No. 14-3876

*In the*

# United States Court of Appeals

*for the*

# Eighth Circuit

JESSE VENTURA, also known as James G. Janos,

*Plaintiff-Appellee,*

v.

TAYA KYLE, as Executor of the Estate of Chris Kyle,

*Defendant-Appellant.*

On Appeal from the U.S. District Court for the District of Minnesota,
No. 12-cv-00472-RHK – District Judge Richard H. Kyle

## BRIEF OF AMICUS CURIAE OF THE THOMAS MORE LAW CENTER IN SUPPORT OF DEFENDANT-APPELLANT TAYA KYLE AND FOR REVERSAL


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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *Amicus Curiae* the Thomas More Law Center makes the following disclosures:

1. For non-governmental corporate parties please list all parent corporations: None.

2. For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock: None.

Dated: March 11, 2015

THOMAS MORE LAW CENTER

/s/ Erin Elizabeth Mersino
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## STATEMENT OF INTEREST[1]

Thomas More Law Center ("TMLC"), a nonprofit public interest law firm, seeks leave to file this brief for the reasons set forth in the accompanying motion. TMLC is a nationally-recognized organization that defends and promotes the First Amendment and freedom of speech. TMLC accomplishes its mission through litigation, appeals (including *Amicus Curiae* support), education, and related activities. TMLC has over 60,000 members nationwide, including members and/or clients in the State of Minnesota. Its members and clients across the country are involved in media, reporting, and written and oral issue advocacy. TMLC supports freedom of speech and opposes any unnecessary interference with this time-honored freedom.

Since its founding in 1998, TMLC has consistently defended the First Amendment right to free speech, litigating claims for both plaintiff and defense, including the prosecution of claims under 42.U.S.C. § 1983 and the defense of defamation and copyright infringement actions. TMLC holds longstanding interests in protecting adherence to the Constitution as written, prohibiting the erosion of rights constitutionally granted to Americans, and protecting the

[1] Pursuant to Fed. R. App. P. 29(c)(5), no party's counsel authored this brief in whole or in part. Neither any party nor any party's counsel contributed money that was intended to fund the preparation or submission of this brief. No person other than *Amicus Curiae* contributed money intended to fund the preparation or submission of this brief.

expansive freedom to speak without unwarranted interference, including interference from courts and judicial opinions. TMLC, its members, and its clients are concerned with the potential expansion of damage theories as related to free speech and the chilling effect that such expansion could have on speech and expression of all kinds. For these reasons, TMLC has a direct and vital interest in the issues before this Court.

## INTRODUCTION AND SUMMARY OF THE ARGUMENT

Free speech is one of the founding principles of our country, as enshrined in the First Amendment. It is a right held in high esteem and to be closely guarded. Free speech restrictions or sanctions in the form of excessive or unsubstantiated damages are both dangerous and traditionally subversive. The parameters of our freedom of speech must be given careful and cautious legal analysis, and new theories of restriction or sanction—including new or expanded theories of damages for exercising speech—should not be created or expanded at whim.

This brief focuses on the reversible error of the lower court that allowed the Plaintiff-Appellee, Jesse Ventura, to pursue an unjust enrichment claim in a case that implicates only a traditional defamation claim—an error that could have wide-ranging and far-reaching implications on First Amendment and defamation jurisprudence. This error wrongfully weighs upon free speech and is not supported by case law—either that binding on the lower court or that traditionally and

universally upheld and employed across the nation in such cases. This brief catalogs and provides an analysis of the treatment of unjust enrichment claims—particularly when brought in defamation cases—in the State of Minnesota and the 8th Circuit, as well as in federal and state courts nationally.

## ARGUMENT

In this case Jesse Ventura asserted three claims against Chris Kyle and, after his untimely murder, pursued those claims against Taya Kyle, Chris Kyle's widow, as executor of his estate. Ventura recovered damages on two of those claims. Ventura recovered a damages award of $500,000 on Count I for Defamation.[2] The jury awarded a verdict of no liability on Count II for Appropriation of Name and Likeness. The trial court judge, upon recommendation of the jury, found liability against Kyle's Estate on Count III for Unjust Enrichment and awarded Ventura judgment in excess of $1.345 million in damages for that count; nearly three times the amount deemed necessary to remedy his damages for his defamation claim. The trial court, denying Taya Kyle's Motion for Judgment as a Matter of Law, ruled that the damages awarded under the unjust enrichment claim were proper and necessary in order to "disgorge" the Estate of the proceeds earned for the sale of the book in question.

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[2] While liability and damages should be reversed on all counts, this brief will not focus on all issues on appeal.

In ruling on the Motion for Judgment as a Matter of Law, the trial judge acknowledged that generally equitable relief (such as damages under the theory of unjust enrichment) is not appropriate "where there is an adequate remedy at law available." ADD-19; citing *ServiceMaster of St. Cloud v. GAB Bus. Servs., Inc.*, 544 NW2d 302, 306 (Minn. 1996). The trial court believed that "[t]he problem with this argument," however, "is that it ignores a key word: *adequate*." ADD-19 (emphasis in original).

The trial court went on to note that "[a] claim for unjust enrichment is barred only when a plaintiff has an otherwise *adequate* legal remedy. That was simply not the case here." *Id.* (emphasis in original). The Court's reasoning for why Ventura did not have an adequate remedy at law was because "[i]t is undisputed [that] the damages available to Plaintiff on his defamation claim were limited to those necessary to remedy the injury to his reputation." *Id.* The trial court judge then deferred to the jury in holding that because the jury "was expressly advised . . . that it could *not* award additional damages for unjust enrichment if it found the Plaintiff's damages award for defamation . . . provided him with an adequate remedy," that such "scuttles Defendant's argument" that the equitable relief should not have been granted due to an adequate remedy at law. *Id.*

The trial court went on: "Plaintiff's defamation claim provided him with no means to obtain the disgorgement of Defendant's ill-gotten gains—money the jury

found, and the Court agreed, that Defendant made by defaming Plaintiff in American Sniper." ADD-19-20. The court then rested its decision on the premise that "[o]nly through unjust enrichment could Plaintiff attempt to force Defendant to yield those improper profits." ADD-20. It was on this basis that the trial court held that "Plaintiff's legal remedy was inadequate to fully ameliorate Defendant's wrongful conduct, and the defamation claim did not preclude the unjust-enrichment claim as a matter of law." *Id.*

Unfortunately, and respectfully, the trial court committed reversible error in its holding on several grounds. The holding as to whether Ventura had an adequate remedy at law is in conflict with established 8th Circuit precedent, Minnesota precedent, and the longstanding and universal precedent of courts throughout the nation. The award of damages on the unjust enrichment claim also contradicted the jury's finding of no liability for appropriation. Beyond that fact, Ventura simply failed to establish all of the elements of unjust enrichment—regardless of his legal remedies—and this count should have been dismissed as a matter of law. Lastly, the damages award for unjust enrichment amount to an impermissible windfall for Ventura that, if permitted to stand, could create precedent that creates a chilling effect on free speech by expanding defamation damages.

For the reasons below, we urge this Court to hold that the lower court erred as a matter of law in adopting the jury's recommendation of damages for unjust

enrichment, reverse the court's holding, and remand this matter back to the lower court to enter a ruling of no liability and no damages on Count III.

## I. CLAIMS AND DAMAGES FOR UNJUST ENRICHMENT ARE INAPPROPRIATE IN DEFAMATION-STYLE CASES AND SHOULD NOT BE PERMITTED.

Research and analysis unveils a dearth of cases in which equitable relief and damages have been permitted under the theory of unjust enrichment in defamation cases. In fact, there are *no* other known or found cases that do so. This is because such damages are not compatible with First Amendment analysis, defamation claims in general, or the historical and traditional acknowledgment of legal remedies for such claims.

The right of recovery for unjust enrichment is equitable in nature. *Lundstrom Constr. Co. v. Dygert*, 254 Minn. 224, 231, 94 N.W.2d 527 (1959). The equity powers of the court may not be invoked when a plaintiff has an adequate remedy at law. *Borom v. City of St. Paul*, 289 Minn. 3781, 376, 184 N.W.2d 595, 598 (1971). "Equitable relief is granted only upon a showing of the inadequacy of any legal remedy." *Zimmeran v. Lasky*, 374 N.W.2d 212, 214 (Minn. App. 1985).

As the trial court acknowledged, under Minnesota law "[a] party may not have equitable relief where there is an adequate remedy at law available." *ServiceMaster*, 544 NW2d at 305. The District of Minnesota recognized this rule

in *Heimbach v. Riedman Corp.*, 175 F. Supp. 2d 1167 (D. Minn. 2001), holding that "recent authority from the Minnesota Court of Appeals has explained that where the plaintiff has an adequate legal remedy, he cannot bring an equitable claim for unjust enrichment." *Id.*; *citing Excel Homes of Minnesota, Inc. v. Ivy Ridge Home Buildings, Inc.*, No. C2-00-1686, 2001 WL 506782 (Minn. App. May 15, 2001). The question of whether or not an adequate remedy at law exists is a legal determination for the court to make. *ServiceMaster*, 544 N.W.2d at 305.

As noted above, the lower court circumvented this legal obstacle for Ventura to recover additional damages under his unjust enrichment claim by pointing to one word: *adequate*. The court began by acknowledging that the jury awarded Ventura damages "necessary to remedy the injury to his reputation," but held such to be inadequate because they "provided him with no means to obtain the disgorgement of" Kyle's gains from the publication of his book. Thus, the court awarded damages under the unjust enrichment claim that were nearly three times the amount of the defamation claim damages.

This reasoning, however, conflates or confuses two separate and distinct things: on one hand, Ventura has his damages that he alleges to have sustained; on the other hand, Chris Kyle, using the trial court's words, "made [money] by defaming Plaintiff." But those two things are not the same and the latter does not affect the adequacy of the former. Tellingly, the lower court concedes that the

jury's damages award on the defamation claim was a sufficient cure "***necessary*** to remedy the injury to [Plaintiff's] reputation."[3] ADD-19. The court did not explain how money damages that are wholly *necessary* to cure a plaintiff's only actual or presumed damages can somehow not be an *adequate* legal remedy. That is: how can a remedy be inadequate if it is the amount determined to be necessary to wholly remedy the injury that Ventura sustained?

Moving beyond this common-sense, logical, and semantic dissonance in the lower court's opinion, a significant legal deficiency stands out. Courts throughout the country, including this Court, have long held that money damages in defamation claims are an "adequate remedy at law." The lower court, therefore, committed reversible error in holding to the contrary. This error could have far-reaching consequences if not corrected.

### A. Courts Have Historically, Traditionally, and Universally Recognized that Adequate Remedies at Law Exist in Defamation Cases and Refuse to Grant Equitable Relief of Any Kind in Such Cases.

Courts throughout this nation have historically, traditionally, and nearly universally held that monetary damages for actual or presumed damage to one's reputation are an adequate remedy at law for a defamation claim. While the State of Minnesota does not appear to have definitively addressed the question, it has acknowledged that it is "probably correct" that a plaintiff has "an adequate remedy

[3] Unless otherwise stated, all emphasis herein is added by the authors of this Brief.

through a defamation action." *Banken v. Banken*, No. A11-2156, A12-0771, 2013 WL 490677, * 10 (Minn. App. Apr. 16, 2013). This Court has held in *Modern Computer Systems, Inc. v. Modern Banking Systems, Inc.*, 871 F.2d 734 (8th Cir. 1989) that Plaintiff "will have an adequate remedy at law if it is successful in establishing the merits of its substantive allegations of antitrust, violation . . ., wrongful termination, ***defamation***, breach of contract, *et cetera*." The District of Minnesota, from which this case arose, has noted that there is "no apparent reason why money damages would not constitute an adequate remedy" for a plaintiff. *Morey v. Ind. Sch. Dist. No. 492*, 312 F. Supp. 1257, 1261 (1969). The trial court's ruling that damages for the defamation claim were not "*adequate*" was not substantiated by the precedent binding on it.

In fact, as addressed more thoroughly below, the very jury that granted the damages for the defamation claim believed that those damages were adequate. In its Jury Verdict Form the jury was asked "What amount of money, if any, will ***fairly and adequately compensate*** Plaintiff Jesse Ventura for damages directly caused by the defamation?" ADD-5. The fact that the jury granted $500,000 (far less than the even more onerous and imposing amount the court awarded for unjust enrichment) denotes that the jury believed that the lesser amount was an "adequate" remedy, even if it wasn't the greatest possible remedy.

State and federal courts throughout the country have long held that plaintiffs have an adequate remedy at law for defamation claims by way of monetary damages. While courts may have reached this conclusion for varying reasons—in determining whether or not to enjoin defamatory speech, whether a party has an adequate avenue for review of an opinion, or whether a claim for unjust enrichment should stand in the face of a defamation claim—courts have resoundingly, if not universally, held that an adequate remedy at law exists.

Circuit courts throughout the country are in agreement on this point. *See, e.g.*, *Modern Computer Systems, Inc.*, *supra* (8th Circuit holding that a plaintiff "will have an adequate remedy at law if it is successful in establishing the merits of its substantive allegations" including a claim for defamation); *Metro. Opera Assoc'n, Inc. v. Local 100*, 239 F.3d 172 (2d Cir. 2001) (holding that equity will only enjoin "rights that are without an adequate remedy at law," and because defamation has such adequate remedies, equity should not be imposed); *Kramer v. Thompson*, 947 F.2d 666 (3d Cir. 1990) (upholding and following Pennsylvania's "adequate remedy rationale" for denying injunctive relief in defamation claims); *Alberti v. Cruise*, 383 F.2d 268 (4th Cir. 1965) ("There is usually an adequate remedy at law which may be pursued in seeking redress from harassment and defamation."); *McMahon v. Kindlarski*, 512 F.3d 983 (7th Cir. 2008) (implying that defamation claims provide adequate remedies at law in saying "we need not

consider whether state remedies available to him are adequate. But it must be said that, from where we stand, it seems that the facts he alleges fit best into a state claim for defamation."); *Reyes v. Lynch*, No. 83-639, 1983 WL 1635 (D. D.C. July 29, 1983) (finding that equity jurisdiction is not present "because plaintiff has an adequate remedy at law where plaintiff demands money damages for defamation . . . .").

Federal district courts are also in agreement. *See, Heimbach v. Riedman Corp.*, 175 F. Supp. 2d 1167 (D. Minn. 2001) (where a plaintiff alleged defamation and several other claims, the court flatly held that "plaintiff has adequate legal remedies in this case."); *Bynog v. SL Green Realty Corp.*, No. 05-cv-305, 2005 WL 3497821 (S.D.N.Y. Dec. 22, 2005) ("The long-standing rule in this Circuit is that equity will not enjoin threatened libel or defamation since there are adequate legal remedies available for damages arising from harmful speech."); *Ameritech v. Voices for Choices, Inc.*, No. 03-cv-3014, 2003 WL 21078026 (N.D. Ill. May 12, 2003) (holding that where claims of injury to business, reputation, and goodwill are asserted in defamation cases, "[t]hese types of injuries . . . are all amenable to pecuniary valuation and can be adequately compensated with money damages" there an adequate legal remedy); *Oliver v. Skinner*, No. 09-cv-29, 2013 WL 667664 (S.D. Miss. Feb. 22, 2013) (plaintiff "has an adequate remedy at law for defamation: monetary damages.").

Likewise, most, if not all, state courts routinely hold that in defamation cases an award of monetary damages for damage to reputation is an adequate remedy at law. *See, Watson v. Matthews*, 286 Ga. 784 (2010) (ruling that plaintiff "had an adequate remedy at law in the underlying defamation case . . . ."); *Franklin Chalfont Assocs. v. Kalikow*, 392 Pa. Super. 452 (1990) ("An action for defamation was an adequate remedy at law despite defendant's indigence since any other conclusion would condition the exercise of the constitutional right to express one's opinion freely on one's economic status."); *Kwass v. Kersey*, 139 W. Va. 497 (1954) (holding that in a defamation case a plaintiff "has an adequate remedy at law: By action for damages, and as an added deterrent, a prosecution for the defamation by criminal prosecution."); *D'Ambrosio v. D'Ambrosio*, 45 Va. App. 323 (2005) (holding that in a defamation suit the plaintiff "has an adequate remedy at law."); *Daugherty v. Allen*, 729 N.E.2d 228 (Ind. App. 2000) (even if damages for injury to reputation are "not easily quantifiable," because such damages can nonetheless "be ascertained, we believe that [the plaintiff] has an adequate remedy at law in the form of a suit for money damages . . . ."); *Greenberg v. Burglass*, 254 La. 1019 (La. 1969) (in defamation cases, "[t]here is an adequate legal remedy, either by an action for damages or by criminal prosecution."); *McFadden v. Detroit Bar Ass'n.*, 4 Mich. App. 554, 145 N.W.2d 285 (1966) (in defamation claims "there is an adequate remedy at law, *i.e.*, an action for damages."); *Ramos v.*

*Madison Sq. Garden Corp.*, 257 A.D.2d 492 (Sup. Ct. N.Y. First Dep't 1999) (holding that an equitable claim for defamatory statements "fails because plaintiff has an adequate remedy at law, *i.e.* post-publication damages" and finding that the question of whether "some form of equitable remedy were appropriate for defamation" is "a dubious proposition at best.").

One case—non-binding on this Court but nonetheless instructive of how courts around the nation traditionally treat unjust enrichment claims when coupled with defamation claims—is *Silvercorp Metals, Inc. v. Anthion Mgt., LLC*, 36 Misc. 3d 1231(A), 959 N.Y.S.2d 92 (Sup. Ct. N.Y. 2012). There, the court held that the defendants "established that the unjust enrichment claim improperly merges into the defamation claim." *Id.*, citing *Anyanwu v. CBS, Inc.*, 887 F. Sup. 690 (S.D.N.Y. 1995) (stating that in a defamation action for an injunction, an apology, and punitive damages, "a separate cause of action for what are essentially defamation claims should not be entertained."); *Butler v. Delaware Otsego Corp.*, 203 A.D.2d 783, 610 N.Y.S.2d 663 (3d Dep't 1994) ("facts alleged by plaintiff are, in essence, inseparable from the tort of defamation and, as such, *plaintiff is relegated to any remedy that would have been available on that basis*.").

In *Silvercorp*, the plaintiff attempted to disgorge the defendants of profits that the plaintiff alleged the defendants made in connection with their defamatory statements. But the court noted that "the factual allegations supporting [the

plaintiff's] unjust enrichment claim are identical to those giving rise to the defamation claim." *Id.* at *13. The Court further noted that "[t]he foundation of the unjust enrichment claim is the alleged defamation . . . . Because the unjust enrichment claim has no independent basis, this claim is dismissed." *Id.*

It is clear that courts throughout the country routinely hold that plaintiffs in defamation suits have an adequate remedy at law based on the monetary damages that accompany successful claims. Based on this, trial court's should not entertain claims for unjust enrichment whose facts giving rise to that claim are identical to an accompanying defamation claim and that have no independent basis from the defamation claim. The lower court erred in not granting the Kyle Estate judgment as a matter of law on the unjust enrichment count.

### B. It Was Improper to Permit Recovery of Damages for Unjust Enrichment when the Jury Determined that Defendant was Not Liable for Appropriation.

Ventura not only had an adequate remedy at law under his defamation claim, but also had an adequate remedy at law for his claim of appropriation. The jury was asked to determine whether Chris Kyle "appropriated to his own use or benefit the value of Ventura's name," and whether Ventura's name was "used for the purpose of appropriating to the defendant's benefit the commercial or other value associated with plaintiff's name." ECF-362, Jury Instruction No. 9. Had the jury found that Chris Kyle or his estate had done so, then they were instructed to

"award [Ventura] the greater of either the amount the Defendant Estate has gained as a direct result of the appropriation *or* the amount Mr. Ventura has lost as a direct result of the appropriation." ECF-362, Jury Instruction No 13.

As to the question of whether Chris Kyle (and by extension his estate) used Ventura's name for his own use or benefit and therefore should be disgorged of the amount gained as a result, the jury came back with a definitive answer: No, he had not. The jury found the Estate not liable on that count. Yet the lower court, in its reasoning for granting the damages for unjust enrichment, stated that it did so because the defamation claim "provided [Ventura] with no means to obtain the disgorgement of [Kyle's Estate's] ill-gotten gains—money the jury found, and the Court agreed, that [Kyle's estate] made by defaming [Ventura] in *American Sniper*." ADD-19-20. Essentially, the Court gave what the jury took away. The trial court circumvented the finding of no liability on the appropriation claim in order to bootstrap the unjust enrichment damages into the defamation claim.[4]

The court's very reasoning in its opinion denying the Estate's Motion for Judgment as a Matter of Law in effect (if inadvertently) concedes that this was precisely what it did. The court held that "[o]nly through unjust enrichment could Plaintiff attempt to force Defendant to yield those improper profits. Under these

[4] It is no defense to the trial court's error that the jury found no liability on the appropriation claim but still recommended damages under the unjust enrichment claim. Simply because the jury held contradicting (and erroneous) views does not excuse the trial court from adopting the same contradicting views and outcomes.

circumstances, Plaintiff's legal remedy was inadequate to fully ameliorate Defendant's wrongful conduct, and the defamation claim did not preclude the unjust-enrichment claim as a matter of law." ADD-20.

But that is not the case. Ventura's alleged damages to his reputation were remedied by the money damages granted to him on the defamation claim. Had the jury believed that the Estate's "wrongful conduct" needed to be "fully ameliorated" by "forc[ing] Defendant to yield those improper profits," they could have found the Estate liable for the appropriation claim. Had the jury truly believed, as the court implied that it did, that Ventura should have "means to obtain the disgorgement of Defendant's ill-gotten gains," then the jury had adequate means to do so through the appropriation claim. Because the jury found the Estate not liable on that claim, neither the jury nor the court should be permitted to say, nonetheless, that Chris Kyle's widow has to pay the damages that would otherwise have gone with such liability if there were any.

Defamation provides a legal remedy of money damages. The tort of appropriation provides legal damages in the way of disgorgement of profits made by a defendant. Unjust enrichment is an equitable remedy that is closely related to the theory of misappropriation.[5] Ventura, therefore, had two adequate legal

[5] *See* Restatement (2d) of Torts, 652 (1977) ("appropriation of name and likeness is similar to impairment of a property right and involves an aspect of unjust enrichment"); *Lerman v. Flynt Distrib. Co., Inc.*, 745 F.2d 123 (2d. Cir. 1984) (the

remedies upon which he could recover monetary damages: one for defamation for which he did recover all necessary damages, and one for appropriation for which the jury determined he was not entitled to damages. It was reversible error for the lower court to award damages for unjust enrichment when Ventura had adequate remedies at law.

### C. It is the *Existence* of an Adequate Remedy that Matters; Not Whether the Plaintiff Prevailed in Receiving that Remedy

The lower court held that Ventura's defamation damages were not "adequate" because they did not permit him to disgorge the Kyle Estate of its profits. The court likewise circumvented the finding of no liability on the appropriation claim, presumably for the same reason. But it is not a question of whether a plaintiff prevails in receiving an adequate remedy that bars an equitable claim for unjust enrichment. It is simply the *existence* of an adequate remedy that does so. Here, multiple adequate remedies at law existed; simply because Ventura did not prevail in receiving them does not open the back door to damages under an unjust enrichment theory.

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tort of appropriation of name or likeness "is one designed to encourage intellectual and creative works and to prevent unjust enrichment."); *Castro v. NYT Television*, 370 N.J. Super. 282 (2004) ("one reason for imposition of tort liability for commercial appropriation of a person's name or likeness . . . is to avoid the unjust enrichment that would result from uncompensated use of the name or likeness of another person.").

"More recent case law states that the legal remedy must be *available* to prevent unjust enrichment; it does not require that [a plaintiff] took advantage of the legal remedy." *Qwest Comm'ns Co. LLC v. Free Conferencing Corp.*, 990 F.Supp.2d 953 (D. Minn. 2014). "Therefore, regardless of the *result* of [the plaintiff's] legal remedy against [defendant] is, it was available to [plaintiff] and an unjust enrichment claim cannot be maintained." A plaintiff's failure to *prevail* on a legal claim does not make the legal claim "unavailable." *Loftness v. Specialized Farm Equip., Inc. v. Twiestmeyer*, 742 F3d 845, 854-55 (8th Cir. 2013); citing *Cady v. Bush*, 166 N.W.2d 358, 362 (Minn. 1969).

While some courts focus on whether or not a plaintiff *pursued* a legal remedy, that is not the correct (or at least only) question. As this Court stated in *United States v. Bame*, 721 F.3d 1025, 1031 (8th Cir. 2013), "despite courts' occasional emphasis on the failure to pursue a legal remedy, it is the ***existence*** of an adequate legal remedy that precludes unjust enrichment recovery. District courts routinely dismiss unjust enrichment claims where the plaintiff pleaded and pursued both equitable and legal claims simultaneously, as well as where the plaintiff failed to pursue adequate legal remedies." *See, e.g.*, *In re Viagra Prods. Liabl. Litig.*, 658 F. Supp. 2d 950, 968-69 (D. Minn. 2009) (explaining that the plaintiff's unjust enrichment claim failed due to the existence of an adequate legal remedy where the plaintiff also pleaded tort claims.). As the District of Minnesota

held in *In re Viagra*, 658 F. Supp. 2d at 969: "Plaintiff's have an adequate remedy at law—they pled several causes of action sounding in tort, **and there is no dispute that those causes of action would provide adequate relief if Plaintiffs succeeded in proving up their claims**."

Ventura had an adequate remedy at law under his defamation claim and was awarded $500,000 for his damages. Simply because those damages did not disgorge the Kyle Estate of all that they possibly could does not make the remedy inadequate. More importantly, Ventura had an adequate legal remedy for appropriation that, had he prevailed on that count, would have permitted him to recover damages in the form of disgorgement of the Kyle Estate's earnings. Simply because he failed in "proving up" this claim does not negate the *existence* of an adequate legal remedy.

The lower court committed reversible error in granting damages under the unjust enrichment claim.

### D. The Trial Court Erred in Deferring to the Jury to Determine Whether an Adequate Remedy at Law Existed Because Such Determination is a Matter of Law that Should be Determined by the Court. The Jury's and Trial Court's Determination Should be Reversed as a Matter of Law.

The lower court attempted to justify its decision to grant the unjust enrichment damages because, at least in part, the jury was instructed that "it could *not* award additional damages for unjust enrichment if it found that Plaintiff's

'damages award for defamation . . . provided him with an adequate remedy.'" ADD-19. The lower court held that this single fact "scuttles Defendant's argument" that Ventura had an adequate remedy at law and should not be awarded damages under the unjust enrichment theory.[6]

Simply because the jury was instructed in this manner does not absolve the trial court from determining whether there were in fact adequate remedies at law. A trial court's conclusion whether a plaintiff has an adequate remedy at law "is a legal conclusion" that is to be determined by the court. *Service Master*, 544 N.W.2d 302, 305 (Minn. 1996). Moreover, on appeal, such determinations are "subject to de novo review." *Id.*

The lower court improperly relied on the jury's alleged or apparent determination that there were not adequate remedies at law in granting the unjust enrichment damages. At the very least this matter should be remanded so that the lower court can give the question the proper *legal* analysis necessary. But because this Court can review that legal question *de novo*, it would be more proper to reverse the lower court's decision and strike down the damages awarded for unjust enrichment.

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[6] Interestingly, however, on its jury form the jury in fact acknowledged that the $500,000 for the defamation claim was an amount that would "fairly ***and adequately*** compensate Plaintiff Jesse Ventura . . . ." ADD-5.

## II. CLAIMS OF UNJUST ENRICHMENT ARE IMPROPER AS A MATTER OF LAW IN SIMPLE DEFAMATION CLAIMS AND JUDGMENT ON THAT CLAIM IN THIS MATTER SHOULD BE REVERSED BECAUSE VENTURA FAILED TO ESTABLISH ALL OF THE ELEMENTS OF THE CLAIM

Regardless of whether unjust enrichment damages are proper in light of the adequate legal remedies available to Ventura, he did not even establish the necessary elements for unjust enrichment under the applicable law. This is, in fact, the case for most plaintiffs in defamation claims. Unjust enrichment damages are simply not appropriate in most defamation claims and should not be permitted.

The Minnesota Supreme Court has recently held that it has "limited the application of unjust enrichment to claims premised on an implied or quasi-contract between the claimant and the party alleged to be unjustly enriched." *Caldas v. Affordable Granite & Stone, Inc.* 820 N.W.2d 826, 837 (Minn. 2012). "Thus, to prevail on a claim of unjust enrichment, a claimant must establish an implied-in-law or quasi-contract in which a defendant received a benefit of value that unjustly enriched the defendant in a manner that is illegal or unlawful." *Id.* at 838. Thus, some sort of contractual, implied-contractual, or quasi-contractual relationship must exist between the plaintiff and the defendant. *Id.* (holding that "we have not extended the theory of unjust enrichment to allow an incidental third-party beneficiary to enforce a contract, and we decline to do so in this case.").

Under Minnesota law, "[u]njust enrichment requires that: (1) a benefit be conferred by the plaintiff on the defendant; (2) the defendant accept the benefit; (3)

the defendant retain the benefit although retaining it without payment is inequitable." *Zinter v. Univ. of Minn.*, 799 N.W.2d 243 (Minn. App. 2011); *citing Acton Constr. Co. v. State*, 383 N.W.2d 416, 417 (Minn. App. 1986), *review denied* (Minn. May 22, 1986). Key to this definition and these elements is that in order to prevail, the plaintiff must have ***conferred a benefit*** onto the defendant. Otherwise, there is nothing ***retained*** from the plaintiff and nothing to return.

No case could be found in the District of Minnesota, the 8th Circuit, or under Minnesota law in which damages have been awarded in a defamation claim under a theory of unjust enrichment. This makes sense when one considers that "[a]n action for unjust enrichment is a quasi-contractual agreement implied by law where there is no contract." *Hommerding v. Peterson*, 376 N.W.2d 456, 459 (Minn. App. 1985); citing *United States Fire Ins. Co. v. Minn. State Zoological Bd.*, 307 N.W. 2d 490, 497 (Minn. 1981). It makes even more sense when one considers the traditional reason for granting unjust enrichment damages.

The Supreme Court of Minnesota has long held that claims for unjust enrichment (which have been held under Minnesota law to be analogous to claims of money had and received) are actions "to ***recover back money, which ought not to be kept***." *Todd v. Bettingen*, 124 N.W. 443, 444, 109 Minn. 493 (Minn. 1910). This, of course, implies some sort of loss to the plaintiff and/or benefit conferred by the plaintiff to the defendant. "The gist of this kind of action is that the

defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to ***refund*** the money." *Id.* Similarly, "[a]n action for unjust enrichment may be based on failure of consideration, fraud, mistake, and situations where it would be morally wrong for one party to enrich himself ***at the expense of another***." *Anderson v. DeLisle*, 352 N.W.2d 794, 796 (Minn. App. 1984), *review denied* (Minn. Nov. 8, 1984).

Here, however, Ventura has not even alleged that he has conferred any benefit on Chris Kyle or his estate, or that there is anything for him to "recover back" or to be "refunded" to him. Disgorgement of benefits from the Kyle Estate for the benefit to Ventura would not be returning or refunding anything to Ventura. There is simply no argument and no factual development that could be made that anything that Chris Kyle or his estate has received was done at the expense of Ventura, in the stead of Ventura, or in any way had anything to do with Ventura that was not already covered by his damages under his defamation claim. This element has not been met.

In *Qwest Comm'ns Co., LLC v. Free Conferencing Corp.*, 990 F. Supp. 2d 953 (D. Minn. 2014), the district court held that "[t]o make a claim for unjust enrichment, [the plaintiff] must allege that it conferred a benefit on Defendants." *Id.* at 981. In that case the plaintiff alleged that the defendants "reaped substantial

and unconscionable profits," and received money "to which they are not entitled," and that it would be unjust if the defendants retained that money.

The *Qwest* court noted that the parties had no contractual or quasi-contractual relationship, that there was no privity between them, and that neither party had any legal obligation to the other. Thus, the court found that the plaintiff had "not sufficiently alleged that it conferred a benefit on Defendants." The court also held that unjust enrichment claims would be inappropriate where there are other legal remedies available because "the purpose of prohibiting an equitable remedy when a legal remedy is available is to prevent the plaintiff from recovering twice, once in law and once in equity." *Id.* at 982. Therefore, the court held that "[b]ecause the court finds that [the plaintiff] has not alleged it conferred a benefit on Defendants and because the court finds that [the plaintiff] had a legal remedy . . . the court finds it is not necessary to reach the additional arguments for the purposes of disposing of the unjust enrichment claim." *Id.* at 983.

While *Qwest* was not a defamation case, it is instructive as to when an unjust enrichment claim can and cannot be pursued. It is also apparent from cases throughout the country that unjust enrichment claims simply are not appropriate in matters alleging defamation.[7] For example, in *Silvercorp Metals, Inc. v. Anthion Mgt., LLC*, 36 Misc. 3d 1231(A), 959 N.Y.S.2d 92 (Sup. Ct. N.Y. 2012), the court

[7] This is also clear from the *absence* of cases granting damages for such claims in defamation cases.

noted that "[t]he Second Amended Complaint alleges the defendants were 'unjustly enriched at [the plaintiff's] expense' through its 'receipt of profits from their short selling scheme.'" The court, after noting that the unjust enrichment claim "derives from and is the result of the alleged defamation," noted that "[i]n any event, [the plaintiff] fails to allege that defendants received a benefit from [plaintiff]. In seeking disgorgement of defendant's profits, [the plaintiff] cannot allege that defendants have been unjustly enriched at [plaintiff's] expense, since [plaintiff] did not make any payments or financially contribute to the profits defendants received. The profits defendants received simply did not come from [the plaintiff]." *Id.* In other words, simply because a plaintiff claims to have been defamed does not entitle him or her to a share in defendant's profits that the plaintiff had absolutely no hand in obtaining or earning.

Ventura did not confer any benefit on the Kyle Estate that it improperly retained. There is no scenario that "but-for" any actions by the Kyle Estate, Jesse Ventura would have been entitled to the profits he now attempts to disgorge. There was no agreement (quasi or actual) between Kyle and Ventura that was breached and no expectation on Ventura's behalf that was not met. As in *Silvercorp*, "the profits defendants received simply did not come from" Ventura. The damages on the unjust enrichment claims should be stricken and the court's

opinion and ruling should be reversed. Failure to do so simply throws wide open the doors on defamation claims and on defamation damages analyses.

## III. THE JUDGMENT AWARDED FOR UNJUST ENRICHMENT AMOUNTS TO A WINDFALL RECOVERY FOR VENTURA AND SHOULD BE REVERSED

Permitting Ventura to receive a portion of the Estate's profits when he had no part in earning them, when he conferred no benefit onto the Kyle Estate, and when he never could have had any expectation of payment for the sale of the book simply result in a double recovery and windfall for Ventura. As the Supreme Court has noted, "it goes without saying that the courts can and should preclude double recovery by an individual.'" *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 297, 122 S. Ct. 754, 766, 151 L. Ed. 2d 755 (2002). This Circuit has held that courts have properly reduced judgments to preclude a windfall of a double recovery when the evidence of damages did not differentiate between alternative claims. *Margolies v. McCleary, Inc.*, 447 F.3d 1115, 1126 (8th Cir. 2006). Likewise, the District of Minnesota has held that damages that would result in a windfall should be denied. *Mauzy v. Edward Kraemer & Sons, Inc.*, No. CIV. 02-879 AFB, 2004 WL 611127, at *11 (D. Minn. Mar. 4, 2004). This is what the lower court should have held in this matter, as well. *See also Wirig v. Kinney Shoe Corp.*, 461 N.W.2d 374, 379 (Minn. 1990) ("Although we decide parallel actions can be maintained, we do not uphold double recovery for the same harm").

In *Qwest Comm'ns Co., LLC.*, 990 F. Supp. *supra*, the court looked at the precise issue of whether damages should be granted under the theory of unjust enrichment when the plaintiff already had other avenues to legal damages. The court held that "the purpose of prohibiting an equitable remedy when a legal remedy is available is to prevent the plaintiff from recovering twice, once in law and once in equity." *Id.* at 982. This was one reason the court in *Qwest* rejected the unjust enrichment claim.

Because the damages awarded by the jury on the defamation claim were those "necessary" to cover all damages Ventura allegedly incurred, any recovery beyond that would be a double recovery and a windfall. Simply because Chris Kyle and his estate made money on a book that contained one passage pertaining to the alleged defamatory statement in question has no relation to Ventura's damages. While disgorgement may have been an appropriate remedy for an appropriation claim, the jury found the Estate not liable for that claim. To simply award Ventura those damages in an amount in excess of $1.345 million anyhow constitutes nothing more than a windfall recovery and should be reversed.

## CONCLUSION

This Court should reverse the lower court's decision, declare the damages on the unjust enrichment claim to have been awarded in error, and remand this case

for further proceedings consistent with this Court's opinion so that the judgment can be reduced by at least the amount granted on the unjust enrichment claim.

Respectfully submitted,

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**CERTIFICATION PURSUANT TO**
**Fed. R. App. P. 32(a)(7)(B) and (C)**

The undersigned hereby certifies as follows:

1. The foregoing brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and (C) because the brief contains 6,699 words of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and

2. The foregoing brief complies with the typeface requirements of Fed. R. App. P.32(a)(5) and the type style requirements of Fed.R.App.P.32(a)(6) because this brief was prepared in a proportionally spaced typeface using Microsoft Word 2007, the word processing system used to prepare the brief, in 14 point sized font in Times New Roman font type.

Dated: March 11, 2015

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**CERTIFICATE OF COMPLIANCE**
**WITH EIGHTH CIRCUIT RULE 28A(h)**

Pursuant to this Court's Rule 28A(h), I hereby certify that the electronic version of this Brief of Amicus Curiae Thomas More Law Center in Support of Defendant-Appellant Taya Kyle and Reversal has been scanned for viruses and is virus-free.

Dated: March 11, 2015

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## CERTIFICATE OF SERVICE

I hereby certify pursuant to Eighth Circuit Rule 25A that on March 11, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that all of the participants in this case are registered CM/ECF users.

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