2009-CA-00841-T

CERTIFICATE OF INTERESTED PERSONS

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

1. George Bozier, Appellant.

2. Richard Schilling, Appellee/Cross-Appellant.

3. SW Gaming, LLC, Appellee/Cross-Appellant.

4. Libra Securities, investor in SW Gaming, LLC.

5. C.W. Walker III, Andrew N. Alexander III, April D. Robertson, and Susan N. O'Neal with Lake Tindall, LLP, attorneys for Appellant.

6. Joseph L. Adams and Deborah M. Brown, Phelps Dunbar, LLP, attorneys for Appellee/Cross-Appellants.

7. Honorable Marie Wilson, Chancery Court Judge, Washington County, Mississippi.

STATEMENT REGARDING ORAL ARGUMENT

Appellant submits that the issues of law and the factual issues in this case are such that oral argument would greatly assist the Court in reaching its decision and therefore requests same.

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STATEMENT OF THE ISSUES

1. Whether the court erred in *sua sponte* utilizing the doctrine of impossibility of performance to excuse the defendants' breach of contract since impossibility, which is an affirmative defense, was not pled, was not an issue at trial, was not tried by consent of the parties, was supported by no evidence, and was expressly contrary to another Mississippi court's ruling on that factual issue.

2. Whether the court erred in finding that Bozier was responsible for finding additional investors before he was entitled to his ten percent undiluted interest in the venture when there is no testimony to support this finding.

3. Whether the trial court erred in finding that Schilling and SW Gaming were not guilty of fraud or bad faith breach of contract when Schilling, by his own testimony, admitted that he never intended to perform the contract which the court found he voluntarily entered into.

4. In the event that this Court finds that the trial court did not err in applying the doctrine of impossibility, then in that event, whether the trial court erred in limiting Bozier's recovery for unjust enrichment or *quantum meruit* to the last twenty-nine weeks of Bozier's services when the uncontradicted evidence clearly shows Bozier worked, without pay, for the defendants' benefit for several years prior to that on this project.

STATEMENT OF THE CASE AND COURSE OF PROCEEDINGS AND DISPOSITION BELOW

The plaintiff, George Bozier, a long-time resident of Greenville, Mississippi, and a former casino manager of one of the Greenville casinos, undertook in the spring of 2002, to locate and develop a third casino in Greenville, Mississippi. After much time searching, he discovered a favorable location at the Greenville Bridge, negotiated favorable lease terms that could be presented to potential investors, and thereafter began seeking investors for this casino project. Eventually he struck a deal with Richard Schilling, a former owner of the Splash Casino in Tunica, whereby the two verbally agreed that Schilling would undertake to establish a casino at this location and that Bozier would present this opportunity to him exclusively. In exchange, Bozier would receive a ten percent equity interest, a job as the general manager at a salary of $200,000.00 per year, and would be paid $100,000.00 per year until the Casino opened.

As the project progressed it increased in scope in size from a $20 million project to a $60 million project. This casino is now in place in Greenville, Mississippi, and is known as Harlow's Casino and Resort.

After Bozier had given the project to Schilling, negotiated the lease on Schilling's behalf, and worked at Schilling's request, without pay, for over two and one-half years after their initial agreement, Schilling and SW Gaming refused to abide by the terms of their agreement with Bozier and gave him nothing.

Bozier brought this suit in the Chancery Court of Washington County, Mississippi, wherein he sued for breach of oral contract, fraud, unjust enrichment or *quantum meruit* and the imposition of a constructive trust.

Following the trial of this matter and extensive post-trial proposed findings of fact and proposed conclusions of law, the trial court rendered an opinion finding that an oral contract had in fact been established and that Schilling had agreed to the terms that Bozier had proposed. However, the court found that Schilling's breach of the contract was excused due to the doctrine of impossibility of performance. This was a doctrine that was neither pled as an affirmative defense by the defendants nor tried by consent of the parties. In fact it was not even addressed by either party in the post-trial submissions. Instead, this issue was raised *sua sponte* by the court and Bozier was denied his damages under the contract. The trial court did award Bozier damages for unjust enrichment or *quantum meruit* at the sum of $10,000.00 per week (the rate charged by Bozier when he did consultant work). However, even though Bozier worked on this matter for approximately three and one-half years (one year prior to the involvement of Schilling and two and one-half years subsequent thereto) the court only allowed compensation during the last twenty-nine weeks (from June of 2005 to December of 2005) of his association with the project prior to his filing suit. Thereafter, this appeal was timely filed.

STATEMENT OF THE FACTS

This suit revolves around a business venture, begun in 2002, by Plaintiff George Bozier to establish a casino; this casino is now known as Harlow's Casino, and was estimated at the time of trial to be worth as much as $85 million to $100 million. (V. 7 p. 260; R.E. p. 27) It is located at the Greenville, Mississippi, Bridge adjacent to Highway 82.

Bozier has been working in the casino business in many parts of the world since 1960. (V. 5 p. 542; R.E. p. 3) In 1992, he came to work in Mississippi and began work at Splash Casino, the first casino in Tunica County. (V. 5 p. 542; R.E. p. 3) This is where he first had an opportunity to meet and to work with defendant Richard Schilling, who was one of the primary owners of that casino. (V. 6 p. 29; R.E. p. 28) Bozier later moved to Greenville in 1994 to work for the Las Vegas Casino which had just opened. (V. 5 p. 542; R.E. p. 3)

Eventually, he became the general manager at the Jubilee Casino, also in Greenville. (V. 5 p. 542; R.E. p. 3) In November of 2001, Bozier learned that the Jubilee Casino was being sold and realized that, as a result, he would be out of a job. (V. 5 p. 542; R.E. p. 3) Since he and his family enjoyed living in Greenville, he undertook to find another location for a third casino. (V. 8 p. 326; R.E. p. 29) He began investigating sites in and about the Greenville area in December of 2001 into February of 2002. (V. 5 p. 542; R.E. p. 3) Eventually, according to the overwhelming weight of the evidence, Bozier decided upon a location which was owned by Refuge Hunting Club at the Greenville Bridge. (V. 6 pp. 32, 38; R.E. p. 30, 31) As Bozier himself was not wealthy, he began contacting potential investors for this project.

(V. 6 p. 34; R.E. p. 32) One of the individuals he contacted was Richard Schilling. Bozier sent Schilling a letter and a packet of information similar to one identified as Exhibit 1 which was sent to another potential investor, Tom Arrow.[1] (V. 6 pp. 45-46; R.E. pp. 33, 34) At that time, Schilling was not interested in participating in the project. (V. 6 p. 73; R.E. p. 35)

Throughout 2002, Bozier worked with the land owners to try and work out an agreement with them whereby he could present, as a package, a lease agreement to a potential investor so that the business venture to establish a casino could go forward. (V. 6 p. 37; R.E. p. 36) In April of 2003, Bozier received word that Schilling had changed his mind and might now be interested in starting a new casino. (V. 6 p. 40; R.E. p. 37) He again contacted Schilling to see if he would be interested in the Greenville project. (V. 6 p. 40; R.E. p. 37) Schilling indicated at that time that 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. (V. 5 p. 542; R.E. p. 3) Schilling came to Greenville, visited the site with Bozier, and then the two of them met at Bozier's house. At that time, they negotiated the terms of the joint venture to establish a casino at the Greenville Bridge. (V. 5 p. 543; R.E. p. 4) The terms of the deal were as follows:

Schilling, as the "money man," would naturally have the lion's share of the ownership of the casino company. Bozier would give the opportunity to Schilling and Schilling would have the benefit of Bozier's work product over the previous year. Bozier

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[1] Because of his computer failures, Bozier was unable to locate the particular packet that he sent to Schilling in early April of 2003. (V. 6 p. 46; R.E. at 34.; Exhibit 1) A review of Schilling's telephone records show, however, that Bozier did in fact call him in February of 2002. (Exhibit 3; V. 6 p. 34; R.E. p.p. 32, 38-41)

would work with Schilling as the local contact to help get the operation up and running. In that respect he would do whatever Schilling asked him to do. (V. 6 pp. 63-68; 74; R.E. pp. 42-48)

Bozier then testified as to what his end of the deal was to be as follows:

> Q. Okay, now here's what I want you to do. I want you to tell the court what you told him you wanted out of the deal.
>
> A. I told him first of all that I wanted ten percent of the stock of this company. I specifically told him that I wanted it fully diluted and without cash call. I was very, very, very clear about that because I've never had any stock ownership before, but I've heard horror stories within our business of people that got diluted.
>
> Q. Now, let me go ahead ...
>
> A. Then I told him I expected to be the chief operating officer of the company in Greenville, whatever that position, whatever name you want to put on that position. The salary for that would be $200,000.00 a year which is an industry standard. It's, you know, it's a sensible number. I said, you know, there is always a bonus thing with this, but we didn't get into the bonus. I said, you know, we usually have EBIDTA bonuses, but we can talk about that later. And then I said I recognize the fact that we will not have a cash flow until we get this thing open and so I will be prepared to do the work that will be required of doing this – of putting this deal together – on half salary until it opens, which is something I've done before. Well, not half, but a bit more.
>
> Q. And what was his response? What was Mr. Schilling's response when you said that's what you wanted out of this deal?
>
> A. He said okay, that's good.
>
> Q. Were there any qualifications that he put on it at all?
>
> A. None.

> Q. All right, at that point in time, at that very moment, what did you feel about whether or not you had a deal with Mr. Schilling?
>
> A. It was a done deal as far as I'm concerned. That's the way I'm used to doing business. If somebody says that's it, that's it. If I make a commitment, same thing.

(V. 6 p. 42; R.E. at 49) Bozier's testimony with respect to the specific terms of the deal and with respect to the absence of any conditions placed upon the deal is uncontradicted except for Schilling, whose testimony the court found not to be credible, who testified that they never had any deal at all.

Since the two were good friends, [2] Bozier felt comfortable accepting Schilling's word, and a deal was struck. (V. 6 p. 44-45; R.E. p. 50-51) After Schilling left Bozier's house that day, Bozier, jubilant at finally having struck a deal in which he had an ownership interest in a casino, confided in his wife Julia about the terms of the deal. In her words, he was "just like an excited little boy" as he told her the news. (V. 8 pp. 370; R.E. p. 52)

Schilling formed defendant SW Gaming, LLC to undertake this project. He and a business associate, Jeff Wellemeyer, were the initial owners of the units of SW Gaming. Neither paid anything for these units. (V. 8 p. 305; R.E. p. 53) Wellemeyer later dropped out of the project.

Lanny Holbrook next became an investor, purchasing twenty-five percent of the company for $1.5 million in August, 2004. (V. 8 p. 349; R.E. p. 54)

As work got underway on this project, Schilling did nothing to cause Bozier to question whether he would be an owner of the casino. A newspaper article approved by

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[2] Both Schilling and Bozier testified they were friends. (V. 6 p.45; V. 8 p.336; R.E. p. 51; 96)

Schilling referred to Bozier as a "partner." (V. 6 p. 135-136; R.E. p. 55-56) Similarly, the numerous business plans referred to Bozier as a "principal" in the casino. (V. 7 pp. 176-177); R.E. pp. 57-58; Exhibits 108, 109; R.E. 59-76; 77-95)

It eventually took longer than anticipated to bring the project to fruition. One of the barges that was planned for use sank, but was replaced by Schilling with two additional barges. (V. 8 p. 357-361; R.E. p. 97-101) On May 1, 2004, Bozier took a temporary job at a casino in Colorado in order to get some income, although he continued spending time on the casino project as well. (V. 6 pp. 105-107; R.E. p. 102-104) He repeatedly requested that his April, 2003, agreement with Schilling be reduced to writing. In November, 2004, he called Schilling to inquire about the status of a written agreement. Schilling continued to put Bozier off, instructing him to deal with Lanny Holbrook. In response, Bozier wrote a letter to Holbrook, outlining the terms of his earlier oral agreement with Schilling, under which, at that time, he had been performing for approximately one and one-half years. (V. 6 p. 102, 103; R.E. p. 105-106; Exhibit P-63; R.E. p. 107-108)

Holbrook, in turn, directed Bozier to Mike Lanahan, the company's CPA, telling Bozier that Lanahan would draw up the contract. (V.7 p.198; R.E. p. 109; Exhibit 64) At that time, neither Schilling, Holbrook nor Lanahan took any exception to any portion of Bozier's letter, including his outline of the agreement that he and Schilling had reached in April, 2003. Bozier continued to work on the project as before. He also continued to request a meeting with Lanahan to formalize the agreement, but Lanahan continued to put off any meeting concerning that subject. In fact, it was not until July, 2005 that this meeting occurred. (V.6 p. 107-109; R.E. p. 11-113) Bozier had flown to Cincinnati, Ohio,

to work with Lanahan on various items regarding the project. (V. 6 p. 109; R.E. p. 113) On July 27, 2005, he met with Lanahan concerning his agreement. (V. 6 p. 109; R.E. p. 113) It was at this meeting that Lanahan told Bozier that he would not be receiving any stock, because it had all been sold to raise money for the project. (V. 6 p. 108-109; R.E. p. 112-113) Bozier, who had by this time been working on the project for over three years, was outraged but, feeling that he had no choice, he continued to work. (V. 6 p. 109; R.E. p. 113)

In October, 2005, Bozier had a conference call with Schilling and Holbrook in which they informed him that (contrary to the prior agreement) they had hired another individual to be the general manager of the casino. (V. 6 p. 112-113; R.E. p. 114-115) Following this conversation, Bozier, fearing that Schilling and the company had no intention of honoring the April, 2003, agreement, went to an electronics store and bought a recorder for his telephone. (V. 6 p. 113; R.E. p. 115) On November 2, 2005, Bozier received a letter from the company offering him a position inferior to that agreed upon, at half the salary previously agreed upon. This offer was conditioned upon Bozier's relinquishing any claim to any of the company's stock. (Exhibit P-98; V. 6 p. 112; R.E. p. 116-117)

As the parties' relationship deteriorated, Bozier had several telephone conversations with Schilling, each of which – believing that Schilling was not going to honor the parties' agreement – Bozier recorded.

In these conversations, the following exchanges occurred:

November 7, 2005 conversation (V. 8 p. 347; R.E. p. 118; Exhibit 116; R.E. p. 119-135):

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Bozier (B) . . . . I brought this deal to you . . . . It was your deal. . . . I gave the deal to you. . . . I gave it to you. . . . I told you what I wanted out of it. . . . I said I want a little bit of the stock.

Schilling (S) You don't realize how many things have gone on in this deal. . . . The boat sank. . . . I had no (inaudible) . . . I had to buy what's his name (inaudible) . . .

Bozier (B) That was a [expletive deleted] Godsend, that boat sinking.

Schilling (S) I had to buy Wellemeyer out ... I had to buy ... (inaudible)

Both talking together ...

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(B) You were stupid there. . . . Really stupid. . . . The guy wasn't going to contribute a [expletive deleted] thing and you just gave him half the stock. . . . My little ten percent you say . . . oh well, ... I've had to give away this . . . . I've had to give away that . . . . you give that [expletive deleted] idiot half of the [expletive deleted] joint without even thinking.

(S) Well, I never thought I was gonna get involved in it this much to tell you the truth.

(B) . . . . You know . . . . it's never been in question . . . . it's never been in question that I was going to get stock in this deal. . . . Never . . . from day one. . . . Where's my stock?

(S) Never thought I'd get stuck in the deal this far.

(B) But where's my stock, Rick? . . . I ain't got any. . . . You know . . . what you did, Rick, . . . we had this conversation before you talked to Wellemeyer . . . . before you talked to Lanny . . . . before you talked to a living human . . . . you knew what the deal was. . . . .So . . . you know . . . don't come back to me and tell me you gave it away. . . . . It wasn't yours to give away. . . . It was mine, Rick.

(S) Well George, you know . . . . I've got all my money stuck in this deal . . . . I have no more money to put into it. . . . . I got to make it work.

. . . .

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(B) But always you said . . . . always you said there was never a question . . .you're going to be running this joint.

(S) Well . . . that . . . that question changed.

. . . .

Page 11:

(B) You said I was going to get stock in it. You ain't given me any stock in it. You said I was going to run the joint. I ain't running the joint.

(S) (Inaudible) . . . Everything changed. . . . .

. . . .

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(B) No, but Rick, . . . you know . . . we started off with ten percent . . . if you'd said to me . . . you know, . . . I've got to give up with this and that . . . you know . . . and I'm getting . . . I'm getting tight . . . you know, and offered me something else . . . you know . . .

(S) I didn't realize I was going to have to give up as much as I gave up.

. . . .

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(S) . . . . I would have never got in it, George, if I'd know I was gonna do this. . . . I wouldn't . . .

(B) Well, I'd have never brought it to you if I thought you were going to do this to me.

(S) I had no intention to do anything to you. . . . And I still don't have any intentions. . . .

(B) Well, whatever your intentions are . . . you know . . . the reality of it is, Rick, I got nothing.

(S) Well you're just gonna have to wait and see what I can do.

(B) How long am I going to have to wait, Rick?

(S) Until I make some money, George, . . . until I make some money . . . if I get . . . if I make any money . . . you just have to go watch the first time I make money . . . (inaudible) . . .

(B) No, that don't stop you from giving me some of your stock.

(S) If I make money just watch and see what I'm gonna do. . . . That's the only thing I can tell you. . . . If you don't like what I do, quit right then and there. . . .

(B) Well, you know, I don't think it's a question of quitting Rick . . . it's a question of whether I do this deal. . . .

(S) I'm just telling you I'll make it right.

December 2, 2005 conversation (Exhibit 117) (R.E. p. 136-148):

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(B) It seems that every time . . . it seems that every time that . . . you know . . . we talk about this deal . . . my . . . my . . . my personal deal goes further in the tank.

(S) No it isn't George. . . . Quit saying that.

(B) Well . . . that's . . . that's what it looks like, Rick.

(S) It isn't.

. . . .

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(B) Well . . . it matters to me in that I'm supposed to get ten percent.

(S) Yeah . . . you know . . . this is my money I'm putting up. . . . I wasn't supposed to put up any money.

At trial, Schilling denied that there was any agreement between the parties regarding ownership of stock and argued, essentially, that Bozier was a "volunteer" – that he had worked for nothing for approximately three years in the hope of a manager's position once the casino opened. (V. 8 p. 338-339; R.E. 149-150)

Following the trial, and the parties' submission of Proposed Findings of Fact and Conclusions of Law, the trial court issued its Opinion.[3] The court noted that Schilling had denied that he and Bozier had an oral contract. However, the court expressly found otherwise – there was an agreement, Schilling's denials notwithstanding. The court found that the agreement included opening a casino in Greenville utilizing two barges owned by Schilling. The casino would be placed at the specific bridge site identified by Bozier. Bozier would manage the casino at an annual salary of $200,000.00 and, in addition, Bozier would receive an undiluted ten percent interest in the casino. The court found that the cost of the project would be "in the neighborhood of $20 million." (V. 5, pp. 10-11; V. 5, pp. 549, 550; R.E. p. 10-11) The lower court also found that there were several other "terms" in the agreement, including that in order to receive his ten percent interest in the casino, Bozier was required to obtain investors. There is simply no support for that statement in the record – Bozier did not testify that the agreement

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3 This Opinion is found at V. 5, p. 540-566 and R.E. 1-26.

included that term, and Schilling denied that there was any agreement at all. Accordingly, the court cannot insert this nonexistent term into the parties' agreement.

Having found that the parties had an agreement, however, the court then held that Schilling's performance under the contract had been rendered "impossible" by the sinking of the casino barge in September, 2004.

SUMMARY OF THE ARGUMENT

I. Schilling's and SW Gaming's failure to perform the agreement found by the trial court to exist was not excused by the doctrine of impossibility of performance.

A. "Impossibility of Performance" is an Affirmative Defense, which must be pled, or, in the alternative, tried by the consent of the parties. Neither of these occurred. Defendants' counsel never elicited any testimony that the sinking made performance of the agreement impossible, nor was that issue even argued as a defense. Accordingly, plaintiff did not offer any evidence to the contrary, although such proof was available. This defense – if it was a defense – was waived.

B. The sinking of Schilling's existing casino barge did not, in fact, render his performance impossible. Instead, after the barge sank, Schilling purchased two replacement barges and had them delivered to the project site. Documents executed by Schilling and Holbrook before and after the sinking of the casino barge demonstrate that the project was proceeding with the replacement barges. In fact, it was only after the Mississippi legislature changed the law in a special session held in October, 2005, to remove the requirement that gaming vessels be "floating," that Schilling/SW Gaming were able to drop the "barge" plan and build a permanent structure.

C. Schilling offered no proof at trial that he was not guilty of fault in connection with the sinking of the barge. Such proof was essential to a defense (had it been raised) of impossibility. Under established law, in order to show

impossibility, Schilling was required to prove this as part of his burden. He offered no such evidence.

In any event, Schilling would have been collaterally estopped from claiming no fault, as this issue had already been judicially established. After the sinking, Schilling sued the facility at which the barge sank, alleging that it was at fault. United States District Judge Glen Davidson held Schilling was twenty-five percent at fault in connection with the sinking, and that ruling was not appealed. Accordingly, as a matter of law, Schilling could not have been entitled to a later ruling of "impossibility."

II. The trial court found that, under the parties' agreement, Bozier was responsible for finding additional investors in order to be entitled to his ten percent undiluted interest in the venture. There was no evidence to support this finding, as Bozier testified that there were no additional conditions for his receipt of this interest and Schilling denied that there was *any* agreement regarding any interest for Bozier.

III. The trial court erred in finding that Schilling/SW Gaming were not guilty of fraud or bad faith breach of contract. That court's ruling that Schilling was aware that there was an agreement regarding the shares, coupled with Schilling's admission at trial that he never intended to actually transfer the shares, established clearly that Schilling entered into an agreement with Bozier which he never actually intended to perform.

IV. The trial court found that Bozier had an agreement with Schilling, in April, 2003, and that Bozier had never been paid anything. Nonetheless, the court arbitrarily limited Bozier's recovery under the theory of *quantum meruit* to the last twenty-nine

weeks of the parties' relationship. Bozier is clearly entitled to recover *quantum meruit* damages for the entire period during which he worked on the project.

ARGUMENT

I. Schilling's/SW Gaming's Failure to Perform was not Excused by the Doctrine of Impossibility of Performance

The trial court based its finding of "impossibility" on the sinking of one of the two barges that Schilling and Bozier had originally planned to use in the project, reasoning that, once that barge sank, it was "impossible" for Schilling to perform his obligations under the contract. Appellant respectfully submits that this ruling was erroneous for at least three reasons:

(1) the affirmative defense of impossibility was not pled, nor was it tried by agreement of the parties; it was never mentioned or argued at trial;

(2) the sinking of Schilling's existing casino barge did not, in any event, render performance "impossible" in either a practical or legal sense; and

(3) Schilling offered no proof – essential to establishing this defense – that he was guilty of no fault in connection with the sinking. Each of these will be discussed below.

A. The Affirmative Defense of Impossibility was not Pled, nor was it Tried by Agreement of the Parties.

The Chancellor, after hearing all the evidence and listening to recorded telephone conversations between Bozier and Schilling[4], and noting the years of work that were put into the project by Bozier without any pay, correctly determined that an oral contract between Bozier and Schilling had in fact been formed, Schilling's categorical, and

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[4] These conversations were recorded without Schilling's knowledge. They conclusively established that Schillings sworn testimony, denying that he promised Bozier that which Bozier claimed Schilling promised him, was deliberately false.

untruthful, denials of that fact notwithstanding.[5] The trial court's factual findings are accorded great deference, and will not be overturned on appeal where they are supported by substantial, credible and reasonable evidence. *Puckett v. Stuckey,* 633 So.2d 978, 982 (Miss. 1993). The fact that there may be other evidence to the contrary is irrelevant. *Cotton v. McConnell,* 435 So.2d 683, 685 (Miss. 1983). Purported errors of law, on the other hand, are considered by this Court *de novo. Cummings v. Benderman,* 681 So.2d 97, 100 (Miss. 1996).

The Court found the terms of that contract to be as follows:

> "...that Schilling would open a casino using his barges called the Bali Hai.[6] The Bali Hai would consist of the casino barge and the restaurant barge, both to be provided by Schilling, and the barges would be moved to the bridge site at Schilling's expense. Bozier would do the leg work to establish a casino. More importantly, Bozier would obtain investors and/or financing for the casino.[7] Bozier's pay for establishing the Bali Hai Casino and for obtaining investors and/or financing for the casino would be a job as casino manager at an annual salary of $200,000.00, and an undiluted ten (10%) percent interest in the Bali Hai, respectively."

(V. 5, pp. 543, 544; R.E. p. 4, 5)

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5 The Court found as a fact that Schilling's testimony concerning the representations made between the parties was untruthful.

6 The casino project was first referred to as "Splash", then changed to "Bali Hai" and finally changed from "Bali Hai" to "Harlows". It was not changed until much later in the project. (V. 6 p. 56; R.E. p. 151)

7 The Court improperly inserted this term into the contract. There is no evidence in the record to support it. To find that Bozier was the one that was responsible for finding investors is ludicrous, especially considering the fact that he found Schilling and that subsequently sufficient investors were found. In fact the project went from a $20 million project to a $60 million project and sufficient investors were found. This finding, however, is of no moment since it formed no basis for her opinion.

While the Chancellor's finding that the contract was formed is correct, her characterization of it is not. The contract at issue in this case is not about how the parties were going to utilize a particular barge; instead, the contract is clearly one to create a casino project at the particular location discovered and developed by Bozier and provide Bozier with an ownership interest in such casino project, [8]plus a job as general manager of such casino. This is the contract which Schilling breached and upon which Bozier's suit is based. Utilizing Schilling's barges was one way of accomplishing that goal. However, in light of the sinking of that barge and subsequent developments, it was certainly not the only way.

Schilling was one of the original owners of the Splash Casino, the very first casino opened in North Mississippi, which operated in Tunica, Mississippi. (V. 8 p. 319; R.E. p. 152) That casino consisted of two Inland River barges. One was called a "casino" barge, and the other was called a "restaurant" barge. Following the agreement between Bozier and Schilling to construct a hotel and casino resort at the Greenville Bridge location, both of these barges were towed to Greenville, and moored at a shipyard in Lake Ferguson.

Thereafter, in September, 2004, one of the two barges, the casino barge, sank. (V. 8 p. 357-358; R.E. p. 97-98) No evidence was offered to explain the sinking at trial. Schilling in fact purchased two additional substitute barges to use as the casino and delivered them to the Greenville Bridge site. (V. 8 pp. 357-360; R.E. p. 97-100) At this point in time Schilling's sunken casino barge no longer played any part in the Bali

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[8] In fact, Schilling himself defined the "project" in a written agreement between himself and another investor, Lanny Holbrook. (Exhibit P-58; R.E. p. 153-158) In this written agreement the project is defined as "building a casino operation."

Hai/Harlows casino project – it had been replaced by Schilling. As this issue was never raised at trial, no detailed discussion was had concerning it. Fortuitously, however, documents were introduced into evidence that demonstrate what a "non-factor" the sinking of the barge actually was. When Lanny Holbrook took an ownership interest in the project, he and Schilling entered into an agreement on August 11, 2009. This agreement referred to the casino barge and the entertainment (restaurant) barge, and described their future use in the proposed casino operation. It recited their fair market value as $4 million and stated that they could be used as collateral to obtaining additional financing. The agreement further provided that SW Gaming would lease or purchase approximately six hundred fifty slot machines at a cost of between $5 million and $6 million to be placed aboard the barge. (Exhibit P-58; R.E. p. 153-158)

The casino barge sank the next month.

Three months later, in December, 2004, as a part of the preparation of an Offering Memorandum, Schilling and Holbrook entered into "Amended and Restated Investment Agreement." Once again, "The Barges," with a value of $4 million, were pledged as collateral. Like the first agreement, the amended agreement provided for the purchase of slot machines. However, since Schilling had purchased two barges to replace the casino barges the company was now purchasing six hundred fifty to one thousand slot machines, at a cost of between $6 million and $9 million. Following the sinking of the casino barge, it had been replaced with two other barges and the project was proceeding exactly as planned, except that it was growing larger. It certainly was not "impossible." (Exhibit P-66; R.E. p. 159-163)

In 2005, the legislature amended the law to allow land-based gaming. (Miss. Code Ann. §27-109-1) Following passage of this law, even though the sunken casino barge had already been replaced, construction started instead on a land based casino on the site located and arranged by Bozier. At trial, the issue of "impossibility" never even came up.

The Chancellor's reliance on the doctrine of impossibility of performance to bar Bozier's claim was surprising, in part, because that doctrine was never asserted as an affirmative defense[9] by Schilling in his Answer or in his Amended Answer, and was never argued as a defense to Schilling's contract breach by Schilling's counsel before, during or after the trial of this case.

Similarly, neither party in the pretrial or post-trial submissions addressed the issue of impossibility of performance. Schilling took the position at all times that he never made any such representations to Bozier respecting Bozier having a percentage ownership in the company. This was a judge-tried case. It would have been fatal for Schilling to argue on the one hand, "We never had a deal;" and then on the other hand argue, "Well if you don't believe that, then my performance of our deal was rendered impossible when the barges sank." Since impossibility was not raised at trial, plaintiff presented no evidence to refute it. There was no reason to. While the Chancellor states in her findings that the defendant argued impossibility as an alternative theory, that simply did not happen. There is no evidence in this record that any party raised the issue of impossibility.

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9 Rule 8(c) M.R.C.P. mandates, after specifically listing multiple affirmative defenses by name, that "any other matter constituting an avoidance or affirmative defense" must be asserted by way of answer.

This contract "defense" was the court's creation, and the plaintiff was not aware of it until the Opinion was handed down.

In Mississippi, as in most, if not all, other states, an affirmative defense must be either pled by the defendant or tried by agreement of the parties. If not, it is deemed waived. In *Good v. Village of Woodgreen Homeowners Association*, 662 So.2d 1064 (Miss. 1995), the Mississippi Supreme Court held that the defendant was procedurally barred from raising the defenses of laches. The Court correctly held that M.R.Civ.P. 8(c) requires that a party who is relying upon an affirmative defense must plead that affirmative defense, and that affirmative defenses that are neither pled nor tried by consent are deemed to be waived.

Likewise, in *Wholey v. Cal-Maine Foods, Inc.*, 530 So.2d 136, 138 (Miss. 1988) the Mississippi Supreme Court held that the defendant's failure to affirmatively plead *res judicata* precluded the use of that defense as a basis for summary judgment. In *Wholey*, the trial court raised the doctrine of *res judicata* on its own motion and used it to defeat the plaintiff's claim. The Mississippi Supreme Court reversed and stated that, "[s]ince *res judicata* was not affirmatively pled by Cal-Maine, it was error for the lower court to grant summary judgment on this basis." 530 So.2d at 139.

A case most directly on point is *Hertz Commercial Leasing Division v. Morrison*, 567 So.2d 832 (Miss. 1990). That case, like this one, was a contract case. The court held that, where a party sues another on a contract, the defendant must affirmatively plead the affirmative defenses or penalties in relation to that contract. The court stated that a matter is an affirmative defense if it assumes the plaintiff proves everything he has

alleged and, even so, the defendant wins. Obviously the doctrine of impossibility is an affirmative defense which must be pled.

The Mississippi Supreme Court in *Hertz* stated, "If a matter is an affirmative defense, the defendant bears the burden of production and the risk of nonpersuasion." (citing *McDaniel v. Ritter*, 556 So.2d 303 (Miss. 1989) and *Smith v. Sanders*, 585 So.2d 1051 (Miss. 1986)) The court went on to note that the rule is one that goes to the point of fairness. The defendant is required to tell the plaintiff those matters it will rely upon affirmatively as defenses so that the plaintiff will have a fair opportunity to study the matter and try to persuade the court that the defense should not prevail. 567 So.2d at 834. The *Hertz* court went on to hold that, since the trial judge had based his judgment on a penalty which was not and never had been pled in the case, the judgment would be reversed and remanded for a new trial. 567 So.2d at 837. (see also, *MS Credit Center, Inc. v. Horton*, 926 So.2d 167 (Miss. 2006) (failure to plead affirmative defense serves as a waiver of that defense)

B. The Sinking of Schilling's Existing Casino Barge Did Not, in any Event, Render Schilling's Performance "Impossible" in Either a Practical or a Legal Sense

The defendants bear the burden of proof or the risk of non-persuasion with respect to any affirmative defenses. In order to determine whether or not defendants carried their burden of proving the affirmative defense of impossibility, even if it had been pled, a brief review of that doctrine is necessary.

The trial court, citing *Austin Fire Fighters Relief and Retirement Fund v. Brown, et al*, 2008 U.S.D.C., Lexis 75282; 102 A.F.T.R.2d (RIA) 6486 and *Hendrick v. Green*,

618 So.2d 76 (Miss. 1993) correctly stated the contract law regarding impossibility as follows:

> The general rule in Mississippi is this: the mere fact that a contract becomes burdensome or even impossible to perform does not for that reason alone excuse performance. When a party by his own contract creates a duty or charge upon himself he is bound to discharge it, although to do so should subsequently become unexpectedly burdensome or even impossible; the answer to the objection of hardship in all cases such being that it might have been guarded against by proper stipulation.

(V. 5 p. 550) According to Bozier's clear testimony as previously quoted in this brief, there were no stipulations upon the performance and no conditions upon his receiving the interest in the casino to be established at the bridge site. (V. 6 p. 42; R.E. p. 49) This testimony is unrefuted.[10] Had Schilling wanted to condition the contract upon the use of this particular casino barge, which he clearly had the ability to do, he could have stipulated that in their oral contract. He did not do so. Clearly he could have made it a condition of the contract that the barge remain afloat. He did not do so.[11]

The trial court premised its Opinion that Schilling's breach was excused due to the doctrine of impossibility on the Mississippi Supreme Court case of *Piaggio v. Sommerville,* 119 Miss. 6 (1918). The particular finding of the *Piaggio* case is that

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[10] Schilling presented no evidence to refute Bozier's testimony that there were no conditions on performance by Schilling. It was the defendant Schilling's burden to prove this affirmative defense. Since he failed to present any testimony whatsoever to refute Bozier's uncategorical denial of any conditions which would divest him of his interest in the casino then the Court must necessarily rule that Schilling did not carry his burden. *Hearin-Miller Transporters, Inc. v. Burrie,* 248 So.2d 451, 454 (Miss. 1971)

[11] Since Schilling denied the existence of any such agreement it would have certainly been difficult for him to attempt to hypothesize any conditions which might excuse a breach of the obligations that he denied existed.

impossibility of performance is not a defense to a contract breach except under certain extremely limited conditions. The Chancellor identified those three conditions as:

1. A subsequent change in the law whereby performance becomes unlawful;

2. The destruction through no fault of either party of the specified thing, the continued existence of which is essential to the performance of the contract; (emphasis added) and

3. The death or incapacitating illness of the promissory in a contract which has for its objective the rendering of personal services. (V. 5 p. 550-551; R.E. p. 11-12)

The trial court, in finding that the doctrine of impossibility applied in this case, used exception number 2, that is, the destruction, from no fault of either party, of the specified thing, the continued existence of which is essential to the performance of the contract. (emphasis added) If the promisor fails to prove that he is not at fault for the destruction of the specified thing, then the defense of impossibility is not available to him. Likewise, if the promisor fails to prove that the destroyed thing was essential to the performance of the contract, then the defense of impossibility is similarly unavailable to him. Schilling proved neither.

Bozier agrees that *Piaggio* controls in the instant case. Bozier submits, however, that the trial court did not follow the Supreme Court's ruling in that case. This misuse of the Supreme Court's ruling in *Piaggio* prompts a discussion of the *Piaggio* case and the Trial Court's analysis of it.

In *Piaggio*, the owners of a ship (the schooner *Henry S. Little*) and Piaggio entered into a contract. This contract obligated the ship's owners to transport lumber

from the Gulf of Mexico to several foreign ports in England, France and Italy. After the contract was signed, Germany gave "notice to the World that she would ... begin ... submarine warfare and would destroy all vessels ... in the waters adjacent to Great Britain, France and Italy."

The issue for decision before the *Piaggio* court was whether Germany's threat to destroy shipping, publicized after the parties' contract was bound, relieved the ship owners of the obligation to perform that promise. The *Piaggio* court answered that question in the negative, ruling that the ship owners' performance was not excused.

The rule of law upon which the *Piaggio* court based its decision was as follows:

> ... the owners of the vessel were bound to transport the cargo of lumber as provided there, notwithstanding the risk to the vessel of being sunk by a submarine, or pay damages for their failure so to do, for the rule is that when a party by his own contract creates a duty or charge upon himself he is bound to discharge it, although so to do should subsequently become unexpectedly burdensome or even impossible; the answer to the objection of hardship in all such cases being that it might have been guarded against by a proper stipulation.

This holding fits Bozier's claim like a glove. According to the Chancellor, Schilling assumed the duty to provide his barge to this casino project. The barge subsequently sank. Schilling failed to guard against this contingency by proper stipulation. The sinking arguably made Schilling's performance unexpectedly burdensome, but Schilling was nonetheless obligated to perform. Had Schilling wished to condition his performance on the continued existence of the barge he could have done so. He did not.

Implicit in the trial court's conclusion that the doctrine of impossibility applied here is that Schilling proved:

1. That the sinking was not his fault; and

2. That the continued existence of the barge was essential to the performance of the contract.

To successfully carry his burden, Schilling must prove both. No proof was offered on either element. In fact, he could not have offered such proof.

C. Schilling Offered No Proof – Essential to Establish the Defense of Impossibility – That He was Not Guilty of Any Fault in Connection With the Sinking

1. No Evidence was Provided in the Court Below

The trial court concluded, without any proof, that Schilling's barge sank "due to no fault of the parties." (V. 5 p. 551; R.E. p. 12) To be sure, Bozier cannot be charged with fault for the sinking of Schilling's barge. But what is the basis for the Court's conclusion that Schilling is without fault for this sinking? No proof whatsoever was offered on this point. Under established law, Schilling, as vessel owner, owed a duty to provide a "seaworthy" vessel. *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539 (1960). If Schilling's barge sank because its hull was deteriorated and non-water tight, then Schilling's barge was unseaworthy as a matter of law.

If Schilling, as vessel owner, failed to periodically inspect his barge or engage a competent third party to inspect it to determine whether its hull was in a fit, water tight condition, whether it was leaking, etc., then Schilling was negligent. *Walker v. Harris*, 335 F.2d 185 (5th Cir. 1964). If Schilling failed to take adequate precautions to keep the barge afloat once it was discovered that it was leaking, then this also would be a finding

of fault on one of the contracting parties which would remove the sinking from the exceptions in the *dicta*, and render the doctrine of impossibility inapplicable.[12]

As there was absolutely no proof offered on this issue at trial, what was the nature of the "impossibility" that Schilling encountered when his barge sank? Is there any evidence in this record to support a finding that the sinking of his barge, in fact, render Schilling's ability to perform his promise to Bozier "impossible," for it was Schilling's burden to prove that conclusion:

> "Consistent with the general rule that the burden of proving an affirmative defense falls on the party asserting it, it is established that a party claiming impossibility of performance has the burden of proving the defense." *17A Am Jur 2d., Contracts §674*, Pg. 682.)

What did the proof before the Chancellor show? More to the point, what did the proof fail to establish?

What prevented Schilling from performing? He did not have his barge because it sank, at least partially due to his own fault, as found by the Federal Court. If Schilling had refloated and salvaged his barge, he could have used it to perform this contract. His performance would not have therefore been "impossible."

However, Schilling introduced no evidence to explain why he did not salvage his sunken barge and thereby render this barge available to be used in this casino project. Would not proof that it was "impossible" to salvage this barge be critical to a conclusion that Schilling's performance was impossible?

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[12] In point of fact, this is exactly what United States District Court Judge Davidson found as a fact in *Schilling Enterprises, LLC v. Superior Boat works, Inc., et al,* Civil Action No. 4:04cv343-GHD (N.D. Miss. 2006), a lawsuit that Schilling filed against the moorage facility at which the casino barge sank, when he found Schilling to be partially at fault for the sinking of this very barge. See discussion *infra* at Appendix A and Exhibit 15.

No evidence was offered by Schilling to show the burden to which he would have been subjected (the difficulty, the cost, the time lapse) that Schilling would have encountered to salvage his sunken casino barge, had he elected to do that. If this barge could have been salvaged and thereby again become available to Schilling, at minimum trouble, could a conclusion of "impossibility" stand?

Schilling provided the trial court with no proof to support a conclusion that this barge could not be salvaged, no proof of the cost of salvage, and no proof as to the time it would take to accomplish salvage. Yet, the court concluded that the sinking subjected Schilling to the total, absolute loss of this barge with no idea as to whether that conclusion was or was not accurate.

The trial court's conclusion is based on this dubious premise: The mere fact that this barge sank conclusively establishes a finding that it was "impossible" for Schilling to salvage it.

For the moment let us assume that this assumption is valid.

Would not then Schilling have to prove that no substitute barge was available to take the place of his sunken barge at a reasonable cost before it would have been "impossible" for Schilling to have provided a barge for this casino project? After all, if substitute barges, at reasonable costs, could be acquired, would Schilling's performance then be "impossible?"

Schilling's burden of proof required him to prove that the sinking of his casino barge not only prevented Schilling personally from performing his contract with Bozier, but such sinking would have prevented "others from rendering the performance." As one writer put it:

> A contracting party impliedly obligates himself to cooperate in the performance of his contract and the law will not permit him to take advantage of an obstacle to performance which he has created or which lies within his power to remove. *17A Am Jur 2d, Contracts*, §680, p. 687.

Schilling offered no proof to show that it was "impossible" for him to refloat this barge and use it in any casino project, nor did he present proof there were no substitute barges available which could be used.

However, the proof at trial was exactly the opposite. Schilling did in fact acquire substitute barges. (V. 8 pp. 357-360; R.E. p. 97-100) Since substitute barges were actually obtained and delivered by Schilling, his performance was certainly "possible."

However, the decision was eventually made for entirely different reasons to construct this casino on land and not on barges, although the substitute barges were already at the site.

As was noted above, during the course of this project, Mississippi law changed, holding it permissible for casinos to be built on land. Thus the substitute barges were not used. Nevertheless, the Chancellor excused Schilling's breach based upon the unsupported conclusion – not even advanced by Schilling – that the mere fact that Schilling's barge sank, standing alone and without more, made it "impossible" for Schilling to perform his promise to Bozier.

2. In Any Event, The Court is Collaterally Estopped From a Finding Of Impossibility

In addition to the facts that the affirmative defense of impossibility was not pled and there was no evidence even proffered to support essential elements of it, the trial court was estopped to find an essential element of this affirmative defense – that

Schilling was without fault for the sinking of this barge – because of the doctrine of collateral estoppel and/or comity.

Apparently because "impossibility" was never an issue at trial, the trial court was unaware of the fact that Schilling's fault with respect to the sinking of this very barge had already been previously determined by Judge Davidson. In *Schilling Enterprises, LLC v. Superior Boat Works, Inc., et al and Federal Insurance Company*, Civil Action No. 4:04-cv-343-GHD (N.D. Miss. 2006) United States Federal District Judge Glen Davidson, in a judge tried case in admiralty, found as a fact that Schilling was 25% at fault for the sinking of this very casino barge. Judge Davidson determined that Schilling, as vessel owner, "did what its own marine expert, Fred Budwine, called the most negligent act a vessel owner can do when its vessel has a watertight compartment full of water and that is 'open the door.'" (See Judge Davidson's Opinion attached hereto as Appendix A, p. 7-8) Even though counsel for both plaintiff and defendant were well aware of Judge Davidson's decision (both the Phelps Dunbar firm and the Lake Tindall firm participated in the District Court case), neither party brought it to the court's attention simply because it was not an issue.

Had any evidence actually been offered by defendants at the trial of this matter that the sinking rendered his performance of this contract (which he denied existed) impossible and that Schilling was not at fault for the sinking then, in that event, counsel for Bozier[13] would have been quick to point out that Schilling's fault had already been judicially determined.

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[13] One of the attorneys for Bozier, Mr. Walker, happened to be the attorney whose cross examination of Schilling's marine expert is quoted and relied upon by Judge Davidson in his Opinion holding Schilling partially at fault.

Collateral estoppel precludes relitigation in a subsequent suit of specific questions that were actually litigated and determined by and essential to the judgment in a prior suit. *Mayor and Board of Alderman, City of Ocean Springs, Mississippi v. Homebuilders Association of Mississippi, Inc.*, 932 So.2d 44 (Miss. 2006). "Where a question of fact essential to a judgment is actually litigated and determined by a valid and final judgment, that determination is conclusive between the parties in a subsequent suit on a different cause of action." *Johnson v. Bagby*, 252 Miss. 125, 171 So.2d 327 (Miss. 1965). The Mississippi Court of Appeals has held that "collateral estoppel ... applies only to questions actually litigated in a prior suit, and not to questions which might have been litigated." *Walker v. Bentz*, 914 So.2d 1262 (C.A. Miss. 2005)

In this instance, Bozier was not a party in the action before Judge Davidson in the Northern District of Mississippi. However, Schilling was a party. During that trial one of the primary factual issues was whether or not Schilling was at fault for the casino barge sinking. Judge Davidson found that he was.

Even if the doctrine of collateral estoppel should not have applied (which plaintiff denies) then certainly the doctrine of comity, to which Mississippi courts adhere, should have applied. Comity is similar to full faith and credit, but is not governed by the Constitution or by federal statutes. It is a "principle based on courtesy which recognizes the decision of a court from another jurisdiction." *Greater Canton Ford Mercury, Inc. v. Ables*, 948 So.2d 417 (Miss. 2007). Black's Law Dictionary (6th Ed. 1991) defines comity as the principle that "courts of one state or jurisdiction will give effect to laws

and judicial decisions of another state or jurisdiction, not as a matter of obligation by out of deference and mutual respect."

Plaintiff does not assert that the trial court in this instance knowingly found Judge Davidson's previous findings of fault with respect to the sinking of the barge to be incorrect. She was simply never made aware of the fact that this factual issue had already been determined by the United States Federal District Court sitting in admiralty. Since impossibility was not a pled defense and not an issue at trial, neither party thought there was any need to bring it to the court's attention.

The doctrine of impossibility was not available to Schilling as a matter of law, as Schilling has already been judicially determined to have been partially at fault for the sinking of his barge.

Appellant respectfully submits that this Court should not affirm this conclusion which rests on an unpled affirmative defense, which was not an issue at trial, which was supported by no evidence and which is expressly contrary to another Mississippi court's ruling on this factual issue.

II. There was No Evidence At Trial That Bozier was Required to Obtain Investors Under the Parties' Agreement

With regard to the agreement that the trial court found to have been made by Schilling and Bozier, the court's Opinion stated:

> Schilling denies that he and Bozier ever had an oral contract. However, based upon the recorded telephone conversations of Schilling and Bozier, and the amount of work performed by Bozier between April, 2003, and May, 2004, of which Schilling was well aware, clearly there was an agreement. A reasonable man must conclude, based upon the testimony and the exhibits, that in April, 2003, the agreement was that Schilling would open up a casino in Greenville called the Bali

> Hai. Schilling would provide his restaurant barge and his fully equipped casino barge, valued at $2 million each, and move them to a specific bridge site identified by Bozier. Schilling would be the owner of the casino and would manage the restaurant barge. Bozier would provide investors and continue to do the leg work in identifying the people and/or companies needed to acquire and prepare the bridge site for the casino. In exchange for doing the leg work, Bozier would manage the casino barge at an annual salary of $200,000.00. *In exchange for providing required investors, Bozier would receive an undiluted ten percent interest in the casino.*

V. 5 at 549-550; R.E. p. 10-11 (emphasis added)

While there was certainly evidence regarding Bozier's performing other services, there was no evidence that he was required to obtain additional investors in order to be entitled to his ten percent undiluted interest. Bozier testified unequivocally that there were no additional qualifications put into the agreement by Schilling (V. 6 p. 42; R. E. p. 49) and – as he denied the existence of any agreement, neither did Schilling. Accordingly, the Chancellor's addition of that term to the parties' agreement was erroneous. E.g., *Palmere v. Curtis*, 789 So.2d 126 (Miss. App. 2001).

III. Whether the Trial Court Erred in Finding that Schilling and SW Gaming Were Not Guilty Bad Faith Breach of Contract or Fraud

The fact that the Chancellor found that Schilling made the agreement with Bozier, coupled with defendant Schilling's own testimony that he never intended to abide by that agreement, inescapably establishes conclusive proof that Schilling (and therefore SW Gaming) intentionally breached their contract with Bozier, thus entitling Bozier to punitive damages, or alternatively, shows that the defendants committed fraud.

In Mississippi, punitive damages are generally not recoverable unless the breach, "results from intentional wrong, insult, or abuse, as well as such gross negligence as constitutes an independent tort." *Blue Cross & Blue Shield of Mississippi, Inc. v. Maas,* 516 So.2d 495 (Miss. 1987). In this case the Chancellor found, as a fact, that Schilling had made the necessary representations so as to form a valid contract with Bozier. Thereafter, Schilling admitted that he never intended to abide by the terms of that contract. (V. 8, p. 328; R. E. p. 164) How could the breach of contract be more intentional? How could the making of a contract accompanied by the present intention of not ever abiding by the terms of that contract be anything other than bad faith?

Not only was the conduct of Schilling clearly a bad faith breach of contract, but his actions in making the necessary promises or representations to Bozier, without any intention to abide by those promises, clearly constitute fraud. In Mississippi in order to establish fraud the plaintiff must prove nine elements.[14] They are:

(1) A representation;

(2) Its falsity;

(3) Its materiality;

(4) The speaker's knowledge of its falsity or ignorance of its truth;

(5) The speaker's intent that it should be acted on by the hearer and in the manner reasonably contemplated;

(6) The hearer's ignorance of its falsity;

(7) The hearer's reliance on its truth;

(8) The hearer's right to rely thereon;

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14 *Levens v. Campbell,* 733 So.2d 753 (Miss. 1999)

(9) His consequent and proximate injury.

In this case, the Court found as a fact seven of the nine elements. The remaining two were actually admitted by the defendant.

Each of the nine elements will be examined hereafter and the Appellant will clearly demonstrate that, between the court's findings of fact and the admissions of the defendant, fraud was conclusively proven.

Element No. 1 – A Representation

The Court found as a fact that Bozier and Schilling entered into an oral contract to create a casino hotel resort at the Greenville Bridge. The Court found this even though Schilling vehemently denied that any such discussion ever occurred. The Chancellor found Schilling's testimony to be untruthful. In the Court's opinion on page 10 the Court stated:

> Schilling denies that he and Bozier ever had an oral contract. However, based upon the recorded telephone conversations of Schilling and Bozier, and the amount of work performed by Bozier between April of 2003 and May of 2004 of which Schilling was well aware, clearly there was an agreement.

V. 5, p. 549; R.E. p. 10

In order to establish a contract, there must be an offer and an acceptance.

Bozier, who had been working with the Refuge Hunting Club for the previous year and had developed the concept to establish the casino at the river bridge site (V. 6 p. 33; R.E. p. 165) made the offer to Schilling to present him exclusively with this opportunity; to give Schilling the benefit of his work product done the previous year; to work for him during the meantime to get the casino up and rolling; and to thereafter

work as general manager after the casino was up and running. (V. 6, p. 42; R.E. p. 49) In exchange, Bozier demanded very specific things:

1. Ten percent fully diluted interest in the project with no cash calls;

2. A job once the casino was up and running as general manager at a salary of $200,000.00 yearly for five years;

3. A salary during the interim of $100,000.00 per year.

Schilling agreed to these terms without qualification. (V. 6, p. 42; R.E. p. 49; Exhibit 63, 65; R.E. p.107-108; 166-167) This agreement constituted an acceptance of Bozier's offer and thus a contract was formed. This acceptance also constituted a "representation."

Obviously for an agreement to be reached Schilling had to voice his assent. In other words, he agreed to the terms of the contract as set forth by Bozier, that Bozier would be entitled to ten percent of the stock of the casino, a job for $200,000.00 running the casino as the general manager, and compensation of $100,000.00 a year prior to the casino being opened. Of utmost importance is the representation that Bozier would have a share of ownership of the casino. In other words, the representation was made that Bozier would get stock. The trial court found this as a fact. (V. 5 p. 543-544; R.E. p. 4-5)

Element No. 2 – The Falsity of the Representation

Although omitted from the trial court's Opinion, on cross examination Schilling admitted that he never intended to give Bozier any stock. On cross examination by plaintiff's counsel, Mr. Schilling stated:

> Q. Mr. Schilling, did you ever intend, ever intend to give Mr. Bozier any stock?

A. There was no stock to give. First of all there was no project.

BY THE COURT: Well I'm going to do you like I did Mr. Bozier since you're on cross. You first need to answer and then you can explain, so ask him.

A. George was told –

BY THE COURT:

No, no, no. This is a yes or no question.

A. No.

(V. 8, p. 328; R.E. p. 164) This is a clear, unequivocal admission by Schilling that he never intended to give Bozier a percentage of ownership.

Thus, the representation that he would give Bozier ten percent of the stock was necessarily a false representation. Additionally, when SW Gaming was formed, no stock was in fact ever given to Bozier, so clearly the representation made by Schilling that he would give Bozier ten percent of the SW Gaming stock was false, and according to the undisputed proof, intentionally false.

Element No. 3 – The Materiality of the Statement

Under the proof, the representation that Bozier would have a share of the ownership was extraordinarily material in Bozier's mind. As set forth from the very beginning, as reflected in Exhibit 1, Bozier's intent in putting together a casino project at the Greenville Bridge was so that he would, finally, have an opportunity to have an equity position in a casino project. He had been involved in casinos for years, and yet he had never actually held a percentage of ownership. Exhibit 1 is an example of one of the letters that he sent to numerous potential investors in the year 2002. Bozier testified

that one of these was also sent to Mr. Schilling, however he was unable to locate it. This early letter shows that one of the prerequisites that Bozier wanted in putting together a casino project at the bridge was a "healthy chunk of stock." Obviously it was material. In this instance Bozier worked for over two and one-half years subsequent to the representation to him that he would have an ownership position in this project and he worked without any compensation whatsoever in reliance of the statement that he would be an owner and he would be paid. Clearly this representation was material, and the trial court found it to be so.

The court's finding that these representations formed a part of the parties' oral contract satisfies this element of fraud.

Element No. 4 – The Speaker's Knowledge of the Statement's Falsity

Again, when questioned on cross examination, Schilling stated that he never intended to give Bozier any stock. Schilling obviously had knowledge of his own intent. Thus, he necessarily had knowledge that his statement to Bozier that he would give him a percentage of ownership was false. Since Schilling was the speaker, and since he never intended to give Bozier any stock, obviously he had knowledge of the falsity of his own statement.[15]

Element No. 5 – The Speaker's Intent that the Representation Should be Acted Upon in a Manner Reasonably Contemplated

In this instance clearly Schilling intended that Bozier act upon his representation that Bozier would receive stock. From the moment that Schilling made the representation that the two had an agreement, Bozier looked no further for any other

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[15] A review of the tape recorded conversations also reveals Schilling's continued efforts, as late as December, 2005 to con Bozier into continuing to work on the project.

investors to take this project to. At that point in time the deal was exclusively one that rested between him and Schilling and whomever Schilling desired to pull into the deal as reflected by the subsequent entry into the deal by Wellemeyer, then by Holbrook, then by Libra and others. In addition, Bozier continued to work daily on the project for the next two and one-half years. Obviously Schilling's representation in promising Bozier an ownership interest in the casino had its intended effect on the hearer, and Bozier acted in a manner that Schilling thought he would. The trial court's finding that an oral contract was formed due to these representations satisfies this element.

Element No. 6 – The Hearer's Ignorance of its Falsity

Both Schilling and Bozier testified that they were friends. (V. 6, p. 45, 336; R.E. p. 3, 6) Bozier testified that when Schilling told him they had a deal, and that he would receive ten percent of the fully diluted stock with no cash calls, Bozier believed him. Bozier's wife testified that that night, after the meeting with Schilling, Bozier was giddy with joy, "like an excited little boy." (V. 8, p. 370; R.E. p. 52) Obviously Bozier believed Schilling because he continued to work for over two and one-half years without any pay whatsoever in furtherance of this deal. In addition, at a point in time in which it became obvious that Schilling's word had been false, Bozier undertook to have their telephone conversations recorded so that he could document the events as they occurred. While a review of the transcript of the recorded telephone conversations reflects that Schilling had committed fraud, the tenor of the telephone conversations themselves which are in evidence clearly reflect from the tone of the two men's voices that Bozier had been deceived and that Schilling was the one who deceived him. The trial court's ruling that a contract was formed establishes this element.

Element No. 7 – The Hearer's Reliance on its Truth

Again, Bozier worked for over two and one-half years and put everything he had into this project in reliance upon Schilling's word that he would receive ten percent of the project. Bozier gave Schilling all of his work product done the year before. Bozier continued to work with Schilling both before the barge sinking and after the sinking. The trial court, in finding that a contract was formed, found this element to be present.

Element No. 8 – Bozier's Right to Rely Upon the Representation

Because the representation was one which established a contractual relationship between the two, obviously Bozier had a right to rely upon it. This is especially the case since the oral representation made by Schilling that Bozier would get ten percent of the fully diluted stock of the company was one that established Bozier as a partner in this endeavor. Again, the trial court found this element to be present.

Element No. 9 – Bozier's Consequent and Proximate Injury

The trial court likewise found that this element occurred. The court found that Bozier worked for over two and one-half years on this project and in fact awarded Bozier damages in the amount of *quantum meruit* recovery for the last twenty-nine weeks of the work that he did on this project in the amount of $290,000.00. Bozier clearly was damaged in this matter as a result of Schilling's fraud.

Mississippi has long recognized that punitive damages are recoverable in a breach of contract case, "where such breach is attended by intentional wrong, insult, abuse, or such gross negligence as amounts to an independent tort." *Pope v. Sexton,* 613 So.2d 841, 845 (Miss. 1993) (quoting *Tideway Oil Programs, Inc. v. Serio,* 431 So.2d 454, 465-66 (Miss. 1983)). No wrong could be more intentional than entering into a

contract with another without any present intent to ever abide by that contract. Whether it is called bad faith breach of contract or whether it is called what it should be called – fraud – the results are the same. This conduct should not be condoned in Mississippi, much less rewarded. The Chancellor's ruling in this case rewards Schilling for his abhorrent behavior.

IV. Whether the Chancellor Erred in Limiting the Unjust Enrichment or *Quantum Meruit* Recovery of Bozier To the Last Twenty-Nine Weeks of the Parties' Relationship, When the Evidence Shows Without Contradiction That the Defendants Received Substantial Benefits From Bozier's Work During the Three Years Prior to that When He Had Been Working on the Project

The trial court, in her original "Final Judgment," found that Bozier was entitled to damages for unjust enrichment, but failed to specify the amount by which Schilling and SW Gaming had been unjustly enriched at Bozier's expense. (V. 5, p. 542; R.E. p. 19)

As a result, this "Final Judgment" was not final. It did not dispose of all the issues before the court. Appellant's counsel, confused as to what steps to take next, filed a "Motion for More Definite Final Judgment." (V. 5, p. 570-571; R.E. p. 168-169) As a result, the court ordered a telephone status conference with all counsel to discuss the "finality" of the judgment. During that conference with the court, the court determined that it was difficult for her to determine the amount by which the defendants had been enriched by Bozier's actions and that instead Bozier should just "send them a bill."

In accordance with the court's instructions, Appellant's counsel, on behalf of Bozier, sent Schilling's attorneys a bill for Bozier's services. That bill is attached to a pleading filed before the Chancery Court entitled "Plaintiff's Notice of Compliance with Court's Verbal Order." (V. 5, p. 572-576; R.E. p. 170-174) This bill attempted to itemize the various categories in which Bozier's services had been rendered to Schilling and SW Gaming during the years 2002 through 2005. In each and every category identified in the invoice, the trial court found in fact that these services had been performed by Bozier. In each and every category identified in the invoice, the trial court found that Bozier had not been paid for performing those services. It is clear that in each and every category Schilling and SW Gaming had been enriched thereby.

Nonetheless, the trial court arbitrarily limited the award to those services Bozier performed for defendants during the last twenty-nine weeks of his association with the defendants. A review of the factual findings of the court and the evidence shows that the trial court's arbitrary time limitation is clearly erroneous.

A. Services Performed With Respect To The Location Of The Casino

Bozier testified, and the court found as a fact, that Bozier spent most of the year of 2002 investigating various locations in the Greenville, Mississippi area that he felt would support a casino. He did this on his own, and without any support from anyone. His efforts finally led him to believe that a location adjacent to the Greenville Bridge on Highway 82 would be the best location. This land was, and is to this day, owned by the Refuge Hunting Club. It has become the present day location of what is now known as Harlow's Hotel and Casino Resort.

The court found, and the evidence clearly shows, that after finding the location, Bozier began negotiations with the owners to see if they were interested in leasing their land to a casino developer, and if so upon what terms. Thereafter, having secured the landowner's approval to lease its land for a casino, and after negotiating the basic terms to be included in a long term lease of the property, Bozier undertook to find a suitable investor to whom he could present this opportunity.

That man was Schilling. Bozier presented this opportunity to him and convinced him that this was the right spot for a new casino. The court found this as a fact. Bozier gave this opportunity to Schilling exclusively. In other words, Bozier relinquished the right to market it to others, foregoing the opportunity to do business with any other casino developers.

Bozier personally confirmed the agreed upon terms of his negotiations of the lease in a letter from him to Paul Watson dated April 22, 2003. Bozier thereafter worked daily with the attorneys from Phelps Dunbar to finalize the lease. The court found these to be facts.

Was this service valuable to Schilling and to SW Gaming? The site is arguably the single most valuable asset owned by the corporation. It is an asset that was the direct product of Bozier's efforts. The Chancellor even found that Bozier performed these services for Schilling and SW Gaming yet, remarkably refused to award him any compensation for them.

B. Services Performed in Acquiring Other Leased Land

The undisputed evidence also reflects that Bozier assisted in negotiating the lease with one of the adjacent landowners, Gaylon Lawrence. This land is the location of the

parking area, office area, and access to and from Highway 82. This long term lease is currently in place, and is being enjoyed by Schilling and SW Gaming as part of the Harlow's Hotel and Casino Resort facility.

Were Bozier's services in obtaining this lease valuable to SW Gaming? The question answers itself. Yet the trial court arbitrarily excluded them from the award.

C. Services In Performing Necessary Local Legwork

The trial court acknowledged that Bozier, as the only participant who resided locally, performed necessary legwork for Schilling and SW Gaming. Bozier worked with the Washington County Engineer; the Washington County Board of Supervisors; the local power providers; engaged the services of others to provide necessary surveys to determine the location of the Arkansas/Mississippi border; and performed numerous other services for the purpose of preparing the site for a casino and hotel.

As with its other findings, even though the trial court found that he had performed these services without pay, and even though they clearly benefited the new casino, the trial court arbitrarily refused to award Bozier any compensation for these services.

D. Consulting Services Provided By Bozier

The trial court found as a fact that from April 2003 to December 2005 Bozier provided consulting services to Schilling and SW Gaming. The court did find as a fact that there was a period of approximately one year, when Bozier took a temporary job in Colorado to obtain some income, in which his services to the Greenville project were reduced. However, the court arbitrarily limited his compensation only to those services he rendered during the last twenty-nine weeks of his association with the defendants.

The evidence shows that they were aware of Bozier's efforts and they actively solicited his advice and work. In fact, a review of the taped telephone conversations reflects that Schilling was still trying to convince Bozier to keep working on the Greenville casino project, without pay, in late 2005, after their relationship had soured.

The court awarded Bozier damages for unjust enrichment for the last twenty-nine weeks of 2005 at the rate of $10,000.00 per week. This was the rate at which Bozier testified, without contradiction, that he was paid when he sold his consulting services to others. The court therefore had sufficient basis in the record to support such a rate. If Bozier was paid this rate for the entire time that he worked on the project, then he would be entitled to $2,080,000.00 for this element alone.

CONCLUSION

The trial court found that a valid contract existed between the plaintiff and the defendants. The only reason that the court refused to enforce the contract was that she found that the doctrine of impossibility, which was neither pled nor proven, to have excused the defendant's nonperformance. Since the doctrine of impossibility does not apply in this case as a matter of law, this Court should reverse and render its own decision enforcing the contract.

Damages in a contact case in Mississippi are awarded simply to restore the injured party to the position he would have occupied but for the breach. *Thoebald v. Nosser*, 752 So.2d 1036, appeal after remand 784 So.2d 142, reh'g denied (Miss. 2001). The only person to testify concerning the terms of this contract was Bozier. He testified that the terms of the contract was that he to receive: (a) a ten percent non-dilutible interest in the casino project with no cash calls; (2) a salary as the general manager of

the casino for five years at the rate of $200,000.00 per year; and (3) a salary of $100,000.00 per year during the time spent on the project prior to its opening (three years). This Court should simply enforce the terms of the contract. On this issue there is nothing left to decide.

In the event that the Court enforces the contract, then the issue of unjust enrichment or *quantum meruit* becomes moot.

In the alternative, if this Court finds that the doctrine of impossibility was pled and proven at trial, and affirms the trial court's decision in that regard, then plaintiff respectfully submits, the court should award additional damages as unjust enrichment or *quantum meruit,* because Bozier should be awarded sums for all of the benefits he bestowed upon Schilling and SW Gaming, not merely those during the last twenty-nine weeks of his association with them.

In either of the above two scenarios, the fact that the trial court found that Schilling made the agreement with Bozier, coupled with defendant Schilling's own testimony that he never intended to abide by that agreement, inescapably establishes conclusive proof that Schilling (and therefore SW Gaming) committed fraud. Thus the case, on this issue alone, should be remanded to the Chancery Court to determine what amount of money is sufficient to award as punitive damages.

RESPECTFULLY SUBMITTED, this, the 9th day of November, 2009.

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

SCHILLING ENTERPRISES, L.L.C. PLAINTIFF

vs. No. 4:04CV343-D-D

SUPERIOR BOAT WORKS, INC.; et al. DEFENDANTS

FEDERAL INSURANCE COMPANY INTERVENOR

OPINION

Schilling Enterprises, L.L.C. instituted this admiralty action for damage sustained to Schilling's casino barge SPLASH. The SPLASH barge capsized at the Defendant Superior Boat Works, Inc.'s Lake Ferguson, Mississippi, shipyard on September 11, 2004, after making contact with a sunken barge on September 9, 2004. Superior has admitted responsibility for the initial holing of the SPLASH, but denies responsibility for its subsequent capsizing. In addition, Federal Insurance Company has intervened in this action, seeking a declaratory judgment in its favor that Superior's two insurance policies with Federal do not provide indemnity coverage for any potential damages in this case.

The court has jurisdiction of this cause pursuant to 28 U.S.C. § 1333 and Rule 9(h) of the Federal Rules of Civil Procedure. A bench trial in this matter was convened from May 8, 2006, through May 11, 2006.

Having carefully considered the testimony and exhibits presented at trial along with the parties' post-trial submissions, the court finds as follows on the three major issues presented in this case: (1) the Defendant, Superior Boat Works, is 75 percent at fault for the damages sustained by the SPLASH casino barge; the Plaintiff, Schilling Enterprises, is 25 percent at fault for the damages

sustained by the SPLASH casino barge; (2) the value of the SPLASH casino barge prior to its capsizing was $900,000; and (3) there is insurance coverage for this occurrence under Federal Insurance Company policy number 7319777.

Pursuant to Rule 52(a) of the Federal Rules of Civil Procedure, the court issues the following findings of fact and conclusions of law.

A. Factual Background

The Defendant Superior Boat Works operates a shipyard on Lake Ferguson in Greenville, Mississippi. Superior also owns the tugboat M/V CAPT. STOVALL and owns a sunken barge, named the B6, which sank in Lake Ferguson in 1994 and which remains submerged in the lake. The Plaintiff Schilling owns the SPLASH casino barge, which capsized in Lake Ferguson on September 11, 2004, after making contact with the sunken B6 barge on September 9, 2004.

The SPLASH casino barge was towed to Superior's Lake Ferguson facility in June of 2004. Schilling contracted with Superior to provide moorage space for the SPLASH barge for $3,000 per month while the SPLASH was being repaired and refurbished so as to return to service as a casino; this service was to include Superior moving the SPLASH barge as Lake Ferguson's water levels changed and to keep the SPLASH aligned with a loading ramp over which personnel and materials were loaded onto the SPLASH. Schilling and Superior also both state that Superior agreed to perform repairs to the SPLASH barge, including exterior metal fabrication, during this time.

As the Mississippi River and Lake Ferguson rise and fall, moored vessels in Lake Ferguson, such as the SPLASH casino barge, must be moved back and forth with the water level. Superior uses the tugboat M/V CAPT. STOVALL tugboat for this purpose, and in fact did reposition the SPLASH on seven occasions (July 13, 22, and 30; August 14, 20, and 29; and September 6, 2004).

Around 8:30 a.m. on September 9, 2004, the CAPT. STOVALL, which was being piloted by Matt Barham, began what would be the final repositioning of the SPLASH casino barge. As the CAPT. STOVALL attempted to move the SPLASH out from the Lake's bank, the SPLASH contacted and was dragged over the submerged barge B6, holing the SPLASH and causing it to take on water. After four hours of attempting to move the SPLASH barge off of the B6 barge, Barham decided to move the CAPT. STOVALL away from the SPLASH barge. At this time, the SPLASH barge had begun listing to its port (left) side as it was taking on water. The SPLASH then capsized at 5:15 a.m. on September 11, 2004, less than two days after the initial allision[1] took place.

This litigation followed, with Schilling filing its complaint on November 12, 2004, and asserting a claim against Superior for damages incurred by the loss of the SPLASH casino barge. Thereafter, on September 9, 2005, Federal Insurance Company intervened in this action, seeking a declaratory judgment in its favor that Superior's insurance policies with Federal do not provide indemnity coverage for any damages in this case.

B. Discussion

1. Apportionment of Fault for the Sinking of the SPLASH Casino Barge

Negligent conduct on navigable waters that causes loss to another constitutes a maritime tort. United States v. M/V BIG SAM, 681 F.2d 432, 443 (5th Cir. 1982). It is axiomatic that liability for the damage sustained in maritime collision and allision cases is to be allocated according to the degree of the parties' respective comparative fault. United States v. Reliable Transfer Co., 421 U.S.

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[1]An allision is "the sudden impact of a vessel with a stationary object such as an anchored vessel or a pier." Black's Law Dictionary, 7th Ed. at 75. This is an allision case, as opposed to being a collision case, because the object that the SPLASH barge struck was not another seagoing vessel, but rather was the sunken B6 barge, a stationary object.

397, 410-11, 95 S.Ct. 1708, 1715-16, 44 L. Ed. 2d 251 (1975); Valley Towing Serv., Inc. v. S/S AMERICAN WHEAT, 618 F.2d 341, 346 (5th Cir. 1980).

As a corollary to the comparative fault principle, if a party to a maritime accident has violated a federal statute, a rule of law known as the Pennsylvania rule is invoked. The Pennsylvania rule provides that when a ship violates a federal statutory rule of admiralty, "the burden rests on the ship of showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been." The Pennsylvania, 86 U.S. (19 Wall.) 125, 136, 22 L. Ed. 148 (1873); see Transorient Navigators Co., S.A. v. M/S SOUTHWIND, 714 F.2d 1358, 1369 (5th Cir. 1983). If the subject party carries this burden, the burden of proof as to causation is then shifted to its opponent. The Pennsylvania rule applies in allision cases where a party responsible for properly marking a stationary object in navigable waters, including an underwater obstruction, fails to do so. Pennzoil Producing Co. v. Offshore Express, Inc., 943 F.2d 1465, 1472 (5th Cir. 1991).

As the Fifth Circuit has noted, however, the Pennsylvania rule simply determines which party bears the burden of proof regarding fault, transferring it to the party that is in violation of a statute or regulation. Pennzoil, 943 F.2d at 1472. The rule does not determine a party's ultimate share of liability for a loss; thus the principle of comparative negligence remains intact and is applied by courts in maritime allision cases. See id (holding that if "a party fails to carry the burden imposed on it by the rule, the rule does not require that party to bear 100% of the responsibility for the allision."). As such, the court shall examine the events surrounding the capsizing of the SPLASH casino barge and allocate fault between the Plaintiff and Defendant accordingly.

When a moving vessel strikes a fixed object, the moving vessel is presumed to be at fault. Delta Transload, Inc. v. M/V Navios Commander, 818 F.2d 445, 449 (5th Cir. 1987). When a

mariner knows of an obstruction to navigation he is under a duty to avoid it. Pennzoil, 943 F.2d at 1470-71. This presumption applies to allisions with submerged or hidden objects when the person operating the vessel has actual knowledge of the obstruction, as was the case here. Id. In addition, the operator of a fleeting facility has a duty to exercise reasonable care and maritime skill in the care of barges entrusted to it. Noonan Constr. Co. v. Federal Barge Lines, Inc., 453 F.2d 637, 641 (5th Cir. 1972).

The court finds that the Defendant Superior, in addition to its admitted negligence in causing the SPLASH casino barge to contact the B6 barge, was also negligent in failing to properly mark the B6 barge as was required by the federal Wreck Act, 33 U.S.C. § 409, which is part of the Rivers and Harbors Act of 1899, 33 U.S.C. § 401 *et seq.*[2] It is undisputed that the B6 barge, which was a wreck and was sitting largely submerged in Lake Ferguson, is covered by the Wreck Act.

Thus, under the Wreck Act, the Defendant Superior had a statutory duty to mark the B6 barge, begin removal of the B6 from Lake Ferguson, and to maintain the proper markings until the B6 was entirely removed from the lake. See 33 U.S.C. § 409. Because Superior elected not to remove the B6 barge, aside from the fact that it did not properly mark it, it was obligated to obtain a permit for it from the Corps of Engineers pursuant to 33 C.F.R. § 322.3. Superior failed to do so. Thus, the court finds that Superior was negligent in its Wreck Act duties and that the burden of proof as to negligence in this case is shifted to Superior in accordance with the Pennsylvania rule, as noted

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[2]The Wreck Act provides, in pertinent part, that a vessel owner is required to mark and maintain its wrecked vessel and remove it from the area where it capsized. In re Transporter Marine, Inc., 217 F.3d 335, 338 (5th Cir. 2000). The failure to properly mark a wreck or to maintain a proper mark on the wreck subjects the wreck's owner to potential liability to third parties harmed thereby. In re Barnacle Marine Management, Inc., 233 F.3d 865, 868 (5th Cir. 2000); Morania Barge No. 140, Inc. v. M & J Tracy, Inc., 312 F.2d 78 (2nd Cir. 1962).

above, because Superior violated a federal statute - the Wreck Act.

Because Superior stipulates that it is wholly responsible for the initial allision between the SPLASH barge and the B6 barge and the fact that the SPLASH was holed thereby, the court finds that Superior is 75% at fault for the capsizing of the SPLASH barge. Had the SPLASH not been pushed into and dragged over the B6 barge, post-accident actions would not have been necessary and the Plaintiff's actions would not need to be analyzed. Superior's actions began the chain of events that led to the SPLASH's capsizing on September 11, 2004. Accordingly, the court finds that the vast majority of fault lies with Superior because it caused the initial event that led to the capsizing. Superior does not dispute that it is wholly responsible for the allision itself, but it insists that Schilling's post-accident actions also contributed to the capsizing of the SPLASH casino barge. Because the burden of showing negligence on the part of Schilling lies with Superior (pursuant to the Pennsylvania rule), the court now will examine the actions of the Plaintiff Schilling in the aftermath of the SPLASH-B6 allision.

After the SPLASH and the B6 made contact (an event that occurred at approximately 8:30 a.m. on September 9, 2004), the Plaintiff's employees boarded the SPLASH barge and noticed that it was taking on water in one of its compartments, the Number 4.[3] The Plaintiff then rented pumps and put them into use on the SPLASH barge in order to attempt to pump water out of the flooded area of the SPLASH. The Plaintiff avers that it was not aware, and was not told, what object the SPLASH had an allision with, and thus what steps it could take that would be most beneficial in

[3]Barges are designed with watertight compartments that are separated from each other by bulkheads (a bulkhead is an upright wall within the hull of a ship used to create watertight compartments that can contain water in the case of a hull breach or other leak) in order to prevent capsizing. If one compartment is breached and fills with water, the neighboring compartments should remain dry and the vessel afloat.

order to attempt to save the SPLASH barge.

After the allision, only the No. 4 compartment of the SPLASH barge was initially taking on water.[4] Schilling employee Dan Malone, the senior ranking Schilling employee on the scene, decided to breach the bulkhead between the No. 4 and No. 5 compartments in order to pump the water that had entered the No. 4 compartment out through the No. 5 compartment, as the No. 4 compartment was completely flooded. He did this despite the fact that the No.4 compartment was watertight and would not leak unless the surrounding bulkhead was breached. Despite these efforts to pump the water out from the No. 4 (and now the No. 5 as well) through the No. 5 compartment, the Plaintiff's crew was not able to pump any more water out of the SPLASH barge than was coming into the barge via the holes in the No. 4 compartment caused by its allision with the B6 barge. In fact, the SPLASH was slowly sinking, due in part to the Plaintiff's decision to breach the bulkhead between the No. 4 and No. 5 compartments and permit water to escape from the watertight No. 4 compartment. The SPLASH barge was designed to remain afloat with one of its void compartments full of water, but not with two or more. Ultimately, nearly two days after the initial allision, the SPLASH sank. In light of these facts, the court holds that the Defendant Superior has proven that the Plaintiff's actions contributed to the capsizing of the SPLASH casino barge.

Thus, the court finds that Schilling's decision to breach the bulkhead between the No. 4 and No. 5 compartments, and to then pump water out from the No. 5 compartment back into Lake Ferguson, was ineffective and simply resulted in water being circulated from Lake Ferguson into the barge and then back into the lake. By breaching that bulkhead, Schilling did what its own marine

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[4]Early on the morning of September 10, 2004, water was discovered in the SPLASH's No. 2 and No. 3 compartments. That breach was successfully repaired and the water in those compartments was pumped out.

expert, Fred Budwine, called the most negligent act a vessel owner can do when its vessel has a watertight compartment full of water, and that is to "open the door." Accordingly, the court finds that Schilling's negligence in breaching the bulkhead contributed to the SPLASH's sinking, and the court thus finds that Schilling is 25% at fault for the SPLASH's capsizing.

In sum, the court finds that the Defendant Superior is 75 percent at fault for the SPLASH capsizing and that the Plaintiff Schilling is 25 percent at fault.

2. The Market Value of the SPLASH Casino Barge

A vessel is deemed to be a constructive total loss when the cost of salvage and repair exceeds the fair market value of the vessel immediately prior to the casualty. Ryan Walsh Stevedoring Co., Inc. v. James Marine Serv., Inc., 792 F.2d 489, 491 (5th Cir. 1986). Here, the parties agree that the SPLASH casino barge is a constructive total loss.

The market value of vessels in cases such as this is generally established by evidence of contemporaneous sales of like vessels. Standard Oil Co. v. Southern Pac. Co., 268 U.S. 146, 155-56, 45 S.Ct. 465, 467, 69 L. Ed. 890 (1925); E.I. DuPont de Nemours & Co., Inc. v. Robin Hood Shifting & Fleeting Serv., Inc., 899 F.2d 377, 379-80 (5th Cir. 1990). Where a vessel has unique qualities to its owner, however, other methods of valuation such as replacement cost and depreciation may be used as well. DuPont, 899 F.2d at 379-80; King Fisher Marine Serv., Inc. v. NP Sunbonnet, 724 F.2d 1181, 1185-86 (5th Cir. 1984). When a vessel is deemed a constructive total loss, there is no recovery for lost future profits. The Umbria, 166 U.S. 404, 17 S.Ct. 610, 41 L. Ed. 1053 (1857); Matter of P&E Boat Rentals, Inc., 872 F.2d 642, 648 (5th Cir. 1989). The burden is on the vessel's owner to establish the market value of the vessel.

In the case *sub judice*, it is undisputed that the SPLASH casino barge is a constructive total

loss. The Plaintiff, utilizing the replacement cost approach to valuation, presented evidence at trial that the SPLASH had a fair market value at the time of sinking of $3,032,000. The Defendant likewise presented expert testimony at trial; its expert, utilizing the comparative sale approach, calculated the fair market value of the SPLASH casino barge at $500,000.

The court finds that the SPLASH casino barge is a constructive total loss, as it is undisputed that the cost of salvaging and repairing the vessel exceeds the fair market value it possessed immediately prior to its allision with the B6 barge. Because the Plaintiff's damage appraisal expert, Norman Dufour, admitted during cross-examination that his appraisal underestimated the age of the SPLASH's hull, however, the court finds that his estimate of $3,032,000 is inflated. He testified that the SPLASH's hull had an estimated 30 year total life and that it had 10 years of that 30 remaining. The SPLASH's hull, however, was already 35 years old at the time of the subject allision. Dufour also underestimated the age of the SPLASH's superstructure in his $3,032,000 estimate by eleven years; he assumed it had been built in 1992, when in fact it was built in 1981 and then remodeled in 1992. Upon being presented with these facts, Dufour testified during trial that his opinion as to the SPLASH's value would be materially affected by these facts. He did not, however, provide a new estimate of the SPLASH's market value.

Likewise, the court finds that the Defendant's preferred approach of simply utilizing the comparative sales approach is flawed because the SPLASH casino barge obviously had unique qualities to its owner because it was a casino barge and had undergone extensive renovation for that purpose; thus, other methods of valuation, such as replacement cost, may be used as well. King Fisher Marine, 724 F.2d at 1185-86. The Defendant's expert, William Carrier, discussed five comparable sales of casino vessels, which ranged from zero dollars for a barge that was given away

after no purchasers sought it, to a $600,000 sales price for a barge similar to the SPLASH.

The court finds that the SPLASH casino barge was a special purpose vessel that consisted of two barges that the Plaintiff Schilling purchased from Ashland Oil in 1980 when the barges were around 10 years old. In 1981, Schilling modified the barges into a restaurant and night club. Thereafter, in 1992, Schilling remodeled the barge that would become the SPLASH casino barge at a cost of $800,000. The remodeled SPLASH casino barge weighed nearly 3,000 short tons and was 250 feet in length and 50 feet wide, providing over 17,000 square feet of operating space for commercial casino use. The SPLASH then operated as a casino in Tunica, Mississippi, from 1992 until 1995, when it was moved to Vicksburg, Mississippi. After remaining in Vicksburg for a year and a half, the SPLASH was moved to Port Allen, Louisiana, where it remained moored and out of service until it was towed to Lake Ferguson in June of 2004. It was the first casino barge licensed by the Mississippi gaming commission and was moved to Lake Ferguson in order to be retrofitted and moved to a new location to recommence service as a casino.

Taking into account all of the above-denoted factors, the court finds that the fair market value of the SPLASH casino barge prior to its capsizing was $900,000. While utilizing the comparative sales approach leads to a valuation of $600,000 at most, the court finds that replacement cost should also be considered in valuing the SPLASH barge. While the Plaintiff's estimate of $3,032,000 is undisputedly too high, the court finds that a value of $900,000, fifty percent more than the Defendant's estimate, properly takes into account the cost of the barge, the cost of modification and remodeling, and the SPLASH's unique qualities.

Next, the Plaintiff asserts that the cost of removing the vessel from Lake Ferguson is $425,000 plus an additional $200,000 in associated debris removal; it seeks to have the court award

it damages for these not-yet-incurred expenses. Schilling also claims $32,726.67 in expenses it has actually incurred, including pump rental from Taylor Rental for the pumps used in attempting to save the SPLASH and salvage fees. Because the court has found the Defendant negligent in connection with the SPLASH's capsizing, the court shall award Schilling the expenses that it has actually incurred, reduced by 25 percent due to its own negligence. The remaining damages, however, have not yet been incurred and are speculative. The court thus declines to award those damages. Accordingly, the court holds that Superior is liable to Schilling for 75 percent of the expenses it actually incurred in attempting to save the SPLASH casino barge, or $24,545.

3. Insurance Coverage

The Defendant Superior is the named insured on two policies of insurance issued by the Intervenor Federal Insurance Company and in force at the time the SPLASH casino barge capsized: Policy Number 7319777 (the Marine General Liability/Ship Repairer's Legal Liability Policy; hereafter the "primary policy") and Policy Number 7318980 (the Ocean Marine policy, hereafter known as the "excess" or "bumbershoot" policy). The Plaintiff and the Defendant argue that both policies provide Superior coverage, including both indemnity for the claims raised in this case and for Superior's legal expenses incurred in defending this case. The Intervenor disagrees and asserts that neither policy provides the Defendant coverage for any damages incurred in this case.

Federal admiralty law requires courts construing maritime insurance contracts to follow state insurance law principles in cases such as this one. Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310, 75 S.Ct. 368, 99 L. Ed. 337 (1955); Transco Exploration Co. v. Pacific Employers Ins. Co., 869 F.2d 862, 863 (5th Cir. 1989). The Fifth Circuit has ruled that in determining which state's law to apply, courts should look to the state having the greatest interest in the resolution of the issues in

dispute. Transco, 869 F.2d at 863. In the case *sub judice*, it is undisputed that the laws of the State of Mississippi should apply; thus the court shall apply Mississippi law as it pertains to the interpretation of insurance contracts.

In Mississippi, an insurance policy that is plain and unambiguous will be construed exactly as written; however, any ambiguities in an insurance contract are construed against the drafter and in favor of the insured. Paul Revere Life Ins. Co. v. Prince, 375 So. 2d 417, 418 (Miss. 1979); Centennial Ins. Co. v. Ryder Truck Rental, Inc., 149 F.3d 378, 382-83 (5th Cir. 1998). Likewise, the terms contained in an insurance policy, specifically exclusion clauses, are construed against the insurer and in favor of coverage. State Farm Mut. Auto Ins. Co. v. Scitzs, 395 So. 2d 1371, 1373 (Miss. 1981). When an insurance policy has two equally reasonable interpretations, the court construing the policy must adopt the interpretation giving greater indemnity to the insured. Caldwell v. Hartford Accident & Indem. Co., 248 So. 2d 209, 213 (Miss. 1964).

The Intervenor Federal Insurance Company (Federal) indisputedly received a timely claim for indemnity from the Defendant Superior under the primary policy, which provides $1,000,000 in coverage for any one occurrence. In addition, it is undisputed that both the Defendant Superior and Collins Brent, individually, are Assureds under the primary policy.

Under the primary policy's Ship Repairer's Liability section (Section II of the Marine General Liability Policy), the court finds that Federal is obligated to indemnify Superior for the damages awarded against it in favor of the Plaintiff in this case. Section II of the policy provides:

> The Company agrees to pay on behalf of the Assured all sums which the Assured, as Ship Repairer, shall become legally obligated to pay:
>
> A. By reason of the liabilities imposed upon the Assured by law for physical loss of or damage to watercraft and their equipment, cargo

> or other interests on board occurring only while such watercraft are in the care, custody or control of the Assured for the purpose of repair or alteration, or while such watercraft are being moved via inland waters, in connection with repairs or alteration ...

The court finds that, under the plain language of this section, Federal is obligated to indemnify the Defendant for the damages being awarded to the Plaintiff in this case. The SPLASH casino barge was damaged and lost while it was in the care, custody or control of the Defendant, as Ship Repairer, for the purpose of repair or alteration; indeed, it was undisputed at trial that the purpose for the SPLASH barge being moved to Lake Ferguson was so that it could be refurbished and repaired in order for it to be returned to active service as a casino barge. It was also undisputed at trial that the Plaintiff and the Defendant entered into an oral contract for the Defendant to provide repair and alteration services to the SPLASH barge. In addition, the Defendant had already assisted in some repair work on the SPLASH by supplying tug and crane services in connection with the repair work that was accomplished prior to the SPLASH's capsizing. The Defendant ultimately was unable to provide the external metal work it had contracted to perform because the SPLASH capsized before the work was scheduled to be performed. This occurrence does not change the fact that the Plaintiff contracted with the Defendant for repair services or that the reason the SPLASH was moored at the Defendant's facility was for repair or alteration.

The fact that each and every repair that was scheduled to be completed on the SPLASH barge was not to be solely performed by the Defendant at best creates an ambiguity in the contract's language as to whether or not the SPLASH was in the care, custody or control of the Defendant, "as Ship Repairer," for "the purpose of repair or alteration;" and, as noted above, under Mississippi law any ambiguities in an insurance contract are construed against the drafter and in favor of the insured.

Paul Revere Life Ins. Co., 375 So. 2d at 418; Centennial Ins. Co., 149 F.3d at 382-83. Thus, the court finds that indemnity coverage for the subject allision and sinking of the SPLASH casino exists under the primary policy's Ship Repairer's Liability section (Section II of the Marine General Liability Policy). That section of the policy does not explicitly impose the limitation now sought by Federal - i.e. that coverage be limited to situations in which the Assured itself is conducting repairs or alterations to watercraft under its care, custody or control. Federal could have explicitly provided such a limitation but did not do so under the plain language of the policy.

As for coverage exclusions under Section II of the primary policy, Federal argues that Exclusion G under the primary policy's Ship Repairer's Liability section excludes coverage for the subject occurrence. Exclusion G provides:

> This section (Section II) does not cover against nor shall any liability attach hereunder for:
>
> G. Loss of or damage to watercraft placed in the care, custody or control of the Assured for the purpose of storage regardless of whether any work is to be performed on the watercraft; ...

Here, the undisputed trial testimony was that the SPLASH casino barge was not moored at the Defendant's facility for the "purpose of storage," but rather for the purpose of repair or alteration and refurbishing. The SPLASH had been stored for nearly eight years at Port Allen, Louisiana, before it was moved to the Defendant's Lake Ferguson facility in June of 2004 in order to be repaired and refurbished so it could be returned to service as a casino barge. No witnesses testified at trial that the SPLASH barge was placed in the Defendant's care, custody or control for the purpose of storage; indeed, the opposite is true. Thus, the court finds that Exclusion G does not apply and does not exclude coverage for the subject occurrence.

Because the court finds that the primary policy provides coverage, and that no exclusions apply to exclude coverage under that policy, the court finds that Policy No. 7319777 (the Marine General Liability/Ship Repairer's Legal Liability Policy) requires Federal to indemnify the Defendant Superior and Collins Brent for this occurrence (the capsizing of the SPLASH casino barge), including legal fees reasonably incurred in the defense of the Plaintiff's claims.

C. Conclusion

In sum, the court finds that the Defendant Superior is 75 percent liable for the subject allision and the subsequent capsizing of the SPLASH casino barge and the Plaintiff Schilling is 25 percent liable. Because the Defendant Superior has been dissolved as a corporation, and Mr. Collins Brent has continued to do business as Superior Boat Works, it is undisputed that Mr. Brent is personally liable for Superior's debts, including this judgment. Carolina Transformer Co. v. Anderson, 341 So. 2d 1327, 1329 (Miss. 1997). Thus, the court shall enter judgment against both Superior Boat Works and Collins Brent, individually. As for the Intervenor Federal's complaint, the court finds that indemnity coverage for this occurrence is provided by Policy No. 7319777 (the Marine General Liability/Ship Repairer's Legal Liability Policy).

Finally, the general rule in admiralty is that prejudgment interest should be awarded absent peculiar circumstances. City of Milwaukee v. Cement Div., Nat. Gypsum Co., 515 U.S. 189, 195-96, 115 S.Ct. 2091, 2095-96, 132 L. Ed. 2d 148 (1995); King Fisher Marine, 724 F.2d at 1187. The rate of prejudgment interest to be awarded is within the court's discretion. Zim Israel Navigation Co., Ltd. v. Special Carriers, Inc., 800 F.2d 1392, 1395 (5th Cir. 1986). Because no peculiar circumstances exist here, the court finds that an award of prejudgment interest is proper. Prejudgment interest shall be awarded to the Plaintiff at the rate of six percent per annum from the

date of the capsizing, September 11, 2004, to and including the date of this opinion.

A separate judgment in accordance with this opinion shall issue this day.

This the 31st day of August 2006.

/s/ Glen H. Davidson
Chief Judge

CERTIFICATE OF SERVICE

I hereby certify that I have, on this 9th day of November, 2009, mailed, postage prepaid, a true and correct copy of the foregoing to:

Joseph L. Adams, Esquire
Phelps Dunbar, LLP
P.O. Box 23066
Jackson, MS 39225-3066

C.W. Walker III