

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 0769

September Term, 2013

CASH MONEY CARS, LLC

v.

CARMAX OF LAUREL, LLC, ET AL.

Eyler, Deborah S.,
Woodward,
Reed,

JJ.

Opinion by Reed, J.

Filed: December 29, 2014

Like the ancient Greeks and the Persians, or the Hatfields and McCoys, or the Lannisters of Casterly Rock and Starks of Winterfell,¹ appellant Cash Money Cars, LLC, and Bethesda Motors, LLC (“Bethesda Motors”)² are not fond of each other. Appellant and Bethesda Motors were neighboring competitors in the Howard County used automobiles market. The parties competed fiercely for the hard-earned money of the County’s drivers. From hiring sign walkers to “wave in” customers off the street, to calling in regulatory violations, to ultimately filing criminal charges against each other, the parties could not co-exist peacefully. The situation grew so dire that the County intervened and called a meeting of the parties on January 25, 2012, to explore ways of resolving their disputes.³ Whatever peace or *détente* was brokered at that meeting, however, was not for long. Appellant filed its initial Complaint on April 6, 2012, against Bethesda Motors and its members, as well as against Bethesda Motors’ landlord, 9375 Washington Boulevard Holdings, LLC, and its sole member, Chad Bollweg (the “Bollweg appellees”), seeking relief for a variety of business torts.

Amidst this litigation between appellant and the Bollweg appellees, appellant sought discovery from an unrelated third party, CarMax of Laurel (“CarMax”). CarMax

¹ *See generally* GEORGE R.R. MARTIN, A GAME OF THRONES (1996).

² A week after this appeal was filed, on July 29, 2013, appellant dismissed its claims against Bethesda Motors and its individual members, Brett Gurowitz, Barry Goldberg, and Richard Benisti. The circuit court had previously dismissed several counts against the Bethesda Motors defendants on October 10, 2012.

³ The extent of the parties’ dispute was evidenced by the attendance at the meeting of a Howard County police officer who had reported more than fifty complaints from the two businesses.

vehemently opposed the discovery request as inappropriate and potentially harmful to its business.

Appellant seeks review of two separate decisions of the Circuit Court for Howard County. Appellant appeals from an order granting appellee's, CarMax, Motion to Quash Subpoena and Request for Protective Order and Sanctions ("Motion to Quash").⁴ Appellant further appeals from an order granting the Bollweg appellees' Motion for Summary Judgment. Appellant presents the following questions for our review, which we have consolidated and rephrased⁵ as follows:

⁴ CarMax has asked this Court to impose additional sanctions for appellant's maintenance of what it has termed a "baseless appeal." Maryland Rule 1-341 grants a court presiding over a civil action the power to impose sanctions on a party, upon motion by the opposing side, if the court finds the offending party or attorney has maintained or defended a proceeding "*in bad faith or without substantial justification.*" *Id.* 1-341(a) (emphasis added). This Court may impose sanctions pursuant to Rule 1-341 for a meritless appeal. *Kirsner v. Edelmann*, 65 Md. App. 185, 197 (1985).

We shall exercise our discretion per Rule 1-341 and decline CarMax's request for the imposition of additional sanctions.

⁵Appellant originally presented his questions to the Court as follows:

- I. Did the Circuit Court err in excluding Appellant's Exhibit, a market intel report which included information Appellee CarMax claimed to be a proprietary trade secret under the Maryland Uniform Trades [sic] Secrets Act?
- II. Did the Circuit Court err in granting Appellee Carmax's Motion for a Protective Order under Maryland Uniform Trades [sic] Secrets Act?
- III. Did the Circuit Court err in granting Appellee CarMax's fee petition?

- I. Whether the circuit court erred in excluding the market intelligence report on hearsay and foundation grounds;
- II. Whether the circuit court abused its discretion in granting the motion to quash;
- III. Whether the circuit court abused its discretion in levying a sanction of attorney's fees against appellant;
- IV. Whether the circuit court erred in granting the Bollweg appellee's motion for summary judgment on the counts of tortious interference with prospective economic advantage, private nuisance, civil conspiracy, and aider and abettor liability.

For the reasons set forth below, we affirm the judgment of the Circuit Court.

FACTUAL AND PROCEDURAL BACKGROUND

After filing its initial Complaint on April 6, 2012, it amended the Complaint on August 13, 2012.

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- IV. Did the Circuit Court err in granting the Bollweg Appellees' Motion for Summary Judgment as to Appellant's cause of action for Tortious Interference with Prospective Advantage?
 - V. Did the Circuit Court err in granting the Bollweg Appellees' Motion for Summary Judgment as to Appellant's Private Action for Nuisance?
 - VI. Did the Circuit Court err in granting the Bollweg Appellees' Motion for Summary judgment as to Appellant's claims that the Bollweg Appellees engaged in a civil conspiracy with the other defendants to commit other torts against Appellant or that the Bollweg Appellees aided or abetted the other defendants to commit other torts against Appellant?

The First Amended Complaint made allegations against Bethesda Motors and its members of defamation, tortious interference with economic relations, injurious falsehood, malicious use of process, abuse of process, tortious interference with prospective economic advantage, perjury, private nuisance, civil conspiracy, and aider and abettor liability. The complaint also alleged tortious interference with prospective advantage, private nuisance, civil conspiracy, and aider and abettor liability against the Bollweg appellees.

As litigation progressed, appellant engaged a CPA as an expert witness on the question of damages resulting from the actions of Bethesda Motors. The expert, anticipating Bethesda Motors would claim any losses suffered by appellant were the result of market forces and not its conduct, sought background information on the “seasonality” of the industry. To that end, appellant served a subpoena *duces tecum* on a competitor from across the street, CarMax, seeking to obtain records on CarMax’s monthly purchase figures for 2010–2012, *i.e.*, the number of vehicles CarMax appraised and purchased monthly in 2010–2012 (“CarMax appraisal information”).

CarMax registered its opposition directly with appellant’s counsel and asked appellant to withdraw the subpoena. CarMax claimed the requested data was protected business and trade secret information. Appellant refused to withdraw the subpoena, arguing the information requested was simply “raw data” and was not subject to trade secret protections. Upon appellant’s refusal, CarMax filed its Motion to Quash on March 5, 2013, in which it requested an order quashing the subpoena, protecting its

confidential business information, and imposing sanctions for appellant's abuse of the discovery process.

Appellant opposed CarMax's motion and on May 17, 2013, the circuit court held a motions hearing. At the hearing, appellant sought admission of a market intelligence report ("MIR") demonstrating CarMax's monthly sales volume. Appellant argued the MIR would demonstrate the information sought via the subpoena was publicly available information. The court rejected the MIR on hearsay and foundation grounds, and ultimately found the information appellant requested in the subpoena was proprietary information and privileged. The court orally granted the relief requested by CarMax and, further, levied sanctions against appellant. An order memorializing the oral rulings was issued on June 20, 2013.

Appellant, however, was in a rush to have this Court review the grant of sanctions and filed a notice of appeal on June 14, 2013. CarMax filed a Motion to Strike the notice on June 27, 2013. The court granted the motion because the notice was filed prior to the entry of a final order and also because the June 20 Order was a non-appealable interlocutory order, making appellant's notice procedurally improper.⁶ The court levied further sanctions against appellant for the notice; in the court's view, the filing of the

⁶ See *Yamaner v. Orkin*, 310 Md. 321, 322 (1987) (holding an order that directs a party to pay attorneys' fees as a sanction is not immediately appealable under the collateral order doctrine).

notice was done in bad faith and maintained a proceeding that was without substantial justification.

At the same time as the ongoing subpoena dispute, appellant, Bethesda Motors, and the Bollweg appellees continued to litigate the underlying tort suit. The Bollweg appellees filed a motion for summary judgment on April 12, 2013, seeking judgment as a matter of law on the counts of tortious interference with prospective economic advantage, private nuisance, civil conspiracy, and aider and abettor liability. They argued that no genuine disputes of material fact existed that would preclude the grant of summary judgment on all counts asserted against them. At a hearing on July 10, 2013, the circuit court heard argument on the Bollweg appellees' Motion for Summary Judgment. The motion was orally granted as to all counts and an order memorializing the rulings was entered on July 12, 2013.

On July 22, 2013, appellant noted its appeal.⁷

⁷ Appellant prematurely noted its appeal from the circuit court's June 20, 2013, order granting CarMax a protective order and imposing sanctions against appellant. Had the motions been denied, CarMax could have immediately appealed that decision because it was not a party to the underlying litigation between appellant, Bethesda Motors, and the Bollweg appellees; the order was final as to CarMax. *See St. Joseph Med. Ctr., Inc. v. Cardiac Surgery Assocs., P.A.*, 392 Md. 75, 88–89 (2006) (explaining that, analytically, a circuit court discovery order that is adverse to a non-party is a final order and is immediately appealable). As to appellant, however, this order was interlocutory in nature and, consequently, was not immediately appealable. Therefore, appellant prematurely noted its appeal to the June 20 order and the circuit court properly struck the notice. Upon the grant of summary judgment on July 12, 2013, as to the claims against the Bollweg appellees, there was an appealable final judgment in place because Bethesda Motors and its principals were no longer parties to the case. Appellant properly and timely noted its appeal on July 22, 2013.

STANDARDS OF REVIEW

Matters of the trial court's discretion are reviewed under an abuse of discretion standard. *See Goodman v. Commercial Credit Corp.*, 364 Md. 483, 491–92 (2001). We determine an abuse of discretion has occurred where no reasonable person would take the view adopted by the trial court or where the trial court takes action without reference to any guiding principles and the ruling runs contrary to fact and logic. *See Beyond Sys., Inc. v. Realtime Gaming Holding Co., LLC*, 388 Md. 1, 28 (2005) (quotation marks and citations omitted).

With regard to evidentiary rulings, it is generally within the sound discretion of the trial court to determine admissibility. *Myer v. State*, 403 Md. 463, 476 (2008). Accordingly, we review the trial court's determinations for an abuse of discretion. *Id.* We defer to the trial court's decisions “unless the evidence is plainly inadmissible under a specific rule or principle of law or there is a clear showing of an abuse of discretion.” *Decker v. State*, 408 Md. 631, 649 (2009) (internal quotation marks and citations omitted).

Rulings on the admissibility of evidence are reviewed ordinarily under an abuse of discretion standard. *Bernadyn v. State*, 390 Md. 1, 7 (2005) (citing *Hopkins v. State*, 352 Md. 146, 158 (1998)). “Hearsay, under our rules, must be excluded as evidence at trial, unless it falls within an exception to the hearsay rule excluding such evidence or is permitted by applicable constitutional provisions or statutes.” *Bernadyn*, 390 Md. at 8 (quoting Md. Rule 5-802) (internal quotation marks omitted). “Thus, a circuit court has

no discretion to admit hearsay in the absence of a provision providing for its admissibility. Whether evidence is hearsay is an issue of law reviewed *de novo*.” *Bernadyn*, 390 Md. at 8. The trial court’s factual findings will not be disturbed absent clear error. *See State v. Suddith*, 379 Md. 425, 430–31 (2004); *Gordon v. State*, 431 Md. 527, 538 (2013).

Finally, a party may seek summary judgment on all or part of an action provided there is no genuine dispute as to any material fact and that party is entitled to judgment as a matter of law. Md. Rule 2-501(a). Whether the trial court properly granted summary judgment is a question of law. *Boland v. Boland*, 423 Md. 296, 366 (2011) (internal quotation marks and citations omitted). Accordingly, we conduct a *de novo* review of the trial court’s grant of summary judgment. *Id.* We engage in an independent review of the record to determine whether there existed a genuine dispute of material fact and, if not, whether judgment as a matter of law was appropriate. *Id.* The record is reviewed in the light most favorable to the non-moving party and any reasonable inferences drawn from the facts are construed against the moving party. *Id.*

DISCUSSION

I. MARKET REPORT AND PUBLISHED COMPILATION EXCEPTION TO THE HEARSAY RULE

A. Parties’ Contentions

Appellant contends the circuit court erred when it excluded the MIR on hearsay and evidentiary foundation grounds. The MIR, appellant argues, was covered by the market reports and published compilations hearsay exception in Maryland Rule

5-803(b)(17). The MIR contained sales information targeted toward the local used automobile industry, which, according to appellant, constituted a market report within the 5-803(b)(17) hearsay exception. Therefore, appellant argues, the MIR was properly admissible under a hearsay exception.

CarMax disagrees and states, first, that appellant's objections to the exclusion of the MIR were not preserved for appellate review, and, second, the hearsay and foundation objections were properly sustained and the evidence properly excluded. CarMax contends appellant did not preserve its evidentiary objections as to the hearsay and foundation rulings, and cannot raise the hearsay exception for the first time on appeal. In the event the hearsay issue is considered on appeal, CarMax further contends the MIR was inadmissible hearsay because it was offered for a two-fold purpose: 1) to prove the truth of appellant's assertion that the information sought in the subpoena was publicly available information; and 2) to prove the truth of appellant's assertions regarding CarMax's sales volume. As appellant never laid a proper foundation, nor demonstrated the market reports hearsay exception applies, appellee argues the MIR is inadmissible and the circuit court's evidentiary ruling was correct.

B. Analysis

The majority of argument on this question is dedicated to whether the MIR qualifies for the business records hearsay exception in Md. Rule 5-803(b)(17). This, however, is unnecessary. We agree with CarMax's contention that, in fact, the question

of whether the MIR qualifies for 5-803(b)(17) exception was not preserved for our review.

Appellate courts generally abstain from resolving those issues raised for the first time on appeal. Md. Rule 8-131(a) (West 2014) (“Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court.”). If a contention is raised neither in the pleadings nor in the evidence and the trial court does not directly address it, it is not preserved for appellate review. *See Zellinger v. CRC Dev. Corp.*, 281 Md. 614, 620 (1977). Where a party has the option of objecting to an action or ruling of the trial court, a failure to do so operates as a waiver estopping the party from raising the issue on appeal. *See Lohss v. State*, 272 Md. 113, 119 (1974).

Appellant’s counsel proffered the MIR for admission into evidence at the May 17, 2013, Motions Hearing. According to counsel, he had obtained the report the night before the hearing from the Dominion Cross-Sell Report website.⁸ He further explained the contents and the utility of the report, and then offered the MIR as Plaintiff’s Exhibit 1. At that point, the following exchange occurred:

THE COURT: But you don’t know who generated this report? And the person who generated that report is not here?

⁸ DOMINION ENTERPRISES INC. CROSS-SELL REPORT, <http://www.cross-sell.com/> (last visited May 14, 2014).

[APPELLANT'S COUNSEL]: Absolutely not. No, it's just what I downloaded before I came?

[CARMAX'S COUNSEL]: And I'd make an **objection on the grounds of hearsay--**

THE COURT: **Sustained.**

[CARMAX'S COUNSEL]: -- and the **lack of foundation.**

THE COURT: **Sustained.**

[APPELLANT'S COUNSEL]: So, Your Honor, is obviously not accepting this into evidence, correct?

THE COURT: **I'm not accepting it into evidence, no.**

(Emphasis added.)

Upon the court's determination that the MIR was inadmissible hearsay and that it also lacked foundation, appellant's counsel lodged no objection to preserve the issue for appeal. Rather, appellant's counsel proceeded with his argument that the information sought was not privileged or protected by the Maryland Uniform Trade Secrets Act ("MUTSA").⁹ Immediately after the evidentiary ruling, appellant's counsel made no

⁹ Immediately after the inadmissibility determination, appellant's counsel said the following to the court:

Well, again, Your Honor, so-- it really comes down to the fact that not only haven't they proffered any evidence into evidence that these are trade secrets, it would be inconceivable to do so, because the information that we ask for and-- oh, by the way, there was -- an attachment to

explicit objection or said anything this Court could construe as an objection. Moreover, no mention of the MIR or associated evidentiary ruling was made in the remainder of the hearing.

With regard to unpreserved arguments, our colleague Judge Moylan has likened us to the hero of Ithaca—“As with [Odysseus] shielding himself from the sirens . . . our ears are closed to [these] argument[s].” *Stoddard v. State*, 157 Md. App. 247, 283 (2004), *rev’d on other grounds*, 389 Md. 681 (2005). As appellant did not timely object to the trial court’s ruling on the admissibility of the MIR, much like Odysseus, we cannot hear his argument on the Md. Rule 5-803(b)(17) hearsay exception, raised for the first time on appeal.

CarMax’s pleadings was a letter from me in response. There was a letter filed saying if you don’t remove your motion by 5:00 today, I’m going to file a motion to squash [sic] and a threat of sanctions. And I simply responded back, and said look, we’re not asking for any numbers. We’re not asking for purchase -- I should say we’re not asking for any dollar figures. We’re not asking for any profit figures.

What we’re merely asking for is the number [of] purchases per month. The number of appraisals issued per month. And no doubt, they could have merely called and said, hey, that’s a bit of a burden. Can you give us, you know, some kind of administrative compensation?

II. PROTECTION OF PROPRIETARY INFORMATION UNDER THE MARYLAND UNIFORM TRADE SECRETS ACT

A. Parties' Contentions

Appellant further challenges the protective order, arguing the information sought by the subpoena is not a trade secret. First, appellant contends CarMax failed to demonstrate it would suffer harm in the absence of a protective order. Second, according to appellant, the data requested was merely raw data on the number of vehicles appraised and purchased over a thirty-six month period, and not financial information, valuation methods, or standard operating procedures. Appellant claims that, contrary to CarMax's assertions, the raw data is not subject to trade secret protections and no legal precedent exists to support those assertions. It further claims the simplicity of the request lends itself to full disclosure of the appraisal information.

CarMax vehemently disagrees with appellant's assertions. It argues the information requested by the subpoena is not only privileged business information, but also subject to Maryland trade secret protections. CarMax explains the data requested would reveal how the company operates its business and how well it has performed over a three-year period. Because appellant is a competitor of CarMax, the raw data holds great value. This business antagonism cloaks the raw data with a privilege afforded to proprietary information. Further, CarMax regards the requested information as internal operating information on its marketing strategies and, as such, takes measures to keep the information private. Accordingly, the information is protected by MUTSA. Finally, CarMax takes great exception to the notion that the simplicity of the request precludes the

application of any trade secret protections or other privileges. The raw data provides significant insight into CarMax's business model. Regardless of the data's simplicity requested or ease of its production, CarMax demands protection for proprietary business information.

B. Analysis

Parties engaged in discovery may want to seek protective orders for privileged information or information that they do not wish to disclose. *See* Maryland Rule 2-403(a). The text of the rule states that:

On motion of a party, a person from whom discovery is sought, or a person named or depicted in an item sought to be discovered, and for good cause shown, the court may enter any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: . . . (8) *that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way*

Id. (emphasis added). Rule 2-510 extends the protections of Rule 2-403 to the recipient of a subpoena. *See* 2-510(f) (“A person served with a subpoena to attend a deposition may seek a protective order pursuant to Rule 2-403. If the subpoena also commands the production of documents . . . the person served . . . may seek a protective order pursuant to Rule 2-403.”).

Prior to the adoption of MUTSA, the courts of this state employed the definition of “trade secret” in the First Restatement of Torts.¹⁰ See *Optic Graphics, Inc. v. Agee*, 87 Md. App. 770, 782 (1991). This definition included a list of factors courts were to employ in determining certain information was a trade secret. Courts would examine:

1) the extent to which the information is known outside of [the] business; (2) the extent to which it is known by employees and others involved in [the] business; (3) the extent of measures taken by [the business] to guard the secrecy of the information; (4) the value of the information to [the business] and to [its] competitors; (5) the amount of effort or money expended by [the business] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT (FIRST) OF TORTS § 757 cmt. b (1939).

Upon the adoption of the uniform statute, courts began employing the statute’s definition of a trade secret, which it defines as

a formula, pattern, compilation, program, device, method, technique, or process, that:
(1) Derives independent economic value, actual or potential, from not being generally known to, and not being readily

¹⁰ The First Restatement defined a trade secret as:

[A]ny formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating, or preserving materials, a pattern for a machine or other device, or a list of customers.

RESTATEMENT (FIRST) OF TORTS § 757 cmt. b (1939).

ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
(2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

MD. CODE, COM. LAW § 11-1201(e). Although courts employed the MUTSA definition, and use of the Restatement's factors was no longer necessary to the determination of a trade secret, they continued to employ the factors to assist in their analysis. *Optic Graphics*, 87 Md. App. at 784.

Appellant may not seek discovery of CarMax's appraisal information via a subpoena because that information is a protected trade secret under MUTSA. Internal operating information peculiar to a particular business organization, *i.e.*, internal business facts, is one type of trade secret entitled to protection. *Id.* The information appellant seeks from CarMax is a form of internal business facts and information that could give potential competitors a clear picture of CarMax's business operations. Information regarding CarMax's sales may be publicly available via the Motor Vehicle Administration or a proxy service. CarMax's appraisal information, however, is not readily available and is protected by the company. Potential competitors could ultimately determine how CarMax conducts its business, what may be attractive to consumers looking to trade in their vehicle to CarMax, and ultimately, how to undercut CarMax's business if the sales information is evaluated in conjunction with the appraisal information. *Cf. LeJeune v. Coin Acceptors, Inc.*, 381 Md. 288, 309–10 (2004) (finding appellee's manufacturing costs and profit margin information was entitled to trade secret protection because competitor could undercut appellee's prices if competitor gained

access to that information); *Padco Advisors, Inc. v. Omdahl*, 179 F. Supp. 2d 600, 610 (D. Md. 2002) (finding mutual fund's customer list entitled to trade secret protection because certain information in the list was not readily ascertainable by competitors and it held economic value because it could help competitors develop new products).

The appraisal information requested by appellant is not readily ascertainable because it is proprietary information regarding CarMax's operations. This information possesses inherent economic value because it could allow appellant to devise a strategy undercutting CarMax's profitability. Contrasting the number of cars CarMax purchases upon appraisal with its sales numbers could explain to a competitor exactly how much inventory CarMax moves in a given time period, but also what CarMax does well or does not do well. Possession of a holistic picture of CarMax's business operations is valuable to a competitor, therefore making the appraisal information inherently valuable. Accordingly, the appraisal information meets the "independent economic value" prong of the statutory definition of a trade secret under MUTSA.

To receive trade secret protection under MUTSA, the appraisal information must not only possess an independent economic value, but must also be the subject of efforts to maintain its secrecy. Maryland case law on what constitutes a trade secret, and specifically, what secrecy efforts under MUTSA are sufficient, is limited. To that end, we look to our neighbor to the north, Delaware, for guidance on this question. Delaware has enacted the Uniform Trade Secrets Act and its courts have an extensive background in trade secret and other commercial law disputes.

The interpretations of the Uniform Trade Secrets Act by the Delaware courts support our determination that CarMax's appraisal information is protected. First, CarMax has emphasized the appraisal data is not shared outside the company and, internally, is distributed only amongst management. In terms of motivation, one may surmise these policies are in place in order to prevent competitors from receiving a blueprint to CarMax's profitability, and subsequently allowing them to profit without expending large sums in developing their own business model. *Cf. Beard Research, Inc. v. Kates*, 8 A.3d 573, 596–97 (Del. Ch. 2010) (finding chemical manufacturing company's efforts to protect secrecy of compounds catalog—including not revealing information to clients or others outside the company—was sufficient for trade secrets protection). Additionally, even if some of the sales information is publicly available, how CarMax processes and analyzes this information to create the appraisal data is protected under the Act as a trade secret. *See Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 897 (Del. 2002).

Moreover, CarMax's zeal in opposing the subpoena lends further support to its contention that the appraisal data is a trade secret. CarMax's defensive efforts, which include contesting this appeal, comport with its assertions that it strives not to release this appraisal data into the public stream of information. We are persuaded the company has undertaken significant measures to protect the appraisal data both inside and outside the company and is, therefore, entitled to trade secret protection under MUTSA.

We conclude that the circuit court did not abuse its discretion in issuing a protective order to prevent disclosure of the appraisal information.

III. DISCOVERY SANCTION

A. Parties' Contentions

Appellant contends the circuit court erred by imposing a sanction on it for issuing the subpoena *duces tecum*. The sanction was inappropriate, according to appellant, because the circuit court issued it *sua sponte* and without a finding the subpoena constituted a “persistent and deliberate” discovery violation. Appellant also contends the sanction was inappropriate because CarMax did not prove and the circuit court made no finding that the appraisal information was privileged.

CarMax argues Rule 2-510 permits sanctions for the inappropriate use of a subpoena. CarMax contends the circuit court properly issued a sanction for discovery abuses because the subpoena sought information CarMax states is a protected trade secret. Furthermore, CarMax wholly disagrees the sanction was issued *sua sponte* because the request is clearly supported by the record. Moreover, CarMax counters that its request for sanctions was well-supported in both the briefs and at the hearing. Finally, CarMax explains the “persistent and deliberate” standard for discovery violations is reserved for harsh sanctions, *e.g.*, the dismissal of a claim or preclusion of evidence necessary to support a claim.

B. Analysis

Maryland's discovery rules permit any party to an action to depose a non-party "for the use of discovery or for use as evidence in the action or for both purposes." Md. Rule 2-411. If a party seeks the deposition of a non-party and the associated production of documents, the Rules require the deposing party to do so via a subpoena. Md. Rule 2-510(a). In the event a party uses or attempts to use a subpoena "for a purpose other than a purpose allowed under [Rule 2-510]," the court may, upon motion and opportunity for a hearing, impose sanctions in the form of attorney fees on that party. *Id.*

As discussed in § II, *supra*, a party in receipt of a subpoena may seek a protective order for discovery that is privileged or that is not subject to disclosure. Md. Rule 2-403. That party may also seek to quash the subpoena upon motion if the subpoena falls within the ambit of Rule 2-403. Md. Rule 2-510(f). Appellate courts are hesitant to question a trial court's decision to award sanctions in a discovery dispute, and will not disturb that decision absent an abuse of discretion. *See Pinsky v. Pikesville Recreation Council*, 214 Md. App. 550, 590 (2013).

The circuit court did not abuse its discretion in imposing sanctions on appellant because it acted within its authority by rule. CarMax objected to the subpoena under Rule 2-510(f) because it was a nonparty recipient of a subpoena for records it claimed were protected as trade secrets under Rule 2-403(a)(8). Rules 2-510(f) and 2-403 operate in conjunction to provide a nonparty objecting to a subpoena with relief in the form of a protective order. Further, the circuit court did not abuse its discretion in finding the

appraisal information is a protected trade secret under MUTSA. Consequently, the circuit court correctly issued a protective order under Rule 2-510(f).

Further correct was the circuit court's decision to impose sanctions on appellant. We cannot discern any legitimate reason for the subpoena related to the underlying litigation. Although appellant claims the appraisal information was necessary to calculate damages, the subpoena appears to us an attempt to gain an advantage over a nearby competitor. CarMax has no connection to the underlying dispute, which was entirely between appellant and Bethesda Motors, and, to a lesser extent, the Bollweg appellees. Additionally, the record demonstrates appellant states on its website that it competes with CarMax and "beat[s] most CarMax appraisals that [it] see[s]." Moreover, the information requested was not concrete financial information that could provide some basis for comparing profitability during the 2010–2012 period; rather, the information was operational data.

Taking these facts together, the requested information would not provide appellant with a statistic to inform its damages calculation, but a formula with which to examine closely CarMax's business model. This is not appropriate discovery because it does not assist appellant in the underlying litigation against Bethesda Motors and the Bollweg appellees. It would instead provide appellant with data to undercut CarMax's profitability. Because this subpoena *duces tecum* was issued "for a purpose other than a purpose allowed under [Rule 2-510]," we cannot determine the circuit court abused its discretion in imposing sanctions on appellant.

Furthermore, appellant's contention that the circuit court erroneously issued a sanction on a *sua sponte* basis without a finding of persistent and deliberate discovery violations is completely misplaced. First, there is no basis whatsoever for the assertion the sanction was imposed on a *sua sponte* basis. In their motion filed on March 5, 2013, CarMax clearly requested a protective order and a sanction—both in the title and body of the pleading—pursuant to Rules 2-403 and 2-510. In addition, CarMax orally requested this relief at the May 17, 2013, hearing. *See* Mots. Hrg. Tr. 8:15–20, May 17, 2013 (E. 306). Appellant cannot be heard to say the sanction was issued *sua sponte* where there was a clear request for sanctions.

Second, appellant misinterprets the holding of *Butler v. S & S Partnership*, 435 Md. 635 (2013). In that case, the Court of Appeals held the trial court erred when it excluded a key piece of evidence critical to the petitioner's case without a finding of an egregious discovery violation. *Id.* at 652–53. In so holding, the Court explained that the “draconian” sanctions of excluding evidence necessary to a claim or dismissing a claim altogether are reserved for those “persistent and deliberate” discovery violations that cause prejudice to a party or a court. *Id.* at 653 (citing *Admiral Mortg., Inc. v. Cooper*, 357 Md. 533, 545 (2000)). These sanctions are irrelevant because CarMax is not a party to this case. Appellant has not asserted a claim against CarMax, nor has appellant had a claim asserted against it by CarMax. *Butler* is inapplicable here because there is no claim to be dismissed. Further, the circuit court's “exclusion” sanction was not the effect of a

discovery violation, but a logical consequence of the fact that appellant is simply not entitled to CarMax's data.

Moreover, appellant reads *Butler* too narrowly by claiming that discovery sanctions are reserved only for "persistent and deliberate" violations that cause prejudice. This argument conveniently omits a modifier descriptive of severity to create the implication that discovery sanctions are appropriate *only* when a party has engaged in a persistent and deliberate course of conduct. This is incorrect. The *Butler* Court said the *severe* sanctions of exclusion of necessary evidence or dismissal of a claim are warranted when a court is presented with persistent and deliberate violations.

Discovery sanctions are, of course, permitted for those violations that do not meet the persistent and deliberate standard. *See generally* Md. Rule 2-433 (providing for wide range of discovery sanctions, including, but not limited to, dismissal of claims and exclusion of evidence); *see also* Md. Rule 2-510(a) (allowing for sanctions arising from party's inappropriate use of subpoena). Limiting sanctions to only the most egregious of violations would undermine the purpose of the discovery rules altogether, *i.e.*, to require litigants to fully disclose all relevant facts such that each party has a clear picture of the dispute prior to trial. *See Food Lion v. McNeill*, 393 Md. 715, 717–20 (2006) (explaining overall purpose of discovery rules and that certain provisions of rules, including sanctions, are intended to "facilitate achievement of [the discovery rules'] purpose"); *see also Rodriguez v. Clarke*, 400 Md. 39, 61 (2007) (explaining sanctions are meant to ensure access to necessary information for trial and are not required when parties act in

good faith). Consequently, sanctions are required for garden variety violations in order to ensure the efficient exchange of information before trial. Further, courts should not require parties seeking sanctions to meet as high a standard as persistent and deliberate conduct where the violation is a singular event that is neither disruptive to the discovery process nor seeks information unnecessary for trial.

The circuit court did not abuse its discretion in imposing a sanction on appellant because the subpoena *duces tecum* sought protected information unnecessary for trial.

IV. SUMMARY JUDGMENT

A. Parties' Contentions

Appellant also appeals the circuit court's grant of summary judgment in favor of the Bollweg appellees. First, appellant contends the circuit court erroneously granted summary judgment on the count of tortious interference with prospective economic advantage. Appellant argues the Bollweg appellees intentionally sought tenants to compete with appellant; permitted Bethesda Motors to place a trailer obstructing visibility of appellant's lot; turned a blind eye to Bethesda Motors' violation of its lease; and inflated electrical invoices for appellant's marquee and also arranged to have electricity to the marquee shut off. Second, appellant, with little explanation, contends the Bollweg appellees' actions constituted private nuisance and the circuit court also erred in granting summary judgment on this count. Third, appellant contends the circuit court erred in granting summary judgment to the Bollweg appellees on the civil conspiracy and aider and abettor liability counts. The circuit court granted summary judgment on those

particular counts because they were pled as independent torts, which the law does not support. This was error, appellant explains, because the complaint, in fact, pled and supported the underlying torts necessary for civil conspiracy and aider and abettor liability.

The Bollweg appellees counter that they did not do the acts complained of for the counts of tortious interference with prospective advantage and private nuisance. They argue the lease's provision conditionally permitting placement of the trailer upon approval by the county does not form a basis for the aforementioned torts. Furthermore, they state that they did not place the trailer on the lot, and that the trailer's obstruction of the view of the lot is also not a basis for the torts. In addition, the Bollweg appellees contend they simply forwarded the electric bills to appellant seeking the agreed-upon percentage payment, and did not inflate the bills. Any unusually high bills, they argue, were the result of a broken sensor in the marquee. Finally, the Bollweg appellees argue there is no basis for civil conspiracy and aider and abettor liability. First, they explain that it is improper as a matter of pleading to allege these counts as separate torts. Second, because appellant dismissed the actual bad actors—Bethesda Motors and their principals—from the action, there cannot be a conspiracy or aiding and abetting.

B. Standard of Review

We reiterate here our standard of review for the trial court's grant of summary judgment. The propriety of the trial court's grant of summary judgment is question of law reviewed *de novo*. *Boland*, 423 Md. at 366. We engage in an independent review of the

record to determine whether there existed a genuine dispute of material fact and, if not, whether judgment as a matter of law was appropriate. *See id.* The record is reviewed in the light most favorable to the non-moving party and any reasonable inferences drawn from the facts are construed against the moving party. *Id.*

C. Analysis

(i) Tortious Interference

Maryland recognizes the tort of tortious interference with prospective economic advantage. Its elements are:

- 1) intentional and wilful acts;
- 2) calculated to cause damage to the plaintiffs in their lawful business;
- 3) done with the unlawful purpose to cause such damage and loss, without right or justifiable cause on the part of the defendants (which constitutes malice); and
- 4) actual damage and loss resulting.

Ellett v. Giant Food, Inc., 66 Md. App. 695, 707 (1986) (internal citations omitted). To sustain a claim for tortious interference with prospective economic advantage, a plaintiff must identify with specificity a potential future economic relationship that will occur absent the interference. *Mixer v. Farmer*, 215 Md. App. 536, 549 (2013) (internal citations omitted).

Appellant fails to demonstrate, *with specificity*, a prospective economic advantage with which the Bollweg appellees allegedly interfered. The complaint alleges, in broad brush strokes, that the actions of the Bollweg appellees in inflating appellant's BGE bills and the lease of space to the Loft Ballroom caused overall harm to appellant's business. It

does not, however, directly link these actions to a specific economic relationship appellant expected. Appellant's opposition to the Bollweg appellees' motion for summary judgment merely reiterates the allegations in the complaint. Appellant does not provide any facts that demonstrate the Bollweg appellees took action with the intent to interfere with a specific future economic advantage, *i.e.*, their actions did not target appellant and their lawful business. Without facts demonstrating a specific future economic opportunity, there cannot be a genuine dispute, let alone a material one, as to the Bollweg appellees' interference with a prospective advantage.

Accordingly, the circuit court correctly found appellant's claim of tortious interference with prospective economic advantage fails as a matter of law.

(ii) Private Nuisance

A party may recover for a private nuisance, which is the non-trespassory invasion of another's interest in the private use and enjoyment of land. *Exxon Mobil Corp. v. Albright*, 433 Md. 303, 408 (2013) (internal quotation marks and citations omitted). For a valid claim of private nuisance, the plaintiff must demonstrate the injury to the property has materially diminished the property's value and seriously interfered with plaintiff's enjoyment of that property. *Washington Suburban Sanitary Comm'n v. CAE-Link Corp.*, 330 Md. 115, 143 (1993).

This claim fails as a matter of law because there is no genuine dispute that the Bollweg appellees acted in such a way to create a substantial interference with appellant's use of the property. A nuisance claim properly lies where the *defendant's*

actions caused the disturbance and substantial interference. *Exxon Corp. v. Yarema*, 69 Md. App. 124, 148 (1986) (“Nuisance is not contingent upon whether the defendant physically impinged on plaintiff’s property, but whether *the defendant substantially and unreasonably interfered with plaintiff’s use and enjoyment* of its property.”) (emphasis added). Appellant fails to demonstrate a factual dispute that the Bollweg appellees engaged in conduct that constituted a nuisance and that caused a disturbance and that interfered with Appellant’s use and enjoyment of its property. This is because the pattern of obnoxious behavior of which appellant complains was attributed to Bethesda Motors. There is no factual dispute to preclude summary judgment, and with no facts supporting a nuisance claim altogether, it fails as a matter of law. The circuit court correctly granted summary judgment on this count.

(iii) Civil Conspiracy

Civil conspiracy requires an agreement between two or more persons to “accomplish an unlawful act or to use unlawful means to accomplish an act” not inherently illegal, and the actions undertaken “must result in damages to the plaintiff.” *See Brass Metal Prods., Inc. v. E-J Enters., Inc.*, 189 Md. App. 310, 352 (2009) (internal quotation marks and citations omitted). There is no independent tort for civil conspiracy without other tortious injury to plaintiff. *Id.*; *see also Alleco Inc. v. Harry & Jeanette Weinberg Found., Inc.*, 340 Md. 176, 189 (1995) (stating it is “simply incorrect” “that civil conspiracy is recognized in Maryland as an independent tort”). Similarly, there is no separate tort for aider and abettor liability. *Id.* at 200. It requires an underlying tort the

plaintiff must plead separately, and the extent of liability is joint liability with the principal tortfeasor. *See Manikhi v. Mass Transit Admin.*, 360 Md. 333, 360 n.6 (2000).

These claims must also fail as a matter of law because no genuine dispute of material fact exists as to whether the Bollweg appellees committed any of the underlying torts with Bethesda Motors. We have already determined no dispute exists as to the claims of tortious interference with a prospective economic advantage or conduct constituting a private nuisance. Because the underlying claims fail as a matter of law, the joint liability claims must also fail. Maryland law is clear that there can be no recovery for civil conspiracy or aider and abettor liability in the absence of an underlying tort. Accordingly, the circuit court correctly granted summary judgment on these claims as well.

**JUDGMENT OF THE CIRCUIT COURT
FOR HOWARD COUNTY AFFIRMED.
COSTS TO BE PAID BY APPELLANT.**