Circuit Court for Baltimore County
Case No. 03-C-13-002705

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1778

September Term, 2016

SMG HOLDINGS I, LLC, ET AL.

v.

ARENA VENTURES, LLC

Kehoe,
Leahy,
Shaw Geter,

JJ.

Opinion by Shaw Geter, J.

Filed: March 20, 2018

This case involves a dispute over nine billboards attached to the exterior façade of the Royal Farms Arena in Baltimore, Maryland. Appellee, Arena Ventures, LLC, acquired the billboards on May 31, 2008, and had an agreement with the City allowing it to sell advertising through December 31, 2012. Prior to the expiration of that agreement, however, the City claimed that it—not Arena Ventures—owned the billboards. Appellants, SMG Holdings, I, LLC, t/a SMG, SMG Holdings II, LLC t/a SMG (jointly referred to as "SMG") and Legends Sales and Marketing, LLC, subsequently entered into a service agreement with the City to manage the Arena and use the billboards to sell advertising. Arena Ventures filed a complaint in the Circuit Court for Baltimore County on March 14, 2013, alleging trespass to chattels, unjust enrichment, and tortious interference with business relationships against SMG and Legends. Following a bifurcated court trial, the circuit court entered judgment in favor of Arena Ventures. Appellants timely appealed and raise four issues that we have consolidated and reworded:

I. Did the circuit court err in finding that the billboards are the personal property of appellee?

II. Did the circuit court err in awarding disgorged profits as the measure of restitution?[1]

[1] Appellants phrase the questions presented as follows: (1) "Whether the trial court was legally correct concluding that Arena Ventures owns the billboards affixed to the Arena, a City of Baltimore-owned building, after Arena Ventures' license to sell advertising at the Arena expired on December 31, 2012?"; (2) "Whether the trial court was legally correct concluding that there existed a contract between the City and Clear Channel Outdoor that conveyed ownership of the billboards to Arena Ventures because the City did not demand that Arena Ventures remove them from the Arenas' façade?"; (3) "Whether the trial court was legally correct concluding that SMG and Legends committed trespass to chattels and were unjustly enriched by using the billboards to sell advertising after Arena Ventures' license to sell advertising at the Arena expired on December 31, 2012?"; (4) "Whether the trial court was legally correct awarding Arena Ventures $3,360,000 restitution, in the form

For the reasons to follow, we shall affirm in part and vacate in part.

BACKGROUND

Effective July 1, 1998, the City of Baltimore awarded a contract to The Centre Group Limited Partnership to manage and operate the land/real estate located at 201 West Baltimore Street in Baltimore, Maryland, presently known as the Royal Farms Arena.[2] On March 17, 1999, The Centre Group assigned its interest to SMG, charging SMG with "[p]romoting the Arena and arranging all bookings for sports and family entertainment events and other functions." The agreement also gave SMG the authority to hire subcontractors to provide various services, including subcontractors to manage advertising at the Arena.

On March 13, 2002, the City Board of Estimates approved an advertising agreement between SMG and Arena Ventures. The agreement granted Arena Ventures the "right to sell all inside and outside advertising and signage for the Baltimore Arena" in exchange for the payment of an annual $200,000 fee to SMG. It also provided that "Arena Ventures shall be responsible for the cost, upkeep, permits, installation and maintenance (i.e., light removal or replacement) of any signs placed in or on the Baltimore Arena." The agreement had an initial term ending June 30, 2003, with an option for a five-year extension, which

---

of 10-years realized and unrealized, future disgorged profits for the period January 1, 2013 through December 31, 2022, for SMG and Legends' use of the billboards to sell advertising after Arena Ventures' license to sell advertising at the Arena expired on December 31, 2012?"

[2] The Arena was formerly known as the Baltimore Arena and the 1st Mariner Arena.

was exercised. The Board thereafter approved four additional extensions, the last of which expired on December 31, 2012.

In order to display general advertising signs at the Arena, the City had to approve amendments to then-existing zoning ordinances. Edwin Hale, the owner of Arena Ventures, hired lawyers to work with the City staff, the Mayor's Office, and the City's attorneys to draft, approve, and enact new ordinances. Once completed, Arena Ventures contracted with Clear Channel Outdoor, Inc., for the installation of the billboards on the exterior of the Arena pursuant to a signage rights agreement. Section 9 of the agreement, titled "Ownership of Advertising Displays," provides:

> [Clear Channel] is the owner of the Advertising Displays and has the right to remove the Advertising Displays at any time or within one hundred twenty (120) days following the termination of this Agreement. In the event [Clear Channel] removes any Advertising Display from a Wall, [Clear Channel] agrees to repair any damage to the Wall caused by [Clear Channel] or the Advertising Display at [Clear Channel's] expense. In the event an Advertising Display causes damage to a Wall during the term of this Agreement, [Clear Channel] agrees to commence the reparation of such damage within a commercially reasonable period of time and to make such repairs at its expense.

In mid to late 2003, nine billboards were installed on the exterior façade of the Arena, five along Baltimore Street and four along Hopkins Place. The cost to purchase and install the billboards was approximately $600,000, all of which was paid by Clear Channel. Neither the City nor SMG paid any money for the purchase, construction, or maintenance of the billboards prior to January 1, 2013.

Around the time the billboards were installed, a lengthy litigation concerning the legality of the zoning ordinances arose. Hale eventually agreed to take over responsibility

for funding the defense of the litigation, and Arena Ventures entered into an agreement with Clear Channel executed May 31, 2008, where it paid $1.00 to purchase all rights, title, and interest in the billboards.[3] The termination agreement states:

> Clear Channel further agrees that, for consideration of one dollar ($1.00) and the undertaking in this Termination Agreement, upon execution of this Agreement by both parties, all of Clear Channel's ownership rights and title to the nine (9) wall mounted Advertising Displays affixed to the 1st Mariner Arena, designated as Panels 400001 through 40004 located on Hopkins Place, and Panels 40005 through 40009 located on Baltimore Street shall be transferred to Arena Ventures by execution of the Bill of Sale attached hereto as Exhibit 1. Arena Ventures assumes all rights and obligations of ownership of such Advertising Displays. Clear Channel waives and relinquishes all rights of ownership including the right to remove the Advertising Displays pursuant to Section 9 of the Sign Rights Agreement.

In late 2011 or early 2012, Hale learned that the City was considering issuing a request for proposals (RFP) that would package three aspects of Arena management: operation of the Arena; title sponsorship (i.e., naming rights); and sale of advertising rights. This was problematic for Hale because he did not have the capabilities to manage the Arena, though he was qualified to sell naming rights and advertising. As a result, he did not submit a bid for the new Arena management contract.

Nevertheless, Hale met with then-Mayor Rawlings-Blake and her chief of staff requesting that the City not solicit proposals and continue the advertising agreement with Arena Ventures; alternatively, he asked that the RFP be structured so that the operational aspect of the Arena management be severed from title sponsorship and advertising sales. The City declined and published the RFP in June 2012. The RFP did not specifically

[3] Hale testified that his costs incurred in defending the zoning challenge were $632,000.

reference the billboards but stated that all "real property and personal property at the Arena is and shall remain the property of the City," and the "City has and shall retain ownership of the Arena building and all structures and appurtenances thereto[.]"

In August 2012, during a pre-bid meeting relating to the RFP, the City's director of finance, Harry Black, announced that the City was the owner of the billboards. After the meeting, Hale approached Black and declared that he, not the City, owned the billboards. A number of letters followed. On August 20, 2012, the City issued a "points of clarification" letter to prospective proposers stating the City owns the billboards affixed to the Arena. On September 7, 2012, Hale sent a letter to a City purchasing agent insisting that Arena Ventures owns the billboards. A few months later, on December 7, 2012, Hale sent a letter to Frank Remesch, an SMG employee and general manager of the Arena, stating: "[i]n anticipation of SMG getting the award in the Arena RFP, I want to restate that the signage, billboards and video screens and structures inside and on the exterior of the Arena are property of Arena Ventures[.]"

In another letter dated December 21, 2012, counsel for Arena Ventures notified SMG's senior vice president that Arena Ventures was the owner of the billboards; the letter warned that any effort to "use, advertise, or obtain revenue through the Billboards will be in violation of Arena Ventures' rights"; and it reserved all "rights, remedies, and recourse in connection with the Billboards, including but not limited, to its right to claim an equitable lien in and to any and all revenues obtained through the use of Arena Ventures' Billboards."

On December 19, 2012, the Board of Estimates approved the award of a new management contract to SMG, effective January 1, 2013. The contract had a five-year term, until December 31, 2017, and it provides for five additional one-year extensions at the sole discretion of the City. SMG subsequently entered into a service agreement with Legends, granting Legends the naming and advertising rights at the Arena. The term of the Legends agreement was also five years, and it expired on December 31, 2017. For the rights to sell advertising at the Arena, Legends guaranteed payments to SMG totaling $2,050,000 over the life of the agreement.

On March 14, 2013, Arena Ventures filed a complaint against SMG and Legends alleging trespass to chattels, unjust enrichment, and tortious interference with business relationships. Approximately six months later, on September 9, 2013, counsel for appellants and the City sent a letter to Arena Ventures regarding the billboards. The City offered "Arena Ventures the opportunity to exercise its purported right of ownership in the Billboards" but indicated that "Defendants disputed Arena Ventures' claim of ownership rights in the billboards[.]" Hale testified that he was concerned by the City's references to Arena Ventures' rights as "purported ownership" and, as a result, did not respond. The City sent a subsequent letter on January 28, 2015, again indicating that it would provide an opportunity to remove the billboards. Arena Ventures responded on February 20, 2015, requesting a meeting to clarify the City's position regarding ownership and the possibility of removing the billboards. Neither the City, SMG, nor Legends responded to the letter.

Following a two day bench trial in the Circuit Court for Baltimore County, the court found in favor of Arena Ventures on each of the trespass to chattels, unjust enrichment,

and tortious interference claims. The court bifurcated the issues of liability and damages. Following the damages hearing, the court issued a memorandum opinion and order awarding Arena Ventures $728,000—the revenue from the billboards that it found would have been generated between January 1, 2013, and April 1, 2015. The court capped the award because it found that Arena Ventures did not respond to appellants' January 2015 letter and thus failed to mitigate its damages. Appellee filed a motion to alter or amend, noting its February 2015 response to appellants' letter. The court amended the judgment to $3,360,000, representing the billboard revenues for the full ten-year term under the new Arena management contract. This appeal followed.

STANDARD OF REVIEW

When reviewing an appeal from a judgment entered after a bench trial, we review the case on both the law and evidence. *Cane v. EZ Rentals*, 450 Md. 597, 613 (2016). We "will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses." Maryland Rule 8-131(c). "If, in considering the evidence produced at trial in the light most favorable to the prevailing party, an appellate court determines that there is sufficient evidence to support the judgment of the trial court, it will not be disturbed." *The Fischer Org., Inc. v. Landry's Seafood Rest., Inc.*, 143 Md. App. 65, 72 (2002). Accordingly, if "there is any competent, material evidence to support the factual findings below, we cannot hold those findings to be clearly erroneous." *Mayor of Rockville v. Walker*, 100 Md. App. 240, 256 (1994) (citation omitted). We review the "trial court's

conclusions of law and application of law to facts without deference to the trial court." *Cane*, 450 Md. at 613.

DISCUSSION

I. Liability

Appellants raise two arguments in connection with the circuit court's liability findings: 1) SMG and Legends' use of the billboards was not a trespass to chattels because the billboards merged with the City's realty on January 1, 2013; and 2) either Arena Ventures did not confer a benefit on SMG and Legends, or if a benefit was conferred, any unjust enrichment was not unjust as a matter of law. We shall address each of these arguments in turn.

A. Trespass to Chattels

"At common law, fixtures were treated as part of the realty. A fixture was an item that was so connected to the land that it could not be removed without substantial injury to itself or the land." *Colonial Pipeline Co. v. State Dep't of Assessments & Taxation*, 371 Md. 16, 32 (2002) (footnote omitted). A trade fixture, by contrast, "is defined as an item affixed to realty for the purpose of enabling the tenant to perform properly a trade or profession, which can be removed without material or permanent injury to the realty." *Id.* at 34–35. The touchstone for the trade fixtures test is intent: "[t]he sole question is, whether it is designed for purposes of trade or not." *Id.* at 35 (citation omitted). "When the proper intent is found, [n]o matter how strongly [the fixtures are] attached to the soil or imbedded in it, they are treated as personal property, and as such subject to removal by the person erecting them." *Id.* (internal quotations and citations omitted).

A tenant must ordinarily exercise the right of removal before the term expires or the fixture becomes the property of the landlord. *Cabana, Inc. v. Eastern Air Control, Inc.*, 61 Md. App. 609, 615 (1985) (quoting *Carlin v. Ritter*, 68 Md. 478 (1888) and *Northern Central Railway Co. v. Canton*, 30 Md. 347 (1869))). This rule is rooted in the presumption of abandonment arising from the conduct of the tenant in quitting the premises and leaving his fixtures behind; no injustice occurs because it is the tenant's "own fault if he suffers the land to return to the landlord with the fixtures annexed." *Carlin*, 68 Md. at 484. Such a presumption, however, will not arise "where the term being uncertain in its continuance, may be terminated suddenly and without previous notice." *Northern Central Railway*, 30 Md. at 355. "To apply it to a party in possession under a license revocable at pleasure, would be manifestly unjust and without reason. It would be allowing a party, without any fault of his own, or any opportunity of removal, to be deprived of his property at the mere will and caprice of another." *Id.*

Appellants first argue that the billboards were erected and used for Arena Ventures' business purpose of selling advertising; therefore, once the billboards were affixed to the Arena they became trade fixtures as a matter of law. Next, Arena Ventures did not exercise its right to remove the billboards before the advertising agreement expired. Since a landowner's right to possess the land and fixtures as part of the realty vests immediately after the term expires, Arena Ventures forfeited the billboards to the City effective January 1, 2013. Finally, because the billboards merged with the City's realty, their use by SMG and Legends was not a trespass to chattels as a matter of law.

While not conceding that the billboards are trade fixtures, appellee argues that such a classification is immaterial. The central issue is whether Arena Ventures' failure to remove the billboards constitutes an intentional relinquishment of its ownership rights. Because it repeatedly asserted its ownership interest in the billboards and expressly reserved its rights before the expiration of the advertising agreement, appellee maintains that it retained its ownership interest in the billboards.

Prior to the expiration of the advertising agreement, Hale notified the City that he owned the billboards. Hale's claim was substantiated by the signage rights agreement between Clear Channel and Arena Ventures that unequivocally stated Clear Channel "is the owner" of the billboards. When Arena Ventures purchased the billboards, moreover, Clear Channel warranted that it had "good title to the [billboards] free and clear of any liens or encumbrances." Hale's claim was also substantiated by the advertising agreement with SMG that charged Arena Ventures with the "cost, upkeep, permits, installation and maintenance . . . of any signs placed in or on the Baltimore Arena." Despite Hale's notification, the City prevented him from removing the billboards at the end of the lease because, both immediately before and immediately after the expiration of the lease, it wrongly asserted that it owned the billboards. This prevented Hale from doing what he otherwise had the right to do, which was to remove the billboards.

While the circuit court found that the billboards were not trade fixtures, it also explained that "even if so, Mr. Hale did not abandon them. He made it clear . . . to SMG as well as the City that, that he was the owner of, of those billboards. So the assertion that he voluntarily left them there is contrary to the evidence in the case." The court then found

that the billboards were the personal property of Hale. We disagree with the court's first finding: since the billboards were affixed to the Arena for the purpose of selling advertising, they were trade fixtures as a matter of law. *Colonial Pipeline Co.*, 371 Md. at 34–35; *see also Outdoor Sys., Inc. v. Korth*, 238 Mich. App. 664 (1999) ("[T]he jurisdictions that have specifically addressed the question—whether billboards are trade fixtures clearly hold that billboards are trade fixtures."). This distinction is not dispositive, however, because the City's wrongful assertion that it owned the billboards deprived Hale of his right to remove the billboards before the advertising agreement expired. To hold otherwise "would be allowing a party, without any fault of his own, or any opportunity of removal, to be deprived of his property at the mere will and caprice of another." *Northern Central Railway*, 30 Md. at 355. As a result, the billboards remained the personal property of appellee, they did not merge with the City's realty at the end of the advertising agreement, and their subsequent use by SMG and Legends constituted a trespass to chattels.

B. Unjust Enrichment

"The doctrine of unjust enrichment is applicable where the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money, and gives rise to the policy of restitution as a remedy." *Jackson v. 2109 Brandywine, LLC*, 180 Md. App. 535, 575 (2008) (internal quotations and citations omitted). A claim for unjust enrichment has three elements: 1) a benefit conferred upon the defendant by the plaintiff; 2) an appreciation or knowledge by the defendant of the benefit; and 3) acceptance or retention by the defendant of the benefit without the payment of its value. *Hill v. Cross Country Settlements, LLC*, 402 Md. 281, 295 (2007).

A cause of action for unjust enrichment "may lie against a transferee with whom the plaintiff had no contract, transaction, or dealing, either directly or indirectly." *Bank of America Corp. v. Gibbons*, 173 Md. App. 261, 271 (2007). "It is immaterial how the money may have come into the defendant's hands, and the fact that it was received from a third person will not affect his liability, if, in equity and good conscience, he is not entitled to hold it against the true owner." *Plitt v. Greenberg*, 242 Md. 359, 364 (1966) (citation omitted). If, however, "a transferee came into possession of a plaintiff's money in good faith after paying a good and valuable consideration for it, then the plaintiff [cannot] prevail and recover back the funds in that transferee's possession." *Plitt*, 242 Md. at 364.

Appellants raise two sets of arguments in support of their claim that they were not unjustly enriched as a matter of law. First, Arena Ventures did not confer a benefit on SMG and Legends because of the following: 1) Arena Ventures no longer owned the billboards as of January 1, 2013; 2) the circuit court erroneously imputed the City's bad faith in asserting ownership over the billboards, even though SMG and Legends never asserted ownership over the billboards; and 3) SMG and Legends paid valuable consideration to the City for the right to sell advertising at the Arena. Second, even if Arena Ventures conferred a benefit, any unjust enrichment is not unjust as a matter of law because: 1) Arena Ventures acted in their own self-interest by leaving the billboards erected; 2) Arena Ventures voluntarily left the billboards affixed to the Arena; and 3) unjust

enrichment does not exist where a party confers a benefit on another to obtain the benefits of a contract it is unable to negotiate.[4]

Appellee, on the other hand, argues that the circuit court correctly determined that a benefit was conferred on appellants based on their notice of, and conscious disregard for, Arena Ventures' assertions of ownership. Appellee notes that George Manias, the vice president of sponsorships for arenas and stadiums at Legends, admitted prior to bidding on the contract that Arena Ventures claimed to be the owner of the billboards, and Frank Remesch, an SMG employee and general manager at the Arena, admitted prior to the expiration of the advertising agreement that he believed Arena Ventures owned the billboards. As a result, any consideration paid by SMG or Legends was not made in good faith. Finally, the circuit court did not err in imputing the City's assertions of ownership of the billboards to appellants because the focus of an unjust enrichment claim is equity, and it is immaterial how the money came into appellants' hands.

We agree with the circuit court's analysis for the following reasons.

First, Arena Ventures conferred a benefit on SMG and Legends. As indicated above, the billboards did not merge with the City's realty at the end of the advertising agreement. Next, the City wrongfully claimed ownership of the billboards during the

[4] Appellants also argue that the circuit court's decision should be reversed because there is no contract conveying a permanent interest in the City's real property to Arena Ventures. The lack of an express contract, however, does not undermine an unjust enrichment claim. *See County Comm'rs of Caroline Cnty. v. J. Roland Dashiell & Sons, Inc.*, 358 Md. 83, 96–97 (2000) (citation omitted) ("Unjust enrichment and quantum meruit, both 'quasi-contract' causes of action, are remedies to provide relief for a plaintiff when an enforceable contract does not exist but fairness dictates that the plaintiff receive compensation for services provided.").

operative time it issued the RFP, and, despite Hale's assertions to the contrary, the City issued a "points of clarification" letter to prospective proposers doubling down on its ownership claims. SMG and Legends directly benefited from the City's actions, as they did not have to pay to use the billboards, which cost approximately $600,000 to install, and Legends immediately realized the income from its advertising contracts. Because it would be inequitable to allow SMG and Legends to profit from the City's wrongfully dispossessing Arena Ventures of the billboards, the circuit court did not err in imputing the City's assertions of ownership to SMG and Legends. Finally, as noted by appellee, both SMG and Legends had notice—prior to the expiration of the advertising agreement—that Arena Ventures claimed to be the owner of the billboards. Therefore, any consideration was not made in good faith, and it does not relieve appellants from liability of the benefit they received from Arena Ventures. *See* Restatement (Third) of Restitution and Unjust Enrichment ("Restatement"), § 66 cmt. f (Am. Law Inst. 2011) ("If notice is received before title is obtained, or before value is given, the transferee is not protected.").

Second, appellants were unjustly enriched. Arena Ventures was never provided an opportunity to remove the billboards before December 31, 2012, because the City never acknowledged that Arena Ventures owned the billboards. Arena Ventures' failure to remove the billboards thus cannot be characterized as acting for its own benefit or abandoning the billboards. As noted by the circuit court, appellants "cannot have it both ways. If the City owns the billboards, as claimed, then [appellee] cannot be faulted for failing to remove property to which the City claims ownership. However, if the City acknowledged that Arena Ventures owned the billboards, the City would have been well

within their rights to demand that the billboards be removed at [appellee's] expense." Yet prior to the filing of appellee's complaint, "the City made no demand to remove the billboards." Lastly, while SMG ultimately partnered with Legends on a bid for the Arena management RFP, "a cause of action for unjust enrichment may lie against a transferee with whom the plaintiff had no contract, transaction, or dealing, either directly or indirectly." *Gibbons*, 173 Md. App. at 271.[5] There is no dispute that Arena Ventures had an advertising agreement with the City through December 31, 2012; and, as indicated, appellants' improper profits flowed directly from that contract. Therefore, we find no error with the circuit court's determination that appellants were unjustly enriched through their use of the billboards.

II. Restitution

"Liability in restitution derives from the receipt of a benefit whose retention without payment would result in the unjust enrichment of the defendant at the expense of the claimant." Restatement, § 1 cmt. a. Where the defendant is deemed a "conscious wrongdoer," the proper measure of damages "is the net profit attributable to the underlying wrong." *Id.* § 51(4). The first step in our analysis, therefore, is to determine whether either appellant is a conscious wrongdoer, which is defined as "a defendant who is enriched by misconduct and who acts (a) with knowledge of the underlying wrong to the claimant, or (b) despite a known risk that the conduct in question violates the rights of the claimant."

[5] Appellants seek to distinguish *Gibbons* on the basis that SMG and Legends paid consideration to receive the rights to sell advertising at the Arena. We are not persuaded. As explained above, SMG and Legends were on notice that Arena Ventures claimed to be the owner of the billboards. The consideration, therefore, was not made in good faith.

Id. § 51(3). Misconduct is defined as "actionable interference by the defendant with the claimant's legally protected interests for which the defendant is liable[.]" *Id.* § 51(1).

Appellants argue they are not conscious wrongdoers because neither SMG nor Legends asserted ownership over the billboards; both paid considerable value for the right to use the billboards; and, at worst, their conduct was based on misguided, but honestly mistaken, representations of City employees and was by no means malicious.[6] Conversely, appellee argues that even an honest mistake does not relieve appellants of their obligation to pay restitution because they had notice that Arena Ventures claimed to be the owner of the billboards.

As indicated above, both Frank Remesch of SMG and George Manias of Legends admitted having notice prior to the expiration of the advertising agreement that Arena Ventures claimed to be the owner of the billboards. Appellants thus acted with knowledge of the underlying wrong or, at the very least, despite a known risk that the conduct in question violates the rights of appellee when they entered into the subsequent management agreement with the City. Accordingly, there was a sufficient basis for the circuit court to find that SMG and Legends were conscious wrongdoers.

Once a defendant has been deemed a conscious wrongdoer, the next step is to calculate the net profit and, if applicable, credits or deductions. "The object of restitution in such cases is to eliminate profit from wrongdoing while avoiding, so far as possible, the

[6] Appellants also argue that malice must be established in order to justify the remedy of disgorgement. However, as explained below, "[d]isgorgement of wrongful gain is not a punitive remedy." *See* Restatement, § 51 cmt. k.

imposition of a penalty. Restitution remedies that pursue this object are often called 'disgorgement' or 'accounting.'" *Id.* § 51(4). When calculating net profit, "the court may apply such tests of causation and remoteness, may make such apportionments, may recognize such credits or deductions, and may assign such evidentiary burdens, as reason and fairness dictate, consistent with the object of restitution as specified in subsection (4)." *Id.* § 51(5). A "claimant who seeks disgorgement of profit has the burden of producing evidence permitting at least a reasonable approximation of the amount of the wrongful gain. Residual risk of uncertainty in calculating net profit is assigned to the defendant." *Id.* § 51(5)(d).

Appellants raise a number of arguments as to why the circuit court's award of damages is legally incorrect. Many address the calculation of advertising revenues that SMG and Legends received under the new Arena management contract. We need not reach this issue because Arena Ventures' right to sell advertising at the Royal Farms Arena expired December 31, 2012. As appellants correctly point out, the City sought competitive bids for the new management contract, and Arena Ventures did not submit a proposal. Arena Ventures, moreover, did not reach an agreement with SMG, who was awarded the management and advertising rights at the Arena beginning January 1, 2013.

Arena Ventures notes that their burden was to produce "evidence permitting at least a reasonable approximation of the amount of wrongful gain." *Id.* § 51(5)(d). This burden was satisfied, Arena Ventures argues, through the following evidence they produced at trial: Legends' market research and anticipated profitability of the billboards, Legends' sponsorship proposals, actual sponsorship contracts entered into by Legends since January

2013, billboard production invoices, sponsorship contracts entered into by Arena Ventures prior to January 2013, the title sponsorship agreement, and Legends' internal financial documents. Based on this information, Arena Ventures maintains that the court made a factual finding of the monthly net fair market rental value of each billboard to calculate the appropriate restitutionary award, and that the award is supported by competent evidence.

Arena Ventures' arguments rest on the mistaken premise that they had a right to the advertising revenues of SMG and Legends. They did not. There is no dispute that the last advertising agreement between SMG and Arena Ventures expired on December 31, 2012, and that Arena Ventures did not submit a bid for the new Arena management contract. Arena Ventures did not have a "legally protected interest" in the subsequent advertising contract and, therefore, does not have a basis to recover the advertising revenues received by SMG or Legends. *See Restatement* § 51(1).[7]

Any award of disgorged profits after the expiration of the advertising agreement between SMG and Arena Ventures would be grossly disproportionate to the actual harm suffered by Arena Ventures, which was the inability to remove their billboards. Accordingly, we hold that the appropriate measure of damages is the fair market value of the billboards as of December 31, 2012. Because this issue was not litigated by the parties,

[7] Our analysis has focused on the Third Restatement of Restitution and Unjust Enrichment, as this was the primary authority cited by the parties. The outcome would be the same under the First Restatement because Arena Ventures is not entitled to the advertising revenues received by SMG and Legends. *See* Restatement (First) of Restitution and Unjust Enrichment § 157 cmt. a (Am. Law Inst. 1937) (noting that one is under a duty to make restitution only "where a person has received possession of or title to land, chattels, or choses in action to which another is or was entitled").

we shall vacate the circuit court's damage award and remand the case for a new trial on damages.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED IN PART AND VACATED IN PART. CASE REMANDED FOR PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE DIVIDED EQUALLY BETWEEN THE PARTIES.