

**IN THE SUPREME COURT OF OHIO**

**RANDY A. TURTURICE,**

**Plaintiff-Appellant,**

**vs.**

**AEP ENERGY SERVICES, INC.,**

**Defendant-Appellee.**

**08-1139**

**On Appeal From the  
Franklin County Court of  
Appeals, Tenth Appellate  
District**

**Court of Appeals  
Case No. 06APE-12-1214**

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**MEMORANDUM IN SUPPORT OF JURISDICTION OF  
APPELLANT RANDY A. TURTURICE**

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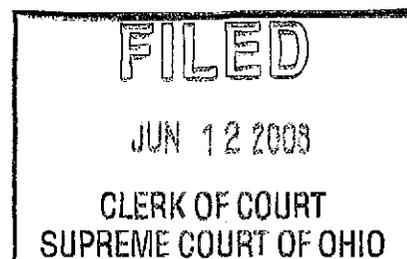


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**EXPLANATION OF WHY THIS CASE IS A CASE OF  
PUBLIC OR GREAT GENERAL INTEREST**

The right to a jury trial is among those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions. Trial by jury is fundamental to the Ohio scheme of justice. The jury trial provisions in the Ohio Constitution and R.C. §2311.04 reflect a fundamental decision about the exercise of official power — a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Jurors are the sentinels and guardians of the people. In 1788, Alexander Hamilton stated it well when addressing the similar right to a jury trial under federal law: “The friends and adversaries of the plan of the [constitutional] convention, if they agree on nothing else, concur at least in the value they have set upon the trial by jury; or if there is any difference between them it consists in this: The former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government.” This case involves the failure of the trial court to honor the plaintiff’s fundamental right to a jury trial. The issue presented here is whether a trial judge can ignore the Ohio Constitution, an Ohio statutory provision which also provides for the right for trial by jury when seeking the recovery of money only and the Civil Rules 38 and 39 by claiming after a jury reached a verdict that the jury was only serving in an advisory capacity and by annihilating the jury’s findings of fact in favor of plaintiff and its award of monetary relief. History and logic preclude this result.

It is crucial to the system of justice that we take extensive steps to ensure the fundamental right to a trial by jury, particularly in circumstances, such as this one, where there are constitutional, statutory and common law grounds supporting the right to a jury when seeking redress for unjust enrichment and quantum meruit where monetary relief is sought. The right to a

jury trial where monetary relief is sought, in this and other cases is a matter of public and great general interest.

### STATEMENT OF THE CASE AND FACTS

On May 27, 2004, Turturice filed a lawsuit to recover an unpaid bonus from his previous employer AEP Energy Services, Inc. ("AEPES"). Plaintiff was employed by AEPES until he was terminated on October 10, 2002 from his position as a natural gas trader. Plaintiff raised alternative claims for relief for breach of contract, quantum meruit, and unjust enrichment for earned, but unpaid compensation for the year 2002. Plaintiff alleged that as a principal part of his compensation, he was paid a salary and a bonus, which amongst traders in his department ranged yearly from 7% to 15% of his trading book profits. AEP's financials for 2002 showed profits of \$175,267,216. The bonuses paid out for 2002 were \$23,864,266, or 13.6% of profits. Turturice claimed that he was entitled to a 15% bonus on his "book" of \$16.5 million which would have equaled \$2,475,000. The trial court overruled motions for summary judgment on all three of plaintiff's claims. The case was tried to a jury beginning October 23, 2006. After deliberating for three days, the jury found that there was no contract for a bonus, but found in favor of plaintiff on his claim of unjust enrichment<sup>1</sup> and determined AEPES unjustly retained \$1,159,016.00 (or 7% of the profits plaintiff made for his employer). The jury also found against AEP on its faithless servant defense. The morning following the verdict, the trial court essentially vetoed the verdict, finding that a bonus to an employee is a windfall and failure to pay such, even to an employee who personally made \$16.5 million in profits for the company in the partial year in question, is not an injustice. The trial judge vetoed the reasoned jury decision that AEP was unjustly enriched by refusing to pay plaintiff's bonus for 2002. In this matter and

consistent with the jury's verdict, plaintiff should have received his bonus payment based on performance and because he achieved the incentive goals during his employment.

**ARGUMENT IN SUPPORT OF TURTURICE'S PROPOSITIONS OF LAW**

**Proposition of Law No. 1: The Parties To A Quantum Meruit Or Unjust Enrichment Action Seeking Monetary Relief Have A Right To A Jury Trial.**<sup>2</sup>

Article I, Section 5 of the Ohio Constitution guarantees and is the anchor of Ohio's vigorous defense of the right to a jury trial, which states: "The right of trial by jury shall be inviolate \* \* \*." Section 5, Article I, Ohio Constitution. Longstanding precedent from the Ohio Supreme Court provides this constitutional guarantee of a right to a jury trial to those causes of action which: (1) were traditionally recognized as jury trials at common law, prior to the adoption of the Ohio Constitution, or (2) have a statutorily conferred right to a jury. *Kneisley v. Lattimer-Stevens Co.* (1988), 40 Ohio St. 3d 354; *Cincinnati v. Cincinnati Dist. Council* (1973), 35 Ohio St. 2d 197, cert. denied 415 U.S. 994 (1974).<sup>3</sup> A right that is specifically guaranteed by a constitution is a fundamental right. *San Antonio Independent School Dist. v. Rodriguez* (1973), 411 U.S. 1, 33-34. Since the right to a jury trial is fundamental, it is to be jealously guarded. To do otherwise would lead to the inevitable conclusion that the right to a trial by jury is really just an illusion - something nice to which we may pay lip service but nothing really of substance.

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<sup>1</sup> The trial court only charged on the unjust enrichment claim, not the quantum meruit claim.

<sup>2</sup> The Court of Appeals Opinion rendered in this case on April 17, 2008 finds that there is no right to a trial by jury on claims of quantum meruit and unjust enrichment. Since there is a conflict on this issue between the Tenth District Court's opinion in this case and the holdings of the Fifth and Eighth Appellate Districts, Turturice moved to certify a conflict pursuant to Appellate Rule 25(A) and Article IV, Section 3(B)(4) of the Ohio Constitution.

<sup>3</sup> In *Allison v. McCune* (1846), 15 Ohio 726, 730, decided five years prior to the adoption of our state Constitution, the Supreme Court emphasized that "[t]he common law of England, imported by our ancestors, as is said, is *in force in Ohio*."

Such a conclusion would ignore the sacredness of the right and our history. *Miller v. Wikel Mfg. Co.* (1989), 46 Ohio St. 3d 76, 82 (Douglas, J., concurring in part).<sup>4</sup>

R.C. §2311.04 also specifically provides the statutory right to a jury: “*Issues of fact arising in actions for the recovery of money only, or specific real or personal property, shall be tried by a jury\* \* \**” Here, plaintiff sought monetary relief for his breach of contract, quantum meruit and unjust enrichment claims. Historically, in *Gunsaulhus, Admr., v. Pettit, Admr.*, 46 Ohio St. 27, in determining the right to a jury trial under R.C. §2311.04’s earlier version, this Court held that:

The code provides, Section 5130 R. S. [Now Section 11379, General Code], that issues of fact arising in actions for the recovery of money only, shall be tried by a jury, unless waived by the parties. \* \* \* Hence the right of a party to trial by jury, in a given case, does not depend upon the character of the principles upon which he may base his right to relief, but *upon the nature and character of the relief sought*. If the relief sought is a *money judgment only*, and all that is required to afford him a remedy, it is immaterial whether his right of action is based upon what were formerly regarded as equitable, or upon what were regarded as legal, principles. In either case *the remedy must be sought in a civil action under the code; and, in it, trial by jury is given upon all issues of fact where the relief sought is a money judgment only.*

*Id.* (Emphasis added.) If a petition contains a prayer for a money judgment only and the allegations therein warrant it, and an answer is filed making an issue on the right to recover such a judgment, then the general rule is that such an action is one at law and triable by a jury. *Ireland v. Cheney* (1935), 129 Ohio St. 527, 535. Here, it was undisputed that plaintiff demanded a jury trial and sought only monetary damages for his claims. Ohio Constitution Article I, Section 5

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<sup>4</sup> The right to a jury trial is a substantive right, rather than a procedural one. *Kneisley v. Lattimer-Stevens Co.* (1988), 40 Ohio St. 3d 354, 356; *Cleveland Railway Co. v. Halliday* (1933), 127 Ohio St. 278. The sanctity of this jury trial right cannot be “invaded or violated” by judicial decree or order. *Gibbs v. Village of Girard* (1913), 88 Ohio St. 34. No court, however

and R.C. § 2311.04 compel that a jury should have decided all of plaintiff's claims for monetary relief. The trial court arbitrarily denied plaintiff's right to a jury trial by obliterating the jury's determinations. The trial court completely circumvented trial procedure by vetoing the jury's decision and after the jury's findings of fact and award of relief were presented in open court deciding to take the jury's decisions under "advisement" only in order to rule adversely to plaintiff. Without providing plaintiff an opportunity to protect his right to a jury trial, the trial court held that unjust enrichment claims are equitable and to be decided by the court and failed to instruct the jury on plaintiff's quantum meruit claim. Similarly, without review of the right to a jury trial and substantive review of the relief sought by plaintiff, the Franklin County Court of Appeals in a split decision relied merely on the proposition that unjust enrichment is an "equitable" claim without consideration of plaintiff's fundamental right to a jury trial under the Ohio Constitution, R.C. §2311.04 and the common law. The courts' conclusory statements denying plaintiff relief not only fail to hold pure the clear language in Ohio's Constitution and statutory provisions, but also ignore centuries of common law.

The lower court's decisions, and several other Courts of Appeals decisions in this area, are inconsistent with Ohio Constitution Article I, Section 5, Ohio Revised Code § 2311.04 and Civil Rule 38, which provide that the right to a jury trial is inviolate and should be granted on issues of fact arising in unjust enrichment and quantum meruit actions for the recovery of money where a jury demand has been made. A trial court should not deny a party the right to a jury trial because the court, without factual or legal analysis, states that a claim is equitable despite the constitutional and statutory provisions for trial by jury and the common law holding that trial by

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sacred or powerful, has the right to take actions that clearly contravene or nullify the rights declared in the constitution. *Knitz v. Harriger* (1919), 99 Ohio St. 240, 247.

jury is required where a party seeks monetary relief. Not only does the Ohio Constitution and the plain language of R.C. §2311.04 demand that a jury trial be granted whenever a party requests when a claim of monetary relief is sought, but additionally, Civil Rule 38 preserves this right: "The right to trial by jury shall be preserved to the parties inviolate." "Inviolated," in its plain meaning, is defined as "not violated," "pure." Merriam Webster's Dictionary 2008, inviolated, (<http://www.merriam-webster.com/dictionary/inviolated>).

The common law also demands that plaintiff's claims should be tried to a jury. Under the common law a two part analysis evolved in determining whether a claim should be tried to a jury: first, the claim is compared to actions brought in the courts of England prior to the merger of the courts of law and equity; second, the remedy sought is reviewed and a determination is made as to whether it is legal or equitable in nature. *Tull v. United States* (1987), 481 U.S. 412, 417. The second stage of this analysis is more important than the first determination. *Granfinanciera v. Nordberg* (1989), 492 U.S. 33, 47-48. Generally, monetary damages are legal damages and subject to a jury trial. Ohio simplified this approach by enacting R.C. §2311.04 which focuses on the relief sought and provides the right to a jury trial if monetary relief is sought.

Under the first part of the common law analysis, the history of the jury trial and causes of action are important. The entitlement to a trial by jury was guaranteed in writing for the first time by the Magna Carta on June 15, 1215. Hon. Randy J. Holland, *State Jury Trials and Federalism: Constitutionalizing Common Law Concepts*, 38 Val. U. L. Rev. 373, 376 (2004) That document provided that "no freeman would be disseized, dispossessed, or imprisoned except by judgment of his peers." *Id.* This language guaranteed the entitlement to a jury where freedom or property was at risk and applied to civil and criminal proceedings. Over time, the

English jury evolved with the jury acting as an impartial fact finder. Theodore F.T. Plucknett, *A Concise History of the Common Law* 129-30 (Little, Brown & Co. 5th ed. 1956). In England during this time, there were two court systems simultaneously in existence: the older courts of law that administered the law and the Court of Chancery that administered equity in the sense of "providing flexible approaches where the law had become too rigid." Dan B. Dobbs, *Law of Remedies: Damages - Equity - Restitution*, § 2.1. Today, there has long since been a merger of law and equity courts so that trial courts of general jurisdiction exercise both "law" and "equity" powers. *Id.* at § 2.6.

The issue of whether a claim is legal or equitable determined whether the claim would be to a jury as a jury trial is a matter of right in a civil action at law, but not in equity. If the action deals with ordinary common law rights cognizable in courts of law, it is to that extent an action at law. To determine whether the action was one triable by a jury at common law, the court is not bound by the form of the action but rather by its nature, and a jury trial should be granted where the gist of the action is legal. *Ripling v. Superior Ct. of Los Angeles Co.* (CA. 2d Dist. 1952), 112 Cal. App. 2d 399. The legal or equitable nature of a cause of action ordinarily is determined by the relief sought.

Reviewing the historical legal actions similar to plaintiff's claims, one finds that the matter was considered by the court of law and trial was by jury. In 1760, the King's Bench, a court of law, in *Moses v. MacFerlan*, recognized that a plaintiff could sue for an action of assumpsit not merely based on an express or implied contract but also when fairness demanded that the plaintiff recover from the defendant. 97 Eng. Rep. 676 (K.B. 1760). Lord Mansfield's use of the term "equitable" in describing actions tried before a jury has created careless analysis and presumptions regarding the case. However, as the scholar George E. Palmer

explains,"[a]lthough Mansfield's description of quasi-contract as 'equitable' has been repeated many times, this refers merely to the way in which a case should be approached, since it is clear that the action is at law and the relief given is a simple money judgment." Palmer, *the Law Restitution*, § 1:1 at 3, § 1.2 at 9 (1978). Thus, at common law, the writ of assumpsit was created to enforce promises which were not under seal and did not create a money debt, but on which the promisee had relied and materially changed position. 1 Corbin on Contracts (1993) § 1.18, pp. 50-51. Trial was by jury. *Id.*, p. 51.

The writ of assumpsit was used to enforce promises that had actually been made, whether express or implied in fact from conduct other than words. *Id.* Over time, the writ of assumpsit was also applied to the enforcement of obligations described as quasi contracts. 1 Corbin on Contracts, *supra*, § 1.18, p. 51. Because the writ of assumpsit was more convenient than other actions, the English courts eventually allowed it to be used for the collection of noncontractual money debts arising out of transactions that included no express or implied promises. *Id.*, p. 52. The courts justified use of the writ of assumpsit in these cases by saying a promise was implied in law. *Id.* The use of the writ of assumpsit did not require distinguishing between contracts implied in fact and quasi contracts. 1 Corbin on Contracts, *supra*, § 1.18, pp. 52-53.<sup>5</sup> Whether the terminology used is quasi contract, contract implied- in-law, constructive contract or quantum meruit, the action is at law and not in equity, and therefore triable by jury. *Id.* at § 1.20, p. 64, fn. 8, citing *Nehi Beverage Co., Inc. v. Petri* (Ind. App. 1989), 537 N.E.2d 78, 85. Thus, "claims for quasi-contract arose and developed under the common law writ of assumpsit and, as a result, were historically brought in the courts of law." *Fischer Imaging Corp. v. Gen. Elec. Co.* (C.A.

10, 1999), 187 F.3d 1165, 1172. Further, "the common count[] of quantum meruit . . . allowed recovery for services . . . that had been supplied by the plaintiff to the defendant under circumstances constituting unjust enrichment."<sup>6</sup> Because "quantum meruit is an action at law, numerous federal courts have allowed actions for quantum meruit to be tried before a jury." *Id.*<sup>7</sup>

With regard to the second factor of the analysis under the common law of the right to a jury trial, the Court must determine whether the remedy plaintiff seeks is legal or equitable. Turturice seeks as a measure of the benefit he conferred on AEP, money damages in the form of a percentage of disgorgement of profits AEP derived as a result of Turturice's labor. Claims for quasi-contract arose and developed under the common law writ of assumpsit and, as a result,

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<sup>5</sup> "In many reported cases it does not appear whether the court found that the defendant had promised or merely that the defendant ought to be compelled to pay money by which the defendant otherwise would be enriched or to redress the impoverishment of the other." *Id.*, p. 53.

<sup>6</sup> Colleen P. Murphy, *Misclassifying Monetary Restitution*, 55 SMU L. REV. 1577, 1600 (2002) (citing Lord Goff of Chieveley & Gareth Jones, *The Law of Restitution* 3 (5th ed. 1998)); *GSGSB, Inc. v. New York Yankees* (S.D.N.Y. Aug. 28, 1995), 1995 U.S. Dist. LEXIS 12406 ("Quantum meruit . . . [was] used at common law by pleaders in suits in assumpsit, and [is] still used today." (quotation omitted)).

<sup>7</sup> See *Henderson Bridge Co. v. McGrath* (1890), 134 U.S. 260, 275-76 (affirming jury instructions given for quantum meruit claim brought at law; *United States v. Mitchell* (C.A. 8, 1939), 104 F.2d 343, 346 (characterizing quantum meruit action as one "at law"); *M.J. Carroll, Inc. v. Gilmore* (C.A. 4, 1939), 103 F.2d 560, 561 (rejecting defendant's contention that quantum meruit action was equitable and should have been taken away from the jury on ground that quantum meruit was suit at law); *In re Sunair Int'l, Inc.* (Bankr. S. D. Fla. 1983), 32 Bankr. 142, 146 (quantum meruit claim "seeks no equitable relief, but only the return of money damages"); *Raymond, Coleson, Glaspy & Huss, P.C. v. Allied Capital Corp.* (C.A. 4, 1992), 961 F.2d 489, 493 (affirming jury award in quantum meruit); *Tang How v. Edward J. Gerrits, Inc.* (C.A. 11, 1992), 961 F.2d 174, 179-80 (jury properly awarded damages in quantum meruit); *Harden v. TRW, Inc.* (C.A. 11 1992), 959 F.2d 201, 204 (both quantum meruit and express contract claims may be presented to jury); *Johnson Group, Inc. v. Beecham, Inc.* (C.A. 8, 1991), 952 F.2d 1005, 1006 (affirming jury award on quantum meruit claim and award of prejudgment interest); *Transnational Corp. v. Rodio & Ursillo, Ltd.* (C.A. 1, 1990), 920 F.2d 1066, 1069-72 (affirming jury instructions and award on quantum meruit claim); *Bushkin Associates, Inc. v. Raytheon Co.* (C.A. 1, 1990), 906 F.2d 11, 11-12 (affirming prejudgment interest jury award on quantum meruit claim); *Midcoast Aviation, Inc. v. General Electric Credit Corp.* (C.A. 7, 1990), 907 F.2d 732, 741 (trial court properly allowed quantum meruit claim to go to jury).

were historically brought in the courts of law in seeking money damages. *See* 1 Dan B. Dobbs, *Law of Remedies* § 4.2(3) (1993); *see also Austin v. Shalala* (C.A. 5, 1993), 994 F.2d 1170, 1176-77 (quasi-contract action requires jury trial because it falls under the common law writ of general assumpsit, a legal action at common law). Generally, in quasi-contract actions courts have submitted the question of the value of the goods or services to the jury.<sup>8</sup> Here, plaintiff sought monetary relief for his unjust enrichment and quantum meruit claims, which are considered legal claims.

Plaintiff does not request a new trial for this case has been fully tried to a jury. Instead, the jury's decision should be reinstated and substituted for the trial court's judgment. Plaintiff timely requested a trial by jury. Plaintiff was entitled under Article I, Section 5 of the Ohio Constitution, R.C. 2311.04 and the common law to a trial by a jury. It has been held under federal law that an advisory jury is not the equivalent of a Seventh Amendment jury. *See Parklane Hosiery Co. v. Shore* (1979), 439 U.S. 322, 337 n.24 ("an advisory jury . . . would not in any event have been a Seventh Amendment jury"); *see also* 8 James Wm. Moore, *Moore's Federal Practice*, § 39.40[4] (1999) (use of advisory jury does not satisfy a party's constitutional right to a jury trial). Similarly, under Ohio law a court may not replace a plaintiff's right to a jury trial with an advisory jury's verdict and the trial court's annihilation of that decision. *See Pradier v. Elespuru* (C.A. 9, 1981), 641 F.2d 808, 811 Here, the trial court clearly should have protected

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<sup>8</sup> *District of Columbia v. Campbell* (D.C. App. 1990), 580 A.2d 1295, 1303 (question of value of services in quantum meruit action submitted to jury); *Baker v. Estate of Mary Brown* (Mo. 1956), 294 S.W.2d 22, 27; *Rodgers v. Levy* (Mo. Ct. App., 1947), 199 S.W.2d 79, 81 (reasonable value of labor and materials submitted to jury in quantum meruit suit); *Paper Stylists, Inc. v. Fitchburg Paper Co.* (N.D.N.Y. 1949), 9 F.R.D. 4, 5 (right to jury in quasi-contract action seeking money damages).

plaintiff's fundamental right to a jury trial when he was seeking monetary relief and this Court should reinstate the jury verdict and plaintiff's award of damages in this case.

**Proposition of Law No. 2: When A Jury Trial Is A Matter Of Right, A Trial Court May Not Circumvent That Right By: (1) Not Making A Determination Under Civil Rule 39(A) That Trial By Jury Does Not Exist On The Claim Before The Jury Is Empanelled And Notifying The Parties; (2) Switching From A Jury Determination To An Advisory Jury After The Jury Has Returned A Verdict; (3) Retroactively Empanelling An Advisory Jury; Or (4) Granting A Judgment Notwithstanding The Verdict Taking The Case From The Jury.**

Pursuant to Civil Rule 39(A)(2), when a jury trial has been demanded the court cannot try the case without a jury unless the court finds that a right of trial by jury of some or all of the issues does not exist. See *Holman v. Keegan* (2000), 139 Ohio App. 3d 911, 916. The trial court did not make a finding that a right of jury trial does not exist on the issue of unjust enrichment until after the jury returned its verdict.<sup>9</sup> The court, instead, appeared to reach an opposite finding just before charging the jury on the unjust enrichment claim when it stated that the "Seventh Amendment ability of the court to make factual determinations trumps my equitable rights. . . . and we have to follow whatever the jury verdict is." (Tr. Vol. V at p. 2-3.)

The Sixth Circuit, in a similar situation, ordered that judgment be entered on the jury's verdict. *Thompson v. Parkes* (C.A. 6, 1992), 963 F.2d 885, 890. The Sixth Circuit held that

the district court erred in determining that the verdict would be advisory after the case was submitted to the jury. The parties are entitled to know prior to trial whether the jury or the court will be the trier of fact. *Pradier v. Elespuru*, 641 F.2d 808, 811 (9th Cir. 1981). This conclusion follows from the language of Rule 39(c), which permits the district court to try a case 'with an advisory jury,' not to have the case tried by a jury and essentially exercise a veto power. The term 'with an advisory jury' implies a jury known to the parties to be merely advisor[y] at the time of trial (and, for the sake of efficiency, sufficiently in advance of trial that counsel may prepare a case appropriate to the trier of fact).

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<sup>9</sup> As discussed in Proposition of Law No. 1, the right to a jury trial does exist here.

*Thompson*, 963 F.2d at 889 (where the court's last word on the issue of an advisory jury was "Whatever.") In this case the court's last words on the issue, after the jury was sent to deliberate, were "Well, we'll sort that out after we see what they decide." (Tr. Vol. V, p. 115.)

If the court engages an advisory jury, the Sixth Circuit cautions, "[c]learly the rule requires that the court's initiative in ordering a trial to an advisory jury must occur, and the parties be made aware of it, before the case is submitted." *Id.* at 888. Thus, "Rule 39(c) does not allow the trial court to transform a jury verdict into an advisory finding after the verdict is rendered \* \* \*." *Id.* at 890. Thus, the trial court also erred in switching from a mandatory jury determination to an advisory jury and retroactively impaneling an advisory jury, where plaintiff had a right to a jury trial and the court acknowledged that fact. Just before closing arguments and instructions to the jury, the court started the proceedings as follows:

"THE COURT: \* \* \* I wanted to call counsel's attention to a case entitled *Tull versus the United States* which my staff attorney found, which was decided in 1987. 481 U.S. 412, Page 425 has the following statement: "If a legal claim is joined with an equitable claim, the right to jury trial on the legal claim, including all issues common to both claims, remains intact. The right cannot be abridged by characterizing the legal claim as 'incidental' to the equitable relief sought."

It seems to me that given the factual circumstances of this case in which the jury has to determine whether or not there was a contract between Mr. Turturice and AEP and has to determine whether or not the faithless servant defense applies, that the Seventh Amendment ability of the Court to make factual determinations trumps my equitable rights. That those are common issues to both claims, and we have to follow whatever the jury verdict is. It's a confusing set of circumstances under the law, but I want to assure the Court of Appeals that we're doing the best we can and trying to sort this out appropriately."

(Tr. Vol. V at p. 2-3.) Thus, the court clearly held that both claims should be decided by the jury. Despite this ruling, after the verdict was rendered with a finding for plaintiff on unjust

enrichment, the court declared the jury to be advisory and took away the jury's verdict. Thus, at best, it was unclear that this was an advisory jury before the verdict and the trial court firmly declared the jury to be advisory and took away the verdict only after the court determined it did not agree with the result.

If the jury was not properly an advisory jury, the court's ruling the morning following the verdict amounted to a judgment notwithstanding the verdict. There was no basis for such a ruling, as the court itself admitted. (Tr. Vol. V at p. 189-190) Plaintiff testified that AEP agreed to compensate him for profitable performance. The trial court chose to ignore these promises and find that any payment of a bonus is a "windfall." (Tr. Vol. V at p. 196) Certainly, the jury found otherwise and case law in Ohio supports payment of plaintiff's bonus for the time he was employed. Ohio courts have consistently ordered the payment of bonuses and commissions when an employee has completed services for which he or she should have been compensated.<sup>10</sup>

**Proposition of Law No. 3: A Bonus Is Not A Gift Or Gratuity, But Is A Part Of Earned Compensation; And It Is Unjust Not To Pay An Earned Bonus.**

Ohio courts have adopted the majority rule that a bonus is "not a gift or gratuity but [is] a sum paid for services, or upon a consideration, in addition to or in excess of that which would ordinarily be given."

Baldwin's Ohio Handbook Series, Oh. Empl. Prac. L. § 11:29 (2006). In direct conflict with the above statement of the law in Ohio, the trial court made numerous holdings and statements as follows:

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<sup>10</sup> See *Haines & Co., Inc. v. Stewart* (2001), 2001 Ohio App. LEXIS 597 (finding that the employer had no right to withhold vested commissions); *Wall v. Pizza Outlet, L.P.* (2002), 2002 Ohio App. LEXIS 3589 ; *Seidler v. FKM Advertising Co., Inc.* (2001), 145 Ohio App. 3d 688; *Ohio Marble v. Byrd* (C.A. 6 1933), 65 F.2d 98, 101; *McKelvey v. Spitzer Motor Center, Inc.* (1988), 46 Ohio App. 3d 75, 77-78; *Montgomery Ward & Co. v. Smith* (1931), 12 O.L. Abs. 28, 30; *Turnipseed v. Bowness* (1929), 7 O.L. Abs. 310; *Elbinger Shoe Mfg. Co. v. Patrick* (1921), 14 Ohio App. 456, 459.

Paying a bonus may be a nice thing for an employer to do”; “the law did not force Scrooge to give a bonus”; “an employer can pay his or her employee as little as the employee will accept, so long as it is above the minimum wage”; “after all is said and done, a bonus is, by definition, a windfall, even for the most valuable employee”; “will not the innumerable employees whom we all know at their daily lives that work at their jobs above and beyond the call of duty, and who defy the criticism of their family that they are workaholics, not then be able to also file similar lawsuits, seeking to rectify the injustice of their employment contracts with their own Scrooge?”; and “AEP may be the proverbial Scrooge, but Mr. Turturice is entitled to no Christmas goose from this Court.”

(Tr. Vol. V, p. 194, 195, 196, 206.) The trial court, thus, misstated the law in Ohio on bonuses.

This is not 19<sup>th</sup> century England. In 21<sup>st</sup> century America it

is now recognized that [bonuses] are not pure gratuities but compensation for services rendered. The employer’s promise is not enforceable when made, but the employee can accept the offer by continuing to serve as requested, even though the employee makes no promise. There is no mutuality of obligation, but there is consideration in the form of service rendered. The employee’s one consideration, rendition of services, supports all the employer’s promises, to pay the salary and to pay the bonus.

2 Joseph M. Perillo & Helen H. Bender, *Corbin on Contracts* § 6.2, at 214-17 (rev’d ed. 1995).

Here, the evidence showed that the traders' compensation included the salary and the bonus in order to competitively compensate the employees for the work performed and the extremely high profits that were generated for AEP’s benefit. In very few cases will an employee be able to directly prove that individually they made millions of dollars in profits in one year for their employer and the employer unjustly refused to pay the agreed upon bonus.<sup>11</sup> The trial court’s finding that plaintiff worked only for his salary and that a bonus is a windfall is in contradiction to the jury's findings and Ohio law. The jury was specifically instructed on both the

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<sup>11</sup> See *Quesnell v. Bank One Corp.* (2002), 2002 Ohio App. LEXIS 1518 (where the court rejected this rationale and found that Quesnell had every reason to anticipate receiving incentive payments for her services because payment was promised to her and it was unjust under the circumstances for the employer to withhold payment).

breach of contract claim and the unjust enrichment claim. The jury held that retention of the benefit by defendant would be unjust under the circumstances. Despite proper instructions to an admittedly intelligent jury, the trial court ignored the jury's finding on manifest injustice and equated Plaintiff's bonus to the "Christmas goose" that Scrooge gave to Bob Cratchet and his family on Christmas morning. (Tr. Vol. V at p. 194.)

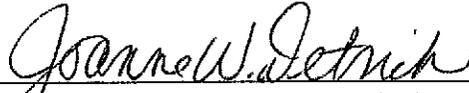
**Proposition Of Law No. 4: Quantum Meruit And Unjust Enrichment Are Separate Claims As To Which A Jury Should Be Separately Charged.**

Plaintiff pled alternative claims of unjust enrichment and quantum meruit. These two claims are distinct, yet the court charged only on unjust enrichment, finding the term "quantum meruit" might be confusing for the jury. "Quantum meruit" and "unjust enrichment" are two separate claims. In *Iowa Waste Systems, Inc. v. Buchanan County* (Iowa 2000), 617 N.W.2d 23, 28-29, the *Iowa* Supreme Court reviewed the history of each of these terms and explained how they are distinct. Under quantum meruit claims successful plaintiffs may recover "for the reasonable value of the services provided and the market value of the materials furnished." *Id.* "Damages under a claim of unjust enrichment are limited to the value of what was inequitably retained. *Id.* at 30. The court instructed the jury only on unjust enrichment. This is error where a plaintiff pleads and proves both claims.

**CONCLUSION**

This is a case of public and great general interest. The record should be certified and the case heard on the merits to make Ohio law consistent with its Constitution, statutes, and common law, as well as resolving the conflicting lower courts' decisions.

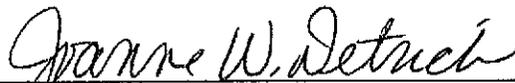
Respectfully submitted,



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**PROOF OF SERVICE**

This is to certify that a copy of the foregoing Memorandum in Support of Jurisdiction was this 12th day of June, 2008 served by first class U.S. Mail upon counsel for Appellees, Adele E. O'Conner, Esq., Bradd Seigel, PORTER, WRIGHT, MORRIS & ARTHUR LLP, 41 South High Street, Columbus, Ohio 43215.



Counsel for Plaintiff-Appellant

Turturice\sect\plmemojuris.doc

**APPENDIX**

Opinion of the Franklin County Court of Appeals (rendered April 17, 2008) .....	A-1
Judgment Entry of the Franklin County Court of Appeals (April 28, 2008) .....	A-23
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IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

RECEIVED  
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BY:.....

Randy A. Turturice, :  
 :  
 Plaintiff-Appellant, :  
 :  
 v. : No. 06AP-1214  
 : (C.P.C. No. 04CV-5604)  
 AEP Energy Services, Inc., : (REGULAR CALENDAR)  
 :  
 Defendant-Appellee and :  
 Conditional Cross-Appellant. :  
 :

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O P I N I O N

Rendered on April 17, 2008

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*Law Offices of Russell A. Kelm, Russell A. Kelm and Joanne W. Detrick, for appellant.*

*Porter, Wright, Morris & Arthur LLP, Adele E. O'Conner and Bradd N. Siegel, for appellee.*

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APPEAL from the Franklin County Court of Common Pleas.

DESHLER, J.

{¶1} Plaintiff-appellant, Randy A. Turturice, appeals from a judgment of the Franklin County Court of Common Pleas in favor of defendant-appellee, AEP Energy Services, Inc. ("AEPES"), in appellant's action for unpaid bonuses earned during his employment with AEPES.

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FRANKLIN COUNTY, OHIO  
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{¶2} AEPES is a wholly-owned subsidiary of American Electric Power Co., Inc. ("AEP"), a large electric utility. AEP created AEPES in 1997 for the purpose of trading in the natural gas wholesale market and related activities.

{¶3} Appellant began employment with AEP in 1997 in another position, and in 1998 transferred to a position as a trader for AEPES, working in this capacity until he was fired in October 2002. For the last 18 months of his employment, appellant worked for the AEPES "trading desk" at the New York Mercantile Exchange ("NYMEX") as a fixed-price natural gas trader. This was one of four regional desks operated by AEPES.

{¶4} Appellant, like most AEPES traders, was paid a comparatively low annual fixed salary, and realized the bulk of his income from a bonus system based upon trading book profits. The terms under which these bonuses were paid to some of AEPES's traders present one of the questions of fact in this matter, but it is undisputed that multi-million dollar annual bonuses were common in the energy trading industry generally and for AEPES's traders, supervisors, and executives.

{¶5} AEPES fired appellant in October 2002 along with three other gas traders and a supervisor, accusing these employees of manipulating various published trading indices. The traders were accused of submitting false trade data for the purpose of increasing the profitability of their own transactions on behalf of AEPES. AEPES did not pay appellant a bonus for the portion of 2002 that he worked, despite the fact that appellant had realized substantial trading profits during that period.

{¶6} Appellant's complaint alleged that prior-year bonuses for himself and others ranged from seven to 15 percent of trading profits. The complaint further asserts that

appellant earned \$16.5 million in profits on his trading book for AEPES in the portion of 2002 that he worked, and sought a corresponding bonus on theories of breach of contract, quantum meruit, and unjust enrichment.

{¶7} The trial court overruled motions for summary judgment by AEPES, and the matter went to trial under disputed conditions: AEPES asserts that the jury was impaneled to render a binding verdict on the contract claim, but only in an advisory capacity on the equitable claims for quantum meruit and unjust enrichment. Appellant asserts that all theories of the case were tried to the jury for a binding verdict. In the event the jury found against appellant on his contract claim, concluding that no express contract for employment or payment of a bonus existed. The jury found in favor of appellant on his unjust enrichment claim, awarding damages of seven percent of the profits from appellant's trading book for 2002, or \$1,159,016. In subsequent proceedings, the trial court declined to accept the jury's verdict and found that appellant was not entitled to any bonus for his last year of employment. AEPES characterizes this action by the trial court as a refusal to accept an advisory jury's verdict, and appellant, to the contrary, characterizes it as the trial court in essence granting judgment notwithstanding the verdict after the jury had rendered its decision in a matter fully tried to the jury.

{¶8} Appellant brings the following five assignments of error from the trial court's decision:

I. THE TRIAL COURT ERRED IN SWITCHING FROM A MANDATORY JURY DETERMINATION TO AN ADVISORY JURY ON THIS UNJUST ENRICHMENT CLAIM.

II. RETROACTIVELY EMPANELING AN ADVISORY JURY, WHERE PLAINTIFF HAS A RIGHT TO A JURY TRIAL ON HIS UNJUST ENRICHMENT CLAIM WAS ERROR.

III. GRANTING A JUDGMENT NOTWITHSTANDING THE VERDICT ON PLAINTIFF'S UNJUST ENRICHMENT CLAIM WAS ERROR.

IV. THE TRIAL COURT ERRED IN FINDING AS A MATTER OF LAW THAT IT WAS NOT UNJUST TO NOT PAY PLAINTIFF HIS EARNED BONUS.

V. FAILING TO CHARGE THE JURY ON PLAINTIFF'S QUANTUM MERUIT CLAIM WAS ERROR.

{¶9} AEPES has filed a conditional cross-appeal and brings the following four assignments of error:

Assignment of Error No. 1

THE TRIAL COURT ERRED BY ALLOWING THE JURY TO CONSIDER SIMULTANEOUSLY PLAINTIFF'S CONTRACT AND QUASI-CONTRACT CLAIMS.

Assignment of Error No. 2

THE TRIAL COURT ERRED BY REJECTING DEFENDANT'S PROPOSED JURY INSTRUCTIONS CONCERNING PLAINTIFF'S UNJUST ENRICHMENT CLAIM.

Assignment of Error No. 3

THE TRIAL COURT ERRED BY EXCLUDING AS HEARSAY INVESTIGATION NOTES PREPARED BY DEFENDANT'S VICE PRESIDENT FOR HUMAN RESOURCES.

Assignment of Error No. 4

THE TRIAL COURT ERRED BY ALLOWING INTO EVIDENCE A PREJUDICIAL HEARSAY PROFFER LETTER FROM PLAINTIFF'S CRIMINAL ATTORNEY TO THE COMMODITIES FUTURES TRADING COMMISSION.

{¶10} The threshold question in this case, and one that cuts across most assignments of error presented by both parties, concerns the capacity in which the jury was impaneled by the trial court. Civ.R. 39 governs trial by jury, including the use of advisory juries on non-jury issues, providing as follows:

(A) By jury

When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist. \* \* \*

(B) By the court

Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issues.

(C) Advisory jury and trial by consent

In all actions not triable of right by a jury (1) the court upon motion or on its own initiative may try any issue with an advisory jury or (2) the court, with the consent of both parties, may order a trial of any issue with a jury, whose verdict has the same effect as if trial by jury had been a matter of right.

{¶11} Because it appears that some parts of the trial court's discussion of which issues would be tried to a jury, and whether that jury would be an advisory jury or one making a binding determination, are not preserved in the record, we must glean the trial court's rulings from rather tangential references arising later in the proceedings. AEPES

asserts in its brief on appeal that, in response to pre-trial briefing of the issue by the parties, the court expressly ruled that appellant's contractual claims would be tried to the jury, and that appellant's equitable claims for recovery in quantum meruit or unjust enrichment would be tried to the court with the jury serving an advisory function pursuant to Civ.R. 39(C). Unfortunately, the court does not appear to have issued a written ruling on this aspect of the matter, nor does the transcript contain any verbal disposition of the parties' arguments.

{¶12} The court would subsequently at three points in the transcript verbally address the question of (1) which of appellant's claims would be allowed to go to the jury; (2) what the jury's function would be with respect to those claims, i.e., whether the jury would render a binding verdict or an advisory one; and (3) what effect the jury's determination with respect to some aspects of the legal claims would have in precluding or mandating certain determinations in those equitable aspects of the matter tried to the bench.

{¶13} With respect to this last issue, the trial court engaged, on the morning before charging the jury, in a lengthy discussion of *Tull v. United States*, (1987), 481 U.S. 412, 107 S.Ct. 1831, in which the United States Supreme Court discussed the impact of ancillary equitable claims upon a right to jury trial on legal ones: "If a legal claim is joined with an equitable claim, the right to jury trial on the legal claim, including all issues common to both claims, remains intact. The right cannot be abridged by characterizing the legal claim as 'incidental' to the equitable relief sought." *Id.* at 425, 107 S.Ct. at 1839. The trial court then went on to discuss in detail certain aspects of this matter, namely the

faithless servant doctrine, in which the jury's determination with respect to the contract claim would affect the court's disposition of the equitable ones.

{¶14} While appellant on appeal attempts to characterize this discussion by the trial court as a declaration that all matters in the case would be tried to the jury and that no aspect of the jury's verdict would be merely advisory on those issues reserved for trial to the bench, we must disagree. Although admittedly some ambivalence remained which would not be clarified until the trial court's post-verdict statements, it is clear that the court did not intend to place the equitable claims before the jury as of right.

{¶15} Subsequently, counsel for AEPES attempted to further clarify the matter while the jury was deliberating:

MR. SIEGEL: Secondly, if just to note for the record, it's our understanding that the Court has impaneled the jury as an advisory jury with respect to the quasi contract claim, and therefore, anything that the jury returns with regard to that claim in their advisory capacity, your Honor, I don't believe would be within the scope of the case you cited earlier before we came in. That was that would not be a determination by the jury of those facts; it would be, at best, advisory.

THE COURT: Well, we'll sort that out after we see what they decide.

(Tr. at 115.)

{¶16} Again, while the court's response to defense counsel's attempt to clarify the jury's status was less than unequivocal, the court on this occasion did not clearly declare that the jury would hear and conclusively decide the equitable claims.

{¶17} Finally, after the jury had returned a verdict in favor of AEPES on appellant's contract claims and in favor of appellant on his unjust enrichment claim, the

court rendered a lengthy and detailed oral decision reflected in pages 186 through 206 of the transcript. In its decision, the court clarified that the jury had only rendered a binding verdict as to the legal claim for recovery under a contract, and that the jury's determination on the equitable claim was merely advisory and the court would decline to follow it for a number of stated reasons.

{¶18} We therefore find, on the question of what role the jury served in this case, that the trial court in response to the plaintiff's jury demand impaneled a jury to hear and decide appellant's contract claim, which arises at law. We further find that the trial court properly decided that appellant's equitable claims in quantum meruit and unjust enrichment would be heard and decided by the court, and the jury would serve in an advisory capacity only on these claims. We further find that there is no indication in the record that AEPES consented pursuant to Civ.R. 39(C)(2) to have these equitable claims tried by the jury with a binding verdict. We will further discuss the various arguments of the parties on appeal on this basis.

{¶19} Appellant's first assignment of error asserts that the trial court erred in impaneling a jury to render a mandatory jury determination and then taking some aspects of the matter away from the jury. Because we find that the trial court never, in fact, impaneled a jury to render a binding verdict on the equitable claims, appellant's first assignment of error is overruled.

{¶20} Appellant's second assignment of error asserts that appellant had the right to a jury trial on his unjust enrichment claim. Appellant does not on appeal present any authority for the proposition that these equitable claims invoke a right to a jury trial. In

arguments before the trial court on this issue, however, appellant did provide two unreported Ohio cases for this proposition: *Novomont Corp. v. The Lincoln Electric Co.* (Nov. 1, 2001), 8th Dist. No. 78389, and *Bush v. The Estate of Carl A. O'Dell* (Feb. 26, 1992), 5th Dist. No. CA-3705. While neither decision explains why equitable claims indeed were referred to the jury in each case, it remains the clear consensus of law in Ohio that equitable claims are not triable as of right to a jury. See, e.g., *Ashmore v. Eversole* (Nov. 29, 1996), 2nd Dist. No. 15672; *Natl. City Bank v. Abdalla* (1999), 131 Ohio App.3d 3204; *Cross v. Ledford* (1954), 161 Ohio St. 469. Appellant's second assignment of error is accordingly overruled.

{¶21} Appellant's third assignment of error asserts that the trial court erred in granting judgment notwithstanding the verdict on appellant's claim for unjust enrichment. Appellant's fourth assignment of error asserts that the trial court erred in determining that appellant was not entitled to a judgment on his equitable claim for past bonuses. We will address these two assignments of error together.

{¶22} We first note that the trial court clearly stated that it was not granting judgment notwithstanding the verdict under Civ.R. 50 because the jury was serving merely in an advisory function. We have held as much in our discussion above. The standard, therefore, for the trial court in disregarding the trial court's jury was not the stringent one for granting judgment notwithstanding the verdict, but whether the trial court, in its independent assessment of the facts heard and tried to the court, chose to give weight to the jury's resolution of evidentiary issues before ruling on these equitable matters that ultimately were triable only to the court. In its oral decision, the trial court

noted that although it approved of some aspects of the jury's verdict on the equitable claims, particularly the amount awarded if any amount were to be awarded at all, the court ultimately was compelled to differ from the jury on whether the weight of the evidence supported any judgment in favor of appellant on his equitable claims. Because the trial court's judgment on these claims is not, strictly speaking, in derogation of a jury verdict, it does not represent judgment notwithstanding the verdict and our only standard on appeal is whether the trial court's judgment on these issues tried to the court is supported by the manifest weight of the evidence.

{¶23} When reviewing a trial court's decision on a manifest weight of the evidence basis, we are guided by the presumption that the factual findings of the trial court were correct. The weight to be given the evidence and the credibility of the witnesses are primarily for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, paragraph one of the syllabus. The rationale for this presumption is that the trial court is in the best position to evaluate the evidence by viewing witnesses and observing their demeanor, voice inflections, and gestures. *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 461 N.E.2d 1273. Likewise, documentary evidence is best viewed in the context of the entire scope of evidence heard at trial, and the trier of fact is in the best position to assess the global weight of all evidence heard. Thus, judgments supported by some competent, credible evidence going to all the essential elements will not be reversed by a reviewing court as being against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, 376 N.E.2d 578.

{¶24} We will begin by defining the elements needed to establish appellant's equitable claim. The parties agree that, at a minimum, in order to prevail upon a theory of unjust enrichment appellant needed to establish the following three elements: (1) a benefit conferred by him upon AEPES; (2) knowledge by AEPES of the benefit conferred; and (3) retention of the benefit by AEPES under circumstances where it would be unjust to do so without payment. *Hummel v. Hummel* (1938), 133 Ohio St. 520, 527. In addition, AEPES argues that a more stringent standard must be applied in this case before appellant can recover on an unjust enrichment claim, and that beyond the above elements appellant must show fraud, illegality, or bad faith on the part of AEPES. This is based on cases holding if an express contract exists concerning the services for which compensation is sought, the doctrine of unjust enrichment does not apply in the absence of fraud, bad faith, or illegality because where the relationship between parties is governed by an express contract, unjust enrichment is unavailable absent these additional factors. *Weiper v. W.A. Hill & Assoc.* (1995), 104 Ohio App.3d 250, 262, *Rumpke v. Acme Sheet & Roofing, Inc.* (Nov. 12, 1999), 1st Dist. No. 17654. This restriction on equitable recovery has been extended to employment cases: "A party seeking a remedy under a contract cannot also seek equitable relief for unjust enrichment since, absent evidence of fraud, illegality, or bad faith, compensation is governed by the parties' contract." *Howland v. Lyons* (Mar. 7, 2002), 8th Dist. No. 77870.

{¶25} AEPES asserts that the term "express contract" has been held by some courts to include employment-at-will situations, such as appellant's, in which employment was not governed by a defined contract. AEPES asserts that this is a logical extension of

the Supreme Court of Ohio's decision in *Lake Land Emp. Group of Akron LLC v. Columber* (2004), 101 Ohio St.3d 242, 247, in which the court stated that "at-will employment is contractual in nature. In such a relationship, the employee agrees to perform work under the direction and control of the employer, and the employer agrees to pay the employee at an agreed rate." AEPES postulates that because at-will employment is "contractual in nature," it is governed by an "express contract" regulating all aspects of the employment relationship and warrants application of *Weiper* and *Howland* to require the stricter standard for recovery in equity.

{¶26} AEPES argues that this court has accepted this rationale on at least one occasion. In an employment case, *Kucan v. Gen. Am. Life Ins. Co.*, 10th Dist. App. 01AP-1099, 2002-Ohio-4290, this court practically in the same legal breath found "no evidence of an express or implied contract," *id.* at ¶31, precluding recovery by the plaintiff-employee under contract theories, and then found that the matters in dispute were governed by the terms of an express contract, and the plaintiff was accordingly barred from recovery on his unjust enrichment claim in the absence of fraud, bad faith, or illegality, *id.* at ¶35.

{¶27} Despite the language employed in the above-outlined sections of *Kucan*, that case in fact did involve extensive discussion of the express contractual terms governing the plaintiff's employment, as did *Metz v. Am. Elec. Power Co., Inc.*, 172 Ohio App.3d 800, 2007-Ohio-3520, a companion case to the present one that cites *Kucan*. We therefore do not believe that *Kucan* stands for the proposition that an at-will employment relationship necessarily constitutes the form of express contract contemplated under

*Weiper*, and if that were the holding in *Kucan*, we would overrule it. There is no reason to find that an at-will employee who has failed on an employment claim precisely because of the absence of an express contract should then see that contract miraculously revived as a bar to recovery in equity. In the present case, AEPES strove throughout to establish that appellant's terms of at-will employment did not contractually entitle him to a bonus because the bonus plans in place were entirely discretionary with the employer. It is undisputed that AEPES regularly paid its energy traders bonuses under a discretionary plan, and (more pertinently to the time period involved in appellant's claim) after the expiration of that plan continued to pay bonuses in the absence of any explicit plan at all. It follows that whatever at-will employment agreement—"contractual in nature" under *Lake Land*—governed appellant's employment, it neither mandated nor precluded bonuses. If appellant's rights to such a bonus are not contractual, then they are not governed by an express contract. Lacking an express contract controlling this aspect of appellant's employment, *Weiper* and *Howland* do not apply, and appellant needed only show the basic elements of unjust enrichment in *Hummel* before the trial court. As it happens, the trial court displayed remarkable prescience in rejecting the proposed *Kucan* standard and properly considered the matter solely under the elements set forth in *Hummel*. We will therefore review the trial court's decision under the same basic unjust enrichment standard employed by the trial court.

{¶28} The trial court emphasized the following evidence in its decision. The trial court noted that appellant was initially hired based on his accounting skills to help check on the accounting practices of the trading division. Appellant then of his own volition

sought transfer to become a trader himself. During the course of his employment, he was repeatedly educated on the ethical expectations of AEP and its subsidiary AEPES, including training films and a video sent to his home about corporate honesty and corporate compliance. AEP maintained an anonymous reporting number for whistle blowers. Despite this, appellant joined in a pre-existing practice by other traders of misreporting prices and other information about energy trades to entities reporting and compiling a public index of such trades. While the trial court was skeptical about the extent and impact of appellant's personal activities on the rapid demise of the energy trading activities of AEP and its subsidiaries, the trial court did note that AEP eventually paid an \$81,000,000 fine for irregular activities by its traders, and the bulk of AEP's energy trading activities were shut down shortly after appellant's termination, including the layoffs of most other traders, even those not directly implicated in irregular activities.

{29} Even accepting, as the trial court seems to have accepted, that appellant generated a profit of \$16,500,000 on his trading book in 2002 before being terminated, and that AEPES and its parent company retained this benefit, the balance of the evidence does not support reversal of the trial court's judgment. Specifically, in light of appellant's personal knowledge over a substantial period of time of the illegal activities in the trading desk where he worked, his failure to report these illegal activities, and the subsequent heavy fine imposed upon AEP for its trading activities, it is difficult to find error in the trial court's conclusion that it was not unjust or improper to allow AEPES to retain the benefit conferred by appellant's activity while employed. We accordingly find that there is competent, credible evidence going to the essential elements upon which the trial court

found in favor of AEPES, and we will not reverse the judgment of the trial court. Appellant's third and fourth assignments of error are accordingly overruled.

{¶30} Appellant's fifth assignment of error asserts that the trial court erred in failing to instruct the jury separately on his quantum meruit claim in addition to his claim for unjust enrichment. Appellant asserts that the two causes of action are distinguishable, and the jury should have been instructed separately on both.

{¶31} In the posture in which we now place this appeal with respect to the jury verdicts, we first note that any failure to instruct an advisory jury amounted to harmless error and the actual question is whether the trial court, in trying these matters itself, should have separately considered and ruled upon appellant's quantum meruit claim. Quantum meruit has been defined as an equitable doctrine based on the principle that one should not be unjustly enriched at the expense of another, to be awarded when one party confers a benefit on another without receiving just compensation for the reasonable value of services rendered. *Metz v. AEP*, 10th Dist. No. 06AP-1161, 2007-Ohio-3520, citing *Beckler v. Bacon*, 170 Ohio App.3d 612, 2007-Ohio-1319, ¶13.

{¶32} Although we do not need to broadly hold that the two forms of equitable relief are in fact indistinguishable, we find in the present case that the trial court did not err in failing to analyze and separately rule upon appellant's quantum meruit claim because the two claims are so materially interrelated on the facts that denial of one mandated denial of the other. See, e.g., *Caras v. Green & Green* (June 28, 2006), 2nd Dist. No. 14943, holding that the two forms of equitable relief are closely related, and *U.S. Health Practices, Inc. v. Blake* (Mar. 22, 2002) 10th Dist. No. 00AP-1002 ("quantum meruit and

unjust enrichment are doctrines derived from the natural law of equity, and the essential elements of recovery under both are the same").

{¶33} We accordingly find that the trial court did not commit prejudicial error when it did not expressly analyze and pass upon appellant's claim for quantum meruit in the process of rendering judgment for AEPES on appellant's equitable claims generally, and appellant's fifth assignment of error is overruled.

{¶34} In accordance with the foregoing, appellant's first, second, third, fourth and fifth assignments of error are overruled. The conditional cross-appeal of appellee AEPES need not be considered, and the judgment of the Franklin County Court of Common Pleas is affirmed.

*Judgment affirmed.*

SADLER, J., concurs separately.  
TYACK, J., dissents.

SADLER, J., concurring separately.

{¶35} I concur, but write separately to emphasize the reasons why, having reviewed the record in this case, and the law applicable to it, I concur in overruling the first two assignments of error.

{¶36} Jury demands do not confer the right to a jury trial; they only invoke it as to "any issue triable of right by a jury \* \* \*." Civ.R. 38(B). The allegations in the complaint determine the nature and character of the claim as being one in which the parties are or are not entitled to a jury trial. *Corry v. Gaynor* (1871), 21 Ohio St. 277, 280. In this case,

appellant pled his claims alternatively. First, he pled a claim of breach of contract. The contract was implied-in-fact, not express, but is nonetheless a contract-based claim. Express contracts and "contracts wholly implied in fact \* \* \* both are true contracts formed by a mutual manifestation of assent." Calamari & Perillo, *Contracts* (1970) 11, Section 10. Appellant had a right to a jury trial on his claim for breach of contract. *Dockery v. Doctor Bo Auto Clinic* (July 27, 2001), Sandusky App. No. S-00-045.

{¶37} Second, appellant pled a claim of quantum meruit, or unjust enrichment, based not on an intentional promise, but on a quasi-contractual promise implied-in-law, for which he seeks the equitable remedy of restitution. "A contract implied in law is not a contract at all but an obligation *imposed by law* to do justice even though it is clear that no promise was ever made or intended. \* \* \* There is nothing contractual about this at all." (Emphasis added.) Calamari & Perillo, *supra*.

{¶38} A contract implied in law presents an issue of law and "[i]ssues of law must be tried by the court, unless referred as provided in the Rules of Civil Procedure." R.C. 2311.04. Moreover, the Supreme Court of Ohio has characterized claims for unjust enrichment, such as appellant's second claim, as equitable claims,<sup>1</sup> and the court has "long held that a right to a jury trial does not exist if the relief sought is equitable rather than legal." *Digital & Analog Design Corp. v. N. Supply Co.* (1992), 63 Ohio St.3d 657, 662, 590 N.E.2d 737. My colleagues seem to view as an open question whether unjust

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<sup>1</sup> "Unjust enrichment occurs when a person 'has and retains money or benefits which in justice and equity belong to another[.]'" (Emphasis added.) *Johnson v. Microsoft Corp.*, 106 Ohio St.3d 278, 2005-Ohio-4985, 834 N.E.2d 791, ¶20, quoting *Hummel v. Hummel* (1938), 133 Ohio St. 520, 528, 11 O.O. 221, 14 N.E.2d 923. "[Quasi-contracts based on unjust enrichment are] a legal fiction that does not rest upon the intention of the parties, but rather on equitable principles in order to provide a remedy." *Paugh & Farmer, Inc. v. Menorah Home for Jewish Aged* (1984), 15 Ohio St.3d 44, 46, 15 OBR 142, 472 N.E.2d 704.

enrichment is equitable or legal in nature, but the Supreme Court of Ohio has spoken, in *Johnson and Paugh & Farmer*, fn. 1 supra, and thus, the question, in my view is settled.

{¶39} Since no right to a jury trial ever existed as to appellant's unjust enrichment claim, and it presents an issue of law, it "must be tried by the court, unless referred as provided in the Rules of Civil Procedure." R.C. 2311.04. Thus, unless the court and/or the parties had clearly invoked the procedures in Civ.R. 39(C), appellant's claim for unjust enrichment had to be tried to the court. I share my colleagues' view that the trial court in this case did not employ exemplary practices in communicating about this issue in advance of the verdict. Nonetheless, we must take the record as we find it, and because the record in this case lacks any *explicit* indication that the court and the parties invoked the procedure in Civ.R. 39(C)(2), I cannot say that the jury was impaneled to render a binding verdict on the unjust enrichment claim.

TYACK, J., dissenting.

{¶40} I respectfully dissent.

{¶41} Civ.R. 38(A) indicates that the right to a trial by jury shall be preserved to the parties inviolate on any issue triable of right by a jury.

{¶42} Civ.R. 39(A) requires that, when trial by jury has been demanded, the trial of all issues for which a jury has been demanded shall be determined by the jury except (1) those situations where parties stipulate their consent to certain issues being decided by the trial judge; or (2) the court upon motion or of its own initiative finds the right of jury trial does not exist.

{¶43} Clearly the civil rules contemplate that the determination of what issues are to be tried by the jury be made before trial, not after the jury verdict has been returned. The parties should be informed before the trial if a jury is merely advisory, if only to spare themselves the substantial costs associated with a jury trial.

{¶44} The record before us on appeal is remarkably silent on the issue of what the role of the jury was to be. Counsel for appellees asserts that everyone knew that the jury was to be merely advisory on all issues except on the issue of whether an employment contract was breached. Counsel for appellant asserts that all issues were to be decided by the jury as the trier of fact.

{¶45} The trial judge had an opportunity to clarify the situation before trial and even while the jury was deliberating. No document or statement on the record clearly defined before trial the role of the jury in finding facts. When the issue was raised by counsel for appellees during deliberations, the trial judge expressed a desire to see what the jury decided, rather than clarify the jury's role.

{¶46} I do not feel the trial judge used the best practice by waiting until after the jury had returned a verdict with which he ultimately disagreed before indicating on the record that he viewed the jury's verdict as merely advisory.

{¶47} Had the trial judge followed what to me is a better procedure, the issue of whether unjust enrichment was triable to a jury would not be before us in its present posture. The parties could have briefed the issue and the trial judge could have made a determination before evidence was presented. Clearly, the case law on this issue is conflicting, with the Fifth and Eighth Districts having rendered opinions which conflict with

opinions from the Second and Seventh Appellate Districts. I do not see *Cross v. Ledford*, supra as providing any insight on the issue from the Supreme Court of Ohio's perspective since the *Cross* case deals with rescission of a fraudulent contract and the five paragraphs of the syllabus do not address the differences between cases in law and cases in equity. Because of the conflicts between the districts, the Supreme Court of Ohio should address the issue in the future. Since the issue falls in a gray area of the law, to me the failure of the trial court to address the issue before trial means that the issue was submitted to the jury for purposes of Civ.R. 39. For all the above reasons, I would sustain the first assignment of error.

{¶48} I would also sustain the second assignment of error. I can find no indication that "unjust enrichment" was a claim litigated in the English courts of equity. The Second Appellate District's holdings on the issue seems to rest on assertions that the primary thrust of the claim for relief was equitable in nature. However, given the strong bias for jury trials in the United States, reflected in both the Constitution of the United States and the Constitution of Ohio (not to mention the Ohio Rules of Civil Procedure), I am not inclined to deprive litigants of the right to a jury trial unless the specific claims for relief were tried in the English courts of equity. If the claim for relief falls in a gray area, then the American bias in favor of jury trials should dictate that the claim be litigated as a legal claim with a jury as the trier of fact.

{¶49} Since I believe the first and second assignments of error should have been sustained, I would find the third and fourth assignment of error to be moot. The fifth

assignment of error would also be moot, assuming the jury's verdict is reinstated. I do not see merit in any of the assignments of error in the conditional cross-appeal.

{¶50} Therefore, I would remand the case with instructions to reinstate the jury verdict. Since the majority does not, I respectfully dissent.

DESHLER, J., retired of the Tenth Appellate District, assigned to active duty under authority of Section 6(C), Article IV, Ohio Constitution.

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IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

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Randy A. Turturice,  
Plaintiff-Appellant,

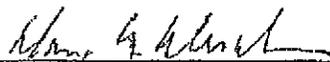
BY: .....No. 06AP-1214  
: (C.P.C. No. 04CV-5604)  
: (REGULAR CALENDAR)

v.  
AEP Energy Services, Inc.,  
Defendant-Appellee and  
Conditional Cross-Appellant.

JUDGMENT ENTRY

For the reasons stated in the opinion of this court rendered herein on April 17, 2008, appellant's five assignments of error are overruled, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed. Costs shall be assessed against appellant.

DESHLER, J. and SADLER, J.

By   
Judge Dana A. Deshler

DESHLER, J., retired of the Tenth Appellate District, assigned to active duty under authority of Section 6(C), Article IV, Ohio Constitution.

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

**FINAL APPEALABLE ORDER**

RANDY A. TURTURICE,

Plaintiff,

vs.

AEP ENERGY SERVICES, INC.,

Defendant.

:  
:  
:  
:  
:

Case No 04CVH05-5644

(Judge Frye)

TERMINATION NO. 18  
BY *[Signature]*

**FINAL JUDGMENT**

In accordance with the Verdict of the Jury returned on November 2, 2006 on the breach of contract claim, and consistent with the decision announced in open court on November 3, 2006 regarding the equitable, quasi contract claim, Final Judgment is entered hereby against plaintiff Randy A. Turturice and in favor of defendant AEP Energy Services, Inc. on the merits, and for the costs of this action.

\*\*\* THIS IS A FINAL APPEALABLE ORDER. \*\*\*

**IT IS SO ORDERED.**

*[Signature: Richard A. Frye]*  
RICHARD A. FRYE, JUDGE

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IN THE COURT OF COMMON PLEAS  
FRANKLIN COUNTY, OHIO  
CIVIL DIVISION

- - -

Randy A. Turturice,            )  
                                  )  
                                  ) Plaintiff,                    )  
                                  ) Case No. 04CVH05-5644  
                                  ) vs.                            )  
                                  ) AEP Energy Services,        )  
                                  ) Inc.,                            )  
                                  ) Defendant.                    )

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TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE RICHARD A. FRYE  
HELD ON FRIDAY, NOVEMBER 3, 2006

- - -

APPEARANCES:

ON BEHALF OF PLAINTIFF:

Russell A. Kelm, Esq.  
Joanne W. Detrick, Esq.  
Cyndi Dawson, Esq.

ON BEHALF OF DEFENDANT:

Bradd Siegel, Esq.  
Adele E. O'Conner, Esq.

- - -

1 decision.

2 MR. KELM: I understand. That's why  
3 David Dunn is in France and Bill Reed is on the  
4 ocean with a 51-foot sailboat in Florida. Had  
5 nothing to do with reasonable compensation when  
6 it was phantom equity, but it does when Randy  
7 Turturice tries to get a bonus for making them  
8 \$16 million.

9 And I think, as I said before, that the  
10 fine of \$81 million to AEP is like someone making  
11 \$80,000 a year paying \$222. It's all  
12 commensurate with the size of defendant and the  
13 culpability of their acts.

14 AEP paid a fine for its wrongdoing. Joe  
15 Foley paid \$350,000, a fine for his wrongdoing.  
16 Randy Turturice hasn't been asked to pay a fine,  
17 but he's given up \$1.3 million of compensation he  
18 earned by a verdict of this jury. I think that's  
19 a fair and equitable result and I think it should  
20 be affirmed by this Court.

21 THE COURT: All right, counsel. Let me  
22 give you my thoughts, because we have our 10:00  
23 hearing waiting for us here.

24 I went through the evidence again last  
25 night. We've been two weeks in trial with this

1 case.

2 I do want to memorialize for the benefit  
3 of the Court of Appeals and the Supreme Court of  
4 Ohio that we had ten jurors deliberate by  
5 agreement of all lawyers and parties. Of those  
6 ten, nine had college degrees, and either five or  
7 six of them had graduate degrees. And the  
8 non-college graduate had 35 years experience as  
9 an employee of Buckeye Steel, if I recall  
10 correctly, and was a very attentive juror as  
11 well, so we had, in every sense of the word, a  
12 blue ribbon jury.

13 The jury went out noon Monday of this  
14 week and did not return their verdict until late  
15 afternoon on Thursday, yesterday, so there should  
16 be no feeling by anyone that ever studies this  
17 case that it was not fully and fairly considered  
18 by as good of a jury as is humanly possible to  
19 get.

20 The jury found that there simply was no  
21 contract for a bonus for the Plaintiff in 2002.  
22 That fact is now certain. It also concluded, in  
23 my view, inferentially, based upon the answer to  
24 Interrogatory No. 4, that AEP did not prove the  
25 elements of the faithless servant affirmative

1 defense. That leaves the Court facing several  
2 uncertainties over several legal issues.

3 That leaves us with several issues.  
4 First, was that jury verdict finding a quasi  
5 contract recovery is proper, legally binding on  
6 this Court, or is the Court instead supposed to  
7 make an independent evaluation of the evidence  
8 and effectively decide the case, giving only such  
9 consideration as Rule 39 may otherwise allow to  
10 the jury verdict.

11 Second, and more fundamentally is, is a  
12 quasi contract recovery proper in this  
13 circumstance either as a matter of law or as a  
14 matter of equity.

15 All of these quasi contract issues are,  
16 by definition, equitable, but what that means is  
17 confusing, at least in my view. The Second  
18 District Court of Appeals has held there's no  
19 right to a jury trial in a case like this one.  
20 That's the Caras, C-a-r-a-s, against Green &  
21 Green, decision in June of 1996, which is cited  
22 by the parties' briefs.

23 The Ohio Supreme Court has held "that a  
24 right to a jury trial does not exist if the  
25 relief sought is equitable rather than legal."

1 That's Digital & Analog Design Corporation  
2 against North Supply Company, 1992 decision  
3 published at 63 Ohio St. 3d 657 at Page 662,  
4 which in turn cites a 1915 Ohio Supreme Court  
5 decision in Taylor against Brown.

6 On the other hand, although not deciding  
7 the point, our research uncovered a Court of  
8 Appeals for Franklin County decision in San,  
9 S-a-n, against Scherer, S-c-h-e-r-e-r, decided on  
10 February 5th, 1998, which appears to have allowed  
11 a jury verdict on a promissory estoppel claim  
12 without discussing whether or not that was  
13 proper, whether or not that constituted the kind  
14 of equitable claim that was not triable to a  
15 jury.

16 I want to make some findings and then  
17 I'll get into how I'm going to resolve the equity  
18 versus jury issue.

19 First of all, there's been reference  
20 this morning to Rule 50(B). I could not believe  
21 the evidence is so one-sided that there's any  
22 basis to contend and conclude that the jury  
23 verdict here may be set aside under the tight  
24 standard in Civil Rule 50(B), assuming for the  
25 moment that this is a jury case. In other words,

1 this is not one in which I would vacate the  
2 verdict if that verdict were binding.

3           However, given the confusing divergence  
4 in the legal authority, I have independently  
5 reviewed the evidence, and while giving fully  
6 dispositive effect to the factual findings of the  
7 jury that I've referred to, that there was no  
8 bonus contract and that Mr. Turturice was not a  
9 faithless servant, in my view, the evidence does  
10 not lead me to conclude that he has a quasi  
11 contract claim under Ohio Law that meets the  
12 tests and satisfies what is required,  
13 notwithstanding the due consideration I've given  
14 to the jury's finding under Interrogatory No. 4.  
15 So the parties are left to fight on in the Tenth  
16 District and ultimately in the Supreme Court of  
17 Ohio as to whether or not this quasi contract  
18 claim in this case is equitable, and what  
19 elements are to satisfy it if it is a jury  
20 verdict and whether or not the verdict is proper.

21           I'll state for the record my findings on  
22 why I don't follow and find consistent my view  
23 with Interrogatory No. 4 from the jury.

24           Before doing so, I want to state for the  
25 record that if there were liability for quasi

1 contract, that in my mind the number picked by  
2 the jury would be the appropriate one. I agree  
3 with them that the 7 percent of the profits  
4 generated by Mr. Turturice in 2002, which is at  
5 the bottom of the scale of possible bonuses to  
6 which he testified, would be the correct number  
7 for me if I were finding in favor of  
8 Mr. Turturice on quasi contract.

9 In addition, I believe under Royal  
10 Electric that the amount of \$1,159,000 would draw  
11 a prejudgment interest, even though it's based on  
12 a quasi contract.

13 Quasi contract claims are discussed at  
14 some length in a decision by the Supreme Court of  
15 Ohio called Hummel, H-u-m-m-e-l, versus Hummel,  
16 which was decided in 1938, and is published at  
17 133 Ohio St. 520. Hummel was then cited with  
18 approval in Hambleton, H-a-m-b-l-e-t-o-n, against  
19 R.G. Barry Corp., decided in 1984, published at  
20 12 Ohio St. 3d 179 at Page 183.

21 In addition, we've had our attention  
22 called this morning to the US Health Practices  
23 against Blake decision by the Tenth District  
24 Court of Appeals decided in March of 2001.

25 All of these cases seem to focus on

1 several essential elements, and it is the third  
2 of them which in this situation is case  
3 dispositive for me. That is the element defined  
4 as "retention of the benefit by the defendant  
5 under circumstances where it would be unjust to  
6 do so without payment (unjust enrichment)."  
7 That's a quote from the way the Supreme Court  
8 described the element in the Hambleton and Hummel  
9 cases.

10 This is the most equitable of the  
11 elements, I think, in the description of quasi  
12 contract, admittedly not a well-developed body of  
13 law. It is somewhat like Justice Potter Stewart's  
14 well-known description of obscenity that a judge  
15 knows it when he or she sees it.

16 But it is clear as well that quasi  
17 contract law does embrace a few rules. One that  
18 seems to be important to mention here is that  
19 Ohio does not recognize a cause of action for  
20 so-called detrimental reliance. There must be  
21 more. There must be this inequity, this  
22 injustice element, and that necessarily means  
23 that if there's no claim for just detrimental  
24 reliance, that the subjective expectation of a  
25 bonus of Mr. Turturice is only part of the facts

1 that have to be proven.

2 In addition, the Tenth District Court of  
3 Appeals case which holds there's no claim for  
4 detrimental reliance, which is Interstate Gas  
5 Supply against Calex, C-a-l-e-x, Corporation, it  
6 was decided on Valentine's Day this year,  
7 February 14th, 2006. It's on the Supreme Court  
8 website at 2006-Ohio-638. And in particular, the  
9 holding there's no claim for detrimental reliance  
10 is Paragraphs 104 and 105.

11 In addition to making that observation,  
12 the Tenth District quotes a Minnesota Supreme  
13 Court case that says "the test is not whether the  
14 promise should be enforced to do justice, but  
15 whether enforcement is required to prevent an  
16 injustice." That's a subtle but meaningful  
17 distinction in this case.

18 The focus of this controversy is a bonus  
19 claimed by a salaried, white-collar employee.  
20 Mr. Turturice has been found to have had no  
21 legally enforceable contract right to a bonus.  
22 The question then becomes: Is a bonus something  
23 that the law, and more accurately the equity side  
24 of the law, views as unjust for AEP to retain?  
25 Is a bonus something that must be enforced here

1 to prevent an injustice? Is it unconscionable  
2 not to pay Mr. Turturice a bonus earned on the  
3 basis of the work he did in 2002 as proven by  
4 this record? My answer is no.

5           Paying a bonus may be a nice thing for  
6 an employer to do, but being nice is not the  
7 essence of preventing an injustice, as these  
8 cases have somewhat loosely defined the equitable  
9 concept.

10           In thinking about this, I was reminded  
11 of Dickens' famous book, *A Christmas Carol*. Bob  
12 Cratchett worked dawn to dusk, six days a week,  
13 in Scrooge's counting house. After midnight  
14 visits from Christmas past, present and future,  
15 however, Ebenezer Scrooge discovered that money  
16 wasn't everything. He discovered what some  
17 people at AEP only came to discover after  
18 everything blew up in 2002, that cash wasn't  
19 king.

20           Scrooge's humanity carried around his  
21 avarice and greed, and he hopped up out of bed on  
22 Christmas morning and carried a bonus over to  
23 poor Bob Cratchett and his family, a Christmas  
24 goose to feed family and bring happiness to  
25 crippled Tiny Tim. Audiences have loved that

1 book and the stage play that tours through  
2 Columbus every year, because the story reminds us  
3 that human kindness can triumph over avarice and  
4 greed, and that gifts can come out of even a  
5 Scrooge, notwithstanding the phrase that cash is  
6 king.

7 But I suggest the legal point of my  
8 story is this: The law did not force Scrooge to  
9 give a bonus. No chancellor in equity in 19th  
10 century England would have dreamed to order  
11 Scrooge to dip into his own pocket and go buy a  
12 Christmas goose and bonus Bob Cratchett on  
13 Christmas morning, no matter how hard Cratchett  
14 worked and no matter how rich Scrooge had made  
15 himself through that work.

16 From what I can tell from the law, we  
17 still live in a state, in Ohio, in which  
18 employment contracts govern the terms and  
19 conditions of virtually all aspects of the  
20 employment relationship. Absent express  
21 agreement otherwise, an employer can pay his or  
22 her employee as little as the employee will  
23 accept, so long as it is above the minimum wage.

24 Absent express agreement an employer can  
25 terminate the employment of a subordinate at any

1 time for virtually any reason, as long as race,  
2 gender, age or other statutorily-prohibited cause  
3 is not the basis. Against this back drop, harsh  
4 in some respects as it may seem, how can there be  
5 any equitable right to a bonus? For, after all  
6 is said and done, a bonus is, by definition, a  
7 windfall, even for the most valuable employee.

8 If one has the misfortune to work for an  
9 unrepentant Scrooge, how is it the law's  
10 obligation to say that Scrooge must pay more than  
11 his contract and the minimum wage laws otherwise  
12 require? And if Mr. Turturice is entitled to  
13 call upon equity in circumstances like this one,  
14 will not the innumerable employees whom we all  
15 know at their daily lives that work at their jobs  
16 above and beyond the call of duty, and who defy  
17 the criticism of their family that they are  
18 workaholics, not then be able to also file  
19 similar lawsuits, seeking to rectify the  
20 injustice of their employment contracts with  
21 their own Scrooge?

22 So, in my view, looked at in the context  
23 of employment law in Ohio and Free Enterprise  
24 economy that we -- the so-called Free Enterprise  
25 economy that we have in America, and even in the

1 context of comments like were made to  
2 Mr. Turturice, "We're all here for the bonus,"  
3 the idea that a court can step in and as a matter  
4 of equity compel payment of a bonus simply fails.  
5 Scrooge may be despised, but his conduct is not  
6 illegal or so manifestly unjust that equity  
7 provides a remedy.

8 And I reach the same conclusion in  
9 looking at this case from a another perspective,  
10 and I'll mention that. That is to look more  
11 broadly at the totality of circumstances,  
12 including what Mr. Turturice individually  
13 contributed to AEP, and balancing against his  
14 contributions his claim that a lack of a bonus  
15 was manifestly unjust.

16 In thinking about it in this context, I  
17 accept the apparently undisputed evidence that he  
18 contributed a great deal of profit, something in  
19 the range of \$16 million, to AEP's bottom line  
20 between January and October first 2002. I accept  
21 that for less productive work he had been richly  
22 rewarded with a \$300,000 bonus for 2001. And I  
23 accept that those around Mr. Turturice were  
24 richly rewarded for 2002, even after he was  
25 fired, including Mr. Reed, where the buck

1           apparently did not stop very hard.

2                   I accept that this gas and electric  
3 trading by AEP with their borrowed employees from  
4 Enron was a version of high stakes gambling  
5 intended to enhance the bottom line for AEP  
6 shareholders. And that in that environment, the  
7 entire commodity trading industry generally  
8 operated on relatively small salaries with the  
9 potential of huge, and indeed, at times,  
10 obscenely large bonuses, if, at the end of the  
11 year, everything worked out as people hoped.

12                   Again, the catch phrase, "Cash was  
13 King," and, "We're all here for the bonus" that  
14 we heard about in trial, I think captures  
15 accurately that environment.

16                   But in deciding whether a quasi  
17 contractual remedy is appropriate to prevent an  
18 injustice for Mr. Turturice, one must first  
19 conclude that leaving him without any bonus would  
20 be an injustice, and that requires looking  
21 broadly at everything and not just at these  
22 obscenely large bonuses and cash-is-king  
23 environment.

24                   Mr. Turturice was introduced to the  
25 trading environment at AEP in the late 1990s in

1 order to help bring to bear his financial and  
2 accounting training and background so that the  
3 company could control the risk of otherwise  
4 uncontrollable and unregulated traders. Kayvon  
5 Malik, of course, is a poster child for that  
6 risk. According to the evidence, he lost  
7 \$87 million of AEP's money trading natural gas  
8 for AEP in 2002 before he resigned or was fired  
9 part way through the year.

10 Having been hired to help police these  
11 traders and to use his accounting and finance  
12 background to protect AEP from potential ruin,  
13 Mr. Turturice soon adopted the traders'  
14 perspective that cash was king, and he began to  
15 envy the traders. So Mr. Turturice thought to  
16 become one of them.

17 I have no doubt he did this through long  
18 hours of work and diligent study. But I also  
19 have no doubt that he did it in pursuit of  
20 incredible wealth, for which he was more than  
21 willing to invest incredibly long days working  
22 under very high stress, but in an environment  
23 that never generally guaranteed him any success  
24 beyond his base salary, in part because he could  
25 never guarantee he'd be profitable as a trader,

1 assuming he moved into trading.

2 While tolerating high stakes commodity  
3 gambling, the evidence is irrefutable that AEP  
4 also sought to be something other than "Another  
5 Enron Product," as the initials AEP were referred  
6 to within AEP. They tried to police in some  
7 sense their highly educated, highly driven  
8 traders who were chasing visions of highly traded  
9 rewards.

10 I have never heard of anything like the  
11 evidence here of a business that's sent home to  
12 each employee's home a video about corporate  
13 honesty and a corporate compliance program, so  
14 that each individual employee could be assured of  
15 a personal opportunity to understanding visually  
16 audibly, and otherwise, the corporate culture.

17 Now, admittedly, that corporate culture  
18 was somewhat at variance with these commodity  
19 trading folks, but nevertheless, that video to me  
20 moves very large in this case. Over and above  
21 that, the corporate culture of honesty was  
22 portrayed in HR brochures and employee handbooks  
23 so that the 20,000 employees, including  
24 Mr. Turturice, were exposed to far more than many  
25 employees in many businesses.

1                   Beyond that, AEP put in place an 800  
2                   number, call-in line, where employees could call  
3                   in total anonymity to assure that if they had  
4                   concerns about irregularities in the workplace,  
5                   there was someplace to blow the whistle and see  
6                   them addressed and presumably resolved. To be  
7                   sure, Mr. Kemp brought out the evidence that very  
8                   few people ever use the 800 number. But the fact  
9                   that it was there, that it was advertised to  
10                  employees, is, in my view, crucial when we search  
11                  for the equity in the circumstances that involve  
12                  Mr. Turturice in 2002.

13                  Beyond the video, the HR brochures, the  
14                  HR handbooks, the 800 number, with his background  
15                  in finance and accounting, Mr. Turturice had to  
16                  know that this was a somewhat unusual employer  
17                  where honesty mattered. AEP was highly  
18                  regulated. Leaving aside environmental  
19                  regulations on smoke stack emissions and OSHA  
20                  safety rules, this was a publicly traded company  
21                  with SEC reporting obligations and concomitant  
22                  obligations for annual audits.

23                  In addition, there was a ratemaking side  
24                  of the business, at least on the power-generation  
25                  side, with things like PUCO and other state and

1 federal regulators who had oversight. Over and  
2 above that, although clearly Mr. Turturice was  
3 not well trained in the subtleties of it, there  
4 were FERC and Commodity Future Trading Commission  
5 rules.

6 In this environment, Mr. Turturice had  
7 to understand that trading commodities in public  
8 markets had implications for the legal,  
9 financial, and reputational health of his  
10 employer.

11 Those expectations all served to  
12 reinforce, for any senior level employee,  
13 particularly again, someone like Mr. Turturice  
14 with an accounting and finance background, that  
15 bookkeeping and reporting of numbers was not some  
16 informal sidelight to the business that could be  
17 taken lightly.

18 Now, while the jury has not found  
19 pervasive misconduct in 2002 such as to  
20 constitute unfaithful servant under that  
21 affirmative defense, there was an undeniable  
22 admitted lack of accurate report to Gas Daily by  
23 Mr. Turturice. The Court recognizes that was  
24 motivated by Joe Foley and others superior in the  
25 organization to Mr. Turturice. But nevertheless,

1 the Court can't disregard the fact that it  
2 resulted in findings against AEP by federal  
3 regulators.

4 An \$81 million penalty may not be much  
5 of a penalty for a company this big, but the size  
6 of the penalty is irrelevant. Similarly, the  
7 direct impact on the stock price is irrelevant.  
8 Any penalty blemishes the public reputation of a  
9 business like this one. Any investigation causes  
10 those in management untold hours to attend  
11 meetings with regulators and with lawyers. It  
12 costs money out of pocket to hire lawyers for  
13 witnesses like Mr. Reed. And overall, it becomes  
14 a significant distraction from the ordinary  
15 course of business.

16 Just as the Plaintiff could not leave  
17 behind his past professional education and  
18 experience if he were to be promoted to the  
19 highly demanding NYMEX trading job to which he  
20 aspired and which he achieved in the spring of  
21 2001, so, too, I conclude Mr. Turturice could not  
22 be careless about corporate compliance issues,  
23 the potential of criminal and civil penalties  
24 from the government, or other legal harm which  
25 might be visited upon his employer related to

1 misrepresentation of trading numbers of which  
2 Mr. Turturice had actual knowledge, or just as  
3 blindly following Joe Foley's apparent offhand  
4 comments on the trading floor to do things like  
5 "move it up," or "Squeeze that spread," came with  
6 risks on the marketplace of commodity trading.

7 So, too, blindly following Foley's lead  
8 in reporting risky numbers in reporting trading  
9 numbers was a risky play for which Mr. Turturice  
10 unfortunately did not hedge his bet by getting an  
11 explicit bonus contract in place for 2002, or by  
12 self-reporting to the 800 number or otherwise  
13 bringing it to management's attention.

14 The statements, "Gas Vegas" and "Another  
15 Enron Product," were accurate descriptions of  
16 this whole chapter of AEP's corporate life,  
17 which, as an aside, I'm glad is behind it.

18 But balanced against that, there's the  
19 greater weight of the evidence that  
20 notwithstanding Joe Foley and notwithstanding  
21 this cash-is-king mentality, that AEP did not  
22 want profits to be earned at any risk or at any  
23 price. Mr. Turturice helped obscure a ticking  
24 time bottom of past inaccurate reporting of gas  
25 trading prices for nine months in 2002. Even

1 after Enron exploded in late 2001.

2 All things considered, against the  
3 background presented, it is not unjust for AEP  
4 not to have paid him a bonus in 2002.

5 In closing, I might mention the fact  
6 that two other people, according to the evidence,  
7 knew about illegal gas reporting and were not  
8 fired, and that internal investigations did not  
9 reach up far into the AEP management structure as  
10 Mr. Cohn did his investigation are facts to me  
11 which are simply irrelevant to what was  
12 manifestly just or unjust with this particular  
13 Plaintiff.

14 To bring up those points is a little  
15 like a speeding driver out on the freeway who,  
16 after he's caught, complains to the officer that  
17 other drivers were speeding, too. In that  
18 circumstance, the law says, "So what?" The key  
19 issue is what conduct the driver was doing who  
20 was actually pulled over and not whether others  
21 equally culpable escaped down the road.

22 Here, AEP was entitled to consider that  
23 Mr. Turturice had shown a lack of integrity and,  
24 arguably, committed flagrant violations of his  
25 obligation. Since he had no bonus contract to

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protect him, the Plaintiff cannot call on a court of equity to overturn AEP's decision. AEP may be the proverbial Scrooge, but Mr. Turturice is entitled to no Christmas goose from this Court.

The foregoing constitute the Court's findings of fact and conclusion of law. Judgement will be entered for AEP on the merits and for costs. We are adjourned.

- - -

(Thereupon, the hearing was concluded at 10:30 o'clock a.m. on Friday, November 3, 2006.)

- - -

C E R T I F I C A T E

State of Ohio, )  
County of Franklin,)

I, JULIE A. LONG, Registered Professional Reporter and Notary Public in and for the State of Ohio, hereby certify that the foregoing is a true and accurate excerpt of the transcript of the proceedings hereinbefore set forth, as reported in stenotype by me and transcribed by me or under my supervision.

*Julie Long*

COPY

JULIE A. LONG  
Registered Professional Reporter and  
Notary Public in and for the State of Ohio

My Commission Expires: 04-08-2007

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IN THE COMMON PLEAS COURT  
FRANKLIN COUNTY, OHIO

RANDY A. TURTURICE, :  
 :  
 Plaintiff, :  
 :  
 v. :  
 :  
 AEP ENERGY SERVICES, INC., :  
 :  
 Defendant. :

Case No. 04CVH05562

Judge Frye

FILED:  
COMMON PLEAS COURT  
FRANKLIN CO, OHIO  
NOV -2 PM 3:05  
CLERK OF COURTS

GENERAL VERDICT FORM

We the jury, being duly impaneled, hereby find in favor of (Check One):

Randy Turturice

AEP

Having found in favor of Randy Turturice, we the jury hereby award damages to

Randy Turturice against AEP as follows:

\$1,159,016.00 in Damages

Jennifer Corsi  
Bob Gury  
Don Radomsky  
Wendy  
Amy Korenstein

Judy Walker  
Christina  
Marko Bencala

IN THE COMMON PLEAS COURT  
FRANKLIN COUNTY, OHIO

RANDY A. TURTURICE,

Plaintiff,

v.

AEP ENERGY SERVICES, INC.,

Defendant.

Case No. 04CVH055624

Judge Frye

FILED  
COMMON PLEAS COURT  
FRANKLIN CO. OHIO  
2004 NOV -2 PM 3:07  
CLERK OF COURTS

GENERAL VERDICT FORM

We the jury, being duly impaneled, hereby find in favor of (Check One):

Randy Turturice

AEP

Having found in favor of Randy Turturice, we the jury hereby award damages to

Randy Turturice against AEP as follows:

\$1,159,016.00 in Damages

Jennifer Corsi  
Doug Lewis  
Don Radomsky  
Mark [unclear]  
Amy Korenstein

Judy Walker  
Christina [unclear]  
Martha [unclear]  
\_\_\_\_\_  
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IN THE COMMON PLEAS COURT  
FRANKLIN COUNTY, OHIO

FILED:  
COMMON PLEAS COURT  
FRANKLIN CO., OHIO  
2006 NOV -2 PM 3:04  
CLERK OF COURTS

RANDY A. TURTURICE, :  
 :  
 Plaintiff, :  
 :  
 v. : Case No. 04CVH05 564  
 :  
 AEP ENERGY SERVICES, INC., : Judge Frye  
 :  
 Defendant. : Interrogatories to Jurors

In order to answer "Yes" or "No" below, at least 8 out of 10 of you need to agree. If at least 8 out of 10 of you agree, each of you that agree should sign your name.

Interrogatory No. 1

Do you find that the Plaintiff proved by a preponderance of the evidence that a contract for a bonus in 2002 existed between Randy Turturice and AEP.

YES  NO

All those that agree sign below:

*James Metcalfe*  
*Christina Price*  
*Frank R. Riddle*  
*Jessie Carri*  
*Don Radanov*

*Mark S.*  
*Ann Korvick*  
*Judy Walker*  
*George H. H.*

If the answer of eight or more jurors to Interrogatory No. 1 is "Yes," you must move to Interrogatory No. 2. If the answer of eight or more jurors to Interrogatory No. 1 is "No," answer Interrogatory No. 4, and do not complete Interrogatories 2 and 3.

Interrogatory No. 2

If you find that a contract existed between the parties, did AEP breach that contract?

YES / NO

All those that agree sign below:


If the answer of eight or more jurors to Interrogatory No. 2 is "Yes," you must move to Interrogatory No. 3, and do not answer Interrogatory No. 4. If the answer of eight or more jurors to Interrogatory No. 2 is "No," please complete the Verdict form.

**Interrogatory No. 3**

If you find that a contract existed between the parties and that AEP breached the contract, do you find that plaintiff's conduct was faithless to the company in the year 2002.

YES / NO

All those that agree sign below:

_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

If 8 or more jurors answer "yes" or "no" proceed to the general verdict form. Do not answer Interrogatory No. 4.

Interrogatory No. 4

Do you find that the Plaintiff proved by a preponderance of the evidence that he had no contract for a bonus in 2002, but performed services for AEP's benefit, AEP knew or should have known that the services were given with the expectation of reasonable value, that AEP had a reasonable opportunity to prevent the Plaintiff from giving services prior to them being rendered by the Plaintiff, and that retention of the benefit by AEP would be manifestly unjust without payment of a bonus to the Plaintiff?

FILED  
COMMON PLEAS COURT  
FRANKLIN CO. OHIO  
2006 NOV -2 PM 3:06  
CLERK OF COURTS

YES / NO

All those that agree sign below:

*George Miatello*  
*Christina Rice*  
*Maisha Bass*  
*Jennifer Corri*  
*Don Koolman*

*Mark S...*  
*Amy Karvatin*  
*Judy Walke*  
*George Henry*

Complete the General Verdict consistent with your answer.