In the
Court of Appeals
Second Appellate District of Texas
at Fort Worth

No. 02-18-00025-CV

BBB INDUSTRIES, LLC, Appellant

V.

CARDONE INDUSTRIES, INC., Appellee

On Appeal from the 17th District Court
Tarrant County, Texas
Trial Court No. 017-271617-14

Before Sudderth, C.J.; Kerr, J.[1]
Memorandum Opinion by Justice Kerr

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[1]Justice Bill Meier was a member of the original panel but has since retired. Therefore, the two remaining justices decided the case. *See* Tex. R. App. P. 41.1(b).

MEMORANDUM OPINION

Cardone Industries, Inc. is a Pennsylvania corporation that produces and sells remanufactured aftermarket automotive parts and products, including brake calipers, power-steering products, gears, and rack-and-pinion products. BBB Industries, LLC is an Alabama company that directly competes with Cardone. This case arises from BBB's alleged misappropriation of Cardone's trade secrets and confidential information.

In 2014, Cardone sued BBB and Joel Farina, a Texas resident and former Cardone employee, in Tarrant County, Texas. Cardone claimed that Farina stole its trade secrets and confidential information related to its general business model when he resigned from Cardone and jumped ship to BBB in 2013. BBB and Farina answered and entered general appearances. Over three years after it filed suit, Cardone amended its petition to allege that in 2010, 2011, and 2014, BBB misappropriated Cardone's trade-secret and confidential information related more specifically to Cardone's power-steering business with National Auto Parts Association (NAPA), a Georgia-headquartered company. Cardone's new allegations involved BBB conduct both before and after Farina decamped to BBB.

BBB filed a special appearance concerning Cardone's NAPA-based misappropriation allegations, arguing that because those allegations were severable claims, BBB could specially appear to challenge the trial court's personal jurisdiction over it as to those claims even though it had already generally appeared in the suit

three years earlier. *See* Tex. R. Civ. P. 120a(1) ("A special appearance may be made as to an entire proceeding or *as to any severable claim* involved therein." (emphasis added)). The trial court denied the special appearance, and BBB filed this interlocutory appeal. *See* Tex. Civ. Prac. & Rem. Code Ann. § 51.014(a)(7). Concluding that even if a party may lodge a special appearance and theoretically obtain a severance under these circumstances, we will affirm because Cardone's new allegations are so interwoven with its initial misappropriation allegations that they involve the same facts and issues, and the trial court thus properly exercised its discretion in denying BBB's special appearance.

Background

Cardone alleges that starting in 2010, BBB began a campaign to overtake Cardone's market share. At that time, BBB "had a relatively minor presence" in the automotive-parts retail aftermarket, and Cardone was NAPA's exclusive power-steering vendor. BBB decided that it wanted to enter the power-steering market and sell power-steering products to NAPA. Cardone contends that to that end, BBB actively solicited NAPA to get Cardone's trade-secret information. According to Cardone, NAPA voluntarily offered up a copy of Cardone's power-steering arrangement sheet—a document containing the Cardone–NAPA contract's essential terms—which enabled BBB to grasp completely the terms of Cardone's power-steering program with NAPA. Cardone alleges that BBB knew that the arrangement sheet was a trade secret and used it to "unfairly and illegally advance its economic

interest to enter the power steering market sector" to Cardone's detriment. Cardone further alleges that in addition to trade secrets, BBB also obtained Cardone's confidential information when, in March 2011, it acquired Cardone's core[2]-pricing information for NAPA power steering.

In early 2013, Farina, who worked from his Texas home[3] as Cardone's Senior Vice President of Retail Accounts, began working toward ending his employment with Cardone by giving six months' notice of his desire to terminate a particular employment agreement. In his position with Cardone, Farina "played a key role in developing, among other things, Cardone's confidential sales and marketing strategies and plans, pricing discount strategies and plans, and business development plans and strategies" and "regularly consulted with other Cardone executives and key sales employees regarding such strategies and plans." Farina also had access to and gained knowledge of Cardone's trade secrets and confidential information, including sales and marketing strategies, costs, credit and financing information, pricing and discount strategies, customer preferences and ordering history, business processes, and supplier information. During his employment with Cardone, Farina signed several agreements designed to protect Cardone's trade-secret and confidential information from disclosure.

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[2]A core is an element of an automotive part that is refurbished and reused in a remanufactured part.

[3]Farina started working for Cardone in 1991 and moved to Texas in 1997.

In August 2013, Farina resigned from his position at Cardone to work for BBB as its Senior Vice President–Aftermarket Retail Sales. Shortly before his resignation, Farina had disclosed to BBB Cardone's fill-rate strategy with NAPA.[4] Immediately after his resignation, Farina downloaded documents containing Cardone's confidential, proprietary, and trade-secret information from Cardone's computer systems to his personal and BBB-issued electronic devices. These documents included information related to Cardone's brake-caliper product line and its power-steering business with NAPA.

Sometime in 2014, BBB allegedly obtained confidential information related to Cardone's pricing discounts for NAPA power steering, enabling BBB to match or beat Cardone's pricing. Cardone claims that BBB used and continues to use this information—along with the arrangement sheet it obtained in 2010 and the core-pricing information it received in 2011—to unfairly compete with and outbid Cardone and to win power-steering business from NAPA, causing "tens of millions of dollars in damages to Cardone."

In April 2014, Cardone sued BBB and Farina in Tarrant County, Texas, claiming that Farina took Cardone's confidential, proprietary, and trade-secret information when he left Cardone to work for BBB and that he and BBB used and continued to use that information to unfairly compete with Cardone. Cardone alleged

[4]According to Farina, fill rates refer to the percentage of a customer's order that a vendor is able to fulfill in one shipment.

claims for trade-secret misappropriation, misappropriation of confidential information, unfair competition by misappropriation, conversion, breach of fiduciary duty, breach of contract, and conspiracy. Because Farina is a Texas resident and because Cardone alleged that Farina's acts of misappropriation happened in Texas, BBB and Farina did not contest personal jurisdiction over them.

In June 2015, a Tarrant County grand jury indicted Farina on multiple felony counts, including breach of a computer system and trade-secret theft. Nearly two years later, Farina pleaded guilty to theft of trade secrets (a third-degree felony) pursuant to a plea bargain, and a Tarrant County Criminal District Court sentenced him to 10 years' confinement, probated for three years, plus a $10,000 fine and $150,000 in restitution.[5] *See* Tex. Penal Code Ann. § 31.05.

Cardone's original and first amended petitions made no mention of BBB's allegedly obtaining Cardone's trade-secret and confidential information related to its NAPA power-steering business in 2010, 2011, and 2014, alleging misappropriation of broad categories of information. But in October 2017, Cardone amended its petition a second time to add new factual allegations under the heading "BBB's Additional Acts of Misappropriation of Cardone's Trade Secrets." Cardone now specifically alleged that in 2010, 2011, and 2014, BBB obtained Cardone's trade-secret and confidential information related to Cardone's power-steering business with NAPA and that it used

[5]The plea bargain's terms included Farina's resigning from BBB and his returning all confidential, proprietary, and trade-secret information to Cardone.

and continues to use that information to unfairly compete with Cardone. Cardone added no new causes of action.

BBB then filed a special appearance as to Cardone's NAPA-related misappropriation allegations, arguing that because those were severable claims with little or no connection to Texas, the trial court should dismiss them for lack of personal jurisdiction. *See* Tex. R. Civ. P. 120a(1). After a hearing, the trial court denied the special appearance without stating the grounds for its ruling. No findings of fact and conclusions of law were requested or filed.

On appeal, BBB raises two issues: (1) whether rule 120a allowed BBB to enter a special appearance challenging the trial court's specific personal jurisdiction[6] over Cardone's newly added misappropriation claims,[7] and (2) if so, whether the trial court erred by denying BBB's special appearance because Cardone neither alleged nor proved that the misappropriation occurred in Texas or that BBB directed its use of the misappropriated information at Texas.

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[6]Cardone does not assert that BBB is subject to general jurisdiction in Texas.

[7]On appeal, BBB gives the impression that Cardone's complaints regarding BBB's misappropriation of Cardone's trade-secret and confidential information related to its NAPA power-steering business were a surprise and are unrelated to Cardone's allegations in its original petition. But the record shows that BBB knew from the start of this case that power steering was at issue: BBB itself sought discovery from Cardone related to both parties' efforts from 2010 to the present to obtain NAPA's power-steering business. BBB also made several statements in motions and at hearings declaring that this case is about brake-caliper and power-steering products.

Standards of Review and Applicable Law

When analyzing the denial of a special appearance, we review the trial court's factual findings for legal and factual sufficiency but review its legal conclusions de novo because whether a court has personal jurisdiction over a defendant is a legal question. *BMC Software Belg., N.V. v. Marchand*, 83 S.W.3d 789, 794–95 (Tex. 2002). When, as here, a trial court does not issue findings and conclusions, we infer all facts that are necessary to support the judgment and are supported by the evidence. *See id.* at 795. But when the appellate record contains both the reporter's and clerk's records, these implied findings are not conclusive and may be challenged for both legal and factual sufficiency. *Id.* We must affirm the trial court's ruling if we can uphold it on any legal theory supported by the evidence. *SITQ E.U., Inc. v. Reata Rests., Inc.*, 111 S.W.3d 638, 645 (Tex. App.—Fort Worth 2003, pet. denied); *see also Dukatt v. Dukatt*, 355 S.W.3d 231, 237 (Tex. App.—Dallas 2011 pet. denied).

Rule 120a provides that "[a] special appearance may be made as to an entire proceeding or as to any severable claim involved therein." Tex. R. Civ. P. 120a(1). We review for an abuse of discretion a trial court's decision on whether a claim is severable under rule 120a. *Man Indus. (India) Ltd. v. Bank of Tokyo-Mitsubishi UFJ, Ltd.*, 309 S.W.3d 589, 591 (Tex. App.—Houston [14th Dist.] 2010, no pet.) (applying abuse-of-discretion standard to severability determination under rule 120a(1)); *see Shen v. Chen*, No. 05-17-00280-CV, 2018 WL 1407099, at *2 (Tex. App.—Dallas Mar. 21, 2018, no pet.) (mem. op.) (same); *see also Guar. Fed. Sav. Bank v. Horseshoe Operating Co.*,

793 S.W.2d 652, 658 (Tex. 1990) (op. on reh'g) (reviewing trial court's severance decision for an abuse of discretion). A claim is severable if (1) the controversy involves more than one cause of action, (2) the severed claim would be the proper subject of a lawsuit if asserted independently, and (3) the claim to be severed is not so interwoven with the remaining action that they involve the same facts and issues. *F.F.P. Operating Partners, L.P. v. Duenez*, 237 S.W.3d 680, 693 (Tex. 2007) (op. on reh'g). "The controlling reasons for a severance are to do justice, avoid prejudice and further convenience." *Guar. Fed. Sav. Bank*, 793 S.W.2d at 658.

When evaluating severability, a trial court must generally accept the plaintiff's pleadings as true and then determine whether severance is appropriate. *In re Reynolds*, 369 S.W.3d 638, 650–51 (Tex. App.—Tyler 2012, orig. proceeding); *In re Liu*, 290 S.W.3d 515, 520 (Tex. App.—Texarkana 2009, orig. proceeding) (citing *Jones v. Ray*, 886 S.W.2d 817, 820 (Tex. App.—Houston [1st Dist.] 1994, orig. proceeding) (op. on reh'g)); *see Aviation Composite Techs. v. CLB Corp.*, 131 S.W.3d 181, 188 (Tex. App.—Fort Worth 2004, no pet.) (concluding that because the trial court was not required to hold an evidentiary hearing on the motion to sever, it could have decided the severance issue on the parties' pleadings).

An appearance that does not comply with rule 120a is a general appearance and waives a party's objection to personal jurisdiction. Tex. R. Civ. P. 120a(1) ("Every appearance, prior to judgment, not in compliance with this rule is a general appearance."). Here, if the trial court found that Cardone's NAPA-related

misappropriation allegations are not severable, then BBB cannot challenge personal jurisdiction as to those claims because it has already generally appeared. *See id.*; *Shen*, 2018 WL 1407099, at *2. Thus, we must first consider whether the trial court would have abused its discretion by finding that Cardone's NAPA-related misappropriation allegations are not severable claims.[8] *See Shen*, 2018 WL 1407099, at *2–4 (examining whether intervention claims filed after nonresident defendant had generally appeared were severable under rule 120a).

Analysis

The parties disagree about whether Cardone's NAPA-based misappropriation allegations are separate claims. BBB argues that they are: the allegations present a new and discrete set of facts giving rise to separate grounds for judicial relief and damages. Cardone counters that the terms "claim" and "cause of action" are synonymous and that because its NAPA-based misappropriation allegations are merely additional factual allegations supporting its already-pleaded causes of action, those allegations cannot be split into separate claims. But we may skirt that quagmire by assuming,

[8]We note this case's unusual procedural posture: a nonresident defendant's filing a special appearance concerning claims added after that defendant has generally appeared in the suit. As noted, rule 120a(1) allows the filing of a special appearance as to severable claims. *See* Tex. R. Civ. P. 120a(1). And the plain language of the civil practice and remedies code contemplates this situation because it provides that an interlocutory appeal from a denial of a special appearance automatically stays the trial pending resolution of the appeal in certain situations in which the plaintiff has filed a new cause of action and the defendant files a special appearance as to that cause of action. *See* Tex. Civ. Prac. & Rem. Code Ann. § 51.014(a)(7), (b), (c)(2)(C).

without deciding, that Cardone's NAPA-based misappropriation allegations satisfy the first two prongs of the severability test and so focus only on the interrelatedness issue, keeping in mind the importance of doing justice, avoiding prejudice, and optimizing convenience. *See In re State*, 355 S.W.3d 611, 614 (Tex. 2011) (orig. proceeding).

BBB's liability for Cardone's misappropriation-related causes of action hinges on whether BBB or Farina, together or separately, wrongfully acquired, disclosed, or used Cardone's trade-secret, confidential, or proprietary information. Texas law protects these separate types of information similarly. *See Alliantgroup, L.P. v. Feingold*, 803 F. Supp. 2d 610, 624 & n.3 (S.D. Tex. 2011) (collecting cases). Misappropriation is not limited to improperly acquiring trade secrets; it includes using or disclosing them. Under the common law, "liability for a misappropriation of trade secrets claim occurs if one discloses or uses another's trade secrets, without privilege to do so, if (a) he discovers the secret by improper means, or (b) his disclosure or use constitutes a breach of confidence placed in him by the owner of the secret." *Twister B.V. v. Newton Research Partners, L.P.*, 364 S.W.3d 428, 438 (Tex. App.—Dallas 2012, no pet.). Similarly, to prevail on a statutory misappropriation claim,[9] a plaintiff must show that

[9]In 2013, the legislature enacted the Texas Uniform Trade Secrets Act (TUTSA). *See* Act of Apr. 23, 2013, 83rd Leg., R.S., ch. 10, § 1, secs. 134A.001–.008, 2013 Tex. Sess. Law Serv. 13, 13–14 (amended 2017) (current version at Tex. Civ. Prac. & Rem. Code Ann. §§ 134A.001–.008). TUTSA applies to trade-secret misappropriations occurring on or after September 1, 2013, but both misappropriations made before that date and continuing misappropriations beginning before that date are governed by the law in effect before that date. *See* Act of Apr. 23,

the defendant either (1) acquired the trade secrets knowing or with reason to know that they were improperly obtained or (2) disclosed or used the trade secrets without express or implied consent. *See* Tex. Civ. Prac. & Rem. Code Ann. § 134A.002(3). To establish unfair competition by misappropriation, the plaintiff must prove that in competition with the plaintiff, the defendant used a product that the plaintiff created through extensive time, labor, skill, and money, "thereby gaining a special advantage in that competition, (*i.e.*, a 'free ride') because [the] defendant is burdened with little or none of the expense incurred by the plaintiff." *Dresser-Rand Co. v. Virtual Automation Inc.*, 361 F.3d 831, 839 (5th Cir. 2004) (quoting *U.S. Sporting Prods., Inc. v. Johnny Stewart Game Calls, Inc.*, 865 S.W.2d 214, 218 (Tex. App.—Waco 1993, writ denied)); *see Leader's Inst., LLC v. Jackson*, No. 3:14-CV-3572-B, 2017 WL 5629514, at *5 (N.D. Tex. Nov. 22, 2017) (assuming that plaintiff's trade secret was the "product" in its claim for unfair competition by misappropriation).

BBB contends that the NAPA-based misappropriation claims are not interwoven with Cardone's other misappropriation claims because each set of claims

- involves different wrongful acts (allegedly receiving information from Farina versus receiving information from NAPA);
- occurred during different time periods (2013 versus 2010, 2011, and 2014);

2013, 83rd Leg., R.S., ch. 10, §§ 3–4, 2013 Tex. Sess. Law Serv. 13, 14. We express no opinion on whether TUTSA applies to Cardone's misappropriation claims.

- relates to different markets (brake calipers[10] versus power steering);
- involves different actors; and
- gives rise to different damages.

But here, Cardone has pleaded a continuing misappropriation by BBB for the purpose of competing with it generally in the automotive-parts retail aftermarket. *See* Tex. Civ. Prac. & Rem. Code Ann. § 16.010(b) ("A misappropriation of trade secrets that continues over time is a single cause of action and the limitations period described by Subsection (a) begins running without regard to whether the misappropriation is a single or continuing act."); *Accelerated Wealth, LLC v. Lead Generation & Mktg., LLC*, No. 04-12-00647-CV, 2013 WL 1148923, at *4 (Tex. App.—San Antonio Mar. 20, 2013, no pet.) (mem. op.) ("The operative facts of the litigation are not isolated to the events occurring pre-petition, especially in the context of the misappropriation of trade secrets where the wrongful acts of misappropriation can be on-going."). BBB's alleged misappropriation of Cardone's confidential and trade-secret information started in 2010 and 2011 when BBB acquired the arrangement sheet and core-pricing information for Cardone's power-steering business with NAPA and used that information to compete with Cardone.

[10]BBB argues that Farina's theft was confined to Cardone's trade-secret and confidential information related to brake calipers. Cardone's pleadings, however, do not so limit Farina's theft.

BBB's misappropriation allegedly continued when, in 2013, Farina stole wide swaths of Cardone's confidential, proprietary, and trade-secret information and shared that information with BBB. According to Cardone's pleadings, this information was not limited to a specific Cardone product line and even included information related to Cardone customers with whom Farina was not involved. BBB used this information to compete with Cardone, and then, in 2014, BBB obtained Cardone's pricing discounts for NAPA power steering and used that information, too, to compete with Cardone. Cardone alleges that BBB—both with and without Farina—has acquired and has used and continues to use Cardone's confidential, proprietary, and trade-secret information to unfairly compete with Cardone in the brake-caliper and power-steering markets.

In short, Cardone's misappropriation claims arise out of an alleged course of conduct undertaken by BBB (both with and without Farina) that started in 2010 and, according to Cardone's pleadings, is continuing. Because Cardone has broadly pleaded that Farina took and disclosed to BBB Cardone's confidential, proprietary, and trade-secret information—which could have included information related to Cardone's power-steering business with NAPA—and that BBB's use of the information it obtained from Farina and from other sources is ongoing, we conclude that Cardone's Farina-based claims and its NAPA-based claims involve some of the same issues, facts, and evidence.

Here, the court could have found that given the continuing and overlapping nature of Cardone's misappropriation claims, splitting this suit by the sources and locations of the trade secrets' misappropriations would be unworkable and that justice and convenience would be better served by allowing a single factfinder to determine all Cardone's misappropriation claims against BBB in a single suit. And because BBB has already agreed to defend against Cardone's Farina-based misappropriation claims here, it will not be unduly prejudiced by having also to defend against Cardone's NAPA-based misappropriation claims here.

Based on Cardone's pleadings, we conclude that the trial court would not have abused its discretion by finding that Cardone's NAPA-based misappropriation claims are not severable. Because the trial court would not have abused its discretion by so finding, and because BBB's appearance as to the other claims in the case constitutes a general appearance, the trial court did not err by denying BBB's special appearance.[11] *See Shen*, 2018 WL 1407099, at *4; *Man Indus.*, 309 S.W.3d at 593.

[11]Consistent with the cases cited in our standard-of-review section, BBB asserts that the trial court was limited to the pleadings when determining severability. We note, however, that some courts have considered evidence when ruling on a severance issue. *See, e.g.*, *Shen*, 2018 WL 1407099, at *3. But even if we considered the parties' evidence, our holding would be the same. According to Cardone's special-appearance evidence, Farina disclosed Cardone's fill-rate strategy with NAPA to BBB while he still worked for Cardone, and the information he downloaded to his BBB-issued laptop included information related to Cardone's power-steering business with NAPA. Farina testified at the special-appearance hearing that fill-rate strategies are not confidential information and that although he downloaded the NAPA power-steering information to his BBB computer in 2013, he never gave that information to BBB and never worked on the NAPA account while he was employed at either

Accordingly, we overrule BBB's two issues.[12]

Conclusion

Having overruled both of BBB's issues, we affirm the trial court's order denying BBB's special appearance.

/s/ Elizabeth Kerr
Elizabeth Kerr
Justice

Delivered: May 9, 2019

Cardone or BBB. But without fact findings, we must infer all facts that are necessary to support the judgment and are supported by the evidence. *See BMC Software*, 83 S.W.3d at 795. Viewed through this prism, the evidence supports Cardone's pleadings.

[12]Even though we do not address jurisdictional contacts as they relate to Cardone's power-steering trade secrets or confidential information, our holding is consistent with the supreme court's jurisdictional analysis in *Moncrief Oil International Inc. v. OAO Gazprom*, 414 S.W.3d 142 (Tex. 2013). There, Moncrief (a Texas-based company) met with Gazprom (a Russian company) in Moscow and Washington, D.C. concerning a proposed joint business venture in Texas. *Id.* at 148. During these meetings, Moncrief gave Gazprom trade secrets related to the venture. *Id.* The following year, Moncrief provided Gazprom with updated versions of the trade secrets at meetings in Houston, Boston, and Fort Worth. *Id.* In analyzing the jurisdictional contacts on a claim-by-claim basis, *see id.* at 150–51 (citing *Seiferth v. Helicopteros Atuneros, Inc.*, 472 F.3d 266, 274–75 (5th Cir. 2006)), the supreme court did not split Moncrief's trade-secret-misappropriation claim according to where and when Gazprom acquired Moncrief's trade secrets. *See id.* at 151–54. Rather, the court concluded that Gazprom's voluntary attendance at the two meetings in Texas during which it received Moncrief's trade secrets for the purpose of considering a joint venture in Texas with a Texas company yielded sufficient contacts to establish jurisdiction over Moncrief's trade-secret-misappropriation claim, even though Gazprom had also obtained other versions of Moncrief's trade secrets at different times outside of Texas. *Id.* at 153–54.