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NO. 27038

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI'I

KIRK CAMERLINGO and DOROTHY CAMER,
Plaintiffs-Appellants,
v.
LORI J. KIM, STEVEN J. KIM, WESLEY W. ICHIDA,
and PAUL A. LYNCH, Defendants-Appellees
and
JUNE W.J. CHING, Defendant,
and
SCOT S. BROWER,
Additional Counterclaim Defendant

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CIVIL NO. 01-1-0297)

SUMMARY DISPOSITION ORDER

(By: Burns, C.J., Nakamura and Fujise, JJ.)

Plaintiffs-Appellants Kirk Camerlingo (Camerlingo) and Dorothy Camer (Camer) (collectively, Plaintiffs) appeal from the circuit court's¹ December 6, 2004 Judgment which finalized the court's June 10, 2002 order entering summary judgment in favor of Defendants-Appellees Lori J. Kim (Lori), Steven J. Kim (Steven), Wesley W. Ichida (Ichida) and Paul A. Lynch (Lynch) (collectively, Defendants).

The background is as follows: On July 24, 1991, a child (Child) was born to Lori and Camerlingo. Lori and Camerlingo were married on July 6, 1992. On October 22, 1993, in the Family Court of the Third Circuit, FC-D No. 93-228, they were divorced. The divorce decree awarded custody of Child to Lori with restricted rights of visitation to Camerlingo.

¹ Judge Eden Elizabeth Hifo presiding.

E.M. RIMANDU
CLERK, APPELLATE COURTS
STATE OF HAWAII

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In February 1994, Lori and Camerlingo reconciled and lived together with Child until they separated again in January 1995. On January 12, 1996, Camerlingo filed an order to show cause seeking, for his visits with Child, a "specific visitation schedule" and unsupervised visitation for himself. On June 5, 1996, Lori and Camerlingo stipulated that Camerlingo would continue his supervised visits with Child and would attend therapy and parenting classes.

Camer is Camerlingo's mother. On June 13, 1996, Camer moved to intervene in the divorce case and sought to gain child visitation rights. The Family Court of the Third Circuit granted the motion for intervention but denied her request for child visitation rights. Camer appealed. In that appeal, Steven, then from the law firm of Lynch & Farmer, represented Lori. In 1997, Lori and Steven were married.

On April 28, 1998, in the divorce case, the court entered a stipulated order that stated as follows:

A. [Steven] shall not act as, or perform work as, [Lori's] attorney in the above-entitled proceedings. [Steven] may, subject to court approval, be permitted to sit in the courtroom with [Lori].

B. The law firm of Lynch and Farmer may continue its representation of [Lori].

On July 20, 1998, in Camerlingo v. Camerlingo, 88 Hawai'i 68, 961 P.2d 1162 (App. 1998), this court held that: (1) the statute governing visitation after divorce does not mandate that the family court, upon a grandparent's request, award the grandparent rights of visitation with his or her grandchild, but leaves the issue to the discretion of the court; (2) in deciding

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whether to grant grandparental visitation, the family court may consider the effect of visitation on the noncustodial parent's visitation rights; and (3) evidence supported the decision not to grant specific grandparental visitation, but to have the parent share time with the grandparent.

On January 26, 2001, Plaintiffs filed the complaint that commenced this case. On October 2, 2001, they filed an amended complaint in which (1) Camer sued Steven individually, and as agent for Ichida and Lynch, for defamation, (2) Plaintiffs sued Defendants for abuse of process, and (3) Camerlingo sued Lori and Steven for violating electronic eavesdropping laws and thereby invading Camerlingo's privacy. Plaintiffs demanded a jury trial and sought special, general, and punitive damages and interest, costs, and attorney fees. Plaintiffs were represented by attorney Scot S. Brower (Brower).

On appeal, Plaintiffs assert in their Opening Brief that

[Camer's] claim for defamation against [Steven, Ichida, and Lynch] is based upon a letter dated October 14, 2000 written by [Steven] individually, and as attorney and agent for [Ichida] and [Lynch] addressed and published to Brian C. Means, Assistant Disciplinary Counsel for the Office of Disciplinary Counsel.

[Steven] stated: "Ms. Camer's central complaint seems to be her assertion that I am continuing to represent my wife in her family court case. This is simply not true. Wes Ichida represents Lori, and he has done so throughout this case. Pleadings are prepared by Mr. Ichida. However, when it is appropriate, there are instances in which Lori and I provide Mr. Ichida with factual materials to help him understand incidents that Lori and/or I were witness to." The defendants [sic] letter to Brian Means of the Office of Disciplinary Counsel was in response to a complaint dated September 8, 2000 made by [Camer] against [Steven, Ichida, and Lynch]. [Camer] complained that [Steven] was representing [Lori] and/or doing work for her in a family court case, when he had been prohibited from doing so by a stipulated entered [sic] Family Court Order.

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[Steven's] statement that [Camer's] assertion that [Steven] continued to represent [Lori] was simply not true, and the inference that [Camer] is a liar is contradicted by the Declaration of Elsbeth B. McKeen. Elsbeth B. McKeen, a licensed attorney who had practiced law in the law firm of [Steven, Ichida, and Lynch,], stated "[Steven] said the judge ordered him not to work on the case, but that he worked on the case anyway, but [Ichida] would make court appearances. [Steven] indicated he agreed not to do the work on the case, but that he did the work anyway."

The basis for [Plaintiffs'] claims for civil conspiracy² and abuse of process against [Lori, Ichida, and Lynch] arise from the damages Plaintiffs claim were caused by [Steven's] surreptitious, unlawful, and fraudulent violations of the Family Court Order, which prohibited [Steven] from acting as his wife [Lori's] attorney and/or prohibiting him from doing work for her in the Family Court case.

The basis for [Camerlingo's] claims against [Lori and Steven] for violations of the electronic eavesdropping laws and invasion of privacy is that [Lori and Steven] secretly recorded telephone conversations between [Camerlingo] and his minor daughter, without [Camerlingo's] consent and knowledge.

(Footnote added; record citations omitted).

On October 10, 2001, the court entered an order stating, in relevant part, as follows:

1. [Steven] cannot represent any party other than himself at the trial of this case.
2. [Steven] may continue to represent other parties and himself for pre-trial proceedings in this case.
3. No reference shall be made at the trial of this case that [Steven] has represented parties other than himself during pre-trial proceedings.

² The Reply Brief insists that the amended complaint asserted a claim for civil conspiracy. The amended complaint states, in relevant part:

17. That from January 26, 1999 to the present [Steven], has acted surrepti[t]iously, unlawfully and fraudulently, as an attorney for [Lori], in the post divorce litigation, with the knowledge and consent [of] Ichida and Lynch, and with all defendants acting in concert with each other, for the improper purpose of giving [Lori] an [sic] coercive advantage over defendants Camerlingo and Camer and to inhibit and prevent [Plaintiffs] from exercising and enjoying their legal rights.

18. That as a direct and proximate result of the defendant's [sic] abuse of process, [Plaintiffs] have suffered general and special damages in amounts to be proven at trial, and within the jurisdictional limits of this court.

The answering brief states that **"Plaintiffs' Conspiracy Claim Fails Because There Is No Underlying Tort."**

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On November 16, 2001, Defendants filed a counterclaim against Plaintiffs and Brower for (1) abuse of process and (2) for violating § 524 of Title 11, United States Code (Bankruptcy Code) in light of the fact that Steven and Ichida had been granted discharges under § 727 of Title 11, United States Code (Bankruptcy Code). Defendants sought special, general, and punitive damages and interest, costs, and attorney fees.

On April 3, 2002, Steven, Ichida, and Lynch moved (1) for partial summary judgment regarding the defamation claims and (2) for partial dismissal or partial summary judgment regarding the abuse of process claims. On April 17, 2002, Lori joined in these motions.

On April 16, 2002, Steven, Ichida, and Lynch moved for partial summary judgment as to the "unlawful access, interception, and/or use of telephone communications and invasion of privacy." On April 17, 2002, Lori joined in this motion.

On April 17, 2002, Lori separately (1) moved for partial dismissal or partial summary judgment regarding the abuse of process claims, (2) moved for partial summary judgment regarding the claim that she violated electronic eavesdropping laws and thereby invaded Camerlingo's privacy, and (3) moved for partial summary judgment regarding the defamation claims.

On May 13, 2002, after a hearing, the court orally granted the motions. On May 31, 2002, the court entered an HRCF Rule 54(b) "[p]artial final judgment . . . in favor of Defendants and against Plaintiffs as to all claims raised against Defendants

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by Plaintiffs in this matter." On June 10, 2002, the court entered its written order stating, in relevant part, as follows:

With regard to the Abuse of Process Motion, the Court treats said Motion as a summary judgment motion, as the Court has taken into account admissible evidence. The Court finds that a question of fact exists as to whether [Steven] violated the *Stipulation Regarding Defendant's Motion to Disqualify Steven J. Kim and the Law Firm of Lynch and Farmer as Counsel for Plaintiff*, filed April 28, 1998 in FC-D No. 93-228 (Third Circuit) (hereinafter referred to as the "Stipulated Order"). However, even if the Stipulated Order were to have been violated, the Court finds [sic] that the Stipulated Order is not within the meaning of process as contemplated by the tort of abuse of process, and therefore no tort liability would attach. The Court further finds no ulterior motive in the Defendants' conduct as set forth in the record. . . .

With regard to the Defamation Motion, the Court finds [sic] said Motion to be merited on all grounds, specifically that (1) Movants are entitled to absolute and conditional immunity from liability for the alleged defamation, and (2) that there was no defamatory statement made by Movants, or any of them, as a matter of law. . . .

With regard to the Electronic Eavesdropping Motion, the Court finds no actionable claim against [Steven] for listening to recorded telephone conversations to which [Camerlingo] was a party. Furthermore, based upon the record, the Court finds no questions of fact to exist, and finds as a matter of law, that there was neither a violation of Section 803-48 of the Hawaii Revised Statutes, nor any actionable "electronic eavesdropping" or "wiretap" arising otherwise. It follows that Plaintiffs have no actionable claim for invasion of privacy. . . .

To the extent that Plaintiffs have asserted causes of action for conspiracy and for punitive damages, the Court finds [sic] that such claims cannot be sustained as a matter of law in the absence of any underlying actionable tort claims[.]

On June 20, 2002, the court entered an order granting the motions filed by Lori. On March 18, 2003, at the request of the Defendants, the court entered an order dismissing their counterclaim. On July 29, 2003, the court entered a Judgment. On November 5, 2003, Plaintiffs filed a notice of appeal. On March 2, 2004, the Hawai'i Supreme Court entered an order dismissing this appeal.

On April 29, 2004, the circuit court entered an order requiring Plaintiffs to pay \$3,976.25 costs to the law firm of

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Lynch Ichida Thompson Kim & Hirota, and costs of \$4,168.37 to the law firm of Watanabe Ing Kawashima & Komeiji.

On December 6, 2004, the court entered another Judgment. On January 3, 2005, Plaintiffs filed a notice of appeal. This appeal was assigned to this court on July 21, 2005.

Summarized, the three claims and their basis are as follows:

First, Camer asserted a claim against Steven individually, and as agent for Ichida and Lynch, for defamation. In a September 8, 2000 letter to the Office of the Disciplinary Counsel (ODC), Camer alleged, among other things, that after the entry of the April 28, 1998 order barring him from performing work as Lori's attorney in the divorce case, Steven was involved in the preparation of a document in the divorce case. In a four-page single space letter dated October 4, 2000, Steven, for himself and as attorney for Lynch and Ichida, responded, in relevant part, to the ODC as follows:

Ms. Camer's central complaint seems to be her assertion that I am continuing to represent [Lori] in her family court case. This is simply not true. [Ichida] represents Lori, and he has done so throughout this case.

A copy of the letter is attached to the answering brief as exhibit C. The answering brief states that "[u]ltimately, Camer's complaint to ODC was dismissed with no action taken against Steven or the other Defendants."

Without recognizing the material difference between (1) her allegation that after the entry of the April 28, 1998 order barring him from performing work as Lori's attorney in the

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divorce case Steven performed work for Lori in the divorce case, and (2) Steven's denial that he was "continuing to represent" Lori in the divorce case, Camerlingo alleged that Steven's response was false and contends that Steven thereby defamed her.

Second, Plaintiffs asserted a claim against Defendants for abuse of process. It appears that Plaintiffs assert that (1) Steven violated the family court order, and (2) this violation was an abuse of process.

Third, Camerlingo asserted a claim against Lori and Steven for violation of electronic eavesdropping laws and a resulting invasion of Camerlingo's privacy. It appears that Camerlingo alleged, without evidence, that both Steven and Lori secretly recorded telephone conversations between Camerlingo and Child without Camerlingo's consent and knowledge and thereby (a) violated electronic eavesdropping laws and (b) invaded Camerlingo's privacy. In the answering brief, (a) Lori admits that she taped telephone conversations between Camerlingo and Child, and (b) Steven and Lori admit that they listened to the taped conversations. The question is whether the record shows a triable cause of action by Camerlingo against Steven and/or Lori pursuant to Hawaii Revised Statutes §§ 803-41 thru 48 (Supp. 2005). Camerlingo does not identify which specific statutory provision he contends was violated, and none are apparent.

Therefore, in accordance with Hawai'i Rules of Appellate Procedure Rule 35, and after carefully reviewing the record and the briefs submitted by the parties, and duly

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considering and analyzing the law relevant to the arguments and issues raised by the parties, we conclude that the circuit court did not err when it entered summary judgment in favor of Defendants.

IT IS HEREBY ORDERED that the December 6, 2004 Judgment entered in the Circuit Court of the First Circuit, which finalized the June 10, 2002 order, is affirmed.

DATED: Honolulu, Hawai'i, March 17, 2006.

On the briefs:

Scot S. Brower
for Plaintiffs-Appellants.


Chief Judge

Wesley W. Ichida and
Paul A. Lynch
(Lynch Ishida Thompson Kim &
Hirota)
for Defendant-Appellee
Lori J. Kim.


Associate Judge

John T. Komeiji and
Dan Ko Obuhanych
(Watanabe Ing Kawashima &
Komeiji)
for Defendants-Appellees
Steven J. Kim, Wesley W.
Ichida, and Paul A. Lynch


Associate Judge