

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

BUCKEYE DIAMOND LOGISTICS, INC.	:	
flka BUCKEYE RECYCLERS, INC.	:	
	:	Civil Action No. C3-01-440
Plaintiff,	:	
	:	Judge Walter Herbert Rice
v.	:	
	:	
CHEP USA, a general partnership,	:	
	:	
Defendant.	:	

TRIAL BRIEF OF DEFENDANT CHEP USA

I. INTRODUCTION

As a result of the Court's Summary Judgment Decision and Entry (Doc. # 61) issued on August 11, 2003, the issues for trial have been significantly narrowed. The Court has determined, as a matter of law, that CHEP owns its pallets and that CHEP has not lost, sold or abandoned them simply by allowing its customers to ship its pallets to non-participants in the CHEP system. This Court's conclusive determination of Buckeye's challenge to CHEP's ownership rights means that the only remaining issues are (1) Buckeye's sole claim for unjust enrichment and (2) CHEP's claim for damages due to the conversion of its pallets by Buckeye.

This Court's Summary Judgment Decision and Entry put to rest all of the factual matters dealing with CHEP's accounting treatment for its pallets (i.e., loss reserves and write-offs), any consulting studies about the number of pallets at or beyond non-participating distributors, the impact of CHEP's lost pallet fee charge, and CHEP's charges to its customers who ship to non-participants. However, from a review of the Joint Proposed Pretrial Order it is evident that Buckeye seeks to re-litigate the ownership issues and the loss and abandonment theories that

have already been resolved. In this Trial Brief, CHEP endeavors to focus on what truly remains relevant and in controversy.

II. BUCKEYE'S REMAINING CLAIM

A. Summary of Buckeye's Unjust Enrichment Claim

Buckeye claims that CHEP has been unjustly enriched by Buckeye's taking, sorting, separation and storage of CHEP's pallets. The evidence will show that from 1999 through September 2003, Buckeye accumulated 27,395 CHEP pallets. From July 2000 through August 2001, Buckeye sold 11,414 of these pallets to two of its customers for \$37,482. The remaining 15,981 pallets were returned to CHEP in September 2003 as a result of the Court's Summary Judgment Decision and Entry (Doc. # 61) filed on August 11, 2003. From October 2003 through May 27, 2005, CHEP has recovered an additional 14,070 CHEP pallets from Buckeye. Buckeye asserts that it is entitled to damages for its services in transporting, sorting and storing the 15,981 pallets reclaimed by CHEP in September 2003 and the 14,070 pallets released to CHEP between October 3, 2003 and May 27, 2005. Buckeye is not seeking damages related to the 11,414 CHEP pallets it sold to its customers in 2000 and 2001.

Buckeye's primary witness will be Sam McAdow, Sr., the President of Buckeye, who is also a lawyer. Although Mr. McAdow will testify that Buckeye incurs expenses in handling CHEP pallets, he will not be able to quantify those expenses. In fact, on cross-examination, Mr. McAdow will concede that he not only does not know what Buckeye's expenses are, he will also admit that Buckeye never endeavored to determine these expenses.

In any event, CHEP will demonstrate that Buckeye is not entitled to any monetary award because it cannot demonstrate that any benefit CHEP receives from Buckeye's efforts is unjust. First, with respect to the pallets that Buckeye held prior to September 2003, as the Court has

already held, CHEP did not receive any benefit. Rather, as CHEP will demonstrate, CHEP incurred damages as a result of Buckeye's stock-piling and refusal to return CHEP's pallets.

With respect to pallets that have come into Buckeye's possession since September 2003 and subsequently released to CHEP, CHEP will present evidence showing that through its Asset Recovery Program ("ARP"), CHEP more than compensates pallet recyclers such as Buckeye for any costs they may incur when they come into possession of a CHEP pallet. CHEP will introduce evidence establishing that the compensation CHEP offers to recyclers is not only fair, but that it exceeds any actual cost Buckeye experiences in handling CHEP pallets. Finally, CHEP will prove that it repeatedly invited Buckeye to participate in the ARP but that Buckeye refused. In short, CHEP offered to fully compensate Buckeye for its efforts, both in the past and going forward, and Buckeye rejected the offer.

B. The Substantive Elements of Buckeye's Claim for Unjust Enrichment

The elements of unjust enrichment are: (1) a benefit conferred on the defendant by the plaintiff; (2) the defendant's knowledge of the benefit; and (3) the defendant's retention of the benefit under circumstances where it would be unjust to retain the benefit without payment. The Andersons, Inc. v. Consol, Inc., 185 F. Supp. 2d 833 (N.D.Ohio 2001). Additionally, a party seeking recovery under a theory of unjust enrichment must prove that it incurred a substantial detriment that is causally connected to a substantial benefit conferred on the defendant. Id.; see also, Fairfield Ready Mix v. Walnut Hills Associates, Ltd., 60 Ohio App. 3d 1, 572 N.E.2d 114 (Ohio Ct. App. 1988). The underlying issue concerns the amount of compensation, if any, Buckeye deserves for taking, sorting and separating CHEP's pallets. See Doc. # 61 at p. 42.

It is important to recognize that even where a party demonstrates that it has suffered a detriment and that it conferred a benefit on another party, there can be no recovery under a

theory of unjust enrichment unless the party is able to establish a causal connection between the loss and the gain. Gaier v. Midwestern Group, 76 Ohio App. 3d 334, 601 N.E.2d 624 (Ohio Ct. App. 1991). A finding that the party defending a claim for unjust enrichment was not responsible for the opposing party's detrimental position or that the opposing party was largely responsible for its own detriment breaks the causal connection and defeats a claim for unjust enrichment. U.S. Health Practices, Inc. v. Byron Blake, M.D., Inc., No. 00AP-1002, 2001 WL 277291 (Ohio Ct. App. Mar. 22, 2001).¹

In this case, the substantive elements of unjust enrichment need to be considered in two separate contexts: (1) The 15,981 CHEP pallets that Buckeye accumulated over a period of time and eventually allowed CHEP to recover in September of 2003 (as a result of the Court's Decision); and (2) those CHEP pallets that Buckeye has, since October 2003, promptly notified CHEP about and allowed CHEP to reclaim.

CHEP does not dispute that the prompt reclamation of its pallets is a benefit to CHEP. As this Court noted in its Decision and Entry at page 40, "Buckeye points to evidence indicating that CHEP recognizes the value that recyclers add to its business by separating CHEP pallets from other pallets and returning them to CHEP. Indeed, CHEP's ARP itself is evidence of this fact." See Doc. # 61, p. 42. Conversely, with respect to the 15,981 CHEP pallets that Buckeye stock-piled and refused to allow CHEP to recover, CHEP's inability to recover these pallets caused a detriment to CHEP. The Court recognized this detriment in the Decision and Entry in stating, "[r]egarding [Buckeye's] continued storage of CHEP pallets at their depot, it cannot be said that they convey a benefit upon CHEP, for their actions are against CHEP's expressed

¹ Pursuant to Local Rule 7.2(b)(4), copies of unreported or unofficially reported opinions cited in this Brief will be made available upon request of the Court or counsel for Buckeye.

wishes." Id. at 41 (emphasis added). Thus, only the pallets promptly released to CHEP after September 2003 have any bearing on Buckeye's unjust enrichment claim.

Buckeye's unjust enrichment claim must be considered separately as to pallets promptly released and those withheld for an extended period of time.

C. Damages on Buckeye's Unjust Enrichment Claim

1. Buckeye may only recover the amount necessary to reimburse Buckeye for providing transportation and sortation services.

The general rule of damages upon a theory of an unjust enrichment is that the aggrieved party may receive restitution for the actual services provided. Shaw v. J. Pollock & Co., 82 Ohio App. 3d 656, 662, 612 N.E.2d 1295, 1299 (Ohio Ct. App. 1992); see also Restatement (Third) of Restitution & Unjust Enrichment § 1 (2000) ("A person who is unjustly enriched at the expense of another is liable in restitution to the other"); 30 Ohio Jurisprudence 3d Damages § 29 (2004) (stating that "the general rule of damages upon a theory of an unjust enrichment is that the aggrieved party is entitled simply to restitution for the actual services provided"). Thus, with respect to the pallets that have been promptly released since September 2003, if Buckeye proves all of the elements of unjust enrichment by a preponderance of the evidence, then it may be entitled to recover the actual costs it incurs in transporting and sorting those pallets. See, Shaw, 82 Ohio App. 3d at 662, 612 N.E.2d at 1299.

2. Buckeye may not recover any profits earned by CHEP.

Buckeye asserts that it "is entitled to disgorgement of profits earned by CHEP as the result of a system CHEP knowingly put into place by which Buckeye would be forced to bear the expense of recovering pallets for CHEP." (Doc. # 170 at p. 13.) Not only is Buckeye's position factually unsupportable, disgorgement of profits is not a proper measure of damages under an unjust enrichment claim.

In Blue Chip Pavement Maintenance, Inc. v. Ryan's Family Steak Houses, Inc., No. CA2003-09-072, 2004-Ohio-3357 (Ohio Ct. App. 2004), the court affirmed an award of \$20,968 to Blue Chip Pavement for work it had done for Ryan's Steak House while not directly under contract with Ryan's. The court stated that "unjust enrichment entitles a party only to restitution of the reasonable value of the benefit conferred [by the aggrieved party]." Id. at ¶ 18 (citing St. Vincent Med. Ctr. v. Sader, 100 Ohio App. 3d 379, 384, 654 N.E.2d 144 (Ohio Ct. App. 1995)). The court explicitly denounced the notion that Blue Chip Pavement would be entitled to any form of profit from Ryan's Steak House. Id. The \$20,968 award was the value of the work performed. Id.

Because Ohio law is clear that Buckeye may only recover restitution of the reasonable value of its efforts in transporting and sorting CHEP's pallets, its request for disgorgement of CHEP's profits is improper and should be denied.

D. Buckeye's Request for Declaratory Relief

Pursuant to ¶ 42 of the Complaint, Buckeye requests a declaration pursuant to O.R.C. § 2721 of CHEP's obligation to reimburse it in the future for Buckeye's services in sorting, separating and storing CHEP pallets that come into Buckeye's possession. Because Buckeye has not asked the Court to declare the amount of any future reimbursement, CHEP contends that evidence on the issue of what, if anything, CHEP should pay Buckeye in the future is both improper and speculative. Should the Court take evidence on the amount, if any, that CHEP should reimburse Buckeye in the future, CHEP is prepared to present evidence that the compensation it offers pursuant to the ARP is not only adequate compensation to Buckeye but, in fact, exceeds the actual costs Buckeye incurs in promptly releasing CHEP pallets.

E. Buckeye did not Request Injunctive Relief on its Unjust Enrichment Claim

As indicated in the Parties' Proposed Joint Final Pretrial Order filed June 7, 2005 (Doc. # 170), Buckeye claims that it is seeking "permanent injunctive relief" on its unjust enrichment claim "barring CHEP from engaging in business practices that force Buckeye unjustly to enrich CHEP by the sortation and return of pallets marked with CHEP's logo." (Doc. # 170 at p. 13.) While the facts are clear that Buckeye is not "forced" to do anything, under the unjust enrichment claim in its Complaint, Buckeye requests only money damages and a declaration of CHEP's obligation to reimburse Buckeye in the future for its services. The only reference to permanent injunctive relief was included in Buckeye's prayer for relief wherein Buckeye requests "a preliminary and permanent injunction restraining defendants from making deceptive representations concerning its ownership of pallets or the obligations of those in possession of its pallets." Because Buckeye never before requested the "permanent injunctive relief" referred to in the Proposed Joint Final Pretrial Order, it should not be permitted to seek such relief at trial, nor is it warranted under the facts presented.

III. CHEP'S COUNTERCLAIM FOR CONVERSION

A. Summary of CHEP's Conversion Claim

From 1999 through September 2003, Buckeye acquired 27,395 CHEP pallets. CHEP will present evidence, through testimony and Buckeye's business records, that in 2000 and 2001, Buckeye sold 11,414 of those pallets to third parties and invoiced the third parties \$37,482. Despite repeated demands to return all of the CHEP pallets in its possession, Buckeye refused to return any of them and held the remaining 15,981 pallets hostage until ordered to release them by this Court in August 2003.

CHEP will present evidence establishing the damages it suffered as a result of Buckeye's wrongful conversion of the 27,395 CHEP pallets. Because Buckeye has been either unable or unwilling to explain how long it held the pallets, Elton Potts, CHEP's Senior Vice President in charge of Asset Management, will testify that in his estimation the pallets were held by Buckeye for an average of 15.5 months. Although Buckeye will undoubtedly challenge Mr. Potts' testimony on the length of time Buckeye held the pallets, credibility on this issue will lie with CHEP.

CHEP will introduce an affidavit from Mr. McAdow executed in January 2002 in which he stated, under oath, that Buckeye had received no more than 3,200 CHEP pallets since January 1998. However, based on facts developed during discovery, Mr. McAdow will have to admit that Buckeye sold 11,414 CHEP pallets in the year prior to making that affidavit! Based on this, the Court may conclude either that Buckeye's accounting methods are seriously flawed or that Mr. McAdow was less than truthful in his January 2002 affidavit.

Mr. Potts will testify that CHEP pallets depreciate over time. In particular, Mr. Potts will testify that the pallets depreciate in value at the rate of 12.5¢ per pallet per month. Based on the 15.5 month average that Buckeye retained CHEP's pallets, CHEP experienced damages in the form of depreciation for the 27,395 pallets of over \$53,000.

Mr. Potts will also provide testimony regarding the cost of capital CHEP incurred in replacing the 27,395 pallets wrongly withheld by Buckeye, which amounts to over \$63,000. Mr. Potts will explain why CHEP is not seeking to recover the more than \$500,000 it spent to purchase the replacement pallets nor its lost income, which would be in excess of \$400,000, but merely the cost of capital for substitute pallets for the time the CHEP pallets were held hostage.

Finally, CHEP will introduce evidence through Derrick Smith, a director of plant operations for CHEP, who was involved in inspecting the 15,981 pallets Buckeye released in compliance with this Court's August 11, 2003 Decision and Entry. Mr. Smith will testify regarding the costs expended by CHEP to recondition or replace the pallets and will explain what portion of that cost should be attributed to Buckeye. Mr. Smith will testify that out of a total of \$46,483, CHEP is entitled to more than \$34,000 from Buckeye for washing, repairing and replacing pallets returned by Buckeye. In total, CHEP will establish that it is entitled to recover over \$188,000 from Buckeye.

B. The Substantive Elements of CHEP's Counterclaim for Conversion

To establish a claim for conversion, a plaintiff must demonstrate: 1) plaintiff's ownership or right to possession of the property at the time of the conversion; 2) defendant's conversion by a wrongful act or disposition of plaintiff's property rights; and 3) plaintiff suffered damages as a result of the conversion. Kramer Consulting, Inc. v. McCarthy, 284 F. Supp. 2d 917, 923 (S.D. Ohio 2003); see also, Baltimore & Ohio Ry. Co. v. O'Donnell, 49 Ohio St. 489, 32 N.E. 476 (1892). Ohio courts explain conversion as "the wrongful assuming of unauthorized control over the personal property of another, whether it is done purposefully or not." Fulks v. Fulks, 95 Ohio App. 515, 121 N.E.2d 180, 182 (Ohio Ct. App. 1953). "Intent or purpose to do a wrong is not a necessary element of proof to establish conversion," and "[t]he motive by which a party was controlled in the conversion of property is of no avail as a defense." Id. (quoting Baltimore & Ohio Ry. Co., supra). A party charged with conversion may be acting under misapprehension or mistake and still be guilty of conversion. Freeman v. Smith, No. 7498, 1988 WL 142289 (Ohio Ct. App. 1988). The motive by which a party is controlled in the conversion of property is not all relevant to a claim of conversion. Fulks, 95 Ohio App. at 519, 121 N.E.2d at 182.

The Court already held that "CHEP has at all times retained ownership in its pallets." (Doc. # 61 at p. 19.) In addition, the Court has already found that "Buckeye has no lien on the CHEP pallets; which is to say, it has not added value to the CHEP pallets and does not have the right to withhold their return to CHEP. The CHEP pallets belong to CHEP, and they must be returned." (Doc. # 61 at p. 42.) This Court's prior determinations establish the first and second elements of conversion. Therefore, the Court need only consider CHEP's evidence of damages with respect to the conversion of its property.

C. Buckeye's Attempt to Dispute CHEP's Ownership of the Pallets is Not a Defense to Conversion

Buckeye claims that it had "reasonable doubt as to CHEP's ownership and right to possession" of CHEP's pallets and Buckeye's filing of this action constitutes a "complete defense" to CHEP's conversion claim. Buckeye's argument has no support under Ohio law. Indeed, Buckeye's "defense" contradicts Ohio law.

The only case cited by Buckeye in support of its defense is Triple-A Baseball Club Associates v. Northeastern Baseball, Inc., 655 F. Supp. 513 (D.Me. 1987),² which is inapplicable. In Triple-A, the court, applying Maine law, mentioned in dicta that the defendant "might plausibly have made a qualified refusal" to surrender the intangible rights at issue. Id. at 539. The instant action does not involve, nor do Ohio courts recognize, claims for conversion of intangible property. See, e.g., Davis v. Flexman, 109 F. Supp. 2d 776, 808 (S.D. Ohio 1999); Wiltberger v. Davis, 110 Ohio App. 3d 46, 55 (1996); Brod v. Cincinnati Time Recorder Co., 82 Ohio App. 26 (1947). Further, the Triple-A court did not hold that defendant's refusal to plaintiff's demand was justified or that it constituted a "complete defense" to a conversion claim. In Ohio, any exercise of dominion wrongfully exerted over the personal property of another is a

² Buckeye cited this case in its proposed jury instructions prior to the Court striking Buckeye's jury demand.

conversion. Ohio Telephone Equip. & Sales, Inc. v. Hadler Realty Co., 24 Ohio App. 3d 91, 93 (1985).

D. Compensatory Damages on CHEP's Conversion Counterclaim

The fundamental rule for calculating damages in a conversion action is that the owner must be compensated for the loss sustained by reason of the wrongful conversion of his property. Wright v. Miller, No. 752, 1991 WL 37926 (Ohio Ct. App. Mar. 11, 1991). The subordinate rule, which is applicable only where it accomplishes the purpose of the fundamental rule, is the market value rule. Id. Under the market value rule, the owner is awarded damages for the market value of the converted property. Id. Where property is returned to the party asserting a claim of conversion, the party may still recover damages caused by the loss of use of the converted property. Dalicandro v. Morrison Road Development Co., Inc., Nos. 00AP-619, 00AP-656, 2001 WL 379893 (Ohio Ct. App. Apr. 17, 2001).

CHEP is entitled to recover its repair and replacement costs incurred as a result of Buckeye's conversion of CHEP's pallets, the depreciation in value of the pallets, and its cost of capital for replacement pallets. With respect to CHEP's property that Buckeye sold to its customers, CHEP is entitled to recover Buckeye's proceeds from this unlawful transaction. It is appropriate to award CHEP damages in an amount that fairly compensates CHEP for its loss. See, Wright, supra.

E. Punitive Damages on CHEP's Conversion Counterclaim

A party may receive punitive damages for conversion of its property where the acts complained of are willful, wanton, fraudulent, malicious or prompted by ill motives. Meacham v. Miller, 79 Ohio App. 3d 35, 606 N.E.2d 996 (Ohio Ct. App. 1992). Accordingly, the Court may award CHEP punitive damages if it finds that Buckeye's conduct in withholding CHEP's

pallets and refusing to return them was willful, wanton, fraudulent, malicious or prompted by ill motives. Buckeye's solicitation of funds from other pallet recyclers to underwrite the cost of this litigation is pertinent to this issue.

F. Interest and Attorney's Fees on CHEP's Conversion Counterclaim

A party that proves a claim for conversion is also entitled to recover prejudgment interest. Lyle v. Durham, 16 Ohio App. 3d 1, 473 N.E.2d 1216 (Ohio Ct. App. 1984). Generally, interest is awarded from the time of conversion. Id. CHEP is entitled to recover prejudgment interest from the date of conversion of its pallets, which CHEP will demonstrate began no later than January 1999.

Attorneys' fees may be awarded in a conversion action as special damages or where bad faith is shown. Bench Billboard Co. v. Columbus, 63 Ohio App. 3d 421, 579 N.E.2d 240 (Ohio Ct. App. 1989). A party may also recover attorneys' fees incurred in regaining its property. International Total Services, Inc. v. Glubiak, No. 71927, 1998 WL 57123 (Ohio Ct. App. Feb. 12, 1998). The Court may consider awarding CHEP attorney's fees as special damages, if it is found that Buckeye acted in bad faith. The Court may also award the attorney's fees CHEP expended litigating its Counterclaim through summary judgment to recover the 15,981 pallets Buckeye refused to surrender until September 2003.

IV. EVIDENTIARY ISSUES

In addition to the issues addressed above, CHEP believes that issues regarding the scope and applicability of the "business records" exception to the hearsay rule will arise during trial. Accordingly, CHEP is submitting a bench brief on that exception, which is attached hereto at Tab "A".

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of Defendant's Trial Brief was served this
20th day of June, 2005, via the Court's electronic filing notification, upon:

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