

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

U.S. DIAMOND & GOLD D/B/A
STAFFORD'S JEWELERS, et al.,

Plaintiffs,

Case No. C-3-06-371

Judge Thomas M. Rose

-v-

JULIUS KLEIN DIAMONDS LLC, et al.,

Defendants.

**JKD'S MOTION FOR A NEW TRIAL IS OVERRULED (Doc. #209);
JUDGMENT AS A MATTER OF LAW IS GRANTED TO JKD ON THE
ISSUE OF DAMAGES ON STAFFORD JEWELERS' AND JOHN
STAFFORD'S THEFT CLAIM; FINDING THAT STAFFORD JEWELERS
AND JOHN STAFFORD ARE NOT ENTITLED TO TREBLE DAMAGES
ON THEIR THEFT CLAIM; AND GIVING STAFFORD JEWELERS AND
JOHN STAFFORD NOT MORE THAN THIRTY (30) DAYS TO SUBMIT
A MOTION FOR ATTORNEYS' FEES AND COSTS ASSOCIATED WITH
THEIR CONVERSION CLAIM**

The trial of this matter was bifurcated into two phases. The first phase was a determination of liability and compensatory damages, and the second phase was a determination of liability for punitive damages and the amount of punitive damages. The determination of liability and compensatory damages was tried to a Jury beginning November 3, 2008. Plaintiffs Stafford Jewelers and John Stafford tried claims of unjust enrichment, conversion and civil liability for theft. Defendant Julius Klein Diamonds ("JKD") tried a counterclaim for fraud.

The Jury reached a verdict on the determination of liability and compensatory damages on November 19, 2008. The Jury found for Stafford Jewelers and John Stafford on their unjust enrichment, conversion and civil liability for theft claims and for Stafford Jewelers and John Stafford on JKD's counterclaim for fraud.

The second phase of the trial, which was on the determination of liability for punitive damages and the amount of punitive damages, was tried to the same jury beginning on November 24, 2008. The Jury reached a verdict on that same day. The Jury found that JKD's actions did not demonstrate malice and that JKD knowingly authorized, participated in or ratified the actions of an agent that did demonstrate malice. No punitive damages were awarded.

This matter is now before the Court on one Motion and one issue. On November 21, 2008, after the verdict was reached in the first phase of the Trial, JKD filed a Motion for a New Trial Based On Inconsistent Interrogatory Answers. (Doc. #209.) Stafford Jewelers and John Stafford responded. (Doc. #215.) JKD replied (doc. #217) and then submitted an Amended Reply (doc. #219). This Motion is now fully briefed and ripe for decision. JKD's Amended Reply, and not its initial Reply, will be considered.

On December 19, 2008, Stafford Jewelers and John Stafford filed a Notice of Statutory Election of Damages Pursuant To R.C. § 2307.61 and a Proposed Judgment Entry. (Doc. #216.) To this, JKD responded and Stafford Jewelers and John Stafford replied. It too is, therefore, ripe for consideration. JKD's Motion for a New Trial will first be considered.

I. JKD'S MOTION FOR A NEW TRIAL

Both Parties agree that the jury instructions on damages were clear and unambiguous. JKD, however, argues that the jury returned inconsistent and contradictory answers to the Interrogatories requiring a new trial pursuant to Fed. R. Civ. P. 49(a) and 59(a)(1)(A). The Interrogatories and Verdict Forms will first be summarized followed by the relevant legal provisions, the Parties' arguments and an analysis of JKD's Motion.

A. Interrogatories and Verdict Forms

In addition to the Instructions, the Jury was given nine (9) Interrogatories and four (4) Verdict Forms for the first phase of the Trial. After approximately seven (7) hours of deliberations the jury submitted the following written question to the Court: “We are requesting clarification on compensatory damages. Are we allowed to award compensatory damages in each Interrogatory?” The Court, with the agreement of Counsel, responded in writing: “Yes. However, the compensatory damages if awarded must not be duplicative. Please review the instructions on compensatory damages and multiple recoveries prohibited contained on pages 24-26 of your instructions.”

Pages 24 and 25 are the instructions on Compensatory Damages. Page 26 is entitled “Multiple Recoveries Prohibited,” and reads as follows:

There is an overlap of matters for which damages can be awarded to Stafford Jewelers and John Stafford. Purely as an example, Stafford Jewelers and John Stafford could conceivably recover the value of the Pink Diamond for each of their claims. Therefore, in determining the amount of damages, if any, which will reasonably compensate the party making more than one successful claim, you must avoid making a multiple award. In other words, a party bringing more than one claim is entitled to recover only once for a specific harm suffered, regardless of how many claims you resolve in that party’s favor.

After more than three (3) hours of additional deliberation, the Jury returned their answers to the Interrogatories and Verdict Forms for the first phase of the Trial.

In response to Interrogatory No. 1, “Have Stafford Jewelers and John Stafford proved, by a preponderance of the evidence, that JKD was unjustly enriched by acquiring the Pink Diamond without compensating Stafford Jewelers and John Stafford?” the Jurors checked “Yes.” In response to Interrogatory No. 2, “What amount of compensatory damages, if any, would compensate Stafford Jewelers for JKD’s unjust enrichment?” the Jurors wrote “\$8,400.”

In response to Interrogatory No. 3, “Have Stafford Jewelers and John Stafford proved, by

a preponderance of the evidence, that JKD wrongfully converted and exercised dominion and control over the Pink Diamond?” the Jurors checked “Yes.” In response to Interrogatory No. 4, “What amount of compensatory damages, if any, would compensate Stafford Jewelers and John Stafford for JKD’s conversion of the Pink Diamond?” the Jurors wrote “\$1.7 million.” In response to Interrogatory No. 5, “Should JKD be liable for the money expended by Stafford Jewelers and John Stafford for attorneys fees in the prosecution of their conversion claim? If you decide that JKD is liable for attorneys fees, the Court will determine that amount,” the Jurors checked “Yes.”

In response to Interrogatory No. 6, “Have Stafford Jewelers and John Stafford proved, by a preponderance of the evidence, that JKD committed the criminal act of theft by stealing the Pink Diamond from Stafford Jewelers and John Stafford?” the Jurors checked “Yes.” In response to Interrogatory No. 7, “What amount of compensatory damages, if any, would compensate Stafford Jewelers and John Stafford for JKD’s theft of the Pink Diamond?” the Jurors wrote “\$2.3 million.”

In response to Interrogatory No. 8, “Has JKD proved by a preponderance of the evidence, that Stafford Jewelers and John Stafford committed fraud. That is, that Stafford Jewelers and John Stafford knowingly and with the intent to mislead JKD, made a false representation of material fact regarding the events surrounding the loss of the Pink Diamond and that JKD justifiably relied on those misstatements to their detriment,” the Jurors checked “No.” In response to Interrogatory No. 9, “What amount of compensatory damages, if any, would compensate JKD for Stafford Jewelers’ and John Stafford’s commission of fraud with regard to the loss of the Pink Diamond?” the Jurors left the answer line blank.

In addition to the nine (9) Interrogatories, the Jury was given four (4) Verdict Forms. On the Verdict Form for Stafford Jewelers' and John Stafford's Unjust Enrichment Claim, the Jurors checked the answer, "for Stafford Jewelers and John Stafford on Stafford Jewelers' and John Stafford's unjust enrichment claim." On the Verdict Form for Stafford Jewelers' and John Stafford's Conversion Claim, the Jurors checked the answer, "for Stafford Jewelers and John Stafford on Stafford Jewelers' and John Stafford's conversion claim." On the Verdict Form for Stafford Jewelers's and John Stafford's Theft Claim, the Jurors checked the answer, "for Stafford Jewelers and John Stafford on Stafford Jewelers' and John Stafford's theft claim." Finally, on the Verdict Form for JKD's Fraud Claim, the Jurors checked the answer, "for Stafford Jewelers and John Stafford on JKD's fraud Claim."

All eight Jurors signed Interrogatories No. 1 through 8 and all eight Jurors signed all four (4) Verdict Forms. The Jurors wrote nothing on any of the Interrogatories or Verdict forms other than what is indicated above.

The Jury was given three (3) Interrogatories on the punitive damages phase of the Trial. During deliberation, the Jury submitted the following written question to the Court: "Is this Interrogatory #2 asking us if JDK or agent or servant acted with malice in the conversion of the Pink Dia." With the agreement of counsel, the Court responded, "Please refer to Punitive Damage Claim Inst. page 15 paragraph 2." The second paragraph of page 15 of the punitive damages instructions reads:

You may decide that JKD is liable for punitive damages on Stafford Jewelers' and John Stafford's conversion claim if you find by clear and convincing evidence that the actions or omissions of JKD demonstrate malice or that JKD, as principal or master, knowingly authorized, participated in, or ratified actions or omissions of an agent or servant that demonstrate malice.

In response to Punitive Damage Interrogatory No. 1, “Do you find by clear and convincing evidence that actions or omissions by JKD with regard to conversion of the Pink Diamond demonstrate malice?” the Jury checked “No.” In response to Interrogatory No. 2, “Do you find by clear and convincing evidence that JKD, as principal or master, knowingly authorized, participated in or ratified the actions of an agent or servant that you have determined to have demonstrated malice with regard to conversion of the Pink Diamond?” the Jurors checked “Yes.” In response to Interrogatory No. 3, “What amount of punitive damages, if any, has Stafford Jewelers and John Stafford proved by clear and convincing evidence on their conversion claim against JKD?” the Jurors wrote “-0-.”

All eight Jurors signed punitive damages Interrogatories No. 1 through 3. The Jurors wrote nothing on any of these Interrogatories other than what is indicated above. The Jurors were not given a verdict form for the punitive damages phase of the Trial.

B. Relevant Legal Provisions

In this case, JKD has brought a Motion for a New Trial (doc. # 209) pursuant to Fed. R. Civ. P. 49(a) and 59(a) but this Motion does not include a renewed motion for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(b). However, a motion for a new trial brought pursuant to Rule 59 may be joined with a renewed motion for judgment as a matter of law brought pursuant to Fed. R. Civ. P. 50(b). 9B Charles Alan Wright and Arthur R. Miller, *Federal Practice and Procedure* § 2531 (3d ed. 2008).

Absent a motion, judgment as a matter of law may be granted sua sponte. *Aetna Casualty and Surety Co. v. Leahey Construction Co, Inc.*, 219 F.3d 519, 546 (6th Cir 2000). Further, on at least one of the issues raised by JKD’s Motion for a New Trial, the Court will

consider judgment as a matter of law sua sponte.

i. Motion for Judgment As a Matter of Law Compared To Motion for a New Trial

Motions for judgment as a matter of law brought pursuant to Rule 50(b) have distinct functions and different standards governing their allowance from motions for a new trial brought pursuant to Rule 59. Wright and Miller, *supra*. If a motion for a new trial is granted, the case is tried again. *Id.* If judgment as a matter of law is granted, the case is at an end. *Id.* Therefore, because of the finality of a judgment as a matter of law, it is measured by a “far more rigorous standard.” *Id.*

On a motion for a new trial, the court has “wide discretion” to order a new trial whenever there has been a prejudicial error. *Id.* On a motion for judgment as a matter of law, the court has no discretion. *Id.*

On a motion for a new trial, the trial judge may consider the credibility of witnesses and the weight of the evidence. *Id.* On a motion for judgment as a matter of law, the judge may not consider the credibility of witnesses and weigh the evidence. *Id.*

Thus, a judge may set aside a verdict supported by substantial evidence where the judge determines that the verdict is contrary to the clear weight of the evidence, is based upon false evidence or to prevent a miscarriage of justice. *Garrison v. United States*, 62 F.2d 41, 42 (4th Cir. 1932). However, judgment as a matter of law may be granted “only where there is no substantial evidence to support recovery by the party against whom it is directed or where the evidence is all against him or so overwhelmingly so as to leave no room for doubt what the fact is.” *Id.* (citing *Gunning v. Cooley*, 281 U.S. 90 (1930)).

ii. Motion for Judgment as a Matter of Law Pursuant To Rule 50

When considering judgment as a matter of law, the court reviews all evidence and draws all reasonable inferences in a light most favorable to the party against whom the judgment as a matter of law is being considered. *Jackson v. FedEx Corporate Services, Inc.*, 518F.3d 388, 392 (6th Cir. 2008)(reh'g en banc denied); *see also Groob v. KeyBank*, 843 N.E.2d 1170, 1173 (Ohio 2006). Judgment as a matter of law is appropriate when “a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue.” *Id.*(quoting Fed. R. Civ. P. 50(a)(1)). Said another way, judgment as a matter of law is appropriate “whenever there is a complete absence of pleading or proof on an issue material to the cause of action or when no disputed issues of fact exist such that reasonable minds would not differ.” *Id.*(quoting *Jackson v. Quanex Corp.*, 191 F.3d 647, 657 (6th Cir. 1999)).

Finally, a motion for judgment as a matter of law does not present factual issues. *Groob*, 843 N.E.2d at 1173. A motion for judgment as a matter of law presents a question of law even though a decision on such a motion requires consideration of the evidence. *Id.*(citing *O’Day v. Webb*, 280 N.E.2d 896 (Ohio 1972)).

iii. Motion for a New Trial Pursuant To Rule 59

A new trial may be granted for a variety of reasons. Those reasons relevant to JKD’s Motion include the validity of jury verdicts, faulty jury instructions, inconsistencies in interrogatory answers, jury impropriety and inconsistent damage awards.

a. Jury Verdicts

Where a question as to the validity of a jury verdict is raised, “it is incumbent upon a trial court... to reconcile the answers if possible under any view of the evidence in the case.” *Johnson v. Howard*, 24 Fed. Appx. 480, 485 (6th Cir. 2001)(quoting *Waggoner v. Mosti*, 792 F.2d 595,

597 (6th Cir. 1986)). Where the verdicts and answers to interrogatories could reasonably have been reached based upon the evidence presented at trial, a new trial should not be granted. *Valley City Steel, LLC v. Liverpool Coil Processing, Inc.*, No. 5:05CV1902, 2008 U.S. Dist. LEXIS 39285 at *11 (N.D. Ohio May 12, 2008). Further, a verdict is not unreasonable simply because different inferences and conclusions could have been drawn or because other results are more reasonable. *Id.* at *12 (citing *J.C. Wyckoff & Associates v. Standard Fire Insurance Co.*, 936 F.2d 1474, 1487 (6th Cir. 1991)).

Verdicts may be set aside under certain circumstances. For example, a verdict must be set aside if it is against the manifest weight of the evidence. *Valley City Steel*, 2008 U.S. Dist. LEXIS at *11 (citing *Wyckoff*, 936 F.2d at 1487). However, a jury verdict is overturned based upon the verdict being against the manifest weight of the evidence only where it appears that the jury totally misapprehended the facts or were influenced by sympathy, bias, prejudice, wilful disregard of duty, perversity, corruption or other motives. *Shampton v. City of Springboro*, Nos. CA2000-08-080, CA 2000-09-081, 2001 Ohio App. LEXIS 5105 at *8-9 (Ohio Ct. App. Nov. 13, 2001), *rev'd on other grounds by* 786 N.E.2d 883 (Ohio 2003).

In addition to the validity of any one verdict, the consistency of jury verdicts may also be an issue. Multiple verdicts may be set aside if they are inconsistent on their faces. *Hopkins v. Coen*, 431 F.2d 1055, 1059 (6th Cir. 1970). Verdicts that are inconsistent on their faces are an indication that the jury was either in a state of confusion or abused its power. *Id.*

The consistency of the jury verdicts are to be considered in light of the judge's instructions to the jury. *Id.*(citing *Waggoner*, 792 F.2d at 597). However, when considering inconsistencies, a judge may not treat one verdict as the jury's "true" disposition and conform

another verdict thereto. *Timm v. Progressive Steel Treating, Inc.*, 137 F.3d 1008, 1010 (7th Cir. 1998). The proper thing to do is conduct a new trial. *Id.* Finally, if it is necessary to correct a mistrial, the court has a duty to set aside the erroneous proceedings and grant a new trial. *Pugh v. Bluff City Excursion Co.*, 177 F. 399, 401 (6th Cir. 1910).

b. Jury Instructions

A verdict may also be set aside and a new trial ordered based upon faulty jury instructions. *Micrel, Inc. V. TRW, Inc.*, No. 1:02 CV 2539, 2005 U.S. Dist. LEXIS 34929 at *15 (N.D. Ohio Dec. 22, 2005)(citing *United States v. Beaty*, 245 F.3d 617, 621 (6th Cir. 2001)), *aff'd*, 486 F.3d 866 (6th Cir. 2007). However, jury instructions will not be a basis for a new trial where the instructions as a whole are not misleading and leave the reader with a sense of what the court was asking. *Id.* at *15. Further, it is always presumed that the jury has followed the instructions given to it by the trial court if nothing indicates that the jury did otherwise. *Hildebrandt v. Hyatt Corp.*, 154 Fed. Appx. 484, 489 (6th Cir. 2005).

A trial court has broad discretion in drafting jury instructions. *Micrel*, 2005 U.S. Dist. LEXIS 34929 at *14. The jury instructions should identify the issues and accurately state the law. *Id.* at 14-15. “Whether a court uses a special or general verdict rests in its discretion, as does the content and form of any interrogatories it chooses to submit.” *Id.* at 24-25 (citing *Bills v. Aseltine*, 52 F.3d 596, 605 (6th Cir. 1995), *cert. denied*, 516 U.S. 865 (1995)).

c. Jury Interrogatories

A verdict may also be set aside and a new trial ordered if the answers to interrogatories are inconsistent with each other and one or more is likewise inconsistent with the general verdict. *Id.* at *25(citing Fed. R. Civ. P. 49(b)). Answers to interrogatories are inconsistent when

there is “no rational, nonspeculative way to reconcile two essential jury findings.” *Cunningham v. Mitsubishi Motors Corp.*, No. C-3-88-582, 1993 U.S. Dist. LEXIS 21299 at *21 (S.D. Ohio June 16, 1993)(citing *Witt v. Norfe, Inc.*, 725 F.2d 1277, 1278 (11th Cir. 1984)). However, answers should be considered inconsistent only if there is no way to reconcile them. *Id.* Finally, answers may be reconcilable if they address different factual questions. *Id.*

d. Jury Impropriety

A new trial on all of the issues is necessary where the circumstances point irrefutably to some kind of jury impropriety. *Hatfield v. Seaboard Air Line Railroad Co.*, 396 F.2d 721, 724 (5th Cir. 1968). Circumstances considered include hotly contested liability, jury confusion on one of the issues, the time required by the jury to reach a verdict, acceptance of the verdict by the parties, and a damage award that lacks support in the record. *Id.* at 723. If the jury impropriety contaminates the entire verdict, a new trial on damages alone is precluded. *Id.* at 724.

e. Damages

Finally, regarding findings on damages, if damage awards are inconsistent, a new trial is warranted. *Pugh*, 177 F. at 401. However, 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.” Yet, some evidence of damages, particularly in this case, the market value of the Pink Diamond when it was sent to JKD, must be presented from which a finder of fact could determine the market value. *See Polen Implement, Inc. v. Toth*, 2008 Ohio App. LEXIS 2742 at *24 (Ohio Ct. App. June 30, 2008); *Werr v. Moccabee*, 2008 Ohio App. LEXIS 509 at *10 (Ohio Ct. App. Feb. 13, 2008); *Bingman v. Fowler*, 2007 Ohio App. LEXIS 2141 at *26 (Ohio Ct. App. May 10, 2007).

If appropriate evidence is presented, a party is not entitled to recover damages twice for the same loss even if that party would otherwise be able to recover under separate theories of liability. *Johnson*, 24 Fed. Appx. at 484(citing *General Telephone Co. of the Northwest v. EEOC*, 446 U.S. 318, 333 (1980)). Yet, although a party may not recover twice for the same loss, the jury is not prohibited from allocating a total damage award between different theories of recovery. *Id.* at 485(citing *Gentile v. County of Suffolk*, 926 F.2d 142, 154 (2d Cir. 1991)).

C. JKD's Arguments

JKD argues that the damages awarded to Stafford Jewelers and John Stafford on their unjust enrichment, conversion and theft claims “are in clear conflict with one another and together are non-sensical.” More specifically, JKD argues that compensatory damages on the unjust enrichment and conversion claims should have been identical and that there is no evidence from which the Jury could have determined the retail value of the Pink Diamond for its response to the Interrogatory on damages for theft. In its Amended Reply Memorandum, filed after completion of the punitive damage phase of the Trial, JKD also argues that the punitive damages interrogatory answers are further evidence of the Jury’s confusion.

D. Stafford Jewelers’ and John Stafford’s Response

Stafford Jewelers and John Stafford respond that the Jury’s answers to the Interrogatories are completely consistent with the Jury Instructions, with the evidence presented and with each other. They also argue, invoking the “invited error” doctrine, that JKD cannot now object after failing to try to correct any of the errors about which it now complains.

E. Analysis

i. Unjust Enrichment and Conversion

The Jury found that JKD was unjustly enriched by its acquisition of the Pink Diamond without compensating Stafford Jewelers and John Stafford. (Interrogatory No. 1.) The Jury also found that JKD wrongfully converted and exercised dominion and control over the Pink Diamond. (Interrogatory No. 3.) Being consistent, the Jury entered verdicts for Stafford Jewelers and John Stafford on their unjust enrichment claim (Verdict Form for Stafford Jewelers' and John Stafford's Unjust Enrichment Claim) and for Stafford Jewelers and John Stafford on their conversion claim (Verdict Form for Stafford Jewelers' and John Stafford's Conversion Claim).

Consistent with their liability findings, the Jury awarded damages. The Jury awarded Stafford Jewelers and John Stafford \$8,400 on their unjust enrichment claim (Interrogatory No. 2) and \$1.7 million on their conversion claim (Interrogatory No. 4). The issue then is whether the damages that the Jury awarded on the unjust enrichment and conversion claims are consistent.

The Jury Instructions, which are not challenged by either party at this time, provide that the measure of damages for conversion of the Pink Diamond "is determined by the value of the Pink Diamond when Stafford Jewelers and John Stafford sent it to JKD." The Jury Instructions also provide that the measure of damages for conversion of the Pink Diamond "is determined by the value of the Pink Diamond when Stafford Jewelers and John Stafford sent it to JKD." Thus, these two instructions are identical. However, the Jury Instructions, under the heading "Compensatory Damages," also provide that:

The actual compensatory damages may include out-of-pocket expenses. If you find for Stafford Jewelers and John Stafford on their unjust enrichment claim, you may award Stafford Jewelers and John Stafford the value of any unjust enrichment gained by JKD that is not taken into account in computing the actual loss to Stafford Jewelers and John Stafford.

Thus, the Jury Instructions on damages for the unjust enrichment claim and damages for the

conversion claim are not the same. Damages for the unjust enrichment claim may include the value of any unjust enrichment gained by JKD.

Further, the Jury Instructions prohibit multiple recoveries. The Jury was told that there was an overlap of matters for which damages could be awarded to Stafford Jewelers and John Stafford and that Stafford Jewelers and John Stafford could recover only once for a specific harm suffered.

The analysis next considers the evidence presented to the jury. John Stafford testified several times that he paid \$8,000 for the Pink Diamond. Zuri Mesica testified that to send one Brinks package "would cost you \$300 or \$400 plus insurance." (Nov. 13, 2008 Transcript ("Tr.") 214.) Further, John Stafford provided expert testimony that the wholesale value of the Pink Diamond was \$1.5 to \$1.7 million. He also testified that he had insurance on the shipment of the Pink Diamond in the amount of \$1.7 million.

Thus the Jury could reasonably conclude that \$1.7 million was the value of the Pink Diamond when John Stafford sent it to JKD. The Jury could also reasonably conclude that John Stafford had \$8,400 in out-of-pocket expenses. This amount is the total of the amount John Stafford paid for the Pink Diamond and the cost of sending the Pink Diamond to JKD.

Avoiding awarding the value of the Pink Diamond when John Stafford sent it to JKD more than once, as the law requires and the Jury was instructed, the Jury could reasonably have awarded the \$1.7 million as damages for only the conversion claim. Further, the Jury was instructed that damages for unjust enrichment could include out-of-pocket expenses in addition to the actual loss. Since the value of the actual loss was awarded for the conversion claim, the Jury could reasonably have awarded only out-of-pocket expenses of \$8,400 for the unjust

enrichment claim.

Therefore, the answers to the unjust enrichment and conversion claims could reasonably have been reached based upon the evidence presented at trial. The Jury Interrogatories for the unjust enrichment and conversion claims are not inconsistent and no further action by the Court is required on these two claims.

ii. Theft

Turning now to the theft claim, the applicable Jury Instruction tells the Jurors that the measure of damages for the theft claim "is determined by the **retail** value of the Pink Diamond **when Stafford Jewelers and John Stafford sent it to JKD**. (Emphasis added.) The **retail** value is the value of the Pink Diamond when it is offered for sale by a merchantile establishment." (Emphasis added.) The Jurors were further instructed that, "[t]he party seeking compensatory damages has the burden of proving by a preponderance of the evidence what compensatory damages, if any, were the natural and probable result of the other party's or parties' wrongful acts." Finally, the Jury was instructed that "any amount of damages which you decide to award must not be based upon speculation or uncertainty," and "on the other hand, 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." JKD does not dispute these instructions but argues that no evidence of the retail value was presented.

On November 4, 2008, John Stafford testified that he purchased the Pink Diamond on June 3, 2005, for \$8,000. (Nov. 4, 2008 Tr. 87-88.) He testified that he "knew" the Pink Diamond was worth at least 2 million dollars at a fancy intense pink and if the Pink Diamond "went to vivid," it could be worth "3 or 4 million dollars" but you would have to "take that stone

and put it back on the wheel and cut it. And when you do that you heat this stone up. And the stone can break or on the pink stones what happens is when you apply excessive heat, the color of the stone can change either temporarily or permanently. And you don't know what is going to happen and that can affect the value. And I personally would be unwilling to take the risk on it." (Id. 117.) He then testified that he did not plan to sell the Pink Diamond in 2005 because "the prices of pink diamonds were going crazy." (Id. 132.)

John Stafford also testified that he had the ability to sell the Pink Diamond retail to Jed Baron. (Id. 136.) He testified that he showed the Pink Diamond to Jed Baron when he (John Stafford) was in Vegas and gave Jed Baron a price that "I think it was either three or three and a half million dollars...." (Id.) John Stafford also testified that he told John Chambers that he would sell the Pink Diamond to the Beerman family "at a wholesale price plus 10 percent." (Id. 137.) On November 5, 2008, John Stafford testified that the value of the Pink Diamond that he discussed with Jed Baron and the Beerman family was **retail** value. (Nov. 5, 2008 Tr. 30; emphasis added.)

On November 5, 2008, John Stafford was asked what the fair market value range was of the Pink Diamond on February 14, 2006. He responded, "between \$1.7 and 3.5 Million." (Nov. 5, 2008 Tr. 27.) Upon objection by JKD, this testimony was struck and the Jury was instructed to disregard this answer. (Id. 28.) He was then asked what the wholesale value of the Pink Diamond was on February 14, 2006. (Id. 29-30.) He responded, "1.5 Million Dollars to 1.7 Million Dollars." (Id. 30.) John Stafford also testified that he told Zuri Mesica that he "was asking somewhere between, you know, in that Million 5, Million 7 range...." (Id. 79.)

Roger Laurel testified that, in June of 2005, John Stafford showed him a pink diamond.

(Nov. 12, 2008 Tr. 8-10.) He further testified that John Stafford later told him "the net worth could be anywhere from a million and a half to two and a half million dollars depending on the quality of the stone. (Tr. 10.)

John Chambers testified that, in late November or early December of 2005, John Stafford showed him what John Stafford called a pink diamond. (Nov. 4, 2008 Tr. 8, 10.) John Stafford told him that the pink diamond was a "valuable piece" and was worth "over 2 Million Dollars." (Id. 9-10.) John Stafford also told John Chambers that the pink diamond "might be worth considerably more than that depending upon the buyer and how it finally got cut and polished." (Id. 10.) John Chambers remembers John Stafford mentioning "higher numbers, perhaps even 3 to 5 Million Dollars" and that "it was clearly over 2 Million Dollars" depending upon the buyer and how the pink diamond finally got cut and polished. (Id.)

Assuming that the Jury did not award duplicate damages, to reach the \$2.3 million awarded for theft, they must have assumed that the **retail** value of the Pink Diamond at the time it was sent to JKD was \$4.0 million, the sum of the \$1.7 awarded for the conversion claim and the \$2.3 million awarded for the theft claim. Yet, there was no evidence that the **retail** value of the Pink Diamond was \$4.0 million when it was sent to JKD.

John Chambers remembers John Stafford telling him that the Pink Diamond might be worth \$3 to 5 million depending upon how it finally got cut and polished but there is no evidence that the Pink Diamond had been cut and/or polished before it was sent to JKD. In fact, there is no evidence at all regarding the **retail** value of the Pink Diamond when Stafford Jewelers and John Stafford sent it to JKD.

Stafford Jewelers and John Stafford have been fully heard on the issue of the **retail** value

of the Pink Diamond when it was sent to JKD and there is no legally sufficient evidentiary basis for a reasonable jury to find any **retail** value of the Pink Diamond when it was sent to JKD. Thus, there is no legally sufficient evidentiary basis for a reasonable jury to find any amount of damages for theft of the Pink Diamond and JKD is entitled to judgment as a matter of law on this issue.

iii. Punitive Damages

JKD argues that the punitive damage award is further evidence of the Jury's confusion. The Jury considered punitive damages immediately following the completion of the first phase of the trial which was on liability and compensatory damages. Evidence of punitive damages was presented and the Jury reached a verdict on the same day.

The Jury found that JKD's actions did not demonstrate malice. (Interrogatory No. 1.) The Jury did, however, find that JKD knowingly authorized, participated in or ratified the actions of an agent who demonstrated malice. (Interrogatory No. 2.) Yet, the Jurors awarded no punitive damages. (Interrogatory No. 3.)

The Jurors were instructed regarding the amount of punitive damages as follows:

If you award punitive damages, the amount should be fair and reasonable under all the facts and circumstances. It should not be excessive, nor influenced by passion, sympathy, or prejudice. The amount rests in your sound judgment and should be determined from all the evidence in the case. It should be an amount that will appropriately punish JKD for its conduct and deter similar conduct in the future. In reaching a decision as to the appropriate amount, you may consider the nature of the conduct that resulted in the injury, JKD's financial condition, and the amount necessary to deter future similar conduct.

JKD argues that the answers to the punitive damage Interrogatories "reflect a lack of understanding and indicate that there may have been a compromise to prevent disagreement."

JKD further argues that the answers to the punitive damage Interrogatories evidence the Jury's

confusion throughout the entire trial.

However, there are at least three (3) reasonable explanations for the Jury's answers to the punitive damage interrogatories. One is that the Jury decided that one of JKD's agents acted with malice but that a "fair and reasonable amount" of punitive damages for those actions was zero.¹ The Jury may also have decided not to award punitive damages against JKD for the actions of the agent of JKD that they thought acted with malice. Finally, nothing in the Jury Instructions required the Jury to award punitive damages.

iv. Reconciliation of Interrogatories

JKD also argues that it is not proper to reconcile the Interrogatories to one another. However, this argument lacks merit. First, JKD cites no law in support of this argument. Second, reconciliation of one Interrogatory on damages to another is proper, if not required, in a case such as this, where duplicate damage awards are possible and the Jury has been instructed not to make duplicate damage awards.

v. "Invited Error" Doctrine

Regarding the "invited error" doctrine, Stafford Jewelers and John Stafford argue that JKD is precluded from now complaining about inconsistent jury interrogatories when it failed to do so earlier. While JKD did not complain about the relevant Jury Instructions, it did file its Motion for a New Trial regarding the Jury's findings while the Jury was still impaneled and the trial was still in session. Thus, JKD cannot be said to have "invited" the error about which it now

¹In *Ealy v. City of Dayton*, No. 95-3969, 1996 U.S. App. LEXIS 33236 at *12 (6th Cir. Dec. 16, 1996), the Sixth Circuit found that a finding of liability (for excessive force in the Ealy case) does not, as a matter of law, entitle the plaintiff to an award of damages (compensatory damages in the Ealy case). The Sixth Circuit then identified a number of situations where a jury may reasonably conclude that compensatory damages are inappropriate in spite of finding that excessive force was used.

complains.

vi. Rule 49(a)

One final issue, JKD asserts that Fed. R. Civ. P. 49(a) is applicable in this case because there was no general verdict submitted to or returned by the Jury. JKD argues that Rule 49(b) applies only where the court submits written questions together with a general verdict.

However, Rule 49(b) applies. It applies when the court submits forms for a general verdict together with written questions on one or more issues of fact that the jury must decide. Fed. R. Civ. P. 49(b)(1). In this case, the Jury was given general verdict forms and written questions on one or more issues of fact.

Rule 49(b) provides the court with options when the answers are consistent with each other but one or more is inconsistent with the general verdict. Fed. R. Civ. P. 49(b)(3). Rule 49(b) also provides the court with options when the answers are inconsistent with each other and the verdict. Fed. R. Civ. P. 49(b)(4). In this case, none of the answers to the Interrogatories are inconsistent with the general verdicts and the answers to the Interrogatories are not inconsistent with each other. An answer to one of the interrogatories is not supported by the evidence. Therefore, Rule 49(b), while it may apply, does not provide a direction for the Court to take.

F. Conclusion

The Jury awards for Stafford Jewelers' and John Stafford's unjust enrichment and conversion claims are reasonable when compared to the evidence presented and to each other. A new trial is not merited on Stafford Jewelers' and John Stafford' unjust enrichment or conversion claims.

While the Jury determination that JKD committed the criminal act of theft by stealing the

Pink Diamond from Stafford Jewelers and John Stafford is supported by evidence submitted, the Jury's damage award for Stafford Jewelers' and John Stafford's theft claim cannot reasonably be supported by the evidence. No evidence of the **retail** value of the Pink Diamond when it was sent to JKD has been presented.

There are reasonable explanations for the Jury's answers to the punitive damages Interrogatories. Therefore, a new trial on punitive damages is not warranted.

No law preventing the reconciliation of Interrogatory answers has been identified by JKD, and, in fact, reconciliation is entirely proper and necessary when, as here, duplication of a damage award is entirely possible. Further, JKD did not "invite" error regarding the Jury Instructions. Finally, Rule 49 applies in this case and none of the answers to the Interrogatories are inconsistent with the general verdicts and the answers to the Interrogatories are not inconsistent with each other. However, one of the answers to an Interrogatory is not supported by any evidence.

The damages awarded to Stafford Jewelers and John Stafford on their unjust enrichment, conversion and theft claims are not in clear conflict with one another and are not non-sensical. Further, the compensatory damages on the unjust enrichment and conversion claims do not necessarily have to be identical. Finally, the punitive damages Interrogatory answers are not evidence of the Jury's confusion.

Therefore, JKD's Motion for a New Trial is **OVERRULED**. Further, JKD is Granted Judgment As a Matter of Law on the damages portion of Stafford Jewelers' and John Stafford's theft claim.

II. JKD'S NOTICE OF STATUTORY ELECTION AND PROPOSED JUDGMENT ENTRY

The issue of the election of treble damages on the theft claim will be addressed because it is fully briefed, it is a question of law, and it may later come into play. Stafford Jewelers and John Stafford assert that they are entitled to treble damages on the theft claim pursuant to Ohio Rev. Code § 2307.61(A)(1)(b)(ii). JKD responds that Stafford Jewelers and John Stafford cannot now elect treble damages because they did not pray for or seek treble damages at any time.

A. Relevant Legal Provisions

In a diversity action, such as this one, the Court applies the substantive law of the relevant state, Ohio in this case. *Atlantic Purchasers, Inc. v. Aircraft Sales, Inc.*, 705 F.2d 712, 716 (4th Cir. 1983)(citing *Hanna v. Plumer*, 380 U.S. 460 (1965)), *cert denied*, 464 U.S. 848 (1983). Also, in a diversity action, such as this one, the Court applies federal procedural rules. *Id.*

The substantive law at issue here is Ohio Rev. Code § 2307.61. Section 2307.61 sets forth damages recoverable for willful damage or theft. This regulation provides, relative to this matter, that, if a property owner brings a civil action to recover damages for theft, the property owner may elect to recover compensatory damages of \$150, if the value of the property was more than \$100 at the time it was stolen, and liquidated damages. Ohio Rev. Code § 2307.61(A)(1). Liquidated damages are defined as \$200 or three times the value of the property at the time it was stolen irrespective of whether the property is recovered, whichever is greater. Ohio Rev. Code § 2307.61(A)(1)(b).

The federal procedural law applicable here is Fed. R. Civ. P. 54(c). The relevant portion of Rule 54(c) provides that every final judgment, other than a default judgment, “should grant the relief to which each party is entitled, even if the party has not demanded that relief in its

pleadings.”

Rule 54(c) entitles a prevailing plaintiff to the relief proper to the claim even if that relief was not requested because the circumstances bearing on the feasibility of a particular form of relief often change between the initiation of the suit and the final judgment. *Chicago United Industries, Ltd. v. City of Chicago*, 445 F.3d 940, 948 (7th Cir. 2006). However, Rule 54(c) is not designed to allow plaintiffs to recover for claims they never alleged. *USX Corp. v. Barnhart*, 395 F.3d 161, 165 (3d Cir. 2004).

Rule 54(c) has been liberally construed that it is the court’s duty to grant whatever relief is appropriate in the case on the facts proved. *Atlantic Purchasers*, 705 F.2d at 716. However, there are limits to the relief that may be granted under Rule 54(c). *Id.*

One such limit on the application of Rule 54(c) is that a party will not be given relief not specified in its complaint where the “failure to ask for particular relief so prejudiced the opposing party that it would be unjust to grant such relief. *Id.*(citing *United States v. Marin*, 651 F.2d 24, 31 (1st Cir. 1981); *see also Albemarle Paper Co. v. Moody*, 422 U.S. 405, 424 (1975). For example, a substantial increase in the defendant’s ultimate liability can constitute specific prejudice barring additional relief. *Id.*(citing *Goodman v. Poland*, 395 F. Supp. 660, 685 (D. Md. 1975)). In another example, a failure to present and litigate an issue to the trier of fact constitutes prejudice and prevents relief on that issue. *Rodriguez v. Doral Mortgage Corp.*, 57 F.3d 1168, 1173 (1st Cir. 1995); *Sylvan Beach v. Koch*, 140 F.2d 852, 861 (8th Cir. 1944). In one final example, tardiness and inconsistency in demanding certain relief prejudices the other party and prevents relief. *Albemarle*, 422 U.S. at 424.

B. Analysis

The analysis begins with whether JKD received notice before trial of Stafford Jewelers' and John Stafford's claim for treble damages on the theft claim. If so, treble damages should be granted. If not, the analysis proceeds to whether JKD was prejudiced by not receiving such notice.

i. Notice

The analysis of notice begins with Stafford Jewelers' and John Stafford's Complaint. (Doc. #3.) Count Five of the Complaint is against JKD for civil liability for criminal acts. (Id.) Paragraph 61 alleges damages as follows: "JKD's actions have caused Plaintiffs, Stafford's Jewelers and John Stafford, to suffer actual damages in an amount to be determined at trial, but believed to be in excess of \$25,000." (Id.) Paragraph 62 of Count Five also seeks punitive damages. The Complaint's Prayer for Relief demands judgment "[f]or Count Five (Civil Liability for Criminal Acts) that Plaintiffs, Stafford's Jewelers and John Stafford, be awarded by Defendant JKD: compensatory damages and special damages in an amount in excess of \$25,000 as will be further proved at trial; punitive and/or exemplary damages, in a just and proper amount determined at trial, but reasonably believed to substantially exceed \$25,000; pre and post judgment interest; attorneys' fees and costs...." Thus the Complaint does not mention or in any way indicate treble damages for theft. Also, Stafford Jewelers and John Stafford never sought to amend their Complaint to include treble damages nor were treble damages ever mentioned during the Trial.

The Amended Final Pretrial Order jointly submitted to and approved by the Court does not mention treble damages. (Doc. #166.) The section indicating the claims alleged in Plaintiffs' complaint that remain for trial contains the following statement"

Plaintiffs assert in Count 5 that JKD is civilly liable for criminal acts pursuant to Ohio Revised Code § 2307.60 for its theft of the Pink Diamond in violation of Ohio Revised Code § 2913.01(A).

Plaintiffs seek compensatory and punitive damages, pre and post judgment interest, attorney fees, and expenses on their claim against JKD for civil liability for criminal acts.

This too does not put JKD on notice that Stafford Jewelers and John Stafford are seeking treble damages on the theft claim.

Stafford Jewelers and John Stafford assert that “R.C. § 2307.61 was specifically cited in paragraphs 59 and 60 of the Complaint. However, paragraphs 59 and 60 of the Complaint that was before this Court make no mention of R.C. § 2307.61. (Id.)

Stafford Jewelers and John Stafford also assert that treble damages were mentioned in their Response to JKD’s Motion To Show Cause Why Plaintiffs Should Not Be Held In Contempt of the Court’s March 29, 2007 and January 7, 2008 Orders. The language in Stafford Jewelers’ and John Stafford’s Response to which they are referring here is: “Moreover, one of Plaintiff’s claims requests treble damages.” This sentence is offered, along with other arguments, in response to JKD’s allegation that Stafford Jewelers’ and John Stafford’s initial settlement demand of \$15 million was “extortion” and “blackmail.”

This sentence could hardly have put JKD on notice that Stafford Jewelers and John Stafford were seeking treble damages for their theft claim. First, this is not considered a pleading for purposes of a claim for relief. See *Black’s Law Dictionary* 1173 (7th ed. 1999)(“In federal civil procedure, the main pleadings are the plaintiff’s complaint and the defendant’s answer.”). Second, no specific claim is mentioned in this assertion so this assertion could hardly be said to put JKD on notice that Stafford Jewelers and John Stafford were seeking treble damages on the theft claim.

Both JKD and Stafford Jewelers and John Stafford make much of Ohio court cases applying and interpreting Ohio Rev. Code § 2307.61. However, these arguments are without merit because, as indicated above, in a federal court, the application of state substantive law is governed by federal procedural law, Rule 54(c) in this case, and not by state law.

JKD argues that Ohio law requires pre-suit notice. In support, JKD cites Ohio Rev. Code § 2307.61(C). However, § 2307.61(C) requiring pre-suit notice only applies to cases where the value of the property that was the subject of the theft is less than five (5) thousand dollars. *See* Ohio Rev. Code § 2307.61(A)(2). That is not the case here.

In sum, JKD did not receive notice that Stafford Jewelers and John Stafford were seeking treble damages on their theft claim until after the Trial when Stafford Jewelers' and John Stafford's Notice of Election of Statutory Damages was filed. The analysis next turns to whether JKD was prejudiced by not receiving notice before the Trial.

ii. Prejudice

JKD was prejudiced by not knowing that Stafford Jewelers and John Stafford were allegedly seeking treble damages. Not knowing denied JKD the opportunity to make a realistic appraisal of the case for settlement purposes. Further, not knowing denied JKD the opportunity to include the treble damages in their litigation strategy.

In *Atlantic Purchasers*, the Fourth Circuit found that fundamental fairness requires that, in a case where the statutory remedy may significantly increase the defendant's liability, the defendant be notified of the possibility of the significant increase prior to plaintiff's tender of a proposed judgment on the verdict. 705 F.2d at 717. In this case, JKD was not given notice that its liability may significantly increase due to the election of treble damages on the theft claim

until Stafford Jewelers and John Stafford submitted their proposed judgment entry.

Stafford Jewelers and John Stafford argue that *Atlantic Purchasers* is not applicable here because the Fourth Circuit was addressing the North Carolina Unfair Trade Practices Act (“NCUPTA”), a statute that is not at issue here. However, while it is true that the NCUPTA is not at issue here, notice that liability may significantly increase is at issue here as is Rule 54(c). Thus, the Fourth Circuit’s application of Rule 54(c) to treble-damage provisions of the NCUPTA is instructive as to how Rule 54(c) is to be applied to the request for treble damages in this case.

C. Conclusion

Stafford Jewelers and John Stafford gave no notice of their election of treble damages on the theft claim until after it was tried. As a result, JKD was prejudiced. Therefore, Stafford Jewelers and John Stafford are not entitled to treble damages on their theft claim.

III. SUMMARY

JKD’s Motion for a New Trial (doc. # 209) is OVERRULED. However, JKD is granted judgment as a matter of law on the amount of damages to which Stafford Jewelers’ and John Stafford are entitled on their theft claim. Thus, Stafford Jewelers and John Stafford are entitled to no damages on their theft claim. However, would they have been entitled to damages on their theft claim, they would not have been entitled to treble damages.

The Jury determined that JKD is liable for the money expended by Stafford Jewelers and John Stafford for attorneys fees in the prosecution of their conversion claim. Therefore, Stafford Jewelers and John Stafford are given until not later than thirty (30) days following entry of this order to submit their motion for attorneys’ fees and other expenses associated with the prosecution of their conversion claim. In doing so, Stafford Jewelers and John Stafford are reminded that this Court uses the *Lodestar* method to assess motions for attorneys’ fees

including the requirement that a movant present evidence of a reasonable hourly rate and a reasonable number of hours expended.

DONE and **ORDERED** in Dayton, Ohio, this Thirteenth day of May, 2009.

s/Thomas M. Rose

THOMAS M. ROSE
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record