

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

Case No.: 2009-CA-00388

JAMES E. LANGHAM

APPELLANT

VERSUS

NICHOLAS G. BEHNEN

APPELLEE


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REPLY BRIEF OF APPELLEE

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On Appeal from the Circuit Court of  
Hancock County, Mississippi

ORAL ARGUMENT REQUESTED

Timothy P. Kottemann (MSB   
Kottemann Law Firm, P.L.L.C.  
P.O. Box 1352  
Biloxi, Mississippi 39533-1352  
(228) 697-6717  
Fax: (228) 864-0297

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**CERTIFICATE OF INTERESTED PERSONS**

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Supreme Court may evaluate possible disqualification or recusal.

APPEALLANT:

James E. Langham

ATTORNEY OF RECORD FOR APPELLANT:

Paul A. Koeber, Esq.  
Attorney for the Appellant  
P.O. Box 12805  
Jackson, Mississippi 39236  
(601) 956-0072

APPELLEE:

Nicholas G. Behnen

ATTORNEY FOR APPELLEES:

Timothy P. Kottemann, Esq.  
Kottemann Law Firm, P.L.L.C.  
P.O. Box 1352  
Biloxi, Mississippi 39533  
228-697-6717

CIRCUIT COURT JUDGE:

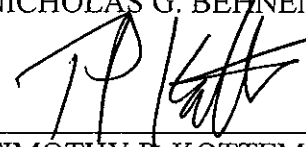
Judge Jerry O. Terry  
P.O. Box 1461  
Gulfport, Mississippi 39502


COURT REPORTER:

Cheryl E. Sablich, CSR  
P.O. Box 763  
Biloxi, Mississippi 39533-0763

RESPECTFULLY SUBMITTED, this the 2<sup>nd</sup> day of November, 2009.

NICHOLAS G. BEHNEN, Appellee

  
TIMOTHY P. KOTTEMANN  
Attorney for Appellee

Timothy P. Kottemann (MSF   
Kottemann Law Firm, P.L.L.C.  
P.O. Box 1352  
Biloxi, Mississippi 39533-1352  
(228) 697-6717  
Fax: (228) 864-0297

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REPLY BRIEF OF APPELLEE

I. APPELLANT'S STATEMENT OF ISSUES

1. Whether Hancock County Circuit Court on a motion for a directed verdict erred in dismissing claims against Appellee Behnen, due to a misapplication of the law regarding agency;
2. Whether the Hancock County Circuit Court erred in granting Appellee Behnen's motion for directed verdict, when the clearly established law regarding agency creates questions of fact for the jury's consideration, not questions of law;
3. Whether the Hancock County Circuit Court, on a motion for directed verdict, erred in dismissing Langham's claims of unjust enrichment or quantum meruit, when issues of fact existed for the jury's consideration.

II. SUMMARY OF CASE

This case at bar involves one (1) telephone conversation where it was alleged that Behnen gave Culpepper (Diamondhead Employee) agency principals. That is simply not the case.

Behnen testified that the one (1) call involved the removal of one (1) dangerous tree and Culpepper "would get back with him." Culpepper never did. The next time Behnen was contacted was by Langham requesting payment and Behnen asked "What is it for". This

demonstrates Behnen had no idea, if anybody, as alleged was cutting trees on his lots in Hancock County, Mississippi. It is important to keep in mind that the corps of engineers was operating in the Diamondhead community clearing lots and removing storm debris, consistent with Diamondhead's Property Owner Associations regulations. In addition, independent contractors were being paid with FEMA money to do the same work that Langham alleged he performed. Common sense prevails that if work in Diamondhead was being done, either by the corps of engineers or with federal funds to independent contractors, Langham was targeting out of town clients. As the Court correctly found, Langham was in Mississippi to help himself. Langham had no license to do business in the State of Mississippi, nor proper insurance. He was a man with a truck and a chainsaw looking to take advantage by price gauging out of town land owners at a time of our country's greatest natural disaster.

### III. STATEMENT OF THE CASE

The case *sub judice* involves the allegation that the Appellant (hereinafter referred to as "Langham"), an individual domiciled in the State of Georgia, did work on the Appellee's (hereinafter referred to as "Behnen"), an individual domiciled in the State of Nevada, undeveloped lots in Diamondhead, a subdivision in Hancock County, Mississippi, after Hurricane Katrina. At that time, Behnen owned 101 undeveloped lots in said subdivision. Langham claims he cleared dangerous trees from eleven (11) of those lots. He claims he is owed \$4,500.00 per lot. Although, Langham did not have a conversation of any nature with Behnen before he alleged he completed the work.

Jennifer Culpepper at no time was acting as Behnen's agent as alleged by Landgham.

There was never a misapplication of law of agency relating to Behnen and Culpepper. Jennifer Culpepper is an individual that worked at the Diamondhead Property Owners Association. The law regarding agency does not create a question of fact for the jury's consideration by the allegation alone.

The Court did not error in dismissing Langham's claim for unjust enrichment or quantum meruit based on the insufficient amount of trustworthy evidence and the speculative nature of the issue. The jury would be totally in the dark as how to judge whether or not Behnen was unjustly enriched. Mr. Behnen never acknowledged that he was responsible, in fact, he ignored the bill. It is obvious that Langham operated his business in a reckless manner. In addition, it is also obvious Langham left Georgia to come to Mississippi to help himself and nobody else.

#### IV. SUMMARY OF THE ARGUMENT

The three (3) issues that Langham alleges in this appeal are without merit. The first two (2) attempted to formulate that there is a contract between Langham and Behnen. The last point attempts to establish that there is no contract but Behnen has been unjustly enriched and therefore, owes Langham. Langham had no evidence that a contract existed between himself and Behnen or that Culpepper was infact an agent for Behnen and not himself. The last point, would have had to been based on rank speculation before the trial court.

#### V. ARGUMENT

The first issue for review by Langham relates to the misapplication of the law regarding agency.

Whether the principal master has the power to terminate the contract at will; whether he as the power to fix the price in payment for the work, or vitally



controls the manner and time of payment; whether he furnishes the means and appliances for the work; whether he has control of the premises; whether he furnishes the materials upon which he work is done and receives the output thereof, the contractor dealing with no other person in respect to the output; whether he has the right to prescribe and furnish the details of the kind and character of work to be done; whether he has the right to supervise and inspect the work during the course of employment; whether he has the right to direct the details of the manner in which the work is to be done; whether he has the right to employ and discharge the sub employees and to fix their compensation; and whether he is obliged to pay the wages of said employees. *Kisner v. Jackson*, 59 Miss. 424, 132 So. 90, 91 (1931).

The facts of this case, are that there is absolutely no way Ms. Culpepper can be found to be Behnen's agent. Behnen spoke to her one (1) time about one (1) dangerous tree and Behnen testified that she "would get back with him". The Court was correct in finding that there was no proof of any kind that Mrs. Culpepper was an agent of Behnen not, by the wildest imagination. [T. P.178, L. 10-12] If Mrs. Culpepper was an agent, the overwhelming weight of the evidence is that she was acting as an agent for Langham. Some of the evidence is that she found Langham a place to live, did all his typing and billing, made phone calls for him, all things that an employee\agent would do for his or her principal master.

The second issue that Langham brings before the Court is that agency creates questions of fact for the jury's consideration. The Judge found "there is no proof of any kind that Mrs. Culpepper was an agent for defendant [Behnen] not, by the wildest imagination." [T, P. 178, L. 10-12] Therefore, there can be no material facts at issue for the jury to consider. An agency allegation alone does not create a material fact for the jury's consideration, there must be clearly established evidence. Here there is none, not a scintilla of evidence for consideration by the jury.

The third issue before the Court, is that the lower court erred in dismissing Langham's

claims of unjust enrichment or quantum meruit, alleging that issues of fact existed for the jury's consideration. Langham is incorrect here also. Quantum meruit recovery is contract remedy which may be promised either on express or "implied" contract, and a prerequisite to establishing ground for quantum meruit recovery is claimant's reasonable expectation of compensation. *Wiltz v. Huff*, 264 So.2d 808 (Miss. 1972); *Est. of Van Ryan v. McMurtray*, 505 So.2d 1015 (Miss. 1987). The measure of recovery in quantum meruit is the reasonable value of the materials or services rendered. *Kalavros v. Deposit Guaranty Bank & Trust Co.*, 248 Miss. 107, 158 So2d 740 (1963).

Unjust enrichment is an equitable remedy closely associated with "implied contracts" and trusts. In *Hans v. Hans*, 482 So.2d 1117 (Miss. 1986), the Court said:

The doctrine of unjust enrichment or recovery in quasicontract applies to situations where there is no legal contract but where the person sought to be charged is in possession of money or property which is good conscience and justice her should be retain but should deliver to another, the courts imposing a duty to refund the money or the use value of the property to the person to whom in good conscience it ought to belong.

482 So. 2d at 1122. And, in *Magnolia Federal Savings & Loan v. Randal Craft Realty*, 342 So.2d 1308 (Miss. 1977):

[t]he terms "unjust enrichment" and "resolution" are modern designation for the doctrine of "quasicontracts" and the basis for an action for "unjust enrichment" lies in a promise, which is implied by law, that one will pay to the person entitled thereto which in equity and good conscience is his.

342 So.2d at 1311.

The measure of recovery is a distinction between quantum meruit and unjust enrichment. Recovery in quantum meruit is measured by the reasonable value of materials or services rendered, while recovery in unjust enrichment is that to which the claimant is equitable entitled. See *Kalavros v. Deposit Guaranty*

*Bank & Trust Co.*, 158 So. 2d 740 (Miss. 1963); and *Magnolia Federal Savings & Loan v. Randal Craft Realty*, 342 So. 2d 1308 (Miss. 1977).

In the case sub judice, as a matter of unjust enrichment and quantum meruit, the judge correctly found “this jury would be totally in the dark as to judge whether or not Mr. Behnen was unjustly enriched other than somebody comes along and says that they cut a bunch of trees.” [T. P.178, L. 23-26] The Judge further correctly stated that “He [Behnen] never acknowledged that he was responsible for this. Never acknowledged to anybody. In fact, he [Behnen] ignored the bill.” [T. P. 178, L. 28 -29 and P. 179, L. 1]

The Court was correct in finding that no facts existed for the jury to consider relating to the unjust enrichment or quantum meruit. In fact, there would be rank speculation to the value of the alleged work done by Langham on Behnen’s lots. The Court stated “where is the guide for .... where is the evidence is there a guide for the jury in determining what benefit has been received by the defendant [Behnen] as far as value is concerned on each one of these lots?” [T. P.170, L. 23-27]

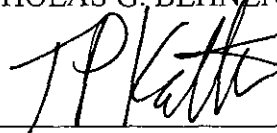
Langham argues that his expert places a value on his services to show an unjust enrichment to Behnen, but the Court was correct in its analysis, by stating that “The jury does not have to accept his [Expert], nor do I have to accept his [Expert] speculation as to what it would cost. [T. P. 172, L. 22-25]

## VI. CONCLUSION

The decision of the trial court for a directed verdict in Behnen’s favor should not be disturbed. The trial court made factual and legal findings that do not breach the standard of review for directed verdict, pursuant to Miss. R. Civ. P. 50(a).

RESPECTFULLY SUBMITTED, this the 2<sup>nd</sup> day of November, 2009.

NICHOLAS G. BEHNEN, Appellee



TIMOTHY P. KOTTEMANN

Attorney for Appellee

Timothy P. Kottemann (MSB: [REDACTED])  
Kottemann Law Firm, P.L.L.C.  
P.O. Box 1352  
Biloxi, Mississippi 39533-1352  
(228) 697-6717  
Fax: (228) 864-0297

**CERTIFICATE OF SERVICE**

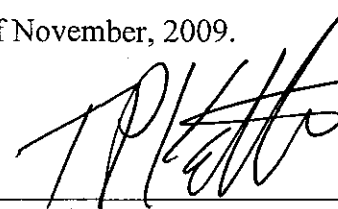
I, Timothy P. Kottemann, Esq. do hereby certify that I have mailed a true and correct copy of the foregoing Reply Brief of Appellee to the following:

Paul A. Koerber, Esq.  
Attorney for the Appellant  
P.O. Box 12805  
Jackson, Mississippi 39236  
(601) 956-0072

Judge Jerry O' Terry, Retired  
P.O. Box 1461  
Gulfport, Mississippi 39502

Judge Roger Clark, Senior Circuit Court Judge  
1801 23<sup>rd</sup> Avenue  
Gulfport, Mississippi 39501

SO CERTIFEID, this the 2<sup>nd</sup> day of November, 2009.

  
\_\_\_\_\_  
Timothy P. Kottemann (MSB [REDACTED])  
Kottemann Law Firm, P.L.L.C.  
P.O. Box 1352  
Biloxi, Mississippi 39533-1352  
(228) 697-6717  
Fax: (228) 864-0297