

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

BAY OIL COMPANY, a Michigan
corporation,
Plaintiff,

vs

File No. 90-8164-CK
HON. PHILIP E. RODGERS, JR.

RAY A. SUTHERLAND, DAVID B.
SUTHERLAND, GCS OIL COMPANY,
STEPHEN H. SUTHERLAND, SUTHERLAND
OIL, INC.,

Defendants.

Rex O. Graff (P14250)
Attorney for Plaintiff

Craig W. Elhart (P26369)
Attorney for Defendants Ray
Sutherland and GCS Oil

DECISION AND ORDER

This matter was scheduled for a bench trial before the Court. At the close of the Plaintiff's proofs, all Defendants moved for a directed verdict. MCR 2.515. The parties were given an additional opportunity to brief their motions and oral arguments were heard following the submission of those briefs. The Court took the matter under advisement and will now provide its findings of fact and conclusions of law. MCR 2.517.

The basic relationship of the parties to each other and a concise description of the issues in this litigation may be found in those stipulated facts submitted to the Court prior to the date of trial. Bay Oil Company ("Bay Oil") is a Michigan corporation with its principal place of business in Traverse City, Michigan. During the time period relevant to this dispute, Bay Oil was a wholly-owned subsidiary of Woodland Oil Company ("Woodland Oil"), also a Michigan corporation with its principal place of business in Traverse City, Michigan. William Russell Milligan ("Russ") is Bay Oil's sole stockholder, director and officer.

Ray A. Sutherland ("Ray") is an individual who resides in Leelanau County and who, for 38 years, worked in the petroleum business delivering fuel oil and related products. David B.

Sutherland ("David") is Ray Sutherland's son and a person who assisted in the delivery of Bay Oil products in Grand Traverse and Leelanau Counties.

GCS Oil Company ("GCS") is a Michigan corporation formed by Ray Sutherland to allow his son David to assume his contractual relationship with Bay Oil while he received social security disability benefits. GCS shares are wholly owned by Gertrude Sutherland, the wife of Ray Sutherland.

Stephen H. Sutherland ("Steve") is also Ray Sutherland's son and the principal stockholder, director and officer of Sutherland Oil, Inc. ("Sutherland Oil"). Sutherland Oil is a Michigan corporation which at all times relevant to this dispute was a competitor of Bay Oil.

At the time of trial, Ray Sutherland was 62 years of age and, as previously noted, had spent his entire working life in the oil delivery business. For most of that time, he was a truck owner/driver who delivered petroleum products on consignment or pursuant to agency agreements for suppliers, including Bay Oil, Woodland Oil, Ray Sutherland, Inc., Total Petroleum and Mobil Oil. His wife, Gertrude, was responsible for the paperwork and, over the years, his sons Steve and David were involved with his business.

Ray Sutherland and Russ Milligan met in 1975. Ray was working as a consignment driver for Mobil Oil and Russ was employed by Total Petroleum. Ray was hired as a consignment driver for Total in 1975 and executed a "Bulk Plant Sales Agreement" on August 8, 1975 which defined their contractual relationship. In February of 1978, Ray left Total to make deliveries under an oral contract for Orth Oil Company and formed his own business, Ray Sutherland, Inc.

Russ Milligan subsequently left Total and became employed by Woodland Oil. In December, 1980, Ray abandoned his independent corporation, Ray Sutherland, Inc., and went to work as a consignee for Woodland Oil. The agreement between Ray Sutherland and Woodland Oil was set forth in the "Consignee Bulk Sales Agreement" dated December 1, 1980. (Exhibit 21).

When Ray Sutherland joined Woodland Oil, Ray had an established clientele of customers and a route list, as well as equipment he owned outright. Both Plaintiff and Ray Sutherland agree that he was "his own boss." Neither Woodland Oil nor Bay Oil provided him with vacation or disability benefits. When he took a vacation or became sick or disabled, it was his obligation to

protect his customers by having others drive his route for him.

In October of 1989, Ray approached Russ Milligan to discuss their consignment agreement. Ray was experiencing significant physical problems and was intending to seek social security disability benefits. Ray suggested that his son David could make his deliveries and, ultimately, assume his route. On behalf of Bay Oil, Russ agreed that David could make Ray's deliveries and, when fully qualified, eventually take over Ray's route. David would then become the consignee.

An assignment of the consignment agreement was drafted by Ray's attorney, David Clark, in November, 1989 and revised by Bay Oil. This agreement assigned Ray's interest in the consignment agreement to GCS effective January 1, 1990. Bay Oil approved the assignment but insisted on the personal guarantee of both Ray and David. David had no other contractual ties to Bay Oil. David was considered an employee of GCS.

The parties agree that David did not want to sign the personal guarantee provision of the contract and did so only after pressure from his mother and father. By November of 1989, David was performing nearly all of Ray's deliveries. David lived with his children at Ray and Gertrude Sutherland's home and received no wages for his work. David was divorced and, during some portion of this time, received workers compensation benefits for a prior industrial injury with an unrelated employer.

This relationship continued until July 25, 1990. On that date, Ray and Gertrude Sutherland were advised by David that he was quitting and would no longer make deliveries for Ray. David acknowledges that his parents were upset by his announcement, and Gertrude Sutherland testified she was "shocked."

Ray Sutherland's testimony concerning David's announcement was entirely credible. Having been unable to drive the route himself for many months and being actively involved in the process of obtaining social security disability benefits and without knowing any other qualified driver who was able to take David's place, his son David had abandoned him and was immediately leaving the area. David did not disclose to his father that he had sought employment with Sutherland Oil and been offered a job. David told his father that he was quitting because he was not being paid. Ray testified that David's leaving was a "bomb." Ray immediately told Russ Milligan of his problem.

Since David left the area, Russ Milligan was unable to contact him and, a few days later, terminated the consignment agreement. This litigation followed shortly thereafter.

In viewing the motion for directed verdict, the Court must make factual inferences most favorable to the Plaintiff. The standard for a directed verdict is well-established by Michigan's higher courts. In *Beard v Detroit*, 158 Mich App 441, 451; 404 NW2d 770 (1987), the Court of Appeals restated that standard, as follows:

In *Caldwell v Fox*, 394 Mich 401, 407; 231 NW2d 46 (1975), the Supreme Court said:

The jury, not the trial judge, is the trier of fact. Whenever a fact question exists, upon which reasonable minds may differ, the trial judge may not direct a verdict. Conversely, when no fact question exists, the trial judge is justified in directing a verdict. In deciding whether or not to grant a motion for a directed verdict, the trial judge must accord to the non-moving party the benefit of viewing the testimony and all legitimate inferences that may be drawn therefrom in a light most favorable to the non-moving party. If the evidence, when viewed in this matter, establishes a *prima facie* case, the motion for a directed verdict must be denied.

The Court is the trier of fact and will not ignore its perceptions of credibility, the weight of the evidence or the admissions offered by the parties. Russ Milligan acknowledged that Plaintiff has no evidence that its customer list was given to Steve Sutherland or Sutherland Oil or that Ray Sutherland was trying to solicit business for Sutherland Oil within the 90-day period prohibited by the consignment agreement. Plaintiff also acknowledged that it had no evidence that any of its preprinted tickets were missing and acknowledged that it could not correlate any lost customer with Sutherland Oil's use of Ray Sutherland's telephone number.

Indeed, the testimony was uncontested that Steve Sutherland owned the disputed telephone number which had been used by his father for a number of years. There was no evidence to dispute

Steve Sutherland's testimony that he unilaterally changed the call forwarding on that number for his own benefit and without notice to his father. The facts associated with the call-forwarding transaction were confirmed by the testimony of Pamela Kuhl, an employee of Century Telephone.

Not a single witness testified that Ray Sutherland attempted to solicit business for his son Steve or Sutherland Oil Company. Robert Ihme acknowledged that he was solicited by Sutherland Oil but not by Ray Sutherland.

It was also acknowledged that Steve Sutherland did not need a customer list to know where his father's most significant customers were located since he had been an employee of his father's, had installed equipment for most of these customers and had delivered fuel oil to them during the two years his father had his own business.¹ The parties further acknowledged that Ray and Steve had

Footnote 1: There is also insufficient evidence to show any relationship between Ray Sutherland's furnishing of a partial equipment list to Steve Sutherland to accomplish a sale of that equipment and any damage to Plaintiff. Plaintiff acknowledges an inability to relate (footnote continues)

an oral agreement not to compete with each other so long as Ray was still in business.

Although having caused a suit to be filed against him, Russ Milligan was quite generous in his description of Ray Sutherland's character. He acknowledged having known Ray for 15 years and that he had never known him to cheat, steal or embezzle. He described him as a hard working individual and recognized that he had made deliveries over the years with his leg in a cast and while suffering with hemorrhoids. He also acknowledged that Ray Sutherland had not been given help covering his route when his mother died and that he never thought of Ray as a malingerer. Indeed, it was stipulated that Ray Sutherland's physical problems precluded him from continuing deliveries for Bay Oil and that his physical condition had been relatively constant for a year prior to his announcement that David would no longer make the deliveries in his place.

Construed most favorably from Plaintiff's perspective then, what evidence was received that supports claims of Ray Sutherland's

wrongdoing? This Court can find none, whether direct or circumstantial.

To the contrary, Ray Sutherland was a valued driver who performed his work reliably and honorably for many years. He worked through other injuries but was never able to "pull hose" after his rotator cuff surgery. He discussed his physical condition with Russ Milligan in a timely fashion and, for over eight months, they worked together in a cooperative effort to allow David to assume the contractual obligations associated with the consignment agreement.

David quit without prompting from Ray and without providing

Footnote 1 continued: any lost customer to action by Ray Sutherland and acknowledges the significant disputes regarding ownership of the equipment which caused it to decide not to purchase it. Additionally, there is no evidence that the partial equipment list was even provided to Steve Sutherland until some point after his three day extensive customer solicitation was completed.

Ray with any meaningful notice. Physically disabled and unable to perform the work himself, a fact known to Plaintiff for many months, and having been abandoned without any notice by his own son and without doing anything to interfere with Bay Oil's relationship with the customers on his route, he was sued.

It is acknowledged that Ray paid his debts to Plaintiff and that he delivered his truck when it was paid for. The accounts aging list and all preprinted tickets were returned and the only customer list which Ray and Gertrude Sutherland had was returned. Although not the list which the Plaintiff expected, Gertrude Sutherland explained how she used the updated list provided by Plaintiff to record new account numbers and that the list she turned in was an amalgamation of three prior lists. There is neither evidence nor a basis to infer that any other list was retained or provided to others. Construing the evidence most favorably from the Plaintiff's perspective, Ray Sutherland is owed an apology, if not the gold watch referred to by his counsel in opening statements.

Although Ray Sutherland was a guarantor of GCS' contractual performance, no evidence was introduced which would reasonably relate David Sutherland's surprise announcement and refusal to

continue Ray's deliveries to damages experienced by Bay Oil. Bay Oil's comptroller, Charles Rockafello, reviewed his analysis of Bay Oil's lost profits. (Exhibit 18). Without reviewing all the analytical deficiencies associated with it, this Court finds that, at best, it supports a speculative opinion concerning lost revenue. The Exhibit 18 analysis included all business lost after November, 1989 and did not delete from the list that business which was lost before David Sutherland's announcement on July 25, 1990. Mr. Rockafello acknowledged that no effort was made to contact customers and determine why the business was lost or even to whom it was lost. *Lorenz Supply Co v American Standard, Inc*, 100 Mich App 600, 611-612 (1980).

Ray Sutherland reviewed the accounts at length and provided uncontested testimony regarding why those customers had been lost for reasons unrelated to David's refusal to continue to make deliveries for Bay Oil.

As with the analysis with Exhibit 87-A, it is evident that Bay Oil lost customers from Ray Sutherland's route before July 25, 1990, that some of the customers lost between July 25, 1990 and October 27, 1990 have returned to Bay Oil, that some customers would have been lost even if Bay Oil had received the notice construed most liberally in its favor that might be found in the Exhibit 21 agreement and that a number of customers would have been lost due to the incongruity between their payment practices and Bay Oil's credit policies. Unfortunately, Plaintiff did not provide the Court with an analysis in either Exhibit 87-A or Exhibit 18 or in the testimony received which would allow the Court to determine damages with any reasonable certainty. 2

It became evident to the Court, however, that the retirement of a driver or the sale of corporate assets creates a "free for all" in the petroleum business. The competition that would ensue for Ray Sutherland's business was apparent to both Steve Sutherland and Russ Milligan upon learning that David would no longer make the deliveries. Steve Sutherland clearly saw a corporate opportunity in the hiring of his brother David to retain the route. Again, the uncontested testimony was that David Sutherland went to his brother on several occasions seeking a job and was refused. Only when David told his brother he was quitting and would no longer drive for his father, did Steve recognize that Ray's business would be up for grabs and that David would be helpful in retaining it. Unfortunately, David lied to Steve about his contractual relationship with Bay Oil. Neither Steve nor Sutherland Oil could interfere with a contract which was not disclosed to them. Unaware

of David's contract, Steve hired David and gave him \$200 and orders

Footnote 2: Since the liquidated damages clause found at paragraph 22 of Exhibit 21 is calculated as a function of the price paid for products by persons solicited during the 90-day notice period, it is also incapable of reasonable enforcement due to the speculative nature of Plaintiff's proofs regarding lost business.

to leave the area so that he could not be unfairly accused of improperly soliciting accounts. Steve Sutherland unabashedly admits intense solicitation of his father's customers for the next three days.

There is no question that Steve Sutherland had worked for his father for two years and that he had resided in Leelanau County since his graduation from high school. He knew where the customers were located and had "protected" his father's customers during the years he was in business. Steve Sutherland was a principal of Sutherland Oil, and it was admitted that he never acted in an ultra vires capacity. Steve and Sutherland Oil had every right to solicit Bay Oil's customers. There was no evidence of consideration ever provided to Sutherland Oil or Ray Sutherland by Plaintiff for the tacit non-competition agreement that Ray and Steve recognized with each other. Finally, David came to Steve for a job and was refused one on a number of occasions. Hiring David on these facts was not a tortious act.

There is, then, no basis for personal liability to attach to the Defendant Stephen Sutherland or to Sutherland Oil. Viewed most favorably from Plaintiff's perspective, there is insufficient evidence to support a claim for wrongful interference with contractual relations or intentional interference with a perspective economic advantage. There was no testimony that Stephen Sutherland or Sutherland Oil solicited customers in violation of this Court's injunctive order. Rather, the evidence indicates that Steve Sutherland and Dennis Durga worked diligently to solicit customers through July 28, 1990. Again, there is no evidence to link any use of Ray Sutherland's telephone number by Sutherland Oil to loss of business by Bay Oil.

Parenthetically, the Court is perplexed at how Bay Oil proposed to keep its route list or customer identities confidential when it left to its consignees the obligation to find replacement drivers. Valuable employees must be expected to take vacations,

and there is a normal incidence of injury or illness associated with employment and the aging process. If Bay Oil was not going to assume the obligation to provide replacement drivers, then it must have presumed that its consignees would disclose customer names and addresses to persons qualified to make the deliveries who were not necessarily employed by Bay Oil.

Rita Hansen, a Bay Oil secretary, acknowledged that a Sutherland Oil employee "Dennis" had helped Ray on two prior occasions. It should be neither startling nor unforeseeable to Bay Oil that its consignees will look to other experienced fuel oil drivers to help them cover vacations or absences due to illness or injury and that those drivers will necessarily learn the identity of each other's customers. Any construction of the consignment agreement that would place liability upon the consignee for a loss of confidentiality associated with retention of drivers in these circumstances would be unconscionable.

Finally, the Court's attention is drawn to David Sutherland and GCS Oil Company. It is often said that one chooses one's friends, not one's relatives. Ray Sutherland relied upon his son David because he was in a difficult situation and had no other choice. David did not present himself to the Court as a particularly credible individual. He was emotional, angry and resentful. He would not make eye contact with the attorneys or the Court and slumped in the witness chair. His memory loss was convenient, and he impressed the Court as a whiner.

Although receiving workers compensation benefits for a right elbow injury, he was able to work for his father. He justified the receipt of workers compensation benefits because his father was not able to pay him. Yet, recognizing the significant debts which his parents had, his father's physical condition, the medication he was taking and the medical bills his parents were incurring, he, nevertheless, abandoned his father with absolutely no notice.

David's explanation for his departure is not unreasonable, only the manner by which it was announced and the lack of notice are unreasonable. David could not continue to be expected to work for nothing. However, he had contractually agreed to guarantee GCS' performance to Bay Oil and sought a position with his brother's company without disclosing this fact. He subsequently developed a medical problem that left him unable to drive for Sutherland Oil and, at the time of trial, no longer was a petroleum truck driver.

Bay Oil Company had several months to observe David Sutherland, his demeanor and his work habits. He may well have been a short-term solution to the problem associated with retaining Ray Sutherland's clients, but even a casual observation of David Sutherland must have suggested that he was not the long-term answer. Nevertheless, there was no discussion with Ray regarding David's prospects or the need to seek a replacement. David continued to work without compensation, his resentment grew and, not unforeseeably, the relationship fell apart.

David Sutherland did assume corporate obligations to Bay Oil which he accepted without coercion or duress. He has, on a review of the evidence most favorable to Plaintiff, breached those agreements and violated this Court's injunctive order on at least one occasion when he participated in a fuel oil delivery at "Tall Timbers." However, as discussed previously, the analysis of Exhibits 18 and 87-A does not leave this Court with a reasonable basis to make a damage determination. Although it is not relevant to this motion, it is painfully obvious that David Sutherland does not have the capacity to pay any damages awarded against him.

Similarly, GCS Oil Company also assumed obligations to Bay Oil and breached them. GCS also lacks assets to pay a judgment in the event damages could be reasonably determined. However, as noted in the preceding discussion, this Court is satisfied that on the evidence before it, the Court cannot make a reasonable determination of damages.

It is evident to the Court that the petroleum business is highly competitive. The opportunity to solicit new customers comes along infrequently. Home-heating customers are quite loyal and more likely to switch to an alternative fuel than to respond to the solicitation of a new driver. Conversely, commercial accounts are extremely price sensitive and loyalty is neither expected nor received.

Just as Bay Oil was entitled to and did actively solicit Sutherland Oil accounts upon its asset sale to Crystal Flash, so Sutherland Oil and its competitors were entitled to solicit Ray Sutherland's accounts upon his effective retirement. Neither Sutherland Oil nor any other competitor of Bay Oil was restrained by contract or law from responding to another driver's request for employment where the prospective employee fails, as David did have, to disclose his total contractual commitment to another oil company. Lawful constraints on the movement of drivers between companies originate in the agreements between the drivers and their

suppliers. David Sutherland, not Ray, violated this agreement and even though Ray guaranteed his performance, the damages related to David's breach are too speculative to form the basis of a damage award.

The Court does believe that at the time Plaintiff filed its complaint, it was legally sufficient to avoid an award of sanctions. MCR 2.114. Further pursuit of a claim against Ray Sutherland on the evidence presently before this Court would be quite another matter. For the reasons described above, motions for directed verdict by all Defendants are granted and the case against them dismissed with prejudice.

IT IS SO ORDERED.

HONORABLE PHILIP R. RODGERS, JR.
Circuit Court Judge
Dated: 12/13/93