IN THE SUPREME COURT OF MISSISSIPPI

No. 2009-CA-00841

GEORGE M. BOZIER

APPELLANT/CROSS-APPELLEE

VS.

RICHARD J. SCHILLING, JR.
AND SW GAMING LLC

APPELLEES/CROSS-APPELLANTS

APPEAL FROM THE CHANCERY COURT OF WASHINGTON COUNTY, MISSISSIPPI

BRIEF OF APPELLEES/CROSS-APPELLANTS

ORAL ARGUMENT NOT REQUESTED

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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 Court of Appeals may evaluate possible disqualification or recusal.

1. George Bozier, Appellant/Cross-Appellee
2. Richard Schilling, Appellee/Cross-Appellant
3. SW Gaming LLC, Appellee/Cross-Appellant
4. C.W. Walker III, Andrew Alexander III, April D. Robertson, and Susan N. O'Neal of Lake Tindall LLP, Attorneys for Appellant/Cross-Appellee
5. Joseph L. Adams, Debra M. Brown, Jerome C. Hafter and W. Brett Harvey of Phelps Dunbar LLP, Attorneys for Appellee/Cross-Appellant
6. Honorable Marie Wilson, Judge, Washington County Chancery Court

So certified, this the 2nd day of February, 2010.

W. BRETT HARVEY, attorney of record for Appellees/Cross-Appellants Richard J. Schilling, Jr. and SW Gaming LLC

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is not needed. Appellant George Bozier devotes most of his brief to challenging the chancellor's reference to the impossibility doctrine, which is immaterial to the judgment. He does not challenge the chancellor's dispositive factual finding that Bozier and Appellee Richard Schilling conditioned their agreement upon certain events that—impossible or not—simply did not occur. Nor could he, as this finding has ample factual support in the record.

Further, Bozier's misguided attack is waived, as Bozier failed to object to the chancellor's use of the impossibility doctrine below. The arguments on pages 17 through 34 of Bozier's appellate brief were never presented to the chancellor and cannot be raised on appeal.

This Court can thus affirm on two simple grounds: (1) the chancellor's factual findings are supported by substantial evidence; and (2) Bozier's chief argument is waived. Neither determination warrants oral argument.

On cross-appeal, Schilling challenges the chancellor's award of damages on an unpled quantum meruit claim. While the trial court's desire to award Bozier some money is understandable, Bozier refused to comply with specific instructions to submit evidence supporting such a claim. As a result, there is no evidence to support Bozier's unpled quantum meruit claim. Here again, the briefs provide an adequate basis for deciding the appeal. No oral argument is needed.

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INTRODUCTION

I. Bozier's Direct Appeal

The chancellor got the right result. She found that George Bozier and Richard Schilling had a "fast and loose oral agreement" that was subject to "contingencies and conditions." 5:543.[1] If the parties successfully opened a small, barge-based casino called the Bali Hai, Bozier would get stock in that casino. The chief "condition" was that the casino had to be opened "using Schilling's fully equipped casino barge." 5:551. The sinking of that fully equipped barge "marked the end of the Bali Hai barge based project." 5:545. Thus, Bozier got no stock.[2]

These factual findings dispose of Bozier's claims. Bozier does not challenge them, nor could he. Instead, he devotes more than half of his argument—roughly eighteen pages—to attacking a straw man: the impossibility doctrine. The chancellor made exactly one reference to the impossibility doctrine in her twenty-six page opinion.

There is no need for this Court to delve into the impossibility doctrine. Impossibility is a defense to a breach of contract claim, and ***Bozier never pled a breach of contract claim.*** 1:10-16. At trial, his lawyer said, "This is not a contract

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[1] Citations to the trial court record will follow this format: [volume]:[page].

[2] Schilling maintained throughout trial that the oral agreement was solely for employment as the manager of the Bali Hai casino, not for stock. 8:323. Without conceding the point, for purposes of this appeal, Schilling's brief assumes the accuracy of the chancellor's finding that there was a deal for stock.

case. It's a fraud case." 6:20. Thus, it would have been ridiculous for Schilling to raise impossibility as a defense in his answer or at trial.

For the sake of completeness the chancellor's opinion lays out the reasons why Bozier's unpled, untried, disavowed contract claim would fail anyway. 5:548-51. One of those reasons is impossibility. Bozier seizes this brief reference to impossibility like a drowning man, but it does him no good. The chancellor rejected his claims—including his unpled contract claim and his fraud claim—for factual reasons. It simply does not matter whether the stock deal was legally "impossible" because the chancellor found ***the parties themselves*** put conditions on their deal, and these conditions never occurred.

The chancellor's factual findings about the conditions underlying the "fast and loose" oral agreement—and the failure of those conditions—are supported by substantial evidence. There is no clear error, so the chancellor's denial of Bozier's claims should be affirmed.

In addition, as set forth below, Bozier waived any objection to the chancellor's invocation of impossibility. He filed multiple post-trial motions challenging her judgment, but none challenged impossibility.

II. Cross-Appeal

One point in the chancellor's judgment, however, is clearly erroneous. The chancellor awarded Bozier $290,000 in quantum meruit damages. Bozier never pled a quantum meruit claim. Further, the chancellor told Bozier to submit

evidence of the value of his services, but he refused. Instead, he submitted an unsworn letter from his lawyer listing vague categories of damages totaling over nine million dollars.

Lacking any evidence, the chancellor simply presumed that Bozier spent twenty-nine weeks doing "consulting" work worth $10,000 per week. The ***only*** evidence showed the opposite: (1) that Bozier's consulting company never generated any revenue, and (2) that high-dollar casino consulting jobs last no more than about three weeks, not twenty-nine weeks. There was no factual basis for the $290,000 quantum meruit award.

The chancellor's decision should be affirmed on direct appeal, reversed on cross-appeal, and judgment rendered for Schilling and SW Gaming LLC.

STATEMENT OF THE CASE

George Bozier filed this lawsuit against Richard Schilling and SW Gaming LLC in the Chancery Court of Washington County in December 2005. 1:10-16. Bozier raised claims of unjust enrichment, "misappropriation of business opportunity," breach of fiduciary duty, and fraud, and sought the establishment of a constructive trust. *Id.*

Bozier did not raise a breach of contract claim. *Id.* Consequently, Schilling did not plead any affirmative defenses to contract claims, such as impossibility.[3]

[3] For the sake of brevity, this brief refers to appellees Richard Schilling and SW Gaming LLC collectively as "Schilling," except where the distinction is relevant.

Indeed, at trial, Bozier's own lawyer said, "This is not a contract case. It's a fraud case." 6:20. He explained that he deliberately omitted a contract claim to avoid the statute of frauds. *Id.*

The chancellor presided over a four day bench trial on September 8th through the 11th, 2008. On March 23rd, 2009, the chancellor issued her Final Judgment. 5:540-66. In a thorough twenty-six page opinion, the chancellor denied recovery on each of Bozier's claims except an unpled quantum meruit claim. *Id.*

On April 1, 2009, Bozier filed a Motion for More Definite Judgment, asking the chancellor to specify the amount of quantum meruit damages. 8:570-71. Shortly thereafter, the parties held a telephone conference in which the chancellor instructed Bozier to "submit an itemized bill" for his services from June 1, 2005 through December 15, 2005. 8:631.

The chancellor later found that Bozier failed to submit any itemized bill. *Id.* Schilling filed a memorandum of law objecting to quantum meruit damages and contending that, if any damages were awarded, they should be limited to $51,041.66. 8:577-85. The chancellor nonetheless awarded Bozier $290,000 in quantum meruit damages. 8:630-31.

Bozier also filed a Motion for New Trial on April 1, 2009, incorrectly contending that certain documents were not provided in discovery. 8:567-69. After briefing by the parties, the motion was denied. 8:629. None of Bozier's

post-trial motions addressed or objected to the chancellor's use of the impossibility doctrine.

Bozier timely appealed and Schilling cross-appealed. 8:632-34. On appeal, Bozier does not challenge the rejection of his misappropriation, fiduciary duty, and unjust enrichment claims.

STATEMENT OF FACTS

The chancellor's opinion correctly states the facts. 5:541-48. Consequently, an exhaustive recitation of the factual background is not necessary. Certain of the chancellor's findings, however, deserve special mention.

I. The Prologue

Richard Schilling once owned the Splash Casino in Tunica.[4] 5:557. It was a small but profitable barge-based facility. 5:542, 8:320-21. When it closed in 1995, Schilling was left with two barges: one equipped as a casino and one equipped as a restaurant. 5:542-43. Sitting idle, the two Splash barges quickly became a major liability, costing Schilling as much as $20,000 per month to store. 7:173.

Beginning in 1996, Schilling began looking for alternative sites to re-open the Splash barge-based casino. *Id.* He considered various sites in Natchez and Greenville, including a location by the U.S. Highway 82 bridge. *Id.*

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[4] Richard Schilling passed away on January 27, 2010, shortly before this brief was filed. Counsel for Mr. Schilling do not believe this affects the status of this appeal, but will confer with Bozier's counsel regarding the appropriate steps under Rule 43 of the Mississippi Rules of Appellate Procedure.

In 2001, George Bozier lost his job as casino manager at the Jubilee Casino in Greenville, Mississippi. 5:542. Bozier wanted to remain in Greenville, and so began looking at sites for a possible new casino. *Id.* He also started contacting people who might be interested in developing such a casino. *Id.* One of the people he contacted was Richard Schilling. *Id.*

Initially, Schilling was not interested. *Id.* But by 2003, Schilling was growing tired of paying mooring charges for the two Splash casino barges. *Id.* Though Schilling had already seen the site, Bozier suggested to Schilling that the location by the U.S. 82 Bridge in Greenville would be a suitable place to re-open the Splash barges. *Id.*

II. The "Fast and Loose Oral Agreement"

The chancellor found that in 2003 Schilling and Bozier entered into a "fast and loose oral agreement," about a possible barge-based casino, but it was not the "broad agreement of [Bozier's] dreams." 5:544. Rather, it was "an agreement containing contingencies and conditions which would have been clearly specified in a written agreement." *Id.*

Schilling and Bozier planned to use Schilling's two Splash barges to establish a small casino in Greenville, costing about $20 million. 5:543-44. The agreement was "never reduced to writing" despite the fact that Bozier had an attorney, 5:543, and despite the fact he and Schilling were both "seasoned

businessmen" who "knew the intricacies of starting and running a casino and the need for written contracts." *Id.*

The chancellor described the terms of the oral agreement as follows. Schilling would "open a casino using his barges." *Id.* The Casino would be "called the Bali Hai." *Id.* It "would consist of the casino barge and the restaurant barge" that Schilling owned, which previously comprised the Splash Casino in Tunica. *Id.* The Splash barges "would be moved to the bridge site at Schilling's expense." *Id.*

Bozier "would do the leg work to establish the casino" in Greenville. *Id.* Bozier's compensation "for establishing the Bali Hai casino" would be "a job as the casino manager at an annual salary of $200,000 and an undiluted 10% ownership interest" in the casino. 5:543-44.

Bozier's appellate brief presents a substantially different version of the oral agreement. Bozier says the deal was that "Schilling would undertake to establish a casino" at a location in Greenville, and "Bozier would present this opportunity to him exclusively," whatever that means. Bozier Br. at 2. In short, he says he had a broad agreement to get stock in ***any*** casino Schilling later opened in Greenville, not just the barge-based Bali Hai.

The chancellor rejected Bozier's account. She specifically found that "Schilling and Bozier never agreed to construct a casino. They agreed to open a casino ***using Schilling's fully equipped casino barge***. The casino barge was

essential to the performance of the oral agreement between Schilling and Bozier. It was the specified item at the heart of their agreement." 5:551 (emphasis added).

Bozier also contends there is no evidence he was required to find investors as a condition of receiving stock. *See* Bozier Br. at 34. But Bozier's worthless marketing plan, his fruitless letters to investors, and his claim to have assisted SW Gaming in obtaining a line of credit, 5:544, 546-48, all are evidence he promised to help find investors. He would not have done these things gratuitously.

Finally, Bozier repeatedly asserts—without any citation—that Schilling denied the existence of an oral contract. *See, e.g.,* Bozier Br. at 7, 13, 18-19. This is objectively, demonstrably false. Schilling never denied the existence of a deal.

On page 323 of the trial transcript, Schilling flatly stated, "I offered Mr. Bozier the casino manager job." 8:323. Schilling denied only that the oral agreement involved Bozier receiving stock, not that it existed. And as shown below, Schilling and others offered substantial testimony as to the other conditions and terms of the agreement.

Consequently, Bozier's false assertion that his account of the deal is somehow "uncontradicted," *see* Bozier Br. at 7, is properly ignored.

III. The Bali Hai Project Fails

In 2004, the Bali Hai deal fell apart. With the project making no progress, Bozier left in May for a job in Colorado. 5:544. In June, one of the initial owners, Jeff Wellemeyer, abandoned the project. 6:139. Wellemeyer testified that he

considered the Bali Hai project "dead. It was a dead deal. There was really nothing to sell." *Id.* Then, in September 2004, the Splash casino barge sank, driving the last nail into the coffin. 5:545.

At trial, the chancellor asked Schilling how the sinking of the Splash Casino barge affected the project. 8:357. Schilling explained that he had "to buy two new barges" to replace the one Splash Casino barge, "and build a new building on [them.]" *Id.* "That's why the cost started escalating," Schilling explained. *Id.* "That's why I had to keep selling more stock. In other words, [the Splash] was already a casino, a fully equipped casino. All we had to do was put the equipment back in it because we had used it at the Splash in Tunica." *Id.*

Ultimately, the chancellor found that—while Schilling would press forward with a new, larger casino project—the sinking of the Splash barge "marked the end of the Bali Hai barge based casino project." 5:545. She likewise found that "Bozier was well aware that the initial barge based project had ended." 5:545.

Indeed, the chancellor found that Bozier was repeatedly put on notice that he was not going to going to get stock in the new, larger casino. 5:546. The evidence supports this finding as well. For example, in July 2003, Schilling formed SW Gaming with Jeff Wellemeyer. They did not give Bozier any stock interest. 5:544. Wellemeyer specifically told Bozier he would not get any stock. *Id.*

Likewise, after the sinking, Bozier "attempted to reassert his oral agreement with Schilling, by putting it in writing for the first time . . . via his letter to [project

investor Lanny] Holbrook dated November 12, 2004." 5:545-46, Pl. Exh. 63. But Holbrook's reply "made it clear that Bozier's oral agreement with Schilling was no longer in existence." 5:561.

IV. The Harlow's Project

Schilling found new investors and moved forward with an alternative, more costly casino project in Greenville. Ultimately, this resulted in the November, 2007 opening of the land-based Harlow's Casino and Resort. 5:546-48.

Harlow's is vastly different from the barge-based Bali Hai casino contemplated in Bozier and Schilling's oral agreement. It is built on a massive landfill, with fully integrated hotel, restaurant, and entertainment facilities. Bozier himself conceded that Harlow's is "pretty different" from the planned Bali Hai. 7:295. Harlow's cost $85 million, or just over four times the expected cost of the Bali Hai.

While the Bali Hai project was still alive—but on life support—Bozier left Mississippi to take a job at a casino in Colorado. Later, the Chancellor found that Schilling told him "don't come back" because there was no job for him at Harlow's, 8:354, and that he "could not be paid," 5:547.

But Bozier came back anyway in summer 2005 and worked on the Harlow's project in hopes of landing a job when it was completed. *Id.* Around this time, Schilling explicitly told Bozier—once again—that he would not be receiving any stock or ownership share in Harlow's. *Id.* As the chancellor noted, Jamie Goff was

"the only person in front of whom Bozier mentioned to Schilling the disputed 10% interest." 5:547. Goff testified that around 2005, Schilling yet again told Bozier he was not getting any stock. *Id.*; 7:165.

In December 2005, Bozier was offered a job as the casino manager of Harlow's casino at a salary of $100,000 per year. 5:547. Bozier rejected the offer, contending he was entitled to a $200,000 salary and ten percent ownership of the Harlow's Casino and Resort. *Id.* On December 15, 2005, he quit working on the project.

In June 2006, six months after Bozier admits he stopped working on the project, financing was finally obtained and construction began on Harlow's Casino. 5:563. The project was completed in November 2007, three years after the Splash casino barge sank, and almost 2 years after Bozier filed suit.

V. Bozier's Performance Provided Practically No Benefit.

The chancellor found that Bozier's performance had no value to the Harlow's Casino project. 5:570-71. The chancellor found that, "despite the numerous memoranda he forwarded to just about everyone involved . . . the credible evidence is that little to none of the work generated by Bozier on the initial project was ultimately used by Harlow's Casino and Resort." 5:563. Bozier's brief does not directly challenge that finding.

Bozier claims credit for locating the casino site, but casinos are built near bridges all along the Mississippi River, and there is evidence Schilling had

considered the site before Bozier entered the picture. 8:322. In any event, the chancellor found there was "no agreement . . . that [Bozier] would be paid for persuading Schilling to use the bridge site," and "there was no proof that a competent lease would not have been finalized without Bozier." 5:570.

The chancellor also found "insufficient proof that the casino was established because of the work [Bozier] did," and that the work he was doing "was also being done by others who were well qualified to do the work without him." 5:571. The record fully supports all these findings.

SUMMARY OF THE ARGUMENT

The chancellor rejected Bozier's claims based on extensive, well-supported factual findings. She found his agreement with Schilling was subject to certain "contingencies and conditions." 5:544. These contingencies never occurred, the Bali Hai project failed, and Bozier got no stock, end of story. Appellate review of these factual findings is limited to clear error, and Bozier knows he cannot prevail under that standard. So he attacks a straw man.

The straw man is the impossibility doctrine. On one page of her twenty-six page opinion, the chancellor referred ***exactly once*** to the impossibility doctrine as one basis for rejecting a hypothetical breach of contract claim that ***was never pled and never tried.*** Bozier's brief devotes eighteen pages—more than half the argument section—to attacking that reference. Obviously, this does nothing to resuscitate Bozier's claims.

First, as noted, the chancellor's reference to the impossibility doctrine is completely immaterial to the judgment. Impossibility is a defense to a breach of contract claim. Bozier never pled or raised a breach of contract claim, and his lawyer specifically disavowed any contract claim at trial. Bozier raised tort claims, which the chancellor rejected based on amply-supported factual findings.

And even if Bozier had raised a contract claim, it too would be defeated by the chancellor's factual finding that ***the parties themselves*** considered Schilling's fully equipped barge "essential" to the deal. 5:551. It simply does not matter whether the barge sinking rendered it legally "impossible" to build a casino, because ***the parties themselves*** are the masters of their contract, and ***they agreed*** the use of the barge was a condition of any stock deal between them.

Second, if reached, Bozier waived any objection to the chancellor's use of impossibility. Bozier received the chancellor's Final Judgment, then filed multiple post-trial motions challenging it, but never challenged her reference to the impossibility doctrine.

Third, if reached, even if a contractual claim had been pled, it would be barred both by the impossibility doctrine and the statute of frauds.

Fourth, Bozier's fraud claim was properly rejected based on the same well-supported factual findings as his other claims. The chancellor correctly found that Schilling never promised Bozier any stock in the Harlow's Casino and Resort.

Indeed, Bozier was specifically told on multiple occasions he would not be getting stock in Harlow's Casino Resort. Bozier disputes neither finding.

Finally, turning to Schilling's cross-appeal, the chancellor erred in awarding Bozier $290,000 in quantum meruit damages. Bozier never pled a quantum meruit claim, and the parties stipulated it was not tried by consent. Further, Bozier failed to submit evidence of the value of his services, despite the chancellor's explicit instruction that he do so. He submitted only an unsworn, un-itemized demand letter from his lawyer asking for over nine million dollars.

Despite all this, the chancellor simply presumed that Bozier worked for twenty-nine weeks as a "consultant" for $10,000 per week. The only record evidence is Bozier's testimony that such "consulting" services last no more than three weeks, not twenty-nine weeks. Consequently, the chancellor clearly erred in awarding damages on an unpled, untried quantum meruit claim for which there is no evidentiary support.

ARGUMENT

I. The Impossibility Doctrine Is Immaterial To The Chancellor's Final Judgment.

Bozier devotes most of his brief to attacking the chancellor's reference to the impossibility doctrine. Bozier is chasing a red herring. Attacking impossibility provides no basis whatsoever for reversing the chancellor's judgment.

The impossibility doctrine appears exactly once in the chancellor's twenty-six page Final Judgment. She invokes it to deny an "oral contract" claim. 5:551. All of Bozier's other claims were denied on separate grounds. The impossibility doctrine is not mentioned anywhere else in the opinion. Nor could it be, since it is an affirmative defense only to a breach of contract claim. *See, e.g., Hendrick v. Green*, 618 So.2d 76, 78-79 (Miss. 1993).

The chancellor's reference to the impossibility doctrine is immaterial because, among other things, ***there is no breach of contract claim in this case.*** Bozier never pled one. He pled unjust enrichment, "diversion of business opportunity," fiduciary breach and fraud, and he asked for a constructive trust. 1:10-15. But the word "contract" does not appear in Bozier's complaint. *Id.* Consequently, Schilling had no reason to plead impossibility as an affirmative defense.

Nor did Bozier raise a breach of contract claim at trial. His assertion on page 23 of his appellate brief that this "was a contract case" is false and disingenuous. At trial, his lawyer said, "This is not a contract case. It's a fraud case." 6:20.[5] His lawyer explained that the omission of contractual claims was a deliberate tactical choice intended to avoid the statute of frauds. *Id.* He said:

[5] Because he failed to plead a contract claim, then affirmatively assured the chancellor and the opposing party that he did not mean to pursue one, 6:20, Bozier indisputably is judicially estopped from claiming on appeal that such a claim was raised. *See, e.g., Dockins v. Allred*, 849 So.2d 151, 155 (Miss. 2003) (judicial estoppel prevents parties from "asserting a position,

> [T]he statute of frauds is totally irrelevant. It's totally inapplicable. It doesn't have anything to do with this case. ***That's why this is not a contract case. It's a fraud case. If we had to have a written contract to win, the case would never have been filed.*** And that's the law. Thank you.

6:20.

Despite all the above, the chancellor—perhaps erring on the side of over-inclusion—listed "oral contract" as a discrete claim for relief in her judgment. 5:548.[6] She then proceeded to deny relief ***on that one claim*** based partly on the impossibility doctrine, and partly on a factual finding that the parties regarded the Splash casino barge as "essential" to the oral agreement. 5:550-51. She did not mention, much less invoke, the impossibility doctrine anywhere else in her opinion.

Even if Bozier could show the impossibility doctrine was invoked erroneously, it would get him literally nothing. The single contractual claim to which it was applied was never raised in this litigation, and thus provides no basis to award damages. *See, e.g., Estate of Stevens v. Wetzel*, 762 So.2d 293 (Miss.

benefitting from that position, and then, when it becomes more convenient or profitable, retreating from that position later in the litigation").

[6] Despite expressly disavowing any contract claim at trial, Bozier listed "oral contract" as one of the counts in his Proposed Post-Trial Findings of Fact and Conclusions of Law. This probably explains why the chancellor's Final Judgment erred on the side of inclusion and specifically denied recovery under an "oral contract" theory. In any event, the parties filed their proposed findings simultaneously and after the close of evidence, giving Schilling no opportunity to respond. It provides no basis for damages under a contract theory.

2000) (damages may not be awarded on an unpled, untried claim). The idea of "reversing" the denial of a nonexistent claim is a *non sequitur*.

Further, even if a contractual claim had been raised, it would be properly denied based on factual findings that have nothing do with impossibility, as shown below in Part II. Nor could a contractual claim be raised on remand, as it is now time barred. *See* Miss. Code Ann. § 15-1-49 (three-year statute of limitations on contract actions); *Peavey Elec. Corp. v. Baan USA, Inc.*, 10 So.3d 945, 960-61 (Miss. Ct. App. 2009).

II. The Chancellor Denied Bozier's Claims Based On Well-Supported Factual Findings, Not The Impossibility Doctrine.

The chancellor found as fact that Bozier and Schilling's oral agreement was limited to establishing a small casino using a fully equipped casino barge. That casino was never established, so Bozier received no stock.

As a preliminary matter, most of the chancellor's findings—particularly, those relating to Bozier's claims of fiduciary breach (5:561-63), unjust enrichment (5:553-58), and diversion of business opportunity (5:563-65)—were not raised by Bozier on appeal. Any challenge to the denial of these claims is waived. *See, e.g., University of Mississippi Med. Ctr. v. Johnson*, 977 So.2d 1145, 1158 (Miss. Ct. App. 2007) (issues raised for the first time in appellate reply brief are barred).

With respect to Bozier's remaining claims, this Court's review of the chancellor's factual findings is limited to clear error. *See, e.g., Hamilton v.*

Hopkins, 834 So.2d 695, 699 (Miss. 2003). So long as the chancellor's findings regarding the oral agreement are supported by substantial evidence, they may not be disturbed on appeal. *See, e.g., Chapel v. Chapel*, 876 So.2d 290, 292 (Miss. 2004). The task of the appellate court "is to determine whether the chancellor's ruling was supported by credible evidence, not whether we agree with that ruling." *Benal v. Benal*, 22 So.3d 369 (¶4) (Miss. Ct. App. 2009), citing *Lee v. Lee*, 798 So.2d 1284, 1290 (Miss. 2001).

A. The chancellor's findings regarding the oral agreement are supported by substantial evidence.

The chancellor found that Schilling and Bozier understood their "fast and loose oral agreement" was conditioned upon the availability of Schilling's Splash casino barge. 5:543, 551. This finding prevents recovery on Bozier's fraud claim, 5:573-74, as well as any unpled "oral contract" and "implied agreement" claims, 5:548-53.[7]

In particular, the chancellor found that Schilling and Bozier "agreed to open a casino using Schilling's fully equipped casino barge. The casino barge was essential to the performance of the oral agreement[.] It was the specified item at the heart of their agreement." 5:551. The use of the existing casino barge was essential to opening a small, low cost casino with a minimum amount of capital from financiers and other third parties.

[7] To be clear, as discussed in Part II.B below, this is a finding as to what *the parties themselves understood their agreement to be*, not whether the deal became legally "impossible."

The chancellor explicitly rejected Bozier's contention that the agreement was to give him stock in any casino built in Greenville, finding that "Bozier knew that his fast and loose agreement with Schilling was not the broad agreement of his dreams, but rather an agreement containing contingencies and conditions." 5:544.

To the contrary, "[t]he agreement between the parties was with regard to Schilling's casino barge. Their agreement was over when the casino barge, the heart and essential element of their agreement, sank." 5:560. If any doubt remained, the chancellor found that "Schilling and Bozier never agreed to ***construct*** a casino. They agreed to ***open*** a casino using Schilling's fully equipped casino barge." 5:551 (emphases added).

There is ample evidence supporting the chancellor's factual finding that the parties conditioned their agreement on the availability of the Splash casino barge. The assertion on page 25 of Bozier's brief that it is "unrefuted" that there were "no conditions" upon the agreement is stunningly wrong, as shown below. The chancellor's finding may not be disturbed on appeal.

1. Using the Splash barges would eliminate mooring expenses.

Evidence of the importance of the Splash barge abounds, coming from both parties and multiple witnesses. On cross-examination, Bozier was asked point blank, "At a point in time when this casino project began with Mr. Schilling, what was it envisioned would serve as the actual casino facility?" 6:86. Bozier responded, "Mr. Schilling wanted to use the Splash Boat." *Id.* On cross

examination, Bozier conceded that using the fully-equipped Splash casino barge was Schilling's original plan. 7:294-95.

Bozier is correct: In 2003, Schilling was not looking to open just any casino. He was looking for a way to use ***two specific barges*** that were costing him money while they sat idle. It is undisputed that Schilling was paying up to $20,000 per month in mooring and maintenance costs on the Splash barges. 7:173. Indeed, witness Michael Lenihan testified that Schilling had been looking for a productive use for the barges since 1996. *Id.*

Lest there be any doubt, Bozier concedes in his own appellate brief that Schilling's objective in entering the oral agreement was to find a productive use for the fully-equipped Splash barges, not to build just any casino. Bozier says Schilling "indicated . . . he would be interested ***because he had two barges***—the former Splash facility—***which were costing him a significant amount of money in moorage expenses***." Bozier Br. at 5. (emphases added).

2. The parties understood this was a "twenty million dollar" barge-based casino project.

Bozier and Schilling had another reason for conditioning their agreement on the use of the Splash barge: keeping costs low. Schilling testified that the Bali Hai project "was only going to be twenty million dollars," and the chancellor specifically credited this unrefuted testimony. 8:327; 5:544. Only by re-using the

existing casino barges could the Bali Hai project's cost be kept to the agreed-upon twenty million.

When questioned by the chancellor, Schilling testified that the Splash was "a fully equipped casino." 8:357. Its sinking and subsequent replacement by two new unequipped barges was the reason "why the cost started escalating" and "why [Schilling] had to keep selling more stock." *Id.*

To begin work on Harlow's casino, Schilling had "to buy two new barges" to replace the one Splash Casino barge, "and build a new building on [them.]" *Id.* "That's why the cost started escalating," Schilling explained. *Id.* "That's why I had to keep selling more stock. In other words, [the Splash] was already a casino, a fully equipped casino. All we had to do was put the equipment back in it because we had used it at the Splash in Tunica." *Id.*

The chancellor found that the sinking of the Splash casino barge ended the "twenty million dollar" project to which Bozier and Schilling agreed. 5:545. This was indisputably correct. After the sinking, costs increased to forty-four million. 8:325. Then costs ran over by another "six or eight million." *Id.* Schilling testified the land-based Harlow's casino cost "about sixty-nine million when it was finished." 8:326. In fact, the cost was ultimately closer to $85 million. 5:548.

In sum, Schilling testified that "[n]one of us ever thought it would take four to five years. All of us thought we could put the boats in. Then we had trouble with the boat sinking. I put it into Superior Shipyard and they sank the casino

boat. That's what caused all the problems. I never dreamt that if I pushed the boat into a shipyard, a shipyard would sink my boat." 8:340. "[T]hat's how the whole problem started. We lost the casino [barge]." *Id.*

The chancellor rejected Bozier's claims because the parties conditioned their oral agreement on the use of the fully equipped Splash casino barge. They did so to eliminate mooring costs and to keep down the cost of opening the casino. Ample evidence supports this finding, only a sampling of which is listed above. The chancellor's judgment must be affirmed.

B. The chancellor's denial of Bozier's claims is not dependent upon the impossibility doctrine.

As the above makes clear, the chancellor's denial of Bozier's tort claims is not dependent upon the impossibility doctrine. Bozier, however, seems to confuse the impossibility doctrine with the factual question of what Schilling and Bozier actually agreed to. For instance, in a section purporting to address impossibility, Bozier incorrectly argues that the parties put no "stipulations" or "conditions" upon the oral agreement. *See* Bozier Br. at 25.

Deliberately or not, Bozier is conflating two distinct legal concepts. "Conditions" imposed ***by contracting parties themselves*** have nothing to do with the impossibility doctrine, or vice versa. Bozier's misunderstanding warrants clarification.

The impossibility doctrine permits a court to declare a contractual obligation null. *See, e.g., Hendrick*, 618 So.2d at 79. To be clear, the basis for this nullification ***is not*** the understanding of the parties to the contract, but rather the common law, which affirmatively intervenes to excuse performance. *See id*, citing *Littleton v. Employees Fire Ins. Co.*, 453 P.2d 810 (Colo. 1969) (impossibility applies only where events are "vitally different" from what "should reasonably have been within the contemplation of both parties). In other words, the impossibility doctrine imposes conditions that the parties ***did not impose on themselves***. *See id.*; *see also Ferguson v. City of Orofino*, 953 P.2d 630, 633 (Idaho 1998) (impossibility applies only where "bargained-for performance is no longer in existence or is no longer capable of being performed due to the unforeseen" event).

But impossibility is not the only way future events may excuse performance. The parties themselves may agree to make performance contingent upon the happening of some event. Courts often call this a "condition precedent." *See, e.g., Piaggio v. Somerville*, 80 So. 342, 344 (Miss. 1919).[8] But no special label is required; the court need only find as fact that the parties agreed that the happening of the event is a term of their contract. *See, e.g., Smith v. Redd*, 593 So.2d 989,

[8] *Piaggio* is the featured case in Bozier's brief. It directly undermines his argument. In *Piaggio*, this Court first considered whether the parties had agreed that a schooner's clearance of the Mobile port was a "condition precedent" of their deal. 80 So. at 344. Only after it had determined that the parties themselves had no such agreement did it turn to the issue of impossibility. *See id.* Thus, as early as 1919, this Court understood what Bozier fails to understand: that "impossibility" of performance is entirely irrelevant if the parties condition their deal on the occurrence of an event.

992-94 (Miss. 1991) (condition precedent established by unwritten understanding that events had to precede performance). That is exactly what the chancellor did here. *See, e.g.,* 5:551 (the "project as contemplated between" Bozier and Schilling was "opening a casino using Schilling's casino barge").

When parties choose to condition their contracts on the happening of an event, it does not matter one iota whether the non-occurrence of the event renders performance legally "impossible." *See, e.g., Piaggio*, 80 So. at 344. Parties are masters of their own contracts. *See, e.g., Rotenberry v. Hooker*, 864 So.2d 266, 278-79 (Miss. 2003). They are free to set cost limits, time limits, performance minimums and other conditions without any regard to what is possible or impossible. *See, e.g., Gunn v. Heggins*, 964 So.2d 586, 590 (Miss. Ct. App. 2007) (loan conditioned on clear title).

Here, the chancellor held that one condition of Bozier's and Schilling's agreement was the availability of the Splash casino barge. 5:543-45, 551.[9] This finding provides sufficient ground to reject all the claims Bozier raises on appeal, including the non-existent "oral contract" claim. It is not a finding of legal

[9] Bozier argues that Schilling did not expressly "stipulate" that this was a condition. *See* Bozier Br. at 25. But here again, he misses the point. The agreement was a "fast and loose oral agreement." 5:559. Neither party expressly stipulated much of anything. But where parties are not clear as to the terms of their agreement, the trial court is nonetheless charged with making factual findings about what those terms are. *See, e.g., Simmons v. Jaggers*, 914 So.2d 693 (Miss. 2005); *Jones v. McGahey*, 191 So.2d 532, 534 (Miss. 1996). That is precisely what the chancellor did here. Bozier cannot enter a handshake agreement, then insist that a court find all its terms are favorable to him because neither party put anything in writing. Indeed, Schilling might just as well argue that Bozier did not "stipulate" that there could be no unilateral cancellation of the deal prior to construction.

impossibility, nor does it need to be.[10] The chancellor threw in impossibility for good measure, but it was unnecessary: her factual findings about the conditions put on the agreement by ***the parties themselves*** do all the necessary work.

So once again, attacking the impossibility doctrine gets Bozier nowhere.

III. Bozier Waived Any Challenge To The Chancellor's Application Of The Impossibility Doctrine.

In addition, Bozier's challenge to the chancellor's application of the impossibility doctrine has been waived. Bozier filed multiple post-trial motions challenging the chancellor's Final Judgment, but never once objected to the application of impossibility. He thereby waived any challenge on appeal.

It is settled law that "[a] trial judge will not be put in error on a matter which was not presented to him for his decision." *Parker v. Mississippi Game & Fish Comm'n*, 555 So.2d 725, 730 (Miss. 1989). Normally, a party does not have to raise an objection in post-trial pleadings, since the issues were raised at trial. But where an issue arises for the first time in a chancellor's judgment, a party wishing to dispute it must file a post-judgment challenge. If he fails to do so, the objection is waived on appeal.

The Supreme Court addressed this exact issue in *City of Jackson v. Internal Engine Parts Group, Inc.*, 903 So.2d 60 (Miss. 2005). There, the City of Jackson

[10] Bozier's citation-free assertion that the chancellor found "Schilling assumed the duty to provide his barge to the casino project," is flatly wrong. The chancellor found no such thing. She found that the agreement was contingent upon the use of the barges, but made it abundantly clear Schilling never agreed to bear the risk of any loss; if the barge was lost, the deal simply died. 5:560 ("The sinking of the barge marked the end of the Bali Hai casino project.").

filed a post-trial motion to amend a final judgment, contending the trial court's final judgment relied on statutory provisions that no longer applied. *Id.* at 66. The Supreme Court held the argument was waived. It reasoned that:

> The City's [post-trial] motion did not assert that the judgment referenced law that was no longer applicable and did not raise any issues under § 11-46-9(1)(v) or § 11-46-3. The City ***did not present this issue to the trial court in its motion for amendment or for new trial.*** Having failed to preserve the issue, the City of Jackson is barred from raising it now on appeal,

Id. (emphasis added), citing *Materials Transp. Co. v. Newman*, 656 So.2d 1199, 1203 (Miss. 1995); *see also Fitch v. Valentine*, 959 So.2d 1012, 1027-28 (Miss. 2007) (challenge to punitive damage award waived because defendant "did not seek remittance . . . in post trial motions").

Here, the waiver is even more clear-cut than in *City of Jackson*. Bozier filed a Motion for More Definite Final Judgment, 8:570-71, and a Motion for New Trial, 8:567-69. Unlike the appellant in *City of Jackson*, who at least made a vague reference to the alleged legal error in its post-trial motion, Bozier never mentioned the impossibility doctrine in any of his post-trial filings. Indeed, Bozier admits in his appellate brief that he never "addressed the issue of impossibility of performance" in his "post-trial submissions." Bozier Br. at 22.

Bozier had the opportunity to present the impossibility issue to the chancellor for review. He failed to do so, and cannot raise the issue for the first time on appeal.

IV. If A Contractual Claim Had Been Raised, It Would Be Barred By Impossibility And The Statute Of Frauds.

A. The impossibility doctrine would bar any contractual claim Bozier raised.

By this point, it is clear that the impossibility doctrine was of little or no importance to the result below. In an abundance of caution, however, Schilling will show that Bozier's misguided attacks on impossibility also fail on their merits.

1. Schilling did not "waive" the impossibility defense.

First, Bozier contends that Schilling waived an impossibility defense by failing to plead it or raise it at trial. Obviously, that is wrong. Impossibility is a defense to a breach of contract claim. *See, e.g., Hendrick*, 618 So.2d at 78-79. Bozier never pled a breach of contract claim, and his lawyer expressly disavowed any such claim at trial. 6:20. To state the obvious, a defendant cannot "waive" a defense to a claim that was never pled or raised.

In the alternative—and again, assuming counterfactually that a contract claim was raised—Bozier tried the impossibility defense by consent. Under Mississippi law, an affirmative defense is waived only if it is "neither pleaded nor tried by consent." *Goode v. Village of Woodgreen Homeowners*, 662 So.2d 1064, 1077 (Miss. 1995), *see also Ashburn v. Ashburn*, 970 So.2d 204, 212 (Miss. Ct. App. 2007). Rule 15(b) of the Mississippi Rules of Civil Procedure provides that "[w]hen issues not raised by the pleadings are tried by expressed or implied

consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." MISS. R. CIV. P. 15(b).

In short, Rule 15(b) prevents plaintiffs from attacking affirmative defenses for the first time on appeal, as Bozier attempts to do here.

A plaintiff implicitly consents to trial of an affirmative defense where evidence supporting the defense is introduced at trial, and the plaintiff fails to object. *See, e.g., Lahmann v. Hallmon*, 722 So.2d 614, 619 (Miss. 1998). This Court has "adopted a very liberal view" of the implied consent rule. *Id.*, citing *Queen v. Queen*, 551 So.2d 197, 202 (Miss. 1989). Thus, "if evidence is offered by a party which is outside the scope of the pleadings and the other party fails to object, the opponent will be considered to have impliedly consented to the issue." *Lahmann*, 722 So.2d at 619.[11]

As the testimony above in Part II.A shows, Schilling indisputably introduced evidence that the Splash casino barge was an essential condition of the oral agreement between Bozier and Schilling. It does not matter that Schilling never used the legal term "impossibility," since Rule 15(b) looks to the facts introduced by the parties, not the labels applied to them. *See, e.g., Covington v. Griffin*, 19

[11] The implied consent rule does not require the defendant's answer to be "formally amend[ed] to conform with the evidence." *Id.*; *see also* MISS. R. CIV. P. 15(b). Nor does it require use of precise legal terminology—like, "the impossibility doctrine"—to describe the defense. *See, e.g., Covington v. Griffin,* 19 So.3d 805, 816-17 (Miss. Ct. App. 2009) (unconscionability defense tried by consent where defendant presented evidence that "there was no meeting of the minds").

So.3d 805, 816-17 (Miss. Ct. App. 2009) (defendant never pled contract defense of unconscionability, but tried it by consent by raising evidence "concerning unconscionability at trial"). Bozier never objected to any of this evidence.

In sum, neither a contract claim nor an impossibility defense was ever raised below. But if this Court were to give Bozier the benefit of an unpled, untried contract claim, Schilling must likewise get the benefit of an unpled "impossibility" defense, since Bozier never objected to evidence supporting it. That is only fair.

2. Bozier failed to introduce evidence that Schilling was at fault for the sinking.

Bozier contends that Schilling has the burden of proving he was not at fault for the sinking of the casino barge. *See* Bozier Br. at 28-29. Again, the idea that Schilling had ***any*** burden with respect to the impossibility doctrine requires an incorrect conclusion that Bozier actually raised a contract claim. But assuming as much, Bozier is wrong about the burden of proof.

Bozier says Schilling must "prove that he is not at fault for the destruction of" the barge. Bozier Br. at 26. Bozier fails to cite authority for this strange proposition because there is none. No Mississippi court has ever held that a defendant must prove a negative—i.e., that it is "not at fault"—for the impossibility doctrine to apply.

Indeed, only a handful of courts have ever addressed this question. All of them, however, have held that the proponent of the impossibility defense does not

bear the burden of showing the loss was not his fault. *See, e.g., Newman v. United Fruit Co.*, 141 F.2d 191, 193 (2d Cir. 1944), citing *Joseph Constantine S. S. Line, Ltd. v Imperial Smelting Corp.*, 2 All Eng. 165 (1942).

Although he did not have to, Schilling indisputably ***did*** submit evidence the sinking was not his fault. He testified that he put the barge "into Superior Shipyard and they sank the casino boat. That's what caused all the problems. I never dreamt that if I pushed the boat into a shipyard, a shipyard would sink my boat." 8:340. ***Bozier introduced no evidence to refute this.***

Bozier now seeks to introduce new evidence on appeal to rebut Schilling's testimony, but it is far too late. He attaches as an exhibit to his brief a federal court opinion finding Schilling Enterprises, in which Schilling owned an interest, 25% at fault for the barge's sinking under federal maritime laws, due to conduct by an employee.

As a preliminary point, Bozier offers no authority for the proposition that the entity employee's conduct can be imputed to him for purposes of the impossibility defense. And plainly, there is no basis for imputing such liability to co-defendant SW Gaming LLC, which is not wholly-owned by Schilling.

But far more importantly, Bozier's attorney ***never introduced this opinion as evidence at trial.*** To state the obvious, "new evidence cannot be offered on appeal." *Foreman v. State*, 830 So.2d 1278, 1281 (Miss. Ct. App. 2002). The federal court opinion is submitted here as new factual evidence of fault, not as

legal authority. But regardless, Bozier never gave the chancellor an opportunity to consider it, so it cannot be grounds for finding error. *See, e.g., Parker*, 555 So.2d at 730 (Miss. 1989); *Grenada Living Ctr., LLC v. Coleman*, 961 So.2d 33, 38 (Miss. 2007) (legal arguments not presented to trial court are waived).

In sum, the chancellor heard evidence that Schilling was not at fault for the barge's sinking. Bozier failed to respond at trial or in his post-trial motions. If impossibility had been an issue, there would be no basis to reverse its application on appeal.

3. Bozier failed to raise collateral estoppel in the trial court.

Finally, Bozier argues that Schilling is collaterally estopped from arguing he was not at fault for the sinking. *See* Bozier Br. at 31-32. The argument is likewise procedurally barred. Collateral estoppel is a defense that must be raised in the trial court, or it is waived on appeal. *See, e.g., State ex rel. Moore v. Molpus*, 578 So.2d 624, 640-641 (Miss. 1991) (failure to timely assert collateral estoppel waives the issue for appeal). Bozier never argued collateral estoppel in the trial court, and cannot raise for the first time here.

B. Bozier's claims are barred by the statute of frauds.

In addition, any contractual claim would also be barred by the statute of frauds. Bozier contends that he had an oral agreement to serve as the general manager of the Bali Hai casino for five years. Bozier testified that he specifically told Schilling, "I want this deal, and I want it to be a certain period of time." 2:177.

That "certain period" was "for five years," which would "keep renewing" automatically at certain intervals. *Id.*

The Mississippi statute of frauds provides that, "[a]n action shall not be brought whereby to charge a defendant or other party ... upon any agreement which is not to be performed within the space of fifteen months from the making thereof." Miss. Code Ann. § 15-3-1.

It is well-settled law that an oral agreement for future employment of a definite duration longer than fifteen months is void under the statute of frauds.[12] It does not matter whether the plaintiff seeks the benefits of employment via contract claims, or as here, tort claims. All are barred.[13]

The chancellor initially granted summary judgment on the basis of the statute of frauds, but later reversed that holding. Citing only *Landry v. Moody Grishman Agency, Inc.*, 181 So.2d 134 (Miss. 1965), the chancellor found that "it

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[12] *See, e.g., Floyd v. Segars*, 572 F.2d 1018, 1023-24 (5th Cir. 1978) (oral employment contract for fixed period over fifteen months was invalid under Mississippi law); *Robinson v. Coastal Family Health Center, Inc.*, 756 F. Supp. 958, 963 (S.D. Miss. 1990) (oral four-year contract for future employment was barred by statute of frauds); *Gulfport Cotton Oil, Fertilizer & Mfg. Co. v. Reneau*, 48 So. 292 (Miss. 1909) (oral employment contract exceeding statutory period was void and unenforceable).

[13] *See, e.g., Harris v. Griffin*, 83 So.2d 765, 766 (Miss. 1955) (protection of statute of frauds "include[s] liability for a tort and [is] not to be restricted to defaults or miscarriages arising out of contracts"); Miss. Code Ann. § 15-3-1 ("An ***action*** shall not be brought whereby to charge a defendant ... upon any agreement which is not to be performed within the space of fifteen months.") (emphasis added). Other states have reached the same common sense conclusion. *See, e.g., Maginn v. Norwest Mortgage, Inc.*, 919 S.W.2d 164, 168-69 (Tex. App. Austin 1996) ("When tort claims have their nucleus in an alleged oral contract which is unenforceable under the statute of frauds, the statute of frauds bars the tort claims as well.").

appears that the Mississippi Statute of Frauds cannot be applied to the terms of an oral contract where the existence of the oral contract is denied by the person seeking to apply the statute." 5:565.

Respectfully, that is not what *Landry* held. In *Landry*, the defendant initially denied the existence of an oral employment agreement. Later, however, ***the defendant*** asserted that a five-year stock agreement was part of an oral employment agreement, and put the entire deal in violation of the statute of frauds. 181 So.2d at 140. The plaintiff "denied that any oral agreement concerning the acquisition of stock was made." *Id.*

The *Landry* opinion simply held that the defendant could not, on one hand, tell the court that no agreement existed, and on the other hand, tell the court what the terms of said agreement were. *See id.* No such problem exists here because Bozier, not Schilling, told the chancellor the terms of the alleged oral agreement. Unlike the *Landry* defendant, Schilling has not advanced two contradictory factual positions. Schilling simply contends that, even if Bozier's account of the oral agreement is true, it is barred by the statute of frauds.

Mississippi courts routinely apply the statute of frauds in cases where the defendant denies any agreement. *See, e.g., Thompson v. First American Nat'l Bank*, 19 So.3d 784, 786-88 (Miss. Ct. App. 2009) (statute applied where defendant denied oral agreement with bank teller); *Favre Property Mgmt., LLC v.*

Cinque Bambini, 863 So.2d 1037, 1041, 1045 (Miss. Ct. App. 2004) (statue applied where defendant denied oral agreement to provide survey).

The very point of the statute of frauds is to require parties to put contracts in writing, lest plaintiffs concoct agreements that never happened. The rule stated by the chancellor would do the opposite: it would protect the guilty and punish the innocent. It would ***require*** defendants to say they did—in fact—enter an agreement, but nonetheless want it invalidated on a technicality. Not surprisingly, *Landry* has never been cited by any court for the overbroad proposition stated by the chancellor.

When one disregards the chancellor's application of *Landry*, the statute of frauds clearly applies and bars all of Bozier's claims except fraud, which is addressed below. A trial court's judgment can, of course, be affirmed for reasons different from those given by the chancellor. *See, e.g., Bolton v. Equiprime, Inc.*, 964 So.2d 529, 535 (Miss. Ct. App. 2007), citing *Puckett v. Stuckey*, 633 So.2d 978, 980 (Miss. 1993). For this additional reason, the chancellor's rejection of Bozier's claims should be affirmed.

V. The Chancellor Correctly Rejected Bozier's Claims Of Fraud And Bad Faith.

The chancellor found that Schilling did not commit fraud because Schilling never made any promises to Bozier concerning the $85 million Harlow's Casino and Resort. 5:573-74. Bozier sued for a ten percent stake in that casino, but

critically, he ***does not dispute that factual finding.*** Schilling cannot have committed fraud with respect to stock in a casino, if he never promised stock in that casino.

A. Schilling never promised Bozier a share of Harlow's Casino.

There was no promise to give Bozier stock in the Harlow's casino. As the chancellor correctly found, fraud requires a promise. 5:560. The only promise the chancellor found in this case was "with regard to Schilling's casino barge." *Id.* That agreement "was over when the casino barge, the heart and essential element of [the] agreement, sank. Thus, Schilling could not have committed a fraud upon Bozier regarding Harlow's Casino and Resort since there was no agreement between them regarding the same." *Id.*

Put another way, Bozier's fraud claim depends entirely on what Schilling promised as consideration in the "fast and loose oral agreement." Bozier glosses over this key point by stating that there was "a representation" to provide stock "in the project." *See* Bozier Br. at 38. But the question is, stock in what project? The chancellor correctly rejected Bozier's fraud claim because the only promise was with respect to the failed Bali Hai casino. Bozier cannot have been "defrauded" out of stock in the Bali Hai, because no such stock ever existed.

B. Bozier was repeatedly told he would not receive a share of Harlow's Casino.

A fraud claim also requires the plaintiff to show he had a right to rely on any false statement. Again, Bozier's brief glosses over this requirement, this time in three sentences with no citation to authority. See Bozier Br. at 42.

Under settled law, a fraud plaintiff has no right to rely upon promises after learning the promisor has no intention to perform. *See, e.g., Waters v. Allegue*, 980 So.2d 314, 318 (Miss. Ct. App. 2008) (no right to rely where plaintiff learned before closing that house did not contain stated square footage); *Hutton v. American Gen. Life & Acc. Ins. Co.*, 909 So.2d 87, 96-97 (Miss. Ct. App. 2005) (no right to rely on representations contradicted by policy receipt language).

Here, it is undisputed that in 2003, Bozier was told he would not receive stock in the Bali Hai Casino by then-partner Jeff Wellemeyer. 5:544. But he kept working. After the Splash barge sank and the Bali Hai project failed, Bozier was told in July 2005 by Schilling and Lenihan that he wasn't getting stock in the new Harlow's casino. 6:108-09. But again, he kept working. Consequently, Bozier had no right to rely on any purported statement that he would get stock, and his fraud claim fails as a matter of law.

C. Schilling lacked the required fraudulent intent.

Finally, even if Bozier ***had*** been promised stock in Harlow's and ***had not*** been specifically told no stock would be provided, his fraud claim fails for an additional reason: Schilling had no fraudulent intent.

Fraud requires proof of particular facts demonstrating that the defendant knew his representation was false. *See, e.g., Hobbs Auto., Inc. v. Dorsey,* 914 So.2d 148, 153 (Miss. 2005); Miss. R. Civ. P. 9(b). Consequently, to be fraudulent, an assertion must "relate to past or presently existing facts, as facts, ***and cannot consist of promises***, except in some cases when a contractual promise is made with the present undisclosed intention of not performing it." *McMullan v. Geosouthern Energy Corp.*, 556 So.2d 1033, 1037 (Miss. 1990); *see also Spragins v. Sunburst Bank*, 605 So.2d 777, 781 (Miss. 1992) ("Fraud cannot be predicated on statements which are promissory in nature.").

Assuming a deal as the chancellor found, there is ample evidence that the reason Schilling did not give Bozier stock was changed circumstances, not some "present undisclosed intention." Bozier's own evidence shows this. The transcript of his telephone call with Schilling has Schilling repeatedly explaining that there was no stock because "everything changed." *See* Bozier Br. at 10-11. Schilling told Bozier, "I didn't realize I was going to have to give up as much as I gave up." *See* Bozier Br. at 11. At trial, Schilling testified that the sinking of the barge was

the reason "why the cost started escalating" and "why [he] had to keep selling more stock." 8:357.

Bozier's only response is to argue that an exchange during Schilling's cross examination shows he had a present undisclosed intention to deny Bozier stock. *See* Bozier Br. at 38-39. Schilling testified he never intended to give Bozier stock. *Id.* This was consistent with Schilling's prior testimony that he had no oral agreement with Bozier concerning stock.

The chancellor, however, did not credit Schilling's account of the agreement. She found as fact that Schilling entered an oral contract to give Bozier "an undiluted 10% ownership interest in the Bali Hai." 5:559. She later found no stock was given, not because Schilling lied, but because the oral agreement "was over when the casino barge . . . sank." 5:560.

Bozier's argument boils down to this: he thinks the chancellor should have ***discredited*** Schilling's assertion that there was no stock deal, but simultaneously ***credited*** his assertion that he never intended to give Bozier stock. See Bozier Br. at 38-39. But that is not what the chancellor found. She took the common-sense approach and implicitly discredited both statements, since they are two ways of saying the exact same thing—i.e., "I did not agree to give Bozier stock."

Mississippi law requires appellate courts to construe a chancellor's findings to support her legal conclusions, and even to infer necessary findings when not explicitly set forth. *See, e.g., Southern v. Glenn*, 568 So.2d 281, 287 (Miss. 1990).

As shown above, to find undisclosed intent to defraud, one must do the opposite. One must infer a contorted and unnatural interpretation of the testimony—an interpretation that is totally absent from the chancellor's judgment—by taking two functionally identical statements and treating one as true and the other as false.

As shown above, there is ample evidence that stock was not provided due to changed circumstances, not any fraudulent intent. For this additional reason, the chancellor correctly denied Bozier's fraud claim.

VI. The Chancellor Erred In Awarding Bozier Quantum Meruit Damages.

The chancellor's decision to award Bozier $290,000 in quantum meruit damages was clearly erroneous. Bozier never pled a quantum meruit claim and failed to introduce any evidence of the value of his services. The quantum meruit award should be vacated and this Court should render judgment for Schilling.

A. Bozier never pled or tried a quantum meruit claim.

As a preliminary matter, Bozier's complaint does not contain a quantum meruit claim. 1:10-16. Nor was any such claim tried by consent. To the contrary, both parties signed a stipulation acknowledging Schilling's objection to a quantum meruit award. 5:647.

It is black letter law that damages cannot be awarded on a claim that is neither pled nor tried by consent. For example, in *Estate of Stevens v. Wetzel*, 762 So.2d 293 (Miss. 2000), the Court of Appeals found that a plaintiff was entitled to recover under a conversion theory. The Supreme Court reversed, noting that the

plaintiff never pled the conversion theory or raised it at trial. *Id.* at 295. The plaintiff's summary judgment motion and the trial transcript both confirmed that no conversion claim was raised. *Id.*

In this case, there is no mention of a quantum meruit claim anywhere in the complaint, the summary judgment briefs, or the trial transcript. For this reason alone, the Court should vacate the chancellor's $290,000 quantum meruit award and render judgment for Schilling.

B. Bozier ignored the chancellor's instruction to submit evidence of the value of his 2005 services.

There is more. Even if Bozier had pled a quantum meruit claim, he refused to comply with the chancellor's specific instruction to submit evidence of the value of his services.

The chancellor found that Bozier contributed nothing to the Harlow's project and denied his unjust enrichment claim. 5:553-58.[14] She nonetheless took up his unpled quantum meruit claim, finding Bozier was entitled to the reasonable value of his services from June 2005 through December 2005. 5:558-59. Bozier then filed a "Motion for More Definite Final Judgment" asking the court to determine the precise value of these services. 5:570-71.

In response, the chancellor instructed Bozier to "submit an itemized bill for the services he performed for the casino project from June 1, 2005 to December

[14] Bozier's inexplicable statement on page 43 of his brief that the chancellor awarded him "damages for unjust enrichment" is objectively false. 5:558 ("[T]he court finds that Plaintiff is not entitled to damages on the theory of unjust enrichment.").

15, 2005." 5:631. However, as the chancellor noted, Bozier "did not submit" the required bill and did not "request additional time to do so." *Id.* Instead, Bozier submitted a vague list of "categories" of services he allegedly provided. 5:574-75. This was a wish list from his lawyer, asking for $9.5 million in general damages. *Id.* It was not confined to the specified 2005 time period, nor was it itemized, nor was it sworn. *Idi.*

Because Bozier failed to comply with her instruction, the chancellor had no evidence of what Bozier did in 2005 or what it was worth. As shown below, she was left to speculate on these questions. Speculation is no basis for damages. *Sentinel Industrial Contracting Corp. v. Kimmins*, 743 So.2d 954, 966-67(¶ 32) (Miss. 1999). For this additional reason, Bozier's quantum meruit award should be vacated and judgment rendered for Schilling.

C. If Bozier is entitled to any quantum meruit recovery, there is no evidence to support a $290,000 award.

A damage award must be based on evidence, not speculation or conjecture. The quantum meruit award here was based entirely on the latter, and should therefore be vacated.

Under Mississippi law, "plaintiffs bear the burden of going forward with sufficient evidence to prove their damages by a preponderance of the evidence." *River Region Med. Corp. v. Patterson*, 975 So.2d 205, 208 (Miss. 2007). Where a

plaintiff fails to provide evidence of damages, his claim fails as a matter of law. *See, e.g., Edmonds v. Williamson*, 13 So.3d 1283, 1291 (Miss. 2009).

There is no evidence Bozier's work from June 2005 through December 2005 was worth anything. Bozier was repeatedly told not to return to Greenville in 2005 because there was nothing for him to do, and that he "could not be paid." 5:547. The chancellor specifically rejected all Bozier's arguments that his 2005 work added value to the Harlow's project. 5:553-57.[15] All of the evidence indicates the "reasonable value" of Bozier's 2005 work was little or nothing.

The chancellor simply presumed—contrary to the evidence above—that because Bozier was allowed to be involved in the Harlow's project, his work must have been worth something. 5:559. She further presumed, inexplicably, that all work done during the specified twenty-nine week period consisted of "consultant services" worth an astronomical $10,000 per week. 5:631.

There is absolutely nothing in the record to support this speculation. Indeed, the evidence conclusively shows that Bozier has never and could never command a $10,000 per week fee over twenty-nine weeks.

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[15] Indeed, the chancellor had no evidence establishing what Bozier did during the fall of 2005, other than attend a conference in Las Vegas and work on business forecasts that were not used. 3:329, 4:450; Exhibits P-71 to P-103. The chancellor found generally that Bozier worked on the "building, development, and establishment of the casino," 5:630, but it is absolutely certain that Bozier did not help with the "building" of the casino, which did not start until seven months after his departure, in July 2006.

First, Bozier admitted, and his tax returns show, that from 2001 through 2007 he earned nothing as a consultant, despite having incorporated a business for that purpose. 8:302, 308. Bozier admitted that, from 2001 through 2007, he could never get a client to pay him a $10,000 per week rate. 8:304.

Second, even if Bozier could obtain a $10,000 per week consulting fee, he admitted that the "average" duration of any consulting arrangement would be "about two weeks, two to three weeks." 6:116. Indeed, ***the only evidence in the record*** of Bozier actually earning any consulting fees was his assertion that from 1984 through 1991 he would make $10,000 per week for "a two, three or four week consultancy." 8:312. Nothing in the record suggests there is any such animal as a ***twenty-nine week*** casino consultancy at $10,000 per week.

Third, there is nothing in the record to support a finding that all or most of Bozier's work from June through December 2005 was "consulting" of the kind that demands $10,000 per week. Indeed, ***Bozier never even claimed*** that he spent this entire time "consulting" as opposed to doing some other, less remunerative work. Obviously, time spent on routine administrative tasks is not worth the equivalent of $10,000 per week. The chancellor had no idea how much time Bozier spent on such tasks because he refused her instruction to provide an itemized bill. 5:631. Further, Bozier admitted that he kept no time records or journals for any of the time he claims to have worked on the project. 6:59.

Finally, the idea of paying $10,000 per week for twenty-nine weeks of "consulting" is absurd on its face. Quantum meruit awards reflect the "reasonable value" of services rendered. 5:558, citing *Estate of Johnson v. Adkins*, 513 So.2d 922 (Miss. 1987). According to Bozier, the highest value he ever conveyed as a consultant was $30,000—three weeks at $10,000 per week. 8:312.

Even though Bozier hung around the Harlow's project for twenty-nine weeks, there is absolutely no evidence to support a finding that he conferred $10,000 worth of value to the project every week. As Bozier explained, a casino that pays a consultant thousands is "buying knowledge and experience of the market and business, rather than extreme effort." 6:116. As noted above, the Chancellor found that almost nothing Bozier did was used to get Harlow's open or help it operate. 5:553-57.

In sum, Bozier cannot recover in quantum meruit when there is no evidence proving either "quantum" or "meruit."

D. If any quantum meruit award is warranted, it was correctly limited to the period between June and December 2005.

Finally, Bozier contends that the chancellor erred in limiting the quantum meruit award to the twenty-nine week period between June and December 2005.[16] He is wrong as a matter of settled law.

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[16] The Court will note that the portion of Bozier's brief addressing the quantum meruit award is almost entirely bereft of citations to the record. *See* Bozier Br. 44-47. In many instances, his conclusory assertions are simply false. For example, Bozier cites no authority for his assertion that "the trial court found as a fact that from April 2003 to December 2005 Bozier

The chancellor correctly noted that quantum meruit damages are unavailable where the parties have agreed upon consideration for work done. 5:559, citing *Kalavros v. Deposit Guaranty Bank & Trust Co.*, 158 So.2d 740, 744-45 (Miss. 1963) (quantum meruit is not available "where there is proof of a special agreement to pay therefore a particular amount ... ."); *see also In re Estate of Davidson*, 794 So.2d 261, 267-68 (Miss. Ct. App. 2001) (holding same).

Applying the *Kalavros* rule, the chancellor found that in 2003 and 2004, Bozier was working on the failed Bali Hai project. 5:559. His consideration for that work was the chance to receive a 10% share in the Bali Hai and a job as its manager, if the project was successful. 5:558-59. Consequently, Bozier was not entitled to any quantum meruit award for this period.

Upon his return from Colorado in 2005, Bozier was working on the land-based Harlow's project, despite admonitions that he was not needed and would not be paid. The chancellor thus found Bozier's prior consideration—the chance to own stock—was no longer in effect. 5:573. She therefore limited Bozier's quantum meruit damages to his work from June 2005 until he quit the Harlow's project in December 2005.

This was exactly the right result under the *Kalavros* rule. Bozier's statement that the time limitation was "arbitrary" is just wrong. Bozier does not even

provided consulting services to Schilling." Bozier Br. at 46. Nor could he, because the chancellor never made any such finding. The Court should view all such citation-free assertions with skepticism.

mention *Kalavros* or the chancellor's reasoning. He simply lists things he purportedly did in 2003 and 2004. The chancellor tacitly responded: "That's well and good, but your consideration for that work was a chance at stock, so you get no further recovery." Bozier has no answer. The chancellor's limitation was indisputably correct.

CONCLUSION

The chancellor found that whatever the understanding was in 2003, it was not the agreement of Bozier's dreams. It was subject to contingencies and conditions that were not met. If Bozier believed differently, it would have been easy for he and his lawyer to draft a written contract that matched the claims he now makes in his brief. But they did not.

The chancellor's factual findings about the parties' understanding are supported by substantial evidence. She correctly found there was no fraud because Bozier was never promised any stock in the Harlow's project. Her only error was awarding Bozier damages for an unpled, untried quantum meruit claim that was unsupported by any evidence.

For these reasons, the Court should affirm on direct appeal, reverse on cross-appeal and render judgment for Schilling.

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CERTIFICATE OF SERVICE

The undersigned attorney of record for Appellees hereby certifies that I have this day mailed, postage prepaid, a true and correct copy of the foregoing to the following person at the address indicated:

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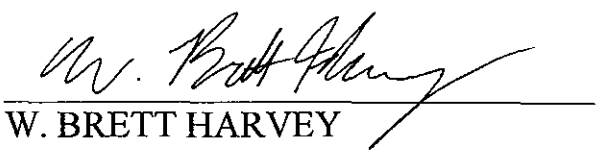
This the 2nd day of February, 2010.



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