IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2018-CA-00334-COA

M & R BUILDERS, LLC **APPELLANT**

v.

WILLIAMS EQUIPMENT AND SUPPLY COMPANY, INC. AND TRIANGLE CONSTRUCTION COMPANY, INC. **APPELLEES**

DATE OF JUDGMENT:	02/20/2018
TRIAL JUDGE:	HON. DENISE OWENS
COURT FROM WHICH APPEALED:	HINDS COUNTY CHANCERY COURT, FIRST JUDICIAL DISTRICT
ATTORNEYS FOR APPELLANT:	BRIAN CRAIG KIMBALL KATHLEEN ELIZABETH CARRINGTON
ATTORNEYS FOR APPELLEES:	M. REED MARTZ MACY DERALD HANSON
NATURE OF THE CASE:	CIVIL - CONTRACT
DISPOSITION:	AFFIRMED IN PART; REVERSED AND RENDERED IN PART - 08/13/2019
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

BEFORE CARLTON, P.J., GREENLEE AND McCARTY, JJ.

CARLTON, P.J., FOR THE COURT:

¶1. Williams Equipment and Supply Company Inc. filed a complaint in the Hinds County Chancery Court against M&R Builders LLC and Triangle Construction Company Inc. seeking to recover rental payments for metal concrete forms used in foundation work on a construction project. M&R Builders and Triangle Construction then filed cross-claims against each other for breach of contract alleging that the terms of the subcontract agreements regarding foundation work meant that the other party was responsible for paying the rental

payments owed to Williams Equipment.

¶2. After a trial on the matter, the chancellor found that according to the subcontract agreements, M&R Builders was responsible for paying Williams Equipment the rental costs of the metal concrete forms. Accordingly, the chancellor ordered M&R Builders to pay Williams Equipment $50,905.89 in damages and attorney's fees. The chancellor also found that M&R Builders was responsible for the attorney's fees incurred by Triangle Construction in defending the action and awarded Triangle Construction over $15,000 in damages and attorney's fees.

¶3. M&R Builders now appeals and asserts the following assignments of error: (1) the chancellor did not have subject matter jurisdiction; (2) the chancellor erred by implicitly finding that Williams Equipment proved the essential elements of its claims against M&R Builders and Triangle Construction; (3) the chancellor erred in finding that M&R Builders was responsible for the rental costs of the metal concrete forms; and (4) the chancellor erred in awarding damages and attorney's fees to Williams Equipment and damages and attorney's fees to Triangle Construction.

¶4. After our review, we affirm the chancellor's award of damages to Williams Equipment and the chancellor's award of both damages and attorney's fees to Triangle Construction. However, we reverse and render the chancellor's award of attorney's fees to Williams Equipment.

FACTS

¶5. The case before us concerns the payment of the rental costs for metal concrete forms

used in foundation work for two construction projects. Triangle Construction is a general contracting company in Jackson, Mississippi. Relevant to this litigation, Triangle Construction served as the general contractor for the construction of three multi-family apartment complexes in Jackson: the Taylor Court Project, the Downing Court Project, and the Oxford Court Project.[1] Bob King is the president of Triangle Construction.

¶6. After substantial rainfall in the Jackson area created delays for Triangle Construction, it sought the subcontracting services of M&R Builders in order to ensure timely completion of the projects. Relevant to this case, M&R Builders bid the foundation work for the three apartment complexes. Jerry and Jackie McBride own M&R Builders. Their son, Johnny McBride, works as a project manager with the company.

¶7. Williams Equipment, a company that rents and sells equipment and materials for construction projects, rented out the metal concrete forms used by M&R Builders in performing the foundation work.

¶8. The record reflects that the initial engineering plans for the Oxford Court Project and the Downing Court Project provided for stem walls (also known as retainer walls). The structural engineer instructed that metal concrete forms were required for the foundation work. As a result, M&R Builders informed Triangle Construction that they needed to obtain metal concrete forms for the foundation work. According to M&R Builders and Williams

[1] This appeal mainly involves two of the three apartment complexes: the Downing Court Project and the Oxford Court Project. The record reflects that the plans for the Taylor Court Project required a standard foundation with standard footings and grade beams, and M&R Builders used wooden concrete forms for this project. Triangle Construction paid for the rental costs of the wooden concrete forms.

Equipment, Triangle Construction authorized M&R Builders to order the forms and that Triangle would pay for them.

¶9. In late July 2015, Bob King of Triangle Construction met with Jerry McBride and Johnny McBride of M&R Builders and Laird McMahen, a representative of Williams Equipment. McMahen testified that a week prior to this meeting, he called King, who assured McMahen that "he would be renting all the forms and paying for all the forms [and that] whatever Johnny needed to order, to release it to him." McMahen testified that at that time, Bob King gave McMahen his American Express credit card number.

¶10. McMahen testified that at the in-person meeting, he informed King that the concrete forms are rented on a 28-day cycle and that King would be charged on more than one occasion for the rentals. Johnny McBride and Jerry McBride both testified that at that same meeting, King instructed M&R Builders that he wanted parallel production (simultaneous construction on all slabs) in order to speed up the work on the projects. Johnny McBride informed King that parallel construction would increase the cost for the concrete forms.

¶11. On July 30, 2015, Williams Equipment charged Triangle Construction's American Express account in the amount of $4,513.39 for the rental of the first set of metal concrete forms. McMahen testified that Triangle Construction did not object to the charge. McMahen admitted that Williams Equipment did not have a signed rental contract or note of security from Triangle Construction; rather, he had "a man's word and his credit card."

¶12. In August 2015, the two subcontract agreements between Triangle Construction and M&R Builders for the work on the Oxford Court Project and the Downing Court Projects

were finalized. These two subcontract agreements are nearly identical to one other.

¶13. M&R Builders submitted into evidence the original draft of the Oxford Court subcontract agreement. This original draft contains handwritten changes made by Jerry McBride from M&R Construction. The provisions (as well as the handwritten changes) in this original draft were also initialed by Jerry McBride. These changes were then incorporated into both the Oxford Court and Downing Court subcontract agreements, and the revised versions of both subcontract agreements were submitted into evidence by Triangle Construction.

¶14. In the revised versions of the subcontract agreements, the parties agreed that the "Scope of Work" for the slabs under the two contracts would be "Form, Pour, and Finish – Labor Only; Install Rebar – Labor Only." Under Article 4, (Progress and Completion), the original draft of the subcontract agreement for the Oxford Court Project provided that M&R Builders would "keep and maintain on the project a sufficient number of properly qualified workmen **and a sufficient quantity of materials, equipment, and supplies** to efficiently perform the work." However, the terms "materials" and "supplies" were marked out with Jerry McBride's initials next to these markings. These terms ("materials" and "supplies") were then omitted from the revised subcontract agreements, and the revised sentence read as follows: M&R Builders "shall keep and maintain on the project a sufficient number of properly qualified workmen **and a sufficient quantity of equipment** to efficiently perform the work." It is important to note that the revised subcontract agreements submitted into evidence by Triangle Construction do not contain any of these handwritten changes or

initials, but these agreements do incorporate the handwritten changes.

¶15. Relevant to payment for the metal concrete forms, the final versions of the subcontract agreements state as follow:

> 1. PERFORMANCE:
>
> [M&R Builders] agrees to perform all of the work specified and actually required, **to furnish all labor, materials, equipment, supplies and other items for the work and to pay promptly for all of such**, and to complete the work in strict compliance with the terms of the Prime Contract and to the satisfaction of, and in compliance with, the directions of Triangle Construction Co.
>
> . . . .
>
> 4. PROGRESS AND COMPLETION:
>
> Unless herein otherwise specifically provided, [M&R Builders] shall commence work promptly or upon notice from [Triangle Construction]. [M&R Builders] shall, in any event, prosecute the work diligently and so as to avoid delaying the progress of [Triangle Construction] or other subcontractors on other portions of the project work. [**M&R Builders] shall keep and maintain on the project a sufficient number of properly qualified workmen and a sufficient quantity of equipment to efficiently perform the work** as required without delay. Should [M&R Builders] cause delay in the progress or completion of the project, [Triangle Construction] may recover from [M&R Builders] the damages resulting there from.
>
> . . . .
>
> 6. ADVANCES:
>
> [Triangle Construction] may, but shall not be required to, advance sums to [M&R Builders] for the purpose of financing the work and may offset such against any subcontract earnings, including final retainage, without the consent of, and free of any claim of unauthorized prepayment by, any Surety or [M&R Builders]. **[Triangle Construction] may, but shall not be required to, supply [M&R Builders] with labor, materials, equipment and supplies and other items acceptable to the Subcontractor in the performance of the work. If this occurs, Triangle [Construction] may recover the value or**

> **price therefore against [M&R Builders]** and [M&R Builders's] surety, if any, without being required to offset the same or any part thereof against the earnings of [M&R Builders].
>
> . . . .
>
> 24. ADDITIONAL PROVISIONS:
>
> All documentation and pay requests to be processed using Procore.
>
> INCLUSIONS:
> Labor
> **Equipment**
> Insurance
> Licenses
> Tax
>
> EXCLUSIONS:
> **Materials**
> Steel
> Concrete
> Concrete Pump Truck

(Emphasis added).

¶16. McMahen testified that when Williams Equipment was ready to charge Triangle Construction for the additional metal concrete forms, he attempted to contact King on multiple occasions without success. McMahen explained that: "Before I made the final charge of $31,922.79 to Triangle Construction, I tried calling Mr. King and setting up an appointment to see if he had any questions about this. I went by his office. I called him. I went by his office. I called him. I went by his office. Mr. King was avoiding me." McMahen testified that he grew concerned. On November 24, 2015, Williams Equipment attempted to charge Triangle Construction's American Express account for the remaining amount due for the rental of the metal concrete forms: $31,525.31. Triangle Construction successfully

disputed the charge with American Express.

¶17. On May 19, 2016, Williams Equipment filed a complaint in Hinds County Chancery Court alleging that Triangle Construction and M&R Builders were "liable under contract, under the laws of agency, under a theory of quantum meruit, [and] under a theory of unjust unrichment" to pay Williams Equipment the amount of $31,922.79 for the metal concrete forms.[2]

¶18. In July 2016, Triangle Construction and M&R Builders filed their answers to Williams Equipment's complaint. (Triangle Construction also filed a counterclaim against Williams Equipment, which was eventually dismissed with prejudice.)

¶19. Triangle Construction and M&R Builders also filed cross-claims against each other for breach of contract. In the cross-claims, each party alleged that the terms of these two subcontract agreements meant that the other party was responsible for paying Williams Equipment for the metal concrete forms. M&R Builders asserted that it was responsible for "labor only" with respect to the concrete work and that Triangle Construction was responsible for all other costs.

¶20. On August 16, 2016, M&R Builders filed a motion to transfer the case to the Hinds County Circuit Court. In its motion, M&R Builders asserted that "[t]he [c]omplaint makes

[2] Williams Equipment also named Oxford Court Group LP and Downing Court Group LP as defendants in their complaint. In an order titled Stipulation of Dismissal with Prejudice of Certain Pleaded Claims, Williams Equipment, Triangle Construction, and M&R Builders eventually stipulated to the following: (1) Triangle Construction's counterclaims against Williams Equipment were dismissed with prejudice, and (2) all of Williams Equipment's claims against Oxford Court Group and Downing Court Group were dismissed with prejudice.

clear that the nature of Williams [Equipment's] claim is contractual and that the primary relief sought is damages." M&R Builders argued that such matter should be heard by a court of law and not a court of equity. Triangle Construction joined this motion.

¶21. At a hearing held October 21, 2016, the parties agreed that no express contract, i.e., no written or oral contract, existed between Williams Equipment and M&R Builders or Triangle Construction. Williams Equipment conceded that because there was no express contract pertaining to who was responsible for payment of the rental costs, its claim against M&R Builders and Triangle Construction was actually one for quantum meruit. The chancellor accordingly denied M&R Builders's motion to transfer based on this representation. The chancellor then ordered Williams Equipment to amend its complaint and withdraw the breach of contract claim.

¶22. During this same hearing, the chancellor determined that the subcontract agreements between M&R Builders and Triangle Construction were "ancillary determinations to the real claim" regarding which one of the parties owed Williams Equipment rental payments for the metal concrete forms. Triangle Construction acknowledged that two versions of the subcontract agreements were submitted into evidence—one that has terms crossed out and contains Jerry McBride's initials, and one that incorporates these changes—and asserted that "one of the questions that a jury will have to answer is which version of this contract is correct."

¶23. On January 24, 2017, the chancellor entered an order memorializing her bench ruling on M&R Builders's motion to transfer. Williams Equipment entered its first amended

complaint and removed the breach of contract claim.

¶24. On March 20, 2017, M&R Builders filed a motion for summary judgment seeking dismissal of Williams Equipment's claims against it. The chancellor denied the motion.

¶25. A trial was held on Williams Equipment's claims and M&R Builders's and Triangle Construction's cross-claims on April 3, 2017 and June 12, 2017. The chancellor heard testimony from Laird McMahen and Mike Wainscott of Williams Equipment; Scott King and Bob King of Triangle Construction; and Johnny McBride and Jerry McBride of M&R Builders. We discuss this testimony at length in our discussion section below.

¶26. On August 18, 2017, the chancellor entered an order and opinion determining that M&R Builders was responsible to Williams Equipment for the cost of the metal concrete forms. The chancellor explained that Section 1 of the subcontract agreement between Triangle Construction and M&R Builders provided that M&R Builders agreed "to furnish all labor, materials, equipment, supplies, and other items for the work and to promptly pay for all of such." The chancellor stated that based on the evidence and testimony provided, the concrete forms in question constituted equipment. The chancellor held that the term "equipment," as well as who bears the responsibility for supplying the equipment, was unambiguous. The chancellor also determined that under Section 24 of the subcontract agreement, the term "equipment" was listed under the category of "inclusions," and therefore M&R Builders was responsible for supplying the equipment.

¶27. Regarding Triangle Construction's payment of $4,513.39 for the rental of the first set of metal concrete forms, the chancellor found that Section 6 of the subcontract agreement

provided that Triangle Construction

> may, but shall not be required to, advance sums to [M&R Builders] for the purpose of financing the work and may offset such against any subcontract earnings, including final retainage, without the consent of, and free of any claim of unauthorized prepayment by, any Surety or [M&R Builders]. [Triangle Construction] may, but shall not be required to, supply [M&R Builders] with labor, materials, equipment and supplies and other items acceptable to [M&R Builders] in the performance of the work. If this occurs, Triangle [Construction] may recover the value or price therefore against [M&R Builders] and [M&R Builders's] surety, if any, without being required to offset the same or any part thereof against the earnings of [M&R Builders].

¶28. The chancellor therefore held that "the one-time $4500 payment via an American Express card authorized by Mr. King at the request of Jerry McBride to Williams Equipment . . . [was] an advance and, therefore, the payment is not to be construed as evidence that Triangle [Construction] assumed the responsibility of paying the cost of renting the concrete form equipment from Williams Equipment."

¶29. On October 6, 2017, the chancellor entered a second order and opinion finding that M&R Builders was responsible "for the payment of the attorney['s] fees incurred by Triangle [Construction] in this action." The chancellor referenced Section 8 of the subcontract agreement which provided as follows:

> [M&R Builders] shall also be liable for all costs and expenses, including but not limited to attorneys fees [sic], incurred by [Triangle Construction] in prosecuting or defending any claim, suit[,] or other action which arises out of or relates to the obligations assumed herein by [M&R Builders] or [M&R Builders's] (including its successors, agents and employees) actions, inactions or omissions in performing under this subcontract.

¶30. On January 30, 2018, the chancellor held a hearing on the issue of damages. On February 9, 2018, the chancellor entered her final judgment awarding Williams Equipment

the amount of $31,922.79 in damages for the principal amount due, as well as $18,654.50 in attorney's fees and $328.60 in other fees and costs, for a total of $50,905.89—despite M&R Builders's objection. On February 20, 2018, the chancellor entered a judgment awarding Triangle Construction over $15,000 in damages and attorney's fees.[3]

¶31. M&R Builders now appeals the following judgments: (1) the August 17, 2017 order and opinion finding "M&R bears the responsibility for the cost of renting the concrete forms from [Williams Equipment]," (2) the October 6, 2017 order and opinion finding "M&R [Builders] bears the responsibility for the payment of the attorney's fees incurred by Triangle [Construction] in this action," (3) the February 8, 2018 judgment in favor of Williams Equipment, and (4) the February 20, 2018 judgment in favor of Triangle Construction.

STANDARD OF REVIEW

¶32. On appeal, we review a chancellor's decision for an abuse of direction. *Byrd v. Abney*, 99 So. 3d 1180, 1183 (¶11) (Miss. Ct. App. 2012). "We will not disturb a chancellor's findings unless they are manifestly wrong, clearly erroneous, or applied the wrong legal standard." *Cummins v. Goolsby*, 255 So. 3d 1257, 1258 (¶8) (Miss. 2018). We review questions of law de novo. *Id*.

DISCUSSION

I. Chancery Court versus Circuit Court Jurisdiction

[3] In her final judgment, the chancellor specified that M&R Builders was liable to Triangle Construction in the amount of $4,542.15 for reimbursement of the advance that Triangle Construction made on behalf of M&R Builders on its American Express credit card, as well as the amount of $1,213.52 for reimbursement of the cost of the Joint 30(b)(6)/individual deposition of M&R Builders and Jerry McBride. The chancellor also awarded Triangle Construction $10,000.00 for reimbursement of attorney's fees.

¶33. M&R Builders argues that the chancellor did not possess subject matter jurisdiction over the instant matter and therefore erred by refusing to transfer the case to the circuit court. M&R Builders argues that Mississippi jurisprudence has repeatedly held that breach of contract cases are best suited for circuit courts, especially in cases like the one before us, where the primary relief sought is damages rather than specific performance.[4] M&R Builders maintains that damages are a legal remedy meant for a court of law, not a court of equity.

¶34. The record reflects that in Williams Equipment's initial complaint, it alleged that M&R Builders and Triangle Construction were "liable under contract," among other theories, and that Williams Equipment was owed "the principal amount of $31,922.79" pursuant to a series of invoices. M&R Builders acknowledges that Williams Equipment later removed its contract claim from the complaint, but it asserts that Williams Equipment still proceeded at trial as if the case was one for breach of contract. M&R Builders claims that Williams Equipment relied on bid summaries and invoices as the basis for what was rented and the amounts owed to establish the reasonable value of the rented materials. Although M&R Builders objected, the chancellor admitted these items into evidence.

¶35. We recognize that "[j]urisdiction is a question of law that is reviewed by this Court de novo. *Tyson Breeders Inc. v. Harrison*, 940 So. 2d 230, 232 (¶5) (Miss. 2006). Similarly, "[t]he standard of review for a ruling on a motion to transfer from chancery court to circuit court is also de novo." *Id*. We must "look to the face of the complaint, examining the nature

---

[4] In *Derr Plantation Inc. v. Swarek*, 14 So. 3d 711, 717 (¶15) (Miss. 2009), the supreme court explained that "[a] claim for specific performance as a remedy for breach of contract is within the equity jurisdiction of the chancery court."

of the controversy and the relief sought" in order to determine which court has subject matter jurisdiction. *Derr Plantation Inc. v. Swarek*, 14 So. 3d 711, 716 (¶11) (Miss. 2009). The supreme court has instructed the reviewing court to "look to the substance, not the form, of a claim to determine whether that claim is legal or equitable." *Id*.

¶36. The supreme court "has held that breach of contract issues are best heard in circuit court." *Tyson Breeders*, 940 So. 2d at 233 (¶9). In *Tyson Breeders*, the supreme court explained that "Article 6 of the Mississippi Constitution of 1890 designates the circuit court as a court of general jurisdiction, and the chancery court as one of limited jurisdiction." *Id*. at 233 (¶8). The Mississippi Constitution mandates that "all causes that may be brought in the chancery court whereof the circuit court has exclusive jurisdiction shall be transferred to the circuit court." *Id*. (quoting Miss. Const. art. 6, § 162). However, the supreme court has "consistently held that if it appears from the face of a well-pleaded complaint that an independent basis for equity jurisdiction exists, our chancery courts may hear and adjudge law claims." *Derr Plantation*, 14 So. 3d at 716 (¶11).

¶37. Williams Equipment maintains, and the record reflects, that it admitted that its claim against M&R Builders and Triangle Construction was one for quantum meruit. The supreme court has stated that "quantum meruit claims are equitable in nature and should be brought in the chancery court." *Poole v. Gwin, Lewis & Punches LLP*, 792 So. 2d 987, 991 (¶15) (Miss. 2001); *McDonald's Corp. v. Robinson Indus. Inc*., 592 So. 2d 927, 934 (Miss. 1991) ("Where there appears from the face of the well-pleaded complaint an independent basis for equity jurisdiction, our chancery courts may hear and adjudge law claims.").

¶38. Additionally, in the present case, the chancellor acknowledged the breach of contract claims set forth in the cross-claims between M&R Builders and Triangle Construction. The chancellor determined that those breach of contract claims, which stemmed from the subcontract agreements, "are ancillary determinations to the real claim," which is that one of the parties owes Williams Equipment rental payments for the metal concrete forms. The supreme court has "allowed a chancery court to consider actions at law if those questions are pendent to the claim by which the court has subject matter jurisdiction," explaining that "[a] claim is pendent if it arises out of the same transaction or occurrence as the principal claim or, as others put it, out of a common nucleus of operative fact." *McDonald's Corp*, 592 So. 2d at 934 (internal quotation mark omitted).

¶39. After our review, we find that the basis of Williams Equipment's amended complaint is quantum meruit and therefore Williams Equipment's claim is equitable in nature. Furthermore, all of the parties herein agree that no express contract existed between Williams Equipment and M&R Builders or Triangle Construction. We find no error in the chancellor's decision to retain jurisdiction over this case.

II. Essential Elements of Williams Equipment's Claims

¶40. M&R Builders states that in the order and judgments entered in the chancery court, the chancellor made no findings regarding Williams Equipment's causes of action for agency, unjust enrichment, or quantum meruit. Instead, the chancellor addressed only the breach of contract claims that M&R Builders and Triangle Construction set forth. M&R Builders asserts that the chancellor therefore implicitly found that Williams Equipment

proved the essential elements of its claims against M&R Builders and Triangle Construction. M&R Builders argues that such finding constitutes reversible error.

¶41. In the chancellor's August 18, 2017 order and opinion, she set forth the procedural history of the case and stated "[o]f final issue in this case is whether M&R Builders . . . or Triangle Construction . . . bears responsibility for the cost of renting concrete forms for the construction project." Where the chancellor does not make a specific finding, the Court is required, on review, to assume "that the [c]hancellor resolved all such fact issues in favor of [the] appellee." *Thomas v. Crews*, 203 So. 3d 701, 704 (¶14) (Miss. Ct. App. 2016). Here, the chancellor did not make express findings regarding each of Williams Equipment's claims, but she ultimately found that Williams Equipment was entitled to receive payment for the rental costs of the metal concrete forms.

¶42. In its complaint, Williams Equipment set forth the following claims: agency, unjust enrichment, and quantum meruit.

A. Agency

¶43. M&R Builders asserts that "agency" is not a theory of liability under Mississippi law. M&R Builders also asserts that Williams Equipment failed to present evidence regarding any "agency" relationship that would support another cause of action.

¶44. Williams Equipment maintains that it did not assert a stand-alone claim based on agency in its complaint. However, Williams Equipment argues on appeal that "the law is clear that if M&R [Builders] was acting as an agent for Triangle [Construction] in ordering the forms, which was the position taken by M&R [Builders], then Triangle [Construction]

could in fact be liable for the form rental charges even if Triangle [Construction] could establish it did not give approval to Williams Equipment for the rental order."

B. Unjust Enrichment

¶45. M&R Builders argues that "unjust enrichment only applies to situations where there is no legal contract and 'the person sought to be charged is in possession of money or property which in good conscience and justice he should not retain but should deliver to another.'" (Citing *Powell v. Campbell*, 912 So. 2d 978, 982 (¶14) (Miss. 2005)). M&R Builders maintains that Williams Equipment presented no proof that M&R Builders or Triangle Construction possessed mistakenly paid money or possessed property that belonged to Williams Equipment.

¶46. Williams Equipment disputes M&R Builders's assertion that a claim for unjust enrichment can only exist if there is a mistaken payment. In support of its argument, Williams Equipment cites to Billy G. Bridges, James W. Shelson & George D. Warner, Griffith's Mississippi Chancery Practice § 720 (2000) for the following proposition:

> The doctrine of unjust enrichment or recovery in quasi-contract applies to situations where there is no legal contract but where the person sought to be charged is in possession of money or property which in good conscience and justice he should not retain but should deliver to another, the courts imposing a duty to refund the money **or the use value of the property** to the person to whom in good conscience it ought to belong.

(Emphasis added); *see also Powell*, 912 So. 2d at 982 (¶14). In *Hans v. Hans*, 482 So. 2d 1117, 1122 (Miss. 1986), the supreme court recognized this definition of unjust enrichment. Williams Equipment therefore maintains it is entitled to "the use value of the property," namely the rental value of the metal concrete forms which were returned to Williams

Equipment after the builders had completed using them.

¶47. The transcript reflects that Williams Equipment presented testimony and evidence to show that it indeed rented out the metal concrete forms at issue to M&R Builders, and M&R Builders used these forms in their foundation work. At the time of trial, Williams Equipment was still owed $31,922.79 in outstanding rental fees. Williams Equipment submitted bid summaries and invoices to prove the reasonable value of the rented concrete forms.

C. Quantum Meruit

¶48. M&R Builders next argues that Williams Equipment's claim for quantum meruit fails because they did not prove (1) the "reasonable value of the materials" rented or (2) that M&R was the "person sought to be charged." Williams Equipment, however, maintains that it met all four requirements that are essential to recovery under a claim for quantum meruit.

¶49. Under a theory of quantum meruit, the plaintiff must prove:

> (1) valuable services were rendered or materials furnished; (2) for the person sought to be charged; (3) which services and materials were accepted by the person sought to be charged, used and enjoyed by him; and (4) under such circumstances as reasonably notified person sought to be charged that plaintiff, performing such services, was expected to be paid by person sought to be charged.

Tupelo Redevelopment Agency v. Gray Corp. Inc., 972 So. 2d 495, 514-15 (¶56) (Miss. 2007). "The measure of recovery in quantum meruit is the reasonable value of the materials or services rendered." *Estate of Johnson v. Adkins*, 513 So. 2d 922, 926 (Miss. 1987).

¶50. M&R Builders maintain that because this is not a contract case, Williams Equipment cannot simply rely on invoices as proof of what it believes it is owed for renting metal concrete forms for use on the apartment complex projects. M&R Builders argues that

without more, the bid summaries and invoices are not proof of the reasonable value of the materials for purposes of the Williams Equipment's quantum meruit claim. M&R Builders asserts that Williams Equipment must establish that the invoices reflect the reasonable value of M&R Builders's and Triangle Construction's use of those materials. M&R Builders states that Williams Equipment failed to do this; as a result, they failed to prove this essential element of its claim.

¶51. As stated, the record reflects that the chancellor admitted into evidence various bid summaries and invoices prepared by Williams Equipment, despite M&R Builders's objection. M&R submits that during McMahen's testimony, McMahen explained that the bid were prepared by Josh Pearson, a detailer and estimator for Williams Equipment, who used a computer database to put together the bid summaries. McMahen testified that he personally did not create the database and could not testify to how those values were generated. M&R Builders also asserts that although the bid summaries were used to create the invoices, the amounts do not correlate, and Williams Equipment did not offer any evidence verifying McMahen's assumption that Williams Equipment must have been asked to provide additional materials that were not part of the original bid summaries. M&R Builders further asserts that although the invoices also include freight charges, McMahen could not testify regarding the number of deliveries actually made to the job site to verify the freight charges or the time the materials were in the possession of M&R Builders and Triangle Construction. McMahen also testified that there was a delay in billing "[b]ecause we couldn't bill [for the forms] accurately without knowing exactly what was still out there."

¶52. During the testimony of Mike Wainscott from Williams Equipment, Wainscott stated that he assumed the invoices accurately reflected what forms went out to the job sites. However, M&R Builders maintains that Wainscott did not have any personal knowledge to verify that assumption: Wainscott's testimony reflects that he did not know when the forms were delivered, when they were picked up, or how many deliveries were made.

¶53. Our review of the record reflects that at trial, Williams Equipment provided testimony and evidence to meet each of the four requirements necessary for recovery under a claim for quantum meruit: (1) Williams Equipment furnished the metal concrete forms necessary for use in the foundation work; (2) Williams Equipment sought payment from M&R Builders and Triangle Construction; (3) Triangle Construction subcontracted M&R Builders, who used the metal concrete forms to perform work for Triangle Construction; and (4) Triangle Construction and M&R Builders that rental costs must be paid to Williams Equipment for the use of the metal concrete forms. *See Tupelo Redevelopment Agency*, 972 So. 2d at 514-15 (¶56).

¶54. After our review of Williams Equipment's claims and the evidence presented at trial, we find that the chancellor did not abuse her discretion in finding that Williams Equipment was entitled to receive payment for the rental costs of the metal concrete forms.[5]

---

[5] M&R Builders claims that even if this Court finds that Williams Equipment proved the reasonable value of the use of the metal concrete forms and that the bid summaries and invoices were properly admitted into evidence, Williams Equipment failed to prove that M&R was the "person sought to be charged" for the rented forms. *See Tupelo Redevelopment Agency*, 972 So. 2d. at 514-15 (¶56). M&R Builders maintains that Williams Equipment "unwaveringly" testified at trial that Triangle Construction was the "person" Williams Equipment "sought to be charged" for the rented forms. Wainscott and McMahen both testified that M&R Builders never represented that it would be financially

III. Responsibility of Rental Costs

¶55. M&R Builders argues that the chancellor erred in finding that M&R Builders was responsible for the cost of renting concrete form for use on the Downing Street Project and the Oxford Street Project. M&R Builders asserts that the metal concrete forms are considered materials, not equipment. M&R Builders therefore claims that according to the subcontract agreements, Triangle Construction was responsible for the cost of the forms.

¶56. In her August 18, 2017 order and opinion, the chancellor held as follows:

> Based on the evidence and testimony provided, the [c]ourt finds the concrete forms in question to be equipment. The [c]ourt also finds the term "equipment" to be unambiguous. Also, the Court deems the use of the term "equipment" in the contract itself and who bears the responsibility for supplying the equipment to be unambiguous.

The chancellor determined that according to the subcontract agreement, M&R Builders was responsible for the cost of renting the metal concrete forms.

¶57. This Court reviews questions of contract construction de novo. *Epperson v. SOUTHBank*, 93 So. 3d 10, 16 (¶16) (Miss. 2012). Reviewing and interpreting a contract on appeal involves a three-step analysis:

> First, we must determine whether the contract is ambiguous, and if it is not, then it must be enforced as written. In making that determination, the Court must review the express wording of the contract as a whole. If the contract is unambiguous, the intention of the contracting parties should be gleaned solely

---

responsible for the forms, and it was always M&R Builders's position that Triangle Construction was responsible. As stated, McMahen testified that King told him that Johnny McBride was to order the forms and that Triangle Construction would pay for all of the rental forms. According to McMahen, King provided credit card information for Williams Equipment to use in charging Triangle for the forms, Triangle did not dispute the charge, and Laird informed Bob that he would be charged on more than one occasion. We address this argument in section III of the discussion.

> from the wording of the contract and parole evidence should not be considered. This Court must accept the plain meaning of a contract as the intent of the parties where no ambiguity exists.
>
> . . . .
>
> Second, if the Court is unable to ascertain the meaning of the contract and the intent of the parties within the "four corners" of the contract, we will apply the canons of contract construction. Where the language of an otherwise enforceable contract is subject to more than one fair reading, the reading applied will be the one most favorable to the non-drafting party.
>
> Third, if the meaning of the contract is still ambiguous, only then is extrinsic evidence considered. It is only when the review of a contract reaches this point that prior negotiation, agreements, and conversations might be considered in determining the parties' intentions in the construction of the contract. The parol evidence rule provides that where a document is incomplete parol evidence is admissible to explain the terms but, in no event, to contradict them.

Id. at 16-17 (¶¶17-19) (citations and internal quotation marks omitted).

¶58. M&R Builders maintains that the principal dispute regarding the subcontract agreements is whether the concrete forms are "materials" or "equipment." M&R Builders argues that if the term "equipment" is unambiguous, as set forth in the chancellor's order and opinion, then the chancellor was not permitted to rely on evidence and testimony to find that the forms were "equipment" and not "materials."

¶59. The supreme court has defined an ambiguity "as a susceptibility to two reasonable interpretations." *Dalton v. Cellular S. Inc*., 20 So. 3d 1227, 1232 (¶10) (Miss. 2009). "We note that uncertainty of the contractual terms can provide the necessary condition precedent to find ambiguity." *Hicks v. N. Am. Co. for Life & Health Ins.,* 47 So. 3d 181, 185 (¶16) (Miss. Ct. App. 2010) (quoting *Miss. Farm Bureau Mut. Ins. Co. v. Walters*, 908 So.2d 765,

769 (¶12) (Miss. 2005)).[6] However, the supreme court has held that "[t]he parties[']
disagreement over the meaning of a word or provision, alone, does not render an instrument
ambiguous." *HeartSouth PLLC v. Boyd*, 865 So. 2d 1095, 1105 (¶27) (Miss. 2003). Rather,
"we must read the contract as a whole to determine the presence of any ambiguous terms.
Particular words should not control; rather, the entire instrument should be examined."
Cypress Springs LLC v. Charles Donald Pulpwood Inc., 161 So. 3d 1100, 1104 (¶16) (Miss.
Ct. App. 2015) (internal quotation mark omitted).

¶60. In *Dalton*, 20 So. 3d at 1232 (¶10), the supreme court explained:

> An "ambiguous" word or phrase is one capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business.

From our reading of *Dalton*, we find that a chancellor can look at additional evidence of "the
customs, practices, usages and terminology as generally understood in the particular trade or
business" for the purposes of determining if an ambiguity exists. *Id*.[7]

¶61. In *Page v. Hudson*, 187 So. 3d 1072, 1078 (¶18) (Miss. Ct. App. 2016), the chancellor
held that the language in a property-settlement agreement was "clear and unambiguous as a

---

[6] The supreme court has held that "[t]he fact that a term is not defined in the policy itself does not alone make that term ambiguous." *Chevis v. Miss. Farm Bureau Mut. Ins. Co.*, 76 So. 3d 187, 194 (¶23) (Miss. Ct. App. 2011) (quoting *In re Katrina Canal Breaches Litig*., 495 F.3d 191, 207 (5th Cir. 2007) (applying Louisiana law)).

[7] Compare *Linde Air Prod. Co. v. Am. Sur. Co.*, 168 Miss. 877, 152 So. 292, 293 (1934), where the supreme court held that the term "equipment," as used in a contractor's surety bond, "must be given its usual and ordinary meaning, which is, the outfit, i. e., tools, machinery, implements, appliances, etc., necessary to enable one to do the work in which he is engaged."

matter of law," but found that it remained to be determined what the language meant. In determining the meaning of the language at issue, the chancellor considered the evidence and motions submitted by the parties. *Id*. at (¶19). On appeal, this Court found that the chancellor "properly examined" the property-settlement agreement

> to determine whether or not it was ambiguous. Upon his finding that the Agreement was clear and unambiguous, the chancellor turned next to determine the meaning of the language in the provision regarding [the appellee's] retirement.

Id. at (¶20). In so finding, this Court recognized that "[t]he mere fact that the parties disagree about the meaning of a provision of a contract does not make the contract ambiguous as a matter of law." *Id*.

¶62. We now turn to review the evidence and testimony the chancellor considered in making her findings in the present case.

¶63. As stated above, the subcontract agreements provide in pertinent part as follows:

> 1. PERFORMANCE:
>
> [M&R Builders] agrees to perform all of the work specified and actually required, **to furnish all labor, materials, equipment, supplies and other items for the work and to pay promptly for all of such**, and to complete the work in strict compliance with the terms of the Prime Contract and to the satisfaction of, and in compliance with, the directions of Triangle Construction Co.
>
> . . . .
>
> 4. PROGRESS AND COMPLETION:
>
> Unless herein otherwise specifically provided, [M&R Builders] shall commence work promptly or upon notice from [Triangle Construction]. [M&R Builders] shall, in any event, prosecute the work diligently and so as to avoid delaying the progress of [Triangle Construction] or other subcontractors on

other portions of the project work. [**M&R Builders] shall keep and maintain on the project a sufficient number of properly qualified workmen and a sufficient quantity of equipment to efficiently perform the work** as required without delay. Should [M&R Builders] cause delay in the progress or completion of the project, [Triangle Construction] may recover from [M&R Builders] the damages resulting there from.

. . . .

6. ADVANCES:

[Triangle Construction] may, but shall not be required to, advance sums to [M&R Builders] for the purpose of financing the work and may offset such against any subcontract earnings, including final retainage, without the consent of, and free of any claim of unauthorized prepayment by, any Surety or [M&R Builders]. **[Triangle Construction] may, but shall not be required to, supply [M&R Builders] with labor, materials, equipment and supplies and other items acceptable to the Subcontractor in the performance of the work. If this occurs, Triangle [Construction] may recover the value or price therefore against [M&R Builders]** and [M&R Builders's] surety, if any, without being required to offset the same or any part thereof against the earnings of [M&R Builders].

. . . .

24. ADDITIONAL PROVISIONS:

All documentation and pay requests to be processed using Procore.

INCLUSIONS:
Labor
Equipment
Insurance
Licenses
Tax

EXCLUSIONS:
Materials
Steel
Concrete
Concrete Pump Truck

(Emphasis added).

¶64. As stated, Laird McMahen of Williams Equipment testified at trial that Johnny McBride initially contacted him regarding renting the metal concrete forms. Johnny informed McMahen that "Triangle Construction was going to be paying for all the form rental," and Johnny gave McMahen the phone number for Bob King. McMahen testified that he called Bob King, who "agreed that yes, he would be renting all the forms and paying for all the forms." Bob King told McMahen "that whatever Johnny needed to order, to release it to him." Bob King also gave McMahen an American Express credit card number. McMahen testified that about a week after speaking to Bob King on the phone, he met with King in person on the job site. At that time, Bob King again confirmed that he was paying for the metal concrete forms. McMahen informed Bob King that according to Williams Equipment's rental payment system, Bob King would incur more than one charge on his credit card. McMahen testified that Bob King understood that there would be a series of transactions charged to his card.

¶65. McMahen testified that Triangle Construction did pay for the first rental charge, which was just over $4,000. McMahen stated that Triangle Construction never objected to this charge. However, McMahen testified that before charging Bob King's card for the remaining amount of $31,922.79, he attempted to call King and set up an appointment to see if he had any questions about the charge. McMahen testified that he repeatedly called Bob King and went by his office, but King "was avoiding" him. McMahen said that he grew concerned.

¶66. McMahen admitted that the invoices listed Jerry McBride (of M&R Builders) under the "ordered by" line. McMahen explained, however, that according to the system used to print the invoices, you have to choose an option for the "ordered by line" and he "had no other choice" than to list Jerry McBride's name even though he intended for Triangle Construction to receive the invoices. McMahen also discussed that the invoices were billed to "a 304 account" with Triangle Construction's credit card and the invoices listed Triangle Construction under the "ship to" line. During cross-examination, McMahen opined that in the foundation industry, concrete forms qualify as "materials."[8]

¶67. Regarding the issue about giving McMahen his credit card, Bob King testified that Jerry McBride informed him that he needed to rent metal concrete forms from Williams Equipment in order to pour the retaining walls for the slabs at the construction site. According to Bob King, Jerry McBride told him "that he did not have an account with Williams Equipment and asked could I help him get the equipment out there that he needed so that for all of us to try to stay on schedule because we did have a schedule to go by and there was economic problems should we not hit those schedules." Bob King testified that he told Jerry McBride that he would "make this first payment. It was a month, supposed to be a month's worth of lease or rental of this equipment." Bob King asserted that he "told Mr. McBride that we would be taking that money back out of his check as an advance." Bob King testified that Jerry McBride "appeared to understand" and made no objection. Bob

[8] As we will discuss shortly, Bob King and Scott King testified that the metal concrete forms constitute "equipment." However, as stated, the chancellor found the term "equipment" in the contract to be unambiguous.

King explained that he made the first month's rental payment "[i]n order to keep my job moving and to stay with my schedule." As quoted above, Section 6 of the subcontract agreements (Advances) states that "[Triangle Construction] may, but shall not be required to, supply [M&R Builders] with labor, materials, equipment and supplies and other items acceptable to the Subcontractor in the performance of the work. **If this occurs, Triangle [Construction] may recover the value or price therefore against [M&R Builders]**."[9]

¶68. Bob King further testified that M&R Builders was responsible for "providing the equipment," and he stated that the metal concrete forms are equipment.

¶69. Scott King, vice-president of Triangle Construction, also testified at trial that he considered the metal concrete forms to be equipment. Scott King clarified that the metal concrete forms were not affixed to the projects, and could be reused and rented to other people. The following exchange regarding the contract terms occurred on direct examination between Scott King and counsel for Triangle Construction:

> [COUNSEL]: Are these concrete forms, are they equipment or tools of the trade?
>
> [KING]: Yes.
>
> [COUNSEL]: What makes you convinced that these concrete forms are either equipment or tools of the trade?
>
> [KING]: Common sense for one, first thing. You have to have this equipment in order to perform the labor of constructing this type of slab, this type of concrete slab foundation.

---

[9] *See generally Serv. Elec. Supply Co. v. Hazlehurst Lumber Co.*, 932 So. 2d 863, 870 (¶¶17-21) (Miss. Ct. App. 2006) (finding that the agreement made by the owner of a building project to issue checks to the supplier for all material ordered by the contractor did not create a contract between the owner and the supplier).

[COUNSEL]: But what is it in your mind about these forms specifically that put them into the category of equipment or tools of the trade and not in the category of a material or raw material?

[KING]: So this type of equipment or these type of tools would be used on the project to form, pour and finish the concrete slab as per the agreement. But they don't stay with the project. They don't -- it's not like it's fixed to the slab foundation. It stays there forever like the steel or like the concrete. It's used just in the formation and then pulled off afterwards and not used anymore or sent back, I guess.

¶70. Scott King also testified regarding the two versions of the subcontract agreements that were submitted into evidence by the parties—the original draft that has terms crossed out and contains Jerry McBride's initials, and the revised version that incorporates those changes. Scott King admitted that Jerry McBride requested that edits be made to the subcontract agreements "based on the conversations he had had with his attorney . . . after reviewing the language of the form contracts." Scott King opined that the revised version of the subcontract agreements were mutually drafted by Jerry McBride and himself.

¶71. Jerry McBride testified that the metal concrete forms were materials, explaining that "it's an industry standard" to consider the forms materials. Jerry McBride also testified regarding the two versions of the subcontract agreements. Jerry McBride explained that he and Scott King went through the original draft of the subcontract agreements and made changes to remove the word "materials" from falling under the responsibility of M&R Builders. According to Jerry McBride, Scott King "was supposed to make those changes" and remove the word "materials" from the subcontract agreement. Jerry McBride admitted

that he did initial next to Article I (Performance) in the original draft of the subcontract agreements, which provided that "[M&R Builders] agrees to perform all of the work specified and actually required, **to furnish all labor, materials, equipment, supplies and other items for the work and to pay promptly for all of such**." However, he asserted that Scott King "was supposed to take material out of that paragraph," but "he failed to take it out." Jerry McBride admitted that he "didn't read [the agreement] close enough" and "missed that [Scott King] had not taken out the [term] material" from that paragraph in Article I. Jerry McBride stated, however, that the word "materials," as far as being the responsibility of M&R Builders, "came [out] everywhere else [in the agreement]. It's under every exclusion. It's all over the contract."

¶72. Johnny McBride also testified that the metal concrete forms were materials. Johnny McBride explained that as it pertained to the project at issue, he understood the metal concrete forms to qualify as materials. Johnny McBride also testified that the wood forms used on the Taylor Court project were also considered materials and that Triangle Construction, not M&R Builders, paid for the wood forms.

¶73. We find that it was proper for the chancellor to review evidence and testimony in order to determine if an ambiguity existed in the subcontract agreements. After reviewing the evidence and testimony, the chancellor determined that the metal concrete forms were equipment and held that the term "equipment" was unambiguous. The chancellor also held that the use of the term "equipment" in the contract itself and the agreement about which party bore the responsibility for supplying the equipment was unambiguous. After our

review of the record, we find no error in the chancellor's order and opinion stating that per the subcontract agreements, M&R Builders was responsible for the rental costs of the metal concrete forms.

IV. Damages and Attorney's Fees

¶74. Finally, M&R Builders claims that the chancellor erred in her award of damages to Williams Equipment and the award of attorney's fees to Triangle Construction.

A. Award of $31,922.79 in Damages to Williams Equipment

¶75. Regarding the award of damages to Williams Equipment, M&R Builders claims that the chancellor improperly permitted Williams Equipment to use bid summaries and invoices to prove the reasonable value of the rented concrete forms. We review a chancellor's decision to admit or refuse evidence for an abuse of discretion. *Bower v. Bower*, 758 So. 2d 405, 413 (¶35) (Miss. 2000).

¶76. M&R Builders submits that because no contract exists between Williams Equipment and M&R Builders or Triangle Construction, bid summaries and invoices alone cannot be used to prove "reasonable value." M&R Builders submits that instead, Williams Equipment was required to put on proof demonstrating that the invoices reflect the actual use of the rented forms, namely what was used, when it was used, and the basis for a valuation of that use. M&R Builders additionally argues that the bid summaries and invoices should have been excluded from evidence because Williams Equipment failed to establish the necessary foundational requirements for their admission as business records under Mississippi Rule of Evidence 803(6).

¶77. Williams Equipment argues that the bid summaries and invoices submitted into evidence were supported by testimony and affidavits. Williams Equipment also asserts that M&R Builders never disputed the invoices prior to this appeal. The record reflects, however, that at trial, M&R Builders objected to the bid summaries and invoices being admitted into evidence.

¶78. Rule 803(6) defines a record of a regularly conducted business activity as:

> A record of an act, event, condition, opinion, or diagnosis if: (A) the record was made at or near the time by—or from information transmitted by—someone with knowledge; (B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit; (C) making the record was a regular practice of that activity; (D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11); and (E) neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness.

This Court has recognized the following foundational requirements for admitting evidence under the business records exception:

> (1) [T]he statement is in written or recorded form; (2) the record concerns acts, events, conditions, opinions or diagnoses; (3) the record was made at or near the time of the matter recorded; (4) the source of the information had personal knowledge of the matter; 5) the record was kept in the course of regular business activity; and (6) it was the regular practice of the business activity to make the record.

Dillon v. Greenbriar Digging Serv. Ltd., 919 So. 2d 172, 175 (¶8) (Miss. Ct. App. 2005) (citing *Flowers v. State*, 773 So. 2d 309, 322 (¶72) (Miss. 2000)).

¶79. At the trial below, M&R Builders objected to the bid summaries and invoices being admitted into evidence, arguing that the documents failed to fall within the business records exception of Rule 803(6). After hearing arguments from the parties, the chancellor allowed

the bid summaries into evidence after finding that they were generated in the ordinary course of business by Williams Equipment and that "to the extent that this witness is introducing the document for the company, it would be a business record." The chancellor also allowed the invoices into evidence, explaining that "[t]he rule is pretty broad that a person with knowledge in the business . . . can testify."

¶80. After reviewing the record, we find that Williams Equipment established the foundation requirements necessary to admit the bid summaries and invoices under the business records exception to the hearsay rule. We find the chancellor abused no discretion by allowing these documents into evidence. The chancellor then relied on these documents, as well as testimony from the parties, to award Williams Equipment $31,922.79 in damages.

B. Award of Attorney's Fees to Williams Equipment

¶81. M&R Builders also maintains that Williams Equipment erroneously sought attorney's fees under the open account statute, which the chancellor granted. M&R Builders argues that Williams Equipment "cannot argue on one hand that this case is not contractual in an effort to stay in [c]hancery [c]ourt and then argue it is contractual to recover attorneys' fees." M&R Builders additionally argues that Williams Equipment failed to provide adequate evidence of the reasonableness of the attorney's fees.

¶82. The supreme court has set forth that "[s]uits on open account are always contractual matters, because an underlying contract must exist for the open account to exist. It is well-established that an open account is an unwritten contract." *T. Jackson Lyons & Assocs. P.A. v. Precious T. Martin Sr. & Assocs. PLLC*, 87 So. 3d 444, 453-54 (¶33) (Miss. 2012)

(internal quotation mark omitted).[10] "[A]ttorney's fees are a special remedy available only when expressly provided for in either a statute or contract, or when there is sufficient proof to award punitive damages." *Falkner v. Stubbs*, 121 So. 3d 899, 903 (¶15) (Miss. 2013). Relevant to the issue before us, "[p]arties prevailing in a suit on an open account are entitled to attorney's fees pursuant to [Mississippi Code Annotated section] 11-53-81." *Gulf City Seafoods Inc. v. Oriental Foods Inc*., 986 So. 2d 974, 977 (¶8) (Miss. Ct. App. 2007).

¶83. Our review of the record reflects that no underlying contract exists between M&R Builders and Williams Equipment. As stated, Williams Equipment amended its complaint to remove the breach of contract claim and assert the equitable claim of quantum meruit. Because no underling contract exists, we find that Williams Equipment cannot recover attorney's fees under the open account statute.

¶84. As we acknowledged above, "attorney's fees are a special remedy available only when expressly provided for in either a statute or contract, or when there is sufficient proof to award punitive damages." *Falkner*, 121 So. 3d at 903 (¶15). There is no contract between Williams Equipment and M&R Builders and there is no "statute upon which an award of attorney's fees in this case could be based" in the present case. *In re Guardianship of Duckett*, 991 So. 2d 1165, 1179 (¶30) (Miss. 2008). The chancellor here did not award punitive damages. *Id*. Accordingly, we reverse and render the chancellor's award of

---

[10] *See also Knights Marine & Indus. Servs. Inc. v. Gulfstream Enters. Inc*., 216 So. 3d 1164, 1170 (¶21) (Miss. Ct. App. 2017); *Serv. Elec. Supply Co. v. Hazlehurst Lumber Co.,* 932 So. 2d 863, 870 (¶20) (Miss. Ct. App. 2006) ("An open account is an unwritten contract. It 'is a type of credit extended through an advance agreement by a seller to a buyer which permits the buyer to make purchases without a note of security and is based on an evaluation of the buyer's credit.'").

attorney's fees to Williams Equipment.

C. Award of Attorney's Fees to Triangle Construction

¶85. M&R Builders also argues that the chancellor erred in finding that it was required to pay attorney's fees incurred by Triangle Construction. M&R Builders maintains that Triangle Construction filed an unsupported "fee affidavit" rather than the itemization of attorney's fees that the chancellor ordered. M&R Builders asserts that this fee affidavit is insufficient to support the chancellor's award of attorney's fees.

¶86. We review a chancellor's award of attorney's fees for an abuse of discretion. *Stokes v. Campbell*, 794 So. 2d 1045, 1048 (¶13) (Miss. Ct. App. 2001). "Such awards must be supported by credible evidence." *Id*.

¶87. The subcontract agreements in this case contain an indemnity clause that provides, in pertinent part, that

> [M&R Builders] shall also be liable for all costs and expenses, **including but not limited to attorney[']s fees**, incurred by [Triangle Construction] in prosecuting or defending any claim, suit[,] or other action which arises out of or relates to the obligations assumed herein by [M&R Builders] . . . actions, inactions or omissions in performing under this subcontract.

In her October 6, 2017 order and opinion, the chancellor found "the indemnification section" of the subcontract agreements "to be unambiguous." The chancellor then ordered Triangle Construction to file an itemization of attorney's fees.

¶88. The record reflects that counsel for Triangle Construction submitted a fee affidavit for legal services provided in connection with the Williams Equipment and M&R Builders "billing dispute." In the fee affidavit, counsel for Triangle Construction set forth as follows:

> I, on behalf of my law firm, . . . agreed to represent [Triangle Construction] in defense of the claims made against them—but also to affirmatively represent their cross and counterclaims in this matter—for a flat fee.
>
> The flat fee for my firm's representation of [Triangle Construction] is $10,000.00.
>
> My customary billable rate for this work, based upon its substance, complexity, and sophistication is $175 per hour billed. An hourly method of billing would have vastly exceeded the $10,000.00 flat fee in this dispute (which includes the denial of multiple bond claims prior to the filing of this litigation).
>
> This flat fee of $10,00[0].00 is a more than reasonable fee for the legal services provided by my law firm to [Triangle Construction]. The market rate for the work I performed on this matter is actually, at a minimum, $20,000.00.

¶89. At the hearing on attorney's fees, the chancellor reviewed the fee affidavit and held as follows:

> With regard to the itemization and affidavit, a flat fee is appropriate, and the information I have and the fact that I was here for three days is sufficient evidence of the reasonableness of the $10,000 fee. So the Court will grant an award of attorney fees in the amount of $10,000 plus the $4,542.15 for reimbursement for credit card.

¶90. Our review of the subcontract agreements reflect that they contain an indemnity clause that provides that M&R Builders shall be liable for attorney's fees Triangle Construction incurred "in prosecuting or defending any claim, suit, or other action which arises out of or relates to the obligations assumed herein" by M&R Builders. *See Tunica County v. Town of Tunica*, 227 So. 3d 1007, 1027 (¶49) (Miss. 2017) (attorney's fees may be awarded when a contractual agreement provides for such an award). The chancellor found this indemnification section of the subcontract agreements "to be unambiguous." After our review of the matter, we find no abuse of discretion by the chancellor in ordering M&R

Builders to pay $10,000 in attorney's fees to Triangle Construction.[11] We therefore affirm the chancellor's judgment.

¶91. **AFFIRMED IN PART; REVERSED AND RENDERED IN PART.**

BARNES, C.J., GREENLEE, WESTBROOKS, TINDELL, McDONALD, LAWRENCE, McCARTY AND C. WILSON, JJ., CONCUR. J. WILSON, P.J., CONCURS IN PART AND IN THE RESULT WITHOUT SEPARATE WRITTEN OPINION.

[11] In their appellate brief, M&R Builders asks this Court to vacate the chancellor's entire damages award to Triangle Construction. However, their argument regarding the chancellor's award of damages does not specifically address the chancellor's award of damages to Triangle Construction in the amount of $4,542.15 for the reimbursement of the advance that Triangle Construction made on behalf of M&R Builders on its American Express credit card, as well as the amount of $1,213.52 for reimbursement of the cost of the Joint 30(b)(6)/individual deposition of M&R Builders and Jerry McBride. Regardless, based on our analysis and findings above, we find the chancellor did not abuse her discretion in determining that M&R Builders was liable to Triangle Construction for these damages.