

Civil Conspiracy

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I. Overview

A. Elements

§9.1 A civil conspiracy is, at its root, “an agreement, or preconceived plan, to do an unlawful act.” *Bahr v Miller Bros Creamery*, 365 Mich 415, 427, 112 NW2d 463 (1961). The elements of a cause of action for civil conspiracy in Michigan are (1) a concerted action (2) by a combination of two or more persons (3) to accomplish an unlawful purpose or a lawful purpose by criminal or unlawful means, (4) causing damage to the plaintiff. *Fenestra, Inc v Gulf American Land Corp*, 377 Mich 565, 593, 141 NW2d 36 (1966); *Mays v Three Rivers Rubber Corp*, 135 Mich App 42, 48, 352 NW2d 339 (1984). Although these elements are frequently reiterated in Michigan cases, the cause of action itself is, by definition, a somewhat shadowy vehicle for furthering complaints about a vast array of allegedly unlawful acts. Thus, the cause of action is ideally suited for creative argument within the bounds of these well-recognized elements.

The court of appeals has stated: “An allegation of conspiracy, standing alone, is not actionable.” *Magid v Oak Park Racquet Club Associates*, 84 Mich App 522, 529, 269 NW2d 661 (1978) (citing *Roche v Blair*, 305 Mich 608, 614—616, 9 NW2d 851 (1943)). In other words, the mere agreement to commit an unlawful act is not actionable; a civil conspiracy action is one for *damages* arising out of the acts committed pursuant to the conspiracy. *Fenestra*, 377 Mich at 593—594; *Auto Workers*Temple Ass’n v Janson*, 227 Mich 430, 433, 198 NW 992 (1924); *Krum v Sheppard*, 255 F Supp 994, 998 (WD Mich 1966), *aff’d*, 407 F2d 490 (6th Cir 1967); 16 Am Jur 2d *Conspiracy* §49, at 267 (1979).

An allegation of civil conspiracy “must be coupled with a substantive theory of liability in order to sustain a cause of action.” *Mohammed v Union Carbide Corp*, 606 F Supp 252, 257 (ED Mich 1985) (citing *Earp v Detroit*, 16 Mich App 271, 275, 167 NW2d 841 (1969)); *Early*

Detection Center, PC v New York Life Ins Co, 157 Mich App 618, 632, 403 NW2d 830 (1986) (“since plaintiffs have failed to state any actionable tort theories in their proposed amended complaint, the conspiracy theory must also fail”); *Cousineau v Ford Motor Co*, 140 Mich App 19, 37, 363 NW2d 721, *cert denied*, 474 US 971 (1985); *Magid v Oak Park Racquet Club Associates*, 84 Mich App 522, 529, 269 NW2d 661 (1978).

Although this book focuses on business torts, note that the underlying theory of liability in a conspiracy action need not be a tort. Indeed, in Michigan, many different theories of liability, both tort and nontort, have supported actions for civil conspiracy. *See, e.g., Roche v Blair*, 305 Mich 608, 9 NW2d 861 (1943) (conspiracy to defraud); *Temborius v Slatkin*, 157 Mich App 587, 403 NW2d 821 (1986) (same); *Borsuk v Wheeler*, 133 Mich App 403, 349 NW2d 522 (1984) (same); *Durant v Stahlin*, 374 Mich 82, 130 NW2d 910 (1964) (conspiracy to libel); *Northern Plumbing & Heating, Inc v Henderson Bros, mc*, 83 Mich App 84, 268 NW2d 296 (1978) (conspiracy to breach contract); *Mays v Three Rivers Rubber Corp*, 135 Mich App 42, 352 NW2d 339 (1984) (conspiracy by employer and insurance company to deprive disabled employee of benefits); *Brown v Brown*, 338 Mich 492, 61 NW2d 656 (1953), *cert denied*, 348 US 816 (1954) (conspiracy to alienate affections).

B. Reasons to Consider Pleading Civil Conspiracy

§9.2 Although a cause of action for civil conspiracy is poorly defined in most Michigan decisions, there are several advantages to pleading a civil conspiracy when the facts support it. First, an action for conspiracy may permit one to sue persons who would not otherwise be liable, such as an individual who performed acts not wrongful in themselves to further a conspiratorial agreement. For example, suppose that A and B agree on a scheme to defraud C. A’s acts to further the scheme are independently wrongful; B’s acts are not. Although B is not directly liable for any wrongful act, B may still be sued. If C suffers damages, C may assert a cause of action for civil conspiracy against B because B agreed to act with A toward the unlawful end of defrauding C.

Second, a civil conspiracy claim has certain evidentiary and procedural advantages. A plaintiff may introduce evidence of acts done or statements made by a co-conspirator to further a common purpose, whether or not, the co-conspirator is a named defendant. *Brown v Brown*, 338 Mich 492, 504, 61 NW2d 656 (1953), *cert denied*, 348 US 816 (1954). Under the Federal Rules of Evidence, “a statement by a coconspirator of a party during the course and in furtherance of the conspiracy” is an *admission* of a party-opponent, *not* hearsay, when offered against that party. FRE 801(d)(2)(E). The Michigan evidence rule is similar but more restrictive:

A statement is not hearsay if it is offered against a party and is made “by a co-conspirator of a party during the course and in furtherance of the conspiracy *on independent proof of the conspiracy*.” MRE 801(d)(2)(E) (emphasis added).

Third, as a practical matter, alleging a conspiracy sounds ominous; a conspiracy to defraud sounds worse than ordinary fraud, and a conspiracy to libel sounds worse than mere libel.

C. Unlawful Purpose or Means

§9.3 To establish the third element of a civil conspiracy, a plaintiff must prove that the defendants *either* had an unlawful purpose *or* used unlawful means; a plaintiff need not establish both facts. *Fenestra, Inc v Gulf American Land Corp*, 377 Mich 565, 579, 141 NW2d 36 (1966). In *Fenestra*, the Michigan Supreme Court reversed the* trial court’s finding of a civil conspiracy among several groups of defendants arising Out of the sale of 46 percent of the shares of the plaintiff-corporation. Fenestra had alleged a conspiracy among (1) the purchasing corporation (Gulf), (2) the entity that arranged for the sale, and (3) the selling, shareholders. The aim of the alleged conspiracy was to grant the controlling interest in Fenestra to Gulf for “the purpose of having Fenestra*s large amount of current assets exploited for the sole advantage of Gulf.” *Id.* at 569. The plaintiff based its case on the element of unlawful purpose, conceding that the defendants had employed no unlawful means. However, after carefully reviewing the trial court*s findings, the supreme court concluded that Fenestra had not proved that any of the defendants had an unlawful purpose. Gulf*s admitted intention to obtain control of Fenestra was held not in itself improper. Further, the court held that the record did not support the plaintiff*s contention that Gulf*s reason for wanting to obtain control was purely for its own interest and at the expense of other stock-holders, who, if they were threatened by Gulf*s actions after it acquired control, could seek equitable relief. *Id.* at 596—601.

II. Persons and Entities Liable

A. Generally

§9.4 “All those who, in pursuance of a common plan to commit a tortious act, actively take part in it and further it by cooperation or request, or who lend aid or encouragement to the wrongdoer, or who ratify and adopt the acts done for their benefit, are equally liable with the wrongdoer.” *Rosenberg v Rosenberg Bros Special Account*, 134 Mich App 342, 354, 351 NW2d 563 (1984) (quoting W. Prosser, *Handbook of the Law of Torts* §46, at 292 (4th ed 1971)). Once a civil conspiracy is established, “whatever was done in pursuance of it by one of the conspirators is to be considered as the act of all, and all are liable irrespective of the fact they did not actively participate therein.” *Brown v Brown*, 338 Mich 492, 503, 61 NW2d 656 (1953) (quoting *Warsop v Cole*, 292 Mich 628, 291 NW 33 (1940)), *cert denied*, 348 US 816 (1954). However, “[i]t is only where means are employed, or purposes are accomplished, which are themselves tortious, that the conspirators who have not acted but have promoted the act will be held liable.” W. Keeton, *Prosser and Keeton on the Law of Torts* §46, at 324 (5th ed 1984) (footnotes omitted).

Consider, for example, a scheme hatched between A and B to defraud C by convincing C that her business is worth less than its fair market value. A approaches C about buying the business, and B plays the role of an appraiser and provides a fraudulent appraisal of the

business. Although A has not actually committed an independent tort, A may be liable for civil conspiracy due to (1) his agreement with B to defraud C and (2) B's actions to further the conspiracy. B, of course, may be liable for both fraud and conspiracy to defraud.

Note that one who innocently does an act that inadvertently furthers the tortious purpose of another is not acting in concert with the tortfeasor. *Rosenberg*, 134 Mich App at 354. Thus, in the preceding example, if a second appraiser, D, who is not in any way connected with A or B, provides a low appraisal based on an honest error, D would not be liable for civil conspiracy even if D's action actually furthered the conspiracy between A and B.

It is well established in Michigan and elsewhere that liability for acts taken in pursuance of a civil conspiracy is joint and several. *Brown*, 338 Mich at 503; *LA Young Spring & Wire Corp v Falls*, 307 Mich 69, 106, 11 NW2d 329 (1943). But even when a formal agreement does not exist and, hence, no action for conspiracy lies, a plaintiff may still be able to recover from the defendants jointly if the defendants' acts constitute a joint tort.

B. Conspiracy by Corporations and Corporate Officers

§9.5 A conspiracy also exists when a corporation, through its officers or agents, conspires with another entity or a person outside that corporation. *Borsuk v Wheeler*, 133 Mich App 403, 349 NW2d 522 (1984). This is so even when- the actions of the corporate agents or employees are contrary to the corporation's best interests, as long as the actions are within the agents' scope of authority. *Id.* at 410—411.

In *Borsuk*, the plaintiff-homeowners sued defendants Wheeler, Advance Mortgage Corporation, and unknown employees of Advance on the theory that Wheeler and certain Advance employees conspired to defraud plaintiff by falsifying mortgage documents to help Wheeler qualify for a mortgage. Just before the sale closing, Wheeler demanded a renegotiation of the contract to buy the plaintiffs' home, and when the plaintiffs did not renegotiate, Wheeler failed to appear at the closing.

Advance moved for summary judgment, asserting, among other things, that plaintiffs failed to plead that the Advance employees acted "within the scope of their employment," as they allegedly were required to do by the doctrine of *respondeat superior*. However, the court noted that, while "intentional and reckless torts are generally held to be beyond the scope of employment" (*id.* at 410 (emphasis added)), Advance, as a principal, might be liable for acts of its employees falling within the scope of their *authority* (*id.* at 411). The activity that Advance's employees had engaged in was obviously detrimental to Advance, but the court nevertheless found that such activity could be within the scope of the employees' authority because their duties presumably included matters relating to accepting and rejecting mortgage applications. Accordingly, summary judgment was not appropriate because Advance could be liable for civil conspiracy based on the acts of its employees and the co-defendant buyer, as long as the other elements of civil conspiracy were established.

A different question arises when a plaintiff alleges a conspiracy among several agents or employees of the same corporation. This combination of actors is not recognized as a conspiracy. The general rule is that a corporation does not “conspire” with its own agents or employees when the agents or employees are acting within the scope of their employment and not for personal purposes. *Doherty v American Motors Corp*, 728 F2d 334, 339 (6th Cir 1984); *Schroeder v Dayton-Hudson Corp*, 448 F Supp 910, 915 (ED Mich 1977), *modified on another issue*, 456 F Supp 650 (ED Mich 1978). Two separate entities are required in a conspiracy claim; a corporation and its own agents or employees are considered to be *one* entity. *Doherty*, 728 F2d at 339 (quoting *Nelson Radio & Supply Co v Motorola*, 200 F2d 911, 914 (5th Cir 1952), *cert denied*, 345 US 925 (1953)).

In *Doherty*, the court extended the general rule regarding intracorporate agents to hold that neither in-house nor outside counsel, acting on behalf of a corporation, conspire with a corporation when there is no evidence that the attorneys were motivated by personal concerns as opposed to concerns for their client. 728 F2d at 340.

The next question is whether there can be a conspiracy between a corporation and a corporate agent who acts in his or her own interest rather than that of the corporation. Although the issue has not been addressed in a published Michigan opinion, a Michigan court could well find two distinct actors under these circumstances. This issue was the subject of a Texas case, *Fojtik v First National Bank of Beeville*, 752 SW2d 669 (TexCt App 1988), *error denied*, 775 SW2d 632 (Tex 1989), where the plaintiff sued a bank and two of its directors on numerous business tort theories, including civil conspiracy to defraud. The plaintiff, a farmer in the auction and equipment business, had obtained a \$500,000 line of credit and a \$250,000 loan in early 1983. Later in 1983, the bank imposed additional conditions on the loan and reduced the line of credit to \$250,000. The plaintiff based his conspiracy claim on the fact that one of the directors of the bank was also the owner of an International Harvester dealership-franchise that competed directly with the plaintiff. The trial court had dismissed the civil conspiracy claim on the theory that a corporation and its agents constitute a single person and, therefore, do not form a conspiracy. However, as the appellate court observed, “[t]he underlying rationale for this holding, of course, is that the acts of a corporation’s agents are deemed to be acts of the corporation itself.” 752 SW2d at 673. The appellate court reversed the trial court’s opinion that the bank and its directors could not have formed a conspiracy, holding that “it is conceivable that [one of the bank’s directors], if he had in fact conspired with the bank, did so in his capacity not as a corporate agent but as an independent equipment dealer.” *Id.*

C. Franchisee Conspiracy

§9.6 At least one federal district court has refused to allow a cause of action for conspiracy where the activity allegedly undertaken to further the conspiracy was protected by the First Amendment right to assemble. In *McAlpine v AAMCO Automatic Transmissions, mc*, 461 F Supp 1232, 1273 (ED Mich 1978), counterplaintiff AAMCO alleged that the plaintiffs, a

group of Michigan AAMCO franchisees, “arranged among themselves to stop being AAMCO franchisees and to start up another transmission repair company.” Despite the fact that the franchisees met and performed other acts to enable them to do business as another transmission company as soon as possible after their agreement with AAMCO terminated, the court rejected AAMCO’s conspiracy claim against the franchisees because

[f]ranchisees, by necessity, must have access to the franchise group in order to act together to deal with common problems, whether those problems be the oppressiveness of the franchisor or some less momentous concern. The fact that a contract might have been breached as a direct result of franchisee organization means nothing more than that the franchisor would have a cause of action for breach of contract.

Id. at 1273—1274. The court was unable to find a sufficiently wrongful act to ground the theory of conspiracy. In struggling with this issue, the court stated:

On the one hand, it is clear that the mere agreement to do a wrongful act can never amount to a tort, whether or not it may be a crime, and that some act must be committed by one of the parties in pursuance of the agreement, which is itself a tort. The gist of the action is not the conspiracy charged, but the tort working damage to the plaintiff. On the other hand, there are certain types of conduct, such as boycotts, in which the element of combination adds such a power of coercion, undue influence or restraint of trade, that it makes unlawful acts which one man might legitimately do.

Id. at 1273 (citations omitted).

The *McAlpine* court found that the franchisees were within their constitutional rights to assemble. On this basis, the court was unwilling to find either that the act of meeting was an unlawful act sufficient to ground liability for conspiracy or that the meetings were undertaken for a sufficiently improper purpose to ground liability for conspiracy. While it may appear that the court has overlooked that breaching a contract may be an improper purpose and that its First Amendment exception threatens to swallow the tort, the case is best understood as a reflection of the reality that “only the collective power of franchisees* group activity can mitigate the gross imbalance between [franchisor and franchisees] ~ in all their dealings.” H. Brown, *Franchising Realities and Remedies* §10.08[5][b] n41 (1981 & Supps).

III. Other Issues

A. Pleading and Proving Conspiracy

§9.7 In alleging conspiracy, a plaintiff need not specify the exact means used to carry out the illegal purpose. *Goldsmith v Moskowitz*, 74 Mich App 506, 521, 254 NW2d 561 (1977). However, claiming conspiracy is not sufficient when the facts pleaded do not disclose a

conspiracy. *Coronet Development Co v FSW, Inc*, 3 Mich App 364, 369, 142 NW2d 499 (1966), *aff'd*, 379 Mich 302 (1967).

Proof of a conspiracy is generally circumstantial. *Bahr v Miller Bros Creamery*, 365 Mich 415, 421, 112 NW2d 463 (1961). However, conspiracy may not be assumed (*Harvey v Lewis*, 357 Mich 305, 311, 98 NW2d 599 (1959)), and evidence of conspiracy must “support a reasonable inference that two or more persons planned or acted in concert to accomplish an unlawful end.” *Rencsok v Rencsok*, 46 Mich App 250, 252, 207 NW2d 910 (1973) (citations omitted). As stated in *Temborius v Slatkin*, 157 Mich App 587, 600, 403 NW2d 821 (1986):

The agreement, or preconceived plan, to do the unlawful act is the thing which must be proved. Direct proof of agreement is not required, however, nor is it necessary that a formal agreement be proven. It is sufficient if the circumstances, acts and conduct of the parties establish an agreement in fact. Furthermore, conspiracy may be established by circumstantial evidence and may be based on inference.

(Footnote omitted.) Furthermore, while all conspirators named as defendants are, as a rule, jointly and severally liable for any damages arising from the conspiracy, the plaintiff need not join all conspirators as defendants and may, in fact, name only one. *Hanover Fire Ins Co of New York v Furkas*, 267 Mich 14, 21, 255 NW 381 (1934). Also, a plaintiff may introduce evidence of acts done or statements made by any conspirator to further the common purpose, whether or not that conspirator is a party defendant. *Brown v Brown*, 338 Mich 492, 504, 61 NW2d 656 (1953), *cert denied*, 348 US 816 (1954).

B. Statute of Frauds in Conspiracy to Breach a Contract

§9.8 If it is alleged that a party to a contract and a third party have conspired to cause a breach of that contract, the plaintiff must show a writing sufficient to satisfy the statute of frauds to establish that the contract exists. *Northern Plumbing & Heating, Inc v Henderson Bros, mc*, 83 Mich App 84, 91, 268 NW2d 296 (1978); *Jaques v Smith*, 62 Mich App 719, 720, 233 NW2d 839 (1975). The rationale for this rule is that if the contract is not enforceable between the parties, no wrongful act is committed by failing to perform the contract. Therefore, if a party to an unenforceable contract conspired with a third party to induce non-performance of the contract, no unlawful act would result because the contracting party has no enforceable obligation to perform. Note that this result differs from the rule for tortious interference claims discussed in §2.3.

C. Statute of Limitation

§9.9 In Michigan cases, the statute of limitation that applies to the underlying cause of action also appears to apply to the particular conspiracy alleged. *Roche v Blair*, 305 Mich 608, 609, 9 NW2d 861 (1943) (conspiracy to defraud; court adopted six-year statute of limitation for fraud). Because the gist of a cause of action for civil conspiracy is not the

conspiracy itself but the wrongful act causing the damages, it has been held that a cause of action for civil conspiracy does not accrue upon the discovery of the *conspiracy*, but rather upon the occurrence of the *acts* causing the damages. *Id.* at 608, 614—616. Thus, while the concealment of damaging acts may toll the statute, the concealment of the conspiracy itself will not. *Id.* at 617—618.