COURT OF APPEALS
DECISION
DATED AND FILED

August 8, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP1398 **Cir. Ct. No. 2003CV470**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

CERTIFIED POWER, INC. A FOREIGN CORPORATION, B&B INDUSTRIES, INC. A DOMESTIC CORPORATION AND PUMP DRIVES, INC. A DOMESTIC CORPORATION,

PLAINTIFFS-RESPONDENTS,

V.

JAMES P. BEIERLE AND PROP SHAFT SUPPLY, INC. A DOMESTIC CORPORATION,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Walworth County: MICHAEL S. GIBBS, Judge. *Affirmed*.

Before Anderson, P.J., Nettesheim and Snyder, JJ.

¶1 ANDERSON, P.J. James P. Beierle and Prop Shaft Supply, Inc. (hereafter PSS) appeal from a judgment of the circuit court in favor of Certified

Power, Inc., B&B Industries, Inc. and Pump Drives Inc. (hereafter, collectively CPI) finding that Beierle and PSS had been unjustly enriched and awarding CPI $729,000 in damages. The circuit court thoroughly and properly analyzed the evidence and we agree with its decision. We affirm.

¶2 CPI is a multi-division company.[1] The driveline division of CPI manufactures and sells drive shafts and is located in Elkhorn, Wisconsin. PSS, owned by Beierle, also manufactures and sells drive shafts. Prior to owning PSS, Beierle had owned and operated Pump Drives, Inc. for approximately seventeen years. In November 1997, Beierle sold Pump Drives to CPI and at the time of the transaction Pump Drives had sales of approximately $3 million. CPI paid $3 million for the Pump Drives stock buyout, assumed a $450,000 loan owed by Pump Drives, hired Beierle on as a general manager and paid Beierle a $350,000 earnout over the next year.

¶3 In 1998 or early 1999, CPI merged the operations of Pump Drives with North American Engineering (hereafter NAE), another division of CPI with headquarters in Minneapolis, Minnesota. CPI consolidated the operations in Elkhorn and Beierle continued to serve as general manager. The combination of Pump Drives and NAE resulted in combined databases which included such things

[1] Appellant's "statement of the facts" is heavily laced with legal argument and it is so skimpy on the facts so as to be useless to this court. The appellant's failure to provide this court with a proper recitation of facts is a disservice both to this court and to its client. *See* MICHAEL S. HEFFERNAN, APPELLATE PRACTICE AND PROCEDURE IN WISCONSIN, § 11.13 (4th ed. 2006) ("The statement of facts is arguably as important as the argument. A well constructed statement of facts is essential to understanding the case. A poor statement of facts will not only make the court's task more difficult, but it also may cast an unfavorable light on the arguments raised later in the brief.").

as engineering documents, drawings, bills of materials, vendor base lists and customer base lists.

¶4 Sometime before October 12, 2000, because Beierle also did some work from home, CPI loaded all of the same information that Beierle had on his CPI-provided laptop computer onto Beierle's personal home computer.

¶5 On October 12, 2000, Beierle resigned from CPI. He testified that he was "frustrated" and believed he "was going to be driven out very soon" so he "made a snap decision" and quit. On October 13, 2000, Beierle purchased a laptop computer; he had left behind his CPI-provided laptop the day he quit. On October 17, 2000, Beierle and his wife created PSS and commenced operations. Approximately one week after leaving CPI, Beierle transferred his entire hard drive from his home computer onto his new personal laptop computer. He said he did so because he was going to "start doing work … start doing buying and selling and [he] needed e-mail and needed Excel and Word and whatever else [he] had."

¶6 In 2001, Beierle's new company, PSS, had gross sales of nearly $1.3 million. By 2002, PSS's gross sales were approximately $2 million and in 2003, PSS's gross sales totaled approximately $2.8 million.

¶7 At some point, CPI suspected that Beierle and PSS were using CPI information in order to compete with CPI in the marketplace. In 2003, CPI filed a complaint and ultimately an amended complaint against Beierle and PSS. The amended complaint alleged breach of contract, conversion, unfair competition,

violations of the computer crimes act, WIS. STAT. § 943.70 (2005-06),[2] unjust enrichment and misappropriation. The case went to a six-day jury trial.

¶8 At trial, CPI asserted that Beierle and PSS were unjustly enriched by using the information obtained from CPI during Beierle's employment with CPI and avoiding startup costs. CPI's expert witness calculated that Beierle's use of CPI information increased PSS profits, from January 2001 through July 2004, by approximately $1,500,000. After applying a gross profit rate of $47.6% to this amount, the damage amount asserted was $729,000.

¶9 At the conclusion of the evidence and prior to the matter being submitted to the jury, Beierle and PSS filed a motion with the trial court to decide the equitable issue of unjust enrichment after the jury returned its verdict. Beierle and PSS stated to the trial court: "These claims are not properly submitted to a jury." Beierle and PSS further advised: "[T]his court, having presided over a trial, is properly able to render a decision, as it should. This court has a duty to decide as a matter of law, whether the appropriate facts exist which would entitle Plaintiffs to equitable relief." CPI agreed that the trial court should decide the unjust enrichment claim.

¶10 The jury decided the misappropriation and unfair competition claims in favor of Beierle and PSS. It did, however, find a breach of contract by Beierle, but did not find the breach caused damage to CPI.

[2] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

¶11 After the jury returned its verdict, CPI moved the trial court to decide the unjust enrichment cause of action. The trial court accepted briefs and heard oral argument. On April 5, 2006, the trial court issued a decision, finding for CPI and awarding CPI $729,000.[3] The trial court's decision recited the elements of unjust enrichment and analyzed each element to determine whether CPI was entitled to damages for unjust enrichment.

¶12 The trial court ordered that judgment be entered jointly and severally against PSS and Beierle individually. On April 24, 2006, judgment was entered.

¶13 Beierle and PSS filed a motion for reconsideration of the trial court's decision and CPI challenged the basis of Beierle's and PSS's motion for reconsideration. After reviewing the materials submitted in connection with the motion, the trial court found there were no grounds to reconsider its decision. (Before the trial court issued its order on the reconsideration motion, Beierle and PSS filed a notice of appeal on June 7, 2006.)

¶14 On review of a factual determination made by a trial court without a jury, an appellate court will not reverse unless the finding is clearly erroneous. ***Noll v. Dimiceli's, Inc.***, 115 Wis. 2d 641, 643, 340 N.W.2d 575 (Ct. App. 1983); WIS. STAT. § 805.17(2).

[3] Because CPI did not oppose a motion by Beierle and PSS to dismiss the conversion and computer crime causes of action, the sole remaining cause of action before the trial court for decision was unjust enrichment.

Other rulings incorporated in the court's decision addressed motions. These included upholding and entering judgment on the special verdict determined by the jury, denying CPI's request for a permanent injunction and denying an award of attorneys' fees to either party.

¶15 The trier of fact also determines the credibility of the witnesses and the weight to be given their testimony and any disputes in testimony are to be resolved by the trier of fact. ***State v. Conway***, 34 Wis. 2d 76, 81, 148 N.W.2d 721 (1967). Moreover, "[a] finding of fact of a trial court made upon conflicting evidence should not be set aside on review if a judicial mind could, on due consideration of the evidence as a whole, reasonably have reached the conclusion of the court below." ***Id.*** (quoting ***Estate of Larsen***, 7 Wis. 2d 263, 273, 96 N.W.2d 489 (1959)).

¶16 A trial court's decision to grant equitable relief in an action for unjust enrichment is discretionary. ***Tri-State Mech., Inc. v. Northland Coll.***, 2004 WI App 100, ¶13, 273 Wis. 2d 471, 681 N.W.2d 302. The application of the facts to the unjust enrichment legal standard is a question of law that we review de novo. ***Id.***

¶17 In an action for unjust enrichment, recovery is based upon the moral principle that one who has received a benefit has a duty to make restitution when to retain such benefit would be unjust. *See* ***Management Computer Servs., Inc. v. Hawkins, Ash, Baptie & Co.***, 206 Wis. 2d 158, 188, 557 N.W.2d 67 (1996). Because unjust enrichment is based upon equitable principles, the damages are measured by the benefit conferred upon the defendant, not by the plaintiff's loss. *See* ***id.***

¶18 To recover on a claim for unjust enrichment, three elements must be proven: (1) a benefit conferred upon the defendant by the plaintiff, (2) an appreciation or knowledge by the defendant of the benefit, and (3) the acceptance or retention by the defendant of the benefit under circumstances that makes its retention inequitable. ***Tri-State Mech., Inc.***, 273 Wis. 2d 471, ¶14.

¶19 The amount of damages to be awarded is a factual question. *See* ***Roach v. Keane***, 73 Wis. 2d 524, 539, 243 N.W.2d 508 (1976). Factual findings are not overturned unless clearly erroneous. WIS. STAT. § 805.17(2).[4] We do not substitute our own judgment for that of the fact finder, but review the damage award in the light most favorable to sustaining the award. ***Teff v. Unity Health Plans Ins. Corp.***, 2003 WI App 115, ¶41, 265 Wis. 2d 703, 666 N.W.2d 38.

¶20 On appeal, Beierle and PSS makes three arguments: The trial court erred when it applied the doctrine of unjust enrichment, given that the parties had

[4] WISCONSIN STAT. § 805.17(2) provides:

> **Trial to the court.**
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> ….
>
> **(2)** EFFECT. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the ultimate facts and state separately its conclusions of law thereon. The court shall either file its findings and conclusions prior to or concurrent with rendering judgment, state them orally on the record following the close of evidence or set them forth in an opinion or memorandum of decision filed by the court. In granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a referee may be adopted in whole or part as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of ultimate fact and conclusions of law appear therein. If the court directs a party to submit proposed findings and conclusions, the party shall serve the proposed findings and conclusions on all other parties not later than the time of submission to the court. The findings and conclusions or memorandum of decision shall be made as soon as practicable and in no event more than 60 days after the cause has been submitted in final form.

a contract referring to the same subject matter. The trial court erred when it granted recovery on a theory of unjust enrichment when the materials at issue are widely available in the public domain. The trial court erred when it imposed a damages award that did not conform to the evidence. We do not agree with any of Beierle and PSS's arguments. We address them in order.

¶21 We conclude the trial court did not err when it applied the doctrine of unjust enrichment despite the existence of a contract between the parties. First, as to PSS, Beierle's argument does not flow since the contract was between Beierle and CPI, not between PSS and CPI. With regard to Beierle himself, the basis for the unjust enrichment claim moves apart from and beyond the contract between Beierle and CPI. It flows from events and conduct by Beierle separate from his obligations under the contract. Specifically, the unjust enrichment claim rises out of Beierle's use of CPI's databases in the startup of his new business, PSS. CPI purchased Pump Drives and combined its database with another of its companies (NAE) and, in so doing, recompiled drawings, designs and other CPI information forming a database not within the purview of the contract between Beierle and CPI.

¶22 This established, we turn to our review of the trial court's application of the facts to the unjust enrichment legal standard. *See* ***Tri-State Mech., Inc.***, 273 Wis. 2d 471, ¶13. The trial court did a thorough analysis and we draw heavily from its well-reasoned decision.[5]

[5] Beierle's and PSS's reply brief arguments are generally taken into account in our discussion. We have not considered any new arguments made in the reply brief such as the contention that "the trial court decision effectively voided the jury's verdict." *See* ***Schaeffer v. State Pers. Comm'n***, 150 Wis. 2d 132, 144, 441 N.W.2d 292 (Ct. App. 1989) ("We will not, as a general rule, consider arguments raised for the first time in a reply brief.").

¶23 In determining whether CPI is entitled to damages for unjust enrichment, we engage in the three part analysis. First, did CPI confer a benefit upon Beierle? The trial court found, and we agree, that CPI unequivocally did confer a benefit by installing on Beierle's home computer a wealth of knowledge including drawings, designs, and other CPI information. Second, did Beierle understand or appreciate the benefit? The trial court found, and we agree, that Beierle did understand or appreciate the benefit. Beierle acknowledged receipt of the database onto his home computer during his employment with CPI and stated that upon his leaving CPI, he transferred this database to his laptop computer. Thus, Beierle not only understood and appreciated its value and importance, but he took steps to preserve it. Third, did Beierle accept or retain the benefit under circumstances making it inequitable for the defendant to do so without payment of its value? The trial court found, and we agree, that he did. Beierle made the effort to transfer the data to another one of his computers and thereby preserve it. Beierle claims that the laptop with the CPI database later "crash[ed]" and therefore he could not produce it for examination by CPI after litigation began.[6] The trial court "candidly [found] this assertion quite coincidental."

¶24 However, Beierle's laptop "coincidental[ly]" crashing was not the trial court's basis for determining that Beierle has been unjustly enriched. Several additional factors support the third prong of the unjust enrichment analysis. Within days of quitting CPI, Beierle started up the same type business in the same small town. This was a breach of the stock purchase agreement, which the jury

[6] Beierle testified that in 2002, the year before CPI filed suit, he "tossed out" his home desktop computer because it did not work. Beierle testified that approximately one year after CPI filed suit, he gave his laptop computer away to his brother-in-law to use for parts because the hard drive went out causing it to "crash."

did find. In addition, the trial court found there to be no doubt that Beierle used to his own advantage CPI's database, including the designs and drawings, in starting up his new business. We agree and highlight that it is not only the information contained within the CPI database, but the time and effort involved in combining, forming and cataloguing the database which, in this court's opinion, manifestly supports CPI's unjust enrichment claim.

¶25 Beierle's second argument on appeal is that the trial court erred when it granted recovery on a theory of unjust enrichment when the materials at issue are widely available in the public domain. That these designs and drawings are readily available in this industry is immaterial when it comes to the question of unjust enrichment because, as just noted, Beierle avoided startup costs and the time and effort it would have taken to amass and organize all of the information necessary to run the new business. CPI introduced evidence regarding the savings Beierle acquired, and noted that in three years Beierle's profits were the same as it had taken him almost twenty years to generate with his previous company. Beierle argues that unjust enrichment cannot arise unless the defendant wrongfully takes or appropriates property that qualifies as a trade secret. This is not the law. In ***Burbank Grease Services, LLC v. Sokolowski***, 2006 WI 103, ¶16, 294 Wis. 2d 274, 717 N.W. 2d 781, our supreme court was asked to construe Wisconsin's trade secrets statute[7] to determine if it precluded other claims for relief, even though

[7] WISCONSIN STAT. § 134.90 is Wisconsin's trade secrets statute and states in part:

> **(6)** EFFECT ON OTHER LAWS. (a) Except as provided in par. (b), this section displaces conflicting tort law, restitutionary law and any other law of this state providing a civil remedy for misappropriation of a trade secret.
>
> (b) This section does not affect any of the following:

(continued)

what was taken did not qualify as trade secrets. The court held that WIS. STAT. § 134.90 "leave[s] available all other types of civil actions that do not depend on information that meets the statutory definition of a 'trade secret.'" ***Burbank***, 294 Wis. 2d 274, ¶33. Quite simply, CPI's unjust enrichment claim is not precluded under the law and facts of this case.

¶26 Lastly, Beierle argues that the trial court erred when it imposed a damages award that did not conform to the evidence. The trial court reviewed the evidence and determined that a fair assessment of the unjust enrichment gained by Beierle is $729,000. This figure was derived by CPI's expert witness, who determined the figure based on Beierle's sales and a gross profit rate. The trial court determined that the figure adequately and accurately reflected the increase in profit (i.e., unjust enrichment) earned by Beierle due to his use of CPI's information in the startup of his new business, PSS. It is for the trial court to determine the credibility of the witnesses and the weight to be given their testimony and any disputes in testimony are to be resolved by the trier of fact. ***Conway***, 34 Wis. 2d at 81. In reviewing the damage award in the light most favorable to sustaining the award, we hold that the award ordered by the trial court conformed to the evidence. *See* ***Teff***, 265 Wis. 2d 703, ¶41. It was appropriately based on Beierle's duty to make restitution from having received an unjust benefit. *See* ***Management Computer Servs.***, 206 Wis. 2d at 188.

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1. Any contractual remedy, whether or not based upon misappropriation of a trade secret.

2. Any civil remedy not based upon misappropriation of a trade secret.

3. Any criminal remedy, whether or not based upon misappropriation of a trade secret.

¶27 Everything considered, this situation smacks of unjust enrichment. The trial court fittingly noted that "Beierle wants to have his cake and eat it too." Neither the trial court nor this court is willing to provide him the fork to do so.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.