

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON**

BUCKEYE DIAMOND LOGISTICS, INC. :
fka BUCKEYE RECYCLERS, INC. :

Plaintiff, :

Case No. C3-01-440

v. :

Judge Walter Herbert Rice

CHEP USA, a general partnership :

Defendant. :

BUCKEYE DIAMOND LOGISTICS' REPLY
MEMORANDUM IN SUPPORT OF MOTION FOR
CERTIFICATION OF ISSUE FOR INTERLOCUTORY APPEAL

I. Introduction

CHEP USA's Memorandum in Opposition to Buckeye Diamond Logistics' Motion seeking certification of the Court's decision granting CHEP USA's Motion to Strike Jury Demand for interlocutory appeal pursuant to 28 U.S.C. § 1292(b), fails to address controlling Sixth Circuit authority supporting such appeal or Supreme Court precedent regarding the necessity of the utmost scrutiny of any denial of the right to trial by jury. Instead, CHEP reiterates the same arguments advanced in support of its motion to strike the jury demand, ignores Buckeye's opposing arguments, and asserts that because the Court granted the Motion to Strike, no substantial issue for appeal exists. CHEP then seeks to bolster its argument by asserting that an interlocutory appeal would unduly delay resolution of this matter, ignoring the fact that CHEP itself waited 13 months from the time of the Court's summary judgment ruling to raise the issue of

whether a trial by jury was appropriate – far longer than a resolution by the Sixth Circuit is likely to take.

Notwithstanding CHEP's attempt to obscure the fact, the Sixth Circuit has said that interlocutory appeal is an appropriate mechanism for gaining immediate review of a decision striking a jury demand. An interlocutory appeal of this issue will present the Sixth Circuit with a discrete issue it can decide promptly, and thereby avoid the possibility that this matter will have to be tried twice. The Court should therefore follow the Circuit's controlling precedent, and certify this case for immediate interlocutory appeal.

II. Argument

A. Interlocutory Review of Determinations of a Party's Right to Jury Trial Is Consistent with Controlling Precedent and Is the Most Effective Means of Reviewing the Denial of a Jury Trial

CHEP does not address or dispute that the Sixth Circuit's decision in National Union Electric Corporation v. Wilson, 434 F.2d 986, 988 (6th Cir. 1970), specifically finding that denial of trial by jury is appropriate for interlocutory review, remains the law of this Circuit. The simple fact that in other circumstances courts have found that interlocutory appeal should be used sparingly is irrelevant to controlling precedent holding that the fundamental right to a jury is different than other issues, and irrefutably appropriate for interlocutory review.

Moreover, CHEP's reliance on International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. Midland Steel Products Co., 771 F. Supp. 860 (N.D. Ohio 1991), is misplaced. In Midland, the court declined to grant review of an order denying at motion to strike jury demand. The court found that

no harm would occur in having the matter tried to a jury. Plainly, this conclusion was correct since the court always retains the discretion to submit even non-jury claims to a jury for determination.¹ The same reasoning does not apply here, where Buckeye is being denied the right to a jury trial.

CHEP offers no explanation of how the issue of whether Buckeye is entitled to a trial by jury can be preserved for review after trial without Buckeye having to incur the cost of trying this case twice. Obviously, two trials are of no concern to CHEP – it is a huge, billion dollar partnership with the resources of an international conglomerate to back it. It has shown already that it will go to huge expense to avoid a precedent setting judgment holding that it is being unjustly enriched by forcing a recycler such as Buckeye to bear its cost of recovering pallets from non-participating distributors and the multitude of others that these pallets circulate to. Buckeye is a family-owned business from South Charleston, Ohio, that can never match the resources CHEP brings to this case. As such, and consistent with the overwhelming precedent holding interlocutory appeal a particularly appropriate avenue for resolving the issue of entitlement to a jury, this issue one upon which it is particularly important to allow interlocutory appeal.

B. CHEP's Assertions that No Substantial Grounds Exist for a Difference of Opinion as to Buckeye's Right to a Jury Trial Is Misplaced

CHEP does not dispute that the following issues are issues of first impression in the Sixth Circuit: (a) whether under Ohio law and the Seventh Amendment, Buckeye's claim for unjust enrichment is a cause of action at law which it has a right to have

¹ Presumably, given CHEP's lack of a jury demand on its counterclaim, this discretion has been only basis upon which CHEP has based its belief that its conversion counterclaim would be determined by a jury.

determined by a jury, both (i) because monetary relief is the predominant form of damages sought and (ii) because the cause of action for unjust enrichment has common ancestry both in law and equity; (b) whether right to a jury under Ohio Revised Code § 2311.04 is a substantive right that cannot be abridged by removal of this action from state court to this Court; and (c) whether right to a jury under Section 5, Article I of the Ohio Constitution is a substantive right that cannot be abridged by removal of this action from state court to this Court. Rather, CHEP asserts that notwithstanding the lack of precedent on this issue that Buckeye's arguments are without any substantive merit, and therefore not ones upon which there are substantial grounds for difference of opinion.

It is telling that CHEP does not cite any Ohio or Sixth Circuit case involving a common law unjust enrichment action in asserting that the law is well-established that Buckeye is not entitled to a jury on this claim. Even CHEP must concede that the usual rule is that a claim for money damages is one in law, and therefore one a party is entitled to have tried by a jury. See Hildebrand v. Board of Trustees of Michigan State University, 607 F.2d 705, 707 (6th Cir. 1979) (quoting Ross v. Bernhard, 396 U.S. 531, 538 n. 10 (1970)); Thomas v. Dayton Power & Light, 710 F. Supp. 1146, 1148 (S.D. Ohio 1988). CHEP does not cite any decision from within this Circuit – apart from the decision Buckeye seeks to appeal – applying the exception to the usual rule its argument rests on to a common law unjust enrichment claim. It does not cite a single case holding that an unjust enrichment claim cannot be tried to a jury in Ohio. While Buckeye respects the reasoning of the Court granting the motion to strike jury demand, that reasoning alone does not make this an issue on which there is not substantial ground for difference of opinion.

Indeed, CHEP's assertion that a restitutionary-type remedy is always one in equity has recently been squarely rejected by the Sixth Circuit in the context of an ERISA cause of action:

In cases in which the plaintiff "could *not* assert title or right to possession of particular property but in which nevertheless he might be able to show just grounds for recovering money to pay for some benefit the defendant had received from him," the plaintiff had a right to restitution *at law* through an action derived from the common-law writ of assumpsit. In such cases, the plaintiff's claim was considered legal because he sought "to obtain a judgment imposing a merely personal liability upon the defendant to pay a sum of money." Such claims were viewed essentially as actions at law for breach of contract (whether the contract was actual or implied).

In contrast, a plaintiff could seek restitution *in equity*, ordinarily in the form of a constructive trust or an equitable lien, where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession. A court of equity could then order a defendant to transfer title (in the case of the constructive trust) or to give a security interest (in the case of the equitable lien) to a plaintiff who was, in the eyes of equity, the true owner. But where "the property [sought to be recovered] or its proceeds have been dissipated so that no product remains, [the plaintiff's] claim is only that of a general creditor," and the plaintiff "cannot enforce a constructive trust of or an equitable lien upon the property of the [defendant]."

Qualchoice, Inc. v. Rowland, 367 F.3d 638, 644 (6th Cir. 2004) (quoting Great-West Life & Annuity Insurance Co. v. Knudson, 534 U.S. 204, 209, 213-14 (2002)) (emphasis in original). Thus, the Supreme Court and the Sixth Circuit, in different circumstances, like the *Restatement of Restitution*, have recognized that claims for quasi-contract arose and developed under the common law writ of assumpsit and, as a result, were historically brought in the courts of law. See also 1 Dan B. Dobbs, *Law of Remedies* § 4.2(3) (1993); Austin v. Shalala, 994 F.2d 1170, 1176- 77 (5th Cir.1993) (quasi-contract action requires jury trial because it falls under the common law writ of general assumpsit, a legal action at common law). CHEP is simply wrong in asserting that no authority exists for the

argument that Buckeye's claim is one at law rather than at equity. Plainly, at best for CHEP, the issue presented is one upon which there are substantial grounds for difference of opinion.

Further, CHEP's reliance on Kampa v. White Consol. Industries, Inc., 115 F.3d 585 (8th Cir. 1997), for the assertion that Buckeye has lost its state law right to a jury by removal of this case is misplaced. Kampa, and the authority it rests on, dealt with the issue of whether a party in federal court could be denied a right to a jury trial that existed under Seventh Amendment analysis because the underlying state statute provided that the claim should be tried to the court rather than to a jury. The Kampa court found that the state legislature court not limit the availability of a jury in a federal court proceeding. The converse issue is presented here. CHEP does not dispute that if this case had not been removed from the Common Pleas Court of Clark County, Buckeye would be entitled to a jury under both the Ohio Constitution and Ohio Revised Code § 2311.04. While this Court has found that removal extinguished these rights, there can be no doubt that this issue also is one that of first impression in this Circuit and upon which there are substantial grounds for difference of opinion. Interlocutory appeal is appropriate to address this issue before the Court's and the parties' resources are consumed with a trial that could have to be redone.

C. **CHEP's Assertions that Interlocutory Appeal Will Substantially Delay Resolution of this Matter Lack Credibility Given CHEP's Repeated Delays of this Matter and the Fact that CHEP Delayed Bringing this Issue to the Court for More than a Year**

It has become a pattern in this case that whenever CHEP wishes to avoid giving Buckeye a fair opportunity to have its day in Court, it cries that Buckeye is trying to

delay the case. In February 2004, when CHEP produced a damage disclosure for the first time less than three weeks before trial, it claimed that Buckeye was just delaying by seeking discovery on those damages – the Court properly rejected that argument and gave Buckeye the discovery it was entitled to. In May 2004, when CHEP refused to produce dwell time, revenue, and utilization rate information in an effort to force a trial without full rebuttal to its damage theories, CHEP again accused Buckeye of delaying the trial for no good reason – after a hearing, however, the Magistrate Judge disagreed, and ordered CHEP to produce all of this information. In October 2004, after having been ordered to produce dwell time, revenue, and utilization rate information, CHEP again sought to bamboozle the Court by claiming that it had produced everything ordered, and again accusing Buckeye of simply seeking to delay the trial – as Buckeye’s Motion to Compel filed last Friday shows, however, CHEP’s own witness admits that Buckeye has not received what that Court ordered, and indeed that CHEP has not even looked for much of it. Given CHEP’s past behavior, its professed concern about delay should be taken not as a genuine concern, but as a warning that CHEP is again seeking to disadvantage Buckeye.

It is particularly ironic that CHEP complains about Buckeye seeking delay with respect to the issue of its right to a jury, given CHEP’s own treatment of the issue. CHEP has known since August 11, 2003, that Buckeye’s unjust enrichment claim was its only claim remaining to be tried, yet it waited more than 13 months to file a motion to strike the jury demand. In the interim, it twice signed final pretrial orders indicating the case would be tried to a jury. See Docket # 78 and # 101. While CHEP cites statistics concerning the overall workload of the Sixth Circuit, it cite no information concerning

the Circuit's disposition of interlocutory appeals.² The issue presented by this appeal will be discrete. If CHEP is genuinely concerned with prompt disposition of this case, it should agree to expedited briefing of an issue that will have to be determined by the Court of Appeals by one means or another, rather seeking to disadvantage Buckeye by seeking to force Buckeye to risk bearing the expense of two trials in order to preserve this issue.

III. Conclusion

For the reasons set forth above, as well as those in its Motion, Buckeye respectfully request that the Court certify its order granting CHEP's Motion to Strike Jury Demand for interlocutory appeal pursuant to 28 U.S.C. § 1292(b).

s/James A. Wilson

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² Nor does CHEP dispute or address that absent certification for interlocutory appeal, the issue may be raised by a petition for a writ of mandamus. See Dairy Queen v. Wood, 369 U.S. 469, 472 (1962); Beacon Theatres v. Westover, 359 U.S. 500 (1959). Indeed, one of the cases relied upon by CHEP, Golden v. Kelsey-Hayes Co., 73 F.3d 648 (6th Cir. 1996), specifically holds that in seeking to protect a right to trial by jury, a party need not satisfy the two ordinary preconditions to issuance of a writ of mandamus: (1) that there are no other adequate means for the party to obtain the desired relief, and (2) that the party has a "clear and indisputable" right to issuance of the writ.. CHEP does not dispute that allowing an interlocutory appeal would be a much more orderly process for allowing the Sixth Circuit to review this issue. Its Memorandum ignores that the baseline for determining whether an interlocutory appeal is appropriate should therefore not be a comparison with no review of the issue, but rather a comparison with review of this issue by mandamus.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of this Motion was served on
October 18, 2004, by electronic delivery upon:

John C. McDonald
Kevin L. Murch
Schottenstein Zox & Dunn
250 West Street
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s/James A. Wilson
James A. Wilson