

IN THE SUPREME COURT OF OHIO

RANDY A. TURTURICE, :  
 :  
 Plaintiff-Appellant, : Case No. 08-1139  
 :  
 v. : On appeal from the Franklin County  
 : Court of Appeals, Tenth Appellate District  
 :  
 AEP ENERGY SERVICES, INC., :  
 : Court of Appeals Case No. 06APE-12-1214  
 :  
 Defendant-Appellee. :

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DEFENDANT-APPELLEE AEP ENERGY SERVICES, INC.'S MEMORANDUM  
IN OPPOSITION TO PLAINTIFF-APPELLANT'S MEMORANDUM  
IN SUPPORT OF JURISDICTION

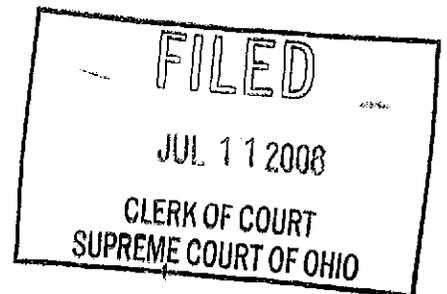
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**RESPONSE TO PLAINTIFF-APPELLANT'S EXPLANATION OF WHY THIS IS A CASE  
OF PUBLIC AND GREAT GENERAL INTEREST**

This case neither requires nor justifies the attention of Ohio's highest Court. Plaintiff-Appellant Turturice was terminated in October 2002 along with four other gas traders by AEP Energy Services, Inc. ("AEPES") for admitted falsification of market price trading data reported to a leading industry trade publication. Turturice admits that he did, in fact, falsify this data, and he makes no challenge in this lawsuit that his termination was unlawful. Rather, despite the fact this data falsification led to a lengthy and costly federal government investigation, an \$81 million civil fine to AEPES, and a large-scale reduction-in-force that caused numerous innocent employees to lose their jobs, Turturice simply claims that it was "unjust" for AEPES not to pay him a bonus of over One Million Dollars for the partial year of work he completed in 2002 prior to his termination for misconduct.

Under AEPES's written bonus plan in effect at the time, Turturice clearly would not have been eligible for a bonus under these circumstances. So Turturice instead brought this lawsuit based on a purported oral promise that he would receive an annual bonus between 7% and 15% of the profits reflected in his trading book, although he also admits that no one promised him he would receive anything if he worked less than a full year, let alone, if he were terminated for misconduct part way through the year. The jury rejected Turturice's contract claim but, sitting in an advisory capacity, recommended an award of \$1,159,016 on his unjust enrichment claim, which the trial court promptly rejected as being inconsistent with the evidence at trial.

The trial court clearly was correct in holding that Turturice's evidence failed to meet the standard set forth by this Court in *Hummel v. Hummel* (1938), 133 Ohio St. 520, 528, requiring Turturice to demonstrate that AEPES retained "money or benefits which in justice and equity belong to another." The Court of Appeals agreed. Moreover, as argued in further detail below,

AEPES contends the appropriate standard for proving an unjust enrichment claim in this case is even higher. In *Aultman Hospital Ass'n v. Community Mut. Ins. Co.* (1989), 46 Ohio St. 3d 51, 55, this Court held that there can be no unjust enrichment claim where a contract covers the services in question unless a plaintiff can demonstrate “fraud, illegality or bad faith.” This Court’s decision in *Lake Land Employment Group of Akron, LLC v. Columber* (2004), 101 Ohio St. 3d 242 makes clear that although Turturice was employed at-will, his employment relationship was “contractual in nature.” Hence, absent fraud, illegality or bad faith, Turturice could not bring an unjust enrichment claim seeking more than his contractually-agreed-upon annual salary.

Whether Turturice’s quasi-contract claim is reviewed under the standard of “fraud, illegality or bad faith” recognized by this Court in *Aultman* or under the more lenient standard set forth in *Hummel*, the result is the same -- Turturice failed to produce legally sufficient evidence to support his claim. As such, it is unnecessary for this Court to address in the abstract or in general the proposition whether a right to a jury exists on an unjust enrichment claim because, in this particular case, there were no triable issues to submit to a jury. AEPES respectfully requests that this Court therefore decline to exercise its discretionary jurisdiction to consider this appeal on its merits.

#### **STATEMENT OF THE CASE AND FACTS**

Turturice’s claims proceeded to trial on a breach of contract theory and a quasi-contract theory of unjust enrichment. Before trial began, the parties submitted briefs on whether Turturice had a jury trial right on his quasi-contract claim. The trial court advised the parties that while Turturice was entitled to a jury trial on his contract claim, it had decided the jury would be empanelled on the quasi-contract claim only in an advisory capacity.

The case was tried during the week of October 23, 2006. Consistent with its pre-trial decision to submit Turturice's contract claim to the jury and to try Turturice's quasi-contract claim to the court with the jury sitting in an advisory capacity pursuant to Civil Rule 39, the trial court issued jury instructions and presented interrogatories to the jury covering each of Turturice's claims. The jury ultimately held that Turturice failed to prove any contract for a bonus but, sitting in its advisory capacity, recommended an award of \$1,159,016 on Turturice's quasi-contract claim. The next morning, following arguments from counsel, the trial court rejected the advisory verdict and, for the reasons explained in his November 3, 2006 bench opinion (Tr. V at 186-206), the court entered judgment in AEPES's favor. Turturice subsequently filed his Notice of Appeal with the Tenth District Court of Appeals on December 1, 2006. On April 17, 2008, the Court of Appeals affirmed the judgment of the trial court.<sup>1</sup>

**ARGUMENTS IN RESPONSE TO PLAINTIFF-APPELLANT'S PROPOSITIONS OF  
LAW**

**A. Contrary to Plaintiff-Appellant's First Proposition of Law, He Was Not Entitled to a Jury Trial On His Quasi-Contract Claim.**

Turturice has argued that there is a general right to a jury on an unjust enrichment claim under Ohio law, the Ohio Constitution, Ohio Revised Code § 2311.04, and common law, and he cites to various decisions from other jurisdictions and commentators to support this argument. The authority upon which Turturice relies views the history of the development of an action for unjust enrichment as demonstrating that it was an action at law providing for legal remedies, but he discounts the significance that, from its inception, unjust enrichment was consistently characterized as an "*equitable action*," the gist of which was "that the defendant, upon the circumstances of the case, is *obliged by the ties of natural justice and equity* to refund the money." *Moses v. Macferlan*,

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<sup>1</sup> On June 24, 2008, the Court of Appeals denied Turturice's Motion to Certify a Conflict, and issued a judgment entry to that effect on July 9, 2008.

2 Burr. 1005 (emphasis added). See also *Hummel*, 133 Ohio St. at 526 (quoting *Moses v. Macferlan*); *Paugh & Farmer, Inc. v. Menorah Home for Jewish Aged* (1984), 15 Ohio St. 3d 44, 46 (determining that quasi-contract claims 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.”). In fact, Turturice has cited no Ohio decision holding that there is a right to a jury under these circumstances and, indeed, courts in Ohio and in many other jurisdictions have reached the opposite conclusion.<sup>2</sup>

Turturice’s counsel also contends that regardless of whether the action was properly viewed as sounding in equity or in law, because he only seeks monetary relief in this case he was entitled to a trial by jury under O.R.C. § 2311.04. However, Justice Sadler’s separate opinion below points out that this same statute makes clear that issues of law are reserved for the court and, because an unjust enrichment claim is in actuality a claim based on contracts implied in law, § 2311.04 should therefore be read as reserving to the court the determination of such a claim. (Opinion at ¶ 38.)

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<sup>2</sup> See, e.g., *Ashmore v. Eversole* (Nov. 29, 1996), Montgomery App. No. 15672, 1996 Ohio App. LEXIS 5369, at \*11-\*12 (“we can find no error in the trial court’s decision to keep the issues of . . . unjust enrichment from the jury . . . . [T]hose issues . . . were issues in equity; and were not triable of right by jury”); *Art Paradise, Inc. v. Chromick* (Dec. 27, 1996), Montgomery App. No. 15877, 1996 Ohio App. LEXIS 5963, \*22 (holding that where the “‘primary thrust’ of the action was equitable in nature,” the plaintiffs “were not entitled to a jury trial”); *Merex A.G. v. Fairchild Weston Systems, Inc.* (C.A. 2 1994), 29 F.3d 821, 825 (“money damages may constitute equitable relief where ‘the court is not awarding damages to which the plaintiff is legally entitled but . . . to prevent unjust enrichment’”); *SEC v. Commonwealth Chem. Sec., Inc.* (C.A. 2 1994), 574 F.2d 90, 95 (disgorgement of profits and unjust enrichment not triable to jury despite award of money damages); *L.K. Comstock & Co. v. Beacon Constr. Co.* (E.D. Ky. 1993), 932 F. Supp. 906, 909 n.1 (“plaintiff sought damages in quantum meruit, . . . based in equity, and presented an issue for the court rather than a jury”); *Bowden v. Grindle* (Me. 1994), 651 A.2d 347, 351 (“Unjust enrichment is an equitable action and, thus, one not triable of right by jury.”); *Vlieger v. Farm for Profit, R & D, Inc.* (Iowa App. Aug. 17, 2005), No. 5-389, 2005 Iowa App. LEXIS 858, at \*2-3 (case involving quantum meruit claim seeking monetary damages and quantum meruit claim submitted to court rather than the jury with the court noting that the “legal issues were submitted to a jury, and equitable issues submitted to the court”); and *McTeague v. MacAdam, MacAdam & McCann, P.A.* (Super. Ct. Me. Aug. 11, 2000), No. CV-00-249, 2000 Me. Super. LEXIS 180, \*6 (the claim was “an equitable claim for unjust enrichment as to which there is no jury trial right” seeking “purely an equitable remedy” even though monetary relief was sought).

This is consistent with numerous decisions of this Court and lower courts that issues of law are determinations to be made by the court.<sup>3</sup>

In any event, as explained more thoroughly below, whether Turturice's unjust enrichment claim is evaluated under the standard of "fraud, illegality or bad faith" set forth by this Court in *Aultman* or under the lesser standard set forth in *Hummel*, because the evidence presented by Turturice was legally insufficient to support his quasi-contract claim, there were no issues of fact to be decided by the jury under § 2311.04 and this Court's precedents. Thus, it is unnecessary for this Court to determine whether or not there is an entitlement to a jury on an unjust enrichment claim in the abstract or in general because there was no right to a jury based on the specific facts of this case. As a result, jurisdiction on this proposition of law should be denied.

**B. Contrary to Plaintiff-Appellant's Second Proposition of Law, The Jury Was Not Retroactively Empanelled.**

Turturice erroneously asserts that the trial court did not make a finding that a right to a jury trial did not exist on the equitable claim until after the jury returned its verdict and that the trial court's ruling following the verdict amounted to a judgment notwithstanding the verdict.

(Memorandum at p. 11.) This is just not true and, as the Court of Appeals concluded, although the trial court could have been more clear, there was no question after reviewing the evidence that "the court did not intend to place the equitable claims before the jury as of right." (Opinion at ¶ 7.) The trial court advised the parties – in response to the parties' pre-trial briefing of the issue and before

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<sup>3</sup> See *Alexander v. Buckeye Pipeline Co.* (1978), 53 Ohio St. 2d 241. See also *Zupancic v. Carter Lumber Co.*, Franklin App. No. 01AP-1248, 2002-Ohio-3246, at ¶ 7 ("The issue before this court is a question of law--whether or not appellee can maintain a claim for unjust enrichment under the facts presented."); *Brune-Harpenau-Torbeck Builders v. Torbeck* (Dec. 24, 1998), Hamilton App. No. C-971072, 1998 Ohio App. LEXIS 6234, at \*6 fn 8 ("The issue raised as to the specific elements that must be proven in a quantum meruit action is a question of law."). Also, as noted in Ohio Jury Instructions, "[w]hether retention of the benefit by the defendant would be unjust under the circumstances is a question of law. Before [the quantum meruit] instruction is given, the judge must insure that the plaintiff's evidence, if believed, satisfies this element." O.J.I. § 253.35 (2007).

trial ever began – that it had decided it would try Turturice’s quasi-contract claim with an advisory jury pursuant to Civil Rule 39. Further, at the end of day on October 26 – which was the last court day preceding closing arguments – the trial judge noted on the record that he did not want to hear the substance of an evidence proffer by AEPES because he was going to have to decide part of the case, thus confirming the court’s earlier ruling that Turturice’s quasi-contract claim would be tried to the court with an advisory jury. (Tr. IV at 198.) Similarly, the trial court made clear that it was not issuing a judgment notwithstanding the verdict by rendering its own judgment on this claim. (Tr. V at 189-90.)

On October 30, 2006, just before closing argument, the trial court reviewed *Tull v. United States* (1987), 481 U.S. 412, to determine how the jury’s findings on Turturice’s contract claim might affect the court’s ability to rule on the quasi-contract claim. There was one issue in particular that concerned the court: AEPES’s “faithless servant” defense. AEPES asserted this defense to both the contract claim and the quasi-contract claim. The trial court answered this concern by looking to *Tull*. Applying this decision, the trial court noted that “the jury has to determine whether or not there was a contract[.]” (Tr. V at 2.) If the jury found a contract, it would also “have to determine whether or not the faithless servant defense applies.” (Tr. V at 2.) These issues, the court held, “are common issues to both [the contract and quasi-contract] claims, and we have to follow whatever the jury verdict is.” (Tr. V at 3.) Turturice’s over-reading of this passage to suggest that the court was reversing its earlier decision on who should try the quasi-contract claim is misleading and defies both common sense and any reasonable reading of the *Tull* decision itself, which had absolutely nothing to do with whether plaintiffs have a jury trial right on a quasi-contract claim. The passage simply demonstrates that the trial court felt it was bound to follow the jury as to its conclusions on the contract and faithless servant issues. The Court of

Appeals disagreed with Turturice's attempt to characterize the trial court's discussion as a declaration that all matters in the case would be tried to the jury and correctly determined that the trial "court did not intend to place the equitable claims before the jury as of right." (Opinion at ¶ 7.) As such, jurisdiction on this proposition of law should be denied.

**C. Contrary to Plaintiff-Appellant's Third Proposition of Law, His Quasi-Contract Claim Fails As A Matter of Law.**

Even if a right to a jury trial exists on an unjust enrichment claim, there are no triable issues of fact in this case because AEPES is entitled to judgment as a matter of law. Whether evaluated against the standard set forth in *Hummel*, which the trial court and Court of Appeals applied, or against the standard of "fraud, illegality or bad faith" established in *Aultman*, which AEPES contends is the more appropriate standard, there were no triable issues of fact for a jury to decide because Turturice failed to present sufficient evidence to satisfy either standard. As such, it is unnecessary for this Court to determine whether a right to a jury trial exists in the abstract because, in this particular case, Turturice's unjust enrichment claim fails as a matter of law.

1. Turturice Failed To Show Fraud, Illegality or Bad Faith.

In *Aultman*, this Court determined that because the contract described the nature of the services to be rendered and the compensation to be paid, absent fraud, illegality or bad faith, the plaintiffs were "entitled to compensation only in accordance with the terms of the written agreement." 46 Ohio St. 3d at 55. Here, the jury found that Turturice did not have any contract for a bonus (See Jury Interrogatory No. 1), and Turturice has not challenged that ruling. But this does not mean that Turturice had no contract at all, however. To the contrary, Turturice clearly had a contract to render services for his agreed annual salary of \$105,000. (Tr. I at 134; Tr. V at 18.)

The refusal of the courts below to apply *Aultman* because of the at-will nature of Turturice's employment is inconsistent with this Court's decision in *Lake Land*. *Lake Land* makes

clear 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.” *Id.* at 247 (citing *Mers v. Dispatch Printing Co.* (1985), 19 Ohio St. 3d 100). The fact that AEPES could have terminated Turturice “at-will” does not mean, of course, that there was no employment contract governing Turturice’s right to compensation for the services he rendered. If, for example, Turturice had been terminated without receiving any earned portion of his salary, he certainly would have had a breach of contract claim for the unpaid wages.

Where, as here, the parties have an express contract whereby “the employee agrees to perform work” and “the employer agrees to pay the employee at an agreed rate,” *Aultman* thus dictates that an unjust enrichment claim can lie only where the plaintiff establishes fraud, illegality or bad faith. In *Howland v. Lyons* (Mar. 7, 2002), Cuyahoga App. No. 77870, 2002 Ohio App. LEXIS 1033, at \*7-8, the court accordingly recognized that “[i]f 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. Absent at least one of these elements, imposition of hardship upon one party or advantage to the other does not relieve the parties from their agreement.” Here, Turturice clearly had a contract to work for AEPES for an agreed annual salary of \$105,000, and the jury held he did *not* have a contract for any bonus. Accordingly, “an express contract exist[ed] concerning the services for which compensation is sought,” and “the doctrine of unjust enrichment does not apply in the absence of fraud, bad faith, or illegality.” *Howland*, 2002 Ohio App. LEXIS 1033, at \*7-8.

Had the court below actually applied this standard, it would have been compelled to find as a matter of law that Turturice’s evidence came nowhere close to meeting his burden of proof as Turturice never identified any allegedly fraudulent promises made to him. In fact, Turturice admits

that the bonus was an “annual” bonus, that profits and losses in his line of work could fluctuate up or down by millions of dollars each day, and that he was never promised he would be paid a pro-rated bonus for a partial year’s work. (Tr. II at 225-26.) Turturice also concedes he was never promised he would be paid a bonus if he was fired for misconduct, nor did he present any evidence at trial showing that AEPES has *ever* paid a bonus to *any* employee so terminated.

Moreover, the undisputed record evidence shows that shortly after the misreporting by Turturice and others, AEPES immediately terminated those involved and self-reported the conduct and dismissals to federal regulatory agencies. (Tr. III at 498.) Many employees who (unlike Turturice) had no involvement in false reporting of trade data lost their jobs because of the false reporting of Turturice and his colleagues. (Tr. III at 502-11.) The company later paid an \$81 million fine resulting in substantial part from these employees’ actions. (Tr. III at 559.) In short, there is nothing in the record that shows the existence of fraud, illegality or bad faith on AEPES’s part. To the contrary, all evidence of fraud, illegality or bad faith points to Turturice, thus undercutting in dramatic fashion any claim that the failure to pay him a bonus under these circumstances is somehow unjust. Therefore, under this Court’s decision in *Aultman*, AEPES was entitled to judgment in its favor as a matter of law.

2. Even Under The More Lenient Standard For Reviewing An Unjust Enrichment Claim, AEPES Was Still Entitled To Judgment As A Matter of Law.

Even in cases where there is no express contract concerning the services for which compensation is sought (which is not the case here), this Court and other Ohio courts have determined that, in order to recover on a claim of unjust enrichment, a plaintiff must demonstrate that the defendant retained “money or benefits which in justice and equity belong to another.”

*Hummel*, 133 Ohio St. at 525. See also *Hambleton v. R.G. Barry Corp.* (1984), 12 Ohio St. 3d 179

(noting that liability in quasi-contract arises when the defendant is “in receipt of benefits which he is not justly entitled to retain”) (citing *Hummel*, 133 Ohio St. 520).

Based upon a comprehensive review of the appellate court decisions applying *Hummel*, the Franklin County Court of Appeals recognized that “[i]t is not sufficient for the plaintiffs to show that [they have] conferred a benefit upon the defendants. [Plaintiffs] must go further and show that under the circumstances [they have] a superior equity so that as against [them] it would be *unconscionable* for the defendants to retain the benefit.” *U.S. Health Practices, Inc. v. Blake*, Franklin App. No. 00AP-1002, 2001 Ohio App. LEXIS 1291, at \*6 (quotations and citations omitted) (emphasis added). Here, even construing the evidence most strongly in Turturice’s favor, the record fails to reveal any evidence demonstrating that it was “unconscionable” for AEPES not to pay Turturice his bonus. Instead, the evidence is clear that Turturice engaged in fraudulent misconduct that led to a lengthy and costly federal government investigation, an \$81 million civil fine to AEPES, and a large-scale reduction-in-force that caused numerous innocent employees to lose their jobs. As such, even under the more lenient standard established in *Hummel* and as applied in *U.S. Health Practices, Inc.*, AEPES would have been entitled to judgment as a matter of law.

In *U.S. Health Practices, Inc.*, the court identified several factors that must be examined in determining whether evidence supports an unjust enrichment claim. First, “the court must consider whether the defendant was the party responsible for the plaintiff’s detrimental position.” 2001 Ohio App. LEXIS 1291, at \*7. Here, Turturice was fired because of his own admitted misconduct.

Second, courts must examine the “totality of circumstances” to assess whether the defendant received “any *net* benefit” from the plaintiff. 2001 Ohio App. LEXIS 1291, at \*9. In the wake of misreporting by Turturice and his four colleagues on AEPES’s Gulf Coast Desk, AEPES paid an \$81 million civil fine, exited speculative trading, and engaged in a large-scale reduction-in-

force that caused numerous innocent employees to lose their jobs. The idea that Turturice conferred any *net* benefit on AEPES is preposterous.

A third factor that the court held was critical to analyzing an unjust enrichment claim is whether the plaintiff “incurred a substantial detriment that was causally connected to a substantial benefit conferred” on the defendant. *U.S. Health Practices, Inc.*, 2001 Ohio App. LEXIS 1291, at \*11. Here, it is hard to see how AEPES “caused” Turturice to suffer a “substantial detriment,” as he never lost anything he “earned” to begin with. Turturice admits he was never promised he would be paid some or all of his annual bonus if he was terminated for misconduct. (Tr. II at 226.) Just as the trial court and the Court of Appeals did in this case, other courts have repeatedly found similar bonus claims completely without merit.<sup>4</sup>

Against these authorities, Turturice cites a string of monthly commission and accrued vacation cases to support his claim that Ohio courts will not enforce “forfeitures” of earned compensation. (Pl.’s Memo at p. 13.) But these cases only serve to highlight the essential question: how can there be a “forfeiture” if Turturice has not even earned the bonus at issue by completing the required year of service necessary to receive it? Every single one of Turturice’s cases involve claims for compensation under commission, bonus, or vacation plans where the

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<sup>4</sup> See, e.g., *Choi v. AEP Energy Services, Inc.* (D. Ore. Nov. 21, 2003), No. 03-179-AS, *aff’d*, *Choi v. AEP Energy Services, Inc.* (May 19, 2005), 9th Cir. No. 03-36041 (failure to meet requirement in AEP Energy Services Incentive Compensation Plan to be employed at end of plan year barred bonus claims, regardless of whether the claims were based in contract or quasi-contract); *Bauer Bros. Co. v. Commissioner of Internal Revenue* (C.A. 6 1931), 46 F.2d 874, 876 (holding that where an employee was told that bonuses would be paid out but was not told “the amount he was to receive,” “whatever promises were that were made, there did not result from them a legal obligation which could be enforced, either on the basis of express or implied contract” because “[t]here was lacking that definiteness which under familiar principles of law of contract fixed the legal liability of the corporation” and the promise was “so vague and indefinite as to be incapable of legal enforcement”).

plaintiff had fully completed the consideration/evaluation period in question.<sup>5</sup> Additionally, none of Turturice's cases involved an employee who had been terminated for admitted misconduct.

Under these circumstances, AEPES's failure to pay Turturice a prorated portion of an annual bonus for the partial year Turturice completed prior to being fired for admitted misconduct can hardly be deemed "a miscarriage of justice." *U.S. Health Practices*, 2001 Ohio App. LEXIS 1291, at \*13.

The final factor that the *U.S. Health Practices* court held is critical to establishing an unjust enrichment claim is proof by the plaintiff that he had a "superior equity" rendering the defendant's actions "unconscionable." 2001 Ohio App. LEXIS 1291, at \*13. The resulting investigations, downsizing, and civil fines cost AEPES many millions more than the \$16.5 million in profits Turturice claims he generated for the company. By contrast, AEPES went to extraordinary lengths to maintain an ethical workforce and police misconduct. It had toll-free ethics concerns hotlines, and even mailed over 20,000 videos to the homes of its employees (including Turturice) on the importance of honest and ethical conduct. (Tr. III at 472-96.) On these facts, as a matter of law, the superior equities lay with AEPES, and it certainly was not "unconscionable" for AEPES to fail to pay Turturice a bonus for 2002.

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<sup>5</sup> In fact, in two recent cases involving clients represented by Turturice's counsel and involving arguments similar to those at issue in this case, the court discounted the very case law upon which Turturice has so heavily relied in this matter. See *Mazzitti v. Garden City Group, Inc.*, Franklin App. No. 06AP-850, 2007-Ohio-3285, at ¶ 43, discretionary appeal not allowed by 2007-Ohio-6518 (discounting the exact string cite used by Turturice by stating that the plaintiff "attempts to persuade this court by citing to a string of cases that, she claims, stand for the proposition that Ohio courts 'consistently' order payment of commissions and bonuses when an employee completed the services for which he or she would have been compensated had the employer not terminated the employee, or the employee voluntarily terminated his or her own employment, before the commissions or bonuses were due. We do not find any of the cases cited by Mazzitti convincing, as they are factually distinguishable and do not concern discretionary performance incentives."); *Metz v. American Electric Power Co.*, Franklin App. No. 06AP-1161, 2007-Ohio-3520, discretionary appeal not allowed by 2007-Ohio-6518 (discounting the *McKelvey* and *Wall* cases cited by Turturice as being factually distinguishable because, unlike Turturice, those plaintiffs worked the entire plan year).

In evaluating this case under the more lenient standard, the trial court found that the weight of evidence compelled a judgment in AEPES's favor as the jury's advisory verdict was inconsistent with the evidence, and the Court of Appeals upheld that decision as being consistent with the manifest weight of the evidence. Although the trial judge stated that he would not grant a judgment notwithstanding the verdict in AEPES's favor, the trial court was too lenient in his evaluation of the sufficiency of Turturice's evidence and, over AEPES's objection, issued jury instructions that set far too low of a standard for awarding quasi-contract damages. The trial court's instructions allowed the jury to award damages if the jury believed it would "clearly be unjust" not to give Turturice "a remedy on the facts proven" in this case. (Tr. V at 101.) As previously noted, these instructions were inconsistent with OJI's direction that the trial court itself first determine whether Turturice's evidence was sufficient to establish "unjustness" as a matter of law, and essentially provided the jury with no standard at all for determining this issue. But when properly judged against either the standard established in *Aultman* or the more lenient standard recognized in *Hummel*, Turturice's unjust enrichment claim was so deficient as to entitle AEPES to judgment in its favor as a matter of law, and therefore left no issues to be tried by a jury in any case.

3. The Advisory Jury's Verdict Cannot be Reinstated.

Turturice's argument that the advisory jury's verdict should be reinstated is flawed for several reasons. First, contrary to what AEPES contends is the correct standard for reviewing Turturice's unjust enrichment claim, the jury was charged by the trial court in its advisory capacity with instructions that the jury needed only determine whether "it would be clearly unjust not to give Mr. Turturice a remedy on the facts proven to you in this case." (Tr. V at 101.) As explained above, this instruction falls short of properly charging the jury on this claim. The jury was

essentially given no standard at all to review the unjust enrichment claim, let alone, the correct standard of fraud, illegality or bad faith, or even the lesser standard set forth by this Court in *Hummel*.

Second, although Judge Frye never had the occasion to rule on a motion for a new trial as AEPES had no need to assert such a motion, a review of the evidence and his opinion makes clear that Judge Frye viewed the advisory jury's verdict as being against the manifest weight of the evidence, which is the standard for granting a new trial under Civil Rule 59. As such, the advisory jury's verdict cannot simply be reinstated.

**D. Contrary to Plaintiff-Appellant's Fourth Proposition of Law, Quantum Meruit and Unjust Enrichment Are Separate Claims as to Which a Jury Should be Separately Charged.**

Turturice's final proposition of law argues that the trial court erred by instructing the jury only on Turturice's unjust enrichment claim, rather than instructing the jury on both claims. This argument suffers five fatal flaws.

First, Turturice never objected to the trial court's instructions to the jury on his quasi-contract claim. (Tr. V at 77-78.) As Civil Rule 51 makes clear, "[o]n appeal, a party may not assign as error the giving or failing to give any instruction unless the party objects before the jury retires to consider its verdict, stating specifically the matter objected to and the grounds of the objection." Ohio R. Civ. P. 51(A).

Second, as the Court of Appeals recognized, any error in failing to instruct the jury on Turturice's quantum meruit claim was harmless, as the claim is equitable in nature and therefore Turturice was not entitled to a jury trial on this claim in the first place. (See Opinion at ¶ 31.)

Third, Turturice's argument fails on its merits. Citing an Iowa case, Turturice argues that quantum meruit and unjust enrichment are materially different claims – though he does not explain

how, exactly, the jury should be instructed on the differences. In any event, Ohio courts have held that quantum meruit and unjust enrichment claims are materially interrelated, and their liability standards are identical.<sup>6</sup>

Fourth, regardless of any technical differences that Turturice now contends exist between unjust enrichment and quantum meruit claims, the fact remains that the jury instruction Turturice actually proposed to the trial court – as well as the quoted authority cited within that proposed instruction – propose a standard almost exactly identical to the instruction and interrogatory the court actually submitted to the jury on Turturice’s quasi-contract claim.

Finally, regardless of whether quantum meruit and unjust enrichment are separate claims, both claims require a threshold determination of issues of law by the court and, as established above, whether Turturice’s quasi-contract claim is reviewed under the “fraud, illegality or bad faith” standard recognized by this Court in *Aultman* or under the more lenient standard set forth in *Hummel*, the result is the same – AEPES was entitled to judgment as a matter of law because Turturice failed to produce legally sufficient evidence to support his claim. For these reasons, jurisdiction on this proposition of law should be denied.

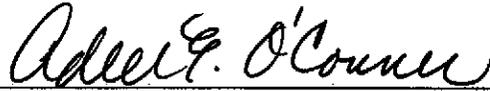
### CONCLUSION

For all of these reasons, AEPES respectfully requests that this Court decline to exercise its discretionary jurisdiction to consider this appeal on its merits.

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<sup>6</sup> See, e.g., *Caras v. Green & Green* (June 28, 1996), Montgomery App. No. 14943, 1996 Ohio App. LEXIS 3162, at \*8 (“it is apparent that the concepts of quasi-contract, unjust enrichment and quantum meruit are interrelated”); *U.S. Health Practices*, 2001 Ohio App. LEXIS 1291, at \*4 (“[q]uantum meruit and unjust enrichment are doctrines derived from the natural law of equity, and the essential elements of recovery under both are the same”); *Loyer v. Loyer* (Aug. 16, 1996), Huron App. No. H-95-068, 1996 Ohio App. LEXIS 3432, at \*9 (“Quantum meruit is also a quasi-contract and contains the same elements as required for recovery under unjust enrichment”).

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and accurate copy of the foregoing was duly served upon Russell A. Kelm and Joanne Weber Detrick, Law Office of Russell A. Kelm, 37 West Broad Street, Suite 860, Columbus, Ohio, 43215, by regular first class U.S. mail, postage prepaid, this 11<sup>th</sup> day of July, 2008.



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