

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 20, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

No. 99-0848

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

KAREN WIPPERFURTH AND BERNADETTE KEUL,

PLAINTIFFS-RESPONDENTS,

v.

**BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN
SYSTEM, THE UNIVERSITY OF WISCONSIN SYSTEM, AND
KATHERINE LYALL,**

DEFENDANTS,

**GEORGE BROOKS, DAVID WARD, LAURENCE MARTON,
AND JOSEPH PELLITTERI,**

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Dane County:
ROBERT R. PEKOWSKY, Judge. *Reversed and cause remanded with directions.*

Before Eich, Roggensack and Deininger, JJ.

¶1 PER CURIAM. George Brooks, David Ward, Laurence Marton, and Joseph Pellitteri (collectively the University) appeal a judgment denying their motion for an assessment of damages caused by a temporary injunction. The temporary injunction directed the University to retain the respondents, Karen Wipperfurth and Bernadette Keul, in their academic staff positions at academic staff pay rates during litigation to determine whether they could be returned to the lower paying, classified service positions they held prior to their academic staff appointments. Ultimately, the injunction was vacated and the respondents were restored to the lower paying positions. The University contends that the trial court erred when it concluded that the University suffered no damages and would be unjustly enriched if it were to recover from the respondents the wage differences from the period of time the injunction was in effect. The University also contends that this court should determine the amount of damages as a matter of law based upon undisputed facts.

¶2 We conclude that the trial court erred, but on different grounds. We conclude that the trial court erred by relying solely on conflicting affidavits to reach its factual determination that the University suffered no damages during the injunction period, rather than conducting an evidentiary hearing with full opportunity to examine and cross-examine witnesses. Accordingly, we reverse and remand for further proceedings consistent with this opinion.

¶3 Karen Wipperfurth and Bernadette Keul originally worked in classified positions at the University of Wisconsin Medical School. They were eventually selected to fill new academic staff positions that paid significantly higher salaries than the previous classified positions. However, after performing in the academic staff positions for some time, the respondents were informed that the academic staff positions would not be renewed and that they would be restored

to their former classified positions. The non-renewal decision resulted in significant salary reductions for both employees. Wipperfurth and Keul filed a complaint alleging numerous causes of action seeking money damages and, in addition, injunctive relief to prevent the non-renewals. The trial court temporarily enjoined the non-renewal action. As a result, Wipperfurth and Keul remained in the academic staff positions and were paid accordingly. The trial court also subsequently granted Wipperfurth's and Keul's summary judgment motion and ordered them fully restored to their academic staff positions. On appeal, however, this court reversed and remanded with instructions to enter summary judgment in the University's favor.¹ The injunction remained in place during the course of the appeal.

¶4 On remand, the trial court granted the University summary judgment and lifted the temporary injunction. The University then implemented the previously issued non-renewal notices. Wipperfurth and Keul were returned to their classified service positions at lower pay rates. The University subsequently filed a motion for an assessment of costs caused by the temporary injunction. Specifically, it sought to recover the difference between the amount Wipperfurth and Keul were paid in academic staff wages and the amount they would have been paid in classified service wages during the period of time the injunction was effective. The trial court denied the University's motion, concluding that the University would be unjustly enriched if these employees were assessed the wage differences during the time the injunction was in effect. The court reasoned that

¹ See *Wipperfurth v. Board of Regents*, No. 96-2515/97-0145, unpublished slip op. (Wis. Ct. App. Sept. 25, 1997).

the University was not damaged by the injunction because Wipperfurth and Keul performed the duties for the level of work they were paid. This appeal ensued.

¶5 WISCONSIN STAT. § 813.07 (1997-98),² authorizes a court to make an assessment of damages caused by a temporary injunction at the conclusion of a case. The amount of damages sustained is a question of fact. *See Mertens v. Lundquist*, 15 Wis. 2d 540, 545, 113 N.W.2d 149 (1962). Here, the respondents proffered an unjust enrichment defense. They contend that because they performed the work of academic staff administrators during the injunction period, the University would be unjustly enriched if it were allowed to retain the benefit of their academic staff work but pay them only at the classified staff level.

¶6 Unjust enrichment is established by demonstrating that: (1) a benefit is conferred; (2) the recipient of the benefit appreciates or knows of the benefit; and (3) retention of the benefit without payment of its value would be inequitable. *See Quinnell's Septic & Well Serv., Inc. v. Dehmlow*, 152 Wis. 2d 313, 316, 448 N.W.2d 16 (Ct. App. 1989). Generally, review of an unjust enrichment determination presents a mixed question of fact and law. *See Waage v. Borer*, 188 Wis. 2d 324, 328, 525 N.W.2d 96 (Ct. App. 1994). We will uphold the trial court's factual determinations unless they are clearly erroneous. *See* WIS. STAT. § 805.17(2). The application of those facts to the legal standard for unjust enrichment, however, presents a question of law that we review de novo. *See Waage*, 188 Wis. 2d at 328.

² All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

¶7 The trial court relied solely on conflicting affidavits to determine whether the University suffered damages during the injunction period and whether a benefit was conferred on the University as a result of the work the respondents performed. These issues, however, require the trial court to determine whether Wipperfurth and Keul were actually performing academic staff responsibilities and, if so, whether a benefit was conferred and the value of that benefit. We conclude that these factual issues cannot be resolved solely by reviewing affidavits.

¶8 Both parties submitted affidavits from experts who conducted position analyses of the respondents' academic staff positions. The experts offered opinions as to whether the respondents performed academic staff responsibilities and whether the University suffered any damages as a result of the temporary injunction. We note that the trial court made a credibility determination that one affidavit was more persuasive than another based upon the type of job analysis each expert performed. However, the experts did not testify and thus were not cross-examined on the reliability of their analytical methods or on the accuracy of their conclusions.

¶9 The University argues that the respondents' expert's methodology was lacking because it failed to distinguish between the content of the respondents' duties before and after the non-renewal. The University further argues that the decision to non-renew was made because the University had determined that there was "little, if any, evident job change" between the duties of the respondents' classified and unclassified positions. These arguments raise disputed issues of material fact and challenge the weight and credibility of the expert affidavits. The trial court's fact-finding was conducted without the benefit of witness testimony or cross-examination to resolve credibility and weight

determinations, and without the presentation of additional evidence to assist in resolving factual disputes. We conclude that it is necessary to resolve these issues with live testimony and a full opportunity to examine and cross-examine witnesses, and to present further evidence if necessary. See *Dillon v. Dillon*, 46 Wis. 2d 659, 675-76, 176 N.W.2d 362 (1970).

¶10 The University also contends that an unjust enrichment defense is not available to the respondents. We disagree. The University relies on the principle that “[a] municipality does not become liable for money, services, or goods upon principles of unjust enrichment where it is prohibited from contracting in any other than a specified way, as, for instance, with the lowest bidder.” *Shulse v. Mayville*, 223 Wis. 624, 629, 271 N.W. 643 (1937). It contends that the civil service system statutorily prescribes the wages that can be paid to employees in unclassified service who are restored to classified service positions and requires that no person can be appointed, reinstated or restored in the classified service by any means except as provided by statute. Therefore, according to the University, it had no choice regarding the respondents’ pay levels.

¶11 We are not persuaded this doctrine applies under circumstances where a temporary injunction enforces the status quo regarding the respondents’ employment. Although the University’s employment authority at the time of non-renewal was constrained by civil service statutes, the effect of the temporary injunction was to maintain the status quo until the employment dispute was resolved. The issue is whether the respondents performed duties above and beyond those of the classified positions during the injunction period, for which it would be unjust for the University not to pay them. Consequently, we conclude that the *Shulse* doctrine upon which the University relies does not control in this instance.

¶12 We conclude that the trial court erred when it relied solely upon conflicting affidavits in determining that the University suffered no damages during the injunction period, rather than conducting an evidentiary hearing with full opportunity to examine and cross-examine witnesses. Accordingly, we reverse and remand for further proceedings to determine whether the University received a benefit from the services the respondents performed during the injunction period, the value of any benefit received, and whether the University suffered any damages.

By the Court.—Judgment reversed and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

