

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

U.S. DIAMOND & GOLD, INC., et al., : **CASE NO. 3:06-cv-371**
 : **Judge: Thomas M. Rose**
Plaintiffs, :
v. :
JULIUS KLEIN DIAMONDS LLC, et al., : **PLAINTIFFS' MEMORANDUM**
 : **CONTRA DEFENDANT'S MOTION**
Defendants. : **FOR A NEW TRIAL**

MEMORANDUM

I. INTRODUCTION

Following eight days of evidence and argument, this Court, after consulting with the parties, instructed the jury regarding the law to be followed in its deliberations. The Court's instructions to the jury were clear and unambiguous.¹ The jury, after deliberating for approximately ten hours over the course of two days, obviously carefully considered and unanimously answered each Interrogatory and Verdict Form provided by the Court. The jury's answers to the interrogatories are completely consistent with the Court's instructions, with the evidence in this case, and are consistent with each other. The jury found for Plaintiffs on each of the three causes of action, and in an amount that was not duplicative of any other amount awarded.

Nonetheless, JKD alleges two reasons as to why a new trial should be granted: (1) the jury's answers to the interrogatories regarding the amount of damages to compensate Plaintiffs on their

¹ And, in fact, even JKD concedes that the jury instructions were clear. See JKD's Motion for a New Trial, Doc. # 209, p. 1.

unjust enrichment and conversion claims are “inconsistent” and “irreconcilable”; and (2) there is “absolutely no evidence of the retail value of the Pink Diamond,” and, thus, allegedly no evidence supporting the jury’s award of \$2,300,000 for Plaintiffs’ claim for the civil liability for the criminal act of theft. Because JKD’s arguments are both unsupported by the law as given by this Court following consultation with the parties, and the evidence introduced at trial, JKD’s Motion must be overruled.

II. PROCEDURAL BACKGROUND

A. Introduction.

Following their deliberations, the jury found for Plaintiffs on the claims of unjust enrichment, conversion, civil liability for a criminal act (theft) and found against JKD on its fraud counterclaim. Moreover, the jury determined damages for each claim in an amount that was not duplicative and was strictly in accordance with the Court’s jury instructions.

B. Multiple Recoveries Prohibited

Consistent with Federal Rule of Civil Procedure 51 and this Court’s General Order,² the Court held an in-chambers conference on Monday, November 17, 2008 to discuss, *inter alia*, the Court’s Proposed Jury Instructions, Interrogatories and Verdict Forms which were derived, at least in part, from the Proposed Jury Instructions submitted by the parties.³ At this in-chambers conference, the Court permitted the parties to note any objections to the proposed instructions, interrogatories and verdict forms. JKD did not object to the Court’s proposed instruction concerning damages. Specifically, the jury was instructed by this Court that there “[was] an overlap of matters for which damages could be awarded to [Plaintiffs]” (Jury Instructions, Multiple Recoveries Prohibited, p. 26), that the jury “must avoid making a multiple award,” (*Id.*)

² II. Trial Practice, H. Pre-Summation (Final Argument) Conference, p. 21.

³ Plaintiffs’ Proposed Jury Instructions, Jury Interrogatories, and Verdict Forms, filed 10/27/2008, Doc. #178 and Defendant’s Julius Klein Diamond, LLC’s Proposed Jury Instructions, 10/27/2008, Doc. # 177.

and that “a party bringing more than one claim is entitled to recover only once for a specific harm suffered, regardless of how many claims [the jury] resolve[d] in that party’s favor.” (*Id.*) As will be seen from the following discussion, the jury strictly followed the Court’s instructions by not duplicating any damages for each cause of action.

1. Unjust Enrichment and Conversion

The jury concluded that JKD was unjustly enriched by acquiring the Pink Diamond without compensating Plaintiffs (Jury Interrogatory No. 1) and that JKD wrongfully converted and exercised dominion and control over the Pink Diamond. (See Jury Interrogatory No. 3.) Further, the jury was instructed that if they found JKD was unjustly enriched or converted the Pink Diamond, then they were “to determine what amount JKD gained from its wrongful actions.” (Jury Instructions, Unjust Enrichment, at p. 17; Conversion at p. 18) As to unjust enrichment, the jury was instructed not only that “[t]he measure of damages is determined by the value of the Pink Diamond when [Plaintiffs] sent it to JKD.” (*Id.*), but that “actual compensatory damages may include out-of-pocket expenses” and that they could award the “value of any unjust enrichment gained by JKD that is not taken into account in computing the actual loss to [Plaintiffs].” (Jury Instructions, Compensatory Damages, at p. 25). JKD did not object to the Court’s instruction concerning unjust enrichment.

For the claim of conversion, the jury was instructed that “[t]he measure of damages is determined by the value of the Pink Diamond when [Plaintiffs] sent it to JKD” (*Id.*), and that if they found JKD liable for conversion, they could award Plaintiffs the “money expended by [Plaintiffs] for attorneys fees in the prosecution of their conversion claim.” (See Jury Instructions, Compensatory Damages, at p. 25).⁴

⁴ JKD’s only objection to this Court’s instruction on conversion was that conversion required that a demand for return first be made.

The jury awarded Plaintiffs' \$8,400 as damages for Unjust Enrichment, (see Jury Interrogatory No. 2) which equates to the out-of-pocket expenses of John Stafford's cost of the Pink Diamond and the Brink's shipping bill as testified to by Zuri Mesica. The amount found by the jury for conversion, \$1,700,000, represents the wholesale value of the Pink Diamond which was testified to by John Stafford.

The jury also concluded that Plaintiffs are entitled to recover their attorneys' fees (Jury Interrogatory No. 5). There is no inconsistency or duplication in these awards.

2. Civil Liability for the Criminal Act of Theft

The jury unanimously answered "Yes" to Interrogatory No. 6, finding that the Defendant JKD committed the criminal act of theft by stealing the Pink Diamond from Stafford Jewelers and John Stafford. (See Jury Interrogatory No. 6). The jury was instructed that if they found JKD liable for the criminal act of theft, they were to award damages. (*Id.*) The Jury Instructions stated that "[t]he measure of damages is determined by the retail value of the Pink Diamond when Stafford Jewelers and John Stafford sent it to JKD." (See Jury Instructions at p. 20.) Further, the retail value is defined as "the value of the Pink Diamond when it is offered for sale by a mercantile establishment" (*Id.*) and, according to John Stafford's testimony at trial, which was not objected to by JKD, the value of the Pink diamond was as high as \$4 million. Because the jury strictly followed the Court's instructions and did not duplicate any damages, they subtracted the previously awarded wholesale value of \$1.7 million for the conversion claim from the retail value of \$4 million testified to at trial and found the "retail" value in response to Interrogatory 7 of \$2.3 million.

C. Jury Question

On November 17, 2008, the jury submitted a question to the Court concerning compensatory damages. Following discussion and agreement by both parties, the jury was

referred to the section of the jury charge concerning Compensatory Damages and Multiple Recoveries Prohibited. Once again, JKD did not object to the Court's response to the jury's question regarding the jury's ability to award damages for more than one interrogatory. Nor did JKD object that it believed the Court's response to the jury's question would confuse the jury or would lead to inconsistent or irreconcilable interrogatory answers. In fact, at no time did JKD even object to the Court's interrogatories or verdict forms on the basis that the jury would be confused or that the forms would somehow lead to inconsistent or irreconcilable answers. And, although JKD certainly had the opportunity to do so, it also did not ask the Court to return the jury back to deliberate following the compensatory damage phase in order to clarify responses to the interrogatories.

Instead of taking advantage of any of the above-opportunities to clarify what JKD now claims are inconsistencies and confusion in the jury's answers to the interrogatories, JKD sat idly by until it filed the Motion for a New Trial, which was an apparent attempt to avoid the punitive damages phase of the trial. Because of the failure to object, JKD cannot now complain of error, confusion or inconsistency in the interrogatories after it failed to object or to attempt to correct any of the errors about which it now complains. Indeed, by failing to object, JKD waived its objections and invited the error about which it now complains.

The doctrine of invited error precludes a party from complaining of an error that it invited or provoked the court or the opposite party to commit.⁵ As explained by an Ohio district court, "invited error precluded the appellant from relying upon any alleged inconsistency in the jury's verdict in support of its challenge to the trial court's denial of its Rule 59(e) motion."⁶ Similarly, in holding that a verdict did not result in a double recovery and that the verdict forms and

⁵ *Valley City Steel, LLC v. Liverpool Coil Processing* (N.D. Ohio May 13, 2008), 2008 U.S. Dist. LEXIS 39285 *14 and *United States v. Sharpe* (6th Cir. 1993), 996 F.2d 125, 129.

⁶ *Valley City Steel, LLC, supra*.

instructions were not erroneous, the Sixth Circuit relied on the defendant’s failure to “object to either the verdict form or the jury instructions with respect to their susceptibility to a double recovery” and noted that both parties were involved in drafting the verdict forms and jury instructions.⁷

Because JKD failed to object to the jury instructions, interrogatories and verdict forms on the basis that they would result in confusion or inconsistency, and because JKD failed to avail itself of the opportunity to have the jury clarify its interrogatory responses, JKD invited any error about which it now complains. Because the invited error doctrine precludes such complaints, JKD’s Motion must be overruled.

III. LAW AND ARGUMENT

A. The Jury’s Interrogatory Responses are Consistent and are Supported by the Evidence.

Although JKD argues that the jury’s awards to the interrogatories are “inconsistent,” it is clear from a review of the jury’s responses and the amounts awarded that no inconsistency exists. In fact, it is obvious that the jury very carefully considered the Court’s instructions based on the evidence and did not make multiple awards, but only permitted one recovery for a specific harm. JKD has not, and cannot, satisfy its burden of demonstrating any inconsistency in the jury’s answers to the interrogatories.⁸

1. Plaintiffs’ unjust enrichment and conversion claims.

Plaintiffs’ award of damages for unjust enrichment and conversion are consistent, not contradictory and demonstrate no confusion.⁹ In discussing whether interrogatories are inconsistent, the Southern District of Ohio explained that “to qualify as inconsistent . . . there must be no rational, non-speculative way to reconcile . . . two essential jury findings. . . . The

⁷ *Johnson v. Howard* (6th Cir. 2001), 24 Fed. Appx. 480, 485.

⁸ *Id* at 486.

⁹ JKD’s Motion for a New Trial, p 3-4.

answers should be considered inconsistent . . . only if there is no way to reconcile them”¹⁰

Interrogatories are reconcilable if they address different factual questions.¹¹ Another Ohio District Court recently rebuffed an argument that the jury’s damage award shows how confused the jury was by the instructions, explaining that “a jury’s award of damages will not be overturned if the verdict is within the range of proof and the jury was properly instructed.”¹²

Additionally, juries are presumed to follow the instructions given.¹³ “[I]t is always presumed that the jury has followed the instructions given to it by the trial court. Therefore, we must presume that the jury applied the law as instructed to them on the issue of not awarding damages for the same item twice.”¹⁴ In making this presumption, it is appropriate to review the evidence admitted at trial to determine if the evidence supports the damages awarded.¹⁵ As explained by the Sixth Circuit, in the event of claimed inconsistencies in answers to interrogatories, “it is incumbent upon a trial court . . . to reconcile the answers if possible under any view of the evidence in the case” and that “the consistency of jury verdicts must be considered in light of the judge’s instructions to the jury.”¹⁶

In *Johnson*, the jury awarded the plaintiff \$15,000 for his assault and battery claims and \$15,000 for his excessive force claim under the Eighth Amendment. The court firmly held that the defendant’s argument that the verdict forms and instructions were erroneous and resulted in a double recovery was not well-taken, explaining that, “[a]lthough a double recovery may not be had, the jury is not prohibited from allocating a total damages award between different theories

¹⁰ *Cunningham v. Mitsubishi Motors Corp.* (S.D. Ohio 1993), 1993 U.S. Dist. LEXIS 21299, *21 (Rice, J.)

¹¹ *Id.*

¹² *Micrel, Inc. v. TRW, Inc.* (N.D. Ohio 2005), 2005 U.S. Dist. LEXIS 34929, *28.

¹³ *Hildebrandt v. Hyatt Corp.*, 154 Fed. Appx. 484, 2005 U.S. App. LEXIS 24972, *12 (6th Cir. 2005) citing *Holmes v. City of Massillon*, 78 F.3d 1041, 1047 (6th Cir. 1996).

¹⁴ *Shampton v. City of Springboro*, Warren Cty. Case No. CA2000-08-080, CA 2000-09-081, 2001 Ohio App. LEXIS 5105 (overruled on other grounds), citing *Pang v. Minch* (1990), 53 Ohio St.3d 186.

¹⁵ *Id.*

¹⁶ *Johnson v. Howard* (6th Cir. 2001), 24 Fed.Appx. 480, 485, citing *Waggoner v. Mosti* (6th Cir. 1986), 792 F.2d 595, 597. See also, *United States of America v. Alpine Industries* (6th Cir. 2003), 352 F.3d 1017, 1026; *York v. Purkey* (6th Cir. 2004), 93 Fed. Appx. 697, 700; *Coggins v. KLLM, Inc.* (6th Cir. 2005), 146 Fed.Appx. 9, 12.

of recovery.”¹⁷ Based upon that legal principle, and exercising its incumbent duty to reconcile the jury’s verdict under any view of the evidence in the case, the court held that the jury’s verdict could be construed to have found that the plaintiff suffered a total of \$30,000 in compensable damages and merely divided that amount between two different causes of action.¹⁸

Similarly, in *Shampton*, the jury, after being instructed not to award damages for the same item twice, deliberated and returned answers to special interrogatories, finding that defendant made a promise to plaintiff to establish a long-term lease, which defendant should have reasonably expected plaintiff to rely on, and awarded plaintiff damages. The jury also returned special interrogatories finding that defendant breached a lease agreement with plaintiff and awarded plaintiff damages. On appeal the defendant complained that the jury returned inconsistent verdicts. The court, after reviewing the evidence, found that the jury’s award of \$120,000 for plaintiff’s damages as a result of defendant’s representation that it intended to establish a lease was, in fact, supported by the amount of money plaintiff invested in the restaurant and fixtures, and that the jury’s award of \$85,000 for breach of contract was based upon evidence of the lost profits plaintiff would have realized. The court found that the jury awarded distinct damages amounts based upon the evidence and concluded that the jury did not award damages for the same item twice.¹⁹

The jury in this case followed the instructions of the Court and, after several hours of deliberation, returned answers to special interrogatories finding for Plaintiffs on each of their claims, and awarded separate and distinct damages for each claim. That is, the Interrogatories submitted by the Court and without objection by JKD as to unjust enrichment and conversion addressed different factual issues—as evidenced not only by the Court’s instructions, but by the

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Shampton, supra* at *12.

damages awarded in response to each Interrogatory. Thus, the Interrogatory answers are reconcilable, and are not inconsistent.²⁰

2. JKD Failed to Object to Evidence Regarding the Retail Value of the Pink Diamond.

Three of Plaintiffs' witnesses testified regarding the retail value of the Pink Diamond—all without any objection to such testimony by JKD. On November 4, 2008, John Chambers testified that, according to John Stafford, the Pink Diamond was very valuable, and worth anywhere between \$2,000,000 and \$5,000,000. Roger Lorelle, who testified on November 12, 2008, told the jury that he understood the net worth of the Pink Diamond to be between \$1,500,000 and \$2,500,000. As instructed by the Court, “the law does not require that the amount of damages be proved with mathematical precision, but only with as much definiteness and accuracy as circumstances permit.” (Jury Instructions, Compensatory Damages, at pp. 24-25). On November 4, 2008, John Stafford, explaining the difference between selling the Pink Diamond to JKD at wholesale price versus selling the Pink Diamond for a retail price, testified that he offered to sell the Pink Diamond to Jed Baron for \$3,000,000, and that he also offered to sell it to the Beerman family (through John Chambers) for a percentage mark-up from the wholesale price. John Stafford further explained that the retail price of a stone such as the Pink Diamond also depends on the relationship between the seller and the buyer, as well as current trends in the market, that he monitored the auction prices for pink diamonds and knew that the price of pink diamonds had doubled every five years since the 1990s. According to Stafford, if the Pink Diamond were cut to increase the number of facets, close the open culet, and cut out the inclusion in the Pink Diamond, its value could increase to as much as \$4,000,000.

²⁰ *Cunningham, supra.*

It is well-established Sixth Circuit law that the owner of personal property is qualified by his ownership alone to testify as to its value.²¹ Thus, based upon the totality of John Stafford's testimony, both as a lay-witness owner of the Pink Diamond and in his capacity as the CEO of Stafford Jewelers, there is sufficient evidence in the record to support a retail value for the Pink Diamond.²²

III. CONCLUSION.

Based upon the evidence, and the instructions of the Court which the jury is presumed to have followed, the amounts awarded for each of Plaintiffs' claims are independent, are based upon different facts, do not overlap, and are supported by the evidence. JKD has not demonstrated any legal or evidentiary basis for its arguments and its Motion for New Trial must be overruled.²³

²¹ *Lawton v. Strong* (6th Cir. 1957), 249 F.2d 299, 302.

²² Clearly, the jury followed the Court's instructions regarding not awarding duplicative damages by finding the "retail" value to be \$2.3 million.

²³ Plaintiffs' note that JKD cites *Hopkins v. Coen* (6th Cir. 1970), 431 F.2d 1055 in support of its argument that the Interrogatory Answers here are inconsistent and that it is entitled to a new trial. *Hopkins*, however, is inapplicable as it is factually distinguishable from the instant case. In *Hopkins*, although the jury returned four verdicts, the Court informed the parties of the jury's answers to only two of those Verdicts. And, the totality of the answers to all four Verdicts were wholly inconsistent. As the *Hopkins* Court summarized, "the following verdicts were returned at the conclusion of the jury's deliberations: a verdict *for* Terry Eugene Hopkins against the defendants in the amount of \$75,000; a verdict *against* Terry Eugene Hopkins for the defendants; a verdict *for* the estate of George R. Hopkins against the defendants in the amount of \$0; and a verdict *against* the estate of George R. Hopkins for the defendants . . . the court then read only two of the verdicts into the record."

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that true copies of the foregoing document were filed and served on counsel of record electronically through the Court's CM/ECF system on December 12, 2008 and also served by e-mail on:

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