April 1997, Walker approached Chenault with an investment opportunity in a Quality Inn in Ormand Beach, Florida. Walker told Chenault that he and his partner, Moore, needed additional funds in the amount of $125,000.00 to close on the acquisition of the Quality Inn and that if plaintiff invested this amount he would receive eight percent in the corporation, Ocean Inn, the owner of the hotel. The complaint avers that Walker continued to represent himself as the principal investor in and vice president of Ocean Inn, as well as a partner with Moore. Walker also represented that defendant Bursey, president of Dimension, was the mortgage broker for their closing and their financial consultant in the investment. Walker continually promised Chenault that copies of all closing documents would be provided concerning the acquisition of the Quality Inn. In May of 1997, before Chenault had paid any money to invest, he and Walker called defendant Bursey from Chenault's office to discuss issues related to the investment, and during this telephone conversation Bursey told Chenault that the investment was a "super opportunity" and that the hotel was producing approximately $800,000.00 per year in profit. The complaint avers that based upon this conversation, Chenault invested his initial $25,000.00 by paying this sum to Black Acre Ridge Capital LLC, the mortgage company, financing the acquisition. The complaint avers that thereafter Bursey, acting individually and for defendant, Dimension, sent by facsimile a two-page document to evidence the receipt of the initial $25,000.00 and setting out that Chenault would have an eight percent interest in Ocean Inn upon payment of the total of $125,00.00. This

[1] This Court originally denied the application for interlocutory appeal. The Supreme Court granted the appellant's T.R.A.P. 11 application for permission to appeal and remanded the case to this Court for a review on the merits.

[2] Also named as a defendant is Jeff L. Walker, but he is not involved in this interlocutory appeal.

document was signed by Walker as vice president. Chenault made his payments for a total of $125,000.00, with the final payment made on July 10, 1997, to Walker. The complaint further avers that Chenault was provided with a stock certificate showing stock ownership and also was furnished the stock distribution agreement attached as Exhibit B between Ocean Inn and Chenault, signed for Ocean Inn by Walker. The complaint alleges that contrary to representations made by Walker, Moore, and Bursey, Chenault was never an actual shareholder in Ocean Inn. Walker was never a shareholder and an officer in Ocean Inn and that the stock certificate and stock distribution agreement were fraudulent. The complaint alleges that in July 1997, Walker advised Chenault that renovations were needed on the Ocean Inn facility in excess of one million dollars and that Walker and Moore were going to sell their investments "in order to avoid being assessed for the renovations." The complaint avers that Walker represented to Chenault that two other hotels were better investments than Ocean Inn and that he should sell his investment in Ocean Inn and invest in those hotels and receive a larger return on his investment. Chenault alleges after this representation by Walker, he again contacted Bursey for her advice, and she confirmed Walker's statement that this was a better opportunity.

The complaint avers that at this time, unknown to him, Bursey was the majority shareholder in Ocean Inn. The complaint further avers that based upon Walker and Bursey's advice, Chenault made the exchange by voiding his stock certificate with Ocean Inn and accepting the stock certificates in the two other companies. In June 1997, it was discovered that the two other hotels - Holiday Inn and a Comfort Inn - in which Chenault was now part owner, were in financial trouble, and this information had been conveyed to defendant, Moore and defendant, Bursey, but they did not disclose this information to Chenault. The complaint also avers that defendants, Moore and Walker, conspired to convince the plaintiff in September to execute a shareholder agreement to allow the hotel properties to be foreclosed. The complaint alleges that because of the combined illegal efforts of Bursey, Walker, and Moore, Chenault lost his total investment and later learned that some of the initial investment was never used for the initial acquisition.

Counts I and II of the complaint allege fraud and misrepresentation respectively and aver that Walker, Moore, and Bursey, individually and through Dimension, made false and fraudulent misrepresentation upon which plaintiff relied to his detriment. Count III of the complaint alleges civil conspiracy and avers:

> 39. Walker, Moore and Bursey, individually, and through Dimension, each had the common design to defraud

> Plaintiff of his investment in Ocean Inn and subsequently to swap his stock in two corporations which were on the verge of bankruptcy. By engaging in these overt acts of convincing Plaintiff to make the investment of $125,000.00, each conspirator was acting in concert, all to the detriment of Plaintiff.

Count IV alleges fraud and avers that Walker, Moore, and Bursey, individually and through Dimension, fraudulently induced Chenault to make the investment.

Count V alleges tortious interference with a business relationship and avers that Walker, Moore, and Bursey, individually and through Dimension, intentionally interfered with Chenault's valid relationship with Ocean Inn.

Count VI alleges that Bursey, as a majority shareholder and member of the Board of Directors of Ocean Inn, breached his fiduciary duty to Chenault.

Count VII alleges breach of contract on the part of Walker, Moore, and Bursey, individually and through Dimension, and Ocean Inn.

Count VIII alleges a violation of the Consumer Protection Act on the part of Walker, Moore, and Bursey, individually and through Dimension.

In Count IX, Chenault prays for an accounting of Ocean Inn, based upon his eight percent interest as a shareholder.

The defendant filed motions to dismiss for lack of jurisdiction, and the trial court denied all motions. The trial court's order denying the motions to dismiss stated:

> Except for the allegations of conspiracy among the defendants, there were insufficient contacts with the State of Tennessee for there to be jurisdiction over the defendants, Bursey, Moore, Ocean Inn, and Dimension, III, but that because of the allegations of a conspiracy among the defendants, the court finds that this court has jurisdiction over these defendants.

Defendants appeal and present three issues for review by this Court as stated in their brief:

> 1. When there are insufficient contacts with the state of Tennessee for jurisdiction, can allegations of a civil conspiracy occurring out of state create a basis for jurisdiction in Tennessee?
>
> 2. Can a civil conspiracy, even if proved, which occurs outside of Tennessee, but which is alleged to have a financial impact on a Tennessee resident, constitute an independent basis for jurisdiction in Tennessee?
>
> 3. Did the Plaintiff prove an out of state conspiracy to defraud?

Plaintiff-appellee presents three issues for review as stated in their brief:

> 1. Upon the showing of a prima facie case of conspiracy effecting [sic] a Tennessee resident, does a finding of *in personam* jurisdiction of each co-conspirator, whether he or she be a Tennessee resident, offend due process, fair play, and justice?

2. Did the trial court err in finding that, except for the allegations of a conspiracy among all the defendants, insufficient contacts exist with the State of Tennessee for there to be *in personam* jurisdiction over the appellants/defendants?

3. May the appellants/defendants raise with this Court an issue on appeal not raised in their Application to the Supreme Court for Interlocutory Appeal.

PROOF

In support of the motions to dismiss, defendants Bursey and Moore filed affidavits. Jo Bursey's affidavit states that she is a resident of Orlando, Florida, and at all pertinent times was a resident of Orlando, Florida. She was president of Dimension, III Financial, Inc., a Florida corporation, engaged in the business of real estate broker and mortgage financing with a principal place of business in Orlando, Florida. Bursey has never acted as a real estate broker for any property in Tennessee and has never financed a mortgage for any property in Tennessee. Dimension was the real estate broker for the seller of the Holiday Inn hotel in Ormand Beach, Florida, and she had discussions with Moore about the possibility of Moore purchasing the Quality Inn. All of the discussions pertaining to the purchase were conducted in Florida. Moore formed the Florida corporation, Ocean Inn, Inc., for the purpose of purchasing the Quality Inn and prior to the purchase of the Quality Inn, Bursey received an unsolicited telephone call at her office in Orlando from David Chenault and Jeff Walker. In this conversation of about two or three minutes, Chenault told her that he wanted to invest in the purchase of the Quality Inn, and Chenault asked her several questions concerning the contract to purchase and the number of rooms in the Quality Inn. After the closing for the Quality Inn had been postponed because of inadequate funding from the buyer, Dimension, acting as the agent for the seller, sent a facsimile to Chenault inquiring about the identity of the person or persons who owned shares in Ocean Inn. Attached to the affidavit as Exhibit A is a copy of a facsimile dated May 23, 1997. Chenault made no response to the facsimile of May 23, 1997.

A copy of this Exhibit A to this affidavit was attached as Exhibit A to the complaint, but the complaint had a second page as a part of Exhibit A which purports to have the signatures of Chenault and Jeff Walker. Bursey states that prior to being served with the complaint, she had never seen the second page of Exhibit A to the complaint, and that she did not facsimile or send such second page to Chenault.

About a week before the closing, Moore informed her that he did not have sufficient funds to close the purchase of the Quality Inn, and it was agreed between Moore, Dimension, and Metro Hotels, Inc., that Dimension would invest $782,000.00

in return for fifty one percent of the shares of Ocean Inn, and Metro Hotels would invest $250,000.00, evidenced by a promissory note secured by a 12.5 percent shareholder interest in Ocean Inn. All of these discussions and negotiations occurred in Florida. On June 6, 1997, the closing took place, and Ocean Inn purchased the Quality Inn. Jack Moore signed as president of Ocean Inn, and the loan was personally guaranteed by Jack Moore.

In November of 1997, Bursey became president of Ocean Inn and she is familiar with the books and records of Ocean Inn. Moore was the incorporator, and at all times from the date of incorporation through the date of closing of the transaction, Moore was the president/director, the vice president, and the secretary/treasurer of Ocean Inn. Prior to being served with Chenault's complaint, Bursey had never seen Exhibit B to the complaint. Jeff Walker was not a director, officer, or shareholder of Ocean Inn, and Bursey had no knowledge he purported to act on behalf of Ocean Inn.

Dimension was the real estate broker on behalf of the owners for the Comfort Inn in Daytona, Florida, and the owners of the Holiday Inn Express in Orlando, Florida. Approximately two months after the Quality Inn was purchased, Bursey received a call in her office in Orlando from David Chenault who advised her that he had cancelled his shares in Ocean Inn and exchanged them for shares in the Daytona and Orlando hotels. She states that at no time did she solicit Chenault to invest in or to engage in any transactions pertaining to any of the properties located in Florida, and at no time did she call Chenault, nor did she come to Tennessee pertaining to any of the transactions alleged. She states in 1997, neither she nor Dimension, nor Ocean Inn, had an office in Tennessee, transacted business in Tennessee, had assets in Tennessee, or solicited any business in Tennessee.

Moore's affidavit states that he is a resident of Panama City Beach, Florida, and has no business investments or dealings of any kind with or in the State of Tennessee. He states that he has never met Chenault personally, nor has he solicited money from him for any investments. He recalls talking with Chenault on an occasion when he was visiting Jeff Walker in Memphis in August or September of 1997. He states that he did not call Chenault and he does not know whether Walker initiated the call or whether Chenault called Walker. He states that the conversation was general in nature about business, and he made no representations or inducements of any kind regarding the validity or probability of any particular investments. He states that the next time they talked, Chenault called him in Florida in December of 1997. He states that Chenault told him that he had made a sizeable investment in a venture, which involved Jeff

Walker and Moore, and did not feel that Jeff told him the truth about the hotel. Chenault told Moore at that time that he was going to sue Walker, Bursey, and Moore. During this same conversation, Chenault asked him to join in the suit against Walker and Bursey. He explained his request by acknowledging that Moore had never called him, had never asked him for money, and did not make any representations about any investments. He states that he declined Chenault's request. Notwithstanding Moore's refusal to be involved, Chenault called him from Tennessee at his home in Florida on two subsequent occasions. The nature of the calls were much the same concerning joining in the litigation. Moore denies that at any time he ever sent anything to Chenault, that he ever made any representations regarding any contract or deal with him, or that he traveled to the State of Tennessee for any purpose regarding Chenault.

In opposition to the motions to dismiss, Chenault filed an affidavit and two supplemental affidavits, which state:

According to Chenault, in April of 1997, Jeff Walker came to his office in Shelby County, Tennessee, concerning the investment opportunity of the Quality Inn in Ormand Beach, Florida. Walker stated that he and his partner, Jack Moore, needed an additional $125,000.00 to close the acquisition of the Quality Inn and that for the $125,000.00 Chenault would receive an eight percent ownership in the corporation owning the hotel, Ocean Inn. Discussions continued along these lines in April and May of 1997 during which time Walker represented himself as a principal investor and vice president of Ocean Inn, as well as a partner with Moore. Walker also represented to Chenault that Bursey was president of Dimension, the mortgage broker for the closing, and Walker's financial consultant. He states that before he agreed to make any investment, Walker asked him to call Bursey on several occasions to discuss issues related to the investment opportunity, and he did so. During these conversations, Bursey told him that the investment was a super opportunity, and that profits were approximately $800,000.00 and should be one million dollars in the following year. He states that based upon these conversations, he invested an initial payment of $25,000.00. Bursey sent him a two-page facsimile evidencing Bursey's receipt of the initial $25,000.00 investment and providing the terms of the total contract investment of $125,000.00 in consideration for eight percent ownership in Ocean Inn. This contract is attached to the complaint and to this affidavit as Exhibit A. After he had paid the total investment of $125,000.00 in Ocean Inn, he was contacted by Walker in July 1997 in an attempt to convince him to sell his investment in Ocean Inn and invest in two other hotels, one in Orlando and one in Daytona Beach. He states that Walker advised

him that as a shareholder in Ocean Inn he would be subject to an assessment of approximately $80,000.00 due to extensive renovation costs, and that Walker and Moore were selling their shares in Ocean Inn, and Walker suggested that he do the same. He states that he thereupon contacted Bursey and she confirmed that the other investment was even stronger than the investment in Ocean Inn and advised him to make the swap of his eight percent interest in Ocean Inn for five percent interest in each of the other two hotels. Chenault states that based upon Walker's request and Bursey's advice, he complied and made the exchange. He states that he never received any of the documents promised to him by Bursey, and that after that time she never returned any of his phone calls. He states that he later discovered that he never owned any shares of Ocean Inn and that his investment was used for some other purpose. He states that Walker and Moore converted $25,000.00 of the investment to their personal use, and Bursey used the other $100,000.00 for her own benefit. Chenault states that this was a scheme to defraud him by Walker, Bursey, and Moore, and he was never advised concerning the financial condition of the two hotels, and, in fact, learned at a later date they were on the verge of foreclosure at that time.

By supplemental affidavit, Chenault states that Bursey's affidavit wherein she states that she did not send page two of the facsimile of May 23, 1997 is not correct, and that he has as attached to the exhibit to the supplemental affidavit the facsimile which indicates that page two came from Dimension's fax number: (407) 291-9392. The affidavit lists the specific payments that constitute the $125,000.00 investment. He states that in January 1998, he met with Bursey in Florida, and Bursey told him at that meeting that she, Moore, and Walker each had knowledge of the needs and problems associated with the closing of the purchase of the Quality Inn in June 1997. She also stated that Chenault did in fact own eight percent of Ocean Inn up until the time that he exchanged his shares.

Chenault's second supplemental affidavit states that Moore's affidavit statement that he had no business dealings in Memphis, Tennessee, is false and that other statements were misleading. He states that in fact Moore solicited him with and through Jeff Walker to purchase two condominiums in the Emerald Coast Club Development in Panama City, Florida, where Jack Moore is the developing contractor. Chenault states that documents submitted by Bursey in support of her affidavit show that Moore incorporated Ocean Inn, Inc., and it was contemplated that the only shareholders would be Moore, Dimension III, and Metro Hotels. Chenault states that these documents show that from the beginning Moore knew that Chenault would not

and did not own any shares in Ocean Inn. He states that at least on one occasion he spoke to Jack Moore on Walker's mobile phone, and that Moore welcomed him as an investor in Ocean Inn and said he looked forward to working with him over the next several years. He also states that Jeff Walker executed the stock distribution agreement under Jack Moore's instruction after the closing was finalized, and it was known that he did not own any shares in Ocean Inn, but defendants tricked him into transferring fictitious ownership in Ocean Inn for actual ownership in two other companies. Chenault states that in December of 1997, he telephoned Jack Moore, and that during this conversation Moore admitted that Bursey received $100,000.00 from Chenault, but he did not know what happened to it. Moore told him that of the initial $25,000.00 investment Moore received $7,500.00, Walker received $7,500.00, and that Moore believed that the other $10,000.00 was used in some way for the two failing hotels. He states that Walker, Bursey, and Moore each knew of the scheme and deception and conspired to defraud him of $125,000.00.

ISSUES

Although the parties have presented several issues for review, we perceive the controlling and decisive issue to be whether the trial court erred in finding *in personam* jurisdiction of the appellants based on Chenault's allegations of conspiracy.

The Tennessee Long Arm State, T.C.A. § 20-2-214, pursuant to which the defendants were served with process, provides in pertinent part:

> **20-2-214. Jurisdiction of persons unavailable to personal service in state - Classes of actions to which applicable. -** (a) Persons who are nonresidents of Tennessee and residents of Tennessee who are outside the state and cannot be personally served with process within the state are subject to the jurisdiction of the courts of this state as to any action or claim for relief arising from:
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> * * *
>
> (2) Any tortious act or omission within this state;
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> * * *
>
> (6) Any basis not inconsistent with the constitution of this state or of the United States;
>
> * * *
>
> (b) "Person," as used herein, includes corporations and all other entitles which would be subject to service of process if present in this state.
>
> (c) Any such person shall be deemed to have submitted to the jurisdiction of this state who acts in the manner above described through an agent or personal representative.

Supplement (1999) provides in pertinent part:

> **20-2-223. Personal jurisdiction based on conduct.** - (a)

> A court may exercise personal jurisdiction over a person, who acts directly or indirectly, as to a claim for relief arising from the person's:
>
> * * *
>
> (3) Causing tortious injury by an act or omission in this state;

The addition of subjection (6) to T.C.A. § 20-2-214 expanded the jurisdiction of Tennessee courts to the full limit allowed by due process, changing the long arm statute from a "single act" statute to a "minimum contacts statute." ***Masada Inv. Corp. v. Allen***, 697 S.W.2d 332, 334 (Tenn. 1985). The minimum contacts by the nonresident defendant with the foreign state must be such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. ***International Shoe Co. v. Washington***, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945); ***see also Burger King Corp. v. Rudzewicz***, 471 U.S. 462, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985); ***Worldwide Volkswagen Corp. v. Woodson***, 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980). Three primary factors are to be considered in determining whether requisite minimum contacts were present: the quantity of the contacts, their nature and quality, and the source and connection with the cause of action with those contacts. Two lessor factors to be considered are the interest of the forum state and convenience. ***Id.*** at 334.

In ***Masada***, the Court said:

> The phrase "fair play and substantial justice" must be viewed in terms of whether it is fair and substantially just to both parties to have the case tried in the state where the plaintiff has chosen to bring the action. In each case, the quality and nature of those activities in relation to the fair and orderly administration of the law must be weighed. As stated above in ***Qantas***, this must involve some subjective value judgment by the courts.

697 S.W.2d at 335 (quoting ***Shelby Mutual Ins. Co. v. Moore***, 645 S.W.2d 242, 246 (Tenn. Ct. App. 1981); ***see, J. I. Case Corp. v. William,*** 832 S.W.2d 530 (Tenn. 1992).

Although the tortious acts in a case may be committed outside the State of Tennessee, if the resulting tortious injury is sustained within the state, then the tortious acts and the injuries are inseparable, and jurisdiction lies in Tennessee. ***Jasper Aviation, Inc. v. McCollum Aviation, Inc.***, 497 S.W.2d 240 (Tenn. 1972); ***Hanvy v. Crosman Arms Co., Inc.***, 225 Tenn. 262, 466 S.W.2d 214 (1971).

The tort of civil conspiracy to defraud is described by our Supreme Court in ***Dale v. Thomas H. Temple Co.***, 186 Tenn. 69, 208 S.W.2d 344 (Tenn. 1948). The Court said:

> "A 'civil conspiracy' may be defined to be a combination between two or more persons to accomplish

> by concert an unlawful purpose, or to accomplish a purpose not in itself unlawful by unlawful means. ***McKee v. Hughes***, 133 Tenn. 455, 181 S.W. 930, L.R.A. 1916D, 391 [Ann.Cas.1918A, 45]."
>
> "A 'conspiracy to defraud' on the part of two or more persons means a common purpose, supported by a concerted action to defraud, that each has the intent to do it, and that it is common to each of them, and that each has the understanding that the other has that purpose. ***Ballentine v. Cummings***, 220 Pa. 621, 70 A. 546, citing ***United States v. Frisbie***, ***C. C.,*** 28 F. 808. The agreement need not be formal, the understanding may be a tacit one, and it is not essential that each conspirator have knowledge of the details of the conspiracy. ***Patnode v. Westenhaver***, 114 Wis. 460, 90 N.W. 467.
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> "Since it is basic principle that each conspirator is responsible for everything done by his confederate which the execution of the common design makes probable as a consequence, the law applying no gauge to ascertain relative activity in the production of that consequence, it follows that each is liable for all damages naturally flowing from any wrongful act of a coconspirator in carrying out such common design. (Citations omitted).

186 Tenn. 69, 208 S.W.2d at 353, 354.

A corporation may be liable for conspiracy to defraud by acts of its agents, although the transaction is outside the scope of its corporate powers. ***Brumley v. Chattanooga Speedway and Motordome Co.***, 138 Tenn. 534, 198 S.W. 775 (1917).

Conspiracies are, by their very nature, secretive operations that can seldom be proved by direct evidence. Therefore, the existence of the conspiracy may be inferred from the relationship of the parties or other circumstances. ***Mohave Elec. Co-op, Inc. v. Byers***, 942 P.2d 451 (Ariz. App. 1997). It follows that a conspiracy may be proved by circumstantial evidence. ***Hayes v. Schweikart's Upholstering Co.***, 55 Tenn. App. 442, 402 S.W.2d 472, 481 (1965).

In 16 Am.Jur.2d, *Conspiracy*, Sec. 57, it is stated:

> § **57. Nature and extent of liability**
>
> A civil conspiracy claim operates to extend, beyond the active wrongdoer, liability in tort to actors who have merely assisted, encouraged or planned the wrongdoer's acts. Each act done in pursuance of the conspiracy by one of several conspirators is, in contemplation of law, an act for which each is jointly and severally liable.
>
> The joint and several liability of a conspirator applies to damages accruing prior to his or her joining the conspiracy as well as damages thereafter resulting - regardless of whether he or she took a prominent or an inconspicuous part in the execution of the conspiracy. This liability of each member of a conspiracy for the damage resulting therefrom exists whether or not the conspirator profited from the result of the conspiracy. Before a person who joins an existing conspiracy will be held liable for what was previously done pursuant to the conspiracy, however, it may be shown that he or she joined the conspiracy with knowledge of the unlawfulness of its object or of the means contemplated.

> A conspirator who withdraws from a conspiracy is not responsible for subsequent acts committed by his or her former confederates. In order for a conspirator to avoid liability by withdrawing prior to the commission of an overt act he or her [sic] must act in good faith and his or her withdrawal must be complete and voluntary. It must be effected by some affirmative act, and bring home the fact of his or her withdrawal to his or her confederates; a mere intent to withdraw is insufficient.

The parties have not cited, nor has the Court found any Tennessee case dealing with the "conspiracy theory of personal jurisdiction." We do, however, find cases from other jurisdictions dealing with the theory which we find instructive.

In ***Chrysler Corporation v. Fedder***, 643 F.2d 1229, (CCA 6th Cir. 1980) the Court, while declining to either adopt or reject the conspiracy theory of *in personam* jurisdiction as a general principle of law in the circuit, noted that other federal cases have stated that "to meet due process requirements, there must be a factual showing of conspiracy, and also of a connection between the acts of the conspirator who was present in the jurisdiction and the conspirator who was absent." ***Id***. at 1236. (quoting ***Leaseco Data Processing Equipment Corp. v. Maxwell***, 319 F.Supp. 1256, 1261 (S. D. N.Y. 1970). In affirming the trial court's dismissal of Chrysler's case, the Court said: "We hold that Chrysler's totally unsupported allegations of conspiracy cannot constitute sufficient contacts with Michigan to justify an exercise of personal jurisdiction over *Interclisa* by the district court." ***Id.*** at 1237.

The Sixth Circuit again in 1987 and in 1990 confronted the conspiracy theory and each case reiterated the Court's statement in ***Chrysler***. ***See Ecclesiastical Order of the ISM of AM, Inc. v. Chase***, 845 F.2d 113 (C.C.A. 6th Cir. 1987) and ***Chandler v. Barklay's Bank PLC***, 898 F.2d 1148 (C.C.A. 6th Cir. 1990).

In ***General Motors Corporation v. Jose Ignacio Lopez De Arriortua, et al***, 948 F.Supp. 656 (D.C. Ed. Mich. S.D. 1996), the Court, in recognizing that personal jurisdiction can be founded on conspiracy grounds, stated:

> Totally unsupported conspiracy allegations do not support jurisdiction. ***Chrysler Corp. v Fedders Corp.***, 643 F.2d 1229, 1237 (6th Cir.) Cert. denied, 454 U.S. 893, 102 S.Ct. 388, 70 L.Ed2d 207 454 U.S. 893, 102 S.Ct. 388, 70 L.Ed.2d 207 (1981). At the same time, it is not fair to require a plaintiff to plead specific facts proving conspiracy before discovery.
>
> > [T]his court refused to force plaintiff to produce evidence concerning the foreign defendants' alleged conspiratorial activity. Such activity constitutes the jurisdictional contact with this forum. To put plaintiff to this task prior to discovery would be wrong for several reasons. First, the jurisdictional issue is so intertwined with the merits of the case that meaningful jurisdictional discovery, in this instance, would be equivalent to full-

> blown pretrial discovery. Conspiracy is an activity which by its very nature is secretive. Therefore, in many cases it is only through discovery that one can root out its existence. Second, any relevant evidence is most likely to be under defendants' control. Therefore, it would be unfair to plaintiff to require proof of forum contacts at this early stage.

948 F.Supp. at 664 (quoting ***Thompson Trading Ltd. v. Allied Lyons PLC, 124 F.R.D. 534, 535 (D.R.I. 1989)).***

In ***Rudo v. Stubbs***, 221 Ga.App. 702, 472 S.E.2d 515 (Ct. App. Ga 1996), plaintiff brought suit alleging a conspiracy to commit fraud. The Court affirmed the trial court's denial of the nonresident defendant's motion to dismiss. The Georgia jurisdictional statutes are similar to the statutes in Tennessee, and in affirming the trial court, the Court said:

> Georgia courts will exercise personal jurisdiction over a non-resident defendant only if (a) the exercise of jurisdiction comports with due process and (b) the non-resident defendant has committed, in person or through an agent, one of the acts set forth in OCGA § 9-10-91. ***See Gust v. Flint***, 257 Ga. 129, 356 S.E.2d 513 (1987). The unrefuted affidavits of the non-resident defendants establish that they themselves have not committed any of the acts listed in OCGA § 9-10-91. See id.; cf. also ***Burt v. Energy Svcs., etc., Corp.,*** 207 Ga.App. 210, 427 S.E.2d 576 (1993)(mere phone and mail contact is insufficient to satisfy Georgia Long Arm Statute). But the Long Arm Statute provides that the acts may be committed "through an agent," and co-conspirators act as agents of each other when they commit acts in furtherance of the conspiracy. ***See American Thread Co. v. Rochester***, 82 Ga.App. 873, 884-885, 62 S.E.2d 602 (1950). Accordingly, we agree with the many courts which have held that the in-state acts of a resident co-conspirator may be imputed to a non-resident co-conspirator to satisfy jurisdictional requirements under some circumstances; and we further conclude that those circumstances are present in this case.

472 S.E.2d at 516, 517; ***see also, Allen v. Columbia Financial Management, Ltd.***, 297 S.C. 481, 377 S.E.2d 352 (S.C. App. 1988).

In ***Cawley v. Bloch***, 544 F.Supp. 133 (D.C. D. Maryland 1982), the Court was faced with a suit alleging, among other things, fraudulent and negligent misrepresentation against foreign parent and subsidiary corporations, and the parent's president and assistant. In considering the motion to dismiss by the individuals for lack of personal jurisdiction, the Court said:

> Plaintiffs attempt to base personal jurisdiction over Bloch and Mnookin upon the conspiracy theory of jurisdiction. That doctrine is based on two principles: (1) that the acts of one co-conspirator are attributable to all co-conspirators, ***McLaughlin v. Copeland***, 435 F.Supp. 513, 530 (D. Md. 1977) ("McLaughln"); and (2) that the constitutional requirement of minimum contacts between non resident defendants and the forum can be met if there is a substantial connection between the forum and a conspiracy entered into by such defendants. ***Vermont***

> ***Castings, Inc. v Evans Products Co.,*** 510 F.Supp. 940, 944 (D. Vt. 1981). The conspiracy theory of jurisdiction as developed in the cases, holds that when several individuals (1) conspire to do something (2) that they could reasonably expect to have consequences in a particular forum, if one co-conspirator (3) who is subject to personal jurisdiction in the forum (4) commits overt acts in furtherance of the conspiracy, those acts are attributable to the other co-conspirators, who thus become subject to personal jurisdiction even if they have no other contact with the forum. (Citations omitted).
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> However, in several cases in which the conspirator who committed the overt acts was a resident of the forum, courts have required only that "substantial acts" in furtherance of the conspiracy be committed in the forum. (Citations omitted) While these courts did not address the point explicitly, the only reasonable interpretation of this standard is that the acts committed in furtherance of the conspiracy must be of a type that, if committed by the non-resident co-conspirators themselves, they would have provided a basis for subjecting the non-residents to personal jurisdiction under the forum's long-arm statute. If the overt acts do not meet this standard, it would be patently unfair to subject those non-residents to personal jurisdiction via the conspiracy theory, under which the non-residents' contacts with the forum are less direct.
>
> (1) All this suggests a need for a simplified articulation of the conspiracy theory of jurisdiction. Under that doctrine, when
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> > (1) two or more individuals conspire to do something
> >
> > (2) that they could reasonably expect to lead to consequences in a particular forum, if
> >
> > (3) one co-conspirator commits overt acts in furtherance of the conspiracy, and
> >
> > (4) those acts are of a type which, if committed by a non-resident, would subject the non-resident to personal jurisdiction under the long-arm statute of the forum state,
>
> then those overt acts are attributable to the other co-conspirators, who thus become subject to personal jurisdiction in the forum, even if they have no direct contacts with the forum.

544 F. Supp. at 134, 135.

Considering the Tennessee statutes dealing with long arm jurisdiction and the decisions of our appellate court, we conclude that the articulation of the conspiracy theory by the ***Bloch*** Court is a correct analysis, and it is adopted by this Court.

Applying the above considerations to the case at bar, we conclude that the trial court did not err in finding *in personam* jurisdiction of the appellants. Chenault alleges a conspiracy to defraud and details the particulars of the defendants' activities. His affidavit supports the allegations, and while defendants have filed affidavits in support of their motion, the affidavits do contain some discrepancies. The allegations of the

alleged misrepresentation by defendant Walker and defendant Bursey and the alleged admissions on the part of Moore, along with the intertwined relationship between the parties and both corporations are sufficient under the above articulation of the conspiracy theory to justify *in personam* jurisdiction. We recognize that discovery and/or trial may dispel our perception, but Rule 11 of the Tennessee Rules of Civil Procedure can be utilized to provide some protection to the defendants.

Accordingly, the order of the trial court denying the motion to dismiss is affirmed, and this case is remanded to the trial court for such further proceedings as may be necessary. Costs of the appeal are assessed against the appellants, Jo Bursey, Jack L. Moore, Ocean Inn, Inc., and Dimension III Financial, Inc.

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W. FRANK CRAWFORD,
PRESIDING JUDGE, W.S.

CONCUR:

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ALAN E. HIGHERS, JUDGE

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DAVID R. FARMER, JUDGE