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No. 65352-1-I

COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION ONE

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W.H. HUGHES, JR. CO., INC.,

Appellant,

v.

KEVIN DAY AND CHARLOTTE DAY, MICHAEL C. BAKER AND  
KRIS E. BAKER, HENRY F. KNAPP AND BEVERLY M. KNAPP, and  
ROBERT C. LEGRANDE AND LYNN J. LEGRANDE,

Respondents.

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**BRIEF OF RESPONDENTS**  
**ROBERT C. LEGRANDE AND LYNN J. LEGRANDE**

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## I. INTRODUCTION

Appellant W.H. Hughes, Jr., Co., Inc. (“Hughes”) is wholly owned by Wilford H. Hughes, Jr. Mr. Hughes has been a real estate developer for over 25 years and has built “many subdivisions over the years.”<sup>1</sup> Mr. Hughes wanted to build a development of 14 new homes in northeast Auburn that he called “Auburn Place.” He knew that to obtain the permits required to proceed with his for-profit real estate venture, the City would require him to install a sewer extension to service the new housing development. In Mr. Hughes’ own words, “[t]he new homes *could not be built without a sewer line extension.*”<sup>2</sup> The City also required Hughes to transfer ownership of the sewer extension to the City. This was simply part of the cost Hughes had to incur to engage in its for-profit real estate development business. There was never any guarantee that Hughes would recover any of that cost, other than through the sale of the homes he was going to build.

However, under RCW 35.91, the Legislature has created a mechanism that a real estate developer like Hughes may use to recover a portion of the cost providing the infrastructure required to build out a subdivision like Auburn Place. Under the statute, the City could, at its

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<sup>1</sup> CP 229.

<sup>2</sup> *Id.* (emphasis added).

option, enter into a “Payback Agreement” with Hughes.<sup>3</sup> Under such an Agreement, the City would collect a portion of the sewer construction costs from property owners who connect to the sewer *after* the Agreement was recorded with the County Auditor. The funds collected would be used, in whole or in part, to reimburse Hughes for the cost of the sewer line. However, the statute *prohibits* retroactive application of such a Payback Agreement to property owners who connected to a sewer line before the Agreement was made and recorded by the County Auditor.<sup>4</sup> Hughes was or should have been well aware of this limitation when it entered into a Payback Agreement with the City.

The LeGrandes, as well as the other defendants/respondents in this action, took the steps the City of Auburn told them to take to apply for, pay for and obtain a City permit to connect to the City’s sewer extension – before a Payback Agreement was recorded with the County Auditor.<sup>5</sup> Their connections are not subject to the Payback Agreement and Hughes has no legal right to recover the cost of constructing the sewer extension from them. Those prior connections were known to Hughes when it

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<sup>3</sup> RCW 35.91.020.

<sup>4</sup> RCW 35.91.020(4).

<sup>5</sup> This responding brief is filed on behalf of Robert C. and Lynn J. LeGrande. However, the relevant facts and law addressed in the LeGrandes’ brief apply to the remaining defendants/respondents with equal force.

entered into a Payback Agreement with the City. The City plainly advised Hughes that Hughes could not subject the prior connections to the Agreement. The Agreement itself recited that prior connections had been made with the City's authorization and for payment of a sum certain set by the City; and the Agreement did not require any further payment for those connections.<sup>6</sup>

After the fact, Hughes filed this suit, seeking to avoid the plain terms of its Payback Agreement with the City and RCW 35.91 – the statute that indisputably controls Hughes's limited right to recover the cost of building the sewer line, which Hughes had no choice but to build if it wanted to develop the Auburn Place project. Invoking "equity," Hughes claimed that the defendants/respondents had been "unjustly enriched," even though they paid exactly what the City told them to pay and exactly what Hughes's Agreement with the City recited they had paid. In sum, Hughes asked the trial court to use "equity" to make an end-run around the statutory bar against retroactive assessments for utility connections made before execution and recordation of a valid Payback Agreement.

The trial court properly dismissed Hughes's unjust enrichment claim on summary judgment because the LeGrandes and the other

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<sup>6</sup> CP 68-69.

defendants have not been “unjustly enriched,” as a matter of law. The LeGrandes and the other defendants were merely incidental beneficiaries of the agreement between Hughes and the City of Auburn for construction of a sewer extension and for the potential reimbursement of a portion of Hughes’s costs. Finally, a party acting as a volunteer – acting on its own, independent motive to make a profit – cannot pursue a claim for “unjust enrichment” merely because its profit-making venture confers an incidental benefit on others. When Hughes decided to build the sewer – solely because it *had to do so* to pursue its own for-profit real estate venture – it acted as a volunteer toward property owners, such as the LeGrandes, who might also benefit from improvements to the municipal sewer system. Hughes had no right to recoup the necessary cost of its own real estate venture, except as permitted by the City, the Payback Agreement and RCW 35.91, the statute that controlled the transaction.

The LeGrandes and the other defendants/respondents connected to the City’s sewer line on the terms the City required. Hughes improperly attempted to retroactively apply its subsequently recorded “Payback Agreement” with the City, in direct contravention of the limited statutory authority that granted Hughes the ability to seek reimbursement of its infrastructure costs. Hughes cannot properly invoke “equity” to change

the rules after the fact or to circumvent the limitations the Legislature chose to impose on Hughes's right to recoup its infrastructure costs.

The trial court properly dismissed Hughes's unjust enrichment claim on summary judgment because there were no material facts in dispute; and, because in light of the undisputed facts, Hughes's claim failed under controlling Washington law.

## **II. RESPONDENT'S STATEMENT OF THE ISSUES PERTAINING TO HUGHES'S ASSIGNMENT OF ERROR**

Did the trial court properly dismiss Hughes's unjust enrichment claim against the LeGrandes (as well as the other defendants/respondents) when the undisputed facts show that (1) RCW 35.91.020 protects these defendants from precisely such a claim, (2) the elements of unjust enrichment cannot be established on the summary judgment record, (3) the defendants were mere incidental beneficiaries of Hughes's contractual arrangements with the City of Auburn, and (4) Hughes acted as a volunteer when it chose to build a sewer line extension in order to pursue its own profit-making real estate venture, whether or not these defendants or any other landowners chose to connect to the sewer line and reimburse Hughes for a portion of the cost?

**Answer:** Yes, the trial court properly dismissed Hughes's unjust enrichment claim. Reasonable minds could only conclude that the

defendants/respondents were not unjustly enriched when they applied for, paid for, and obtained a permit from the City of Auburn to attach their property to the sewer extension Hughes constructed to serve its own multi-building housing project and such attachment occurred before the Payback Agreement between Hughes and the City was recorded with the County Auditor.

### **III. RESPONDENT'S STATEMENT OF THE CASE**

#### **A. Construction of Sewer and Payback Agreement**

In 2004, Hughes began constructing Auburn Place, a subdivision of 14 houses in Auburn, Washington.<sup>7</sup> In its Complaint, Hughes acknowledged that “[t]he permitting of the development and construction *required* that Hughes provide sewer lines to the proposed new homes.”<sup>8</sup> Hughes further admitted in its Complaint that, “[i]n order to provide sewer lines to the proposed new homes, Hughes *had to* lay sewer lines down 112<sup>th</sup> Avenue SE, in Auburn, Washington.”<sup>9</sup>

As part of the Auburn Place project, in June 2004, Hughes and the City of Auburn executed a Developer Public Facility Extension

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<sup>7</sup> CP 174, ¶ 3.1 (emphasis added).

<sup>8</sup> *Id.*

<sup>9</sup> CP 174, ¶ 3.2 (emphasis added).

Agreement relating to the sewer line Hughes was required to install.<sup>10</sup> The parties agreed as follows:

The City agrees to accept the Extension(s) for operation and maintenance if the Developer, at the Developer's expense, designs, constructs, conveys and transfers said Extension(s) to the City pursuant to the terms and conditions of this Agreement. . . .<sup>11</sup>

Hughes agreed to design and build the sewer line at its own expense, and to transfer ownership to the City upon completion. The City took on the burden of operation and maintenance of the sewer extension. Hughes had to do this to build Auburn Place, whether or not any subsequent arrangements were made to allow Hughes to recover a portion of the cost of design and construction.

The Facility Extension Summary described the Extension as follows:

The installation of approximately **1,957 LF** of waterline, **1,781 LF** of sanitary sewer, or any other associated public facility as shown on the Facility Extension application and the initial plans submitted May 14, 2004 and referred to as the **Auburn Place** development. Any changes in this summary during the City's review process that are included in the final approved plans shall be adopted hereto and incorporated herein by this reference.<sup>12</sup>

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<sup>10</sup> CP 123 – 139.

<sup>11</sup> CP 124.

<sup>12</sup> *Id.* (emphasis in original).

The City agreed to accept the Extension “for operation and ownership” once certain conditions were satisfied.<sup>13</sup> The agreement also stated that the City “may” enter into a “Payback Agreement” *pursuant to the requirements of RCW 35.91*:

#### IV. PAYBACK AGREEMENT

*The City may enter into a Payback Agreement, if applicable with the Developer, pursuant to the requirements of RCW 35.91.* The terms of this Agreement, and the City’s established payback procedures are available upon request from the City.<sup>14</sup>

On July 25, 2008, before the City and Hughes had entered into a Payback Agreement, the City of Auburn issued a sewer permit to the LeGrandes.<sup>15</sup> (CP 148) That Permit identifies the LeGrande’s property located at 29706 112<sup>th</sup> Ave. SE as ***Parcel 0521059062***.<sup>16</sup> The Permit included a \$948 line item listed as “Sewer Charge in lieu of Assess.”<sup>17</sup> The LeGrandes completed their connection to the sewer in August 2008.<sup>18</sup> The LeGrandes had no knowledge of a pending Payback Agreement and

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<sup>13</sup> CP 133.

<sup>14</sup> CP 128 (emphasis added).

<sup>15</sup> CP 148.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> CP 117, ¶ 4.

had no communication with Hughes regarding the sewer extension prior to connecting to it.<sup>19</sup>

On September 16, 2008, the City and Hughes executed Payback Agreement #102.<sup>20</sup> The Agreement noted that ownership of the sewer had already been transferred to the City.<sup>21</sup> The Agreement also included a list of nine parcels of property that could connect to the sewer line in the future and the fair *pro rata* share of the cost of construction the property owners would be required to pay if they chose to do so.<sup>22</sup> Hughes expressly agreed that the reimbursement amount “represents a fair pro rata share reimbursement for the DEVELOPER’S construction of the facilities[.]”<sup>23</sup>

The Payback Agreement specifically addressed the sewer connections that had already been made by the LeGrandes and the other defendants before execution and recordation of the Agreement; recited the

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<sup>19</sup> *Id.*, ¶¶ 3 and 5. The other defendants/respondents similarly obtained permits from the City and paid what the City required before they connected to the sewer extension. Not one of the permits and connections was made subject to a recorded Payback Agreement, “pursuant to the requirements of RCW 35.91,” because no such Agreement had been recorded.

<sup>20</sup> CP 108 – 115.

<sup>21</sup> CP 42.

<sup>22</sup> CP 115.

<sup>23</sup> CP 110.

precise amount the City had collected for those connections; and stated those amounts would be paid to Hughes, “in addition to the sum set forth above” that could be collected for connections made in the future and subject to the recorded Agreement:

In addition to sum set forth above, *the City collected fees in lieu of assessment for four properties* (tax parcel nos. 221240-0010, 221240-0140, 221240-0200, and **052105-9062**) within the benefited area prior to execution of this Agreement, totaling \$8,240.29, which the CITY shall pay to the DEVELOPER.<sup>24</sup>

Hughes had specifically negotiated for this provision. In a letter to the Auburn City Attorney dated August 14, 2008, Hughes’s attorney acknowledged his full understanding that property owners who had connected to the sewer extension before the Agreement was in force could not be subjected to further assessments.<sup>25</sup> He also requested that, with respect to the four parcels that had already connected to the sewer line, “the City refund all fees in lieu of assessments that have been collected from these parcels.”<sup>26</sup> The request encompassed “the additional \$948

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<sup>24</sup> CP 110 (emphasis added).

<sup>25</sup> CP 143.

<sup>26</sup> *Id.*

collected from the most recent parcel,” which was the parcel owned by the LeGrandes.<sup>27</sup>

The Payback Agreement also included the following provision:

The provisions of this Agreement shall not be effective as to any owner of real estate not a party hereto unless this Agreement has been recorded in the office of the County Auditor of the County in which the real estate is located prior to the time such owner receives a permit to tap into or connect to said facilities.<sup>28</sup>

The City never authorized Hughes to seek reimbursement from the LeGrandes or others who had connected to the sewer extension before a Payback Agreement had been properly executed and recorded pursuant to RCW 35.91. To the contrary, the City confirmed the plain meaning of the “Developer Public Facility Extension Agreement”<sup>29</sup> and the “Payback Agreement No. 102,”<sup>30</sup> which were subject to the provisions of RCW 35.91. For example, City advised defendants Knapp:

Under state law, properties connecting to the public sewer system prior to the date on which Agreement No. 102 was recorded with the county Auditor’s Office, November 14, 2008, ***are not subject to the agreement, and the owners of those properties were only legally required to pay the***

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<sup>27</sup> *Id.*

<sup>28</sup> CP 110.

<sup>29</sup> CP 123 – 139.

<sup>30</sup> CP 160 – 167.

*connection fees in place at the time of their connection to the public sewer system.*<sup>31</sup>

Hughes remained undeterred by the controlling statute or the plain provisions of its Payback Agreement with the City. Having failed to obtain the City's agreement to impose *post hoc* assessments on the LeGrandes and the other defendants, Hughes sought "equitable relief" to avoid its own written agreements and the controlling statutory scheme.

**B. Procedural Facts**

On December 8, 2010, Hughes filed its Complaint for Unjust Enrichment.<sup>32</sup> In that Complaint, Hughes asked the trial court, acting "in equity," to impose assessments against the owners of each of the four parcels that were connected to the sewer extension *before* the Payback Agreement was executed. In other words, Hughes sought to rewrite the Payback Agreement so it would be retroactively applied – contrary to the plain, negotiated terms of the Agreement and to the enabling statute that authorized the City and Hughes to enter into and enforce such an Agreement in the first place.

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<sup>31</sup> CP 101 – 102 (emphasis added).

<sup>32</sup> CP 9 – 13.

All Defendants filed motions for summary judgment.<sup>33</sup> The trial court granted all the motions.<sup>34</sup> Hughes moved for reconsideration<sup>35</sup> and the trial court denied that motion.<sup>36</sup>

## V. ARGUMENT

### A. Standard of Review

A summary judgment ruling is subject to de novo review.<sup>37</sup> The appellate court engages in the same inquiry as the trial court and may sustain a summary judgment order on any basis supported by the record.<sup>38</sup> Any conclusions of law the trial court might have made “are superfluous and will not be considered on appeal.”<sup>39</sup> Therefore, the Court need not consider any of the statements made by the trial court in its Order Denying Plaintiff’s Motion for Reconsideration.<sup>40</sup>

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<sup>33</sup> CP 32 – 35; 72 – 80; 81 – 93.

<sup>34</sup> CP 290 – 292; 293 – 295; 296 – 297.

<sup>35</sup> CP 298 – 303.

<sup>36</sup> CP 308 – 309.

<sup>37</sup> *Coppernoll v. Reed*, 155 Wn.2d 290, 296, 119 P.3d 318 (2005) (citing *Berger v. Sommeland*, 144 Wn.2d 91, 26 P.3d 257 (2001)).

<sup>38</sup> *Id.* (citing *LaMon v. Butler*, 112 Wn.2d 193, 200 – 201, 770 P.2d 1027 (1989)).

<sup>39</sup> *Concerned Coupeville Citizens v. Town of Coupeville*, 62 Wn. App. 408, 413, 814 P.2d 243 (1991) (citing *Donald v. Vancouver*, 43 Wn. App. 880, 883, 719 P.2d 966 (1986)).

<sup>40</sup> CP 308 – 309.

A. **RCW 35.91.020 prohibited Hughes from recovering construction costs from parties who connected their property to the sewer extension before the Payback Agreement was recorded with the County Auditor.**

Under the terms of its Developer Public Facility Extension Agreement with the City of Auburn, Hughes agreed to design, construct, convey and transfer the sewer line at issue to the City at Hughes's own expense.<sup>41</sup> Moreover, it did so knowing the City had the option, but was not required, to execute a Payback Agreement to help Hughes recoup some of the costs.<sup>42</sup> Specifically, the City agreed that it "*may enter* into a Payback Agreement, if applicable with the Developer pursuant to the requirements of RCW 35.91."<sup>43</sup>

RCW 35.91.020 allows Payback Agreements, but does not require them:

(1)(a) Except as provided under subsection (2) of this section, the governing body of any city . . . hereinafter referred to as a "municipality" *may contract* with owners of real estate for the construction of storm, sanitary, or combination sewers. . . hereinafter called "water or sewer facilities," within their boundaries . . . connecting with the public water or sewerage system to serve the area in which the real estate of such owners is located, *and to provide for a period of not to exceed twenty years for the reimbursement of such owners* and their assigns by any

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<sup>41</sup> CP 124.

<sup>42</sup> CP 128.

<sup>43</sup> *Id.* (emphasis added).

owner of real estate who did not contribute to the original cost of such water or sewer facilities and ***who subsequently tap onto or use the same*** of a fair pro rata share of the cost of the construction of said water or sewer facilities. . .<sup>44</sup>

While RCW 35.91.020(1) allows the City and a private party constructing a sewer to execute a Payback Agreement, subsection (4) of the statute specifically *prohibits* the Payback Agreement from applying to property owners who connect to the sewer before the Agreement is executed and recorded with the County Auditor:

***The provisions of such contract shall not be effective*** as to any owner of real estate not a party thereto unless such contract has been recorded in the office of the county auditor of the county in which the real estate of such owner is located prior to the time such owner taps into or connects to said water or sewer facilities.<sup>45</sup>

Hughes tosses this clear statutory wording aside as a mere “quirk” or an “anomaly” that trial courts may circumvent at will.<sup>46</sup> However, far from being a mere “quirk” in the law, this provision of the statute provides important protection to property owners, like the LeGrandes, who take the required steps to connect to a privately constructed sewer line *before* a Payback Agreement has been recorded.

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<sup>44</sup> Emphasis added.

<sup>45</sup> RCW 35.91.020(4) (emphasis added).

<sup>46</sup> Appellant’s Brief at 1 and 2.

The LeGrandes' situation highlights the balance of interests that is embodied in the statute – a balance the Legislature has already achieved and that our courts may not alter, willy nilly, whenever it suits a for-profit developer, like Hughes, who does not like the deal he has struck with a municipality. Property owners connecting to the sewer *after* the Payback Agreement was recorded will know exactly what the sewer construction cost allocation for their property is and can make a fully informed decision as to whether they wish to pay the allocation and connect to the sewer – or not.

The LeGrandes, on the other hand, knew nothing of the potential arrangement between Hughes and City when they applied for their permit to connect to the sewer. They applied for the permit, the City told them how much the fee would be, they paid the fee, and they connected their property to the sewer. The LeGrandes did not know when they took those actions that Hughes would later contend they must pay tens of thousands of dollars for a utility connection the City allowed them to make – and which the City had every right to allow them to make – upon payment of the assessed fee.<sup>47</sup> RCW 35.91.020 prevents a party in Hughes's position

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<sup>47</sup> More than a year before it had entered into a Payback Agreement with the City of Auburn, Hughes's counsel demanded payment of \$32,017.09 from defendants Kevin and Charlotte Day "within 14 days," threatening that "a lawsuit will be immediately filed against you to ensure that you do not unjustly profit from *my client's sewer extension.*" CP 242 (emphasis added). Of course, the sewer

from laying such a trap for property owners like the LeGrandes. Hughes readily agrees the statutory protection applies to the LeGrandes.<sup>48</sup> Yet, it is now attempting to do through an unjust enrichment claim that which the statute expressly prohibits. This attempt necessarily fails as a matter of law.

This Court has noted:

Unjust enrichment is a general principle that one person should not be permitted unjustly to enrich himself at the expense of another, but should be required to make restitution of or for property or benefits received, retained or appropriated, where it is just and equitable that such restitution be made, ***and where such action involves no violation or frustration of law or opposition to public policy***, either directly or indirectly.<sup>49</sup>

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extension did not belong to Hughes, nor did Hughes have any legal basis for demanding this payment from the Days in the absence of an Agreement authorized and recorded pursuant to RCW 35.91. This was no more and no less than a reprehensible effort by Hughes to shake down the Days and other landowners who had obtained valid permits from the City and had connected to the City's sewer line after paying exactly what the City had asked them to pay.

At the same time, Hughes told the Days it would pursue the City for its "gross error in failing to collect from you at hook up." CP 243. However, under RCW 35.91, the City made no "error" – it had no obligation whatsoever to collect funds from the Days or any other landowner to reimburse Hughes for sewer and similar infrastructure costs that Hughes had willingly expended in order to build and sell 14 homes. That was Hughes's cost of doing business and was not recoverable, except through the sales price of the homes – or to the extent permissible under a validly recorded Payback Agreement with the City under RCW 35.91.

<sup>48</sup> Appellant's Brief at 5.

<sup>49</sup> *Tulalip Shores, Inc. v. Mortland*, 9 Wn. App. 271, 274 – 75, 511 P.2d 1402 (1973) (emphasis added).

Allowing Hughes to pursue an unjust enrichment claim against Defendants in this matter would frustrate the purpose of RCW 36.91.020(4) and the public policy embodied therein. Therefore, the claim for unjust enrichment fails as a matter of law.

C. **Hughes cannot establish the elements of unjust enrichment against the LeGrandes or the other defendants.**

Based upon the prohibition in RCW 35.91.020(4), Hughes should be precluded from pursuing an unjust enrichment claim against any parties connecting their property to the sewer before the Payback Agreement was recorded. However, even if the statute is not read to prohibit such claims, Hughes's unjust enrichment claim against the LeGrandes still fails as a matter of law.

To establish unjust enrichment, the claimant must meet three elements: (1) one party must have conferred a benefit to the other; (2) the party receiving the benefit must have knowledge of that benefit; (3) the party receiving the benefit must accept or retain the benefit under circumstances that make it inequitable for the receiving party to retain the benefit without paying its value.<sup>50</sup>

“[E]nrichment alone will not trigger the doctrine; rather, the enrichment must be unjust under the circumstances and as between the two parties to the transaction.”<sup>51</sup>

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<sup>50</sup> *Cox v. O'Brien*, 150 Wn. App. 24, 37, 206 P.3d 682 (2009) (citing *Dragt v. Dragt/DeTray, LLC*, 139 Wn. App. 560, 576, 161 P.3d 473 (2007)).

<sup>51</sup> *Id.*

Although an unjust enrichment claim may sometimes involve a question of fact, that does not preclude summary dismissal of such a claim because “the trial court may decide factual issues as a matter of law if there is only one conclusion reasonable minds could reach.”<sup>52</sup> Where, as here, the only conclusion reasonable minds could reach, based upon the undisputed facts before the court on summary judgment, is that there has been no unjust enrichment, summary dismissal of the unjust enrichment claim is appropriate.

For example, in *Cox v. O’Brien*, the trial court concluded the plaintiffs had failed to make a prima facie case for their unjust enrichment claim and dismissed the claim.<sup>53</sup> This Court upheld that decision as a matter of law.<sup>54</sup> Similarly, reasonable minds could only conclude that the LeGrandes have not been unjustly enriched and the trial court properly granted their motion for summary judgment.

The undisputed facts in the record on review demonstrate the absence of the very first element of an unjust enrichment claim. Hughes

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<sup>52</sup> *Rhodes v. URM Stores, Inc.*, 95 Wn. App. 794,799, 977 P.2d 651 (1999) (citing *Doe v. Boeing Co.*, 121 Wn.2d 8, 15, 846 P.2d 531 (1993); *Michelsen v. Boeing Co.*, 63 Wn. App. 917, 920, 826 P.2d 214 (1991)). See also *Denny’s Restaurants, Inc. v. Security Union Title Ins. Co.*, 71 Wn. App. 194, 859 P.2d 619 (1993) (“If reasonable minds are compelled to reach but one conclusion on an issue of fact, it may be determined as a matter of law.”)

<sup>53</sup> *Id.*, 150 Wn. App. at 32.

<sup>54</sup> *Id.* at 38.

did not “confer a benefit” on the LeGrandes. Hughes constructed the sewer to further its own interests, not the LeGrandes. It wished to construct Auburn Place and as part of that project, it had no choice but to construct the sewer line.<sup>55</sup> Moreover, Hughes was required to transfer ownership of the sewer to the City. On summary judgment, Hughes did not dispute that such ownership transferred *before* the LeGrandes connected to the sewer. Thus, any benefit that was conferred on the LeGrandes was conferred by the City, not by Hughes. That undisputed fact alone is fatal to Hughes’s unjust enrichment claim.

The third element of unjust enrichment is also missing because, under the circumstances, it is not inequitable for the LeGrandes to maintain the benefit of having their property attached to the sewer. The LeGrandes paid for that benefit when they paid the fee assessed by the City. At most, the LeGrandes were simply incidental beneficiaries of the Developer Public Facility Extension Agreement Hughes executed with the City.

Despite Hughes’s attempts to argue to the contrary in its Opening Brief, *Farwest Steel Corp. v. Mainline Metal Works, Inc.*<sup>56</sup> is directly on point. In *Farwest Steel*, Hensel subcontracted with Mainline Metal Works

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<sup>55</sup> CP 174, ¶ 3.1.

<sup>56</sup> 48 Wn. App. 719, 741 P.2d 58 (1987).

to fabricate and furnish certain metal items. Mainline, in turn, contracted with Farwest to supply its steel requirements for the job. Hensel was aware that Farwest was making deliveries to Mainline. Before its contract with Hensel was complete, Mainline went into bankruptcy. Farwest asserted an unjust enrichment claim against Hensel. The trial court dismissed the claim on summary judgment. In affirming that dismissal, this Court held:

The mere fact that a third person benefits from a contract between two other persons does not make such third person liable in quasi contract, unjust enrichment, or restitution. Moreover, where a third person benefits from a contract entered into between two other persons, in the absence of some misleading act by the third person, the mere failure of performance by one of the contracting parties does not give rise to a right of restitution against the third person. In other words, ***a person who has conferred a benefit upon another, by the performance of a contract with a third person, is not entitled to restitution from the other merely because of the failure of performance by the third person.***<sup>57</sup>

The rule stated in *Farwest Steel* is particularly apropos here, where there has been no failure of performance by a contracting party. Hughes agreed to finance the entire sewer project, when it knew or should have known that the City had no obligation to assist it in recouping any of the expense; and when controlling law prohibited any Payback Agreement

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<sup>57</sup> 48 Wn. App. at 782 (quoting 66 Am.Jur.2d Restitution and Implied Contracts, § 16 at 960) (emphasis added).

from applying to property owners whom the City might allow to connect to the sewer before an Agreement was recorded with the County Auditor. Hughes also knew the project would potentially benefit other property owners. Moreover, Hughes presented no evidence on summary judgment showing the LeGrandes did anything misleading by applying for, paying for and receiving a permit from the City allowing them to connect to the City's sewer system.<sup>58</sup> Indeed, the LeGrandes paid a charge that the City had apparently earmarked for reimbursement to Hughes in lieu of an assessment under the Payback Agreement. As a result, under *Farwest Steel*, Hughes's unjust enrichment claim fails as a matter of law.

Hughes argues that *Farwest Steel* should not apply because the Sixth Circuit declined to apply *Farwest Steel* in deciding *Reisenfeld & Co. v. Network Group, Inc.*<sup>59</sup> However, the Sixth Circuit's decision was premised on Ohio law; it has never even been cited in a reported Washington decision; and it provides no guidance to this Court at all. *Reisenfeld* does not even provide a useful gloss upon, and certainly does not overrule or limit, this Court's own reasoning in *Farwest Steel*.

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<sup>58</sup> See discussion at pages 22 – 23 of Brief of Appellant regarding actions allegedly taken by Defendants Day and Baker. Appellant includes no discussion of any actions by the LeGrandes alleged to be wrongful in any respect.

<sup>59</sup> 277 F.3d 856 (6<sup>th</sup> Cir. 2002). See Appellant's Brief at 13.

In contrast, *Chandler v. Washington Toll Bridge Authority*<sup>60</sup> is binding Washington authority. The following discussion from *Chandler* applies directly to the undisputed facts and confirms the trial court in our case should be affirmed:

In Keener on Quasi Contracts, p. 361, the rule is stated as follows: ‘If a plaintiff has in fact received the equivalent which he expected in exchange for an act done by him, ***the fact that incidentally some one else has also derived a benefit should not give him a cause of action.*** In such a case it cannot properly be said that there is an unjust enrichment on the part of the defendant at his expense, since he has received an equivalent which he regarded as ample when he did the act.’<sup>61</sup>

Hughes received what it expected in its transaction with the City of Auburn – Hughes agreed to design and install the sewer line at its own expense as a prerequisite to building and selling 14 homes in a subdivision in the City. The City entered into a Payback Agreement to assist Hughes in recouping some of those infrastructure costs – to the extent permitted by statute and the negotiated terms of the Agreement itself. The fact that the LeGrandes also derived a benefit from the sewer system cannot be considered “unjust enrichment” on their part, obtained at Hughes’s expense. To the contrary, it would be “unjust” to permit Hughes to recover from the LeGrandes, or any of these defendants, through an unjust

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<sup>60</sup> 17 Wn.2d 591, 137 P.2d 97 (1943).

<sup>61</sup> 17 Wn.2d at 605 (emphasis added).

enrichment claim, what the City refused to provide to Hughes and what RCW 35.91.020(4) specifically prohibited Hughes from recovering under the Payback Agreement.

In its Order Denying Plaintiff's Motion for Reconsideration, the trial court included a string citation to cases decided in equity in support of its decision.<sup>62</sup> Hughes discusses the cited cases at length in its opening brief in an attempt to distinguish them.<sup>63</sup> However, whether the cases cited by the trial court in support of its decision actually support that decision is irrelevant to this Court's review. On *de novo* review of an order granting summary judgment, this Court should affirm by independently applying the controlling law to the undisputed facts. The Court is not constrained to follow the trial court's stated reasoning.<sup>64</sup>

Hughes also places undue emphasis on the trial court's statement that "bad faith" is a factor to be considered in any decision in equity.<sup>65</sup> Hughes cites to multiple cases in which courts have not considered "bad faith" as an element of an unjust enrichment claim.<sup>66</sup> However, most of

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<sup>62</sup> CP 308.

<sup>63</sup> Brief of Appellant at 15 – 21.

<sup>64</sup> *Concerned Coupeville Citizens*, 62 Wn. App. at 413.

<sup>65</sup> CP 308.

<sup>66</sup> Brief of Appellant at 10 n.2.

the cases Hughes cites are distinguishable on their facts, because they do not address claims against the incidental beneficiaries of a contract between two other parties.<sup>67</sup> In contrast, *Farwest Steel* directly addressed our paradigm and held that, “where a third person benefits from a contract entered into between two other persons, *in the absence of some misleading act by the third person*, the mere failure of performance by one of the contracting parties does not give rise to a right of restitution against the third person.”<sup>68</sup>

*Seattle Mortgage Co. v. Unknown Heirs of Daisy Grey*,<sup>69</sup> the one case cited by Hughes involving a claim against an incidental beneficiary, is consistent with this Court’s holding in *Farwest Steel*. *Seattle Mortgage* involved a dispute by a mortgage lienholder against a PUD holding a lien arising from a loan for energy conservation improvements to the

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<sup>67</sup> *Klinke v. Famous Recipe Fried Chicken*, 24 Wn. App. 202, 600 P.2d 1034 (1979) (suit filed by franchisor against franchisee and did not involve an incidental beneficiary); *Found. for the Handicapped v. Dept. of Soc. and Health Servs. of Wash. State*, 97 Wn.2d 691, 648 P.2d 884 (1982) (suit filed against the state agency by organization representing disabled persons who had paid for services to the state agency and did not involve an incidental beneficiary); *Truckweld Equipment Co. v. Olson*, 26 Wn. App. 638, 618 P.2d 1017 (1980) (suit filed by vendor against corporation and its sole shareholder and did not involve incidental beneficiary); *Thola v. Henschell*, 140 Wn. App. 70, 164 P.3d 524 (2007) (court held that Uniform Trade Secrets Act did not preclude an unjust enrichment claim based upon the same facts, but not address the merits of the unjust enrichment claim in any manner).

<sup>68</sup> 48 Wn. App. at 732 (emphasis added).

<sup>69</sup> 133 Wn. App. 479, 136 P.3d 776 (2006).

residence. When the property owner died the mortgage company filed suit, arguing that its lien was primary and any purchaser of the house would take the house free of the PUD's lien. The trial court granted summary judgment to the mortgage company. On appeal, the PUD argued the mortgage company, which had purchased the house at the foreclosure sale, had been unjustly enriched by the energy conservation improvements for which the PUD could not enforce its lien. The court disagreed, concluding that, because the mortgage company had no knowledge of the loan and did not "silently acquiesce" to the improvements and then seek to benefit from them without paying, the claim of unjust enrichment was properly dismissed on summary judgment.<sup>70</sup>

The trial court's comment regarding bad faith was consistent with the holding of *Farwest Steel* and *Seattle Mortgage*. It was an acknowledgement of the possibility that an incidental beneficiary of a contract between two other parties may be found liable under the theory of unjust enrichment if he or she has acted in a misleading way – *i.e.*, in "bad faith." However, the undisputed facts in the present matter show the LeGrandes did not act in any manner that could constitute bad faith. Nor did any of the other defendants. Each defendant obtained a valid permit to

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<sup>70</sup> 133 Wn. App. at 499 (citing *Irwin Concrete, Inc. v. Sun Coast Props.*, 33 Wn. App. 190, 194, 653 P.2d 1331 (1982)).

connect to the sewer extension after paying the amount the City assessed for the right to connect. None of the defendants was obligated to contribute to Hughes's infrastructure costs unless and until the City and Hughes entered into a valid and recorded Payback Agreement. If Hughes has a claim at all, it would be against the City – and we fail to see how Hughes could ever assert such a claim, since it does not appear the City was ever obligated to enter into an Agreement to assist Hughes in recouping its infrastructure costs. RCW 35.91 states that such Agreements may be made, if at all, at the option of the municipality.

Regardless of the trial court's comments in its Order Denying Plaintiff's Motion for Reconsideration, the only question for this Court is whether the trial court's ultimate decision was correct under the facts and the controlling law. It was. The trial court properly concluded that the undisputed facts could not support a claim for unjust enrichment. The LeGrandes took the required steps to attach their property to the sewer and they paid the charge assessed by the City of Auburn. It is undisputed that the LeGrandes were not even aware a Payback Agreement was being negotiated.<sup>71</sup> In response to the motions for summary judgment, Hughes failed to produce a scintilla of evidence to show that the LeGrandes took

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<sup>71</sup> CP 117, ¶¶ 3 and 5.

any actions that were misleading, unfair, inequitable, in bad faith or that would in any way suggest it would be unjust for the LeGrandes to retain the benefit of being connected to the sewer extension. Thus, the trial court properly concluded as a matter of law that the LeGrandes were not unjustly enriched.

**D. Hughes cannot pursue an unjust enrichment claim because it acted as a volunteer.**

Hughes's claim fails as a matter of law because it cannot establish the required elements of unjust enrichment. The claim was also properly dismissed because Hughes was acting as a volunteer when it constructed the sewer extension, which precludes any claim for unjust enrichment.<sup>72</sup>

Whether one acts as a volunteer is determined in light of all surrounding circumstances, including (1) whether the benefits were conferred at the request of the party benefitted, . . . (2) whether the party benefitted knew of the payment, but stood back and let the party make the payment, . . . and (3) whether the benefits were necessary to protect the interests of the party who conferred the benefit or the party who benefitted thereby. . . .<sup>73</sup>

Regarding the first factor, the LeGrandes did not request that Hughes build the sewer extension. Rather, Hughes made the business decision to construct the Auburn Place project and the sewer extension was a

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<sup>72</sup> *Trane Company v. Randolph Plumbing & Heating*, 44 Wn. App. 438, 442, 722 P.2d 1325 (1986); *Ellenburg v. Larson Fruit Co.*, 66 Wn. App. 246, 250, 835 P.2d 225 (1992).

<sup>73</sup> *Ellenburg*, 66 Wn. App. at 251 – 52 (citations omitted).

necessary part of that project. Hughes was acting purely in its own self interest and for its own benefit when it made that decision. Hughes voluntarily moved forward with the project, voluntarily agreed to pay for and construct the sewer extension, voluntarily transferred ownership of the sewer to the City of Auburn, and voluntarily entered into the Payback Agreement with the City of Auburn. Moreover, the LeGrandes had no knowledge of any of this before they applied for the permit and connected their property to the sewer. Thus, the second factor also supports a finding that Hughes acted as a volunteer.

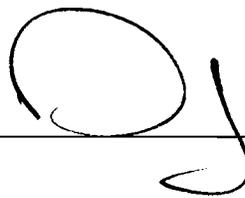
Finally, the third factor is irrelevant because any benefit the LeGrandes received was not necessary to protect the interests of either Hughes or the LeGrandes. Hughes chose to construct the sewer purely for its own benefit. Any subsequent benefit the LeGrandes may have received did not protect Hughes's interests or the LeGrandes' interests. Moreover, the fact that the LeGrandes connected their property to the sewer did not increase the cost of the sewer by any amount. Hughes would have paid the exact same amount regardless of the LeGrandes' decision to apply for and obtain a permit to connect to it. Thus, Hughes's actions can only be characterized as those of a volunteer. As a result, Hughes's claim for unjust enrichment fails as a matter of law.

**VI. CONCLUSION**

The trial court properly dismissed Appellant Hughes's unjust enrichment claims on summary judgment. The LeGrandes, along with the other defendants/respondents, respectfully ask this Court to AFFIRM the trial court's orders granting summary judgment.

DATED and respectfully submitted this 17<sup>th</sup> day of November, 2010.

By



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**CERTIFICATE OF SERVICE**

The undersigned certifies that under penalty of perjury under the laws of the State of Washington, on the below date I caused to be served and filed with The Court of Appeals of the State of Washington, and arranged for delivery of true and correct copies of the foregoing document upon the following:

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