[Cite as *Clifton v. Johnson*, 2019-Ohio-2702.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
PICKAWAY COUNTY

RONALD L. CLIFTON, et al.,	:	
	:	Case No. 18CA13
Plaintiffs-Appellees,	:	
	:	
vs.	:	DECISION AND JUDGMENT
	:	ENTRY
PEARL K. JOHNSON, et al.,	:	
	:	
Defendants-Appellants.	:	**Released: 06/19/19**

APPEARANCES:

James R. Kingsley, Kingsley Law Office, Circleville, Ohio, for Appellants.

Michael N. Beekhuizen, Carpenter Lipps & Leland LLP, Columbus, Ohio, for Appellees.

McFarland, J.

{¶1} This is an appeal from a Pickaway County Court of Common Pleas judgment in favor of Appellees', Ronald L. Clifton's and Robert W. Hamman's, claim for unjust enrichment against Appellants, Pearl K. Johnson and his corporation American Eagle Air, Inc. This case is before this court for a third time following our dismissal of Appellants' first direct appeal for lack of a final appealable order in *Clifton v. Johnson,* 4th Dist. Pickaway No. 14CA22, 2015-Ohio-4246 ("*Clifton I*"), and our subsequent reversal and remand of a summary judgment in favor of Appellees in *Clifton*

v. Johnson, 4th Dist. Pickaway No. 15CA30, 2016-Ohio-8120 ("*Clifton II*"). Upon the remand of *Clifton II,* the court held a trial and issued a judgment in favor of Appellees on their claim of unjust enrichment.

{¶2} It is that judgment that is presently before the court on appeal with Appellants contending that (1) an agreement existed between the parties, which precludes Appellees from recovering unjust enrichment, (2) the trial court erred in granting Appellees contract damages, and (3) the trial court erred when it held that Appellant Johnson was individually liable to Appellees. We overrule Appellants' first and third assignments of error, but sustain their second assignment of error. Therefore, we reverse the judgment of the trial court and remand the cause for proceedings consistent with this decision.

FACTS AND PROCEDURAL HISTORY

{¶3} The facts and procedure in this decision come primarily from *Clifton I* and *Clifton II*. Appellees, Clifton and Hamman, filed a complaint against Appellants, Johnson and his corporation American Eagle Air, Inc., alleging the formation of a partnership and that a joint venture was agreed upon whereby Clifton, Hamman and Johnson, using Clifton's plane, Hamman's camera equipment and Johnson's piloting skills, would jointly provide aerial imaging services for portions of the ATEX pipeline that was

being routed through Ohio. Appellees' complaint contained claims for breach of contract and, alternatively, unjust enrichment, alleging that Johnson and American Eagle Air, Inc. collected more than $200,000.00 for work that was jointly performed by Appellees and Appellant Johnson, and that Appellants failed to pay Appellees for work the parties mutually performed. Specifically, Appellees alleged that they had each only been paid $5,000.00 and that Appellants kept the rest of the money.

{¶4} Appellees subsequently moved the court for summary judgment on the unjust enrichment claim alone, reserving the right to proceed on the breach of contract claim and alternatively the unjust enrichment claim at trial, in the event the motion for summary judgment was denied. Appellants opposed the motion, arguing, among other things, that the court could not grant summary judgment on the equitable remedy of unjust enrichment when a breach of contract claim covering the same subject matter had been pled and was still pending. Appellants also argued that the work performed by the parties jointly was rejected by ATEX and that the "prototype" that was eventually accepted by ATEX was created using a camera, aircraft and personnel from MANN Mapping, a corporation completely unrelated to Appellees.

{¶5} Over the objection of Appellants, however, the trial court granted summary judgment in favor of Appellees on their unjust enrichment claim, and awarded them a joint share of the profits, in the amount of $68,282.00 each, for a total judgment of $136,564.00. Appellants filed a direct appeal from the trial court's decision; however, we dismissed the appeal for lack of a final appealable order, based upon the fact that the breach of contract claim remained pending, and thus all of the claims had not been resolved.

{¶6} Appellants filed a motion for reconsideration asking this Court to reconsider our decision that the trial court's order was not final and appealable, which this court ultimately denied. Meanwhile, Appellees filed a motion for voluntary dismissal of their breach of contract claim and motion for entry of final judgment in the trial court. The trial court issued a decision and entry on October 29, 2015 dismissing Appellees' breach of contract claim with prejudice. On November, 12, 2015, the trial court went on to issue a final judgment entry entering final judgment in favor of Appellees on their unjust enrichment claim, determining damages in the same amount as before ($68,282.00 a piece for Clifton and Hamman), and finding no just reason for delay. On appeal, we concluded that genuine issues of material fact existed, which precluded summary judgment.

Therefore, we reversed the judgment and remanded the cause to the trial court for further proceedings consistent with this opinion.

{¶7} On remand, after a trial before the magistrate, the trial court issued a judgment overruling Appellants' objections and granting Appellees' unjust enrichment claim and again awarded each appellee $68,282.00. It is from this judgment that appellants appeal, setting forth three assignments of error for our review.

ASSIGNMENTS OF ERROR

I. WHEN A PLAINTIFF DISMISSES ITS CAUSE OF ACTION FOR BREACH OF PARTNERSHIP WITH PREJUDICE, PROCEEDS TO TRIAL AND PROVES THE EXISTENCE OF A PARTNERSHIP, IS THE CLAIM FOR UNJUST ENRICHMENT BARRED?

II. THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANTS WHEN IT DETERMINED THE AMOUNT OF DAMAGES.

III THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANTS WHEN IT FOUND THE DEFENDANT INDIVIDUALLY LIABLE.

STANDARD OF REVIEW

{¶8} A court of appeals applies an abuse of discretion standard when reviewing a trial court's adoption of a magistrate's decision. *Anderson v. Anderson*, 4th Dist. Ross No. 16CA3571, 2017-Ohio-2827, 86 N.E.3d 349,

¶ 9, citing *In re Estate of Humphrey*, 10th Dist. Franklin No. 14AP-233, 2014-Ohio-5859, 2014 WL 7671071, ¶ 15. "An abuse of discretion connotes more than an error of law or judgment; it implies that the trial court's attitude is unreasonable, arbitrary or unconscionable." *Id*., citing *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). However, "[w]hen the record affirmatively shows that the trial court has made an error of fact or law upon which it has evidently relied in exercising its discretion, the trial court's decision is reversible error, even if it might have reached the same result in exercising its discretion without error. The presumption of regularity is overcome if the record affirmatively shows that the trial court relied upon a mistake of law or fact in exercising its discretion." *Knox v. Knox*, 4th Dist. Gallia No. 03CA13, 2004-Ohio-428, ¶ 8, citing *Spencer v. Spencer*, 2nd Dist. Clark No. 2724, 1991 WL 70726.

ASSIGNMENT OF ERROR I

{¶9} Appellants assert that Appellees "at trial proved the existence of an express contract" and "[t]he magistrate found that an express contract existed." Therefore, Appellants allege the trial court's judgment in favor of Appellees' unjust enrichment claim was barred because an unjust enrichment claim is permitted only if no contract exists between the parties.

{¶10} "An unjust enrichment claim is an alternative to a breach of contract claim." *MRI Software, L.L.C. v. W. Oaks Mall FL, L.L.C.*, 8th Dist. Cuyahoga No. 105846, 2018-Ohio-2190, 116 N.E.3d 694, ¶ 34. Consequently, "[w]hen an express contract exists, a party must pursue a breach of contract action." *Loop v. Hall*, 4th Dist. Scioto No. 05CA3041, 2006-Ohio-4363, ¶ 23. For a contract to exist, each party must consent to the terms of the contract, the parties must have a meeting of the minds, and the contract must be definite and certain. *Episcopal Retirement Homes, Inc.*, 61 Ohio St.3d 366, 369, 575 N.E.2d 134 (1991), *Farmers Comm. Co. v. Burks*, 130 Ohio App.3d 158, 163-64, 719 N.E.2d 980 (3rd Dist. Sept. 30, 1998). "[T]he elements of a meeting of the minds [are] an offer, acceptance, and consideration." *Wandling v. Matthew*s, 4th Dist. Gallia No. 00CA12, 2001-Ohio-2512, *3, *see Noroski v. Fallet*, 2 Ohio St.3d 77, 442 N.E.2d 1302 (1982).

{¶11} However, "[w]hen a contract fails for a lack of a 'meeting of the minds,' equity should be imposed to prevent an unjust enrichment." *Myers v. Good*, 4th Dist. Ross No. 06CA2939, 2007-Ohio-5361, ¶ 12, citing *Hailey v. MedCorp., Inc.*, 6th Dist. Lucas App. No. L-05-1238, 2006-Ohio-4804, ¶ 17-18, *Enright v. CSR Enterprises*, 6th Dist. Wood No. WD-84-52, 1984 WL 14426.

{¶12} In order to recover on a claim of unjust enrichment, the party asserting the claim must demonstrate "(1) a benefit conferred by a plaintiff upon a defendant; (2) knowledge by the defendant of the benefit; and (3) retention of the benefit by the defendant under circumstances where it would be unjust to do so without payment." *HAD Enterprises. v. Galloway*, 192 Ohio App.3d 133, 139, 2011-Ohio-57, 948 N.E.2d 473 ¶ 8, citing *Hambleton v. R.G. Barry Corp.*, 12 Ohio St.3d 179, 183, 465 N.E.2d 1298 (1984).

{¶13} Initially, we note that on appeal we review the trial court's judgment that adopts or rejects the magistrate's decision, not the magistrate's decision. *Anderson*, 4th Dist. Ross No. 16CA3571, 2017-Ohio-2827, 86 N.E.3d 349, ¶ 9, citing *Mayle v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 09AP-541, 2010-Ohio-2774, 2010 WL 2433119, ¶ 15 ("Claims of error by the trial court must be based on the trial court's actions, rather than on the magistrate's findings.").

{¶14} While the magistrate did make several references in her decision to the parties having an "agreement" or that they acted in "partnership," the trial court's judgment assessment of that issue is instructive:

> "No case law is cited for this objection and the court finds it to be meritless. The court has reviewed the Magistrate's Decision and fails to find where she claims a 'partnership' was ever created between the Plaintiffs and Defendants. There was clearly a working relationship between the parties that created this entire scenario. That relationship allowed the Defendants to exploit Plaintiffs and thus create this cause of action for unjust enrichment."

{¶15} We hold that the trial court's conclusion that there is no agreement between Appellees and Appellants so as to preclude Appellees' recovery for unjust enrichment is not based on a mistake of law or fact, and therefore is not unreasonable, arbitrary or capricious. *Knox*, 4th Dist. Gallia No. 03CA13, 2004-Ohio-428, ¶ 8. Accordingly, we overrule Appellants' first assignment of error.

ASSIGNMENT OF ERROR II

{¶16} In their second assignment of error, Appellants allege that the trial court erred in awarding contract damages instead of the reasonable value of the benefit conferred to Appellants, which, Appellants allege, is the proper award for a claim of unjust enrichment.

{¶17} Initially we note that "[a] trial court has broad discretion when it fashions an equitable award." *Meridien Mktg. Grp., Inc. v. J & E Bldg. Grp., Inc.,* 2nd Dist. Miami No. 2011-CA-02, 2011-Ohio-4872, ¶ 28, citing *Jon Harmon Ents. Ltd. v. Kinsey,* Tuscarawas App. No.2008 AP-12-0074, 2009-Ohio-5655, at ¶ 20-21. Therefore, an award of quantum meruit is reviewed under an abuse of discretion standard. *See Kinsey,* 12th Dist. Tuscarawas No. 2008 AP 12 0074, 2009-Ohio-5655, ¶ 21. An " 'abuse of discretion' implies that the court's attitude is "unreasonable, unconscionable, or arbitrary." *Smith v. Smith,* 4th Dist. Hocking No. 18CA11, 2019-Ohio-899, ¶ 19, citing *State v. Adams,* 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980).

{¶18} "Generally, a party injured by a breach of contract is entitled to his expectation interest or 'his interest in having the benefit of his bargain by being put in as good a position as he would have been in had the contract been performed.' " *Rasnick v. Tubbs,* 126 Ohio App.3d 431, 437, 710 N.E.2d 750 (3rd Dist. Feb. 25, 1998), quoting Restatement of the Law 2d, Contracts (1981) 102-103, Section 344, *see also Blue Chip Pavement Maintenance., Inc. v. Ryan's Family Steak Houses, Inc.,* 12th Dist. Clermont No. CA2003-09-072, 2004-Ohio-3357 ¶ 18, citing *Garofalo v. Chicago Title Ins. Co.,* 104 Ohio App.3d 95, 108, 661 N.E.2d 218 (1995). Remedies for

breach of contract can include profit. *See Raze International, Inc. v. Se. Equip. Co.*, 7th Dist. Jefferson No. 14JE0015, 2016-Ohio-5700, 69 N.E.3d 1274, ¶ 67, citing *Textron Fin. Corp. v. Nationwide Mut. Ins. Co.*, 115 Ohio App.3d 137, 144, 684 N.E.2d 1261 (9th Dist.1996), *see also D'Andrea v. Sturges*, 10th Dist. Franklin No. 89AP-1336, 1990 WL 72611t *2, *Waterford Prod. Co. v. Victor*, 11th Dist. Lake No. 98-L-029, 1999 WL 1313664 *6.

{¶19} However, "[b]ecause recovery for unjust enrichment does not rest upon the intentions of the parties, damages for unjust enrichment are calculated differently from damages for breach of contract." *Blue Chip Pavement Maint., Inc.*, 12th Dist. Clermont No. CA2003-09-072, 2004-Ohio-3357, ¶ 18, citing *Shaw v. J. Pollock & Co.*, 82 Ohio App.3d 656, 662, 612 N.E.2d 1295 (1992), *see also City of Girard v. Leatherworks Partnership*, Trumbull App. No. 2004-T-0010, 2005-Ohio-4779. "Unjust enrichment is a quasicontractual theory of recovery." *HAD Enterprises. v. Galloway*, 192 Ohio App.3d 133, 139-40, 948 N.E.2d 473 (4th Dist. Jan. 6, 2011), citing *Dailey v. Craigmyle & Son Farms, L.L.C.*, 177 Ohio App.3d 439, 2008-Ohio-4034, 894 N.E.2d 1301. "Quasi-contract is a legal fiction created to prevent an unjust enrichment when a benefit is conferred by a plaintiff onto a defendant with knowledge by the defendant of that benefit

and the retention of that benefit under circumstances when it would be unjust to do so without payment." *In re Guardianship of Freeman,* Adams App. No. 02CA737, 2002-Ohio-6386, ¶ 29. "An unjust enrichment claim is intended " ' 'not to compensate the plaintiff for any loss or damage suffered by him but to compensate him for the benefit he has conferred on a defendant.' ' " *Bender v. Logan*, 4th Dist. Scioto No. 14CA3677, 2016-Ohio-5317, 76 N.E.3d 336, ¶ 65, quoting *Johnson v. Microsoft Corp.*, 106 Ohio St.3d 278, 2005-Ohio-4985, 834 N.E.2d 791, ¶ 21, quoting *Hughes v. Oberholtzer*, 162 Ohio St. 330, 335, 123 N.E.2d 393 (1954). Therefore, " '[u]nder the doctrine of unjust enrichment (i.e. quantum meruit), a party may recover the *reasonable value of services* in the absence of an express contract if denying such recovery would unjustly enrich the opposing party.' " (Emphasis added.) *Galloway*, 192 Ohio App.3d 133, 2011-Ohio-57, 948 N.E.2d 473, (4th Dist. Jan 6, 2011) ¶ 8, quoting *In re Estate of Popov*, Lawrence App. No. 02CA26, 2003-Ohio-4556, 2003 WL 22017299, at ¶ 26, *see also Bender*, 2016-Ohio-5317, ¶ 68. The reasonable value [services] conferred is the *monetary amount expended for* the *services provided* and *materials used* [by the plaintiff to the benefit of the defendant]. (Emphasis added.) *City of Girard v. Leatherworks Partnership*, 11th Dist. Trumbull

No. 2004-T-0010, 2005-Ohio-4779, ¶ 41, citing *St. Vincent Med. Ctr*. 100 Ohio App.3d 379, 384, 654 N.E.2d 144 (6th Dist. January 20, 1995).

{¶20} In overruling Appellants' objection to the magistrate's decision that "evidence of lost profits were inadmissible in the unjust enrichment claim," the trial court reasoned that (1) "any admission of lost profits was used as background only," and (2) "the magistrate had discretion to admit this testimony to determine the reasonableness of the remedy created to compensate Plaintiffs for Johnson's quasi-criminal behavior."

{¶21} We agree that evidence of profits could be used to assist a trial court in determining quantum meruit, but Appellees can be compensated for an unjust enrichment claim only in the amount of the reasonable value of the services or materials conferred by Appellees upon the Appellants, not the "benefit-of-the-bargain" compensation from a contract to which Appellees are not a party.

{¶22} Clifton testified the parties discussed charging 14.5 cents per foot for aerial imaging. Both Clifton and Hamman testified that in selling their aerial images they expected to pay their expenses and make a profit. However, it was ATEX and Johnson that *contracted* for ATEX to pay Johnson 14.5 cents per mile for aerial imaging, with Johnson ultimately receiving a total of $219,846.00 for the entire job. Appellees were not a

party to this contract, and therefore have no right under their unjust enrichment claim to recover an expectation interest or benefit of the bargain damages from that contract. *Galloway*, 192 Ohio App.3d 133, 2011-Ohio-57, 948 N.E.2d 473, (4th Dist. Jan 6, 2011) (a plaintiff seeking unjust enrichment may recover only the *reasonable value of services* the claim bestowed upon the defendant). Yet that is precisely what the trial court did when it awarded Appellees Clifton and Hamman their pro rata share of the proceeds from that contract.

{¶23} While a court has discretion in awarding an equitable remedy like quantum meruit, an award for quantum meruit based on the benefit of a bargain and profit from a contract are not a permissible remedies because they are contract damages based on a meeting of the minds. *Rasnick v. Tubbs*, 126 Ohio App.3d 431, 437, 710 N.E.2d 750 (3rd Dist. Feb. 25, 1998). While quantum merit is a legal fiction *intended to compensate a party for the cost reasonable services or materials* that a plaintiff confers upon the defendant in the absence of an agreement. *Galloway*, 192 Ohio App.3d 133, 2011-Ohio-57, 948 N.E.2d 473, (4th Dist. Jan 6, 2011) ¶ 8.

{¶24} Including contract damages in an award for an unjust enrichment claim was a mistake of law making the trial court's damage

award to Appellees unreasonable, arbitrary and capricious. Accordingly, we sustain Appellants' second assignment of error.

ASSIGNMENT OF ERROR III

{¶25} In their third assignment of error, Appellants assert that the trial court erred when it found Appellant Johnson individually liable. Appellants assert that Johnson's contract with ATEX to provide aerial imaging was in the name of Appellant, American Eagle Air, Incorporated. Appellants argue that because Appellant American Eagle Air is a corporate entity, it shields Johnson from personal liability.

{¶26} In rejecting Appellants' argument, the trial court found that "Johnson clearly used his corporation (American Eagle Air) to launder payments from ATEX. This court is not willing to condone Johnson's quasi criminal conduct by allowing him to stand behind the shield of his solely owned corporation."

{¶27} Although the trial court does not cite authority, its actions are consistent with piercing of the corporate veil. *See Dombroski v. Wellpoint, Inc.*, 119 Ohio St.3d 506, 2008-Ohio-4827, 895 N.E.2d 538. *Dombroski* requires that a "plaintiff must demonstrate that defendant shareholder exercised control over the corporation in such a manner as to commit fraud, an illegal act, or a similarly unlawful act." *Id*. at ¶ 2.

{¶28} Johnson testified that they (Johnson, Clifton, and Hamman) "never perfected [the imaging]" so as to provide "a good presentable product." Consequently, Johnson testified that he hired MANN imaging company to take the aerial imaging for ATEX. But Hamman testified that he took his images and put them together with the images taken by MANN to create a layered product that was sold to ATEX. American Eagle Air's invoices charging ATEX for aerial imaging appear to corroborate Johnson's testimony because they described the images sold to ATEX as a "multiple layer scan." Therefore, there appears to be evidence supporting the trial court's conclusion that Johnson, as sole shareholder of American Eagle Air, committed an "unlawful act" that might justify piercing the corporate veil.

{¶29} Moreover, while there is no formal agreement between Appellees and Appellants, there is evidence in the record of discussions between Appellees (Clifton and Hamman) and Appellant (Johnson) in his personal capacity that led Appellees to confer a benefit on Johnson. Both Clifton and Hamman testified that their discussions with Johnson pertaining to imaging were in a personal capacity with Johnson, not with his corporation, American Eagle Air. Further, American Eagle Air uses a helicopter to perform work for American Electric Power. There was no testimony that the helicopter was, or could be, used to take aerial imaging

for ATEX. Rather, Johnson flew Clifton's plane while Hamman took the aerial images.

{¶30} Therefore, we hold that the trial court's finding that Appellants, Johnson and American Eagle Air Inc., are liable to Appellees was not based on a mistake or fact or law and consequently was not an abuse of its discretion. Accordingly, we overrule Appellants' third assignment of error.

CONCLUSION

{¶31} Having sustained Appellant's second assignment of error, we reverse the judgment of the trial court and remand this cause for the trial court to determine Appellants' damages consistent with this decision.

JUDGMENT REVERSED AND CAUSE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE REVERSED AND CAUSE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. Costs are assessed to Appellees.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Pickaway County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Smith, P.J. & Abele, J.: Concur in Judgment and Opinion.

For the Court,

BY: _____
Matthew W. McFarland, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.