

FILED
COURT OF APPEALS

19 JUN 18 PM 1:34

NO. 40171-1-II

STATE OF WASHINGTON

BY ju
COURT CLERK

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

HENRY DRAGT and JANE DRAGT, husband and wife,

Appellants,

v.

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

Respondents.

BRIEF OF RESPONDENTS E. PAUL DETRAY and PHYLLIS
DETRAY

R. Alan Swanson, WSBA # 1181
Law Office of R. Alan Swanson
905 5th Ave. S.E.
Olympia, WA 98501
(360) 236-8755

David J. Corbett, WSBA # 30895
David Corbett PLLC
2106 N. Steele Street
Tacoma, WA 98406
(253) 414-5235

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. RESPONDENTS’ RESTATEMENT OF THE ISSUES.....1

III. RESPONDENTS’ RESTATEMENT OF THE CASE.....2

 A. Factual background.....2

 B. The trial court’s initial judgment.....3

 C. This Court’s prior order.....4

 D. Proceedings on remand.....4

IV. ARGUMENT.....6

 A. The trial court complied with the mandate on remand.....6

 1. The Court of Appeals held that DeTray is entitled to recover in restitution for unjust enrichment, and only unjust enrichment.....7

 2. In order to quantify the award in unjust enrichment for DeTray, the trial court properly looked to the extent to which DeTray caused the Dragts’ property to increase in value.....14

 B. The trial court’s award to DeTray for unjust enrichment is supported by substantial evidence in the record.....17

 C. The trial court did not award DeTray part of the natural appreciation of the property, nor did it award DeTray “expectation damages”.....22

 D. The trial court did not abuse its discretion by awarding prejudgment interest.....26

V. CONCLUSION.....29

TABLE OF AUTHORITIES

Cases

Bailie Communications, Ltd. v. Trend Business Systems, Inc.,
61 Wn. App. 151, 810 P.2d 12 (1991)..... 26, 27

Dragt v. Dragt/DeTray LLC, 139 Wn. App. 560,
161 P.3d 473 (2007)..... passim

Dravo Corp. v. L.W. Moses Co., 6 Wn.App. 74,
492 P.2d 1058 (1971)..... 25

Hansen v. Rothaus, 107 Wn.2d 468, 730 P.2d 662 (1986)..... 26

Hardgrove v. Bowman, 10 Wn.2d 136, 116 P.2d 336 (1941)..... 15

King v. Clodfelter, 10 Wn. App. 514, 518 P.2d 206 (1974) 9

Mehlenbacher v. DeMont, 103 Wn. App. 240, 11 P.3d 871 (2000)..... 26

Richter v. Trimberger, 50 Wn. App. 780, 750 P.2d 1279 (1988)..... 28

Skamania County v. Columbia River Gorge Comm., 144 Wn.2d 30,
26 P.3d 241 (2001)..... 7

Sunnyside Valley Irr. Dist. v. Dickie, 149 Wn.2d 873,
73 P.3d 369 (2003)..... 17

Wenatchee Sportsmen Ass'n v. Chelan County, 141 Wn.2d 169,
4 P.3d 123 (2000)..... 17

Young v. Young, 164 Wn.2d 477, 484, 191 P.3d 1258 (2008)..... passim

Young v. Young, Unpublished opinion of Court of Appeals,
noted at 134 Wn. App. 1033, 2006 WL 2329471 20

Other Authorities

1 *Corbin on Contracts*, (Rev. Ed. 1993), § 1.20..... 10

66 *Am.Jur.* 2nd “Restitution and Implied Contracts,” 9

Black’s Law Dictionary (6th ed. 1990)..... 8

Restatement (Second) of Contracts, § 370 (1981)..... 20, 21

*Restatement (Third) Restitution and Unjust Enrichment, Tentative Draft
No. 7*..... 10

I. INTRODUCTION

When the Court of Appeals first addressed this matter in July, 2007, it “h[e]ld that the Dragts were unjustly enriched by DeTray’s financial contributions and services to the LLC during the development venture,” and it remanded the case to the trial court “for findings regarding the reasonable value of the benefit for services DeTray conferred upon the Dragts.” *Dragt v. Dragt/DeTray LLC*, 139 Wn. App. 560, 576-77, 161 P.3d 473 (2007). The trial court strictly complied with the mandate on remand. After judging the credibility of the witnesses and weighing all of the admissible evidence regarding the value of the benefit conferred, the trial court entered judgment for DeTray in the amount of \$1,745,704.35. CP 468, ¶ 13. The trial court’s factual findings are supported by substantial evidence. Moreover, the trial court’s decision to award DeTray less than the upper bound amount established by the evidence was not an abuse of discretion. The Dragts’ arguments to the contrary are all without merit. Accordingly, this Court should affirm the trial court’s decision.

II. RESPONDENTS’ RESTATEMENT OF THE ISSUES

1. Did the trial court comply with this Court’s mandate to quantify the unjust enrichment award to DeTray by making “findings regarding the reasonable value of the benefit for the services DeTray conferred upon the Dragts”? *Dragt*, 129 Wn. App. at 577.

2. Was the trial court’s determination of the award for DeTray consistent with the law of restitution and unjust enrichment?

3. Was the trial court's determination of the unjust enrichment award for DeTray supported by substantial evidence in the record?

4. Did the trial court abuse its discretion by allowing prejudgment interest on part of the award to DeTray?

III. RESPONDENTS' RESTATEMENT OF THE CASE

A. Factual Background

The facts relevant to the parties' pre-litigation dealings are summarized in this Court's prior opinion. *Dragt*, 129 Wn. App. at 564-69. The Dragts and DeTray formed Dragt/DeTray LLC ("the LLC") in 1996 to develop a 220 acre parcel of real property in Yelm. DeTray's role in the venture was to provide the necessary capital and expertise, whereas the Dragts were to put up the land, on which they had previously operated a dairy farm. However, the only written provision in the LLC Agreement concerning ownership of the parcel in question was an option to the LLC which failed to include a legal description of the property. *Dragt*, 139 Wn. App. at 564-66.

Over the years, DeTray invested a total of \$593,462.66 in the project for such matters as consultant reports and designs, sewer connections and access to wastewater treatment facilities, and making the Dragts' mortgage payments. Despite DeTray's efforts, the Dragts became disillusioned with the pace of the development. In the spring of 2004 they consulted an attorney who advised them that the option to the LLC was invalid. Shortly thereafter, the Dragts sold the parcel to a third party

without openly marketing the property and without providing any prior notice to DeTray. All told, the Dragts received more than \$3,792,000 from the purchaser for the land and the plans and permits they sold with it. *Dragt*, 139 Wn. App. at 566-68.

B. The Trial Court's Initial Judgment

This litigation commenced in 2004 when the Dragts sued DeTray, seeking a declaratory judgment that the LLC's option to the 220 acre parcel was invalid. *Dragt*, 139 Wn. App. at 568 After DeTray counterclaimed for breach of contract, breach of fiduciary duty, and unjust enrichment, the Dragts added a claim for gross mismanagement. *Id.* at n. 1.

The gross mismanagement claim was dismissed on summary judgment, and the remaining claims were subject to a bench trial between February 27 and March 2, 2006. CP 306. In its oral ruling, the trial court noted that although it was certain DeTray was entitled to a recovery, it was not clear whether the recovery was best understood as being based on breach of contract or on principles of unjust enrichment. RP (3/2/2006), p. 44, lns. 21-22, and p. 49, ln. 12 to p. 50, ln.1. The trial court invited DeTray to submit proposed findings and conclusions for both theories, and DeTray did so. After considering both sets of proposed findings and conclusions, the trial court entered judgment for DeTray in the amount of \$2,067,773.88 on the basis of breach of contract and breach of fiduciary duties. CP 316-318.

C. This Court's Prior Order

In its Opinion dated July 3, 2007, this Court held that “the trial court erred in concluding that the Dragts breached their contractual and fiduciary duties to DeTray.” *Dragt*, 139 Wn. App. at 564. However, it also decided that “the Dragts were unjustly enriched by DeTray’s financial contributions and services to the LLC during the development venture.” *Dragt*, 139 Wn. App. at 575. As a consequence, it remanded the case to the trial court for “findings regarding the reasonable value of the benefit for the services DeTray conferred upon the Dragts.” *Dragt*, 139 Wn. App. at 575-76. The Court summed up its holding by noting that “DeTray’s proper remedy is restitution for unjust enrichment.” *Dragt*, 139 Wn. App. at 578.

D. Proceedings on Remand

On remand before the trial court, the Dragts argued that the Court of Appeals had actually held that there were two distinct bases for an award to DeTray. CP 397-398. Although the Dragts acknowledged that the Court of Appeals had held that DeTray was entitled to an award for unjust enrichment, they claimed that it had also definitively quantified this award at \$593,462.66, the amount of DeTray’s financial contributions to the development project. CP 397-398. The only purpose for remand, according to the Dragts, was to determine the magnitude of a separate award in *quantum meruit* for breach of a contract implied-in-fact regarding DeTray’s personal services. CP 398.

After taking Paul DeTray's deposition, the Dragts moved for summary judgment on the grounds that DeTray had provided no evidence in support of an award in *quantum meruit* based on an implied-in-fact contract. CP 396. The trial court denied this motion. CP 443.

The matter then proceeded to a full evidentiary hearing. The Dragts presented no testimony on their behalf, but the trial court accepted into evidence six exhibits offered by the Dragts. RP (9/22/2009 at 106, lns. 4-9); Ex. 5 - 11. One of these exhibits was the "appreciation study" prepared for the Dragts by Mr. Donald Heischman, MAI. Ex. 11. Both Paul DeTray and Brian O'Connor, MAI, testified on behalf of DeTray. Mr. O'Connor testified about his appraisal report, which was devoted to quantifying "the reasonable value of the benefit of the services conferred" by DeTray on the Dragts. RP (9/22/2009); see also Ex. 4.

In its oral ruling at the conclusion of the hearing, the trial court emphasized the credibility of Mr. O'Connor's testimony and the thoroughness of his report. The trial court noted as follows:

Mr. O'Connor was one of the most credible expert witness[es] that I have listened to in 25 years of being a judicial officer. I saw his live testimony, including his response to cross-examination. I read his report. I asked him questions myself, and he was completely credible Although I read Mr. Heischman's report, Exhibit 11 for this hearing, he did not testify and his report was not even close to being as thorough as Mr. O'Conner's, and I had no chance to weigh his live testimony, but clearly his report was not complete. I did not reject Mr. Heischman's report, but it has nowhere near the credibility of Mr. O'Connor's, corroborated by his live testimony which was remarkable in its clarity and its basis. Mr. O'Connor reviewed everything, including the evidence in the prior hearing and the Court of Appeals case and wrote his report and testified

to determine ‘the reasonable value of the benefit for the services DeTray conferred upon the Dragts’ as instructed by the Court of Appeals at page 577 of the Dragt opinion. He used two different methods in coming to his result, and they both came out near the same result.”

RP (9/23/09) at p. 3, ln. 21 to p. 5, ln. 1.

Based on Mr. O’Connor’s testimony, the trial court concluded that DeTray’s contributions increased the value of the Dragts’ property by \$2,925,000. RP (9/23/09) at p. 5, lns. 6-11; CP 468, ¶ 5. However, because the Dragts did not sell the property for its fair market value, the trial court decided to reduce the award to DeTray in order to avoid any possible unfairness to the Dragts. RP (9/23/2009) at p. 6, lns. 22-25 to p. 8, ln. 1. In the end, the trial court credited DeTray with benefiting the Dragts by the amount of \$1,367,757.91, to which it added \$367,946.85 in prejudgment interest on part of the benefit which it held to be a liquidated sum. CP 468.

IV. ARGUMENT

A. The trial court complied with the mandate on remand

According to the Dragts, this Court issued a dual mandate 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.” *Opening Brief of Appellants* (“*Appellants’ Brief*”), p. 6. If this were an accurate description of the mandate, then the trial court would have erred by entering judgment for DeTray on unjust enrichment in the amount of \$1,745,704.35.

However, the Dragts misconstrue this Court’s holding. As the opinion in *Dragt* plainly states, “DeTray’s proper remedy is restitution for unjust enrichment.” *Dragt*, 139 Wn. App. at 578. This “proper remedy” is singular and exclusive. In particular, this Court made no provision for a separate remedy in quantum meruit for breach of a contract implied in fact. Thus, when it remanded “for findings regarding the reasonable value of the benefit for the services DeTray conferred upon the Dragts,” this Court was instructing the trial court to determine the magnitude of the restitutionary award for unjust enrichment. The trial court faithfully complied with this mandate on remand.¹

1. The Court of Appeals held that DeTray is entitled to recover in restitution for unjust enrichment, and only unjust enrichment

The holding that “DeTray’s proper remedy is restitution for unjust enrichment”—with its clear implication that this remedy was exclusive—cannot be dismissed as a careless slip of the pen. *Dragt*, 139 Wn. App. at 578. It fits too well with this Court’s conclusion that “the Dragts were unjustly enriched by DeTray’s financial contributions and services to the LLC during the development venture,” and that “[t]he trial court should have acted in equity and awarded DeTray restitution.” *Dragt*, 139 Wn.

¹ The question of whether the trial court followed this Court’s mandate is a question of law, and is accordingly subject to *de novo* review. See, e.g., *Skamania County v. Columbia River Gorge Comm.*, 144 Wn.2d 30, 42, 26 P.3d 241 (2001).

App. at 575-76. It also fits with, and clarifies, this Court's initial statement of its holding:

[T]he trial court erred in concluding that the Dragts breached their contractual and fiduciary duties to DeTray. 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.

In light of this Court's conclusion that "DeTray's proper remedy is restitution for unjust enrichment," its rejection of any contract-based recovery, and its statement that "the Dragts were unjustly enriched by DeTray's financial contributions and services," this passage cannot properly be read as requiring two distinct awards to DeTray, one in restitution for unjust enrichment and the other for quantum meruit on a contract implied in fact. Instead, it must be seen as stating that the *one award* in restitution for unjust enrichment was to be subject to the trial court's equitable discretion to award DeTray "as much as deserved." *Dragt*, 139 Wn. App. at 576.²

This reading of the opinion as requiring one award, based exclusively on restitution for unjust enrichment, is the only way to harmonize it with established Washington law distinguishing between recoveries on contracts implied in law and recoveries on contracts implied in fact. As was recently reaffirmed by the State Supreme Court, "[u]njust enrichment is the method of recovery for the value of the benefit retained

² See also, *Black's Law Dictionary* (6th ed. 1990), p. 1243 (translating "quantum meruit" to mean "as much as is deserved").

absent any contractual relationship because notions of fairness and justice require it.” *Young v. Young*, 164 Wn.2d 477, 484, 191 P.3d 1258 (2008) (emphasis added). When restitution is required by equity, even though there is no real or enforceable contract between the parties, courts will refer to a “quasi contract” or a “contract implied in law.” *Id.* at 483-484. However, despite the use of the term “contract” in those phrases, a restitutionary award for unjust enrichment has nothing to do with a contract recovery.

On the other hand, a “contract implied in fact” is a true contract.

As *Young* put it, a contract implied in fact is

an agreement depending for its existence on some act or conduct of the party sought to be charged and arising by implication from circumstances which, according to common understanding, show a mutual intention on the part of the parties to contract with each other.

Young, 164 Wn.2d at 485. See also *King v. Clodfelter*, 10 Wn. App. 514, 518, 518 P.2d 206 (Div. I 1974) (noting that “an implied [in fact] contract does not differ from an express contract except in the mode of manifesting assent”).

The term “restitution” can be used to describe both a particular type of recovery for a breach of an actual contract, and to indicate the basis of a right to recover in the absence of contract.³ This Court’s opinion

³ See, e.g., 66 *Am.Jur.* 2nd “Restitution and Implied Contracts,” p. 585 (noting that “[t]he term ‘restitution’ is sometimes used by courts to denote a remedy available (usually in connection with rescission) upon the breach of an actual contract. Restitution in this sense is not within the scope of this article; the article will discuss restitution only in connection with

in *Dragt* clearly used the term “restitution” in the second of these two senses, that linked to a *non-contractual* recovery for unjust enrichment.⁴ It specifically found each of the three elements necessary to support a recovery for unjust enrichment. *Dragt*, 139 Wn. App. at 576-77.

contracts implied in law”). Similarly, a leading treatise notes that when discussing “restitution” or “quasi-contract,” there is “one great and fundamental dichotomy [which] should be deemed essential: quasi contract as a source of primary rights versus quasi contract as a remedy.”¹ *Corbin on Contracts*, (Rev. Ed. 1993), § 1.20 (p. 65). *Corbin* then proceeds to illustrate this dichotomy by distinguishing between 1) a remedy for breach of contract and 2) a basis for recovery in the absence of any contract. See also *Restatement of the Law Third Restitution and Unjust Enrichment, Tentative Draft No. 7* (March 12, 2010), § 1, Comment e(3), which states as follows:

[T]he choice of the word ‘restitution’ as the name for the subject has led to a common misconception about what ‘the law of restitution’ involves. This is the idea that restitution is essentially a *remedy*, and that the remedy of restitution is a device available in appropriate circumstances—as an alternative to damages—to enforce obligations derived from torts, contracts, and other topics of substantive law. If the 1937 Restatement of Restitution had instead been called the Restatement of Unjust Enrichment, it would be easier to see that the subject is a primary category of obligations, analogous in this respect to tort or contract. . . . There are remedies for breach of contract that have frequently been called ‘restitution’ and have sometimes been explained in terms of unjust enrichment. This Restatement describes them as alternative remedies for breach of an enforceable contract (avoiding altogether the word ‘restitution’), and rejects the supposed connection with principles of unjust enrichment

(underlined emphasis added). A copy of § 1 and the accompanying comments to the *Restatement of the Law Third Restitution and Unjust Enrichment, Tentative Draft No. 7* is attached to this Brief as Appendix A.

⁴ The trial court set forth its view on this issue at RP (9/22/09) p. 99, ln. 25 to p. 100, ln. 5.

Conversely, it made no findings of or even reference to the elements necessary to support an award in quantum meruit for breach of a contract implied in fact.⁵ Both this Court's language and the structure of its opinion plainly foreclose any recovery for DeTray based on such grounds.

Indeed, the Dragts are on record before this Court asserting this very conclusion. In *Appellants' Motion for Reconsideration or Clarification*, filed with this Court on July 23, 2007, the Dragts noted that "[i]n its Opinion, this Court agreed with the Dragts that no contractual grounds for relief existed."⁶ Later in the same document, the Dragts asserted that "[a] contract implied in fact is not at issue here."⁷ The Dragts were correct on this point then, so they are necessarily wrong now to claim that the very same Opinion made an award based on a contract implied in fact.⁸

The fact that this Court described its award as "restitution in quantum meruit" cannot change this conclusion. *Dragt*, 139 Wn. App. at 564. As *Young* itself points out, "Washington courts have historically used

⁵ To recover in quantum meruit on a contract implied in fact, a plaintiff must show that 1) the defendant requested work; 2) the plaintiff expected payment for the work; and 3) the defendant knew or should have known that the plaintiff expected payment for the work. *Young*, 164 Wn.2d at 486.

⁶ *Appellants' Motion for Reconsideration or Clarification* ("Motion for Reconsideration"), p. 4. A copy of the Dragts' *Motion for Reconsideration* is attached to this Brief as Appendix B.

⁷ *Motion for Reconsideration*, p. 6.

⁸ DeTray did not contest this particular issue in his *Respondents' Answer to Appellants' Motion for Reconsideration or Clarification*, a copy of which is attached to this Brief as Appendix C.

[‘unjust enrichment’ and ‘quantum meruit’] synonymously.” *Young*, 164 Wn.2d at 483. *Young* attempts to put an end to this synonymous use by restricting “quantum meruit” to mean “the method of recovering the reasonable value of services provided under a contract implied in fact.” However, the trial court in this matter was correct to point out that the Court of Appeals “could not have been expected to foresee how [the Supreme Court] later circumscribed the use of the terms that [it] had earlier employed.” RP (9/23/09) at p. 13, lns 4-9. There is absolutely no justification for fundamentally changing this Court’s holding by finding that DeTray had a contractual remedy after all, simply to make its terminology consistent with that of *Young*.

Finally, there is no textual support for the Dragts’ claim that this Court “clearly distinguished between unjust enrichment and quantum meruit, and gave specific instructions to the trial court for each.” *Cf. Appellants’ Brief*, p. 15. Far from “clearly distinguishing” unjust enrichment and quantum meruit, this Court endorsed the then-prevalent understanding that “[u]njust enrichment encompasses the doctrine of quantum meruit.” *Dragt*, 139 Wn. App. at 576. Moreover, it is simply not true that this Court either directed the trial court to enter an award for unjust enrichment for the precise amount of \$593,462.66, or somehow gave “specific instructions” with regard to quantum meruit.⁹ To see this,

⁹Except in the sense that the Court’s express exclusion of any contractual remedy for DeTray amounts to “specific instructions” not to make an award to DeTray in quantum meruit for the breach of a contract implied in fact.

one need simply examine the precise language this Court used to remand the matter.

The relevant paragraphs of the Court's opinion state as follows:

¶ 45 All three elements of unjust enrichment are met here. First, the Dragts received a benefit from DeTray because DeTray paid mortgage payments and other land expenses when the Dragts did not have sufficient funds to continue making the payments. Second, the Dragts were aware that DeTray made the payments. Third, they benefited from the payments by continuing to own land of increasing value. DeTray should receive compensation for his financial contributions.

¶ 46 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.

¶ 47 The court awarded DeTray \$2,067,773.88 at trial although DeTray's financial contributions only amounted to \$593,462 based on the breach of fiduciary duty and breach of contract claims. 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.

The first thing to note about these paragraphs is that they are directly introduced by, and follow the logic of, the discussion of the elements of unjust enrichment set forth in Paragraph 45. Second, Paragraph 46 does not directly or indirectly quantify DeTray's unjust enrichment award as \$593,462.66. Rather, it states that this is the sum of DeTray's costs, and that "it would be inequitable for the Dragts to receive the benefit of

DeTray's costs." That those costs amount to \$593,462.66 is relevant to the proper award for unjust enrichment, but those costs do not directly determine the size of the proper award. Rather, as Paragraph 47 states, the amount of the award for unjust enrichment was to be decided by the trial court on remand, after making "findings regarding the reasonable value of the benefit for the services DeTray conferred upon the Dragts."¹⁰ This Court based its award to DeTray exclusively on restitution for unjust enrichment. When it sent this case back to the trial court "for findings regarding the reasonable value of the benefit for the services DeTray conferred upon the Dragts," it was thus instructing the trial court to determine how much to award DeTray for unjust enrichment. Dragt, 139 Wn. App. at 577. The trial court correctly understood these instructions, and complied with them.

2. In order to quantify the award in unjust enrichment for DeTray, the trial court properly looked to the extent to which DeTray caused the Dragts property to increase in value

Under Washington law, a party's recovery on a valid claim for unjust enrichment can be measured in one of two ways. First, "[i]t may 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." *Young*, 164 Wn.2d at 487. "Alternatively, it may

¹⁰ See below, pp 16-17, and *Young*, 164 Wn.2d at 488-89, and n. 8 (noting that costs may have "some consequential relationship to the value of the benefit conferred," and criticizing the dissent for "conflat[ing] cost with value").

be measured by the extent to which the other party's property has been increased in value or his other interests advanced." *Id.*¹¹

According to the Dragts, this Court's prior opinion decided which of these two measures apply. The Dragts argue as follows:

[T]he 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 the value of the property. The Court of Appeals could have awarded an amount based 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.

With all due respect, this argument is based on nothing more than fantasy. If this Court had ordered the trial court to enter judgment for a specific amount, there might be some sense in which this Court "necessarily considered" the proper way to quantify its award. As previously explained, however, this Court did not award a specific amount, and there is no textual support for the proposition that it chose one of the two proper methods of measuring the award. What this Court said was that it was remanding "for findings regarding the reasonable value of the benefit for the services DeTray conferred upon the Dragts." *Dragt*, 139 Wn. App. at

¹¹ See also *Hardgrove v. Bowman*, 10 Wn.2d 136, 137-38, 116 P.2d 336 (1941) (holding that "where one expends money and labor in the improvement of the property of another upon the faith of an unenforceable contract, he is, upon repudiation of the agreement by the owner, entitled to be reimbursed for improvements enhancing the value of the property. The measure of damages is the amount the property has been enhanced in value by such labor and improvements").

577. It said nothing more specific about how this “reasonable value of the benefit was to be determined. It left this issue to the trial court.

Moreover, the Dragts’ discussion of how this Court supposedly chose the proper measure of recovery is based on a serious misinterpretation of the law. A party’s recovery for unjust enrichment is simply not properly measured by that party’s costs. Rather, the recovery may be measured by what it would have cost the benefited party “had it obtained the benefit from some other person in the plaintiff’s position.” *Young*, 164 Wn.2d at 487.¹² The costs of the party conferring the benefit can be relevant to this issue, but they do not themselves serve as the measure of the recovery. See, e.g., *Young*, 164 Wn.2d at 487-89 and note 8 (criticizing a trial court for limiting its award to the claimants’ actual costs, rather than looking to what the beneficiary would have had to pay a third party to secure the benefits, and criticizing the dissent for “conflat[ing] cost with value”).

In this case, the Court of Appeals left both the choice of which of the two proper measures to apply, and actual quantification of the award, to the trial court. After having considered the testimony and evidence presented by both sides, the trial court opted to determine the magnitude of the award to DeTray by measuring the extent to which his contributions had increased the value of the Dragts property. The trial court’s choice

¹² The Dragts themselves acknowledge this later in their brief, when the note that “[w]hichever 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.” *Appellants’ Brief*, p. 19.

was consistent with both this Court's prior opinion and the established law of unjust enrichment.

B. The Trial Court's Award to DeTray for Unjust Enrichment Is Supported by Substantial Evidence in the Record

This Court ordered the trial court to quantify DeTray's recovery in restitution for unjust enrichment, and left it to the trial court to decide which of the two proper measures of recovery to apply. The trial court correctly understood this mandate, and did not err in looking to the extent to which DeTray's contributions to the project increased the value of the Dragts' property. It remains to be shown, however, that the trial court's findings of fact regarding the magnitude of the benefit conferred are supported by substantial evidence.

Substantial evidence is "evidence sufficient to persuade a rational fair-minded person the premise is true." *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000).¹³ Here, the trial court's determination that DeTray increased the value of the Dragts' property by *at least* \$1,377,757.91 is clearly supported by substantial evidence.¹⁴ CP 468, ¶ 13. The evidence takes the form of the testimony and appraisal report of Mr. O'Connor, who found that "the reasonable value of the benefit of the services" DeTray conferred on the Dragts was \$2,925,000. RP (9/22/09) at p. 43, ln. 23 to p. 44, ln. 7; and CP 467 ¶ 5.

¹³ If the standard is satisfied, a reviewing court will not substitute its judgment for that of the trial court even though it may have resolved a factual dispute differently. *Sunnyside Valley Irr. Dist. v. Dickie*, 149 Wn.2d 873, 879-80, 73 P.3d 369 (2003).

¹⁴ This amount is calculated as the sum of \$593,462.66 plus \$784,295.25.

After considering the countervailing evidence offered by the Dragts, the court determined that Mr. O'Connor was "one of the most credible expert witness[es]" that it had ever listened to. RP (9/23/09) at p. 3, Ins. 21-23. It then held that "the 'net' value of the benefit conferred, apart from DeTray's costs, is \$2,331,537.34." CP 467, ¶5, Ins. 10-11. Mr. O'Connor's testimony and appraisal report are clearly substantial evidence that support the trial court's conclusions.

It is true, however, that the trial court also decided that it would be "unfair and punitive" toward the Dragts to award DeTray "the full 'net' value of the benefit he conferred on them." CP 467, ¶ 7. It did so because the Dragts reaped less than the full market value of the property when they sold it for \$3,300,000 "without openly marketing it in order to keep their actions hidden from DeTray." CP 467, ¶ 6. The trial court took this fact into account, and exercised its equitable discretion to award DeTray a sum substantially below the \$2,331,537.34 shown by Mr. O'Connor—and held by the trial court—to be net value of the benefit conferred by DeTray. CP 467, ¶¶ 5-7.

Although they are the beneficiaries of this exercise of discretion, the Dragts argue that it constitutes error by the trial court. According to them, the trial court "fail[ed] to consider the actual value of the benefit received." Appellants' Brief, p. 21. However, the Dragts are simply confused. They only received \$3,300,000 in cash from Tahoma Terra,

LLC, when they sold the project.¹⁵ However, this in no way contradicts or disputes the trial court's finding based on Mr. O'Connor's evidence that DeTray's efforts increased the market value of the Dragts property by \$2,925,000. CP 467, ¶ 5. It is the benefit that they received from DeTray, and not the lesser amount that they received from Tahoma Terra, that sets the upper bound for an award in unjust enrichment. That the Dragts later chose not to realize all of the increased market value when they sold the property does not determine the amount of benefit conferred by DeTray.¹⁶

Put slightly differently, what matters for quantifying an award for unjust enrichment under the "increase in value" measure is the increase in market value conferred on the beneficiary rather than the increase in value realized by the beneficiary at a sale. This point is confirmed by both *Young* and the *Restatement (Second) of Contracts*, § 370 (1981). In *Young*, the owner of the property who had benefited from improvements

¹⁵ This Court has previously established that the total consideration given to the Dragts by Tahoma Terra, LLC "included the price of the land, \$3,300,000, plus \$280,000 to be paid to DeTray for the mortgage payments DeTray made on the land, plus the Dragts' attorney fees to relieve them of their obligations to DeTray and the LLC, and loan satisfaction to the bank, approximately \$212,000." *Dragt*, 139 Wn. App. at 568.

¹⁶ The Dragts imply that the trial court improperly based its award on "the value [of the benefits] to the plaintiff who provided them." Appellants' Brief, p. 22. This is not true. The trial court did not base its award on some estimate of how DeTray would value the property, but instead looked at how the market value of the property had been increased by DeTray's contributions.

did not sell the property at all. *Young*, 164 Wn.2d at 480 (describing the underlying action as one brought to quiet title in the name of the benefited party). Nonetheless, despite a complete lack of cash benefit realized by the benefited party, the State Supreme Court determined that she had been unjustly enriched by an amount between \$750,000 and \$1,050,000. *Young*, 164 Wn.2d at 487.¹⁷ Clearly, in *Young* the critical issue for quantifying the upper bound of the award in unjust enrichment was the market value of the benefit conferred, not the (non-existent) price at which the benefited party sold the property. It follows that if the benefited party does sell the property, but chooses to do so for less than the fair market price (as the trial court found happened here; CP 467, ¶ 6) then the sale price does not affect the measure of the benefit conferred.

The *Restatement (Second) of Contracts*, § 370 (1981) makes the same point. Under this provision, “[a] party is entitled to restitution . . .

¹⁷ *Young* affirmed an unpublished opinion issued by this Court, *Young v. Young*, noted at 134 Wn. App. 1033, 2006 WL 2329471. Although GR 14.1 generally prohibits a party from citing an unpublished opinion “as an authority,” DeTray respectfully submits that this prohibition does not extend to the citation of an unpublished case in order to clarify the record that was on review in a later published case. This Court’s unpublished opinion in *Young* clarifies that one of the measures of the “benefit conferred” utilized by the State Supreme Court in its published opinion came from the expert testimony of a real estate agent appraising the property in the absence of a sale. Compare *Young*, 2006 WL 2329471 at *3 (describing testimony that the original property value was \$1,050,000 and “that the property’s value at the time of trial had increased to between \$2,200,000 and \$2,500,000”) and *Young*, 164 Wn.2d at 482 (noting that “the court found the value of the property increased by \$1,150,000 to \$1,450,000”). A copy of this Court’s unpublished opinion in *Young* is attached to this Brief as Appendix D.

only to the extent that he has conferred a benefit on the other party”

The authors of the Restatement then explain in Comment (a) that “[t]he requirement of this Section is generally satisfied if a benefit has been conferred, and it is immaterial that it was later lost, destroyed, or squandered.” *Restatement (Second) of Contracts*, § 370, Comment (a) (emphasis added). They go on to illustrate this principle as follows:

3. A promises to deposit \$100,000 to B’s credit in X Bank in return for B’s promise to render services. A deposits the \$100,000, the X Bank fails, and B refuses to perform. A can get restitution of the \$100,000 because a benefit was to that extent conferred on B even though it was lost by B when X Bank failed.

Restatement (Second) of Contracts, § 370, Comment (a), Illustration 3.

The illustration applies the principle in a situation where the beneficiary loses the benefit through no fault of their own. It follows even more strongly that where the beneficiary loses the benefit through their own “naïve and uninformed actions,” they remain liable for the benefit conferred. RP (9/23/09) at p. 5, lns. 19-20. The Dragts were thus liable up to a maximum of \$2,925,000 for the benefit conferred upon them by DeTray.

In the end, the Dragts’ argument that the trial court “fail[ed] to consider the actual value of the benefit received by the Dragts” reduces to the claim that the trial court erred by not accepting the \$3.3 million price paid by Tahoma Terra as the fair market price of the property at the time DeTray finished conferring benefits on the Dragts. *Appellants’ Brief*, p. 21. However, the trial court’s decision to place a higher value on the

property was supported by substantial evidence in the form of Mr. O'Connor's testimony and appraisal report. The trial court did not err in accepting Mr. O'Connor's evidence to the effect that the true market value of the property in 2006 was \$5.5 million, nor did it err in concluding that DeTray provided the Dragts with \$2,925,000 in benefits. CP 467, ¶ 5. The trial court's decision to award DeTray substantially less than that amount was an exercise of its discretion that helped, rather than harmed, the Dragts. It is not a reversible error.¹⁸

C. The Trial Court did not award DeTray part of the natural appreciation of the property, nor did it award DeTray "expectation damages"

The Dragts also allege that the trial court erred as a matter of law by awarding DeTray part of the "natural" appreciation of the property, and by awarding him expectation damages. Appellants' Brief, pp. 23-29. Here, too, the Dragts' contentions do not withstand scrutiny. Indeed, the Dragts' argument as to how the trial court set out to "capture" part of the natural appreciation for DeTray verges on deliberate misrepresentation of the trial court's holding.

¹⁸ This case is thus readily distinguishable from the abuse of discretion found in *Young*. In *Young*, the trial court made an award for unjust enrichment that fell below the lower limit for recovery set 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." *Young*, 164 Wn.2d at 487-88. The trial court's exercise of discretion in *Young* thus hurt the party that appealed. Here, there were no findings regarding the value of the first measure (that is, what it would have cost the Dragts to purchase DeTray's contributions from someone else), and the trial court's exercise of discretion benefits the appellants.

As the trial court emphasized in its oral ruling, Mr. O'Connor's evidence "does not give Mr. DeTray credit for the natural appreciation that Mr. Dragts' property would have enjoyed and which is solely his benefit, and not Mr. DeTray's." RP (9/23/09) at p. 5, lns. 2-6 (emphasis added). Instead, Mr. O'Connor's evidence established that the "value of the benefit conferred" by DeTray was \$2,925,000. Ex. 4, p. 9. This was an amount clearly over and above the natural appreciation of the property. It necessarily follows that the trial court's reduced award of \$1,377,757.91 does not give DeTray any part of the natural appreciation, but rather is an award of less than the total amount by which DeTray's efforts increased the value of the property.

When the trial court decided to reduce the award to DeTray in order to avoid being unduly harsh on the Dragts, it also expressly maintained its position that DeTray was not entitled to the natural appreciation of the property. In fact, it specifically concluded that "the Dragts will be credited with the fair market value of the project as of January 1997, plus an estimate of the natural appreciation that would have accrued to the Dragts if they had held the project without DeTray's involvement." CP 467, ¶ 8 (emphasis added). However, having decided to use its discretion to award DeTray less than the amount indicated by Mr. O'Connor's evidence, the trial court apparently also felt that it needed to estimate the natural appreciation of the property independently of Mr. O'Connor's conclusions. RP (9/23/09) at p. 9, ln 14 to p. 10, ln. 17.

It was in this context that the trial court referred to “captur[ing]” the natural appreciation. RP (9/23/09) at p. 9, ln. 25. The trial court was clearly not intent on “capturing . . . the natural appreciation . . . for the benefit of DeTray,” as the Dragts’ baselessly claim. *Appellants’ Brief*, p. 23 (emphasis added). Instead, it was attempting to determine the proper estimate of natural appreciation so that this amount could be given to the Dragts. RP (9/23/09), pp. 9-10. The trial court’s explanation of its ruling might have been clearer if it had simply stated that it was using its “tremendous discretion to fashion a remedy” and that it was awarding DeTray less than was indicated by Mr. O’Connor’s evidence. *Young*, 164 Wn.2d at 488. However, the complexity of its explanation does not undermine the legitimacy of its result. By allowing the Dragts to retain more value than they were entitled to based on O’Connor’s evidence, the trial court certainly did not deprive the Dragts of the natural appreciation of their property.

Neither did the trial court award DeTray “expectation damages.” *Cf. Appellants’ Brief*, pp. 27-29. The Dragts’ argument to the contrary rests in part on their confusion of restitution as a remedy for breach of contract with restitution as the basis of an award for unjust enrichment.¹⁹ Restitution as a remedy for breach of contract simply has no place in this case, as this Court explicitly rejected any contractual basis for DeTray’s recovery. *Dragt*, 139 Wn. App. at 564 (holding that “the trial court erred

¹⁹ See above, pp. 9-11 and footnote 3.

in concluding that the Dragts breached their contractual and fiduciary duties to DeTray”). Thus, the Dragts’ assertion that the purpose of an award in restitution is to restore the injured party “to as good a position as that occupied by him before the contract was made” is simply inapposite. Cf. Appellants’ Brief, p. 27 (emphasis added), citing to *Dravo Corp. v. L.W. Moses Co.*, 6 Wn.App. 74, 90-91, 492 P.2d 1058 (1971).²⁰ This Court did not order that DeTray should recover in restitution for breach of contract; it ordered that DeTray should recover in restitution for unjust enrichment. The trial court did not err by using the value of the benefit conferred by DeTray on the Dragts to guide its quantification of the award.

The Dragts also misconstrue the trial court’s comment that the case “calls for remedy in restitution because both parties were expecting a profit from their mutual participation in the project.” RP (9/23/09) at p. 8, lns. 7-9. First of all, the trial court awarded damages in restitution because it was ordered to do so by this Court. *Dragt*, 139 Wn. App. at 577. Secondly, the expectations of the parties were relevant to the legal theory underpinning the award because they were one of the factors that made it unjust for the Dragts to retain the benefits conferred on them by DeTray. RP (9/23/09) p. 6, ln. 9 to p. 7, ln. 17. However, there is nothing in the record that supports the Dragts’ claim that the trial court attempted to use

²⁰ The Court of Appeals in *Dravo* was clearly concerned with “[r]estitution [as] . . . an alternative remedy to damages for breach of contract,” as opposed to restitution as an independent basis for recovery for unjust enrichment. *Dravo*, 6 Wn. App. at 90.

the award to satisfy DeTray's expectations.²¹ Instead, the trial court followed this Court's mandate by making an award in restitution based on "the value of the benefit" DeTray conferred on the Dragts. *Dragt*, 139 Wn. App. at 577.

D. The trial court did not abuse its discretion by awarding prejudgment interest

A trial court's decision awarding prejudgment interest is reviewed for abuse of discretion. *Mehlenbacher v. DeMont*, 103 Wn. App. 240, 250, 11 P.3d 871 (2000). A trial court abuses its discretion if it exercises its discretion on untenable grounds or for untenable reasons. *Mehlenbacher*, 103 Wn. App. at 250-51. Here, the trial court awarded \$367,946.85 in prejudgment interest on that part of the award constituted by DeTray costs. CP 466, ¶ 2. It did not abuse its discretion by doing so.

Under Washington law, "whether prejudgment interest is awardable depends on whether the claim is a liquidated or readily determinable claim, as opposed to an unliquidated claim." *Bailie Communications, Ltd. v. Trend Business Systems, Inc.*, 61 Wn. App. 151, 156, 810 P.2d 12 (1991) (citing to *Hansen v. Rothaus*, 107 Wn.2d 468,

²¹ The Dragts also point to DeTray's testimony on remand as evidence that he believed he was entitled to expectation damages. *Appellants' Brief*, pp. 27-28 (citing to RP (9/22/09) at p. 92, lns. 15-19). Whether this is the proper interpretation of DeTray's testimony is beside the point. As appellants, the Dragts have to show error in the trial court's order, not in DeTray's testimony. As noted, there is no support in the record for the claim that "the trial court agreed with DeTray and awarded expectation damages." *Appellants' Brief*, p. 28.

472-73, 730 P.2d 662 (1986)). A claim is “liquidated” if “the evidence furnishes data which, if believed, makes it possible to compute the amount with exactness, without reliance on opinion or discretion.” *Bailie*, 61 Wn. App. at 157. Here, the trial court properly found that the “cash amount of the benefit knowingly received and retained by Dragt” had already been determined by the Court of Appeals. RP (9/23/09) at 10:23-25; see also *Dragt*, 139 Wn. App. at 577 (noting that “DeTray’s costs . . . amount to \$593,462.66”). The sum of \$593,462.66 was readily computable from the evidence presented at the original trial, without reliance on opinion or discretion, and therefore was properly the basis of an award of prejudgment interest.²² CP 466, ¶¶ 1-2.

In objecting to the award of prejudgment interest, the Dragts make a number of assertions which do not bear scrutiny. First, they claim that the \$593,462.66 “did not ‘rightfully belong’ to DeTray.” *Appellants’ Brief*, p. 32. This claim essentially requests this Court to reconsider its prior holding that the Dragts were unjustly enriched, and is not now properly before the Court. Second, the Dragts claim that they never received the “use value” of the money (apart from the \$280,000 paid for the Dragts mortgage). *Appellants’ Brief*, p. 32. However, the Dragts clearly benefited from DeTray’s expenditures from the date they sold the property to Tahoma Terra, and that is the date on which the trial court

²² That the trial court used its discretion in determining the magnitude of the award for the reasonable value of the benefit of DeTray’s contributions, over and above his costs, does not mean that his costs themselves were not a liquidated sum.

commenced the accrual of prejudgment interest. CP 466, ¶ 2. Third, the Dragts cite to *Richter v. Trimberger*, 50 Wn. App. 780, 785, 750 P.2d 1279 (1988) for the proposition that a party which rejects an offer of settlement for the liquidated sum due is not entitled to prejudgment interest. However, the Dragts cite to no evidence that they actually offered DeTray \$593,462.66. Instead, the only evidence is that “they offered to work out a settlement.” *Appellants’ Brief*, p. 33 (citing to RP (3/1/06) at 14:11-15:8). That is not enough to bar an award of prejudgment interest for DeTray.

Finally, the Dragts assert that the “trial court awarded DeTray prejudgment interest twice.” *Appellants’ Brief*, p. 34. What the trial court in fact did was deduct prejudgment interest from the surplus it decided to divide between the parties. CP 468, ¶ 11. This had the effect of reducing the award to DeTray, compared to what it would have been if the judgment amount had been determined first, followed by an award of prejudgment interest on part of that amount.²³ There is no conceivable sense in which the trial court awarded DeTray prejudgment interest twice.

²³ By deducting prejudgment interest from the surplus it then divided between the Dragts and DeTray, the trial court effectively required DeTray to pay half of the award of prejudgment interest. If the trial court had instead just deducted DeTray’s costs from the surplus, DeTray’s award would have been as follows: Costs of \$593,462 plus prejudgment interest on that sum of \$ 367,946.85 (paid by the Dragts alone) plus one half of a larger “surplus” calculated as $\frac{1}{2} * [\$3,300,000 \text{ minus } (\$770,000 \text{ plus } \$593,462.66)]$, or \$968,268, for a total award to DeTray of \$1,929,676. DeTray does not contend that the trial court erred by failing to award this later sum. Instead, he offers this argument to show that the

V. CONCLUSION

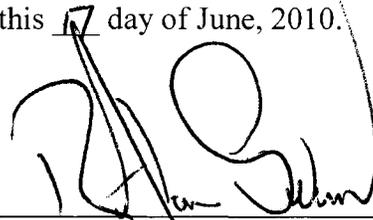
The Dragts' principle argument on appeal is premised on a peculiar sort of reverse legal jujitsu. By multiplying the alleged bases of this Court's original award of restitution to include breach of a contract implied in fact as well as unjust enrichment, the Dragts hope to limit the actual award. However, the plain meaning of this Court's prior opinion defeats the Dragts' efforts. This Court found that the Dragts had been unjustly enriched, and specifically identified each of the elements thereof. Conversely, it rejected all contractual remedies, and made no mention of any contract implied in fact. In the end, it "remand[ed] for findings regarding the reasonable value of the benefit for the services DeTray conferred upon the Dragts," after establishing that "the Dragts benefited . . . by continuing to own land of increasing value." *Dragt*, 139 Wn. App. at 577.

The trial court complied with this mandate on remand. Its conclusion that the "reasonable value of the benefit conferred" by DeTray was \$2,925,000 was supported by substantial evidence in the form of Mr. O'Connor's testimony and appraisal report. Moreover, the trial court did not abuse its discretion—and obviously did not harm the Dragts—by setting the principal amount of the award substantially below the amount indicated by Mr. O'Connor's evidence. Nor did the trial court abuse its discretion by awarding \$367,946.85 in prejudgment interest on that part of

claim that the trial court made the Dragts pay prejudgment interest twice lacks any reasonable foundation.

the unjust enrichment award it determined was a liquidated sum. The Court should affirm the judgment entered by the trial court on remand.

RESPECTFULLY SUBMITTED this 17 day of June, 2010.

By:  _____

R. Alan Swanson, WSBA # 1181
David J. Corbett, WSBA # 30895
Attorneys for Respondents
E. PAUL DETRAY and PHYLLIS
DETRAY

CERTIFICATE OF SERVICE

I declare under penalty of perjury of the laws of the State of Washington that on the 17 day of June, 2010, I caused to be served the foregoing document on counsel for Appellants, as noted, at the following address:

Kevin A. Bay
Ryan, Swanson & Cleveland, PLLC
1201 Third Avenue, Suite 3400
Seattle, WA 98101-3034

Dated this 17 day of June, 2010 at Olympia, Washington.

Andrea Barnes

FILED
COURT OF APPEALS
10 JUN 18 PM 1:34
STATE OF WASHINGTON
BY _____
IDENTITY _____

APPENDIX A

Submitted by the Council to the Members of
The American Law Institute
for Consideration at the Eighty-Seventh Annual Meeting on May 17, 18, and 19, 2010



THE AMERICAN LAW INSTITUTE

RESTATEMENT OF THE LAW THIRD
RESTITUTION AND UNJUST ENRICHMENT

Tentative Draft No. 7

(March 12, 2010)

SUBJECTS COVERED

PART III Remedies

CHAPTER 7 Remedies

TOPIC 2 Restitution Via Rights in Identifiable Property
(§§ 60 and 61)

PART IV Defenses to Restitution

CHAPTER 8 Defenses to Restitution

PART I Introduction

CHAPTER 1 General Principles (Revised)

APPENDIX A Proposed Revisions to Drafts Previously Approved

APPENDIX B Black Letter of Tentative Draft No. 7

THE EXECUTIVE OFFICE
THE AMERICAN LAW INSTITUTE
4025 Chestnut Street
Philadelphia, PA 19104-3099
Telephone: (215) 243-1600 • Fax: (215) 243-1636
E-mail: ali@ali.org • Website: <http://www.ali.org>

© 2010 by THE AMERICAN LAW INSTITUTE
All Rights Reserved

As of the date of publication, this Draft has not been considered by the members of The American Law Institute and does not represent the position of the Institute on any of the issues with which it deals. The action, if any, taken by the members with respect to this Draft may be ascertained by consulting the Annual Proceedings of the Institute, which are published following each Annual Meeting.

PART I INTRODUCTION

CHAPTER I GENERAL PRINCIPLES

- § 1. Restitution and Unjust Enrichment
- § 2. Limiting Principles
- § 3. Wrongful Gain
- § 4. Restitution May Be Legal or Equitable or Both

§ 1. Restitution and Unjust Enrichment

A person who is unjustly enriched at the expense of another is subject to liability in restitution.

Comment:

a. Liability in restitution. The source of a liability in restitution is the receipt of an economic benefit under circumstances such that its retention without payment would result in the unjust enrichment of the defendant at the expense of the plaintiff. The consequence of a liability in restitution is that the defendant must either restore the benefit in question (or its traceable product), or else pay money in the amount necessary to eliminate unjust enrichment.

The identification of unjust enrichment as an independent basis of substantive liability in common-law legal systems was the central achievement of the 1937 Restatement of Restitution, and that conception of the subject is carried forward here. The use of the word "restitution" to describe the cause of action as well as the remedy is likewise inherited from the original Restatement, despite the problems this usage entails. See Comments *c* and *e*.

Such is the inherent flexibility of the concept of unjust enrichment that almost every instance of a recognized liability in restitution might be referred to the broad rule of the present Section. The same flexibility means that the concept of unjust enrichment by itself will not yield a reliable indication of the nature and scope of the liability imposed by this part of our legal system. It is by no means obvious, as a theoretical matter, how "unjust enrichment" should best be defined; whether it constitutes a rule of decision, a unifying theme, or something in between; or what role the principle would ideally play in our legal system. Such questions preoccupy much academic writing on the subject of restitution. This Restatement has been written on the

1 assumption that the law of restitution can be usefully described without insisting on an answer to
2 any of them.

3 Chapters 2-6 of this Restatement classify the circumstances in which a liability in
4 restitution will predictably be imposed—employing categories that are large enough to be
5 significant, small enough to describe cases that are perceptibly alike. The attempt to make the list
6 comprehensive cannot make it exclusive: cases may arise that fall outside every heading of
7 liability in restitution except the rule of the present Section. The tradition from which we receive
8 the modern law of restitution authorizes a court to remedy unjust enrichment wherever it finds it,
9 but not to treat as “unjust enrichment” every instance of enrichment that it regards as unjust. See
10 Comment *b* and § 2.

11 *b. Unjust enrichment.* The law of restitution is the law of unjust enrichment, but “unjust
12 enrichment” is a term of art. The substantive part of the law of restitution is concerned with
13 identifying those forms of enrichment that the law treats as “unjust” for purposes of imposing
14 liability.

15 There is a substantial tradition within English and American law of referring to unjust
16 enrichment as if it were something identifiable *a priori*, by the exercise of a moral judgment
17 anterior to legal rules. This equitable conception of the law of restitution is crystallized by Lord
18 Mansfield’s famous statement in *Moses v. Macferlan*, 2 Burr. 1005, 1012, 97 Eng. Rep. 676, 681
19 (K.B. 1760): “In one word, the gist of this kind of action is, that the defendant, upon the
20 circumstances of the case, is obliged by the ties of natural justice and equity to refund the
21 money.” Explaining restitution as the embodiment of natural justice and equity gives the subject
22 an undoubted versatility, an adaptability to new situations, and (in the eyes of many observers) a
23 special moral attractiveness. Restitution in this view is the aspect of our legal system that makes
24 the most direct appeal to standards of equitable and conscientious behavior as a source of
25 enforceable obligations.

26 At the same time, the purely equitable account of the subject is open to substantial
27 objections. Saying that liability in restitution is imposed to avoid unjust enrichment effectively
28 postpones the real work of definition, leaving to a separate inquiry the question whether a
29 particular transaction is productive of unjust enrichment or not. In numerous cases natural justice
30 and equity do not in fact provide an adequate guide to decision, and would not do so even if their
31 essential requirements could be treated as self-evident. Unless a definition of restitution can
32 provide a more informative generalization about the nature of the transactions leading to liability,
33 it is difficult to avoid the objection that sees in “unjust enrichment,” at best, a name for a legal

conclusion that remains to be explained; at worst, an open-ended and potentially unprincipled charter of liability.

In reality, the law of restitution is very far from imposing liability for every instance of what might plausibly be called unjust enrichment. The law's potential for intervention in transactions that might be challenged as inequitable is narrower, more predictable, and more objectively determined than the unconstrained implications of the words "unjust enrichment." Equity and good conscience might see an unjust enrichment in the performance of a valid but unequal bargain, or in the legally protected refusal to perform an equal one (as where the statute of limitations bars enforcement of a valid debt). Beyond these merely legal instances, moreover, "unjust enrichment" (in the natural and nontechnical sense of the words) might seem to be nothing less than a pervasive fact of human experience—given any prior standard (such as equality or merit) by which people's relative entitlements to enrichment might be measured.

The concern of restitution is not, in fact, with unjust enrichment in any such broad sense, but with a narrower set of circumstances giving rise to what is more appropriately called *unjustified enrichment*. Compared to the open-ended implications of the term "unjust enrichment," instances of unjustified enrichment are both predictable and objectively determined, because the justification in question is not moral but legal. Unjustified enrichment is enrichment that lacks an adequate legal basis; it results from a transfer that the law treats as ineffective to work a conclusive alteration in ownership rights. Broadly speaking, an ineffective transfer for these purposes is one that is *nonconsensual*. Such a transaction may occur when the claimant confers a benefit involuntarily (Chapter 2) (Tentative Draft No. 1, 2001; Tentative Draft No. 2, 2002), or when the claimant confers unrequested benefits without obtaining the recipient's agreement to pay for them (Chapter 3) (Tentative Draft No. 2, 2002; Tentative Draft No. 3, 2004), or when an attempted contractual exchange miscarries after partial performance (Chapter 4) (Tentative Draft No. 3, 2004; Tentative Draft No. 4, 2005; and the Appendix, *infra*); or when the recipient acquires benefits by wrongful interference with the claimant's rights (Chapter 5) (Tentative Draft No. 4, 2005; Tentative Draft No. 5, 2007). A residual set of cases, in which benefits are conferred on the recipient by a third party (rather than by the claimant), is the subject of Chapter 6 (Tentative Draft No. 5, 2007).

Because of its somewhat greater explanatory power, the term *unjustified enrichment* might be preferred to *unjust enrichment*, were it not for the established usage imposed by the first Restatement of Restitution. But while the choice between the two expressions may indicate a preferred vantage point, it implies no difference in legal outcomes. As a description of the circumstances that give rise to legal liability, the terms *unjust enrichment* and *unjustified*

§ 1. Restitution and unjust enrichment.

1 *enrichment* are precisely coextensive, identifying the same transactions and the same legal
2 relationships. This is because— notwithstanding the potential reach of the words, and Lord
3 Mansfield’s confident reference to “natural justice”— the circumstances in which American law
4 has in fact identified an *unjust enrichment* resulting in legal liability have been those and only
5 those in which there might also be said to be *unjustified enrichment*, meaning the transfer of a
6 benefit without adequate legal ground.

7 The two expressions, moreover, point to mutually reinforcing explanations of liability.
8 Enrichment is unjust, in legal contemplation, to the extent it is without adequate legal basis; and
9 the law supplies a remedy for unjustified enrichment because such enrichment cannot
10 conscientiously be retained. In no instance does the fact or extent of liability in restitution depend
11 on whether the source of that liability is conceived or described as unjust enrichment, as
12 unjustified enrichment, or as a combination of the two.

13 *c. Restitution and restoration.* Employed to denote liability based on unjust enrichment,
14 the word “restitution” is a term of art that has frequently proved confusing. The former
15 Restatement of Restitution (1937) adopted the name “restitution” for this topic because
16 recognition of unjust enrichment leads, in most instances, either to the avoidance of a transfer or
17 to an obligation on the part of the transferee to pay for what has been transferred. Either remedy
18 results in a form of “restitution” to the transferor. And yet the concepts of unjust enrichment and
19 restitution (in the literal meaning of “restoration”) correlate only imperfectly. On the one hand,
20 there are significant instances of liability based on unjust enrichment that do not involve the
21 restoration of anything the claimant previously possessed. The most notable examples are cases
22 involving the disgorgement of profits, or other benefits wrongfully obtained, in excess of the
23 plaintiff’s loss. See § 51 (Tentative Draft No. 5, 2007). On the other hand, there are numerous
24 situations in which a claimant’s undoubted right to the restitution (or restoration) of something
25 does not depend on the unjust enrichment of the defendant. Thus if a transfer has been induced by
26 misrepresentation, the transferor is entitled to rescission and restitution even if the transferee—
27 having paid market value—cannot plausibly be said to have been enriched. See § 54, Illustration
28 12 (Tentative Draft No. 6, 2008). Categories are further complicated by a set of cases which do
29 involve a literal restitution, and which might logically be explained as a means of avoiding or
30 rectifying the defendant’s unjust enrichment, but which, by convention, are not so classified. See
31 Comment *g*.

32 In short, most of the law of restitution might more helpfully be called the law of unjust or
33 unjustified enrichment. See Comment *b*. At the same time, while the name “restitution” invites
34 misunderstanding, it remains the word most commonly employed throughout the common-law

Formulas of this kind are not helpful, and they can lead to serious errors. They tend a specious precision to an analysis that may be simple or complicated but which at any rate is not susceptible of this form of statement. The third element of the foregoing list, referring to "circumstances making it inequitable for the defendant to retain the benefit," incorporates the whole of the

of its value. circumstances making it inequitable for the defendant to retain the benefit without payment of the value. To establish a claim for unjust enrichment, the plaintiff must prove three elements: (1) the plaintiff conferred a benefit upon the defendant; (2) the defendant had an appreciation or knowledge of the benefit; and (3) the defendant accepted or retained the benefit under

identity cases in which the receipt of a benefit gives rise to a liability in restitution.

Courts in some jurisdictions refer to checklists of factors, such as the following, to

than if the transaction with the claimant had never taken place. See § 50(3) (Id.).

imposition of a liability that leaves an innocent recipient worse off, apart from costs of litigation, (S 3, 51 (Ennals v. Esdaile, No. 5, 2007)), but principles of unjust enrichment will not support the Restitution may strip a wrongdoer of all profits gained in a transaction with the claimant expenditure or a discharged obligation is no less beneficial to the recipient than a direct transfer.

may take any form, direct or indirect. It may consist of services as well as property. A saved the recipient's wealth. Subject to that limitation, the benefit that is the basis of a restitution claim Restitution is concerned with the receipt of benefits that yield a measurable increase in measuring liability by the extent of the benefit.

of restitution identifies those circumstances in which a person is liable for benefits received, which a person is liable for injury inflicted, measuring liability by the extent of the harm; the law the consequences of their interaction should be. The law of torts identifies those circumstances in with the consequences of transactions in which the parties have not specified for themselves what in the same way that torts is the law of nonconsensual and nonbargained harms. Both subjects deal *of benefits conferred*. Restitution is the law of nonconsensual and nonbargained benefits

context

as synonymous. Any more particular meaning that the words may carry should be clear from the a body of legal doctrine, the terms "restitution" and "unjust enrichment" will generally be treated overlapping topics treated herein. When used in this Restatement to refer to a theory of liability or synonyms, but to convey as clearly and immediately as possible an accurate idea of the present Restatement incorporates both terms—not to imply that they are correlatives, much less which involve a legal restitution in the sense of restoration or giving back. The title of the word to refer to this set of legal obligations and their associated remedies, some but not all of

1 question presented, making the rest of the formula superfluous. The second element, the
2 defendant's "appreciation or knowledge of the benefit," is both mysterious and potentially
3 mischievous. If the requirement is taken to mean that a defendant cannot be liable in restitution
4 for benefits of which the defendant was unaware—or for benefits that the defendant attempted to
5 refuse—it is plainly incorrect. If it refers to defensive limitations on a liability based on unjust
6 enrichment, it is both redundant (in light of the third element) and an awkward summary of
7 several features of the law of restitution that protect the defendant's economic liberty.

8 (Some jurisdictions invoke a similarly formulaic test to identify the circumstances in
9 which a restitution claimant is entitled to the remedy of constructive trust. The checklist approach
10 is poorly suited to this task as well. See § 55, Reporter's Note to Comment *a* (Tentative Draft No.
11 6, 2008).)

12 *e. Liability and remedy.* The fact that the word "restitution" is used to designate both
13 liabilities and remedies for unjust enrichment leads to a series of common misunderstandings.

14 (1) Even when it is clear that the word "restitution" refers to a remedy, the fact that
15 restitution can take such different forms may leave its meaning uncertain. Restitution restores
16 something to someone, or restores someone to a previous position. It may do the former by
17 restoring the very property that the claimant gave up, or by granting substitute property rights
18 (other than money). It may restore someone to a previous position by restoring property, or a
19 substitute, or by granting the equivalent in money of something to which the claimant is entitled.
20 This range of possible meanings encourages further verbal qualifications: lawyers speak of
21 "restitution in specie" or "specific restitution" to distinguish such remedies from what is
22 sometimes called "restitution of value." References to "specific restitution" are themselves
23 ambiguous. Sometimes the expression is used to describe a remedy that restores the identical
24 asset that the claimant has lost, while at other times it describes a remedy that gives substitute
25 rights in specific property as opposed to a money judgment. This Restatement attempts to
26 minimize confusion on this score by avoiding the term "specific restitution," except when the
27 claimant recovers the very thing that was lost. (Some prominent examples of "specific restitution"
28 by this narrow test—such as actions for replevin and ejectment—are outside the scope of this
29 Restatement altogether. See Comment *g*.) The broader set of remedies that is sometimes and more
30 loosely called "specific restitution" (or what English writers call "proprietary restitution") appears
31 in this Restatement under the heading "Restitution via rights in identifiable property" (§§ 54-61
32 (Tentative Draft No. 6, 2008 and this draft, *supra*))

33 (2) The fact that the word "restitution" can also mean "restoration of someone to a
34 rightful position" means that restitution is sometimes confused with a remedy in damages. The

1 problem may be seen in cases of employment discrimination, where courts have sometimes
2 reasoned that an award of either “back pay” or “front pay” (meaning compensation for lost
3 earnings, whether past or prospective) could be characterized as “a form of restitution.” (The next
4 step in this reasoning—that because a money award is “restitutionary” it should be treated as
5 “equitable”—is even more questionable. See § 4, Comment c.)

6 Another context in which the word “restitution” means something closer to “damages” is
7 a product of statutes authorizing compensation to victims as a part of criminal sentencing. It is a
8 natural use of the language to speak of requiring a criminal to “make restitution”; the problem is
9 that the liability imposed in such cases is not based on unjust enrichment but on compensation for
10 harm. To the extent that this aspect of criminal sanctions has a basis in civil obligations, it is
11 found in tort rather than restitution.

12 (3) Finally and most generally, the choice of the word “restitution” as the name for the
13 subject has led to a common misconception about what “the law of restitution” involves. This is
14 the idea that restitution is essentially a *remedy*, and that the remedy of restitution is a device
15 available in appropriate circumstances—as an alternative to damages—to enforce obligations
16 derived from torts, contracts, and other topics of substantive law. If the 1937 Restatement of
17 Restitution had instead been called the Restatement of Unjust Enrichment, it would be easier to
18 see that the subject is a primary category of obligations, analogous in this respect to tort or
19 contract. A liability in unjust enrichment (restitution) is enforced by restitution’s characteristic
20 remedies, just as a liability in contract is enforced by what we think of as contract remedies; and a
21 claim in unjust enrichment (restitution) is subject to characteristic defenses. (Remedies in
22 restitution are described in Chapter 7 (Tentative Draft No. 5, 2007; Tentative Draft No. 6, 2008;
23 this draft, *supra*, and the Appendix, *infra*). Defenses in restitution are described in Chapter 8.)

24 Particular contexts invite further qualification. There are remedies for breach of contract
25 that have frequently been called “restitution” and have sometimes been explained in terms of
26 unjust enrichment. This Restatement describes them as alternative remedies for breach of an
27 enforceable contract (avoiding altogether the word “restitution”), and rejects the supposed
28 connection with principles of unjust enrichment. See Chapter 4, Topic 2, Introductory Note and
29 §§ 37-38 (Tentative Draft No. 3, 2004 and the Appendix, *infra*). A claim for restitution (or
30 “disgorgement”) of the profits of conscious wrongdoing (§§ 3, 40-44 (Tentative Draft No. 4,
31 2005)) incorporates substantive elements of a cause of action for tort, breach of fiduciary duty, or
32 infringement of intellectual property, and some scholars prefer to characterize the claim in
33 restitution as an alternate remedy for the underlying wrong. Nothing practical turns on this
34 disagreement except the identification of the applicable period of limitations (see § 70, Comment

e), and the history of the field rebuts any suggestion that there is only one way such a claim may properly be pleaded. Ordinarily, a complaint that alleges profitable wrongdoing by the defendant states a claim for restitution of unjust enrichment as well as a claim for damages in tort, whether or not it employs the language by which the claim to the defendant's profits would be described in this Restatement.

f. *Restitution and fault.* Liability in restitution is often independent of fault. There are prominent instances of unjust enrichment in which a negligent claimant recovers from a blameless defendant. At other points within the subject, the defining feature of unjust enrichment is that it results from the defendant's wrongful act (§ 3). Fault on the part of either claimant or defendant may be relevant to the measure of liability in unjust enrichment (§§ 50-52). Tentative Draft No. 5, 2007)) and to other features of restitutionary remedies.

g. *Topics omitted or treated elsewhere.* This Restatement makes little or no reference to some important legal relationships that might plausibly be classified under the headings of "restitution," "unjust enrichment," or both. A combination of historical, theoretical, and practical factors explains these omissions.

As already noted (see Comment c), there are instances of "restitution" that fall outside the scope of "restitution and unjust enrichment" on any conventional definition, despite the fact that (i) the remedy plainly involves a restitution in the literal sense of restoration or giving back, and moreover (ii) the liability in question might logically be explained in terms of unjust enrichment, inasmuch as the defendant would be unjustly enriched if the remedy were denied. Examples include an owner's right to recover a stolen chattel in specie, or to recover its value in money; an owner's right to recover possession of real property from a trespasser; a bailor's right to recover a chattel from a bailee; and a lender's right to payment of a debt.

Such cases are not usually classified as part of either "restitution" or "unjust enrichment." Though they correspond fully to the plain meaning of both terms. The reasons are essentially historical. "Restitution" in any of the cases mentioned was unmistakably available by a well-established action at law, long before the idea of a liability based on unjust enrichment was ever thought of or described. Equivalent actions protecting the same property and contract rights are available today; they are the immediate resort of any lawyer confronting such a problem, and they yield widely accepted solutions. The judges and scholars whose work gave rise to the modern law of unjust enrichment did not attempt to elaborate an enrichment-based explanation of rights that were uniformly and adequately understood and explained in terms of property, contract, and tort. Other omissions stem from the fact that particular instances of a liability based on unjust enrichment have become so closely associated with more specialized legal topics that it would

a liability in restitution. Compare Restatement of Restitution § 1, which is reproduced with only a slight change of wording—in recognition of its wide influence in American law and elsewhere. (Section 1 of the original Restatement has reportedly been cited in more judicial

REPORTER'S NOTE

restoration principles under discussion. whenever such examples serve to demonstrate the rationale and reach of the common-law illustrations based on these and similar topics, with cross-references to the relevant statutes. (Commercial Code (see § 6, Tentative Draft No. 1, 2001)). This Restatement includes property (see § 42, Comment c (Tentative Draft No. 4, 2005)) and Article 3 of the Uniform (Comment f). Federal statutes permitting recovery of profits from infringement of intellectual on its interpretation. Important examples include the federal Bankruptcy Code (see § 60, restitutionary principles incorporated (more or less directly) in a statute will shed valuable light accompanying decisional law. It is frequently the case, however, that an understanding of the regulate, and at such points the lawyer's first recourse must be to the relevant statutes and the States displace an analysis in common-law restitution of the particular points that they

Property or Trusts have been left primarily to the Restatements of those subjects. Guaranty. In the same way, certain well-known problems of restitution arising in the context of Restatement does not repeat the more specialized treatment of Restatement Third, Suretyship and indemnification, subrogation, and contribution) all enforce a liability in restitution; but the present not been specified by contract, the characteristic remedies of the law of suretyship (exoneration, Some restitution topics have been left primarily to other Restatements. Where they have

insisted to the materials of federal securities law. that Section but anyone requiring a detailed discussion of insider trading will appropriately turn included as Illustration 9 to § 43 (Tentative Draft No. 4, 2005), as a means to show the scope of through a breach of a confidential relationship. (The paradigm insider-trading case has been purportedly seek to recover profits realized through misappropriation of protected information or currently built on a foundation of restitution theory, inasmuch as the penalties for insider trading appears only at the margins of this Restatement. In the same way, the law of "insider trading" is fraudulent conveyance—although a core example of "restitution and unjust enrichment"— (2007). As it is, the topic is extensively regulated by both state and federal statutes, so that subject, cases of fraudulent conveyance would be a principal focus of § 48 (Tentative Draft No. 5, principles of unjust enrichment and associated equitable remedies. Where there no statutes on the example, the law of fraudulent conveyance (or "fraudulent transfer") is obviously based on serve no practical purpose to give them extensive treatment in this more general work. For

1 opinions than all of its other Sections combined.) If § 1 could be written today on a clean slate, it
 2 would be revised to omit the word “restitution” altogether—thereby circumventing the difficulties
 3 mentioned in Comment c.

4 The scope of the legal subject-matter designated by the name “restitution” has proven
 5 more controversial than the name, among English and Commonwealth writers in particular. On
 6 this question of taxonomy, the present Restatement follows the 1937 Restatement without
 7 apology. The set of topics comprised within this Restatement (like the previous one) may not self-
 8 evidently constitute a single subject—let alone a subject that ought to be called “restitution”—but
 9 the organization is at least defensible. More to the point, it is the set of topics that this
 10 Restatement inherits from its predecessor, and that American lawyers familiar with the subject of
 11 “restitution” will expect to find under that name.

12 For the most pointed criticism of the scope and organization of this Restatement—
 13 because the remarks are specifically directed at this project—see Birks, “A Letter to America:
 14 The New Restatement of Restitution,” *Global Jurist Frontiers*, vol. 3, no. 2, art. 2 (2003),
 15 available at <http://www.bepress.com/gj/frontiers/vol3/iss2/art2> (last visited Mar. 2, 2010). By
 16 contrast, treatises on restitution by Commonwealth authors— which share a common source with
 17 this Restatement in the original Restatement of Restitution (1937)—tend to take the same view of
 18 the subject adopted here. See Goff & Jones, *Law of Restitution* ch. 1 (7th ed. 2007); Maddaugh &
 19 McCamus, *Law of Restitution* ch. 3 (loose-leaf ed. 2008); Mason, Carter & Tollhurst, *Restitution*
 20 *Law in Australia* ch. 1 (2d ed. 2008).

21 For contrasting theoretical approaches by contemporary U.S. writers see, e.g., Gergen,
 22 *What Renders Enrichment Unjust?*, 79 *Tex. L. Rev.* 1929 (2001); Gordley, *Foundations of*
 23 *Private Law* chs. 19-21 (2006); Levmore, *Explaining Restitution*, 71 *Va. L. Rev.* 65 (1985);
 24 Linzer, *Rough Justice: A Theory of Restitution and Reliance, Contracts and Torts*, [2001] *Wis. L.*
 25 *Rev.* 695; Rogers, *Restitution for Wrongs and the Restatement (Third) of the Law of Restitution*
 26 *and Unjust Enrichment*, 42 *Wake Forest L. Rev.* 55 (2007); Sherwin, *Restitution and Equity: An*
 27 *Analysis of the Principle of Unjust Enrichment*, 79 *Tex. L. Rev.* 2083 (2001); Wonnell,
 28 *Replacing the Unitary Principle of Unjust Enrichment*, 45 *Emory L.J.* 153 (1996).

29 An incomparably more extensive literature on the theory of restitution and unjust
 30 enrichment has been produced in recent decades by scholars outside the United States. Useful
 31 starting-points (from which the reader may discover the rest of a constantly expanding
 32 bibliography) include Birks, *Unjust Enrichment* (2d ed. 2005); Burrows, *The Law of Restitution*
 33 (2d ed. 2002); Dagan, *The Law and Ethics of Restitution* (2004); Hedley, *A Critical Introduction*
 34 *to Restitution* ch. 1 (2001); Nadler, *What Right Does Unjust Enrichment Law Protect?*, 28 *Oxford*
 35 *J.L.S.* 245 (2008); *Philosophical Foundations of the Law of Unjust Enrichment* (Chambers,
 36 Mitchell & Penner eds. 2009).

37 *b. Unjust enrichment.* The term “unjust enrichment” is too firmly fixed as the keystone of
 38 American restitution to be replaced without damage to the structure. Given a free choice,
 39 “unjustified enrichment” might be preferable, for reasons suggested in the Comment. The term
 40 “unjustified enrichment” exists in common academic usage, but chiefly in English-speaking
 41 jurisdictions having a closer relation to the civil-law tradition. See, e.g., Clive, *Draft Rules on*
 42 *Unjustified Enrichment and Commentary* 19-20 (1994) [published by the Scottish Law
 43 Commission as an appendix to its Discussion Paper No. 99, *Judicial Abolition of the Error of*
 44 *Law Rule and Its Aftermath*]; Johnston & Zimmermann, *Unjustified Enrichment: Surveying the*
 45 *Landscape*, in *Unjustified Enrichment: Key Issues in Comparative Perspective* 3-33 (Johnston &
 46 Zimmermann eds. 2002); Visser, *Unjustified Enrichment* (2008) (South Africa). One reason is
 47 that “unjustified enrichment” makes an approximate translation of both the German
 48 *ungerechtfertigte Bereicherung* (BGB § 812) and the French *enrichissement sans cause*. In the
 49 statute law of Louisiana, the source of what is here called a liability in restitution is described as
 50 an “enrichment without cause.” *La. Code Civ.* § 2298. As expressed in Canadian law, a claim in
 51 restitution requires that the plaintiff establish an enrichment, a corresponding deprivation, and

“the absence of any juristic reason . . . for the enrichment.” *Rathwell v. Rathwell*, [1978] 2 S.C.R. 430, 435.

A century ago, unjust enrichment as a legal principle might still be caricatured (by Lord Sumner) as “that vague jurisprudence which is sometimes attractively styled ‘justice between man and man.’” *Baylis v. Bishop of London*, [1913] 1 Ch. 127, 140. It may still be necessary, on occasion, to defend the law of restitution against such misconceptions. “The doctrine of unjust— or, as it is sometimes called, unjustified— enrichment is not a synonym for a type of ‘palm tree justice’ by which every unjust displacement of wealth from one person to another can be remedied. *Kane v. Motor Vessel Leda*, 355 F. Supp. 796, 803 (D. La. 1972) (Rubin, J.), citing Nicholas, *Unjustified Enrichment in the Civil Law and Louisiana Law*, 36 Tulane L. Rev. 605, 607 (1962). (The expression “palm-tree justice,” a creation of English lawyers, appears to have inspired Justice Frankfurter’s impatient remark that “[t]his is a court of review, not a tribunal unbounded by rules. We do not sit like a kadi under a tree dispensing justice according to considerations of individual expediency.” *Fermicello v. Chicago*, 337 U.S. 11 (1949).)

As a generalization that is much closer to the mark, “The law of restitution” could be defined as the set of rules that deals with the noncontractual shifting of wealth.” Huber, *Mistaken Transfers and Profitable Infringement on Property Rights: An Economic Analysis*, 49 La. L. Rev. 71 (1988). See also Kull, *Restitution and the Noncontractual Transfer*, 11 J. Contract Law 93 (1997).

c. Restitution and restoration. Before a last-minute editorial change, the 1937 *Restatement of Restitution* was going to be known as the “Restatement of Restitution and Unjust Enrichment.” The American Law Institute originally planned to address the subject of constructive trusts as a topic within the Restatement of Trusts, and to sponsor a separate Restatement of Quasi-contract, before deciding that these topics would be better treated together. The story is summarized by Kull, James Barr Ames and the Early Modern History of Unjust Enrichment, 25 *Oxford J. Legal Stud.* 297, 299-302 (2005).

See Murphy, *What is Specific About “Specific Restitution”?*, 60 *Hastings L.J.* 853 (2009) (emphasizing the inconsistent use of the term in previous drafts of this Restatement).

(On the fundamental differences between restitution as the law of unjust enrichment and the “restitution” mandated by statutes protecting crime victims, see *United States v. Amato*, 540 F.3d 153 (2d Cir. 2008); *State v. Dillon*, 292 Ore. 172, 637 P.2d 602 (1981).)

d. Benefits conferred. The formula describing liability for unjust enrichment is quoted from *S & M Rotogravure Serv., Inc. v. Baer*, 77 Wis. 2d 454, 460, 252 N.W.2d 913, 916 (1977). The origin of such receipts—in particular, the requirement that the defendant “appreciate” of the benefit—is decidedly obscure. The reference to “appreciation” may mean simply that a defendant will not be liable in restitution for a benefit the defendant had the right (but not the opportunity) to refuse. See *Federal Ins. Co. v. Maine Yankee Atomic Power Co.*, 183 F. Supp. 2d 76, 82 n.8 (D. Me. 2001). If the words are interpreted to mean that there is no liability in restitution for a benefit that the defendant is unaware of receiving, they can lead to serious error. See *Buckett v. Janic*, 767 N.W.2d 376 (Wis. Ct. App. 2009), holding (in accordance with § 7(1)) (“*Equative Draft* No. 1, 2001”) that a defendant whose property taxes had been paid by mistake might be liable in restitution to the mistaken payer. Relying on the list of factors quoted in the text, the trial court had erroneously held that there could be no unjust enrichment because defendant had no knowledge of the payments at the time.

There is an understandable temptation to limit the far-reaching notion of unjust enrichment within the manageable confines of a checklist, but the attempt usually leads to trouble. See *DCB Construction Co. v. Central City Development Co.*, 965 P.2d 115, 118-120 (1998) (reconsidering its earlier checklist, which included the element of “appreciation,” and substituting a shorter one). For another example see *Lasalle Nat’l Bank v. Perelman*, 82 F. Supp. 2d 279, 294-295 (D. Del. 2000) (“The elements of unjust enrichment are: 1) an enrichment, 2) an impoverishment, 3) a relation between the enrichment and the impoverishment, 4) the absence of

1 justification and 5) the absence of a remedy provided by law"). The first four elements of this list
2 might make a plausible definition, though the reference to "impoverishment" is too narrow: there
3 is often no "impoverishment" other than a violation of the claimant's rights. The fifth element is
4 plainly erroneous, since so much of unjust enrichment is legal in origin. See § 4

5
6 *e. Liability and remedy.* The confused view that "restitution" is merely a remedy appears
7 to result from a historical accident in the American law-school curriculum. The modern course in
8 Remedies was created by combining elements of traditional courses in Damages, Equity, and
9 Restitution. See Laycock, *How Remedies Became a Field: A History*, 27 *Rev. Litig.* 161 (2008).
10 The new course absorbed those parts of Equity and Restitution that could plausibly be described
11 as remedies, but abandoned the rest. Some of the substantive law of equity found its way into
12 courses on Trusts and Estates. But no one picked up the great bulk of the law of restitution,
13 exploring unjust enrichment as a principle of substantive liability; that material dropped out of the
14 standard curriculum and quickly became unfamiliar to American lawyers, including law
15 professors. Much of the substantive law of equity—in particular, the law describing equitable
16 interests in property held by another—suffered the same fate.

APPENDIX B

COURT OF APPEALS
THE STATE OF WASHINGTON
DIVISION II

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.

NO. 35046-7-II

**APPELLANTS' MOTION FOR
RECONSIDERATION OR
CLARIFICATION**

I. IDENTITY OF MOVING PARTY

Appellants Henry and Jane Dragt ("Dragt") request the relief designated in Part II.

II. STATEMENT OF RELIEF SOUGHT

Dragt moves for clarification and/or reconsideration of the Court's decision to remand for "findings regarding the reasonable value of the benefit for the services DeTray conferred upon the Dragts." Opinion, p. 16.

III. FACTS RELEVANT TO MOTION

Dragt and Paul DeTray ("DeTray") entered into a written agreement (the "Agreement") that created Dragt/DeTray LLC (the "LLC") in 1996. Opinion, p. 1. The parties formed the LLC for the purpose of developing Dragt's real property in Yelm, Washington. *Id.* As stated by this Court, DeTray agreed to front the costs and to provide his expertise to develop the Dragts' land. With regards to DeTray's provision of his expertise and personal services, the Agreement specifically provided:

In return for his skill, services, and expertise in development, marketing, management and sales, DeTray shall be entitled to receive an amount equal to the amount of his development costs attributed to each acre, or fraction thereof. DeTray shall receive his overhead and administrative costs at the rate of thirty three and one-third percent (33 1/3%) of the total development costs, including land costs.

Ex. 178, at 14-15, ¶ 9.7.

In its Opinion in this matter, this Court found that DeTray was entitled to an award of unjust enrichment:

Unjust enrichment encompasses the doctrine of quantum meruit. *Bort v. Parker*, 110 Wn. App. 561, 580-81, 42 P.3d 980 (2002). Quantum meruit literally means as much as deserved and is a remedy for restitution for a reasonable amount of work or services. *Douglas NW., Inc. v. Bill O'Brien & Sons Constr., Inc.*, 64 Wn. App. 661, 683, 828 P.2d 565 (1992); *Eaton v. Engelcke Mfg., Inc.*, 37 Wn. App. 677, 680, 681 P.2d 1312 (1984). Generally a party relying on quantum meruit may recover the *reasonable value* of the benefit their services conferred upon the defendant. *Bort*, 110 Wn. App. at 580-81. Unjust enrichment and quantum meruit are related doctrines; the former is a broader concept that encompasses the latter. *Bailie Commc'ns*, 61 Wn. App. at 160.

All three elements of unjust enrichment are met here. First, the Dragts received a benefit from DeTray because DeTray paid mortgage payments and other land expenses when the Dragts did not have sufficient funds to continue making the payments. Second, the Dragts were aware that DeTray made the payments. Third, they benefited from the payments by continuing to own land of increasing value. DeTray should receive compensation for his financial contributions.

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.

Opinion, p. 15-16. The Court found that DeTray was entitled to unjust enrichment, despite DeTray's election not to pursue this theory before the trial court below, electing instead to pursue an erroneous contract theory.

The Court then remanded to the trial court as follows:

The [trial] court awarded DeTray \$2,067,773.88 at trial although DeTray's financial contributions only amounted to \$593,462 based on the breach of fiduciary duty and breach of contract claims. 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.

Opinion, p. 16.

IV. GROUNDS FOR RELIEF AND ARGUMENT

In its Opinion, this Court agreed with Dragt that no contractual grounds for relief existed but found that DeTray was entitled to an award arising from unjust enrichment. Opinion, p. 14. This Court's opinion, however, appears to leave several open questions that should be clarified or reconsidered prior to remand to the trial court. First, whether DeTray is entitled to any restitution award for the value of any *services* (exclusive of payments DeTray made for the mortgage, sewer connection, consultant reports and designs, and access to a water treatment facility) he contributed to the LLC. Second, whether DeTray is entitled to any restitution award for

the value of any capital contributions he made to cover *development costs*, specifically, consultant reports and designs, sewer connection, and access to a water treatment facility. Pursuant to RAP 12.4, Dragt asks for clarification and/or reconsideration of the Court's Opinion.

Dragt respectfully requests that this Court clarify whether on remand DeTray will be entitled to receive any restitution award for the value of the services or development costs he provided to the LLC. If the answer is yes, Dragt requests that this Court reconsider this decision as it is contravention of long standing Washington law.

A party to a contract is bound by the provisions of its contract and may not disregard that contract and bring an action on an implied contract relating to the same matter. The Agreement at issue specifically addressed DeTray's rights regarding compensation for his capital contributions for development costs and his provision of personal services to the LLC. DeTray is not entitled to disregard these provisions to receive a restitution award for services and costs specifically addressed by the Agreement.

An express contract is formed when the intentions of the parties and the terms of the agreement are expressed by the parties in writing or orally when the contract is made. *Eaton v. Engelcke Mfg., Inc.*, 37 Wn. App. 677,

680, 681 P.2d 1312 (1984). In contrast, there are two types of implied contracts: contracts implied in fact and contracts implied in law. *Id.* A contract implied in fact describes the same legal relationship as an express contract, but the mode of proof is different. *Id.* A contract implied in fact is not at issue here.

A contract implied in law, or “quasi contract,” may exist where there is no contract, agreement, or consent, but where the retention of a benefit received by one party would constitute unjust enrichment. *Id.* A party to an express contract, however, is bound by the provisions of that contract, and may not disregard the contract and bring an action on an implied contract relating to the same subject matter, in contravention of the express contract. *Id.* at 604; *see Douglas N.W., Inc. v. Bill O'Brien & Sons Constr., Inc.*, 64 Wn. App. 661, 683, 828 P.2d 565 (1992) (“A claim in quantum meruit is properly dismissed as a matter of law where that same claim is covered by specific remedial provisions under the contract.”); *Wash. Ass'n of Child Care Agencies v. Thompson*, 34 Wn. App. 235, 251, 660 P.2d 1129 (1983) (“[T]o the extent plaintiff agencies provided services pursuant to an express contract, quantum meruit is not available”); *Spectrum Glass Co., Inc. v. PUD No. 1 of Snohomish County*, 129 Wn. App. 303, 119 P.3d 854 (2005) (“A

party to a valid express contract is bound by the provisions of that contract, and may not disregard the same and bring an action on an implied contract relating to the same matter, in contravention of the express contract.”).

The Agreement governs the parties’ relationship where that Agreement is enforceable and on point. Here, the Agreement specifically provided for under what circumstances DeTray would be entitled to any compensation for the personal services he provided to the LLC or any capital contributions he made to the LLC to cover development costs (exclusive of mortgage payments he made). As the conditions for DeTray to receive compensation for either his personal services or contributions to cover development costs did not occur, DeTray is not entitled to any compensation for his services or the development costs he covered. This is the bargain that the parties struck. DeTray is therefore not entitled to any compensation for the services he provided, except as provided for under the Agreement.

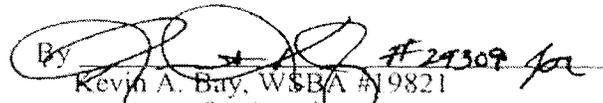
It bears noting that even if this Court is remanding for a determination of the value of any services (separate from any monetary costs) DeTray provided, there is no record below upon which to base such an award. Possibly because DeTray was pursuing a breach of contract theory, at trial in this matter, DeTray presented absolutely no evidence

establishing any hours or the value of any services he contributed to the LLC. Therefore, remand for a determination of the value of DeTray's services would not only be improper, but pointless as no such evidence was presented to the trial court at trial.

For the reasons stated above, this Court should clarify to what extent DeTray is entitled to any award of restitution on remand.

DATED this 23rd day of July, 2007.

RYAN, SWANSON & CLEVELAND, PLLC

By  #29309
Kevin A. Bay, WSBA #19821
Attorneys for Appellants

1201 Third Avenue, Suite 3400
Seattle, Washington 98101-3034
Telephone: (206) 464-4224
Facsimile: (206) 583-0359
bay@ryanlaw.com

DECLARATION OF SERVICE

I declare that on the 23rd day of July 2007, I caused to be served the foregoing document on counsel for respondents, as noted, at the following addresses:

R. Alan Swanson, Esq.
R. Alan Swanson, PLLC
908 5th Avenue SE
Olympia, WA 98501

David John Corbett, Esq.
Robert G. Casey, Esq.
Eisenhower & Carlson, PLLC
1201 Pacific Avenue, Suite 1200
Tacoma, WA 98402



Marcia M. Jacobson

Dated: July 23, 2007

Place: Seattle, WA

APPENDIX C

COURT OF APPEALS
THE STATE OF WASHINGTON
DIVISION II

RECEIVED
CLERK OF COURT
STATE OF WASHINGTON

HENRY DRAGT and JANE
DRAGT, husband and wife,

Appellants,

v.

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

Respondents.

NO. 35046-7-II

RESPONDENTS' ANSWER
TO APPELLANTS' MOTION
FOR RECONSIDERATION
OR CLARIFICATION

I. INTRODUCTION

Respondents E. Paul DeTray and Phyllis DeTray ("DeTray") respectfully submit this Answer to Appellants' Motion for Reconsideration or Clarification ("Motion"). The Court's Opinion in this matter is supported by both the law and the record below, and Appellants' arguments to the contrary are unpersuasive. The Court should deny the Motion.

II. RESTATEMENT OF FACTS

1. DeTray's Expenditures on Development of the Dragt Property

By the time the Dragts sold their Yelm property (the "Property") to a third party, Paul DeTray had invested more than \$593,000 in its development. Opinion, p. 16. DeTray's expenditures included \$280,000 for mortgage payments on the Property; \$124,371 for sewer connections;

RESPONDENTS' ANSWER TO APPELLANTS'
MOTION FOR RECONSIDERATION OR
CLARIFICATION - 1

00366220.DOC

COPY

\$120,000 for the right to access a wastewater treatment facility, and \$69,000 for consultant reports and designs. *Id.*

Thanks to DeTray's mortgage payments, the Dragts were able to "continu[e] to own land of increasing value." Opinion, p. 16. Moreover, when the Dragts sold out to Tahoma Terra, LLC, the Property sold was defined to include "any and all 'Permits and Plans' . . . deposits, governmental permits, approvals, licenses, easements, and . . . surveys, architectural and engineering drawings and plans, consultant reports, appraisals, design work, soils tests and studies which related to the Real Property." Exhibit 176, p. 1. The Dragts' sale of the Property and permits to Tahoma Terra thus gave Dragt the benefit of all of DeTray's expenditures and efforts, and left DeTray empty-handed.

2. Procedural Posture Below.

The Dragts misstate the procedural history of this case. In particular, it is not true that DeTray "elect[ed] not to pursue" a claim of unjust enrichment before the trial court. *Cf.* Motion, p. 4. DeTray pled unjust enrichment in his Answer, Affirmative Defenses, and Counterclaims, CP 405-406. Furthermore, DeTray clearly presented his claim for unjust enrichment in his trial brief, CP 472-73. At the conclusion of the trial, Judge Hicks requested that the parties submit proposed findings of fact and conclusions of law covering both breach of contract and unjust enrichment, and DeTray did so. RP (3/2/2006) 44, 49, CP 514-522, 870-879.

Although DeTray's post-trial submission recommended that the trial court base its ruling on breach of contract principles, he reiterated his entitlement to a remedy for unjust enrichment in the event the court found the contract to be invalid. CP 514-522. Ultimately, Judge Hicks chose to base his holding on breach of contract. CP 880-889. Although this Court has held that the trial court erred on this point, and that the Dragts did not breach any contract when they sold their property to Tahoma Terra, there is no support for the Dragts' implication that DeTray waived his right to pursue a remedy for unjust enrichment.¹

III. ARGUMENT AND AUTHORITY

The Dragts make two distinct contentions in their Motion. First, they assert that DeTray may not recover in unjust enrichment for either his expenditures on development costs or his personal services because compensation for these contributions remains regulated by a valid contractual provision. Motion, pp. 4-7. Second, they maintain that remand for determination of the value of DeTray's services would be "pointless" because of the lack of evidence on the issue. Motion, pp. 7-8. Neither of these contentions withstands scrutiny.

1. There is no valid contractual provision barring DeTray's recovery for unjust enrichment.

DeTray acknowledges the general principle that "[a] party to a valid express contract is bound by the provisions of that contract, and may

¹ DeTray pled unjust enrichment in the alternative in his Respondents' Brief to this Court. Respondents' Brief, pp. 45-46.

not disregard the same and bring an action on an implied contract relating to the same matter, in contravention of the express contract.” *Chandler v Washington Toll Bridge Authority*, 17 Wn.2d 591, 604, 137 P.2d 97 (1943) (emphasis added).² However, this principle does not bar DeTray’s recovery for unjust enrichment for two reasons. First, with the failure of the option, there is no valid express contract between the parties. Second, even if parts of the LLC Agreement remained in force following the failure of the option, none of those parts is “contravened” by DeTray’s recovery in unjust enrichment.

The failure of the option, taken together with Dragt’s unilateral decision to sell the property to Tahoma Terra and this Court’s determination that the parties did not modify the LLC Agreement by their subsequent conduct, means there simply is no valid contractual agreement between the parties. The failure of the entire LLC Agreement follows from the lack of consideration flowing from Dragt to DeTray in what is left of the LLC Agreement once the option is taken away. *See, e.g., King v. Riveland*, 125 Wn.2d 500, 505, 886 P.2d 160 (1994) (noting that “[e]very contract must be supported by a consideration to be enforceable”). With the option invalid and the property sold to a third party, there is simply no consideration flowing from the Dragts to DeTray to support a contract, and the entire LLC Agreement fails.

² The Dragts’ attribution of this quotation to *Spectrum Glass Co., Inc. v. PUD No. 1 of Snohomish County*, 129 Wn.App. 303, 119 P.3d 854 (2005) is mistaken, as this case does not include the quote, nor does it deal with a claim of unjust enrichment.

Even if there were legally sufficient consideration to support what is left of the LLC Agreement after the failure of the option, nothing in the remainder of the Agreement bars DeTray from recovering in unjust enrichment. In particular, there is “no specific remedial provision[] under the contract” which covers a sale by the Dragts to a third party. *Douglas Northwest, Inc. v. Bill O’Brien & Sons Constr. Inc.*, 64 Wn. App. 661, 683, 828 P.2d 565 (1992).

According to the Dragts, DeTray’s recovery in unjust enrichment is barred by Paragraph 9.7 of the LLC Agreement. Motion, p. 2, 7. That paragraph provides in relevant part as follows:

Additional Allocations. Before allocation of Net Profit or Loss according to Section 9.1.1, the Members, currently known individually as Dragt and DeTray, shall share in Company profits according to this Section 9.7 In return for his skill, services, and expertise in development, marketing, management and sales, DeTray shall be entitled to receive an amount equal to the amount of his development costs attributed to each acre, or fraction thereof. DeTray shall receive his overhead and administrative costs at the rate of thirty three and one-third percent (33 1/3%) of the total development costs, including land costs.

Ex. 178, at 14-15, ¶ 9.7. However, this paragraph is silent about whether DeTray would be entitled to compensation from the Dragts if the Dragts refused to turn the property over to the LLC and instead sold it to a third party. This eventuality was simply not contemplated by the parties when they formed the LLC Agreement. *Cf.* Opening Brief of Appellants, p. 9 (asserting that “both Dragt and DeTray mistakenly believed the option was valid when they signed the LLC Agreement, and for more than eight years

thereafter”). Moreover, one cannot logically infer from this paragraph (or anything else in the LLC Agreement) that there was any implicit agreement that the Dragts could take the benefit of DeTray’s expenditures and efforts, sell the property to a third party, and leave DeTray with nothing. That DeTray would get certain compensation upon satisfaction of a condition (profitable development of the project) by no means necessarily implies that failure of the condition—let alone failure of the condition caused by the Dragts’ choices—rules out compensation for DeTray.

Put in abstract terms, there is no necessary inference from “If ‘A,’ then ‘B’” to “Not ‘A,’ therefore ‘Not B.’” If it rains tonight (“A”) the ground will be wet in the morning (“B”). However, if it doesn’t rain tonight (“Not A”), that does not necessarily mean the ground won’t be wet in the morning (“Not B”). A dam could burst, someone could leave a sprinkler on, or any number of other things could occur to cause the ground to be wet despite the lack of rain. The point of this example is simply to show that there is no force to the Dragts’ contention that because the LLC Agreement specified how DeTray was to be compensated if there were profits, it implicitly specifies that DeTray was to receive no compensation if there were no profits. *A fortiori*, there is no merit to the claim that DeTray is contractually barred from compensation when the reason there were no LLC profits is that the Dragts sold the property to a third party. There is neither logic nor evidence to support the contention that “[t]his is the bargain that the parties struck.” Motion, p. 7.

Careful analysis of *Douglas Northwest* and related Washington cases confirms that there is no contractual bar to DeTray's recovering in unjust enrichment. In *Douglas Northwest*, a construction subcontractor was allowed to recover in unjust enrichment from the general contractor on a "labor and equipment inefficiency claim" despite the fact that there was a generally valid contract between the two parties. *Douglas Northwest, Inc.*, 64 Wn. App. at 685. As the Court of Appeals for Division I noted:

After reviewing the contractual provisions relied upon by [the party objecting to the award of unjust enrichment], we are not convinced that any of them specify or require a particular remedy for O'Brien's labor and equipment inefficiency claim When the happening of a condition has been foreseen and a remedy has been provided for its occurrence, the presumption is that the prescribed remedy is the sole remedy. In this case, however, the contract is silent as to the type of remedy available for O'Brien's labor and equipment inefficiency claim. As such, we fail to see how the quantum meruit relief granted by the lower court in this case is inconsistent with the terms of the contract.

Id. (internal citations omitted). *See also Johnson v. Whitman*, 1 Wn. App. 540, 546, 463 P.2d 207 (1969) (noting that "[t]here cannot be an express contract and an implied one relating to the same subject matter and covering all its terms. . . . But there may be an implied contract on a point not covered by an express one").

Just as in *Douglas Northwest*, the LLC Agreement in issue here is silent as to any sort of remedy available to DeTray if the Dragts should sell the property to a third party. The parties clearly did not anticipate this eventuality when they executed the LLC Agreement. RP 2/27/06 at 78; 5-

25; 104; 4-25; 128; 11-14). Accordingly, the LLC Agreement does not prevent this Court from granting DeTray a remedy in unjust enrichment.

Nothing in *Washington Ass'n of Child Care Agencies v Thompson*, 34 Wn. App. 235, 660 P.2d 1129 (1983) or *Chandler v. Washington Toll Bridge Authority*, 17 Wn.2d 591, 137 P.2d 97 (1943) is to the contrary.³ In *Thompson*, a variety of private entities providing foster care to children objected to the reimbursement rates paid by the state pursuant to express written contracts. Some of the entities refused to sign the contracts, but continued to accept placements of children after being informed of the rates. The Court of Appeals for Division II held that by accepting placements after being informed of the reimbursement rate, these entities were bound by a contract implied in fact (a form of "express contract") that incorporated the rate specified by the state. *Thompson*, 34 Wn. App. at 238. It was only in this context that the Court invoked the principle that a party to an express contract "may not bring an action relating to the same matter on a theory of a 'contract' implied by law, in contravention of the express contract." *Id.* As noted above, the Dragts and DeTray simply did not have anything remotely resembling an express agreement regarding compensation in the event the Dragts sold out to a third party, so *Thompson* does not support the Dragts' position.

³ As previously noted, *Spectrum Glass Co. v. P.U.D. No. 1 of Snohomish County*, 129 Wn. App. 303, 119 P.3d 854 (2005) does not appear to have any bearing on the question of the relationship between unjust enrichment and contract theories of recovery. *Cf.* Motion, pp. 6-7.

In *Chandler*, the Washington Supreme Court found that the plaintiff had entered into an express contract with certain franchisees to provide preliminary engineering work for the original Tacoma Narrows bridge. In the event work on the bridge was not commenced by a specified date, the contract explicitly called for the public to be “entitled to the benefit of any of the work which [plaintiff] should have performed by way of preparation of plans, specifications, or similar data.” *Chandler*, 17 Wn.2d at 595.

The franchisees did not commence work on the bridge within the specified time, and the franchise expired by statutory limitation. *Id.* Afterwards, the plaintiff sued the entity that in fact constructed the bridge, arguing that it had utilized his plans and efforts and that he was entitled to an award in *quantum meruit*. *Id.* at 598. The court rejected this claim in so far as it concerned services performed for the franchisees on the grounds that the Toll Bridge Authority was entitled to the benefit of the express contractual covenant leaving plaintiff’s work product to the public. *Id.* at 604. The court then proceeded to articulate the principle on which the Dragts attempt to rely: that “[a] party to a valid express contract is bound by the provisions of that contract, and may not disregard the same and bring an action on an implied contract relating to the same matter, in contravention of the express contract.” *Id.* However valid this principle is in general, it is of no use to the Dragts, because there is no express term in the LLC Agreement that binds DeTray to allow the Dragts

and third parties to benefit from his efforts and investment without compensation.

As this Court noted in its Opinion, Paul DeTray expended considerable sums and substantial efforts to further the development of the project. DeTray's expenditures and efforts enriched the Dragts, and that enrichment was unjust. Even if the LLC Agreement as a whole does not fail for lack of consideration in the wake of the invalidation of the option, it contains no specific contractual provision that bars providing DeTray a remedy based on unjust enrichment. The Dragts' principal argument for reconsideration fails.

2. Remand to determine the value of DeTray's services would not be pointless.

The Dragts also assert that remand for determination of the value of DeTray's services would be pointless because of a lack of relevant evidence. Motion, pp. 7-8. However, the Dragts misunderstand the clear import of the Court's Opinion, which remands for findings "regarding the reasonable value of the benefit for the services DeTray conferred upon the Dragts." Opinion, p. 16 (emphasis added). Clearly, to carry out this task on remand the trial court does not need to determine either the number of hours worked by DeTray on the project or a reasonable hourly rate for his time. Rather, it need only make a determination regarding the value that his services conferred on the Dragts. See, e.g., *Bort v. Parker*, 110 Wn. App. 561, 580-581, 42 P.3d 980 (2002) (noting that the measure of

restitution in *quantum meruit* is the “reasonable value of the benefit conferred upon the defendant”).

This Court has already indicated the proper way to measure the value conferred on the Dragts by emphasizing that the Dragts “benefited from [DeTray’s] . . . payments by continuing to own land of increasing value.” Opinion, p. 16. Just as DeTray’s payments contributed to this benefit, so too did his services (such as, for example, his personal guarantee of the Dragts’ mortgage). The trial court has ample evidence before it indicating the increase in the value of the Dragt property between 1996 and 2004.⁴ On remand, it need only determine, based on all of the evidence before it, what part of this increase in value, if any, is attributable to DeTray’s services, such as his personal guarantee of the Dragts’ mortgage loan and his efforts directed toward keeping the development project moving forward. Alternatively, this Court could clarify that the trial court may take additional evidence on the issue of the value that

⁴ For example, the Declaration of Sharon Medved provides a basis for concluding that the market value of the Property was \$770,000 as of January 8, 1997. CP 548. Moreover, the Dragts did not assign error to the trial court’s Finding of Fact No. 5, which states in pertinent part that “the sale of the Property ‘as is’ [in late 1995] . . . would have resulted in a purchase price of no more than \$280,000.” CP 881. *Cf.* Opening Brief of Appellants, p. 1 (not assigning error to Finding of Fact No. 5). This unchallenged finding, Ms. Medved’s declaration, and other evidence presented at trial, combined with the undisputed value of the sale to Tahoma Terra as set forth in this Court’s Opinion at p. 6, will allow the trial court to determine the appreciation in value of the Property between 1996 and 2004.

DeTray's services conferred on the Dragts. See, e.g., *Waring v. Lobdell*, 63 Wn.2d 532, 534, 387 P.2d 979 (1964).

IV. CONCLUSION

The Court's Opinion, which grants DeTray \$593,462.66 for his expenditures and in addition remands for a determination of the "reasonable value of the benefit for the services DeTray conferred upon the Dragts," is well-supported by both the law and the record below. Opinion, p. 16. Even if parts of the LLC Agreement remain valid after the failure of the option, no "specific remedial provision" in that Agreement bars DeTray from recovering in unjust enrichment for his expenditures and services. *Douglas Northwest, Inc.*, 64 Wn. App. at 683. Moreover, there is no legal or practical difficulty preventing the trial court from determining the value created by DeTray's services. Accordingly, the Court should deny Appellant's Motion for Reconsideration or Clarification.

DATED this 31st day of August, 2007.

R. ALAN SWANSON, PLLC

By: approval to R. Alan Swanson by email
R. Alan Swanson, WSBA # 1181

EISENHOWER & CARLSON, PLLC

By: David J. Corbett
David J. Corbett, WSBA # 30895
Robert G. Casey, WSBA # 14183

Attorneys for Respondents

RESPONDENTS' ANSWER TO APPELLANTS'
MOTION FOR RECONSIDERATION OR
CLARIFICATION - 12

00366220.DOC

COURT OF APPEALS
THE STATE OF WASHINGTON
DIVISION II

RECEIVED
SEP 14 2007
CLERK OF COURT OF APPEALS DIV II
STATE OF WASHINGTON

HENRY DRAGT and JANE
DRAGT, husband and wife,

Appellants.

NO. 35046-7-II

PROOF OF SERVICE

v.

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

Respondents.

I hereby certify that on the 31st day of August, 2007, I served the foregoing
*Respondents' Answer to Appellants' Motion for Reconsideration or
Clarification*, and this *Proof of Service* on the following persons/parties, at
the following addresses, by the following means:

- 1) A copy by ABC Legal Messenger for delivery on September 4,
2007, to:

Kevin Bay
Ryan Swanson & Cleveland PLLC
1201 Third Avenue, Suite 3400
Seattle, Washington 98101

PROOF OF SERVICE



APPENDIX D

Not Reported in P.3d, 134 Wash.App. 1033, 2006 WL 2329471 (Wash.App. Div. 2)
 (Cite as: 2006 WL 2329471 (Wash.App. Div. 2))

H

NOTE: UNPUBLISHED OPINION, SEE RCWA
 2.06.040

Court of Appeals of Washington,
 Division 2.

Judith A. YOUNG, Respondent

v.

James M. YOUNG and Shannon Young, husband and
 wife, Appellants,

State of Washington, Department of Labor and In-
 dustries,^[FN1] Defendant.

[FN1] State of Washington, Department of
 Labor and Industries, was a named party at
 trial but is not a party on appeal.

No. 33248-5-II.

Aug. 11, 2006.

Appeal from Superior Court of Thurston County; Hon.
Gary R. Tabor, J.

Matthew Bryan Edwards, Owens Davies PS, Olympia,
 WA, for Appellants.

Timothy R. Gosselin, Attorney at Law, Tacoma, WA,
R. Alan Swanson, Law Offices of R. Alan Swanson,
 PLLC, Olympia, WA, for Respondent.

UNPUBLISHED OPINION

VAN DEREN, A.C.J.

*1 Jim and Shannon Young appeal the trial court's damages award that it based on what it actually cost Jim and Shannon to improve Judith Young's property.^[FN2] Jim and Shannon lived on and made substantial improvements to Judith's property from 1998 until December 2002, when she insisted that they move off the property. The trial court concluded that Jim's and Shannon's work substantially enhanced the value of Judith's property and that it was unjust for Judith to retain the value of that work without compensating Jim and Shannon. Jim and Shannon argue that (1) the proper measure of damages for unjust enrichment is

the greater of (a) what it would have cost Judith had she hired a third party contractor to perform the work or (b) the enhanced value of the property resulting from the work; and (2) thus, the trial court erred when it awarded damages based on Jim's and Shannon's actual cost to improve the property. We reverse and remand for an award of damages to Jim and Shannon based on the cost of improvements had a third party performed the work.

[FN2] To avoid confusion, we refer to the parties by their first names. Throughout the briefs, James is referred to as Jim, and we therefore adopt the parties' designation. We mean no disrespect.

FACTS

Judith is an independently wealthy aunt of Jim.^[FN3] Judith resides in Georgia on a 200-acre property where she runs an otter conservation facility and maintains several other animals. Jim is married to Shannon and is a licensed and bonded contractor in Washington engaged in the businesses of timber cutting, clearing, grading, dozing, and concrete slab construction.

[FN3] Jim and Shannon do not challenge any of the trial court's findings of fact making them verities on appeal. *Ducolon Mechanical, Inc. v. Shinstone Furness, Inc., et al.*, 77 Wn.App. 707, 714, 893 P.2d 1127 (1995).

Judith developed a close relationship with Jim and Shannon in 1993. In 1997, Judith discussed the possibility of moving to Washington.^[FN4] In 1998, Jim discovered a 186-acre property in Thurston County when he was asked to hay the property. Its owner had listed the property for sale. Although the property was in poor condition and had not been properly maintained for ten years,^[FN5] Jim and Shannon felt that the property had characteristics Judith might find desirable. It was about the same size as Judith's Georgia property, there were natural springs located on the property, and although run-down, there were also a ranch house and several outbuildings and facilities.

[FN4] Judith did not like her neighbors, did

Not Reported in P.3d, 134 Wash.App. 1033, 2006 WL 2329471 (Wash.App. Div. 2)
 (Cite as: 2006 WL 2329471 (Wash.App. Div. 2))

not like living in Georgia, and wanted to move her otter conservation center to a property with natural springs because well water gave her otters gall stones.

EN5. The ranch house located on the property was in poor condition—the roof leaked, causing significant interior water damage, and most of the appliances and toilets did not work. The outbuildings and facilities located on the property were in substantial need of repair. The land itself was in run-down condition—the fields were full of rocks and stumps, the property's sporadic fencing was in poor repair, the property's roads had not been maintained, and there was substantial debris in the outbuildings and scattered throughout the property.

Jim and Shannon told Judith about the property, sent numerous pictures, and fully described its characteristics, including both its current run-down condition and its potential for development. Judith decided to purchase the property and instructed Jim to submit an offer on the property. He did so in June 1998. After Judith, Jim, and Shannon discussed plans for improving the property, Judith asked them, and they agreed to undertake work necessary to "fix up" the property for Judith. Clerks Papers (CP) at 622. Judith told Jim and Shannon that after she moved to the property, they should continue to live nearby, continuing to assist her in improving and maintaining the property and operating her otter center.

After Jim had submitted an offer to purchase the property on Judith's behalf, but before the sale closed, he visited Judith in Georgia to work on her property there. During that visit, Jim and Judith discussed how Judith would pay Jim and Shannon for both the work he conducted on her Georgia property and the work he and Shannon would complete on her new property in Thurston County. These discussions resulted in Jim's reasonable, good faith belief that Judith would purchase property for Jim and Shannon near Judith's Thurston County property once she relocated her otters to Washington.

*2 The purchase of Judith's Thurston County property closed in late July or early August 1998, and with Judith's knowledge and consent, Jim's and Judith's names were placed on the property's title. Jim's name

was included on the title in the good faith belief that its inclusion would facilitate the acquisition of necessary permits and approvals to construct otter pens and other improvements on the property. Moreover, Judith agreed that Jim, Shannon, and their family should move onto the property to facilitate its improvement.

Jim and Shannon regularly discussed with and informed Judith of the work they were performing on the property; before Jim and Shannon filed their complaint in this matter, Judith never objected to the work they were doing on the property. All work Jim and Shannon performed on the property was of good and workmanlike quality or better, and was of at least the quality or better than what Judith could have obtained had she hired a contractor to perform similar work.

Jim and Shannon performed or supervised all the work themselves. Jim and Shannon either owned or obtained the heavy equipment, machinery, and tools that were used to improve the property. And between 1998 and 2000 (the period when Jim and Shannon made the vast majority of improvements), Jim and Shannon paid all expenses associated with the improvement and upkeep of the property.

In 2000, Judith decided that she did not want to move to the Thurston County property. But she did not communicate her decision to Jim and Shannon, who continued to improve the property. Despite her decision, Judith never suggested or directed Jim and Shannon to cease working on the property. By April 2001, Jim and Shannon began to suspect that Judith would not move to Thurston County and discussed with Judith the possibility of converting the property into a working cattle ranch. After discussing the proposal for about two months, Judith, Jim, and Shannon all formed the good faith belief that they had reached an agreement. Although Jim and Shannon reasonably and in good faith understood the existence of certain terms in the agreement, Judith's understanding of the terms differed substantially. The parties began carrying out their oral agreement according to their respective understandings of its terms.

In August 2002, Judith retained counsel in Seattle and sent a letter to Jim and Shannon expressing her wish to remove Jim from the property title. Jim and Shannon responded that the parties had entered into the cattle ranch agreement and described its terms as they un-

Not Reported in P.3d, 134 Wash.App. 1033, 2006 WL 2329471 (Wash.App. Div. 2)
(Cite as: 2006 WL 2329471 (Wash.App. Div. 2))

derstood it. In May 2005, Judith sued Jim and Shannon, asking the court to quiet title in her name, to eject Jim and Shannon from the property, and to find Jim and Shannon liable for converting her property. Judith also sought an award of damages.

One month later, Jim and Shannon answered and filed a counterclaim, advancing an unjust enrichment theory for the improvements they had made to Judith's property. The court dismissed Judith's claim for conversion and damages but heard all remaining claims at a bench trial held in March 2005.

*3 Michael Summers, a professional cost engineer, testified on behalf of Jim and Shannon. He estimated that Jim's and Shannon's work would have cost Judith \$760,382 in year-2000 dollars had she hired a third party contractor. The trial court specifically found Summers' testimony, opinions, and cost estimate accurate and credible.

Jim and Shannon also presented the testimony of Jan Henry, a real estate agent with 30 years' experience. Henry testified that the purchase price of \$1,050,000 accurately reflected the Thurston County property's fair market value in 1998 when Judith purchased it, and that the property's value at the time of trial had increased to between \$2,200,000 and \$2,500,000. It was Henry's expert opinion that \$300,000 to \$400,000 of the increase was due to the property's natural appreciation in the absence of any improvement. The trial court specifically found Henry's testimony to be accurate and credible.

Gene Weaver, a real estate agent, testified for Judith. It was his opinion that the property's fair market value at the time of trial was \$1,150,000. The trial court specifically rejected Weaver's testimony, finding it inaccurate, not credible, and unreliable.

The trial court determined that Judith asked Jim and Shannon to perform work on the Thurston County property, that she was at all times aware of the work Jim and Shannon were doing, and that Jim's and Shannon's work substantially enhanced the property's value. The trial court additionally found that "[i]t would be unjust for Judith Young to retain the value by which the work performed by Jim and Shannon Young has enhanced the Thurston County property without paying Jim and Shannon Young therefore." CP at 638.

The court stated that in an unjust enrichment case 'the appropriate measure of damages is generally the greater of: (1) the cost the owner would incur for the property owner to obtain the same services from a third party; and (2) the amount by which the services provided have increased the value of the property.' CP at 639. But it declined to adopt that measure 'under the particular circumstances of this case.' CP at 639. The trial court explained that Summers' cost estimate included a number of costs a general contractor would have incurred that Jim and Shannon did not, and therefore, Summers' \$760,382 estimate should be reduced to \$501,866. It therefore limited its damages award to \$501,866.

Jim and Shannon appeal, arguing that the trial court applied the wrong measure of damages.

ANALYSIS

Measure of Damages

A. Standard of Review

The fact finder determines the amount of damages. Mason v. Mortgage Am., Inc., 114 Wn.2d 842, 850, 792 P.2d 142 (1990). Accordingly, we will not overturn a damage verdict unless it is not supported by substantial evidence, shocks the conscience, or resulted from passion or prejudice. Mason, 114 Wn.2d at 850. Substantial evidence exists when there is a sufficient quantity of evidence to persuade a fair-minded, rational person that a finding is true. In re Estate of Jones, 152 Wn.2d 1, 8, 93 P.3d 147 (2004). We review conclusions of law de novo. Sunnyside Valley Irr. Dist. v. Dickie, 149 Wn.2d 873, 880, 73 P.3d 369 (2003).

B. The Trial Court's Award of Damages

*4 Jim and Shannon argue that the trial court stated the correct measure of damages but then improperly declined to apply it. Rather than awarding Jim and Shannon the greater of (1) the cost Judith would have incurred had she obtained the same services from a third party or (2) the amount their services increased the value of the property, the trial court incorrectly awarded only the costs Jim and Shannon incurred in improving the Thurston County property.

Not Reported in P.3d, 134 Wash.App. 1033, 2006 WL 2329471 (Wash.App. Div. 2)
(Cite as: 2006 WL 2329471 (Wash.App. Div. 2))

Judith responds that the trial court had broad discretion to determine the 'reasonable value' of Jim's and Shannon's services and that 'reasonable value' is not synonymous with 'market value.' ¹³⁶ Br. of Resp't. at 10, 11.

FN6. Judith also argues that Jim and Shannon failed to preserve the trial court's alleged error for appeal because they did not raise the issue at trial. Judith is incorrect. Jim and Shannon argued at trial and in their trial brief that the proper measure of damages was the greater of (1) the cost Judith would have incurred had she obtained the same services from a third party; or (2) the amount the services provided increased the value of the property. Further, the trial court did not rule on the measure of damages until after trial when it issued its oral decision on March 30, 2005. Thus, Jim and Shannon did not have an opportunity to object to the court's chosen measure of damages until after trial.

Judith also argues that substantial evidence supports the trial court's damages award. But whether the trial court applied the correct measure of damages-the issue Jim and Shannon raise on appeal-is a question of law we review de novo. Before we determine whether substantial evidence supports the trial court's award-a factual issue-we must determine whether the trial court applied the correct legal standard.

Unjust enrichment occurs when one retains money or benefits that in justice and equity belong to another. Baillie Commc'ns v. Trend Bus. Sys. Inc., 61 Wn.App. 151, 160, 810 P.2d 12 (1991). An unjust enrichment claimant must establish that (1) he conferred a benefit on the defendant; (2) the defendant appreciated or knew of the benefit; and (3) the defendant's acceptance or retention of the benefit under the circumstances make it inequitable for the defendant to retain the benefit without paying its value. Baillie, 61 Wn.App. at 159-60 (citing Black's Law Dictionary 1535-36 (6th ed.1990)).

The proper measure of recovery in an unjust enrichment claim is the reasonable value of the claimant's improvements to the defendant's property. Noel, 98

Wn.2d 375, 382, 655 P.2d 245 (1982). Where the party seeking recovery is not at fault, reasonable value is measured by the amount the benefit would have cost the defendant had she obtained the benefit from some other party in the claimant's position. Noel, 98 Wn.2d at 383.

Judith emphasizes that the principles of quantum meruit govern the measure of recovery in this case. Judith's concern is inconsequential because the measure of recovery under quantum meruit appears to be the same as that outlined in Noel, 98 Wn.2d at 382-83. A party relying on quantum meruit generally recovers the reasonable value of the services rendered or benefit conferred. Bori v. Parker, 110 Wn.App. 561, 580-81, 42 P.3d 980 (2002); Ducolon Mech. Inc., 77 Wn.App. at 711 n. 1, 712-13; Baillie, 61 Wn.App. at 159.

Here, the trial court recited that damages are the greater of the cost to have the services rendered by a third party or the increase in value resulting from the improvements, but then it improperly declined to award either measure. The trial court adopted Jim's and Shannon's contention that the measure of damages was the greater of (1) the cost Judith would have incurred had she obtained the same services from a third party or (2) the amount the services provided increased the value of the property. Although Washington courts have held that the measure of damages in similar cases is the cost the defendant would have incurred had she obtained the same services from a third party, they have not held that the measure is the greater of the two factors stated. Thus, the trial court was only partially correct in adopting Jim's and Shannon's measure of recovery.

*5 Summers estimated that the improvements Jim and Shannon made to the Thurston County property would have cost Judith \$760,382 in year-2000 dollars had she hired a third party to do the work. The trial court specifically found this cost estimate accurate and credible. Thus, the reasonable value of Jim's and Shannon's work was \$760,382. See Noel, 98 Wn.2d at 383. But the court erroneously awarded Jim and Shannon only \$501,866, reducing Summers' cost estimate by costs the trial court concluded a general contractor would have incurred that Jim and Shannon did not.

Whether Jim and Shannon incurred costs a general

Not Reported in P.3d, 134 Wash.App. 1033, 2006 WL 2329471 (Wash.App. Div. 2)
(Cite as: 2006 WL 2329471 (Wash.App. Div. 2))

contractor would have incurred is irrelevant when assessing 'reasonable value' under the Noel standard. See 98 Wn.2d at 383.

'Reasonable value' is distinct from cost and a court should generally not limit maximum recovery to cost. Noel, 98 Wn.2d at 383 n. 6. But where, as here, the party seeking recovery is not at fault, 'reasonable value' is the cost Judith would have incurred had she hired a third party contractor. Noel, 98 Wn.2d at 383. Here, that cost was \$760,382. The trial court did not award Jim and Shannon the reasonable value of their work, but rather, it incorrectly awarded only what it actually cost them to do the work. We reverse and remand for an award of damages to Jim and Shannon based on what it would have cost Judith to have a third party make the improvements. Here, that cost is \$760,382.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

We concur: BRIDGEWATER and HUNT, JJ.
Wash.App. Div. 2, 2006.
Young v. Young
Not Reported in P.3d, 134 Wash.App. 1033, 2006 WL 2329471 (Wash.App. Div. 2)

END OF DOCUMENT