

attorney's fees spent recovering possession of the converted property as a measure of "special damages"). Buckeye's assertion that CHEP may not recover anything beyond the market value of its pallets is without merit.

A. Background with Respect to CHEP's Damages Claim

Buckeye appropriated 27,395 CHEP pallets, each of which it held for an average of 15.5 months at a rate of 3 ½ cents per pallet per day. Those facts translated into potential lost revenue to CHEP of \$446,426. Rather than lose that revenue and injure its customer base, CHEP acquired replacement pallets at a cost of \$548,230 in order to serve its customers while Buckeye was wrongfully withholding the original 27,395 pallets. Rather than assess the entire replacement cost for these pallets to Buckeye however, CHEP seeks merely to recover its \$63,815 in interest costs (cost of capital) and only for the duration of the replacement period.

Over the 15 months that the pallets were being withheld by Buckeye, they depreciated by approximately \$2 per pallet in value and as plaintiff acknowledges, when goods are returned the measure of damages includes the difference in the value of the property at the time it was received and when it was returned. (Memo p. 3, 4) That figure amounts to \$53,146.

The pallets which were returned to CHEP following the Court's ruling on the ownership issue were not only reduced in value but in a sorry state of disrepair as well. CHEP paid an independent contractor \$46,483 to wash and repair these pallets but seeks to recover only \$32,326 of that expenditure, acknowledging that based on historic records it would have had to expend the balance for normal repair and reconditioning.

Buckeye now claims euphemistically to have "returned" 11,414 of its pallets, not to CHEP, but to third parties who were customers of both Buckeye and CHEP. Apart from the fact that Buckeye has consistently maintained that it has no record as to the source of the pallets it

was holding (how does one "return" pallets to an unknown source?) Buckeye's own sales records belie its claims. The pallets were "sold" for \$37,482 (Defendants' Trial Exhibits 13 and 15) despite the fact that Buckeye had no right to possess, let alone sell, CHEP's property and CHEP seeks to be compensated by that amount by reason of Buckeye's wrongful conversion of its property.

In a dazzling display of nerve, Buckeye asserts that all of CHEP's damage claims must fail because they are "based on speculation rather than admissible evidence as to how long Buckeye held the pallets in question." At the very onset of this litigation, Sam McAdow, Sr., president of Buckeye, submitted a sworn affidavit to the effect that "during the past year Buckeye has come into possession of no more than 800 (CHEP) pallets and has received no more than 3,200 such pallets over the last four years." (i.e. January 1998 – January 2002) (see Plaintiffs' Motion to Remand, Docket #7.) If that affidavit were true as to the rate of accumulation, it would have taken Buckeye over 34 years to acquire the 27,395 CHEP pallets which it converted! Rather than accept at face value an obviously erroneous "admission," CHEP based its calculations on the actual number of CHEP pallets that Buckeye accumulated and released to CHEP week by week since October 3, 2003 (following the Court's order directing it to do so). Those figures (Defendant's Trial Exhibit 23) demonstrate an actual intake of approximately 489 pallets per month, as a result of which CHEP has "assumed" that Buckeye accumulated the 27,395 CHEP pallets over a period of less than five years, an assumption that is entirely reasonable and indeed conservatively favorable to Buckeye whose own affidavit concedes that it had been accumulating CHEP pallets since at least January 1998, rather than January 1999 as CHEP's analysis suggests.

B. CHEP's Depreciation Claim is Relevant and Provable

Conveniently ignoring subsequent testimony that Elton Potts was "using the accounting treatment to approximate the decline in value of the pallets that were held by Buckeye" (Potts depo p. 36, 40), Plaintiff offers an out of context response summarizing twenty minutes of questions focused on CHEP's accounting practices ("First off, we're talking depreciation of an accounting standpoint. We're not talking about the value of the pallet. Those are two different things." (Potts depo, p. 35.) As Mr. Potts went on to explain: "From a market value standpoint, if I have a car and you park it at your house for four years, even if you don't drive it, the car's value depreciates. It isn't worth what it was worth before. It isn't worth what it was worth when it was new. That's the difference I'm discussing... We used the accounting treatment that we had to approximate that." (Potts depo, p. 40.)

Because CHEP pallets are never sold on the open market, as Mr. Potts clearly acknowledged, "We used the accounting treatment that we had to approximate . . . loss of market value in these pallets." (Potts depo p. 40.) Having itself claimed nearly \$2,000,000 in depreciation over the past four fiscal years, Buckeye is no stranger to the concept of depreciation both for accounting purposes and for the purpose of approximating the decline in value over time, whether applied to cars or pallets.

C. CHEP is Not Required to Prove its Damages with Mathematical Certainty

Buckeye argues, without citing any authority for its position, that the depreciation prong of CHEP's damages claim is based on speculation and should be precluded. Buckeye's argument is both premature and without merit. Because the Court already found that CHEP owned its pallets that Buckeye held prior to September 2003, CHEP will likely succeed on its conversion

claim. CHEP will be entitled to damages on that claim and is not required to prove its damages with mathematical certainty.

The rule which precludes recovery of uncertain and speculative damages applies only to situations where the fact of damage is uncertain, not where the amount is uncertain. . . . It was not necessary for the plaintiff to prove the amount of the damages to a mathematical certainty. There was substantial evidence in the record, which together with the reasonable inferences to be drawn therefrom, provided a reasonable basis for the jury's verdict. That is all that is required.

E.P. Coverdell v. Mid-South Farm Equipment Assoc., Inc., 335 F.2d 9, 14 (6th Cir. 1964); see also, Burns Bros. Plumbers, Inc. v Groves Ventures Co., 412 F.2d 202, 209 (6th Cir. 1969) (explaining that "where one's right to damages is established, his right will not be denied even though a calculation of damages cannot be accomplished with mathematical exactness"); Allied Erecting and Dismantling Co., Inc. v. City of Youngstown, 151 Ohio App. 3d 16, 32, 783 N.E.2d 523, 535 (holding that a plaintiff's right to damages "will not be denied because the damages cannot be calculated with mathematical certainty").

Because CHEP will likely succeed on its conversion claim and will be entitled to damages on that claim, the jury should be able to hear and evaluate CHEP's evidence regarding those damages. Additionally, as Buckeye concedes, the depreciation prong of CHEP's damages claim is based in part on the actual rate by which CHEP has recovered its pallets from Buckeye since September 2003. Thus, CHEP's claim is based in fact, not mere conjecture. Accordingly, the evidence should be submitted to the jury to determine the actual amount of CHEP's damages.

D. CHEP is Entitled to Costs Associated with the Replacement of All Pallets Wrongfully Converted by Buckeye

Despite evidence to the contrary (see, e.g. Potts depo at p. 37, line 22) Buckeye repeatedly asserts that "stringer pallets were effectively taken out of circulation in 2001, and that substantial quantities of such pallets were physically scraped (sic)", by virtue of which Buckeye's

wrongdoing should presumably be forgiven. While Buckeye is correct that "CHEP is not entitled to recover its cost of capital for pallets that were never replaced" (Memo at 11), Buckeye ignores the undisputed testimony that CHEP "went out and purchased more pallets to take care of our customers." (Potts depo p. 43-44.) Whether the 27,395 pallets were replaced with block pallets or stringer pallets, they were replaced and CHEP's calculations are based on the conservative estimate that 35% of them were replaced at the less expensive cost of stringer pallets. (See Tab D to Buckeye's Motion).

E. CHEP is Not Seeking Duplicative Damages

Without explanation, Buckeye contends that "CHEP should not be entitled to seek both the cost of buying new pallets and the (actual) decrease in value of old pallets." However, Buckeye ignores the fact that its wrongful conversion necessitated the otherwise unnecessary cost of capital for replacement pallets. Additionally, Buckeye's wrongful conversion left CHEP at the end of the day with an equal quantity of old pallets that were in fact worth some \$53,000 less than when they were appropriated by Buckeye. Because CHEP is not seeking the full amount it paid in replacement costs, it is not seeking duplicative damages. Rather, CHEP is seeking only the loss it suffered in having to spend the money to replace the pallets during the conversion period¹ and the loss it suffered as a result of the depreciation of the pallets that were recovered. These are two separate losses for which CHEP is seeking recovery. In any event, any legitimate concerns that Buckeye might have on "duplicate" damages are readily cured with an appropriate jury instruction.

¹ CHEP acquired replacement pallets at a cost of \$548,230 but is seeking to recover only its \$63,815 in interest costs (cost of capital) for the duration of the replacement period.

F. CHEP's Revisions to its Damages Claim Have Not Prejudiced Buckeye

Buckeye reiterates its complaint that CHEP has revised its damage claim three times over the past seven months but fails to acknowledge that those changes have come as additional factual evidence has been obtained by both parties. More importantly, Buckeye ignores the fact that, as noted by Magistrate Judge Ovington, CHEP's methodology has not changed (Doc. No. 112 at 16) – in marked contrast with Buckeye whose theories of recovery have changed frequently. In fact, Buckeye has yet to disclose the specific dollar amount it is seeking on its unjust enrichment claim despite three years of litigation!

G. Buckeye Fails to Demonstrate any Basis for Excluding CHEP's Damages Evidence

Although Buckeye refers to Fed. R. Evid. 401 and 403 in the first introductory paragraph of its Memorandum in Support of its Motion in Limine, Buckeye cites to no authority and provides no analysis that would justify the exclusion of CHEP's damages evidence under those rules. Fed. R. Evid. 401 provides the definition of "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." Because all of the evidence that Buckeye seeks to exclude supports CHEP's theories of damages in this action, the evidence is "relevant." Buckeye's arguments, indeed, do not even focus on the question of relevance but, rather, whether CHEP's damages theories are legally sustainable. That is a question that must be determined by the jury or the Court after it hears all of the evidence and argument concerning those theories.

Moreover, even if a pretrial motion was the proper vehicle for challenging CHEP's damages evidence, Buckeye makes no effort to demonstrate why the evidence should be excluded pursuant to Fed. R. Evid. 403, which states:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence.

Fed. R. Evid. 403 (emphasis added).

Nowhere in its Motion or Memorandum in Support does Buckeye even refer to, let alone provide argument concerning, the balancing of interests contemplated by Fed. R. Evid. 403. Buckeye does not argue that it will be unfairly prejudiced by allowing CHEP to present evidence in support of its damages theories. Buckeye does not provide any insight as to how the presentation of such evidence could confuse or mislead the jury. Finally, Buckeye does not demonstrate that CHEP's presentation of its evidence will delay these proceedings, waste the Court's time, or result in the presentation of cumulative evidence. Again, Buckeye simply argues, without any support, that CHEP's damages theories are not "legally proper." As explained above, Buckeye's arguments are without merit. Additionally, any concerns with the legal sufficiency of CHEP's damages evidence can be cured with a proper instruction to the jury, if necessary.

H. Conclusion

Buckeye's entire Motion is based on an overly narrow view of the proper measure of damages for a conversion claim. Because CHEP is entitled to be fully compensated for any loss sustained as a result of Buckeye's wrongful conversion of CHEP's pallets, CHEP's damages claims, and the evidence supporting those claims, should be presented to the trier of fact in this case. Buckeye will have a full and fair opportunity to challenge CHEP's claims and calculations at trial. Any issues regarding the sufficiency of CHEP's claims should be determined at that time.

For the foregoing reasons, CHEP respectfully requests that the Court overrule Buckeye's Motion in Limine Regarding CHEP's Evidence of Damages.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served upon the following via the Court's electronic filing system the 4th day of October, 2004.

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