IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

CHARLOTTE BROWN,	)	
	)	
Plaintiff/Appellant,	)	
	)	Appeal No.
VS.	)	M1999-02551-COA-R3-CV
	)	
BIRMAN MANAGED CARE, INCORPORATED, BIRMAN & ASSOCIATES, INCORPORATED, DAVID N. BIRMAN, SUE D. BIRMAN, WILLIAM F. BARENKAMP, II, AND KATHY BARENKAMP,	)	Putnam Circuit
	)	No. 97-J0266
	)	
Defendants/Appellees.	)	

APPEALED FROM THE CIRCUIT COURT OF PUTNAM COUNTY
AT COOKEVILLE, TENNESSEE

THE HONORABLE JOHN TURNBULL, JUDGE

STEVE D. GIBSON
112 S. Main Street
Ashland City, Tennessee 37015
For Plaintiff/Appellant

KELLI L. THOMPSON
900 South Gay Street
Knoxville, Tennessee 37902
Attorney for Birman Managed Care, Inc., Birman & Associates, Inc. Dr. David N. Birman and Sue D. Birman

LARRY L. CRAIN
101 Westpark Drive
Brentwood, Tennessee 37027
Attorney for William F. Barenkamp, II and Kathy Barenkamp

REVERSED AND REMANDED

BEN H. CANTRELL,
PRESIDING JUDGE, M.S.

O P I N I O N

The divorced mother of a minor child claimed that her former husband and his employer conspired to fraudulently understate the husband's

income, in order to defeat her attempts to have his child support obligation increased to an appropriate amount. The trial court granted summary judgment to the defendants. We reverse.

I. Divorce and Child Support

Christen Barenkamp was born to William Barenkamp and his wife, Charlotte Brown Barenkamp on May 23, 1981. The parents were divorced by the Connecticut Superior Court in 1985. Although the court initially gave physical custody of the little girl to her father, custody was transferred to the mother the following year, and the father was ordered to pay child support of $25 per week.

William Barenkamp subsequently moved to Cookeville, Tennessee, where he met and married his second wife, Kathy. In Cookeville, the Barenkamps became close friends with Dr. David Birman, the founder of Birman Managed Care, and with his wife Sue. The Barenkamps moved to Texas in 1990 so Mr. Barenkamp could attend Dallas Theological Seminary. After he finished school in 1993 and was ordained as a Southern Baptist minister, Mr. Barenkamp obtained a job as an associate church pastor, and his child support obligation was increased by the Texas court to $335 per month.

In November of 1993, the Barenkamps moved to Tennessee, and Bill Barenkamp began working as the Director of Marketing for Birman & Associates, the parent corporation of Birman Managed Care, at a purported base annual salary of $25,000. Kathy Barenkamp was hired at Birman & Associates at a base salary of $15,000, and given the title of secretary. Kathy Barenkamp was pregnant at the time of the move, and during their first month back in Tennessee, the Barenkamps lived as house guests of the Birmans.

Kathy Barenkamp gave birth to Bill Barenkamp's second daughter, Kaley Rose, on March 4, 1994. Mr. Barenkamp rose rapidly through the executive ranks at Birman Managed Care. He became the Chief Operating Officer of the company before the end of 1996, with a base salary of $100,000 per year. Kathy Barenkamp's salary reached $43,333 before she resigned on November 30, 1995.

In the fall of 1995, Charlotte Brown petitioned the Circuit Court of Putnam County, Tennessee to take jurisdiction of the child support order that had been issued by the District Court of Dallas County, Texas, and to modify the order to reflect Bill Barenkamp's increased income. At the hearing of the petition on April 19, 1996, Mr. Barenkamp submitted a 1995 W-2 form that showed his income for that year to have been $52,536. He testified that his current income as Vice-President and Chief Operating Officer of Birman & Associates was $5,400 per month, or about $65,000 a year.

Mr. Barenkamp did not mention "bonus" income of $20,000 per year that had apparently become a regular part of his annual compensation. Based on his testimony, the court set Mr. Barenkamp's child support obligation at $787.50 per month. The trial court's order was entered on May 28, 1996, and it became final on June 28, 1996. Interestingly, Birman & Associates gave Mr. Barenkamp a $25,000 raise on July 1, 1996, the very next business day after the trial court's order became final.

II. A Fraud and Conspiracy Complaint

On July 29, 1997, Charlotte Brown filed a complaint individually and on behalf of her daughter, alleging that the Barenkamps and the Birmans had conspired together to fraudulently conceal and to understate the full extent of Bill

Barenkamp's income, in order to withhold from the plaintiffs the support to which Christen Barenkamp would otherwise have been entitled.

The plaintiffs claimed that the defendants' conspiracy had two parts, which they refer to on appeal as the "Secretary" Scheme and the "Bonus" Scheme. They allege that in the Secretary Scheme, the defendants fraudulently allocated a large part of Mr. Barenkamp's compensation to his wife during the years 1993-1995 in the form of a generous but unearned salary. They note that the defendants had variously described Kathy Barenkamp as a secretary or administrative assistant at the defendant company, or as a nurse, babysitter or teacher for Sue Birman, but the plaintiffs claim that Kathy Barenkamp never actually did any work.

The Bonus Scheme allegedly involved paying a substantial part of Bill Barenkamp's income in the form of large bonuses which were not reported as salary. The bonuses were generally paid quarterly, but the date of payment was sometimes adjusted in order to avoid having to report the bonus as income. The plaintiffs claimed that as a result of these two schemes, Bill Barenkamp managed to evade $89,375 in child support.

The defendants filed a Motion for Summary Judgment, which was heard on August 7, 1998 before Judge John Maddux. The judge denied the motion and set a trial date, but transferred the case to another judge shortly before trial. During the hearing of the case on November 19, 1998, the court granted the defendants' second Motion for Summary Judgment. This appeal followed.

III. A Conspiracy

Our courts have recognized a cause of action for a civil conspiracy to defraud. *Dale v. Thomas H. Temple Co.*, 208 S.W.2d 344 (Tenn. 1948). The Court described the elements of the tort and what it takes to prove it in the following manner:

> "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. *Ballantine v. Cummings*, 220 P. 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 confederates 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.

Id. at 353-354.

A corporation may be liable for damages to a third person resulting from a conspiracy of its agents with other persons or corporations. *Dale*, supra; *Christopher v. General Computer Systems*, 560 S.W.2d 698 (Tex. Civ. App. 1977).

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. *Ramey v. General Petroleum Corp.*, 343 P.2d 787 (Cal. App. 1959); *Dale v. Thomas H. Temple Co.*, 208 S.W.2d 344 (Tenn. 1948).

The general law with respect to many of the issues raised in this case is summarized in the following excerpt:

> 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 must 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.

16 Am. Jur. 2d, *Conspiracy* § 58.

IV. Disputed Material Facts

The burden of proof in the trial of a fraud claim rests with the party asserting the fraudulent behavior. However, at the summary judgment phase of the proceedings, the moving party must carry the burden of showing that no genuine issue of material fact exists, and that it is entitled to judgment as a matter of law. *Byrd v. Hall*, 847 S.W.2d 208 (Tenn. 1993). In ruling on a summary judgment motion, the trial court must view the pleadings and the evidence before

it in the light most favorable to the opponent of the motion. *Wyatt v. Winnebago Industries, Inc.*, 566 S.W.2d 276 (Tenn. Ct. App. 1977).

We note that Charlotte Brown produced a wealth of evidence in opposition to the defendants' Motion for Summary Judgment, indicating financial dealings that would have to be considered questionable at the very least, in light of the plaintiffs' right under the Tenn.Code.Ann. § 36-5-101(e), to have child support calculated in accordance with the child support guidelines as a percentage of William Barenkamp's income.

The defendants argue, however, that all of the plaintiffs' evidence is either inadmissible or irrelevant, and that they are entitled to judgment as a matter of law, first because the plaintiffs failed to allege the basic elements of a fraud claim, and second because of the operation of the testimonial privilege. The trial court apparently agreed with at least some of these arguments. In order to deal with the trial court's decision, we must first discuss the plaintiffs' evidence.

Charlotte Brown was first informed that Birman & Associates was splitting Bill Barenkamp's salary with his wife Kathy in order to minimize his child support obligation when she received an anonymous letter to that effect, addressed to her Connecticut home. The letter was purportedly written by a former employee of the company who stated herself (or himself) to be outraged by such conduct.

Subsequent investigation produced four former employees of Birman & Associates who testified by deposition and/or affidavit as to conversations and events occurring in the company offices which tended to confirm the allegations in the anonymous letter. Appellees argue that appellant has relied upon rumor and conjecture from former disgruntled employees of

Birman & Associates, supported only by hearsay, to weave a fabricated tale of deceit. We note, however, that in addition to other circumstantial evidence of a suspicious nature, the record contains evidence of a conversation Sue Birman had with an employee of Birman & Associates soon after Bill Barenkamp was employed. Sue Birman explained that she and her husband had decided to put Kathy Barenkamp on the payroll so that Bill Barenkamp would not have to pay child support on the money the family received in that way. Various company employees testified that Kathy Barenkamp did not work for any of the Birman entities. There is evidence in the record from which an inference could be drawn that a corporate employee forged the signature of Kathy Barenkamp on her employment contract and then notarized the signature.

The plaintiffs have also produced documentary evidence regarding the methods used to pay William Barenkamp, sufficient to raise a question of material fact as to whether the bonus compensation was part of a larger scheme to defraud the plaintiffs. It seems especially revealing that when the Barenkamps attempted to qualify for a mortgage loan, their alleged scheme backfired. Their application was turned down for insufficient income, and they had to submit a second one together with supporting documents that contradicted the representations of income that they later made to the trial court.

We do not wish to imply that Birman & Associates did not have the right to pay its executives in whatever way it chose, or that it could not hire whomever it wished. We merely observe that the plaintiffs have met their burden of raising genuine questions of material fact as to whether the Barenkamps, in collusion with the Birmans and their company, have perpetrated a fraud against the plaintiffs, through the use of otherwise legal personnel and payroll practices.

V. William Barenkamp's Defense

Mr. Barenkamp contends that even if the appellants' allegations were correct, their claim for fraud would be barred as a matter of law. He cites to us a classic definition of the elements of fraud, which includes a knowingly false representation of a material fact made to the plaintiff; reliance by the plaintiff on the truth of the representation; and damages resulting from that reliance. Mr. Barenkamp states that he never made any misrepresentations directly to the plaintiffs as to his income, and argues that he therefore cannot be guilty of fraud.

The definition of fraud he offers, while useful as a point of departure for analyzing a fraud claim, does not define the limits of possible inquiry into such a claim. For example, fraud liability may be imposed upon a defendant who makes a deliberate misrepresentation to a third party, in order that the third party might communicate it for the guidance of the plaintiff, even though the defendant did not directly communicate with the plaintiff. *See* William L. Prosser, "Misrepresentation and Third Persons," 19 Vanderbilt Law Review 2 (March 1966).

Mr. Barenkamp states that the only relevant entity to whom he made any representations as to his income was the court. And while he denies that he intentionally misled the court during the child support hearing by failing to mention the bonus income he anticipated he would be paid in 1996, he argues that the only possible remedy for his omission would be an action for contempt.

He supports his argument by referring us to the case of *Buckner v. Carlton*, 623 S.W.2d 102 (Tenn. Ct. App. 1981, Conner, J. dissenting). In that case, a former high school principal filed a lawsuit against the Rutherford County superintendent of schools and a former vice-principal, alleging that they conspired to present false testimony to the Board of Education in order to get him dismissed from his job. The trial court dismissed the suit. We affirmed the trial

court, holding that the defendants were immune from suit under a statute protecting school officials from liability when prosecuting charges against teachers. 623 S.W.2d at 104.

The plaintiff subsequently filed a Petition to Rehear, claiming that the record did not reflect that the defendant vice-principal was an employee of the School Board at the time of the acts complained of. We then filed a supplementary opinion, in which we discussed the testimonial privilege, and found it to be a further ground for dismissing the suit.

As we stated in that opinion, ". . . as a general rule, there can be no recovery of damages for false testimony or for a conspiracy to give or procure false testimony." 623 S.W.2d at 108. We also noted, however, that some courts have permitted an action to proceed where the perjured testimony was offered in furtherance of some larger conspiracy. That appears to be the situation here.

If we take the allegations of the plaintiffs to be true (as we are obligated to do when reviewing a summary judgment motion), then the defendants conspired to understate Mr. Barenkamp's income from the very moment his employment with Birman & Associates began. The acts performed in furtherance of the conspiracy included the issuance of payroll checks to Kathy Barenkamp and of bonus checks to William Barenkamp, as well as attempts to throw Charlotte Brown off the track when she called Birman & Associates to confirm the circumstances of William Barenkamp's employment. But all these acts would be of no avail if Mr. Barenkamp had testified truthfully as to his income. We are unwilling to hold that the very act required to consummate the fraud also had the effect of immunizing the defendants from liability for it.

Further, the allegations of fraud made by the plaintiffs are not confined to Mr. Barenkamp's testimony in the trial court. Rather, plaintiffs

contend that every check issued to Kathy Barenkamp for the purpose of understating her husband's income, and every bonus check issued to William Barenkamp in order to minimize his reported salary, constitutes a separate act of fraud for which all members of the conspiracy would be equally liable.

Appellees advance several arguments that, frankly, are completely without merit, because they do not address the underlying allegations of fraud and conspiracy. Thus, they state several times that William Barenkamp made full and timely payment of every child support installment ordered by the court. While this is commendable, it does not constitute a defense to the claim that the child support order at issue was obtained through fraud. William Barenkamp also states that he had no duty to inform the court, or his former wife, every time his income increased. While this is true, it is equally true that he did have an obligation to testify truthfully when asked about his income in a court of law.

Appellees also argue that because Kathy Barenkamp resigned from her position four months prior to the child support hearing, any purportedly fraudulent scheme had expired, and thus was irrelevant to the court's decision. However, insofar as the child support award was based upon William Barenkamp's income from prior years, the question of the bona fides of her employment remains relevant.

VI. The Birman Defense

The arguments offered by the Birman appellees parallel those of the Barenkamps. The Birmans contend that they are entitled to judgment as a matter of law by virtue of the testimonial privilege. That privilege bars a civil action for damages arising from the giving of false testimony in a judicial proceeding. The Birmans argue that since Mr. Barenkamp's alleged perjury is not actionable, a conspiracy to commit perjury would also not be actionable. We note, however,

that the purpose of the testimonial privilege is to encourage witnesses to testify freely, by shielding them from fear that their testimony could be used to impose civil liability upon them, not to create a blanket immunity for fraudulent conduct outside the courtroom. As we have pointed out in Part V of this opinion, we do not think the testimonial privilege is a bar to this action.

VII.

The judgment of the trial court is reversed. Remand this cause to the Circuit Court of Putnam County for further proceedings consistent with this opinion. Tax the costs on appeal to Birman Managed Care, Inc., Birman & Associates, Inc., David Birman, Sue Birman, William Barenkamp and Kathy Barenkamp.

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BEN H. CANTRELL,
PRESIDING JUDGE, M.S.

CONCUR:

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

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PATRICIA J. COTTRELL, JUDGE