

Commonwealth of Kentucky
Court of Appeals

NO. 2023-CA-1357-MR

CHRIS HARRISON DOING
BUSINESS AS SPEEDWASH CAR
WASHES

APPELLANT

APPEAL FROM WARREN CIRCUIT COURT
v. HONORABLE CHRISTOPHER T. COHRON, JUDGE
ACTION NO. 21-CI-00229

ROBERT RATHER, INDIVIDUALLY
AND ON BEHALF OF RATHER
WASH, RHR DEVELOPMENT, LLC,
MANAGE MY WASH, LLC; FRED
BG FAIRVIEW, LLC; FRED BG
GARY FARMS, LLC; FREDDY
RATHER, INDIVIDUALLY AND ON
BEHALF OF RATHER WASH, RHR
DEVELOPMENT, LLC, MANAGE
MY WASH, LLC; GEOFF RATHER,
INDIVIDUALLY AND ON BEHALF
OF RATHER WASH, RHR
DEVELOPMENT, LLC, MANAGE
MY WASH, LLC; SOUTHWINDS
DEVELOPMENT, LLC; AND
TIMOTHY LYNN HOUGUE,
INDIVIDUALLY AND ON BEHALF
OF NEXT WASH DEVELOPMENT,
LLC

APPELLEES

OPINION
AFFIRMING

** ** *

BEFORE: THOMPSON, CHIEF JUDGE; A. JONES AND LAMBERT,
JUDGES.

THOMPSON, CHIEF JUDGE: Chris Harrison d/b/a Speedwash Car Washes (“Appellant”) appeals from three orders of the Warren Circuit Court granting summary judgment in favor of Robert Rather, *et al.*, (“Appellees”) on Appellant’s claims of breach of agreement, violation of the Uniform Trade Secrets Act, and tortious interference. The action arose from Appellant’s claim that Appellees breached their agreement not to establish car washes in areas where Appellant’s car washes were already operating. Appellant argues that the circuit court erred in failing to apply the “rule of reason” analysis to Sherman antitrust claims made in this case. After careful review, we find no error and affirm the orders on appeal.

FACTS AND PROCEDURAL HISTORY

Appellant Chris Harrison owns and operates several car washes in Bowling Green, Louisville, and Somerset, Kentucky. According to the record, in 2016, Appellee Robert Rather sought Appellant’s help in locating markets in Florida where Rather, his brother, Geoff Rather, and their father, Freddie Rather, could establish car washes. Appellant asserts that Robert Rather was his banker and possessed certain knowledge about how to enter the car wash business.

Appellant agreed to help the Rathers enter the car wash business in Florida, and argues that he agreed to do so only on the condition that the Rathers agreed not to establish car washes in Bowling Green, Louisville, or Somerset, Kentucky, where Appellant was already established.

At issue is an email exchange between Appellant and Robert Rather on September 28, 2016, in which Appellant agreed to help the Rathers get started in the car wash business in Kentucky, as no potential markets for car washes in Florida were found. The email from Appellant to Robert Rather stated:

Since the market study with Brink Results in Florida has yielded no potential carwash sites and we have brought our efforts home, I feel it is best for both of us that we confirm our agreement prior [to] establishing locations in a more local market closer to Speedwash.

You had inquired if there are markets where I could place you that would not conflict with Speedwash and I agreed that there are indeed and would help you get started in the car wash business as long as you did not enter into the markets where Speedwash is currently operating or intends to expand. Those markets are Bowling Green, Somerset, and Louisville. You agreed to those terms and stated that we would never go anywhere that would conflict with you.

If you could memorialize the above by replying and expressing full agreement to the above terms, this should square everything up and we will be all set to move forward in Kentucky with no concerns.

Robert Rather replied with an email stating, “[y]es, below is exactly what we discussed and I fully agree. We would never build or expand anywhere

that would compete against you or impede your growth in[side] the markets you mentioned.”

Thereafter, Appellant assisted the Rathers in finding three locations in Frankfort, Kentucky, to establish car washes. Those car washes were later constructed and began operation. Appellant would subsequently characterize himself as a distributor to the Rathers, having provided them operating systems, handbooks, and training manuals.

Sometime thereafter, Appellant learned that the Rathers were planning to operate car washes in Bowling Green, Kentucky, which Appellant viewed as a violation of their agreement. Appellant then filed the instant action against the Rathers and their associated entities to halt the Rathers’ plans. The complaint was subsequently amended to include the Rathers’ business partner, Timothy Hogue, and set out claims of breach of agreement, violation of the Uniform Trade Secrets Act, and tortious interference.

The amended complaint sought a declaratory judgment and injunctive relief. It asserted that, 1) there was an enforceable agreement between Appellant and Robert Rather, providing that the latter and his associated entities would not operate car washes in Bowling Green, Louisville, or Somerset, Kentucky; 2) that the Appellees individually or jointly breached the agreement by way of their intent to operate car washes in those areas; 3) that Appellees intended to use Appellant’s

proprietary information, which constituted a misappropriation of Appellant’s trade secrets in violation of Kentucky Revised Statutes (“KRS”) 365.880 – KRS 365.990 (“the Uniform Trade Secrets Act”); 4) that Appellant was entitled to injunctive relief; and, 5) a claim of tortious interference. The amended complaint centered on the email exchange, quoted above, which Appellant argued was a binding and enforceable non-compete contract.

After a hearing, the Warren Circuit Court entered an order temporarily enjoining Robert Rather from constructing a car wash in Warren County, Kentucky. Thereafter, Appellees moved for summary judgment seeking dismissal of the amended complaint in its entirety.

In considering the motion to dismiss the amended complaint, the circuit court determined that it did not have to consider whether the email exchange at issue constituted a binding contract. It found that if the email exchange constituted a binding contract, it was void as an unlawful restraint on trade in violation of the Sherman Anti-Trust Act.¹ Conversely, if the email exchange was not a binding contract, then there was nothing to enforce and the matter was moot.

On July 20, 2023, and after considering the scope of the Sherman Anti-Trust Act and its state law analog set out in KRS 367.175, the circuit court

¹ United States Code (“U.S.C.A.”) Title 15, sections 1 and 2.

determined that the email exchange at issue would only be an enforceable non-compete agreement if it were ancillary to a legitimate business transaction. The court found, for example, that such a non-compete agreement might be enforceable if Appellees had sold their business to Appellants. The court went on to conclude that because the instant agreement, if the email exchange could properly be characterized as an agreement, was not ancillary to a legitimate business transaction; therefore, it was “a naked market-division agreement and is per se unlawful.”

After additional pleadings were filed, the Warren Circuit Court entered an order on October 16, 2023, clarifying the July 20, 2023 order granting summary judgment in favor of Appellees. The October 16, 2023 amended order expressly dismissed each count of Appellant’s amended complaint: Count I (declaratory judgment); Count II (breach of agreement); Count III (Kentucky Uniform Trade Secrets Act violation); Count IV (request for injunctive relief), and Count V (Tortious Interference with Contractual Relations). Counts I, II, IV, and V were dismissed because the circuit court found no valid agreement between the parties to support the claims. As to Count III, the court determined that because Appellant voluntarily shared information with Robert Rather prior to the alleged agreement, there could be no showing that Appellees misappropriated information in violation of the agreement. The court also determined that the Kentucky

Uniform Trade Secrets Act violation was time-barred. The October 16, 2023 amended order was designated as final and appealable. Appellant's subsequent motion to alter, amend, or vacate the October 16, 2023 amended order was denied, and this appeal followed.

STANDARD OF REVIEW

Summary judgment “shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Kentucky Rules of Civil Procedure (“CR”) 56.03. “The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor.” *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). Summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. *Id.* “Even though a trial court may believe the party opposing the motion may not succeed at trial, it should not render a summary judgment if there is any issue of material fact.” *Id.* Finally, “[t]he standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine

issues as to any material fact and that the moving party was entitled to judgment as a matter of law.” *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996).

ARGUMENTS AND ANALYSIS

Appellant argues that the Warren Circuit Court committed reversible error in granting summary judgment in favor of Appellees. Appellant first maintains that the circuit court improperly failed to apply a “rule of reason” analysis to the antitrust argument, which Appellees raised in their April 2023 motion for summary judgment.² Appellant contends that the circuit court improperly applied an “all or nothing” analysis to this issue, when it ruled that the alleged email agreement was not enforceable as an unlawful restraint on trade. In Appellant’s view, had the circuit court applied the correct “rule of reason” analysis, it would have determined that the email agreement was enforceable and denied Appellees’ motion for summary judgment.

In response, Appellees argue that Appellant’s “rule of reason” argument is not preserved for appellate review. They note that this argument was first raised in Appellant’s motion to alter, amend, or vacate the circuit court’s July 20, 2023 order granting summary judgment. Because the July 20, 2023 order

² The “rule of reason” analysis permits a case-by-case consideration of antitrust claims, in contrast to the “per se” analysis which employs a broad evaluation of whether the class of activity at issue is improper. *Expert Masonry, Inc. v. Boone County, Ky.*, 440 F3d 336, 342 (6th Cir. 2006).

granting summary judgment disposed of all claims, Appellees assert that Appellant was foreclosed from raising additional arguments. In reply, Appellant points out that the July 20, 2023 order granting summary judgment was not designated as final and appealable. As such, he contends that he properly raised his “rule of reason” argument before the entry of October 16, 2023 amended order granting summary judgment.

In order to resolve the question of whether Appellant’s “rule of reason” argument was raised in a timely manner, and therefore preserved for appellate review, we must determine whether the July 20, 2023 order granting summary judgment was final and appealable.

CR 54.01 states that,

[a] judgment is a written order of a court adjudicating a claim or claims in an action or proceeding. A final or appealable judgment is a final order adjudicating all the rights of all the parties in an action or proceeding, or a judgment made final under Rule 54.02. Where the context requires, the term “judgment” as used in these rules shall be construed “final judgment” or “final order.”

CR 54.02(1) addresses a judgment on multiple claims or involving multiple parties, and states,

[w]hen more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may grant a final judgment upon one or more but less than all of the claims or parties only upon a determination that there is no just reason for delay. The

judgment shall recite such determination and shall recite that the judgment is final. In the absence of such recital, any order or other form of decision, however designated, which adjudicates less than all the claims or the rights and liabilities of less than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is interlocutory and subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

The Warren Circuit Court’s July 20, 2023 order granting summary judgment stated that the court “agrees that *the Defendants are entitled to judgment as a matter of law on all counts* because the email exchange, as either an alleged contract or non-compete [agreement] constitutes an unlawful restraint of trade in violation of the Sherman Act.” (Emphasis added.) Per CR 54.01, the July 20, 2023 judgment constitutes a “final or appealable judgment . . . adjudicating all the rights of all the parties in an action or proceeding.” Because CR 54.01 employs disjunctive “or” language (“adjudicating all the rights of all the parties . . . *or* a judgment made final under Rule 54.02”) (emphasis added), we need not consider whether the judgment was made final and appealable under CR 54.02.³

“A basic general principle of the Rules of Civil Procedure is that a party is not entitled to raise an error on appeal if he has not called the error to the

³ The requirement that the judgment state that it is a final judgment and there is no just reason for delay applies only to a judgment adjudicating fewer than all claims or against fewer than all parties. CR 54.02(1). This requirement does not apply to the July 20, 2023 order granting summary judgment, which disposed of all claims against all parties.

attention of the trial court and given that court an opportunity to correct it.” *Little v. Whitehouse*, 384 S.W.2d 503, 504 (Ky. 1964) (citation omitted). While Appellant did raise his “rule of reason” argument, it was after the July 20, 2023 final judgment. Accordingly, it is not subject to appellate review.⁴

Appellant goes on to argue that the Warren Circuit Court committed reversible error in entering the October 17, 2023 order amending its July 20, 2023 order granting summary judgment. Appellant again maintains that the circuit court improperly failed to apply the “rule of reason” rule to its Sherman Act analysis, and improperly disposed of Appellant’s trade secrets claim.

For the reasons noted above, Appellant’s “rule of reason” argument is not preserved for appellate review, as it was raised for the first time after the July 20, 2023 final judgment. As to Appellant’s claim under the Uniform Trade Secrets Act (“KUTSA”), KRS 365.880 *et seq.*, we turn to *BDT Products, Inc. v. Lexmark Intern., Inc.*, 274 F.Supp.2d 880 (E.D. Ky. 2003), *aff’d*, 124 Fed.Appx. 329 (6th Cir. 2005), which applied Kentucky law. The Federal District Court in *BDT Product, Inc.*, stated:

In order to prevail on a breach of the Uniform Trade Secrets Act claim, Plaintiffs must present evidence which

⁴ Appellant asserts that he raised the “rule of reason” argument in his May 5, 2023 response to Appellees’ motion for summary judgment, thus preserving it for appellate review. Having examined the record, we have determined that this argument was first raised in Appellant’s motion to alter, amend, or vacate the circuit court’s July 20, 2023 order granting summary judgment.

satisfies a two prong inquiry. First, they must present evidence which indicates that the information they seek to protect qualifies as a protectable trade secret. To show the information is entitled to protection, Plaintiffs must put forward evidence demonstrating that the information (1) has independent economic value, (2) is not readily ascertainable by proper means, and (3) was the subject of reasonable efforts to maintain its secrecy. . . .

But, of course, it is not enough merely to show that the information is entitled to protection. Rather, Plaintiffs must also show that the protected information has been misappropriated. To prove misappropriation, Plaintiffs must show that the trade secret was acquired by improper means, was disclosed improperly, or was used by someone without proper consent.

Id. at 890 (internal quotation marks and citations omitted).

In disposing of Appellant’s trade secrets claim by way of summary judgment, the Warren Circuit Court found that Appellant “admits he voluntarily disclosed information to Robert Rather and there is no showing of misappropriation which is fatal to a claim under the Act.” The court also determined that because such voluntary disclosures were made in 2016 or 2017, and the three-year filing period closed no later than 2020 per KRS 365.890, Appellant’s February 15, 2021 complaint was not timely. These findings and conclusions are supported by the record and the law.

Lastly, Appellant argues that the circuit court erred in failing to grant his CR 59.05 motion to alter, amend, or vacate the summary judgment. An order denying a CR 59.05 motion to alter, amend, or vacate is interlocutory and not

appealable. *Tax Ease Lien Investments 1, LLC v. Brown*, 340 S.W.3d 99, 103 (Ky. App. 2011).

CONCLUSION

The Warren Circuit Court correctly found that there were no genuine issues as to any material fact and that Appellees were entitled to judgment as a matter of law. *Scifres, supra*. Accordingly, we find no error and affirm the summary judgment of the Warren Circuit Court.

LAMBERT, JUDGE, CONCURS.

A. JONES, JUDGE, CONCURS IN RESULT ONLY AND FILES SEPARATE CONCURRING OPINION.

A. JONES, JUDGE, CONCURRING IN RESULT ONLY: I do not necessarily agree with the majority that Appellant failed to preserve the “rule of reason” argument. Even so, I agree with the majority’s result to affirm the trial court.

In an effort to escape the *per se* rule, Appellant asserts that his agreement with Appellees is a “vertical agreement” as he was a distributor not merely a competitor. To this end, Appellant points to the fact that he sold Appellees some equipment, and that he characterized himself as a “distributor” during his deposition. Appellant’s unilateral characterization of his business relationship to Appellees is not dispositive.

“[D]etermining the orientation of an agreement can be difficult as a matter of fact and turns on more than simply identifying whether the participants are at the same level of the market structure.” *United States v. Apple, Inc.*, 791 F.3d 290, 314 (2d Cir. 2015). It appears that the “agreement” was entered into long before Appellant ever sold Appellees anything, and at a time the parties were functioning as coequals. Its terms indicate a horizontal agreement between coequals with the intent to limit market competition. Accordingly, I do not believe that the trial court erred when it applied the *per se* rule instead of the rule of reason.

BRIEFS FOR APPELLANT:

David F. Broderick
Brandon T. Murley
Bowling Green, Kentucky

**BRIEF FOR APPELLEES ROBERT
RATHER, INDIVIDUALLY AND
ON BEHALF OF RATHER WASH,
RHR DEVELOPMENT, LLC,
MANAGE MY WASH, LLC;
FREDDY RATHER,
INDIVIDUALLY AND ON BEHALF
OF RATHER WASH, RHR
DEVELOPMENT, LLC, MANAGE
MY WASH, LLC; GEOFF RATHER,
INDIVIDUALLY AND ON BEHALF
OF RATHER WASH, RHR
DEVELOPMENT, LLC, MANAGE
MY WASH, LLC; FRED BG
FAIRVIEW, LLC; FRED BG GARY
FARMS, LLC; AND SOUTHWINDS
DEVELOPMENT, LLC:**

Eric A. Hamilton
Elizabethtown, Kentucky

Timothy L. Edelen
Ryan E. Galloway
Bowling Green, Kentucky

**BRIEF FOR APPELLEE TIMOTHY
LYNN HOUGUE, INDIVIDUALLY
AND ON BEHALF OF NEXT WASH
DEVELOPMENT, LLC:**

Patrick A. Ross
Horse Cave, Kentucky