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

DAVID J. DOUGHERTY, an Individual,

Appellant/Plaintiff,

v.

SAMANTHA R. POHLMAN, in her capacity
as Personal Representative of
the Estate of Raven J. Dougherty,

Respondent/Defendant.

BRIEF OF APPELLANT

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I. INTRODUCTION

Plaintiff David Dougherty and his wife, Raven,¹ were divorced in 2005. Despite that divorce, they embarked shortly thereafter on the construction of a house that they built on a parcel of real property that Raven owned in Buckley, Washington – a parcel that had been awarded to Raven as her separate property in the Judgment finalizing their divorce.

David, a commercial builder who had built and sold many homes in his career, designed the house to take advantage of the site, which enjoys an excellent view of Mount Rainier. David employed his skills as a contractor to arrange for the materials and labor needed to construct the house. He also contributed substantial labor of his own, using the skills and experience he had developed over years of home construction.

In agreeing to build the house on Raven's property, David understood that he would have an ownership interest in the property. After Raven had expressly declined to convey an interest in the property to him, David brought a claim against Raven's estate seeking compensation for the work he had provided to Raven and Raven's estate. When that claim was rejected by Samantha Pohlman, Personal Representative of Raven's estate and, as Raven's

¹ For clarity, this brief refers to David Dougherty and Raven Dougherty by using their first names; no disrespect is intended.

only child, the sole beneficiary of that estate, David filed suit seeking compensation for the contribution he had made to Raven's estate.

At trial, David sought to introduce a letter that his attorney, Thomas Brennan, wrote to Raven in December, 2015. The trial court incorrectly ruled that admission of that letter into evidence was barred by the dead man's statute, RCW 5.60.030. Because the statute of limitations for claims of unjust enrichment and quantum meruit is three years, and because David filed this lawsuit within three years of December, 2015, when his actions accrued, the trial court erred when it ruled that those claims were barred by the statute of limitations, and this suit is timely.

In addition, David presented sufficient evidence at trial to establish a prima facie case for unjust enrichment and quantum meruit. The journal created and maintained by Raven, together with David's testimony as to the expertise and labor he contributed to build the house on the Buckley Property and the value of those contributions establish a prima facie case for his implied contract claims. Accordingly, the trial court erred in dismissing David's claims as a matter of law, and its decision should be reversed and this matter remanded to the superior court for trial.

II. ASSIGNMENTS OF ERROR

1. The trial court erred when it granted the Estate's motion to dismiss under Civil Rule 41.

2. The trial court erred when it held that David's claims were untimely.

3. The trial court erred when it held that the dead man's statute prohibited David from testifying about why he built the house.

4. The trial court erred when it held that the dead man's statute prohibited David from testifying about when he learned that he would not be compensated for building the house.

III. ISSUES RELATED TO ASSIGNMENTS OF ERROR

1) Whether the trial court erred when it dismissed David's claims as a matter of law because Plaintiff's claims were timely and because David presented a prima facie case in support of his unjust enrichment and quantum meruit claims. (Assignment of Error 1)

2) Whether the trial court erred when it held that David's claims were untimely because of the dead man's statute, when documentary evidence establishes the timeliness of David's claims and when this documentary evidence is not barred by the dead man's statute. (Assignments of Error 1, 2)

3) Whether the trial court erred when it held that David could not testify about why he built the house on the Buckley property because the dead man's statute does not prohibit a witness from testifying about his feelings and impressions. (Assignment of Error 3)

4) Whether the trial court erred when it held that David could not testify about when he learned that he would not be compensated for building the house on the Buckley property because such testimony can be established through documentary evidence not prohibited by the dead man's statute. (Assignment of Error 4)

IV. STATEMENT OF THE CASE

1. David and Raven's Relationship and the Construction of the House on the Buckley Property.

Plaintiff David Dougherty ("David") and Decedent Raven Dougherty ("Raven") were married in May 1993. Clerk's Papers ("CP") 2, *ll.* 2-3. They had no children as a result of that marriage. CP 2, *l.* 3.

In July 1993, Raven's brother conveyed to Raven a parcel of unimproved real property located at 12815 – 256th Ave. E., Buckley, Washington (the "Buckley Property"). CP 42, *ll.* 1-3; CP 48. At that time, Raven lived with her husband David, in Illinois, where the two made their marital home. CP 42, *ll.* 6-7.

On April 25, 2005, the Circuit Court of the 19th Judicial Circuit for McHenry County, Illinois entered a Judgment formally dissolving David

and Raven's marriage. CP 42, *ll.* 9-10; CP 50-59. As part of that Judgment of Dissolution, the Court ordered that Raven "should receive as her sole and exclusive property the non-marital lot in Seattle, Washington in the approximate amount of \$100,000.00." CP 51, ¶ 9.

Despite their marriage formally ending in spring 2005, David and Raven remained in an intimate relationship after their divorce. CP 66. Raven even referred to David Dougherty as her "husband" in an August 18, 2008 letter she wrote to an official with the Pierce County Department of Planning and Land Services. CP 249. In that letter, Raven requested reinstatement of a building permit that had been previously issued for the construction of what Raven described as "our WA house," which she and David had been building on the Buckley Property. *Id.*

The construction of that house was chronicled by Raven in a handwritten journal that she started in July 2005, and maintained throughout the course of construction of the house. CP 190-247; Exhibit 109, Report of Proceeding ("RP") (July 31, 2019) at 56:18-60:25. In her journal, Raven recounts in detail the work that went into the construction of the house that she and David built on the Buckley Property, a house based on plans that David had developed and designed with the help of one of his friends. CP 190-247; RP (7/31/2019) at 84:18-88:11. Raven's journal includes photos of herself, David, and others who worked on their new house, and

she documents the numerous expenses incurred in the course of construction. CP 190-247; RP (7/31/2019) at 69:12-71:25.

After the house on the Buckley Property was habitable, David would live in the house from time to time, staying for weeks and months at a time. RP (7/31/2019) at 80:8-25. In late 2015, however, David's relationship with Raven deteriorated and he sought legal representation to help him seek compensation for the expertise, money, and labor he had contributed to planning and building the house on the Buckley Property. RP (7/31/2019) at 91:10-14. David's attorney, Thomas Brennan, sent a letter to Raven requesting that she execute a quit claim deed he had enclosed with his letter, a deed that would have conveyed an undivided one-half interest in the Buckley property from Raven to David. CP 330-334; Exhibit 2, RP (7/31/2019) at 95:19-96:6. Mr. Brennan's letter prompted a response from Raven's attorneys in a letter in which it was stated that Raven would not recognize any obligation to convey an interest in the Buckley property. CP 336-339.

Although David could have filed a lawsuit at that time seeking to enforce his claims, he did not. RP (7/31/2019) at 94:25-95:2. After Raven passed away in March of 2018, however, David Dougherty filed a Creditor's Claim in Raven's probate proceedings on May 16, 2018, seeking compensation from Raven's estate for the benefit he conveyed to Raven.

CP 9-12; RP (7/31/2019) at 94:3-9. David's Creditor's Claim was rejected by Raven's daughter, Defendant Samantha Pohlman, who had been appointed Personal Representative of Raven's estate. CP 44.

2. The Procedural Status of this Lawsuit

In compliance with RCW 11.40.100(1), David initiated this action by filing suit against the Raven's Estate on August 1, 2018. CP 1-13. The Complaint stated claims to quiet title and for breach of contract, promissory estoppel, unjust enrichment, quasi-contract, and quantum meruit. CP 1.

By a series of motions for summary judgment, David's claims for quiet title, breach of contract, and promissory estoppel were dismissed, and at trial, David's only remaining claims were those for unjust enrichment and quantum meruit. CP 373-375; 569-571; The matter went to trial on July 31, 2019, and David's remaining two claims were dismissed on the Estate's CR 41 Motion at the close of David's case in chief. CP 510. Subsequently, David timely filed his Notice of Appeal. CP 517-519.

V. SUMMARY OF THE ARGUMENT

Without entering findings of fact, the trial court dismissed David's claims for unjust enrichment and quantum meruit under Civil Rule 41(b)(3). Because the trial court dismissed David's claims as a matter of law, review is de novo, the evidence is viewed in a light most favorable

to David, and the question on appeal is whether David presented a prima facie case for his unjust enrichment and implied contract claims.

The trial court dismissed David's claims because the court held that his claims were barred by the statute of limitations. In holding these claims to be untimely, the trial court incorrectly concluded that the dead man's statute, RCW 5.60.030, prevented the court from considering evidence that would make David's claim timely.

The trial court erred, however, because the dead man's statute does not apply to documentary evidence. This documentary evidence, specifically a letter written in December 2015, is not barred by the statute and it is this evidence that triggers when the statute of limitations begins to run. Because the statute of limitations for unjust enrichment and quantum meruit claims is three years, and because David filed this lawsuit within three years of December 2015, this suit is timely.

In addition, documentary evidence admitted at trial—specifically Raven's journal—combined with David's testimony, establishes a prima facie case for unjust enrichment and quantum meruit. The trial court also improperly prohibited David from testifying regarding his feelings and impressions regarding the house on the Buckley property. Because David's claims are timely, and because David has established a prima facie case for his implied contract claims, the trial court erred in dismissing his claims as a

matter of law. Therefore, the decision of the trial court should be reversed and this matter should be remanded to the superior court for trial.

VI. ARGUMENT

A. Standards of Review

1. For a CR 41(b)(3) Motion Dismissing a Claim as a Matter of Law, the Standard of Review Is De Novo.

After the plaintiff “has completed the presentation of evidence,” the “defendant may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief.” CR 41(b)(3). In rendering judgment against the plaintiff, the court has two options:

[A] trial court may either weigh the evidence and make a factual determination that the plaintiff has failed to come forth with credible evidence of a prima facie case, or it may view the evidence in the light most favorable to the plaintiff and rule, as a matter of law, that the plaintiff has failed to establish a prima facie case.

In re Dependency of Schermer, 161 Wn.2d 927, 939-40, 169 P.3d 452 (2007). If the court enters judgment on the merits, it must make findings of fact. *Id.* at 939. The court, however, does not need to enter findings “when ruling that the plaintiff has failed to state a claim as a matter of law.” *Id.*

If the case is dismissed as a matter of law, “review is de novo and the question on appeal is whether the plaintiff presented a prima facie case, viewing the evidence in the light most favorable to the plaintiff.” *Id.* at 939-40. De novo review “means that an appellate court looks at the issue

as if for the first time and does not accord any deference to the trial court.”
El Centro de la Raza v. State, 192 Wn.2d 103, 108, 428 P.3d 1143 (2018).

Here, the trial court granted Defendant’s CR 41(b)(3) motion as a matter of law and did not enter any findings. CP 510; Verbatim Report of Proceedings (July 31, 2019) at 110:8–111:1. Thus, review is de novo and the trial court’s decision is not entitled to any deference.

2. The Standard of Review of a Decision Under the Dead Man’s Statute Is Abuse of Discretion.

Because the dead man’s statute involves the admission of evidence, the standard of review is abuse of discretion. *See City of Spokane v. Neff*, 152 Wn.2d 85, 91, 93 P.3d 158 (2004) (“The standard of review for evidentiary rulings made by the trial court is abuse of discretion.”) A court “abuses its discretion when its decision is manifestly unreasonable, based on untenable grounds, or made for untenable reasons.” *Cook v. Brateng*, 180 Wn. App. 368, 375, 321 P.3d 1255 (2014).

B. The Dead Man’s Statute Does Not Apply to Documents or to Transactions with Third Parties, and it Does Not Bar a Party from Testifying About his Feelings or Impressions.

Washington’s version of the dead man’s statute is codified at RCW 5.60.030, which provides:

No person offered as a witness shall be excluded from giving evidence by reason of his or her interest in the event of the action, as a party thereto or otherwise, but such interest may be shown to affect his or her credibility: PROVIDED, HOWEVER, That in an action or proceeding

where the adverse party sues or defends as executor, administrator or legal representative of any deceased person, or as deriving right or title by, through or from any deceased person, or as the guardian or limited guardian of the estate or person of any incompetent or disabled person, or of any minor under the age of fourteen years, then a party in interest or to the record, shall not be admitted to testify in his or her own behalf as to any transaction had by him or her with, or any statement made to him or her, or in his or her presence, by any such deceased, incompetent or disabled person, or by any such minor under the age of fourteen years: PROVIDED FURTHER, That this exclusion shall not apply to parties of record who sue or defend in a representative or fiduciary capacity, and have no other or further interest in the action.

RCW 5.60.030.

This statute bars an interested party from testifying “in his or her own behalf as to any transaction had by him or her with, or any statement made to him or her, or in his or her presence, by any such deceased.” RCW 5.60.030. The purpose of this statute is to prevent self-serving testimony about conversations or transactions with the deceased. *Erickson v. Kerr*, 125 Wn.2d 183, 188, 883 P.2d 313 (1994); *Hofsvang v. Estate of Brook*, 78 Wn. App. 315, 897 P.2d 370 (1995); *Wildman v. Taylor*, 46 Wn. App. 546, 731 P.2d 541 (1987). The dead man’s statute applies to probate proceedings and will contests. *In re Shaughnessy’s Estate*, 97 Wn.2d 652, 655, 648 P.2d 427 (1982).

The interpretation of the word “testifying” is “[t]he key to understanding what an interested party is prohibited from doing under

RCW 5.60.030.” *Wildman*, 46 Wn. App. at 550-51. By its terms, the statute “only prohibits the interested person from testifying in his or her own behalf.” *Id.* at 551.

Thus, RCW 5.60.030 does not bar all testimony, only that which reveals a statement made by the decedent or that relates to a transaction with the decedent. *See Jacobs v. Brock*, 73 Wn.2d 234, 237, 437 P.2d 920 (1968) As discussed in the following sections, the statute does not bar *documentary* evidence, does not bar testimony about transactions with third parties, and it does not prohibit a witness from testifying about his or her feelings or impressions. These three limitations upon the dead man’s statute are crucial to this case.

1. The Dead Man’s Statute Does Not Apply to Documents.

By its express terms, the dead man’s statute does not apply to documentary evidence. KB Tegland, *5A Washington Practice: Evidence* § 601.15 at 319 (6th Ed. 2016); *Thor v. McDearmid*, 63 Wn. App. 193, 202, 817 P.2d 1380 (1991) (“RCW 5.60.030 does not bar documentary evidence, although it may limit testimony about the documents.”). In *Thor*, the court held that it was error for the trial court to bar the admission of a letter purportedly written by the deceased. *Thor*, 63 Wn. App. at 202.

Here, the trial court properly admitted Raven’s journal. Ex. 109; Verbatim Report of Proceeding (July 31, 2019) at 56:18-60:25. The trial

court also properly allowed David to testify about the work he performed, as reflected in photographs and other entries in Raven's Journal. RP (7/31/2019) at 65:11-24; 68:11-71:25.

The trial court also properly admitted the letter from David's attorney to Raven wherein David's attorney requests that Raven convey a one-half interest in the Buckley property. CP 330-334; RP (7/31/2019) at 95:19-96:6. The trial court, however, improperly failed to consider this letter when dismissing David's claims as untimely, as discussed in Section VI.C.2 below.

2. The Dead Man's Statute Does Not Apply to Transactions with Third Parties.

Evidence of "transactions" with third persons is not barred by RCW 5.60.030." *Peoples Nat'l Bank v. Nat'l Bank of Commerce*, 69 Wn.2d 682, 690, 420 P.2d 208 (1966). Here, the trial court properly allowed David to testify as to transactions with third parties, such as Corliss Concrete, who provided supplies and materials used in the construction of the house. RP (7/31/2019) at 72:1-20; 73:20-74:11.

3. The Dead Man's Statute Does Not Bar David Dougherty From Testifying About His Feelings or Impressions.

A statement by David Dougherty of his own feelings or impressions does not come within the ban of RCW 5.60.030. *Wildman*, 46 Wn. App. at 549; *see also King v. Clodfelter*, 10 Wn. App. 514, 516-17, 518 P.2d 206

(1974) (testimony relating services the witness performed for the deceased and relating solely to the witness's own acts, may substantiate an implied contract for payment for the services performed). The reason behind this is that the even if she were alive, Raven could not contradict David's feelings or impressions, and therefore such testimony does not involve a transaction with the decedent. *See Estate of Lennon v. Lennon*, 108 Wn. App. 167, 175, 29 P.3d 1258 (2001); *Jacobs*, 73 Wn.2d at 237.

In *Jacobs*, for example, the plaintiffs filed suit seeking damages for an implied contract for services rendered for the care of the decedent during the decedent's lengthy illness prior to his death. 73 Wn.2d at 234-35. Following a bench trial awarding damages to the plaintiffs, the Washington Supreme Court affirmed and held that the plaintiff's statement ("I was always given the impression we were getting the lake property for looking after him") did not violate the dead man's statute. *Jacobs* at 237-38. As the *Jacobs*' court noted: "The answer of Mr. Jacobs did not reveal a statement made by decedent nor did it relate to a transaction with decedent." *Id.* at 237. Thus, "Mr. Jacobs' statement of his own feelings or impressions does not come within this definition [in RCW 5.60.030]." *Id.* at 238.

Similarly, the Court in *King v. Clodfelter* expressly held that a party could testify to work performed on behalf of a decedent, just not to the terms of any purported agreement. *King v. Clodfelter*, 10 Wn. App. at 517.

Here, the trial court erred when it held that David could not answer the question of why he built the house:

Q. Mr. Dougherty, I want to ask you in all candor, why did you build the Buckley house?

MR. NIEMELA: Objection, Your Honor, to the extent that that may lead to information prohibited by the dead man's statute or backdooring regarding that transaction.

THE COURT: I'm going to sustain the objection.

RP (July 31, 2019) at 90:14-21. As noted above, the trial court improperly prevented David from testifying as to his feelings and impressions as to his role in the construction of the house.

The trial court also prevented David from testifying as to when he learned that he would not be compensated for building the house:

Q. At some point in your life did you discover that you were not going to be compensated for building the house?

MR. NIEMELA: Objection, Your Honor. That's also prohibited by the dead man's statute because he's again, I think, eluding to what transpired between he and Ms. Dougherty.

THE COURT: Sustained

RP (July 31, 2019) at 91:2-8.

The trial court erred in excluding this testimony because David has the right to testify as to his feelings and impressions. In addition, David's knowledge as to the lack of compensation could have been established

through documentary evidence, such as the letter written by his attorney (Ex. 2), and the response of Raven's attorney. CP 336-39.

Because the trial court abused its discretion in prohibiting this testimony, the decision of the trial court should be reversed and David should be allowed to answer these questions in support of his implied contract claims. Additional grounds for reversing the trial court's decision are discussed in the following sections.

C. The Trial Court Erred in Dismissing the Plaintiff's Claims as Untimely Because the Statute of Limitations Did Not Begin To Run Until December 2015.

1. The Statute of Limitations for Implied Contract Claims Is Three Years.

Unjust enrichment and quantum meruit are claims based upon implied contracts. The statute of limitations for an implied, unwritten contract is three years. RCW 4.16.080(3); *Hart v. Clark Cty.*, 52 Wn. App. 113, 116, 758 P.2d 515 (1988) ("The 3-year statute of limitations applicable to actions on unwritten contracts applies to an action for unjust enrichment.")

The statutory limitations period begins to run when the plaintiff's claim accrues. RCW 4.16.005. Generally, a cause of action accrues when a party has the right to apply to a court for relief. *Eckert v. Skagit Corp.*, 20 Wn. App. 849, 851, 583 P.2d 1239 (1978). A plaintiff has the right to apply for relief when he or she can establish each element of the action. *Deegan*

v. Windermere Real Estate/Ctr.-Isle, Inc., 197 Wn. App. 875, 892, 391 P.3d 582 (2017).

In an unjust enrichment claim, “Enrichment alone will not trigger the doctrine; the enrichment must be unjust under the circumstances and as between the two parties to the transaction.” *Dragt v. Dragt/DeTray, LLC*, 139 Wn. App. 560, 576, 161 P.3d 473 (2007), *review denied*, 163 Wn.2d 1042 (2008). For the unjust enrichment claim to begin accruing, the benefit must be retained unjustly. *Dragt*, 139 Wn. App. at 576 (“In order to bring a claim for unjust enrichment, the benefit must be retained unjustly.”)

Furthermore, for the unjust enrichment claim to begin accruing, the repudiation and unjust retention by the defendant must be unequivocal. *See Alaska Pac. Trading Co. v. Eagon Forest Prods., Inc.*, 85 Wn. App. 354, 365, 933 P.2d 417 (1997) (in contract law, a “a court will not infer repudiation from ‘doubtful and indefinite statements that performance may or may not take place.’”) (internal quotation omitted); *Wallace Real Estate Inv., Inc. v. Groves*, 124 Wn.2d 881, 898, 881 P.2d 1010 (1994) (contract law requires a “‘positive statement or action by the promisor indicating distinctly and unequivocally that he either will not or cannot substantially perform any of his contractual obligations.’”) (internal quotations omitted). As discussed in the following section, the unjust retention by Raven of the benefit provided by David did not become unequivocal until December 2015.

2. The Statute of Limitations In this Case Began to Run in December 2015

At the earliest, the claims at issue in this case did not accrue until David's attorney wrote to Raven's attorney in December 2015, requesting that Raven convey a one-half interest in the Buckley house and property to David. Ex 2. Alternatively, the limitations period did not begin until January 2016, when Raven's attorney informed David that Raven would not convey a one-half interest in the house and property to David. CP 336-39.

It was only after Raven unequivocally refused to keep that alleged promise that David Dougherty had the right to apply to the court for relief for unjust enrichment and quantum meruit. David filed suit on August 1, 2018. CP 1. Because this is within three years of December 2015, David's claims are timely.

Thus, the trial court erred in dismissing his claims as untimely. The trial court erred because it failed to consider the December 2015 letter when it ruled that David's claims were untimely. RP (July 31, 2019) at 108:7-23.

The trial court's error is demonstrated in the following statement:

Without being able to establish that there was, in fact, an agreement, I don't really have a basis for finding that there was justification for not filing within three years of the date of death or the date of completion of the house.

RP (7/31/2019) at 108:15-19.

This statement is incorrect because: 1) David did file within 3 years of Raven's death and 2) the date of completion of the house does not trigger the statute of limitations for unjust enrichment or quantum meruit. Rather, the running of the statute of limitations for these claims was triggered by Raven's refusal to convey the property to David, as evidenced in the December 2015 and January 2016 letters. Ex. 2, CP 336-39.

Indeed, in a prior ruling denying the Defendant's summary judgment motion, the trial court that David's claims were made timely by the December 2015 letter:

For purposes of today, though, I'm going to rule as a matter of law that the plaintiff did not realize that he had a cause of action until approximately December of 2015. It appears that that was the period when something was wrong and action was being taken to try and achieve a remedy of some kind.

So using December 2015 as sort of our date, I checked LINX and I showed that this action commenced on August 1, 2018. But given the three-year statute of limitations, I'm finding that the claims are not barred using the December 2015 date as the date that any potential claim would have been discovered.

RP (February 8, 2019) at 19:1-12. Thus, the trial court subsequently erred when it ruled at trial that David's claims were not timely.

D. Because the Plaintiff's Implied Contract Claims Are Timely, and Because the Plaintiff Established a Prima Facie Case in Support of the Implied Contract Claims, the Trial Court Erred in Dismissing these Claims.

If a case is dismissed as a matter of law, “the question on appeal is whether the plaintiff presented a prima facie case, viewing the evidence in the light most favorable to the plaintiff.” *In re Dependency of Schermer*, 161 Wn.2d at 939. Because the trial court dismissed this case as a matter of law without entering findings, David, on appeal, need only establish a prima facie case to warrant reversal of the trial court’s ruling. Here, David has presented a prima facie case of unjust enrichment and quantum meruit sufficient to warrant reversal.

Unjust enrichment is the method of recovery for the value of the benefit retained 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).

Three elements must be established in order to sustain a claim based on unjust enrichment: a benefit conferred upon the defendant by the plaintiff; an appreciation or knowledge by the defendant of the benefit; and the acceptance or retention by the defendant of the benefit under such circumstances as to make it inequitable for the defendant to retain the benefit without the payment of its value.

Id. (quoting *Bailie Commc'ns, Ltd. v. Trend Bus. Sys., Inc.*, 61 Wn. App. 151, 160, 810 P.2d 12 (1991)). In other words, the elements of a contract

implied in law are (1) the defendant receives a benefit, (2) the received benefit is at the plaintiff's expense, and (3) circumstances make it unjust for the defendant to retain the benefit without payment. *Young* at 484-85.

Here, Raven's journal establishes all three elements of an unjust enrichment claim. In her journal, Raven chronicles the trip from Illinois to Washington to begin construction of the house on the Buckley Property, stating that, after arrival in Washington, David was "busy price checking for materials." CP 192. Raven notes that she and David "bought a new tractor from Kabota [sic] in Oregon" and that "Dave went down to pick it up." CP 196. Dave's involvement in the project is noted frequently throughout the journal:

- "Dave found a concrete guy Larry who's willing to wk for cash." CP 197.
- "Dave's been out getting quotes for lumber & windows in Maple Valley, Sumner, + Puyallup." CP 198.
- "Dave got gravel for the driveway + spread it all nice + flat. He's been busy on the tractor + working on the road too." CP 199.
- "Dave has a wall up by the time I get home from wk at 2." CP 200.
- "Tue while I'm at work Dave finishes sheeting for the most part." CP203.

- “Dave found a plumbing supply house that will sell to us.” “Dave’s continuing to put up floor rafters 2 x 12s span the back rooms + Dave’s putting them up all by himself.” CP 205.
- “Corliss shorted us 3 yards of concrete then charged 150 for delivery fee. Dave put in a call to the rep. will see what the outcome is.” CP 207.
- “Dave snapped lines for the walls and finished up on the floor.” “Dave and Bob building walls.” CP 209.
- “Dave back March 2nd + we’re right back to work.” “Dave put on the top windows.” CP 216.
- “Dave also put in the dormer over the kitchen, did the back wall + put up the trusses over it.” CP 217.
- “Dave worked on the copper for plumbing [sic] and is starting to put up trim and siding.” CP 226.
- “Dave started right away with painting the ceiling and tall wall in living room.” “Dave finished up the main room + switched to hanging cabinets.” CP 239.

David testified at trial that he and a friend had designed the house and prepared the blueprints for the house. RP (July 31, 2019) 83:23 - 87:25. David also testified about the work he contributed to the project, as captured in some of the photographs in Raven’s journal. RP (July 31, 2019) 47:6 - 79:2. David testified that he was the person operating the backhoe digging

the foundation in the photo depicted in Exhibit P-0152 (CP 197). RP (July 31, 2019) 62:10-24; 63:1. David also testified that one of the pictures showed him overseeing work on the foundation of the house. RP (July 31, 2019) 70:22 - 71:25. David identified himself framing the walls in one of the photos. RP (July 31, 2019) 72:23 - 73:3. David also identified himself in several photos framing the upper deck, raising plywood up to do the deck and the loft, and setting the gable wall and the beam across the top of the structure. RP (July 31, 2019) 74:13 - 74:20.

David also testified at trial that he had coordinated the construction of the house by making arrangements with vendors (Corliss Concrete, TRM Lumber, Northwest Insulation) for provision of various building materials. RP (July 31, 2019) 72:1-25; 73:1-6; 78:1-7. David also testified that he had hired subcontractors to assist with the construction of the house. RP (July 31, 2019) 76:22-24. Finally, David testified at trial about that the value of the labor and services he provided in building the house was over \$200,000. RP (July 31, 2019) at 102:10-23.

In designing and building the house on the Buckley Property, David provided a substantial benefit to Raven in the form of his expertise and labor. The end result was a gem of a house in which Raven lived until she passed away in March of 2019. David was under the impression that, in exchange for his contribution to the construction of the house, he would have an

ownership interest in the house upon its completion. Given that impression, it would be unjust for Raven to retain the benefit of David's contribution to the construction of the house without some payment to David.

In his Complaint, David also sought recovery on the basis of quantum meruit CP 6. Quantum meruit a method of recovering the reasonable value of services provided under a contract implied in fact. *Young v. Young*, 164 Wn.2d at 485. Quantum meruit denotes recovery for the value of services or materials provided under an actual, implied-in-fact contract. *Id.* 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. The services must be rendered under such circumstances as to indicate that the person rendering them expected to be paid therefor, and that the recipient expected, or should have expected, to pay for them.

Id.

The elements of a contract implied in fact are (1) the defendant requests work, (2) the plaintiff expects payment for the work, and (3) the defendant knows or should know the plaintiff expects payment for the work. *Id.* at 486. "Unjust enrichment" is founded on notions of justice and equity whereas "quantum meruit" is founded in the law of contracts, a legally significant distinction. *Id.* Because quantum meruit relies on some underlying

contractual relationship between the parties, David's prospective recovery under a contract implied in fact (quantum meruit) is limited to the value of the services rendered.

Here, Raven's journal and David's testimony at trial establish all three elements of an unjust enrichment claim. As evidenced by that journal, Raven relied on David's experience as a home builder when she obtained his help building the house on her property. Because they were divorced, David knew that he was building a house on Raven's property – property he did not own. It was evident that he expected payment for his work when, in late 2015, he retained an attorney to request that Raven convey an interest in the Buckley Property in exchange for the house that David had built for Raven. RP (July 31, 2019) at 95:19 – 97:7; CP 330-334. At that time, if not before, Raven knew that David expected to be paid for the work he had done, as he was seeking a one-half interest in the Buckley Property as compensation for the house he had built on that property. Further, David established the value of his labor and services in building the house when he testified at trial that the value of the house he built was over \$200,000, not including any profit or overhead. RP (July 31, 2019) at 102:15 – 103:7.

VII. CONCLUSION

For the reasons set forth above, David Dougherty respectfully requests that the decision of the trial court should be reversed, and this matter should be remanded to the superior court for trial.

RESPECTFULLY SUBMITTED this 11th day of December, 2019.

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CERTIFICATE OF SERVICE

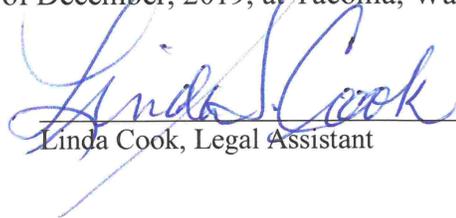
The undersigned makes the following declaration under penalty of perjury as permitted by RCW 9A.72.085.

I am a legal assistant for the firm of Vandenberg Johnson & Gandara. On the 11th day of December, 2019, I caused to be served via email and first class mail a copy of the foregoing document to:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 11th day of December, 2019, at Tacoma, Washington.



Linda Cook, Legal Assistant

VANDEBERG JOHNSON & GANDARA

December 12, 2019 - 9:15 AM

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