

79207-1

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STATE OF WASHINGTON

NO. 79207-1

THE SUPREME COURT
OF THE STATE OF WASHINGTON

JAMES M. YOUNG and SHANNON YOUNG; STATE OF
WASHINGTON DEPARTMENT OF LABOR AND INDUSTRIES,

Appellants,

v.

JUDITH A. YOUNG,

Respondent.

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RESPONSE TO PETITION FOR REVIEW

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II. TABLE OF AUTHORITIES

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III. INTRODUCTION

James and Shannon Young, defendants below,¹ submit this response to Judith Young's petition for review. The unpublished Court of Appeals' decision in this case does not present any issue of substantial importance that would justify this Court in accepting review. Moreover, the Court of Appeals' unpublished decision correctly applies this Court's decision in *Noel v. Cole*, 98 Wn.2d 375, 655 P.2d 245 (1982). Therefore, this Court should deny the petition for review.

IV. COUNTERSTATEMENT OF THE CASE

Judith Young is the beneficiary of trusts established by her grandfather and mother worth many millions of dollars. FoF 3; RP 94-95.² Judith Young lives by herself, together with about a dozen otters and many other animals, in a mobile home on a 200 acre piece of property in rural Georgia. FoF 19. She has been away from her animals overnight on only four occasions since 1993. FoF 16.

Jim Young, Judith's nephew, is a licensed and bonded contractor. FoF 5. He cuts timber, clears and grades land, and constructs concrete slabs for a living. *Id.*

¹ Judith Young was actually the plaintiff in the trial court, contrary to her assertion on page 1 of her petition for review.

² FoF and CoL refer to the trial court's Findings of Fact and Conclusions of Law, which are attached to the Petition for Review as Appendix B.

Because she did not get along with her neighbors in Georgia, Judith formed the idea of moving her otters and other animals to Washington State. FoF 21, 24. In June 1998, Judith purchased, sight unseen, the 186 acre "ranch property" located in South Thurston County. FoF 47-48, 54-60. Judith Young paid \$1,050,000.00 to purchase the ranch property, which was the property's fair market value. FoF 57-58, 160. Judith had asked Jim and Shannon Young to, and Jim and Shannon Young did, locate this property and handle the purchase of it for her. FoF 37-42, 48-49, 55, 61-62.

When Judith Young bought the ranch property, and to her knowledge, the land and the many outbuildings on it were in poor, run-down condition. FoF 27-33. Judith Young asked Jim and Shannon Young to do the work necessary to get the property ready for her to move herself, her otters and her many other animals onto it. FoF 43-46, 62-63, 168. Judith Young told Jim Young that she would pay for the work by purchasing another property for Jim and Shannon Young near her property. FoF 53.

Between 1998 and 2004, Jim and Shannon Young spent substantial amounts of their time, money and energy working on and improving the ranch property. FoF 72, 74-85, 130-132. Judith Young was at all times

aware of the work that Jim and Shannon Young were performing at the ranch property. FoF 87-92, 169.

For example, Jim Young demolished an old derelict farm house and two other old buildings that had been left on the property. See FoF 75-76 (finding that Trial Exhibit 87, Michael Summers' cost estimate, "accurately describes the work Jim and Shannon Young performed on the property," and incorporating that cost estimate by reference into the trial court's findings of fact); Appendix C (Tr. Ex. 87) (line item 24-26). Jim Young removed two old manure lagoons that had been left on the property from when it had been used as a dairy farm. *Id.* (line item 27). Jim cleared 40 acres of the property. *Id.* (line item 32). Jim removed and replaced over 20,000 lineal feet of fencing, installed five new gates, and repaired others. *Id.* (line items 33, 35).

Jim and Shannon Young also did substantial amounts of work on the many old farm outbuildings on the property. For example, Jim and Shannon Young replaced the roofs on almost all the outbuildings. *Id.* (line items 23, 28, 30, 31). Jim and Shannon Young substantially repaired the largest of the barns. *Id.* (line item 30). Jim and Shannon Young repaired several of the other outbuildings. *Id.* (line items 20, 21, 23, 28,

and 29). They also began remodeling a smaller barn into a guest house. *Id.* (line item 31).

Jim and Shannon Young also extensively remodeled and upgraded the ranch house itself. FoF 130-132; Tr. Ex. 87 (line items 1-19). They replaced the underflooring, flooring, and carpet and/or tile throughout most of the house. *Id.* They repaired and/or replaced all the sheetrock that had been badly damaged because the roof had leaked while the house had been left vacant. *Id.* They replaced the furnace and most of the appliances. Tr. Ex. 87 (line items 1, 2, 7). They completely remodeled the kitchen, installing professional grade appliances. *Id.* (line item 11).

Jim and Shannon Young either owned or obtained the heavy equipment, machinery, and tools that were used to improve the ranch property. FoF 80. Jim and Shannon Young also paid for, or bartered for, the labor (other than their own) and materials used in the work. FoF 79. To the extent that others did the work, Jim and Shannon Young supervised their labor. *Id.*

All of the work which Jim and Shannon Young performed on the ranch property was of good and workmanlike quality or better. It was of at least the quality or better than what Judith Young would have obtained had she hired a contractor on the market to perform the work. FoF 78.

In May 2003, without ever having paid Jim and Shannon Young a penny for the substantial amounts of time they had invested improving her property at her request, Judith Young filed this lawsuit against Jim and Shannon Young. FoF 147-148; CP 6-15. Jim and Shannon Young asserted a counterclaim to recover, under the theory of unjust enrichment, for the work they had performed to improve the property. FoF 149-150; CP 16-27.

In September 2004, Jim and Shannon Young asked the trial court to grant them summary judgment on their unjust enrichment claim. FoF 151; CP 138 *et seq.* In their brief, Jim and Shannon Young cited case law that held that the measure of damages in an unjust enrichment case is the greater of: (1) the amount it would have cost the owner to have another perform the work; or (2) the amount by which the work has enhanced the value of the property. CP 171-76. In support of that motion, they also submitted the Declaration of Michael Summers, a professional cost engineer, who testified that a general contractor would have charged Judith Young \$760,382.00 in year 2000 dollars to perform the work that Jim and Shannon Young had actually performed to improve the ranch property. CP 215-227. See Appendix C (Michael Summer's cost estimate).

Judith Young did not dispute Jim and Shannon Young's statement of the law governing the measure of recovery for unjust enrichment. See CP 30-65; 499-506. And Judith Young submitted no evidence to contradict Michael Summers' opinion that it would have cost her \$760,382.00 to hire another contractor to perform the work that Jim and Shannon Young had performed. *Id.*

Despite Judith Young's complete failure to submit any law or evidence pertaining to this issue, the trial court denied Jim and Shannon Young's motion for summary judgment. The trial court ordered the parties to proceed to trial. FoF 151; CP 572-574.

The trial occurred in March 2005. FoF 154. During his opening statement, Judith Young's counsel declared that Judith Young would **not** submit evidence contradicting the amount that Jim and Shannon were seeking to recover:

In terms of damages, Mr. Edwards has repeatedly made the point already that we have not responded to their legal argument, we have not responded to Mr. Summers' estimates. We have not responded because that is not the turf upon which this case will be fought.

RP 59.

During trial, Michael Summers offered the same testimony that he had offered in support of Jim and Shannon Young's summary judgment

motion: that it would have cost Judith Young \$760,382.00 to hire a contractor to perform the work that Jim and Shannon Young had performed. RP 418. See also FoF 155-156; RP 382-457. Mr. Summers further testified that this is what it would have cost Judith Young to have hired a contractor to do the work in 2000 dollars. RP 419. Mr. Summers testified that his estimate would have been 20% to 25% higher (i.e., \$912,458.40 to \$950,477.50) if he had been asked to express it in current dollars. *Id.*

Jim and Shannon Young also offered the testimony of Jan Henry, the realtor who had sold the property to Judith Young. Ms. Henry testified that in 1998, the property had a fair market value equivalent to the \$1,050,000.00 Judith Young paid for it. FoF 58, 159-160. See also Tr. Ex. 88. Ms. Henry testified that the property was worth between \$2.2 and \$2.5 million today. FoF 161. See Tr. Ex. 89. And, Ms. Henry testified that all but \$300,000.00 or \$400,000.00 of the increase in the value was attributable to the work performed by Jim and Shannon Young. FoF 162; RP 556-557.

In other words, Ms. Henry's opinion was that \$750,000.00 to \$1,150,000.00 increase in the value of the property was the result of the work done to improve it by Jim and Shannon Young. The trial court

found, as a fact, that Ms. Henry's opinions and testimony were accurate and credible. FoF 163.

The trial court entered formal findings of fact, conclusions of law, and a judgment. Appendix B. The trial court found that Jim and Shannon Young were entitled to recover, under the theory of unjust enrichment, for the work that they had done. CoL 2-4. **That determination has not been challenged on review.**

With respect to the amount of recovery, the trial court adopted the measure which Jim and Shannon Young had articulated, and to which Judith had not objected:

5. 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.

However, without adopting any factual findings to justify its doing so³, the trial court employed a different measure to value the work that Jim and Shannon Young had performed:

6. However, under the particular circumstances of this case, the Court declines to adopt that measure of damages.

...

³ In its oral opinion, the trial court stated it departed from Mr. Summers' opinion because it included cost components that Jim and Shannon Young had themselves not incurred. See Transcript of Trial Court's March 30, 2005 opinion (attached to the Trial Court's Findings and Conclusions as Exhibit B), p. 10 ("None of that money was expended.").

A. Michael Summers, the cost engineer, whose testimony the Court has generally accepted as credible, testified that it would have cost Judith Young approximately \$760,382.00 in calendar year 2000 dollars to hire a general contractor to perform the same work Jim and Shannon Young in fact performed to improve her property, as set forth in his cost estimate (Defendants' Tr. Ex. 87).

B. Under the circumstances of this case, the Court concludes that Jim and Shannon Young should not be entitled to recover the general contractor's costs identified on page 9 of Mr. Summers' estimate (including mobilization/demobilization costs; the cost of providing supervision, tools and general equipment; the cost for debris disposal; a markup for overhead and profit; and construction contingency; the cost of bonds, insurance and business taxes; and the cost of Washington State sales tax).

CoL 6, 8. Therefore, the trial court entered judgment in favor of Jim and Shannon Young and against Judith Young, after offsets,⁴ in the amount of only \$126,687.00.

Jim and Shannon Young timely appealed from the judgment, asserting that the trial court applied an incorrect measure of recovery. The Court of Appeals agreed and reversed. In its unpublished opinion, the Court of Appeals stated:

The proper measure of recovery in an unjust enrichment claim is the reasonable value of the claimant's

⁴ The trial judge applied an offset of \$375,179.00 to the amount it awarded to account for work that Jim Young had done on Judith's property in Georgia, payments Judith had previously made to Jim and Shannon Young, the cancellation of an indebtedness, and for miscellaneous other matters. See CoL 9-21, especially CoL 19. Neither party contested the appropriateness of these offsets on appeal.

improvements to the defendant's property. *Noel v. Cole*, 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 claimants' position. *Noel*, 98 Wn.2d at 383. . . .

Summers estimated that the improvements Jim and Shannon made to the Thurston County property would have cost Judith \$760,382.00 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 and Shannon's work was \$760,382.00. See *Noel*, 98 Wn.2d at 383. But the court erroneously awarded Jim and Shannon only \$501,866.00, 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 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 costs and a court should generally not limit maximum recovery to costs. *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 \$760,382.00. 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.

Unpublished Decision, p. 8-10. The Court of Appeals remanded, with instructions that the trial court enter a corrected judgment.

V. ANALYSIS

The sole issue presented by this petition for review is whether the Court of Appeals correctly held that, where the claimant is not at fault, the measure of recovery in an unjust enrichment case involving improvements to real property is properly based on the amount the defendant would have to pay to obtain some services from a third party – i.e., the “market cost” of the services.

In both in the summary judgment briefing which they submitted to the trial, and in their pre-trial brief, Jim and Shannon Young took the position that the correct measure of recovery was the greater of (1) the cost the owner would incur in obtaining the same services on the market, or (2) the amount by which the services provided increased the value of the property:

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 601, citing *Realmark Developments, Inc. v. Ranson*, 214 W. Va. 161, 166, 588 S.E. 2d 150, 155 (2003); *Robertus v. Candee*, 205 Mont. 403, 408-09, 670 P.2d 540, 543 (1983).

Before the trial court, Judith Young did not dispute that this was the correct measure of recovery. See CP 513-15; 589-90. Because Judith Young did not dispute that this was the correct measure of recovery, the trial court adopted it in its conclusions of law. CoL 5. Having failed to contest the issue below, Judith should not be permitted to dispute that this is the correct measure of recovery in her petition for review. RAP 2.5(a).

The petition should be denied for this reason alone.

Focusing upon the first of these two standards,⁵ the Court of Appeals noted that, although the trial court had articulated the correct measure of recovery, it had failed to properly employ it in light of the facts as found by the trial court in this case.

⁵ In its unpublished decision, the Court of Appeals observed that no Washington court had yet adopted the “greater than” standard articulated by Jim and Shannon Young and adopted by the trial court. Appendix A. (Unpublished decision, p. 9). But see *Hardgrove v. Bowman*, 10 Wn. 2d 136, 137-38, 116 P.2d 336 (1941); *Smith v. Favilla*, 23 Wn. App. 59, 62-63, 593 P.2d 564, review denied 92 Wn. 2d 1022 (1979) (claimant improving real property entitled to recover increase in the fair market value of the property).

Even if it were true that no Washington court had adopted this standard, in the complete absence of any objection to it, Jim and Shannon Young were entitled to have the trial court apply it here. The trial court explicitly accepted, as accurate and credible, Jan Henry’s testimony that Jim and Shannon Young’s work had caused a \$750,000.00 to \$1,150,000.00 increase in the property’s value. FoF 163. See p. 7, *infra*. The trial court explicitly rejected the competing opinions offered by Judith Young’s expert. FoF 167. Therefore, Jim and Shannon Young were entitled to an award based on the amount by which their work increased the value of the property of at least \$750,000.00.

This analysis provides a second, separate, completely independent basis supporting the Court of Appeals’ decision to reverse the trial court’s decision in this case.

The Court of Appeals correctly determined that the case of *Noel v. Cole*, 98 Wn.2d 375, 655 P.2d 245 (1982) controlled. In *Noel*, a contractor who, through no fault of his own, had made improvements to the State's timber land pursuant to an invalidly awarded contract was held entitled to recover under a theory of unjust enrichment. *Id.* at 382.

Because the contractor had not been at fault, the Washington Supreme Court held that the contractor was entitled to recover the market value of its services, i.e., what it would have cost the state to hire a third party to perform the work the contractor had actually performed:

Where, as here, the party seeking recovery is not at fault, reasonable value is 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. Restatement (Second) of Contracts § 371, comment b (1981); 12 F. Williston, *Contracts* § 1483 (3d ed. 1970).

Id. at 383.

This Court in *Noel* cited to and based the measure of recovery it articulated on the Restatement (Second) of Contracts. The Restatement, in turn, makes it clear that recovery should be based on market cost—i.e., what it would have cost the defendant to obtain the same services on the market. See Restatement (Second) of Contracts, § 371, Comment a (1981) (rule provides for recovery based on market price). Thus, *Noel* holds that

the measure of recovery in an unjust enrichment case is the cost to the defendant of obtaining the services on the market. 98 Wn.2d at 383.

As the Court of Appeals correctly noted, the Court in *Noel* specifically distinguished market value recovery from recovery limited to the costs the claimant actually incurred in performing the services. *Id.* The Court in *Noel* held that a claimant's recovery should be limited to the actual cost the claimant incurred only if the claimant was at fault for causing the situation leading to the unjust enrichment recovery. *Noel*, 98 Wn. 2d at 383, n.6, citing *Edwards v. Renton*, 67 Wn. 2d 598, 607, 409 P.2d 153 (1965) (developer which persuaded city to enter into reimbursement contract in violation of competitive bidding statutes limited to recovering cost city would have incurred had it complied with such statutes). See also *Ducolon Mechanical, Inc. v. Shinstine/Forness, Inc.*, 77 Wn. App. 707, 712-13, 893 P.2d 1127 (1995) (non-defaulting contractor entitled to recover market value of its services, while defaulting contractor is not); *Heaton v. Imus*, 93 Wn.2d 249, 254, 608 P.2d 631 (1980) (unjust enrichment claimant entitled to recover profit where circumstances do not call for its exclusion).

Here, the trial court explicitly found, as a fact, that Jim and Shannon Young had, without fault, performed many years of work

improving Judith Young's property at her request. Jim and Shannon Young performed this work with the agreement that they would ultimately be paid for their work.⁶ FoF 53; CoL 3.

Contrary to what Judith Young alleged in her petition for review, the trial court explicitly found that Jim Young was a licensed and bonded contractor. FoF 5. The trial court also found that, like a contractor, Jim and Shannon Young either owned or obtained the heavy equipment, machinery, and tools that were used to improve the ranch property. FoF 80. The trial court also found that, like a contractor, Jim and Shannon Young had either performed or supervised the performance of all the work on the property. FoF 79. And, the trial court explicitly found that the quality of the work performed by Jim and Shannon Young was "of good and workmanlike quality or better, and was of at least the quality or better than what Judith Young would have obtained had Judith Young hired a contractor to perform similar work." FoF 78.

In light of the rule in *Noel* and in light of these explicit factual findings, the Court of Appeals correctly concluded that Jim and Shannon

⁶ The only reason Jim and Shannon were not entitled to recover "on the contract" – that Judith would buy them their own house – is that the contract was not sufficiently definite to be specifically enforced. See Restatement of Restitution, § 53(1)(b) (1957) (claimant who performs services in exchange for agreement to convey land, where land is not sufficiently described to permit specific performance, is entitled to recover for the services performed on a theory of unjust enrichment).

Young should have been awarded the amount it would have cost Judith Young to hire a contractor to perform the work Jim and Shannon Young performed. Again, the trial court had explicitly accepted, as accurate and credible, Michael Summers' uncontested expert opinion that it would have cost Judith Young \$760,382.00 (in year 2000 dollars) to hire a different contractor to perform the work. FoF 75-77; 157. Therefore, the Court of Appeals properly remanded with instructions for the trial court to enter a judgment based on this amount.

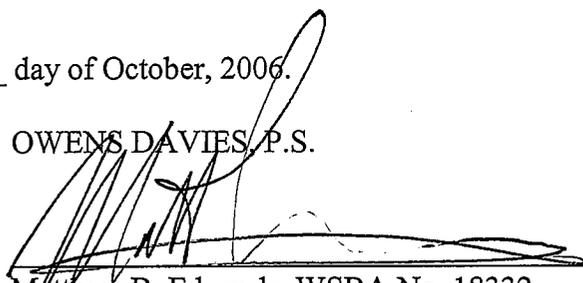
VI. CONCLUSION

The Court of Appeals correctly determined that the trial court had employed an improper measure of recovery. Under *Noel v. Cole*, the trial court was not entitled to limit Jim and Shannon Young's recovery to only its approximation of the costs they had incurred in improving Judith Young's property. The Court of Appeals correctly concluded that Jim and Shannon Young were entitled to recover what it would have cost Judith to hire a contractor to perform the same work -- i.e. the fair market value of the work they had performed.

This case does not present a substantial issue of wide-spread importance that would justify the Supreme Court in accepting review. The petition for review should be denied.

DATED this 3rd day of October, 2006.

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