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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000135-MR

SPEEDWAY SUPERAMERICA, LLC;
ROBERT FURLONG; AND JIM LYONS[1] CROSS-APPELLANTS

CROSS-APPEAL FROM FAYETTE CIRCUIT COURT
v. HONORABLE THOMAS L. CLARK, JUDGE
ACTION NO. 02-CI-02985

ROGER ALLEN TURNER CROSS-APPELLEE

OPINION AND ORDER
DISMISSING CROSS-APPEAL

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; NICKELL AND WINE, JUDGES.

NICKELL, JUDGE: Roger Allen Turner ("Turner") filed suit in Fayette Circuit Court alleging Speedway Superamerica, LLC and two of its employees, Robert Furlong and James Lyons, (collectively referred to as "Speedway"), tortiously interfered with his contractual relationship with his employer and defamed him. As part of his request for

[1] The joint answer, filed by Cross-Appellants on September 3, 2002, clarified that Lyons last name is really "Lyon," however, he continues to be listed as Lyons on the pleadings and we will follow suit.

relief, Turner sought punitive damages. On December 6, 2005, the Fayette Circuit Court granted partial summary judgment to Speedway on the contract interference claim, leaving the defamation claim and the request for punitive damages to be tried. Both parties were dissatisfied with the ruling so Turner appealed the grant of summary judgment to Speedway on the contract interference claim and Speedway cross-appealed the denial of summary judgment on the defamation claim and the request for punitive damages. We previously dismissed Turner's appeal by separate order. We now dismiss Speedway's cross-appeal.

Only a brief recitation of facts is necessary since we will not reach the merits of the cross-appeal. This action arose in July 2001 when Turner, an enhanced route driver[2] for Pepsi in and around Lexington, Kentucky was barred from delivering goods to Speedway gas and convenience stores because he invoiced the sale of 700 cases of soft drinks to Speedway but delivered the product to the warehouse of Excel Vending Company ("Excel"), a third-party vendor unrelated to Speedway. Turner admits delivering the product to the Excel warehouse under a Speedway invoice but says he did so with knowledge of his Pepsi superiors and with approval of Cindy Craycraft, manager of the Speedway store on Versailles Road. Details of the transaction unraveled when

[2] Enhanced route drivers are paid a commission based upon their quantity of sales to gas and convenient stores. Enhanced routes are a perk of seniority and each contains at least one Speedway store. Pepsi representatives testified in depositions and at an arbitration hearing that it is against company policy for enhanced route drivers to sell and deliver Pepsi products to a third-party vendor (an entity selling to consumers via vending machines) using a gas/convenient store account because of discounts and allowances given by Pepsi to stores in recognition of their high volume of sales. Pepsi sells directly to third-party vendors through a separate pricing structure. Third-party vendors typically pay more for Pepsi products than do gas and convenience stores. Excel wanted to purchase Pepsi products through Speedway to take advantage of a sale Speedway was offering to bring more traffic into its stores. By purchasing through Speedway, instead of paying $7.05 for a case of 24 cans of soda, Excel paid only $4.99 per case.

Craycraft did not deposit into the Speedway account the cash payment received from Excel. As a result of this transaction, Craycraft was terminated for violating Speedway procedures; Laurie James, regional manager for Speedway Regional Manager, decided Turner was no longer welcome as a salesman in Speedway stores; and Turner was suspended by Pepsi for a week without pay for falsifying company records and misusing company funds through the improper use of coupons.

Speedway's decision to bar Turner from its stores presented an obstacle for Pepsi because all of its enhanced routes include at least one Speedway store; Turner's route included two of them. If Turner could not deliver to Speedway, he could not work as an enhanced route driver. Turner filed a grievance. Ultimately, his suspension was converted to a written warning with reinstatement of back wages. Turner's union attempted to convince Pepsi to restructure its enhanced routes so Turner could remain in that position without servicing a Speedway store, but to do so would have created great inequity in Pepsi's routes because of the high volume of business generated by Speedway. Thus, Pepsi chose not to create a special enhanced route just for Turner. An arbitrator, ruling on a grievance filed by the union on Turner's behalf, said Pepsi's decision did not constitute a breach of the union contract.

Pepsi offered Turner other positions so he could remain with the company. He was given the option of bidding on an express driver route or a full service route (both of which were based on hourly pay rather than commission) or he could work as a Pepsi merchandiser. None of these options would have been as financially lucrative as being an enhanced route driver and each would have required longer work hours although the work

itself would have been easier. Turner took a position as a Pepsi merchandiser in August 2001 but voluntarily quit after just ten months to launch a new business.

Turner maintains Speedway tortiously interfered with his employment contract by demanding Pepsi terminate him for fraud and embezzlement and by inducing Pepsi to remove him from any route that included a Speedway store. He further claims Speedway defamed him by knowingly making false statements about him, portraying him as the mastermind of the "scheme," and relying solely upon the word a terminated employee rather than conducting any investigation. Speedway responds that truth is a complete defense to any statement made by its representatives and affirmatively alleges the defenses of waiver, estoppel, fraud and illegality. Speedway also asserts both qualified and absolute privilege.

Turner's appeal, challenging the circuit court's grant of summary judgment to Speedway on the contract interference claim was dismissed by an order of this Court entered June 1, 2007. Speedway had moved to dismiss the appeal on the strength of *Personnel Board v. Heck,* 725 S.W.2d 13 (Ky.App. 1987) and we agreed. "When a judgment is based on alternative grounds, that judgment will be affirmed on appeal unless both grounds are erroneous." *Id.* at 18. The circuit court granted summary judgment to Speedway on two grounds, issue preclusion and Speedway's right to exclude individuals from its stores for non-discriminatory and non-illegal purposes. In Turner's pre-hearing statement on appeal, he alleged the circuit court erred only as to issue preclusion. He did not challenge the circuit court's finding that Speedway could exclude individuals from its stores for a proper purpose. Since Turner addressed only one of the two grounds on which the circuit court granted relief, dismissal under *Heck* was permitted. In responding

to the motion to dismiss, Turner argued Speedway's legal right to exclude individuals from its stores was merely an element of the contract interference claim and was not a separate issue that had to be designated on appeal.

Under *Milby v. Mears*, 580 S.W.2d 724, 727 (Ky.App. 1979), noncompliance with appellate rules does not always justify the striking of a brief. The appropriate remedy in any given case will depend upon the particular infraction and is left to the sound discretion of the reviewing court. *Id.* at 728. In the context of this case, failure to identify all claims being pursued in the pre-hearing statement and in the brief for appellant made it nigh on impossible for the litigants and this Court to distinguish what had been conceded from what was being contested. Turner acknowledged as much in his response to the motion to dismiss when he described his failure to "designate separate grounds in the cause of action" as "problematic." For these reasons, Turner's appeal (Case No. 2006-CA-00050-MR) was dismissed without comment on the merits.

As for the cross-appeal which is now before us for review, though neither party argued this point, we note that the denial of a motion for summary judgment is an interlocutory order and therefore not appealable. *Roman Catholic Bishop of Louisville v. Burden*, 168 S.W.3d 414, 419 (Ky.App.2004); *Battoe v. Beyer,* 285 S.W.2d 173 (Ky. 1955); Kentucky Rule of Civil Procedure ("CR") 56.03. An exception to this general rule applies when: "(1) the facts are not in dispute, (2) the only basis of the ruling is a matter of law, (3) there is a denial of the motion, and (4) there is an entry of a final judgment with an appeal therefrom." *Burden, supra,* at 419 (quoting *Transportation Cabinet, Bureau of Highways, Com. of Ky. v. Leneave*, 751 S.W.2d 36, 37 (Ky.App.1988)). That exception does not apply here because no final judgment on the defamation and punitive

damages claims has been entered. Merely adding CR 54.02 finality language to an order does not make it appealable when it is interlocutory by its very nature. *Hook v. Hook*, 563 S.W.2d 716, 717 (Ky.1978); *Hale v. Deaton*, 528 S.W.2d 719 (Ky. 1975). Accordingly, it is ORDERED that the above-styled cross-appeal is DISMISSED.

ALL CONCUR.

ENTERED: February 15, 2008

/s/ C. Shae Nickell
JUDGE, COURT OF APPEALS

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