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

REPLY BRIEF OF APPELLEES/CROSS-APPELLANTS

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ARGUMENT

The reply brief submitted by George Bozier is riddled with factual inaccuracies and red herring arguments. Richard Schilling and SW Gaming LLC, however, are constrained by Rule 28(c) of the Mississippi Rules of Appellate Procedure to reply only to those arguments pertaining to their cross-appeal.

I. Under Mississippi Law, Quantum Meruit and Unjust Enrichment Are Not Interchangeable.

Bozier admits that he did not plead a quantum meruit claim. He incorrectly contends that quantum meruit and unjust enrichment are interchangeable under Mississippi law, such that pleading the latter permits a plaintiff to recover under the former. The Mississippi Supreme Court has flatly rejected Bozier's argument. The Court has made it plain that quantum meruit and unjust enrichment are fully distinct claims that are not interchangeable. [1]

A. Mississippi courts recognize the distinction between quantum meruit and unjust enrichment.

In *Estate of Johnson v. Adkins*, 513 So. 2d 922 (Miss. 1987), the Supreme Court found that a chancellor erred in awarding damages on "the theories of unjust enrichment and quantum meruit." *Id.* at 926. The Court found that only the award

[1] Bozier asserts that "quantum meruit" is Latin for unjust enrichment. This, too, is wrong. Literally translated, quantum meruit means "as much as deserved." BLACK'S LAW DICTIONARY (6th ed. 1990) at 1243. An unjust enrichment claim, by contrast, requires no showing that any compensation was "deserved" or "earned" by the plaintiff. It simply means that the defendant holds money or property without right.

of quantum meruit—not unjust enrichment—was warranted. *Id.* The Court then explained the distinction between the two causes of action:

> Quantum meruit recovery is a ***contract remedy*** which may be premised either on express or "implied" contract, and a prerequisite to establishing grounds for quantum meruit recovery is claimant's reasonable expectation of compensation.
>
> ***
>
> Unjust enrichment is an ***equitable remedy*** closely associated with "implied contracts" and trusts. [. . .] The doctrine of unjust enrichment or recovery in quasicontract applies to situations where there is no legal contract but where the person sought to be charged is in possession of money or property which in good conscience and justice he should not retain but should deliver to another.

Id. at 926 (emphases added).

The *Estate of Johnson* Court further noted that "the measure of recovery is a distinction between quantum meruit and unjust enrichment. Recovery in quantum meruit is measured by the reasonable value of materials or services rendered, while recovery in unjust enrichment is that to which the claimant is equitably entitled." *Id.*, *see also Koval v. Koval*, 576 So. 2d 134, 136-37 (Miss. 1991) (quantum meruit and unjust enrichment differ in measure of damages).[2]

[2] The Court in *Estate of Johnson* determined that conflating the two claims was harmless error, as the damages awarded were consistent with either measure. 513 So.2d at 926. Here, by contrast, the error was not harmless. As discussed below, the chancellor explicitly found that Bozier had not proven ***any damages*** under an unjust enrichment theory. 5:557.

The distinction drawn by the Mississippi Supreme Court is fully consistent with the law of other states. In *Great Plains Equipment, Inc. v. Northwest Pipeline Corp.*, 979 P.2d 627 (Idaho 1999), for example, the Idaho Supreme Court explained:

> The two theories, quantum meruit and unjust enrichment, are simply different measures of recovery as equitable remedies. The doctrine of quantum meruit permits recovery, on the basis of an implied promise to pay, of the reasonable value of the services rendered or the materials provided. [...] Unjust enrichment, as a fictional promise or obligation implied by law, allows recovery where the defendant has received a benefit from the plaintiff that would be inequitable for the defendant to retain without compensating the plaintiff for the value of the benefit.

Id. at 640, *see also Young v. Young,* 191 P.3d 1258, 1263 (Wash. 2008) ("In sum, 'unjust enrichment' is founded on notions of justice and equity whereas 'quantum meruit' is founded in the law of contracts, a legally significant distinction."); *Ramsey v. Ellis*, 484 N.W.2d 331, 333 (Wis. 1992) ("[Q]uantum meruit is a distinct cause of action from an action for unjust enrichment, with distinct elements and a distinct measure of damages.").

As these cases show, the distinction between quantum meruit and unjust enrichment is not merely academic. Defendants will make different inquiries in discovery, and different arguments in briefs and at trial, depending on which claim is pled. Here, for example, quantum meruit was not mentioned once in any pleading or brief, or during the course of the trial. 1:13. Schilling and SW Gaming

were thus entitled to rely on the representation in Bozier's complaint that he was pursuing the equitable remedy of unjust enrichment, rather than the contractual remedy of quantum meruit. This was consistent with his lawyer's pronouncement at trial that, "This is not a contract case." 6:20.

In sum, notice pleading is a liberal standard, but it is not a meaningless formality. Pleadings "are still required to place the opposing party on notice of the claim being asserted." *Bedford Health Properties, LLC v. Estate of Williams*, 946 So. 2d 335, 350 (Miss. 2006). Where a claim simply is not pled, no damages can be awarded thereunder. *See, e.g., Estate of Stevens v. Wetzel*, 762 So. 2d 293, 295-96 (Miss. 2000). Bozier never provided notice of a contract-based quantum meruit claim. The parties stipulated it was not tried by consent. 5:647. The chancellor therefore erred in awarding quantum meruit damages.

B. The chancellor recognized the distinction between quantum meruit and unjust enrichment.

Bozier's attempt to conflate quantum meruit with unjust enrichment fails for another reason: it contradicts the chancellor's opinion. The opinion plainly shows that the chancellor did not regard the two claims as equivalent.

"Unjust Enrichment" and "Quantum Meruit" were listed under two separate headings in the chancellor's opinion. 5:553, 558. The chancellor correctly denied relief on Bozier's unjust enrichment claim after four pages of exhaustive analysis. 5: 553-58. She found that Bozier had "failed to prove that his work on the casino

. . . was a substantial cause of the casino's formation." 5:557. Consequently, Bozier "failed to prove that Schilling or [SW] Gaming received any specific or general benefit from Bozier's work . . . resulting in their unjust enrichment." *Id.*

Next, the chancellor turned to quantum meruit. 5:558. Her analysis began with the words, "[t]here is a distinction between unjust enrichment and quantum meruit." 5:558. She then laid out the discrete elements of a quantum meruit claim. *Id.* She found that Bozier's services from June through December 2005 "must have had some value." 5:559. On this basis, the chancellor later determined that Bozier was entitled "to the reasonable value of his services" during the specified period in 2005.

The chancellor's opinion shows beyond dispute that neither the court nor the parties to this action treated unjust enrichment and quantum meruit as interchangeable. The chancellor expressly found that unjust enrichment damages ***had not been proved***, but then awarded $290,000 in damages on a quantum meruit claim that was not pled or tried. That award should be reversed.

II. Bozier Concedes He Disregarded the Chancellor's Instruction to Submit Evidence of Quantum Meruit Damages.

Bozier does not seriously dispute that he disregarded the Chancellor's instruction to submit an "itemized bill." Instead, he wrongly contends that a letter from his lawyer containing a wish list of general damages totaling $9.5 million should suffice in lieu of the required itemization. *See* Bozier Br. at 34-35.

The chancellor instructed Bozier to "submit an itemized bill for the services he performed for the casino project from June 1, 2005 to December 15, 2005." 5:631. Bozier does not deny that his lawyer's letter was not confined to this time period, nor could he. He likewise concedes, as he must, that the letter was not itemized to reflect specific work done. Consequently, as shown previously and below, there was no evidentiary basis for the chancellor's quantum meruit award of $290,000.

III. Bozier Concedes There Is No Evidence His Work Was Worth $10,000 Per Week for Twenty-Nine Weeks.

Bozier does not seriously dispute the lack of evidence supporting the chancellor's $290,000 award. Schilling's initial brief points out that there is absolutely no evidence in the record that Bozier—or anyone else—could obtain a ***twenty-nine week*** casino consultancy paying $10,000 per week. The ***only evidence*** is Bozier's testimony that such a consultancy would last, at most, "two to three weeks." 6:116. Bozier does not even attempt a rebuttal. Nor does Bozier dispute that there is absolutely nothing in the record establishing what actual work he did during the specified period in 2005.

In sum, the chancellor entered an award—based on pure speculation, after Bozier ignored her instructions to provide an itemized bill—that is larger by orders of magnitude than the largest consulting payment Bozier has ever received. This was plain error and should be reversed.

CONCLUSION

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

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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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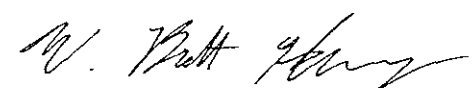
This the 12th day of May, 2010.



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