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QUANTUM MERUIT: THE OTHER CAUSE OF ACTION

Quantum meruit is an equitable remedy "based upon the promise implied by law to pay for services rendered and knowingly accepted."[2] Quantum meruit is designed to prevent a party from accepting the benefits of another's work without providing anything in exchange for such benefits.[3] Texas courts have struggled to consistently identify quantum meruit claims as either implied in law or implied in fact contracts and oftentimes have blurred the lines between unjust enrichment and quantum meruit.

For example, in *Ramirez Co. v. Housing Auth. of City of Houston*, the Houston Court of Appeals appears to have differentiated between implied in fact and implied in law (also referred to as quasi-contract) contracts, by referring to implied in fact contracts as synonymous with quantum meruit.[4] The Houston Court of Appeals later revisited its opinion in *Ramirez* and stated "*Ramirez Co.*'s description of quantum meruit as a species of implied-in-fact contract contradicts language in several supreme court opinions."[5] Some of this confusion may be attributable to the differing terminology courts have utilized when addressing quantum meruit, restitution, and unjust enrichment, including the arguable overlap between the three.[6]

Quantum meruit is not typically available when an express contract covers the subject matter of the lawsuit. As discussed later, quantum meruit is available, however, in limited situations even when a contract exists between the parties.

A. ELEMENTS OF QUANTUM MERUIT

Quantum meruit has four elements: (1) the provision of valuable services or materials; (2) the services or materials were provided to the defendant; (3) the defendant accepted the goods or services; and (4) the defendant had reasonable notice that the plaintiff would perform the services or furnish the materials and would expect compensation from the defendant.[7]

B. CAN A CLAIMANT RECOVER IN QUANTUM MERUIT IF AN EXPRESS CONTRACT COVERS THE WORK AT ISSUE?

The Texas Supreme Court has established the general rule that there can be no recovery in quantum meruit when a valid express contract covers the subject matter of the quantum meruit suit.[8] The existence of a contract, however, will not bar a quantum meruit claim if the materials/services are outside the scope of the contract.[9] Whether a quantum meruit claim exists initially depends upon (1) whether the work was in fact extra; and (2) whether the contract made provision for the type of extra work performed.[10]

C. A CLAIMS PROCEDURE IN A CONTRACT MAY BAR A QUANTUM MERUIT CLAIM

In the case of *Kittyhawk Landing Apartments III v. Anglin Const. Co.*,[11] the construction contract included the following change – claim procedure:

> The Contractor may order changes in the work, the contract sum being increased or decreased accordingly. All orders and adjustments for any extra work of any

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2. *Hill v. Shamoun & Norman, LLP*, 544 S.W.3d 724, 732 (Tex. 2018).
3. *Id.*
4. 777 S.W.2d 167, 173, n.12 (Tex. App.—Houston [14th Dist.] 1989, no writ) ("At common law, there are three recognizable contractual arrangements: First, there is the express contract, written or oral, wherein the parties expressly agree regarding a transaction. Second, there is the implied in fact contract, called quantum meruit, wherein there is no express agreement, but the conduct of the parties implies an agreement to contract from which an obligation in contract exists. The third category is called an implied in law contract, or quasi contract. Such contract is not a contract at all, but an obligation imposed by law for the purpose of bringing about justice and equity without reference to the intent or the agreement of the parties").
5. *Houston Med. Testing Servs., Inc. v. Mintzer*, 417 S.W.3d 691, 704, n.4 (Tex. App.—Houston [14th Dist.] 2013, no pet.).
6. For a further discussion of the differences between quantum meruit and unjust enrichment and, consequently, implied in fact and implied in law contracts, please see Philip L. Bruner & Patrick J. O'Connor, Jr., Bruner and O'Connor on Construction Law § 19:36 (2021); *see also Paffhausen v. Balano*, 708 A.2d 269, 271 (Me. 1998).
7. *Hill*, 544 S.W.3d at 732-33; Tex. PJC § 101.42 (2020).
8. *Vortt Expl. Co v. Chevron U.S.A., Inc.*, 787 S.W.2d 942, 944 (Tex. 1990). Quantum meruit may also be available when there is a contract, but that contract has been rendered unenforceable, such as a contract that has been rescinded, is void, or abandoned. *See, e.g., Hill*, 544 S.W.3d at 731-736; *United States ex rel. Wallace v. Flintco Inc.*, 143 F.3d 955, 965 (5th Cir. 1998); *W&W Oil Co. v. Capps*, 784 S.W.2d 536, 537-38 (Tex. App.—Tyler 1990, no writ).
9. *Black Lake Pipe Line Co. v. Union Const. Co., Inc.*, 538 S.W.2d 80, 86 (Tex. 1976) *overruled on other grounds by Sterner v. Marathon Oil Co.*, 767 S.W.2d 686 (Tex. 1989).
10. *Id.*
11. 737 S.W.2d 90 (Tex. App.—Houston [14th Dist.] 1987, writ ref'd n.r.e.).

> kind must be in writing and signed by the Contractor. Sub-Contractor shall have no claim for extra work unless an order in writing is secured from the Contractor, signed by their authorized agent prior to commencement of the work for which such extra charge is claimed, setting forth the exact cost or basis of cost to be allowed for extra work.[12]

The scope of the work included providing a certain amount of fill material and therefore the additional fill material qualified as "extra work" under the contract. Consequently, the court held that "[t]he contract made provision for the type of extra work performed, and thus appellee must look to the contract for compensation."[13] Therefore, quantum meruit was not available.

D. TRULY EXCEPTIONS

Even in circumstances in which a valid express contract covers the subject matter of the quantum meruit claim, the Texas Supreme Court has provided exceptions to the general rule when: (1) a claimant has partially performed an express contract but, because of the defendant's breach, the plaintiff is prevented from completing the contract or (2) a plaintiff partially performs an express contract that is unilateral in nature.[14] A third exception was seemingly provided by the Texas Supreme Court in *Truly* when it stated "[t]he only Texas cases that have permitted a breaching plaintiff to recover in quantum meruit have involved building or construction contracts. In these cases, plaintiffs have been allowed to recover the reasonable value of services less any damages suffered by the defendant."[15]

This exception would, therefore, allow a *breaching* plaintiff to recover in quantum meruit despite the existence of a building or construction contract. The *Truly* court also stated "[c]entral to the contractor's right to recover in quantum meruit is the owner's acceptance and retention of the benefits arising as a direct result of the contractor's partial performance."[16] The Court further noted that recovery in quantum meruit is based in equity and that to justify recovery in quantum meruit, the plaintiff must not only show that it has rendered a partial performance of value but must also show that defendant has been unjustly enriched and the plaintiff would be unjustly penalized if the defendant were permitted to retain the benefits of the partial performance without paying anything in return.[17]

In *Murray v. Crest Construction*, the Texas Supreme Court addressed a claim by contractor for compensation when the contractor had failed to substantially perform its work.[18] The Supreme Court, in *Murray*, reiterated the general rule that a party may not recover under quantum meruit when there is express contract concerning the services or materials furnished but held that construction contracts are an exception to the rule. Even though the contractor failed to substantially perform certain projects (a condition precedent to recovery under express contracts), the contractor was allowed to sue in quantum meruit to recover the reasonable value of the benefits conferred by its partial performance.[19]

12. *Id.* at 92.
13. *Id.*; *see also Easy Living Inc. v. Cash*, 617 S.W.2d 781, 785 (Tex. App.—Fort Worth 1981, no writ); *Union Building Corp. v. J&J Building and Maintenance*, 578 S.W.2d 519 (Tex. App.—Houston [14th Dist.] 1979, writ ref'd n.r.e.) (plaintiff could not recover in quantum meruit because the claimed extras was compensable under the changes clause of the contract); *Rosick v. Equip. Maintenance and Serv., Inc.*, 632 A.2d 1134, 1141-42 (App. Conn. 1993) ("the express contract provided a procedure for the plaintiff to make a claim for extras and the road patching costs fell within that procedure; thus, because there was an express provision covering road patching, a quantum meruit claim to recover for this work is barred."); *Summit Global Contractors, Inc. v. Enbridge Energy, LP*, 594 S.W.3d 693, 705-706 (Tex. App.—Houston [14th Dist.] 2019, no pet.) (holding that since the contract made provision for the type of extra work performed, the claimant was required to look to the contract for compensation); *Pennsylvania Electric Coil v. City of Danville*, 329 Fed. Appx. 399 (4th Cir. 2009) (quantum meruit relief was not available because contract contained a change order procedure); *JA Moore Construction v. Sussex Associates, LP*, 688 F.Supp. 982 (Del. 1988) (quantum meruit could not be a basis for extras or modifications since a procedure for compensation for work was provided in the contracts); *Choate Construction v. Ideal Electrical Contractors, Inc.*, 541 S.E.2d 435 (Ga. Ct. App. 2000 (quantum meruit not allowed for extra work when contract contemplated changes and modifications and provided method of carrying out changes).
14. *Truly v. Austin*, 744 S.W.2d 934, 936-937 (Tex. 1998). The Texas Supreme Court has defined a unilateral contract as one "created by the promisor promising a benefit if the promisee performs." *Vanegas v. Am. Energy Servs.*, 302 S.W.3d 299, 302 (Tex. 2009). In contrast, a bilateral contract exists "when both parties make mutual promises." *City of Houston v. Williams*, 353 S.W.3d 128, 135 (Tex. 2011). As the Texas Supreme Court stated, "[t]he requirement of mutuality is not met by an exchange of promises; rather, the valuable consideration contemplated in 'exchange for the promise is something other than a promise,' i.e., performance." *Id.* at 136. A unilateral contract becomes enforceable when the promise performs and is accepted by actual performance as opposed to the "usual mutual promises." *Id.* Although it is highly unlikely that an agreement would be classified as unilateral contract in the modern construction industry, the Texas Supreme Court provided the "classic textbook example of a unilateral contract" when a person stated: "'I will pay you $50 if you paint my house.' The offer to pay the individual to paint the house can be withdrawn at any point prior to performance. But once the individual accepts the offer by performing, the promise to pay the $50 becomes binding." *Vanegas*, 302 S.W.3d at 303.
15. *Id.* at 937.
16. *Id.* at 938.
17. *Id.*
18. 900 S.W.2d 342 (Tex. 1995).
19. *Id.* at 346.

Other courts have addressed the *Truly* exceptions in different ways. For example, the Texarkana Court of Appeals, while recognizing *Truly*'s holding as to the availability of quantum meruit in a construction case was dicta, nevertheless allowed recovery under quantum meruit to a breaching contractor.[20] In *Walker*, a contractor was hired to extend a horse training racetrack, and the workers were instructed to leave the project after a dispute arose about how the track was to be built.[21] At trial, the jury determined that the contractor breached the agreement and failed to substantially perform, but that the owner suffered no damages due to the breach.[22] The jury also assessed a monetary value to the services the contractor provided, which the trial court found was recoverable under quantum meruit.[23] On appeal the owner argued that quantum meruit should not be available when the contractor breaches the contract and does not substantially perform.[24] Consequently, the owner urged the appellate court to follow the general rule that quantum meruit is not available when an express contract exists.[25]

In rejecting this argument, the Texarkana Court of Appeals was careful to note that *Truly* established "two exceptions to the general rule" and that the third exception was dicta.[26] The court then turned to *Murray*, however, stating that "another Texas Supreme Court decision reiterates the dicta in *Truly* in holding that a breaching contractor can recover under quantum meruit even where there was no substantial performance under contract."[27] Thus, the contractor could recover under quantum meruit because it showed that it (1) provided valuable services; (2) for the owner; (3) the owner accepted the services; and (4) the services were provided under circumstances that would reasonably notify the owner that the contractor expected to be paid.[28]

In *Bennett v. Spectrum Construction*, the court stated that the exceptions in *Truly* were not the only available exceptions allowing recovery under quantum meruit where a contract exists.[29] The court held that there may also be recovery in quantum meruit if there has been mutual abandonment, or where further performance is prevented by a cause for which neither party is responsible and by reason of which further performance is excused.[30] In *Balfour Beatty Rail, Inc. v. Kansas City S. Ry. Co.*, the court held that simply because a case involves a building or construction contract is insufficient, by itself, to allow for a quantum meruit claim and the exceptions in *Truly* did not apply.[31] In so doing, the Northern District of Texas appeared to discount the existence of a third exception under *Truly*, stating:

> [A] plaintiff may not recover under the general rule of quantum meruit when the claim pleaded fits within the subject matter of a contract between the parties, unless the claim falls within one of the *two* exceptions recognized by *Truly*: (1) recovery in quantum meruit is allowed when a plaintiff has partially performed an express contract but, because of the defendant's breach, the plaintiff is prevented from completing the contract; and (2) quantum meruit recovery is sometimes allowed when a plaintiff partially performs an express contract that also happens to be unilateral in nature.[32]

The court noted that the plaintiff did not allege that it had partially performed an express contract.[33] The court held that "*neither* of the *Truly* exceptions applies."[34]

E. QUANTUM MERUIT AND UNJUST ENRICHMENT

Confusion also exists around unjust enrichment in Texas caselaw—including whether such a cause of action even exists and its relation to a quantum meruit claim. The Texas Pattern Jury Charges describe both quantum

20. *Walker & Assocs. Surveying, Inc. v. Roberts*, 306 S.W.3d 839, 858 (Tex. App.—Texarkana 2010, no pet.).
21. *Id.*at 843.
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.* at 858.
26. *Id.*
27. *Id.*
28. *Id.*; *see also STR Constructors, Ltd. v. Newman Tile, Inc.*, 395 S.W.3d 383, 391-92 (Tex. App.—El Paso 2013, no pet.); *Rasa Floors v. Spring Village Partners*, No. 01-08-00918-CV, 210 WL 4676978, at *1, *6 (Tex. App.—Houston [1stt Dist.] Nov. 18, 2010, no pet.) (mem. op.) (noting that an exception to general rule exists in construction cases which permits a breaching plaintiff to recover in quantum meruit).
29. No. 01–11–00566–CV, 2012 WL 5877948 (Tex. App.—Houston [1st Dist.] Nov. 21, 2012, no pet.) (mem. op.).
30. *Id.* at *5 (citing *Benson v. Harrell*, 324 S.W.2d 620 (Tex. App.—Fort Worth 1959, writ ref'd).
31. No. 3:10-CV-1629-L, 2012 WL 3100833, at *1, *12-*13 (N.D. Tex. Jul. 31, 2012) (mem. op.).
32. *Id.* at *12 (internal quotations omitted) (emphasis added).
33. *Id.*
34. *Id.* (emphasis added).

meruit and unjust enrichment separately, although unjust enrichment is merely included as a comment.[35] Some courts have stated that unjust enrichment is a cause of action.[36] In *Pepi*, the Houston Court of Appeals explicitly stated "[u]njust enrichment is an independent cause of action."[37] Other courts, however, have held that unjust enrichment is not an independent cause of action.[38] Texas courts remain conflicted on whether to classify unjust enrichment as a cause of action or as a component of other claims.[39] Further compounding the confusion, as some courts have held, is the close relationship between quantum meruit and unjust enrichment.[40]

In *Truly*, the Texas Supreme Court stated that unjust enrichment was an essential component of a quantum meruit claim asserted by a breaching contractor stating:

> To justify a recovery in quantum meruit, the plaintiff must not only show that he has rendered a partial performance of value, but must also show that the defendant has been unjustly enriched and the plaintiff would be unjustly penalized if the defendant were permitted to retain the benefits of the partial performance.[41]

Subsequent decisions appear to suggest unjust enrichment is a component of the *Truly* partial performance exception. In *Knight Renovations, LLC v. Thomas*, the court stated that under the *Truly* exception for recovery as a breaching contractor, which partially performed its work, the plaintiff could recover in quantum meruit for the materials and services provided, offset by the damages to the defendant from the plaintiff's breach.[42] The court further ruled that "[t]he plaintiff must prove that the defendant is unjustly enriched as a result of this partial performance, and that permitting the defendant to retain the benefits of the partial performance would unjustly penalize the plaintiff."[43]

In *Walker*, however, the court refused to require any further finding of unjust enrichment to support a quantum meruit claim.[44] On appeal, the defendant argued that unjust enrichment was required to prevail on a quantum meruit claim.[45] The Texarkana Court of Appeals noted that "[i]n *Truly*, the Texas Supreme Court held that the general rule applied—a party may not recover under quantum meruit when there is an express contract on the matter. The further discussion concerning the exception to the general rule for construction cases, including the above quote, was dicta."[46] In addressing unjust enrichment, the

35. *See* Tex. PJC §§101.42, 101.44 (2020) (noting the conflict in Texas regarding unjust enrichment's existence as a cause of action).
36. *See Pepi Corp. v. Galliford*, 254 S.W.3d 457, 460 (Tex. App.—Houston [1st Dist.] 2007, pet. denied) (citing *HECI Exploration Co. v. Neel*, 982 S.W.2d 881, 891 (Tex.1998)).
37. 254 S.W.3d at 460.
38. *See Casstevens v. Smith*, 269 S.W.3d 222, 229 (Tex. App.—Texarkana 2008, pet. denied) ("Unjust enrichment, itself, is not an independent cause of action, but rather 'characterizes the result of a failure to make restitution of benefits either wrongfully or passively received under circumstances that give rise to an implied or quasi-contractual obligation to repay.'"); *Mowbray v. Avery*, 76 S.W.3d 663, 679 (Tex. App.—Corpus Christi 2002, pet. denied) ("[U]njust enrichment is not a distinct independent cause of action but simply a theory of recovery. It can be applied where there is a failure to make restitution of benefits received under circumstances which give rise to an implied or quasi-contractual obligation to repay, that is, where a benefit was wrongfully secured or passively received which would be unconscionable for the receiving party to retain."); *see also Landers v. Landers*, No. 02-19-00303, at *1, *8 (Tex. App.—Fort Worth Apr. 22, 2021, no. pet.) (mem. op.). ("Furthermore, even if Marshall had pleaded unjust enrichment or tried this theory by consent, his appeal would still fail because this court has repeatedly held that '[u]njust enrichment, itself, is not an independent cause of action.'").
39. *See Baylor Scott & White v. Project Rose MSO, LLC*, 633 S.W.3d 263, (Tex. App.—Tyler 2021, pet. filed Nov. 15, 2021) ("The Texas Supreme Court has suggested, although not definitively ruled, that unjust enrichment is an independent cause of action"); *see also Ajose v. Interline Brands, Inc.*, 187 F. Supp.3d 899, 916 (M.D. Ten. 2016) (mem. op.) ("This Court's review of Texas case law reveals a growing conflict in how Texas courts treat complaints that plead unjust enrichment as a separate cause of action."); *VocalSpace, LLC v. Lorenso*, No. 4:09-CV-350, 2010 WL 11527374, at *1, *7 (E.D. Tex. Jan. 29, 2010) (mem. op.) ("There appears to be some confusion as to whether unjust enrichment can be asserted as an independent cause of action. Based on the cited precedent from the Texas Supreme Court, the Court holds that Texas law does allow unjust enrichment as an independent cause of action.").
40. *Pepi Corp.*, 254 S.W.3d at 460 ("[A] claim that the opposing party is unjustly enriched by retaining the benefits of services rendered by the plaintiff can also be the basis for a quantum meruit cause of action, rather than a separate claim in itself"); *see also Timbercreek Canyon Prop. Owners Assoc., Inc. v. Fowler*, No. 07-14-00043-CV, 2015 WL 4776695, at *1, *6 (Tex. App.—Amarillo Aug. 12, 2015, no pet.) (mem. op.) ("The principle of unjust enrichment appears closely related to quantum meruit").
41. 744 S.W.2d at 938.
42. 525 S.W.3d 446, 454 (Tex. App.—Tyler 2017, no pet.).
43. *Id.* (citing *Garcia v. Kastner Farms, Inc.*, 789 S.W.2d 656, 661 (Tex. App.—Corpus Christi 1990, no writ)); *see also STR Constructors*, 395 S.W.3d at 392 (citing *Truly* for the proposition that "[t]o justify a recovery in quantum meruit, the plaintiff must ... show that the defendant has been unjustly enriched and the plaintiff would be unjustly penalized if the defendant were permitted to retain the benefits of the partial performance without paying anything in return"); *Power v. GSE Consulting, LP*, No. 02-16-00175-CV, 2017 WL 2686324, at *1, *6 (Tex. App.—Fort Worth Jun. 22, 2017, no pet.) (mem. op.) ("Because GSE was not unjustly enriched...permitting Power to recover under an exception to the express-contract rule would have the undesirable effect of working an inequity upon GSE, as it would be paying a commission on funds that it did not receive. The partial-performance exception to the express-contract rule cannot apply.").
44. *Walker*, 306 S.W.3d at 858.
45. *Id.*
46. *Id.*

court stated ". . . importantly, the Texas Supreme Court did not require any further finding of unjust enrichment in *Murray*. We believe *Murray* provides the authority for recovering quantum meruit in this case."[47] Thus, the appellate court upheld the trial court's award even though no question regarding unjust enrichment was submitted to the jury.[48]

The Dallas Court of Appeals, while analyzing the exceptions in *Truly* for claims by contractors, concluded that the exception was inapplicable in a case in which a plaintiff acted for its own benefit and retained the benefit of its work.[49] Solar Soccer Club ("Solar") agreed to construct soccer fields on a undeveloped lot owned by Prince of Peace Lutheran Church of Carrollton, Texas ("Prince.").[50] Solar and Prince entered into a ten-year lease in which Solar agreed to construct the soccer fields at its own expense in exchange for Prince not charging it rent as Prince would own the fields after their completion.[51] Solar attempted to argue on appeal that the *Truly* exception for construction contracts allowed for recovery in quantum meruit despite the existence of the written lease.[52] The appellate court, however, found that the exception was inapplicable.[53] In reaching this decision, the court noted that the Prince had not been unjustly enriched because the Solar "undertook the obligations of the lease in order to provide a facility for its own use and benefit, as well as for the use and benefit of Prince of Peace, and has been able to use the facility since its completion in 2000."[54] The lease provided for remedies in the event of a default and addressed the services that formed the basis of Solar's quantum meruit claim.[55] Therefore, the plaintiff was prohibited from looking outside the bounds of the agreement at issue for relief.[56]

F. DOES SUBSTANTIAL PERFORMANCE PREVENT THE APPLICATION OF A QUANTUM MERUIT CLAIM?

Under Texas law, when a contractor has substantially performed a building contract, it is entitled to bring a contract cause of action to recover the full contract price less the cost of remedying those defects that are remedial.[57] The equitable doctrine of substantial performance allows recovery for a contractor who has breached, but substantially performed, its contract.[58] Substantial performance has been defined as meaning "there was no willful departure from the terms of the contract and no omission of essential points of the project."[59] This doctrine recognizes that the contractor has not completed its work and is technically in breach of the contract but prevents the owner from using the failure to fully perform as an excuse for non-payment.[60] In such a case, the contractor has a claim for the unpaid balance and the owner has a claim for damages.[61]

Many courts have held that quantum meruit is not available if the plaintiff has fully performed its work.[62] In

47. *Id.* at 859. The court also relied on the Texas Pattern Jury Charges in reaching its conclusion, stating "The Texas Pattern Jury Charges, upon which the trial court's charge was based, indicate that the measure of damages for quantum meruit is not different in construction contracts . . . Well-settled pattern jury charges should not be embellished with addendum." *Id.*
48. *Id.* at 858-59; *see also Lascano v. Huser Huser Constr.Co.*, No. 04-14-00311-CV, 2015 WL 3398360, at *1, *7, n.4 (Tex. App.—San Antonio May 27, 2015, no pet.) (mem. op.) (While not addressing *Truly* specifically, the court stated "Huser's traditional motion also asserted that Lascano was required to show that Huser was 'unjustly enriched' as an element of Lascano's quantum meruit claim; however, 'unjust enrichment' is a separate theory from quantum meruit."); *but see Laredo Jet Ctr., LLC v. City of Laredo*, No. 04-17-000316-CV, 2018 WL 3551255, at *1, *4 (Tex. App.—San Antonio Jul. 25, 2018, pet. denied) (listing unjust enrichment as an element of a quantum meruit claim and citing *Truly* as authority).
49. *Solar Soccer Club v. Prince of Peace Lutheran Church of Carrollton*, 234 S.W.3d 814, 830 (Tex. App.—Dallas 2007, pet. denied).
50. *Id.* at 818.
51. *Id.* at 818-19.
52. *Id.* at 830.
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.* at 830-31.
57. *Vance v. My Apartment Steakhouse of San Antonio, Inc.*, 677 S.W.2d 480, 481 (Tex. 1984).
58. *Dobbins v. Redden*, 785 S.W.2d 377, 377 (Tex. 1990); *Tips v. Hartland Developers, Inc.*, 961 S.W.2d 618, 623 (Tex. App.—San Antonio 1998, no pet.).
59. *Uhlir v. Golden Triangle Dev. Corp.*, 763 S.W.2d 512, 514 (Tex. App.—Fort Worth 1988, writ denied).
60. *Vance*, 677 S.W.2d at 482.
61. *Id.* at 481-82.
62. *See MMR Constructors, Inc. v. Dow Chemical Co.*, No. 01-19-00039-CV, 2020 WL 7062325, at *1, *11 (Tex. App.—Houston [1st Dist.] Dec. 3, 2020, no pet. h.) (mem. op.) ("MMR did not plead any factual alternative that it had not fully performed its contractual obligations. MMR's judicial admission that it had performed its obligations under the Contract, coupled with its judicial admission that it fully completed its work, which was the subject matter of the Contract and the task for which MMR seeks compensation, was sufficient to conclusively establish that the exceptions to the express-contract rule did not apply and that MMR was precluded as a matter of law from recovering under quantum meruit."); *Sys. One Holdings, LLC v. Campbell*, No. B:18-cv-54, 2018 WL 4290459, at *1, *4 (S.D. Tex. Aug. 21, 2020) (mem. op.) ("Generally, if a subcontractor fully performs its end of a written contract, it cannot pursue relief under quantum meruit, because its recourse lies in contract.").

the case of *Pepi Corp. v. Galliford*, a subcontractor brought a quantum meruit claim against a property owner for work performed on the property.[63] The court recognized the general rule holding that an existence of a contract precludes claims in quantum meruit but also noted the three exceptions in *Truly* that the Texas Supreme Court recognized.[64] In *Pepi*, the claimant had fully performed its duties under the contract and, according to the court, the *Truly* exceptions did not apply.[65] The court consequently held that the trial court had erred in entering judgment premised on quantum meruit.[66]

Courts are divided on if the same prohibition on quantum meruit claims applies to cases where the plaintiff has substantially performed. The Houston Court of Appeals determined that a plaintiff could not recover under quantum meruit when the jury determined that the general contractor had substantially performed.[67] Central to this ruling was that the contractor could recover under the contract because of its substantial performance.[68] Therefore, the contractor could not to look to quantum meruit for relief and should, instead, look to the contract.[69]

Logically, it would follow that quantum meruit should not be available when a party has substantially performed as substantial performance allows a party to recover on the contract. In such circumstances, the plaintiff would not have to resort to the doctrine of quantum meruit in order to recover for its work. Rather, the agreement, which the parties entered into and drafted to conform to their intent, should control. In *D2 Excavating, Inc. v. Thompson Thrift Construction*, the Fifth Circuit discussed the reasons why quantum meruit should not be available to a plaintiff that substantially performs a contract.[70] The court stated:

> Quantum meruit is an equitable theory of recovery which is based on an implied agreement to pay for benefits received . . . it is generally unavailable if a valid contract covers the goods or services a plaintiff furnished . . . If the parties reached an expressed agreement allocating payments, services and risks, that is, a contract – then a court should not step in and impose its view of what would constitute an equitable arrangement. Texas recognizes an exception to this general rule in the construction context. A plaintiff that does not substantially perform a construction contract, and thus cannot recover under the express contract, may pursue quantum meruit for the value of its services . . . unlike the goods or services provided under many contracts, partial work done on a construction project cannot be transferred to another buyer. So it would be unjust to allow the party receiving the partial construction to not pay anything for it . . . if there is no free lunch, then certainly there is no free house. As a result, when a breaching contractor cannot recover the contract price, it nevertheless may be able to recover in quantum meruit.[71]

Because the contractor in *D2* had substantially performed, the Fifth Circuit did not allow recovery under quantum meruit.[72] However, a Dallas Court of Appeals decision noted that "[t]he doctrine of substantial performance 'will not normally prohibit the implementation of the theory of quantum meruit.'"[73]

63. 254 S.W.3d at 462-463.
64. *Id.* at 462.
65. *Id.* at 462-63.
66. *Id.* at 463.
67. *Gulf Liquids New River Project, LLC v. Gulsby Egn'g, Inc.*, 356 S.W.3d 54, 71 (Tex. App—Houston [1st Dist.] 2011, no pet.).
68. *Id.*
69. *Id.*
70. 973 F.3d 430 (5th Cir. 2020).
71. *Id.* at 436.
72. *Id.* ("D2 seeks a quantum meruit recovery despite having substantially performed its contractual duties and, therefore, being able to collect on the contract. In other words, D2 wants quantum meruit plus the contract price. That is not allowed."); *see also Graham Constr. Co. v. Walker Process Equip., Inc.*, 422 S.W.2d 478, 481 (Tex. Civ. App.—Corpus Christi 1967, writ ref'd n.r.e) ("The rule denying recovery under a contract and permitting recovery based on quantum meruit does not apply where there has been substantial or full performance of the contract."); Tex. PJC § 101.46 (2020) ("A building contractor who has not substantially performed may have quantum meruit as an alternate ground of recovery.").
73. *PMC Chase, LLP v. Branch Structural Solutions, Inc.*, No. 05-18-01383-CV, 2020 WL 467791, at *1, *4 (Tex. App.—Dallas Jan. 28, 2020, pet. denied) (mem. op.) (*citing Montclair Corp. v. Earl N. Lightfoot Paving Co.*, 417 S.W.2d 820, 830 (Tex. App.—Houston 1967, writ ref'd n.r.e.) for the proposition that the "court's extensive research revealed no case law precluding construction contractor who substantially performs from electing to recover under quantum meruit rather than on contract."); *see also Gentry v. Squires Constr.*, 188 S.W.3d 396, 404 (Tex. App.—Dallas 2006, no pet.).

G. QUANTUM MERUIT DAMAGES

In order to recover under quantum meruit, "[t]he plaintiff is required to produce evidence of the correct measure of damages in order to recover on a quantum meruit claim."[74] Although many courts do not specifically address the issue, the measure of damages for quantum meruit may differ depending on whether implied in fact or implied in law (quasi-contract) quantum meruit is involved and whether unjust enrichment is a requirement for recovery.[75]

In a typical quantum meruit claim, where there is not a contract covering the scope of the work, the more familiar damages will be available. In this situation, the measure of recovery for quantum meruit claims is the "reasonable value of the work performed or the materials furnished."[76] Evidence of the actual costs a contractor incurred is not the proper measure of damages for quantum meruit under this scenario.[77] Likewise, quantum meruit damages cannot be based solely on the anticipated benefits of a contract or the contract's total price.[78] Therefore, if a contractor wishes to recover under this form of quantum meruit the contractor must do more than provide testimony regarding the costs it incurred on the project or the contract amount. Instead, the contractor must put forth competent evidence regarding the reasonable value of the work or materials provided.

If a contract covers the subject matter of the dispute and a party has partial performed, then the measure of quantum meruit damages may depend on whether the owner or the contractor is the breaching party. Thus, if the contractor is unable to complete the work due to the owner's breach, "the contractor is entitled to recover in quantum meruit the reasonable value of the labor and materials he has put into the building in accordance with the contract, whether the result has any value to the owner or not."[79] On the other hand, if the contractor is the defaulting party, "the net benefit received by the owner, rather than the market value of the labor and materials supplied by the contractor is a proper measure of the defaulting contractor's recovery for part performance."[80] To determine the owner's net benefit, the owner's damages must be offset against the market value of the building.[81] This would seem to be consistent with the unjust enrichment component of *Truly*.

H. CONCLUSION

Quantum meruit remains a viable cause of action in those instances in which the contract does not address the work in question and does not have a claims procedure which addresses extra work claims. According to some courts, quantum meruit is also available as a cause of action even if the contract addresses the work in question (*see* the *Truly* exceptions). In the case of the exception for a breaching plaintiff on construction projects, damages are likely limited to the value to the owner of the labor and materials furnished and the practitioner should consider the submission of damages in that manner and an instruction-question on unjust enrichment.

74. *Brandt Co., LLC v. Beard Process Solutions, Inc.*, No. 05-17-00780, 2018 WL 4103210, at *1, *13 (Tex. App.—Dallas Aug. 29, 2018, pet. grant'd, jdgmt vact'd, remand by agmt) (mem. op); *see Knight Renovations, LLC v. Thomas*, 525 S.W.3d 446, 454 (Tex. App.—Tyler 2017, no pet.); *M.J. Sheridan & Son Co., Inc. v. Seminole Pipeline Co.*, 731 S.W.2d 620, 624-25 (Tex. App.—Houston [1st Dist.] 1987, no writ).
75. *See Beeman v. Worrell*, 612 S.W.2d 953, 956-57 (Tex. Civ. App.—Dallas 1981, no writ) (noting, however, "that not all Texas opinions recognize this distinction.").
76. *Hill*, 544 S.W.3d at 736; Tex. PJC § 115.7 (2020).
77. *M.J. Sheridan*, 731 S.W.2d at 625; *see also Brandt*, 2018 WL 4103210, at *14.
78. *Brandt*, 2018 WL 4103210, at *13 ("Evidence of anticipated benefits of a contract, without more, will not support the recovery of damages for a quantum meruit claim.") (citing *Marrocco v. Hill*, No. 14-14-00137-CV, 2015 WL 9311521, at *1, *3 (Tex. App.—Houston [14th Dist.] Dec. 22, 2015, no pet.) (mem. op.); *Green Garden Packaging Co., Inc. v. Schoenmann Produce Co., Inc.*, No. 01-09-00924-CV, 2010 WL 4395448, at *1, *6–7 (Tex. App.—Houston [1st Dist.] Nov. 4, 2010, no pet.) (mem. op.) (concluding evidence of anticipated profits under contract was not proper measure of damages for quantum meruit claim); *M.J. Sheridan*, 731 S.W.2d at 625 (evidence of actual costs represents breach of contract damages, not quantum meruit)); *Knight*, 525 S.W.3d at 4545 ("The original contract price cannot constitute the value of the work Knight performed when the evidence shows that Knight did not complete all of the work required under the contract and its work was subpar."); *San Antonio Aerospace, L.P. v. Gore Design Completions, Ltd.*, No. 07-06-0309-CV, 2008 WL 2200035, at *1, *2 (Tex. App.—Amarillo May 28, 2008, pet. denied) (mem. op.).
79. *Beeman*, 612 S.W.2d at 957. Note that a plaintiff may in some circumstances instead elect to recover under the contract when the defendant prevented the plaintiff from fully performing. *McFarland v. Sanders*, 932 S.W.2d 640, 644 (Tex. App—Tyler 1996, no pet.) (citing *McCracken Constr. Co., Inc. v. Urrutia*, 518 S.W.2d 618, 621-22 (Tex. App.—El Paso 1974, no writ) ("In Texas it is an established rule of law that where, as here found by the jury, the employee (builder) is prevented by the employer (owner) from completing the performance of his contract, he is entitled to recover for the part performed and the damages he has sustained by reason of the breach of contract by the employer. It is also established law that where an owner wrongfully interferes with a contractor and prevents his completion of the contract, the proper measure of damages where the contractor sues on the contract is the contract price less what would have been the cost to the contractor of completing the work, but that this is not the sole measure of damages since the contractor may treat the contract as rescinded and recover under quantum meruit the full value of the work done.").
80. *Id.*
81. *Id.* at 956.