IN THE SUPREME COURT OF TEXAS

No. 05-0870

T. MICHAEL QUIGLEY, PETITIONER,

v.

ROBERT BENNETT, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FOURTH DISTRICT OF TEXAS

JUSTICE BRISTER, joined by JUSTICE HECHT and JUSTICE WILLETT, concurring in part and dissenting in part.

I agree with the Court that the jury's million-dollar verdict must be set aside under the Statute of Frauds. But there is no reason to set aside the jury's quantum meruit verdict. As the jury answered that question and no one challenges its factual or legal sufficiency, an appellate court cannot set it aside on the possibility that another jury might award a higher or lower figure. As the Court does not render judgment for the plaintiff in that amount, I dissent to that extent.

American law has traditionally recognized three damage measures for breach of contract: expectancy, reliance, and restitution.[1] Expectancy damages award the benefit

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[1] RESTATEMENT (SECOND) OF CONTRACTS § 344 (1981):

Judicial remedies under the rules stated in this Restatement serve to protect one or more of the following interests of a promisee:

(a) his "expectation interest," which is 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,

(b) his "reliance interest," which is his interest in being reimbursed for loss caused by reliance on the contract by being put in as good a position as he would have been in had the contract not been made, or

of a plaintiff's bargain;[2] reliance damages compensate for the plaintiff's out-of-pocket expenditures;[3] restitution damages restore what the plaintiff has conferred on the defendant.[4]

But fraud cases uniformly list only two damage measures: expectancy and reliance.[5] Restitution is generally not listed, perhaps because it as an equitable rather than a legal remedy,[6] or because it is available even without a showing of fraud. For example, a party may recover in quantum meruit when valuable services are furnished and knowingly accepted by a defendant in circumstances giving reasonable notice that the plaintiff expected to be paid.[7] Thus, defendants who promise to pay for such services with no intent of doing so would be liable for fraud,

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(c) his "restitution interest," which is his interest in having restored to him any benefit that he has conferred on the other party.

[2] *Henry S. Miller Co. v. Bynum*, 836 S.W.2d 160, 163 (Tex. 1992)("The 'benefit of the bargain' measure, which utilizes an expectancy theory, evaluates the difference between the value as represented and the value actually received.").

[3] *Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 817 (Tex. 1997) ("[o]ut-of-pocket damages measure the difference between the value the buyer has paid and the value of what he has received").

[4] *Murray v. Crest Constr., Inc.*, 900 S.W.2d 342, 345 (Tex. 1995) (noting that quantum meruit recovery provides "amount of benefits conferred" on defendant).

[5] *See Fortune Prod. Co. v. Conoco, Inc.*, 52 S.W.3d 671, 681 (Tex. 2000); *Latham v. Castillo*, 972 S.W.2d 66, 70 (Tex. 1998); *Formosa Plastics Corp. USA v. Presidio Eng'rs and Contractors, Inc.*, 960 S.W.2d 41, 49 (Tex. 1998); *Arthur Andersen*, 945 S.W.2d at 817; *W.O. Bankston Nissan, Inc. v. Walters*, 754 S.W.2d 127, 128 (Tex. 1988); *Leyendecker & Assocs., Inc. v. Wechter*, 683 S.W.2d 369, 373 (Tex. 1984); *see also* RESTATEMENT (SECOND) OF TORTS § 549 (1977).

[6] *See In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732, 740 (Tex. 2005) ("Quantum meruit is an equitable remedy that is based upon the promise implied by law to pay for beneficial services rendered and knowingly accepted.") (internal quotations omitted).

[7] *Heldenfels Bros., Inc. v. City of Corpus Christi*, 832 S.W.2d 39, 41 (Tex. 1992).

but they would be liable even if they said nothing. In such circumstances, there is no reason a jury could not award restitution damages for fraud.[8]

In this case, the court of appeals affirmed a judgment for $1 million in expectancy damages because the defendant, Quigley, did not object to the charge. But the charge on fraud damages instructed jurors to consider only one element: "The reasonable value of Robert Bennett's compensable work at the time and place it was performed." This is a restitution measure, not expectancy, and in fact was identical to the instruction in the charge for quantum meruit damages. Because restitution can be recovered in fraud cases, the problem was not with the charge but with the evidence Bennett tried to squeeze into it. There was no evidence that generating geologists are paid $1 million in cash for their services; the evidence showed they are paid royalty interests, which are sometimes worth $1 million and sometimes worth nothing. As the Statute of Frauds prevents enforcement of oral contracts for royalty interests, it likewise prevents an action for damages measured by that amount.[9] So I agree with the Court that the courts below erred in entering judgment as they did.

The charge on quantum meruit damages instructed jurors to consider precisely the same element of damage, but they gave a very different answer: $2,500. Neither party objected that these answers were conflicting or requested further deliberations.[10] The reason is quite clear from the

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[8] *See* RESTATEMENT (FIRST) OF RESTITUTION § 152 (1937) ("Where a person is entitled to restitution from another because the other has obtained his services, or services to which he is entitled, by fraud, duress or undue influence, the measure of recovery for the benefit received by the other is the market value of such services irrespective of their benefit to the recipient.").

[9] *Nagle v. Nagle*, 633 S.W.2d 796, 799-800 (Tex. 1982); *Wilson v. Fisher*, 188 S.W.2d 150, 152 (1945).

[10] *See* TEX. R. CIV. P. 295.

record — Bennett told jurors to write millions in both blanks (for a royalty interest), and Quigley told them to write $2,500 in both blanks (for a daily fee for services), so they did some of both. While there was evidence that would have allowed jurors to write anywhere from $500 to $20,000 in the quantum meruit blank, they wrote $2,500. We cannot reverse this finding because a second jury might answer it differently. For both fraud and quantum meruit, Bennett asked only for the value of his services, and the jury found that value was $2,500.

That being the case, there is no reason to remand for further review or a new trial; we can resolve both the apparent conflict and the appeal here. The standard for doing so is quite clear: we must preserve both answers if there is any reasonable basis for doing so:

> It will never be presumed that jurors intend to return conflicting answers, but the presumption is always to the contrary. Courts properly refuse to strike down answers on the ground of conflict, if there is any reasonable basis upon which they may be reconciled.[11]

There was no evidence regarding expenditures Bennett made from his own pocket (reliance damages), and due to the Statute of Frauds there was legally insufficient evidence regarding the bargain he hoped to strike (expectancy damages). Accordingly, the only damage evidence jurors could credit was that regarding a daily fee, and their finding in the quantum meruit award cannot be disregarded.

Quigley argues that Bennett's quantum meruit claim is barred because he did not file suit within four years after finishing his work on this mineral prospect.[12] But the parties never agreed

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[11] *Traywick v. Goodrich*, 364 S.W.2d 190, 191 (Tex. 1963); *accord*, *Huber v. Ryan*, 627 S.W.2d 145, 145-46 (Tex. 1981); *Signal Oil & Gas v. Universal Oil Prod.*, 572 S.W.2d 320, 326 (Tex. 1978).

[12] *See* TEX. CIV. PRAC. & REM CODE § 16.004(a).

Quigley would be paid anything until the leases were sold; it is undisputed that Quigley never asked for payment until after they were. Although Bennett's alleged oral contract was unenforceable, it establishes that limitations did not begin to run until payment was due later. We so held more than sixty years ago in a case involving an unenforceable promise to devise property upon the promisor's death:

> But when a contract to devise property in consideration of services is established, the obligation to pay value for the services, which the law substitutes for the unenforceable promise, is performable also at the death of the promisor; and if there has been no prior repudiation of the contract by him, the cause of action accrues and limitation begins to run at the time of the promisor's death.[13]

Accordingly, I would reverse the court of appeals' judgment based on the jury's verdict regarding fraud damages and render judgment on their verdict regarding quantum meruit. Because the Court does only the former, I concur in part and dissent in part.

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Scott Brister
Justice

OPINION DELIVERED: June 8, 2007

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[13] *Scott v. Walker*, 170 S.W.2d 718, 720 (Tex. 1943), *accord, Stevens' Ex'rs v. Lee*, 8 S.W. 40, 42 (Tex. 1888).