Case No. 2009-CA-00388

JAMES E. LANGHAM — Appellant

vs.

NICHOLAS BEHNEN — Appellee

Appellant's Brief

On Appeal from the Circuit Court of
Hancock County, Mississippi.

ORAL ARGUMENT REQUESTED

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

CERTIFICATE OF INTERESTED PERSONS

In accordance with Rule 28 of the *Mississippi Rules of Appellate Procedure*, Appellant, James E. Langham, would respectfully submit that the following persons or entities have or may have a material and substantial interest in the outcome of this action before this Court:

1. James E. Langham, Appellant
2. Nicholas Behnen, Appellee

Respectfully submitted, this the 2nd day of September, 2009.

James E. Langham, Appellant

By: 
Paul A. Koerber
His Attorney

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STATEMENT OF THE ISSUES AND STANDARD OF REVIEW

In accordance with Rule 28(a)(3) of the *Mississippi Rules of Appellate Procedure*, Appellant, James E. Langham, would respectfully submit that the following issues are determinative of this appeal:

1. Whether the 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 a 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.

All such issues must be weighed in the light most favorable to Appellant Langham.

STATEMENT OF THE CASE

In the aftermath of the catastrophic damage caused by Hurricane Katrina on the Mississippi Gulf Coast, Appellant, James Langham, traveled from his home in Georgia to work for landowners in clearing the debris from their property. [T. 79-80, 84] One such landowner is the Appellee, Nicholas Behnen, of Las Vegas, Nevada. Through Behnen's agent, Langham used machinery and heavy equipment to clear damaged and dangerous trees from property in the Diamondhead community. [T. 82, 85-88] Behnen's agent sent bills for Langham's work to Behnen, who after-the fact refused to pay for the services performed, which had likewise benefitted Behnen and improved his property. [T. 93, 95 This suit concerns Langham's efforts to be paid for such work, based on claims of breach of contract, unjust enrichment and *quantum meruit.*

On February 5 and 6, 2009, this case was tried before the Honorable Jerry O. Terry, Sr., and before a jury that had been selected to determine the factual issues of the case. However, after the conclusion of Langham's case-in-chief, the trial court, on February 10, 2009, entered an adverse Judgment on a Motion for a Directed Verdict, thus dismissing Langham's claims. [T. 158-182] Such dismissal is contrary to established law in Mississippi that such issues regarding agency are

clearly questions of fact solely for the jury's consideration. On March 6, 2009, this appeal was perfected to this Honorable Court, due to such error.

STATEMENT OF THE FACTS

This case is about the refusal of a landowner to pay for extensive work performed to enhance and improve his property after the devastating ravages of Hurricane Katrina.

As this Court is well aware, Hurricane Katrina struck the Mississippi Gulf Coast on August 29, 2005, causing damage to life and property. Among those communities suffering catastrophic property loss was the Diamondhead area in Hancock County, Mississippi. [T. 30] Answering the general call for assistance to the ravaged area was Appellant, James Langham, who traveled from his home in Georgia, to work for landowners, whose property was covered with damaged and dangerous trees and debris. [T. 79-82] One such landowner was the Appellee, Nicholas Behnen, from Las Vegas, Nevada, who owned approximately eleven lots he had bought through tax sales. [T. 138, 142]

Upon arriving on the Gulf Coast, Langham met with the Diamondhead Property Owners Association membership person, Jennifer Culpepper, who first hired Mr. Langham to clear her own property and from whom Langham even rented a place to live, while performing work for landowners in the area. [T. 24,

28, 80-82] During the course of the recovery and clean up efforts, Culpepper had received complaints from members of the Diamondhead Property Owners Association, who owned adjoining properties, about dangerously damaged trees on Behnen's property, and she contact him. [T. 29-30, 37, 39]

Specifically, on November 18, 2005, Culpepper called Behnen and thoroughly discussed the problem trees and debris on his property. [T. 29-30, 37, 39; *see also* Exhibit P-7] An important factor is that Ms. Culpepper had been working for Behnen in caring for his properties, such as cutting grass and similar tasks. [T. 138] She informed him that contractors, such as Langham, were working in the area and were charging prices in a range from $4,000 per lot to $8,000 per lot for such clean-up and debris removal. [Exhibit P-7] She explained to Behnen that Mr. Langham indicated that he would perform such work for $4,500 per lot and that he had done good work. [Exhibit P-7, T. 87] Since there existed a dangerous situation involving trees on Behnen's property, since Ms. Culpepper had been working for Behnen in caring for his property in the past, and since Culpepper had a reasonable estimate from Langham in relation to other contractors performing similar work in the area, Behnen thought the proposal was "great" and told Culpepper "to go ahead." [Exhibit P-7; T. 29-30, 37, 39, 42-45, 65-66, 73-74]

Behnen provided Culpepper with his email address, so that she could communicate with him regarding the work. [Exhibit P-7; T. 45]

Ms. Culpepper then contacted Langham, and the two of them personally located and physically inspected the properties of Behnen, for the purpose of Langham performing the work of clearing dead and dangerous trees and debris. [T. 40-41] They even took photographs of the lots as they then appeared, so that comparison could be made after the work was performed. [T. 48-49] The work was tedious and dangerous, especially when coupled with the by-laws of Diamondhead that lots cannot be "clear-cut", unless there was a plan to build a residence on the property. [Exhibit P-7; T. 88] Langham and his assistant, Jonathan Lacoste, had to carefully remove the trees and debris, all the while avoiding damage to adjacent landowners' fences and other structures. [T. 8889-90, 119] The work of clearing Behnen's eleven lots took approximately four to five weeks to complete. [T. 92]

As Langham performed the work, he presented invoices to Ms. Culpepper, all addressed to Mr. Behnen, so that she could forward them to Behnen for payment. [T. 45, 47, 93] She would then forward the invoices to Behnen for payment to the email address that he had provided, when she had spoken to him on November 18, 2005. [T. 45, 47] Periodically, as he was performing the work,

Langham would inquire from Culpepper whether she had received any payments from Behnen. [Exhibit P-7; T. 57-58, 93] With there being no receipt of monies from Behnen, Ms. Culpepper would email him again in Las Vegas. [Exhibit P-7; T. 47-48] Still, there was no response.

She would then call Behnen, but she could not contact him. [Exhibit P-7]

On December 18, 2005, Ms. Culpepper sent all of the invoices via Federal Express to Behnen, that she had previously emailed to Behnen, along with photographs of his lots before and after the clean-up by Langham. [T. 48-51] As Mr. Langham continued to inquire about the lack of payment from Behnen, Ms. Culpepper would continue to make telephone calls and send emails to Behnen, all to no avail. [Exhibit P-7; T. 94] Langham then requested Behnen's contact information and tried to contact him. Finally, Langham was able to reach Behnen telephonically who stated that she had not received anything from Culpepper. [T. 94-95]

Behnen never denied that Culpepper was acting as his agent for such work and never denied that he had authorized work to be done in cleaning up his lots in Diamondhead. [T. 95, 97] Behnen also never disputed that Langham had actually performed the work, which improved and gave value to his properties. [T. 95-96]

Only when Behnen conveniently asked how much he owed Langham did Behnen erupt and challenged the amount of money he was being charged. Exhibit P-7; T. 95] At that point, he then refused to pay. Langham tried to resolve the matter by offering to take less money, rather than end up in a dispute, but Behnen continued his refusal to pay Langham for the services he had performed and from which Behnen enjoyed the fruits of his labors. [Exhibit P-7; T. 97]

Behnen indicated that he would travel from Las Vegas on January 20, 2006 to view and inspect the property and to meet with Langham and Ms. Culpepper. However, Behnen never showed up. [T. 96] He continued to balk at any effort to resolve the matter and not pay anything to Langham for all the work he had done.

Due to the refusal of Behnen to pay and due to his conduct of not showing up to even inspect his own property or to discuss any possible amicable resolution, the picture became quite clear that Behnen was simply skipping out on his obligations. Langham's only recourse then was to institute suit.

SUMMARY OF THE ARGUMENT

Standard of Review and Summary of Argument

Inasmuch as the Hancock County Circuit Court granted the motion for a directed verdict of the Appellee, Behnen, this Court may review such decisions under a *de novo* standard. *See, Pierce v. Cook*, 992 So. 2d 612, 616 (Miss. 2008);

Pace v. Fin. Sec. Life, 608 So. 2d 1135, 1138 (Miss. 1992). *See also Hooks v. Morrison Milling Co.*, 38 F. 3d 776, 780 (5th Cir. 1994); *Carpenter v. Wichita Falls Independent School District*, 44 F. 3d 362, 365 (5th Cir. 1995).

A motion for directed verdict tests the legal sufficiency of the plaintiff's evidence. *Bankston v. Pass Rd. Tire Ctr., Inc.*, 611 So. 2d 998, 1003 (Miss. 1992). This Court has stated that [i]n deciding whether a directed verdict . . . should be granted, the trial judge is to look solely to the testimony on behalf of the party against whom a directed verdict is requested. He will take such testimony as true along with all reasonable inferences which can be drawn from that testimony which is favorable to that party, and, if it could support a verdict for that party, the directed verdict should not be given. If reasonable minds might differ as to this question, it becomes a jury issue. *White v. Thomason*, 310 So. 2d 914, 916-17 (Miss. 1975) (citing *Williams v. Weeks*, 268 So. 2d 340 (Miss. 1972); *Jones v. Phillips*, 263 So. 2d 759 (Miss. 1972)). This Court has also held that "[i]n considering the evidence and all reasonable inferences, the court must determine whether the evidence is so overwhelmingly against [the nonmovant] that no reasonable juror could have found in [his] favor." *Fox v. Smith*, 594 So. 2d 596, 603 (Miss. 1992) (citations omitted). "[T]his Court considers `whether the evidence, as applied to the elements of a party's case, is either so indisputable, or so

deficient, that the necessity of a trier of fact has been obviated.'" *Spotlite Skating Rink, Inc. v. Barnes*, 988 So. 2d 364, 368 (Miss. 2008) (quoting *White v. Stewman*, 932 So. 2d 27, 32 (Miss. 2006)). Accordingly, "[a] directed verdict pursuant to M.R.C.P. 50(a) is not an appropriate means for the disposition of a case so long as questions of fact are raised in the proof at trial." *Id.* (citing *Bank of Shaw v. Posey*, 573 So. 2d 1355, 1361 (Miss. 1990)). Mississippi Rule of Civil Procedure 50(a) states that "[a] motion for a directed verdict shall state the specific grounds therefor." Miss. R. Civ. P. 50(a).

Here, the Circuit Court did not so appropriately weigh the evidence adduced at the trial of this matter, as set forth above, especially in light of this Court's pronouncements that evidence concerning the establishment of an agency relationship are specifically questions of fact for the jury's consideration and not questions of law. *Miller v. R. B. Wall Co.*, 970 So. 2d 127, 131-132 (Miss. 2007); *Kight v. Sheppard Building Supply*, 537 So. 2d 1355, 1358 (Miss. 1989). On this basis alone, the decision of the Circuit Court should be reversed.

Further, the Circuit Court improperly dismissed Langham's claims concerning *quantum meruit* and unjust enrichment. *See Tupelo Redevelopment Agency v. Gray Corp.*, 972 So. 2d 495, 514-515 (Miss. 2007); and *Magnolia Federal Savings & Loan v. Randal Craft Realty*, 342 So. 2d 1308 (Miss. 1977).

The value of the services rendered by Langham for the clearing of damaged and dangerous trees from Behnen's property was incontrovertibly established by the testimony at trial. There is no question that Langham cleaned up eleven lots at a cost of $4,500 per lot. Certainly, an issue of fact was created for the jury's consideration. The Hancock County Circuit Court should be reversed on this basis, as well.

ARGUMENT

Agency Issue

In his Complaint filed in this action [R. 4], James Langham sought, among other claims, relief based on breach of an oral contract to provide lot clearing services to Nicholas Behnen. That oral contract was specifically stated and entered into by and between Langham and Behnen's agent, Jennifer Culpepper. Indeed, there was no issue at trial that an agreement had been reach to provide such services or the price for such services; rather, Behnen merely disputed that Culpepper was not his agent. The proof showed otherwise.

Mississippi law effectively establishes that oral contract are enforceable. *Ladner v. Manuel*, 744 So. 2d 390 (Miss. App. 1999). Indeed, such a contract is enforceable when there is proof of an offer and an acceptance. *R. C. Const. Co., Inc. v. National Office Systems, Inc.*, 622 So. 2d 1253 (Miss. 1993). Langham's

offer was to clear Behnen's eleven lots in Diamondhead at a price of $4,500 per lot. That offer was specifically communicated to Behnen by his agent, Ms. Culpepper, and she was affirmative authorized to accept by Behnen stating to her "to go ahead". Indeed, Behnen thought the offer was "great, in comparison with other contractors that were performing similar clean-ups in the wake of Hurricane Katrina. Behnen then provided her with his email address, so that she could send him the bills for the work performed by Langham, which she did.

As set forth above, Behnen only questioned the arrangement when Langham called him, due to non-payment of the invoices. In that communication, Behnen did not deny that Culpepper was authorized to make the agreement on his behalf, since he was far away, in Las Vegas, and he did not question that the work had been performed. Indeed, Culpepper had been performing maintenance work of Behnen's properties before Hurricane Katrina had even occurred. It is only convenient now for Behnen to argue that Culpepper did not have his authority, since when he was first contact about the need to have the lots cleared of damaged and dangerous trees and debris, the liability for damage or injury to others existed. Adjacent landowners had complained to the Property Owners Association about the state of his property. Langham therefore provided the means of handling this matter.

This Court has consistently held that, in order to establish agency and apparent authority of the agent to act for the principal, a plaintiff must show (1) acts or conduct on the part of the principal indicating the agent's authority, (2) reasonable reliance on those acts, and (3) detriment as a result of such reliance. *Andrew Jackson Life Insurance v. Williams*, 566 So. 2d 1172, 1180 (Miss. 1990); *Alexander v. Tri-County Co-op*, 609 So. 2d 401 (Miss. 1992). More recently, this Court has found such apparent authority and agency in *American Income Life Insurance v. Hollins*, 830 So. 2d 1230, 1238 (Miss. 2002), in which, as in other cases cited herein, this Court reflected that whether the evidence is sufficient to meet this test is an issue for the fact-finder. *See also Baxter Porter & Sons Well Servicing Co. v. Venture Oil Corp.*, 488 So. 2d 793, 796 (Miss. 1986).

Here, the Hancock County Circuit Court failed to leave the issue for the jury's finding and granted Behnen's motion for a directed verdict.[1] In weighing the evidence adduced above in the light most favorable to Langham, the trial court incorrectly granted the motion. The decision, therefore, should be reversed and this case remanded for proceedings based upon the above and foregoing authority.

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[1] Interestingly, the trial court had denied Behnen's pretrial motion on a similar basis. [t. 3-5]

Quantum Meruit/Unjust Enrichment

Langham also plead for relief under the theories of *quantum meruit* or unjust enrichment. The Circuit Court improperly granted Behnen's motion for a directed verdict on this basis, as well. Curiously, the trial court had specifically indicated to all of the parties that he would let these issues go to the jury, at the close of proceedings after Langham had rested his case-in-chief, on the first day of trial. [T. 151-156] The next morning, the Circuit Court made its conflicting ruling and dismissed the case. [T. 158-181] Such a determination was made without any further evidence being introduced, but rather, it was made after the parties did not settle the case, after the trial court's insistence to do so. [T. 151-156]

Be that as it may, the value of the services rendered by Langham for the clearing of damaged and dangerous trees from Behnen's property was incontrovertibly established by the testimony at trial. There is no question that Langham cleaned up eleven lots at a cost of $4,500 per lot. Certainly, an issue of fact was created for the jury's consideration. These theories of *quantum meruit* and unjust enrichment are viable in Mississippi, even if no legal contract was formed.

Relief under the claim of *quantum meruit* exists where (1) valuable services are rendered or materials are furnished, (2) for the person sought to be charged, (3) which services and materials are accepted by the person sought to be charged, or

used and enjoyed by him; and (4) under such circumstances that the one performing the service would expect to be paid by the person who receives the services after reasonable notice. *Tupelo Redevelopment Agency v. Gray Corp.*, 972 So. 2d 495, 514-515 (Miss. 2007). There is no question but that facts were presented to the jury upon which they should have been allowed to consider. Instead, the trial court dismissed this claim.

Unjust enrichment applies to situations where there is no legal contract and the person sought to be charged is in possession of money or property which, in good conscience and justice, he should not retain, such that the value of such money or property should be refunded or otherwise returned. *Powell v. Campbell*, 912 So. 2d 978 (Miss. 2005); *Hans v. Hans*, 482 So. 2d 1117, 1122 (Miss. 1986). *See also Magnolia Federal Savings & Loan v. Randal Craft Realty*, 342 So. 2d 1308 (Miss. 1977).

The trial court improperly ruled that there was a lack of evidence as to the amount of damages that the jury could award. Such a finding ignores the evidence established above as to the cost and therefore the value received by Behnen on properties he had merely bought at a tax sale for apparent investment purposes. To this day, Behnen enjoys the fruits of Langham's labors on that property, and he has refused to compensate Langham for the benefit he has derived. Therefore, this

Court should reverse and vacate the decision of the Hancock County Circuit Court and remand this case for further proceedings not inconsistent with the above and foregoing authorities.

CONCLUSION

Based on the above and foregoing law and application of such law to the underlying facts, reversal of the Circuit Court's decision is mandated, with remand instruction that trial proceed against the Appellees Behnen, in accordance with this Court's determination. To not allow such remedial proceedings grants permission to persons falsely cloaking themselves in feigned ignorance and effectively avoid their just obligations. In short, Behnen owes Langham for the valuable work he performed after the ravages of Hurricane Katrina to Behnen's property at Diamondhead. Behnen should be made to pay for such services.

RESPECTFULLY SUBMITTED, this the 2nd day of September, 2009.

James E. Langham, Appellant

By: _____

Paul A. Koerber
His Attorney