

No. 40171-1-II

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II

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HENRY DRAGT and JANE DRAGT, husband and wife,

Appellants,

v.

DRAGT/DETRAY, L.L.C., a Washington limited liability;  
and E. PAUL DETRAY and PHYLLIS DETRAY,  
and their marital community,

Respondents.

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**OPENING BRIEF OF APPELLANTS**

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DIVISION II  
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STATE OF WASHINGTON  
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## **I. ASSIGNMENTS OF ERROR**

1. The trial court erred in entering Finding of Fact No. 3.
2. The trial court erred in entering Finding of Fact No. 7.
3. The trial court erred in entering Conclusion of Law No. 2.
4. The trial court erred in entering Conclusion of Law No. 3.
5. The trial court erred in entering Conclusion of Law No. 4.
6. The trial court erred in entering Conclusion of Law No. 5.
7. The trial court erred in entering Conclusion of Law No. 6.
8. The trial court erred in entering Conclusion of Law No. 7.
9. The trial court erred in entering Conclusion of Law No. 8.
10. The trial court erred in entering Conclusion of Law No. 9.
11. The trial court erred in entering Conclusion of Law No. 10.
12. The trial court erred in entering Conclusion of Law No. 11.
13. The trial court erred in entering Conclusion of Law No. 12.
14. The trial court erred in entering Conclusion of Law No. 13.

## **II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Did the trial court improperly exceed the mandate when it revisited the unjust enrichment award adjudicated by the Court of Appeals in the first appeal rather than determine an award under quantum meruit? [relating to Assignments of Error 1, 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14]

2. Even if the trial court did not exceed its authority in awarding additional unjust enrichment damages, did it err in awarding damages that were not supported by any evidence in the record? [relating to Assignments of Error 1,2, 7, 11, 12, 13 and 14].

3. Did the trial court err in awarding expectation damages when the Court of Appeals previously rejected such damages and when the court was instructed to award restitution damages? [relating to Assignments of Error 11, 12, 13 and 14].

4. Did the trial court abuse its discretion in awarding damages beyond the measures of recovery available in an equitable action? [relating to Assignment of Error 5].

5. Did the trial court abuse its discretion in awarding prejudgment interest to DeTray? [relating to Assignments of Error 3, 12, 13 and 14].

### **III. STATEMENT OF THE CASE**

#### **A. Disposition below.**

This case comes before the Court of Appeals for the second time. In the first appeal, which followed a February, 2006 trial, the Court of Appeals reversed the trial court's award of \$2.2 million in breach of contract damages and awarded respondents DeTray \$593,462.66 in unjust

enrichment. It also remanded the case for a determination of a quantum meruit award. CP 343-61.

On remand, respondents DeTray had no evidence to support a quantum meruit claim so the Dragts moved for summary judgment dismissal. CP 396-403. The motion was denied and the case proceeded to trial, after which the trial court awarded DeTray \$1.7 million in unjust enrichment and no money for quantum meruit. CP 470-71.

This appeal follows. The primary issue on review is whether the trial court exceeded the mandate in awarding further damages under unjust enrichment when the Court of Appeals remanded for an award under quantum meruit. If it did exceed the mandate, the trial court should be summarily reversed. If it did not exceed the mandate, it still made significant errors in its decision which warrant reversal.

**B. Statement of facts.**

1. The first lawsuit.

This saga began in 2004 when Henry and Jane Dragt, tired and desperate because the promised development of their land had gone nowhere in eight years, gave the Dragt/DeTray LLC an ultimatum: show some progress or they would sell their land. The LLC, led by DeTray, its managing member, did nothing so the Dragts sold their land to another

developer, Tahoma Terra, LLC. *See, Dragt v. Dragt/DeTray, LLC*, 139 Wn. App. 560, 161 P.3d 473 (2007).

The parties sued and in that suit, the trial court ruled that although the LLC's option to purchase the land was unenforceable, the Dragts were nevertheless obligated to hold their land for DeTray. CP 314. The trial court then awarded DeTray more than \$2.2 million in damages for breach of contract. CP 316-18. Significantly, the trial court gave DeTray the choice of an award based on breach of contract or unjust enrichment, suggesting to DeTray that he should choose unjust enrichment. CP 131:19-132:3 (pp. 49-50 of trial court's 3/2/06 ruling). DeTray ignored the trial court's advice and requested a breach of contract award.

2. The Court of Appeals' mandate.

The Dragts appealed the trial court's decision and this Court reversed, holding that DeTray had no interest in the Dragts' land, the Dragts did not breach any contractual duties and "[i]t was error for the trial court to use contractual remedies to compensate DeTray for his costs." *Dragt v. Dragt/DeTray LLC*, 139 Wn. App. 560, 575.

This Court went on to hold, however, that DeTray was entitled to reimbursement of his costs under unjust enrichment as well as an award under quantum meruit for the value of his services:

We agree with DeTray, however, that the Dragts were unjustly enriched by his financial contributions to the LLC and *we remand to the trial court to award DeTray restitution in quantum meruit.*

*Id.* at 564 (emphasis added).

The record on appeal was sufficient for this Court to accurately determine the costs to be reimbursed to DeTray. Thus, the mandate instructed the trial court to enter judgment against the Dragts for unjust enrichment in the specific amount of \$593,462.66:

In total, DeTray paid \$280,000 in mortgage costs; \$124,371.62 for a sewer connection; \$69,000 for consultant reports and designs; and \$124,000 for access to a wastewater treatment facility. DeTray should be compensated for all these costs. It would be inequitable for the Dragts to receive the benefit of DeTray's costs, and we remand for an award of unjust enrichment against the Dragts for DeTray's costs, which amount to \$593,462.66.

*Id.* at 577.

In determining its unjust enrichment award, there were two measures of recovery available to the Court of Appeals: (1) the cost of obtaining the same services from another source, or (2) the amount by which the other party's property increased in value as a result of the services. *See, e.g., Young v. Young*, 164 Wn.2d 477, 487, 191 P.3d 1258 (2008). The Court of Appeals considered these options and elected to measure DeTray's unjust enrichment recovery by the first option above,

expressly declining to award DeTray any amount based on the alleged increase in value of the Dragts' land.

The Court of Appeals could not determine, on the record before it, the reasonable value of services provided by DeTray, as this evidence had never been presented at trial. It therefore remanded the case to determine DeTray's recovery, if any, under quantum meruit:

Because quantum meruit allows restitution only for a reasonable value for services, we remand for findings regarding the reasonable value of the benefit for the services DeTray conferred upon the Dragts.

*Dragt v. Dragt/DeTray*, 139 Wn. App. at 577.

Thus, the mandate instructed the trial court to (1) enter judgment under unjust enrichment for \$593,462.66 and (2) determine the amount of recovery under quantum meruit for the reasonable value of services rendered by DeTray.

3. The trial court understands the mandate.

On August 12, 2008, after reviewing the Court of Appeals' decision, the trial court issued a letter to both parties, acknowledging this Court's instructions.<sup>1</sup> As stated in that letter, the trial court understood its mandate was to "award DeTray \$593,462.66 in costs under the theory of

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<sup>1</sup> This letter is attached as Exhibit B to the Decl. of Kevin Bay In Support of Appellants' Motion for Writ Requiring Trial Court to Enter Judgment As Directed By This Court's Mandate, filed with the Court of Appeals on or about October 5, 2009.

'unjust enrichment' plus an additional sum, to be determined at the trial court level, under a theory of *quantum meruit* for the reasonable value of services conferred on Dragt by DeTray." Thus, as of August 12, 2008, the trial court distinguished between the two doctrines addressed in the Court of Appeals' decision and understood the Court of Appeals' instruction with respect to each of the two doctrines.

4. The trial court deviates from the mandate.

After acknowledging the Court of Appeals' instructions in its August 12, 2008 letter, the trial court subsequently changed its view when the Dragts moved for summary judgment. DeTray had conceded in deposition that he had no claim for quantum meruit. *See*, CP 455-57. Since quantum meruit was the sole issue on remand, the Dragts moved for dismissal. CP 396-403. The trial court denied the motion, ruling that DeTray could proceed with a claim for unjust enrichment. CP 443-44. This was contrary to the Court of Appeals' mandate and the trial court's August 12, 2008 letter acknowledging the mandate.

The case proceeded to trial on September 22 and 23, 2009. At trial, DeTray conceded, as he had at summary judgment, that he had no claim for quantum meruit. RP (9/22/09) at 10:1-7; 92:8-19. Thus, pursuant to this Court's mandate, the trial court should have entered judgment for \$593,462.66 under unjust enrichment and awarded nothing

under quantum meruit. Rather than enter the judgment for unjust enrichment as directed by the mandate, however, the trial court heard, admitted and considered further evidence of unjust enrichment. The Dragts objected to that evidence as contrary to the mandate but the objection was overruled. RP (9/22/09) at 36:19-37:5. Ultimately, the trial court awarded more than \$1.7 million in unjust enrichment damages, thereby increasing this Court's unjust enrichment award by more than \$1 million and nearly matching the \$2.2 million in breach of contract damages the trial court had awarded in the first trial. CP 470-71. The trial court justified its revised interpretation of the mandate by claiming that the Court of Appeals' decision did not clearly delineate between unjust enrichment and quantum meruit, thus allowing the trial court to reconsider the issue of unjust enrichment.

Because the trial court's award exceeded the unjust enrichment award rendered by this Court, deviated from this Court's mandate, and was beyond the trial court's jurisdiction, the Dragts appealed.

#### IV. AUTHORITY

**A. The trial court exceeded the Court of Appeals' mandate when it awarded additional unjust enrichment damages.<sup>2</sup>**

1. The Court of Appeals' mandate distinguished between unjust enrichment and quantum meruit and gave specific instructions with respect to each.

Unjust enrichment and quantum meruit are separate, although related, theories with different measures of recovery. *See, King v. Clodfelter*, 10 Wn. App. 514, 522, 518 P.2d 206 (1974) (warning that the measure of damages under quantum meruit and unjust enrichment “should not be intertwined”).

Under unjust enrichment, a claimant's recovery can be measured “by the amount which the benefit conferred would have cost the defendant had it obtained the benefit from some other person in the plaintiff's position” or by “the extent to which the other party's property has been increased in value or his other interests advanced.” *Young v. Young*, 164 Wn.2d 477, 487.

Under quantum meruit, recovery is more limited. A claimant may recover only the reasonable value of services he rendered that benefited the other party. *Young v. Young*, 164 Wn.2d at 486; *Dravo Corp. v. L.W.*

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<sup>2</sup> Construing the mandate and determining whether the trial court followed the mandate are issues of law and are therefore reviewed *de novo*. *Skamania County v. Columbia River Gorge Comm.*, 144 Wn.2d 30, 42, 26 P.3d 241 (2001).

*Moses Co.*, 6 Wn. App. 74, 91, 492 P.2d 1058 (1971). The reasonable value of services rendered is *not* measured by the alleged increase in the value of property as that measure is exclusive to an unjust enrichment award.

[W]hen quantum meruit recovery is allowed for extra or additional work, the measure of damages is the costs incurred by the performing party expressed as the cost of labor, materials and a reasonable allowance for profit, *not the enhanced value to the estate of the party receiving performance*. Therefore, the trial court erred in basing the damage computation on the increased value of defendants' house after completion of the remodeling by plaintiff, rather than upon proof of plaintiff's actual costs.

*Modern Builders, Inc. v. Manke*, 27 Wn. App. 86, n. 3, 615 P.2d 1332 (1980) (citations omitted; emphasis added). *See also, Young v. Young*, 164 Wn.2d at 486 (recovery under quantum meruit is "limited to the value of services rendered"); *King v. Clodfelter*, 10 Wn. App. at 523 (damages under quantum meruit for services performed "must be approached from the standpoint of the actual value of that proven to have been performed by the claimant rather than from the vantage of benefit to or enhancement of the estate").

In its opinion, this Court articulated the distinction between the two theories:

Unjust enrichment encompasses the doctrine of quantum meruit. 'Quantum meruit' literally means 'as much as deserved' and is a remedy for restitution for a reasonable

amount of work or services. Generally, a party relying on quantum meruit may recover the *reasonable value* of the benefit its service conferred upon the defendant. Unjust enrichment and quantum meruit are related doctrines; the former is a broader concept that encompasses the latter.

*Dragt v. Dragt/DeTray LLC*, 139 Wn. App. at 576-77 (citations omitted).

This Court then gave specific instructions with respect to each doctrine. It first directed the trial court to enter judgment for \$593,462.66 under unjust enrichment:

It would be inequitable for the Dragts to receive the benefit of DeTray's costs and we remand for an award of unjust enrichment against the Dragts for DeTray's costs, which amount to \$593,462.66.

*Id.* at 577.

It then instructed the trial court to determine the proper recovery, if any, to which DeTray was entitled under quantum meruit:

Because quantum meruit only allows restitution for a reasonable value for services, we remand for findings regarding the reasonable value of the benefit for the services DeTray conferred upon the Dragts.

*Id.*

As set out below, the trial court did neither. It did not enter the unjust enrichment judgment as directed and did not adjudicate DeTray's quantum meruit claim. Instead, it reconsidered this Court's unjust enrichment award, increasing it by more than \$1 million, and did not even address the issue of quantum meruit.

2. The trial court erred by deviating from this Court's mandate and awarding an additional \$1 million in unjust enrichment damages instead of limiting remand to the issue of quantum meruit.

The Court of Appeals' mandate is binding on the trial court and must be strictly followed. *Tucker v. Brown*, 20 Wn.2d 740, 772-73, 150 P.2d 604 (1944), quoting *Frye v. King County*, 157 Wash. 291, 289 P. 18 (1930). If the trial court proceeds contrary to the mandate, it interferes with the jurisdiction of the Court of Appeals. *Id.*; *Garratt v. Dailey*, 49 Wn.2d 499, 500, 304 P.2d 681 (1956).

On remand, the trial court may exercise discretion only where the Court of Appeals directs. *Harp v. American Surety Co. of New York*, 50 Wn.2d 365, 368-69, 311 P.2d 988 (1957). When an appellate court directs the trial court to enter a judgment in a specific amount, the trial court has no discretion to enter judgment in a different amount. *Id.*; *Tucker v. Brown*, 20 Wn.2d at 773. Thus, when the appellate court remanded a case "with direction to enter judgment foreclosing the mortgage," the trial court had no jurisdiction to also enter personal judgments against the defendants. *Robert Morton Organ Co. v. Armour*, 179 Wash. 392, 395-96, 38 P.2d 257 (1934). And when the appellate court remanded a partnership accounting case to determine the cost of operating a piece of partnership

equipment, the “trial court could consider no other issue.” *Matter of Estate of Wilson*, 53 Wn.2d 762, 764, 337 P.2d 56 (1959).

Here, the Court of Appeals found the Dragts had been unjustly enriched and awarded DeTray his \$593,462.66 in costs. In determining the award, the Court of Appeals necessarily considered the measures of recovery available under unjust enrichment – reimbursement of costs or increase in value of the property. *See, supra* at 5-6, 11. The Court of Appeals could have awarded an amount based on the alleged increase in the value of the Dragts’ land but concluded that the “benefit” received by the Dragts was limited to DeTray’s costs and instructed the trial court to enter judgment in that specific amount. *Dragt v. Dragt/DeTray LLC*, 139 Wn. App. at 577. Whether the trial court agreed or not with the Court of Appeals, its decision was binding on the trial court and the trial court had no discretion to alter the unjust enrichment award.

The trial court, however, ignored this Court’s mandate and, over the objection of the Dragts, heard additional evidence on the issue of unjust enrichment. Ultimately, the trial court awarded unjust enrichment damages far in excess of the amount directed by this Court. This exceeded the trial court’s authority under the mandate and therefore was error.

Pursuant to the mandate, the trial court was given discretion to determine recovery under quantum meruit only and the trial court was

obligated to restrict the remand trial to that issue. *Harp v. American Surety Co. of New York, supra*. When DeTray could not prove a claim in any amount under quantum meruit, the trial court ignored this Court's mandate and awarded additional damages under unjust enrichment. By imposing additional damages under unjust enrichment, the trial court acted beyond its authority and invaded the Court of Appeal's jurisdiction. The trial court deviated from the mandate and should be reversed.

3. The Court of Appeals was not confused when it issued its mandate.

The trial court justified deviating from the mandate by suggesting the Court of Appeals was confused because it issued its mandate before the Supreme Court decided *Young v. Young*, 164 Wn.2d 477. The Court of Appeals, the trial court explained, "could not have been expected to foresee how [the Supreme Court] later circumscribed the use of the terms that he had earlier employed and that he employed in the common and previously understood legal manner." RP (9/23/09) at 13:4-9.

The trial court's justification is wrong for two reasons. First, it incorrectly presumes that *Young v. Young* made new law. The Supreme Court did not write new law in that case, nor did it change the definition of unjust enrichment or quantum meruit. It merely reiterated the long-established difference between the two doctrines. *Young v. Young*, 164

Wn.2d at 483 (“we take this opportunity to conceptually clarify the distinction between ‘unjust enrichment’ and ‘quantum meruit’”). At the time the Court of Appeals issued its mandate in this case, the law was the same as that discussed in *Young v. Young*: recovery based on the alleged increase in the value of property was available only under unjust enrichment and recovery for the reasonable value of services falls under quantum meruit. See e.g., *Bailie Comm., Ltd. v. Trend Business Systems, Inc.*, 61 Wn. App. 151, 159-60, 810 P.2d 12 (1991) (distinguishing between recovery under unjust enrichment and quantum meruit); *Ducolon Mechanical, Inc. v. Shinstine/Forness, Inc.*, 77 Wn. App. 707, n. 1, 893 P.2d 1127 (1995) (same); *King v. Clodfelter*, 10 Wn. App. 514, 522 (warning that the measure of damages under quantum meruit and unjust enrichment “should not be intertwined”). See also, *Dragt v. Dragt/DeTray LLC*, 139 Wn. App. at 576-77 and cases cited therein.

Second, although the Supreme Court noted that some courts had confused the two doctrines, there is nothing to indicate the Court of Appeals was confused when it issued its mandate in this case. This Court clearly distinguished between unjust enrichment and quantum meruit, and gave specific instructions to the trial court for each. *Dragt v. Dragt/DeTray, LLC*, 139 Wn. App. at 577. Indeed, the trial court had no difficulty comprehending this Court’s treatment of the two doctrines when

it issued its August 12, 2008 letter. *See, supra*, n. 1. Only after DeTray offered no evidence to support a quantum meruit claim did the trial court suggest there was ambiguity in this Court's mandate.

4. The trial court erred by not following the mandate.

Seizing upon the supposed ambiguity in the mandate, the trial court reasoned that the instructions to determine the “reasonable value of the benefit for the services” (*Dragt*, 139 Wn. App. at 577) meant it was to revisit this Court's unjust enrichment award.<sup>3</sup> This reasoning is simply wrong. The Court of Appeals unambiguously ruled that “quantum meruit allows restitution only for a reasonable value for services.” *Dragt*, 139 Wn. App. at 577 (emphasis added). The “value of services” has always been a measure of recovery exclusive to quantum meruit. *See, e.g., E.F. Dailey v. Testone*, 72 Wn.2d 662, 664, 435 P.2d 24 (1967) (“An action to recover the reasonable value of the services is predicated upon quantum meruit.”); *Ducolon Mechanical, Inc. v. Shinstine/Forness, Inc.*, 77 Wn. App. 707, 711 (quantum meruit is a form of restitution allowing plaintiff to recover for the value of services rendered to the defendant); *Bailie*

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<sup>3</sup> The *Dragts* expect DeTray to focus on the word “benefit” in the Court of Appeals recitation of the measure of damages available under quantum meruit and argue that the use of that word somehow blurs the line between unjust enrichment and quantum meruit. This argument is not persuasive as it would turn the law of quantum meruit on its head. There is no distinction between measuring the “reasonable value of services” provided for the benefit of a defendant as quantum meruit has historically been

*Communications, Ltd. v. Trend Business Systems, Inc.*, 61 Wn. App. 151, 159 (quantum meruit measures recovery under implied contract to pay compensation for the reasonable value of services rendered). Thus, this Court’s instruction to determine the “value of the benefit for the services” is necessarily directed to quantum meruit, not unjust enrichment.

Contrary to express warnings in case law that the two doctrines not be confused, the trial court at one point described its award as based on a combination of unjust enrichment and quantum meruit. RT (9/23/09) at 10:21-22. (“This award is both an award in unjust enrichment and quantum meruit...”). This characterization is incorrect. First, there is no such thing as a combined unjust enrichment/quantum meruit award. They are distinct doctrines, as explained by the Supreme Court in *Young v. Young* and by this Court in its first opinion. *See, Dragt*, 139 Wn. App. at 577. Second, as a matter of law, the trial court’s award was not based at all on quantum meruit. The trial court’s award was based on the alleged increase in value of the Dragts’ property, a measure of damages available only under unjust enrichment. *Young v. Young*, 164 Wn.2d at 487. A court may not award the alleged increase in value of the recipient’s

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described and the “reasonable value of the benefit of services” provided to a defendant as it was described by this Court.

property under quantum meruit. *Id.* at 486.<sup>4</sup> Thus, the trial court's award of damages was purely an unjust enrichment award, not an award in whole or in part under quantum meruit. As such, it violated this Court's clear mandate to award damages under quantum meruit.

**B. There was no evidence offered at trial to support an award under quantum meruit.**

DeTray had the burden of proving his quantum meruit claim. *E.F. Dailey v. Testone*, 72 Wn.2d 662, 664. DeTray offered no evidence to carry his burden.<sup>5</sup> He did not quantify the time spent on the project nor try to establish the value of his time. RP (9/22/09) 92:8-14; CP 452, 457. He did not try to establish the amount it would have cost the Dragts to obtain the same services elsewhere. RP (9/22/09) 55:10-15. DeTray, who did not obtain a single entitlement in eight years managing development of the Dragts' land, could not even identify the "services" he allegedly rendered. RP (9/23/09) at 48:17-21. In fact, the person "doing all the work" was Frank Kirkbride. RP (9/22/09) at 54:4-7. Kirkbride was hired by the LLC and his fees are included in the \$593,462.66 in costs already awarded to DeTray. RP (9/22/09) 53:24-54:17; CP 451:11-20.

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<sup>4</sup> Thus, if the trial court's award is characterized as quantum meruit, the trial court erred by applying the wrong measure of damages.

<sup>5</sup> Whether there was sufficient evidence to support a quantum meruit award is reviewed under the substantial evidence standard of review. *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 575, 343 P.2d 183 (1959).

DeTray presented absolutely no evidence to support an award under quantum meruit. The only evidence presented was focused on the alleged increase in the value of the Dragts' land, a measure of recovery exclusive to unjust enrichment and not available in quantum meruit.

**C. Even if the trial court had authority to award unjust enrichment damages instead of quantum meruit damages, the trial court nonetheless erred.**

As set out above, the trial court erred in deviating from the mandate and re-litigating the Court of Appeals' unjust enrichment award. However, even if the trial court was authorized to revisit unjust enrichment, it nonetheless erred.

Unjust enrichment damages for a faultless claimant<sup>6</sup> can be measured in one of two ways: (1) by the amount which the benefit conferred would have cost the recipient had he obtained the benefit from another source; or (2) by the extent to which the recipient's property has been increased in value. *Young v. Young*, 164 Wn.2d at 487.

Whichever measure is used, the court must view the benefit "through the eyes of the recipient" and the award must represent the value received by the recipient, not the value of the benefit provided by the

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<sup>6</sup> The trial court made no finding as to whether DeTray was a "faultless" claimant. It would be difficult to envision such a finding given the fact that DeTray failed to advance the development of the property in the eight years he controlled the LLC and was given an opportunity to acquire the property from the Dragts before they sold it to Tahoma Terra, LLC.

claimant. *See, Young v. Young*, 164 Wn.2d at 489 (“The obligation to repay the debt or disgorge the value of the received benefit focuses on the *receiver* of the benefit, not on the *provider* of the benefit), citing Restatement of Restitution: Quasi Contracts and Constructive Trusts § 155(1) (1937) (stating “the measure of recovery for the benefit thus received is the value of what was received”); *see also, Bailie Comm., Ltd v. Trend Business Systems, Inc.*, 61 Wn. App. 151, 159-60 (emphasizing the focus of unjust enrichment is on the benefit *received* by the defendant).

The trial court ignored this law when it awarded DeTray \$1.7 million in damages. The evidence at trial supported an award of no more than \$132,000 in damages. And there was no basis for awarding DeTray a share of the natural appreciation of the Dragts’ land.

1. The evidence at trial supported an award of no more than \$132,000 in unjust enrichment damages.

Even if the trial court’s consideration of unjust enrichment was proper, it nonetheless erred because the evidence at trial supported an unjust enrichment award of no more than \$132,000.<sup>7</sup>

DeTray presented the expert testimony of Brian O’Conner to establish his alleged damages. Mr. O’Conner undertook a three-step analysis:

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<sup>7</sup> This issue is reviewed under a substantial evidence standard. *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 575.

1. The value of the Dragts' land in 2004 would have been \$2,575,000 if DeTray had undertaken no pre-development efforts and provided no services at all. RP (9/22/09) at 39:8-13; 43:14-18; trial exh. 4 at 9.

2. The estimated fair market value of the Dragts' land in 2004 was \$5.5 million. RP (9/22/09) at 38:7-39:4; 63:15-16; trial exh. 4 at 9.

3. Therefore, DeTray increased the value of the Dragts' land by \$2,925,000. RP (9/22/09) at 43:19-44:7; trial exh. 4 at 9.

The trial court accepted Mr. O'Conner's testimony, praising his credibility and analysis. RP (9/23/09) at 3:21. However, Mr. O'Conner's analysis omitted a critical element. He opined only as to the estimated value provided by DeTray, failing to consider the actual value of the benefit received by the Dragts. The Dragts sold their land for \$3.3 million, or \$2.2 million less than the \$5.5 million value estimated by DeTray's expert. CP 313 (Finding of Fact 44).

If the actual value received is inserted into Mr. O'Connor's analysis, the actual benefit received by the Dragts is no more than \$725,000, or the difference between the original value (\$2,575,000) and the actual value received (\$3,300,000). Of this amount, DeTray has already been awarded \$593,462.66, leaving a maximum of \$131,537.34 which could be added to an unjust enrichment award.

An unjust enrichment award must be based on the value of the benefits *received* by the defendant, not the value to the plaintiff who provided them. *See, Young v. Young*, 164 Wn.2d 477, 489, 191 P.3d 1258 (2008) (focus should be on the *receiver* of the benefit, not on the *provider* of the benefit). The Court of Appeals' mandate was consistent, instructing the trial court to determine the value "of the benefit" conferred upon the Dragts. *Dragt v. Dragt/DeTray, LLC*, 139 Wn. App. at 577.

At most, the Dragts received a \$131,537.34 benefit from the services allegedly provided by DeTray. There was no evidence that the Dragts *received* any benefit greater than that.<sup>8</sup> Given the evidence presented at trial, \$131,537.34 represents the maximum award the trial court could have awarded to DeTray.<sup>9</sup> The trial court awarded a greater amount because it considered the value **provided** by DeTray rather than the value **received** by the Dragts. This was clear error and the trial court should be reversed.

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<sup>8</sup> Actually, there was no evidence presented that the Dragts received the \$3.3 million Tahoma Terra, LLC agreed to pay. In fact, Tahoma Terra has not paid the Dragts for the land and, since the trial, Tahoma Terra has lost the Dragts' land to foreclosure.

<sup>9</sup> In arguing about the maximum amount of unjust enrichment damages that could be added to the Court of Appeals' prior award, the Dragts do not mean to infer that a smaller judgment would be acceptable to them. The Dragts steadfastly maintain that DeTray is entitled to **no** further unjust enrichment damages under the Court of Appeals' mandate.

2. The trial court erred in awarding DeTray a share of the natural appreciation of the Dragts' property since DeTray had no ownership interest in or contractual right to the property.

The trial court's award was the product of a nearly incomprehensible formula that lacked any evidentiary support or legal precedent. Further, it was aimed at achieving an improper result – “capturing” the natural appreciation of the Dragts' land for the benefit of DeTray.

In Mr. Bay's trial brief, he estimates the natural appreciation [of the Dragts' land] to be between 15.7 percent and 71.66 percent between 1996 and 2004. Now, this is the raw property, not the project plus the property. I can't speculate what this number might be, though it is more likely closer to the smaller number. However, we can capture this number as a result of the following calculation, which is how this court will resolve the case in an equitable manner.

RP (9/23/09) at 9:19-10:2. *See also*, CP 468, (Conclusions of Law 11, 12 and 13 awarding the appreciation of the Dragts' land from 1997 through 2004).<sup>10</sup>

The trial court erred in giving DeTray the natural appreciation of the Dragts' land. As explained above, a plaintiff may not recover in quantum meruit the increased value in the defendant's property. Such

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<sup>10</sup> Whether appreciation of the value of land can be awarded as unjust enrichment damages is a legal question that is to be reviewed *de novo*. *Skamania County v. Columbia River Gorge Comm.*, 144 Wn.2d at 42.

recovery is available only under unjust enrichment and the Court of Appeals remanded for quantum meruit only. *Supra* at 9-13.

But even if the trial court was allowed to consider additional unjust enrichment damages, DeTray still is not entitled to participate in the equity in the Dragts' land. The Court of Appeals has already ruled that DeTray had no ownership interest in or contractual right to the Dragts' land and it is axiomatic that DeTray is not entitled to participate in the equity of the Dragts' land if he has no ownership or contract right to the land. *See Dragt v. Dragt/DeTray*, 139 Wn.2d at 575 ("the LLC never had title to the land, and the sale proceeds were not LLC profits").

Ironically, the trial court initially agreed with this fundamental precept before inexplicably going on to "capture" a share of the appreciation for DeTray:

I also want the reader to recognize that this result does not give Mr. DeTray credit for the natural appreciation that Mr. Dragts' property would have enjoyed and *which is solely his benefit, not Mr. DeTray's*.

RP (9/23/09) at 5:2-6. *Compare*, CP 468, (Conclusion of Law 11, 12, 13, awarding the appreciation of Dragts' land to DeTray).

The trial court's initial pronouncement was correct. There is not a single Washington opinion or other authority supporting the proposition that one may recover the appreciation of another person's property

through unjust enrichment. Counsel could find no case from any jurisdiction that held it was “unjust” for the owner of real property to retain the natural appreciation in value of that property. Logically, appreciation accrues to the owner of real property and since DeTray had no ownership interest in the Dragts’ property, he had no right to share in the appreciation.

Further, unjust enrichment is used to compensate one who improves property or creates value in addition to the natural appreciation thereof. Thus, the tenants in *Young v. Young*, 164 Wn.2d 477, were compensated for the value of the repairs they made to the property but not the amount the property appreciated during their tenancy. Similarly, a bank who loans money to acquire property is not entitled to the appreciation even though the bank’s money enabled the borrower to hold the property as it increased in value.

Finally, appreciation is not recoverable in unjust enrichment because it does not come at the claimant’s expense. One of the elements of unjust enrichment is that the defendant received a benefit “at the plaintiff’s expense.” *Young v. Young*, 164 Wn.2d at 484. The appreciation enjoyed by the Dragts was not at DeTray’s expense; DeTray did not lose out on the appreciation because, as a non-owner, he was never entitled to it. The only benefit received at DeTray’s expense was the

\$280,000<sup>11</sup> paid toward the Dragts' mortgage, which this Court previously awarded.

In giving DeTray a share of the appreciation of the Dragts' land, the trial court violated the fundamental purpose of restitution: to "restore the injured party to as good a position as that occupied by him before the contract was made." *Dravo Corp. v. L.W. Moses Co.*, 6 Wn. App. 74, 90-91, citing 5A Corbin, Contracts § 1109 (1964) and C. McCormick, Law of Damages § 165 (1935). By awarding restitution of his \$593,462.66 in out-of-pocket expenditures, the Court of Appeals already put DeTray in as good a position as he was prior to the parties' LLC Agreement. Awarding appreciation, in addition to his costs, puts DeTray in a *better* position than before the contract was made and gives him a share of the equity in the Dragts' land without an ownership or contract right thereto.<sup>12</sup> This was error. Even if the trial court was authorized to revisit the Court of Appeals' unjust enrichment award, the court still erred by awarding DeTray a share of the owners' equity in the land.

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<sup>11</sup> The other costs awarded by this Court were not "received" by the Dragts. Rather, they were paid on behalf of the Dragt/DeTray LLC and there was never any evidence presented that the Dragts received any benefit from those costs.

<sup>12</sup> It could be argued that the Court of Appeals' award of \$593,462, by itself, actually put DeTray in a better position than had the contract been enforced since under articles 8.4 and 13.7 of the LLC agreement DeTray drafted, he had no recourse against the Dragts for his capital contributions.

**D. The trial court's award, although couched in equity, awarded the same expectation damages which were reversed in the original appeal.**

Expectation damages are not available in an equitable case. In equity, restitution is the remedy, the purpose of which is to restore the injured party "to as good a position as that occupied by him before the contract was made." *Dravo Corp. v. L.W. Moses Co.*, 6 Wn. App. at 90-91.

In the first appeal, the Court of Appeals ruled that DeTray was not entitled to expectation damages because there was no breach of contract. *See Dragt v. Dragt/DeTray, LLC*, 139 Wn. App. at 575 ("it was error for the court to use contractual remedies to compensate DeTray for his costs"). The Court of Appeals ruled DeTray was entitled only to equitable relief. *Id.* at 575-77. To put DeTray in as good a position as he was prior to forming the LLC, the Court of Appeals awarded DeTray, by way of restitution, his out-of-pocket expenditures and gave him the opportunity to prove the value of his services. *Id.*

On remand, however, DeTray claimed he was entitled to expectation damages, just as he did in the first trial:

Q: You are asking for equity in the [Dragts'] property, correct?

A: Yes. That's what the LLC did have.

Q: And that expectation is what is – is based on your understanding of the LLC Agreement, right?

A: Yes.

RP (9/22/09) at 92:15-19.

At the conclusion of trial, the trial court agreed with DeTray and awarded expectation damages.<sup>13</sup> The trial court candidly stated it was awarding damages “in restitution because both parties were expecting a profit for their mutual participation in the project,” an incongruent and erroneous application of law since expectation damages are not a restitution remedy. RP (9/23/09) at 8:7-9. The trial court’s award went well beyond restitution and put DeTray in the position he expected to be in under his contract.

It was clear error for the trial court to base its award on the parties’ contract expectations when this Court ruled that the Dragts did not breach any contractual duties and DeTray was not entitled to contract remedies. Perhaps the most stunning indictment of the trial court’s decision is the fact that DeTray doubled his expected profit via the trial court “equitable” award. Under the LLC Agreement DeTray drafted, he was to get, in exchange for his development services, 33% of the net profits from the

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<sup>13</sup> Whether a trial court can award expectation damages as restitution damages is a legal issue which is to be reviewed *de novo*. *Skamania County v. Columbia River Gorge Comm.*, 144 Wn.2d at 42.

sale of the Dragts' land.<sup>14</sup> The trial court awarded DeTray more than two-thirds of the Dragts' profits in exchange for DeTray's services, thereby doubling DeTray's contract expectations.

**E. The trial court abused its discretion by venturing far beyond the confines of unjust enrichment and quantum meruit to award damages to DeTray.**

While the trial court has broad discretion to fashion relief in an equitable claim, such discretion is not unlimited. The trial court's discretion must be exercised "within the range" of the legal limits of available remedies. *Young v. Young*, 164 Wn.2d at 487-88 (trial court has "tremendous discretion" to fashion a remedy "within the range" of available measures of recovery).

Thus, in an unjust enrichment claim, the trial court may exercise discretion but only within the parameters of the two measures of recovery available in such a claim: (a) the cost of obtaining the same benefit from another source or (b) the increase in value of the recipient's property. *Id.* Similarly, in a quantum meruit claim, the court has discretion to determine the market value of the services rendered but cannot base that value on the increase in value of the recipient's property. *Id.* at 486. Regardless of

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<sup>14</sup> See, Article 9.7 of the parties' LLC Agreement, attached to the Complaint filed in this action on September 29, 2004, which will added by way of supplement to the Clerk's Papers.

which doctrine is used, the trial court must confine its award to the recovery allowed under that doctrine.

Here, the trial court's calculation of damages represents a stark departure from the bounds of the remedies available in this case.<sup>15</sup> The trial court's award exceeded the limits of quantum meruit recovery because it based damages on the alleged increase in the value of the Dragts' land. *See*, CP 467 (Conclusion of Law 4). Even if the court was instructed to revisit unjust enrichment, the trial court's award exceeded the limits of unjust enrichment recovery because it focused on the value of the benefit provided rather than the value of the benefit received by the Dragts and improperly gave DeTray an ownership interest in the Dragts' land.

The practical result of the trial court's excess is inequitable and punitive. From the Dragts' perspective, they were poised to sell their land in 1996 for \$2.85 million and retire comfortably. Trial exh. 9.<sup>16</sup> DeTray then talked his way in and eight years later, due directly to his involvement, the Dragts get \$1.6 million [\$3.3 million sales price less \$1.7

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<sup>15</sup> Determining the proper standard of recovery is an issue of law to be reviewed *de novo*. *Young v. Young*, 164 Wn.2d 477, 483.

<sup>16</sup> In 1993, before DeTray ever talked his way into the Dragts' lives, the Dragts had listed their land for sale for \$2.2 million and signed contract to sell it for \$2 million. Trial exhs. 5, 6. Then their land was annexed into the City of Yelm, increasing its potential density and, hence, its value. Accordingly, the Dragts listed their land again in 1995, this time for \$3.5 million and had another sale contracted at \$2.85 million. Trial exhs. 7, 8, 9. Ultimately, the sale did not close and the Dragts ended up in the LLC with DeTray. *See* CP 439-41.

in damages]. DeTray, on the other hand, invests \$593,462.66 into an LLC that fails miserably under his management and he gets \$1.7 million, nearly a 300% return on his investment.

There is no evidentiary or legal basis to support the trial court's calculation of damages and there are no equitable reasons for the award. The trial court abused its discretion and should be reversed.

**F. DeTray was not entitled to prejudgment interest and certainly was not entitled to recover prejudgment interest twice.**

Prejudgment interest is allowed when a party retains funds that rightfully belong to another. *Forbes v. American Bldg. Maintenance Company West*, 148 Wn. App. 273, 297, 198 P.3d 1042 (2009); *Richter v. Trimberger*, 50 Wn. App. 780, 785, 750 P.2d 1279 (1988) (prejudgment interest is granted to compensate a party for the loss of use of money to which he was entitled). The policy supporting prejudgment interest arises from the view that one who had the use of money owed to another should in justice make compensation for its wrongful detention. *Forbes v. American Bldg. Maintenance Co.*, 148 Wn. App. at 297.

However, if the plaintiff tenders the amount due and the defendant refuses to accept the tender, the defendant is not entitled to prejudgment interest on the amounts. *Richter v. Trimberger*, 50 Wn. App. at 785.

Similarly, if the plaintiff causes a delay that extends the pre-judgment period, it will suspend the running of the prejudgment interest for the duration of the delay. *Farm Credit Bank of Spokane v. Tucker*, 62 Wn. App. 196, 202, 813 P.2d 619 (1991).

Here, DeTray was not entitled to prejudgment interest and the trial court erred in awarding it. First, the \$593,462.66 in expenses did not “rightfully belong” to DeTray. Those were his capital contributions to the parties’ LLC, intended to preserve the LLC’s option to the Dragts’ land, which turned out to be unenforceable. Like any other investment, it had its risks and the LLC agreement specifically provided that DeTray was not entitled to recourse against Dragt for return of his capital contributions.<sup>17</sup> Thus, the LLC, not DeTray, was the “rightful owner” of the funds.

Second, the Dragts did not have “improper use” of those funds other than the \$280,000 paid towards the Dragts’ mortgage. The other funds were paid to consultants and agents hired by DeTray or to government agencies for future development. The Dragts never received the “use value” of the money, which is “the touchstone of an award of prejudgment interest.” *Mahler v. Szucs*, 135 Wn.2d 398, 429, 957 P.2d 632 (1998).

Third, DeTray never demanded reimbursement of his capital contributions from the Dragts. Although DeTray pled an unjust enrichment cause of action, he never once demanded return of his \$593,462.66 in capital contributions; he always demanded a share of the equity in the Dragts' property. Since the Dragts were never presented the opportunity to pay DeTray for his capital contributions, there is no basis for awarding prejudgment interest on those amounts:

A defendant should not, however, be required to pay prejudgment interest in cases where he is unable to ascertain the amount he owes to plaintiff.

*Bailie Comms., Ltd. v. Trend Business Systems, Inc.*, 61 Wn. App. 151, 157.

In fact, not only did DeTray never demand return of his capital contributions, he rejected an offer to reimburse those costs. When Tahoma Terra purchased the Dragts' property in 2004, it offered to "work out a settlement" that would reimburse DeTray for his investment in the LLC. RP (3/1/06) at 14:11-15:8. Since DeTray rejected that offer, he is not entitled to prejudgment interest on that amount. *Richter v. Trimberger*, 50 Wn. App. at 785.

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<sup>17</sup> Articles 8.4 and 13.7 provide that members are not entitled to return of their capital contributions and have no recourse against other members for those contributions. The LLC Agreement is attached to the Complaint, which will be supplementally added to the Clerk's Papers.

Subsequently, DeTray rejected yet another opportunity for reimbursement of his capital contributions. At the conclusion of the first trial, the trial court gave DeTray the option of an award for breach of contract damages or unjust enrichment damages. CP 131:19-132:3 (pp. 49-50 of trial court's 3/2/06 ruling). The unjust enrichment award would have been smaller but would have included reimbursement of his capital expenditures. The trial court even advised DeTray to choose unjust enrichment. *Id.* But DeTray elected the breach of contract remedy, which was subsequently reversed by the Court of Appeals. DeTray never asked for or wanted reimbursement of his capital contributions and accepted them as damages only when the Court of Appeals reversed the larger contract award. The Dragts should not have to pay prejudgment interest on DeTray's capital expenditures during the period he declined them and unsuccessfully pursued another remedy.

Finally, even if DeTray was entitled to prejudgment interest, he is entitled to recover such interest only once. The trial court awarded DeTray prejudgment interest twice, factoring prejudgment interest into the formula it employed to arrive at an "equitable" result, then awarding \$367,946 in prejudgment interest again after getting to that result. *See* CP 466-68 (Conclusions of Law 2, 11 and 13).

The Dragts have been punished enough without the award of prejudgment interest. The trial court has taken away the natural appreciation of their own land and stripped their equity. The trial court has orchestrated a higher return for DeTray – who had no ownership in the Dragts’ land, and accomplished nothing in eight years of managing their LLC – than for the Dragts, who were simply looking to sell their farm land to retire. The trial court has turned DeTray’s speculative investment into a 300% return to punish the Dragts’ allegedly “secretive” sale when, in reality, the Dragts sold their land because DeTray had accomplished nothing except except deplete the value of the land. The Dragts do not deserve the punitive award the trial court entered and certainly do not deserve to pay twelve percent prejudgment interest on money of which they never had the “use value.”

**V. CONCLUSION**

The trial court erred. This Court should reverse and remand the case to the trial court with specific instructions to enter judgment in the amount of \$593,462.66 only and nothing more.

DATED this 19<sup>th</sup> day of April, 2010.

RYAN, SWANSON & CLEVELAND, PLLC

By  \_\_\_\_\_  
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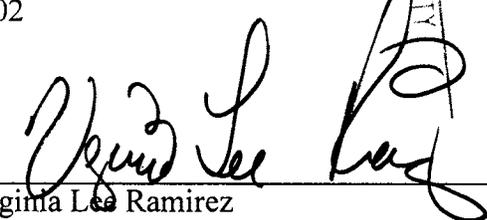
**DECLARATION OF SERVICE**

I declare that on the 19<sup>th</sup> day of April, 2010, I caused to be served the foregoing document on counsel for respondents, as noted, at the following addresses:

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Place: Seattle, WA

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