

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE

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**FILED**

October 12, 1999

Cecil Crowson, Jr.  
Appellate Court Clerk

**NANCY B. DURR,**

Plaintiff-Appellant,

Vs.

Davidson Chancery No. 96-2068-II  
C.A. No. 0A01-9901-CH-00030

**MICHAEL BUERGER,**

Defendant-Appellee.

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FROM THE DAVIDSON COUNTY CHANCERY COURT  
THE HONORABLE CAROL MCCOY, CHANCELLOR

Jay S. Bowen and Gregory S. Reynolds  
Bowen Riley Warnock & Jacobson of Nashville  
For Appellant

James G. Martin, III  
Farris, Warfield & Kanaday of Nashville  
and  
John P. Branham and Kathryn E. Barnett  
Branham & Day of Nashville  
For Appellee

***AFFIRMED AND REMANDED***

Opinion filed:

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

**CONCUR:**

**DAVID R. FARMER, JUDGE**

**HOLLY KIRBY LILLARD, JUDGE**

Plaintiff/Appellant, Nancy B. Durr, appeals the order of the trial court dismissing her complaint against Defendant/Appellee, Michael Buerger. The trial court *sua sponte* dismissed the complaint on the basis of unclean hands.

From the pleadings and depositions filed in the cause, we have determined the factual scenario hereinafter set out.

The parties to this action are former lovers who were involved in an adulterous affair while each was married. Soon after the beginning of their affair, both parties began their separate divorce proceedings. Durr's divorce complaint filed March 4, 1994, sought, among other things, child custody, alimony and other financial support. According to Durr, Buerger, in late spring or early summer of 1994, convinced her to abandon her claims for alimony and other financial support in order to make his divorce proceeding easier and in return he would provide certain financial support and assistance.<sup>1</sup> Specifically, Durr asserts that Buerger promised that he would: (1) pay her \$100,000.00 annually for five years; (2) as a guaranty for his payment of the \$500,000.00, purchase a \$1,000,000.00 life insurance policy on his life naming Durr as the beneficiary; (3) pay Durr \$2,000.00 a month; (4) pay Durr's home mortgage payments of approximately \$1,000.00 a month owed to Durr's sister; (5) pay Durr's counseling bills during her divorce; (6) reimburse Durr for monies she withdrew from her IRA to pay her divorce attorneys' fees; and (7) purchase Durr a new car.<sup>2</sup>

According to Durr, she did not pursue her claims for alimony and other financial support in reliance upon the agreement with Buerger. Durr further asserts that Buerger began performing under the agreement. She states that the promised \$2,000.00 a month

was paid for a period of months, that Buerger paid \$1,500.00 to her divorce attorney, that Buerger gave her a motorcycle, that Buerger deposited \$20,000.00 as partial payment of the \$100,000.00 annual payment into a safety deposit box he acquired for her, that Buerger purchased a 1996 Volvo for her, that Buerger sent one of his employees to her house to make repairs, and that Buerger paid a portion of her counseling bills. However, the parties' relationship ended soon after both of them obtained their divorces, and, according to Durr, Buerger refused to fulfill their agreement after she demanded that he honor it.

On July 9, 1996, Durr filed the instant complaint alleging that Buerger breached the parties' agreement by refusing to pay Durr the amounts promised and seeking specific performance of the contract. Buerger's answer denies the existence of the agreement and affirmatively pleads that Durr's claims are barred by the Statute of Frauds and the statute of limitations. On June 5, 1998, Buerger filed a motion for summary judgment on the grounds that the alleged oral agreement is too uncertain and indefinite to be enforced and that it violates the Statute of Frauds. Durr filed a response to Buerger's summary judgment motion wherein she asserts that the agreement is sufficiently definite and certain and does not fall within the Statute of Frauds.

On August 28, 1998, a hearing was held on the motion at which time the trial court requested the parties to supplement their briefs as to whether the alleged oral contract violated public policy. The trial court requested this in part because of Durr's deposition testimony in the instant action. In her deposition, Durr admitted that her deposition testimony in her divorce proceedings was inaccurate and untruthful in certain respects.

Durr filed a supplemental brief wherein she asserted that the alleged oral contract was not violative of public policy because the agreement was not a collusive agreement to obtain a divorce. Durr further asserted that she had already decided to obtain a divorce prior to entering into the agreement and that the agreement did not require the parties to suppress evidence in a judicial proceeding. Durr also filed an affidavit wherein she stated that it was never part of the agreement that she would testify inaccurately in her divorce

proceedings in exchange for Buerger's promises. Buerger also submitted a supplemental brief wherein he asserted that the alleged agreement violated public policy since Durr's part of the agreement was to testify falsely during her divorce proceedings, which she admittedly did, in return for the alleged promises on his part.

On November 19, 1998, the trial court entered a "Memorandum and Order." The trial court found that Durr perjured herself at the insistence, and with the assistance of Buerger and that the promise of support was given "in exchange for Ms. Durr providing untruthful testimony in discovery depositions in both her divorce from Mr. Durr and in the Buerger divorce proceeding." Finding that both parties were knowledgeable about the true purpose of their activities, the trial court stated that each must be denied relief on the basis of unclean hands and denied Buerger's motion for summary judgment. The trial court also dismissed Durr's complaint on the basis that Durr did not come into court with clean hands due to her perjury, finding that her claim is "based upon her dishonesty in the divorce proceedings and is not only linked to her prior bad acts, but is the very foundation upon which she seeks this Court's assistance."

This appeal ensued, and Durr presents the following issue, as stated in her brief, for our review:

Did the lower court err in applying the doctrine of unclean hands on summary judgment, even though the evidence failed to establish that Appellant gave certain inaccurate deposition testimony as part of the agreed consideration for the contract at issue in this case?

"He who comes into equity must come with clean hands." ***Gibson's Suits in Chancery*** § 18 (7th ed. 1988). This maxim is known as the unclean hands doctrine. In discussing this doctrine, this Court in ***Continental Bankers Life Insurance Co. v. Simmons***, 561 S.W.2d 460 (Tenn. App. 1977) stated:

The principle is general, and is one of the maxims of the Court, that he who comes into a Court of Equity asking its interposition in his behalf, must come with clean hands; and if it appear from the case made by him, or by his adversary, that he has himself been guilty of unconscientious, inequitable, or immoral conduct,

in and about the same matters whereof he complains of his adversary, or if his claim to relief grows out of, or depends upon, or is inseparably connected with his own prior fraud, he will be repelled at the threshold of the court. **C.F. Simmons Medicine Co. v. Mansfield Drug Co.**, 93 Tenn. 84, 23 S.W. 165 (1893). None of the parties to the fraud can have the assistance of the Court to compel either the enforcement or cancellation of the contract or to have property interests transferred thereunder restored. Equity will leave such parties where they have placed themselves, and will refuse all affirmative aid to either of the fraudulent parties. **Gibson's Suits in Chancery**, 5th Ed., § 51; **Parks v. McKamy**, 40 Tenn. 297 (1859).

*Id.* at 465.

In **Overton v. Lewis**, 152 Tenn. 500, 279 S.W. 801 (1926), our supreme court stated that:

It is not every willful and reprehensible act that will preclude a litigant in a court of equity from obtaining the relief prayed, but such conduct, under the principle involved in this maxim, **must bear an immediate relation to the subject-matter of the suit**, and in some measure affect the equitable relations subsisting between the parties to the litigation and arising out of the transaction. . . .

152 Tenn. at 510, 279 S.W. at 804 (emphasis in original). The operation of the maxim is confined to misconduct connected with the particular matter in litigation and does not extend to any misconduct, however gross, which is unconnected therewith, and with which the defendant is not concerned. **Greer v. Shelby Mutual Ins. Co.**, 659 S.W.2d 627, 630 (Tenn. App. 1983).

The pleading of unclean hands is not a prerequisite for denying relief. Upon discovering it, the court may apply the maxim on its own motion. **Owens v. Owens**, 21 Tenn. App. 104, 106 S.W.2d 227 (1937). The maxim “gives wide range to the equity court’s use of discretion in refusing to aid the unclean litigant.” **Precision Instrument Mfg. Co. v. Automotive Maintenance Machinery Co.**, 324 U.S. 806, 815, 65 S. Ct. 993, 997, 89 L. Ed. 1381 (1945). The trial court is not “bound by formula or restrained by any limitation that tends to trammel the free and just exercise of discretion.” **Keystone Driller Co. v. General Excavator Co.**, 290 U.S. 240, 245-46, 54 S. Ct. 146, 148, 78 L. Ed. 293, 297 (1933).

Durr asserts that the trial court erred in dismissing her complaint based on the doctrine of unclean hands, because the evidence in the record does not establish that Buerger's promises of financial support were contingent on Durr providing untruthful testimony in her divorce proceeding. Durr contends that the doctrine of unclean hands applies only where the plaintiff's misconduct bears an immediate connection to the particular transaction that forms the basis of her claim against the defendant. It does not apply where such misconduct is separable from the agreement plaintiff seeks to enforce. Durr avers that the evidence in this case supports a finding that her inaccurate testimony was not part of the parties' contract, but rather separate conduct that she engaged in at Buerger's request.

Buerger, on the other hand, submits that the trial court properly found that Durr's claims grow out of, depend upon and are inseparably connected with her own prior fraud. Durr admitted that she committed unconscientious, inequitable and immoral conduct in and about the matters raised in her complaint. Because the alleged contract violates not only public policy but also the laws of the State of Tennessee, Buerger asserts that the Chancellor did not abuse her discretion in dismissing the case. Buerger also submits that had the Chancellor not dismissed the case on the basis of unclean hands, he would have been entitled to summary judgment because the purported agreement is so indefinite and uncertain that it is invalid and that it violates the Statute of Frauds. Durr asserts that the agreement is definite and certain and that it does not violate the Statute of Frauds.

In her deposition testimony in the instant action, Durr admitted time after time that she and Buerger agreed that she would testify falsely about their relationship in her divorce proceedings in order to protect Buerger in his divorce proceedings. For example, Durr testified, in pertinent part:

Q. Do you recall testifying in your deposition on February 10, 1995, that you did not recall the first time you had a social meeting such as a dinner or a lunch with Michael Buerger?

A. That's possible.

Q. Was that testimony false?

A. It's possible that I said that.

Q. Is it possible you testified falsely?

A. Oh, possibly, yes.

Q. Why would you have falsified that testimony?

A. So that Mr. Buerger's divorce case would go smoothly, as per his request.

\* \* \*

Q. Was it agreed between you and Mr. Buerger that you would lie in your deposition?

A. It was agreed between Mr. Buerger and myself that my divorce wasn't important and that his was very important and meant everything to the both of us. And I took it at whatever it took for me, that's what I committed to do with him, along with him.

\* \* \*

Q. Yes. Was there ever any discussion between you and Michael Buerger about you testifying falsely in your deposition?

A. He gave me this as a cheat sheet so that I would know what to say. It was implied that this was very important that I know what he said in his deposition so that when they deposed me, that I would know what to say.

Q. Aside from the implication that you have just mentioned, was there ever any explicit conversation between you and Mr. Buerger about your lying in your own deposition?

A. I think that this cheat sheet is pretty implicit.

Q. No, ma'am. I used the word "explicit." Was there ever any explicit conversation between you and Michael Buerger about your lying in your deposition?

A. It was implied that I was to do what it took so that his divorce would go smoothly and that mine wasn't an important thing and that it was -- the most important thing was that he get through his divorce.

Q. Was there ever any express use of the word "testify falsely" or "lie" or "perjure yourself under oath" during your conversations

with Mr. Buerger?

A. He gave me this cheat sheet and said specifically, this is what I said. This is what you can say.

\* \* \*

Q. There were times when you testified inaccurately in your deposition; isn't that true?

A. I basically did what Mr. Buerger wanted me to do.

Q. Well, in doing that, did you testify on occasions in ways that you knew weren't true?

A. I can't remember exactly at this point. I just basically did what Mr. Buerger had told me to do.

Q. And you don't know today as we sit here whether some of that included testimony --

A. Yes, yes. Some of it included -- some of it -- yes, I did what Mr. Buerger told me to do so that -- because he made it very clear to me that my divorce wasn't the important thing and that his divorce was. And I did what Mr. Buerger asked me to do.

\* \* \*

Q. I'm talking about the deposition you gave in your own divorce and the temporary support proceedings in your own divorce. In any of that sworn testimony, did you testify falsely?

A. My testimony in my divorce was one that I was simply saying anything it took to get through it because Michael and I discussed that my divorce was not the important divorce, and whatever it took for me to do is what I was going to do so that Michael's divorce -- so that Michael could get through his divorce easily, that --

\* \* \*

Q. In your deposition, why did you not disclose the account at the Bank of Goodlettsville?

A. I wanted to protect Michael.

Q. Even at the risk of perjuring yourself?

A. Even at that risk.

Q. Would you perjure yourself in this deposition now to obtain your goal of winning this case?



A. The reason why I perjured myself is, Michael assured me that if I were to do that, that my divorce wasn't an important divorce and that his was, and at all costs to protect his divorce. And that's what I did.

Q. Do you consider this to be an important case?

A. Yes.

Q. Would you perjure yourself in this deposition if it would help you win this case?

A. No.

Q. What's the difference?

A. The difference is that Michael assured me that my divorce case was unimportant and what I had to lose there was strictly to give up my claim on alimony and my claim on any futures, business, the recording business and all that stuff. That is what I had to lose there. And that's why I did it. Michael assured me that he would make good the promises that he did, and that's why I did it. He told me in no uncertain terms that my divorce wasn't important and that his was.

Q. And did you concur?

A. Obviously I did.

Durr's testimony establishes that she and Buerger agreed that she would do anything necessary to help Buerger in his divorce proceeding and that pursuant to that agreement she testified falsely in the divorce proceedings. Giving her testimony the benefit of every doubt and accepting her testimony that there was an agreement, it is clear that her performance under the agreement required her to do "anything" to assist Buerger's divorce case, which includes perjury. In furtherance of the agreement, she committed perjury. It is obvious to this Court that Durr's claim grows out of, depends upon, and is inseparably connected with her agreement to commit perjury, and the actual commission of perjury. It was proper for the trial court to repel Durr at the threshold of the court.

Accordingly, the order of the trial court is affirmed, and the case is remanded for such further proceedings as necessary. Costs of appeal are assessed against the appellant.

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

**CONCUR:**

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**DAVID R. FARMER, JUDGE**

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**HOLLY KIRBY LILLARD, JUDGE**