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SUPREME COURT
STATE OF WASHINGTON

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No. 79207-1

SUPREME COURT

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

James M. and Shannon Young, *Respondents*

v.

Judith Young, *Petitioner*.

**RESPONDENTS JAMES M. AND SHANNON YOUNGS'
SUPPLEMENTAL BRIEF
ON APPEAL TO SUPREME COURT**

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ORIGINAL

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I. INTRODUCTION

Jim and Shannon Young file this supplemental brief pursuant to RAP 13.7(d).

II. ISSUE PRESENTED FOR REVIEW

At Judith Young's request, Jim and Shannon Young spent over six years repairing and remodeling the many buildings located upon and substantially improving Judith Young's 186 acre farm in Thurston County. Jim and Shannon Young expected that that Judith Young would pay Jim and Shannon Young for this work by buying Jim and Shannon Young their own property nearby.

Without paying Jim and Shannon Young a penny for the years of work they had put into improving her property, Judith Young sought to eject Jim and Shannon Young from the property. Because their agreement that Judith Young was to buy other property to pay Jim and Shannon Young for their work was too vague to be specifically enforced, the trial court held that Jim and Shannon Young were entitled to recover under a theory of unjust enrichment. **That determination has not been challenged on appeal.**

The sole issue presented by this case is whether the trial court

employed the correct legal standard for measuring Jim and Shannon Young's recovery. In an unjust enrichment case involving improvements to real property, where the claimants are not at fault, this Court should hold that the proper measure of recovery is the greater of: (1) the cost the owner would incur in obtaining the same improvements on the market, or (2) the amount by which the improvements increased the value of the property.

The trial court, although finding that Jim and Shannon Young had acted without fault, limited Jim and Shannon Young's recovery to its approximation of the costs that Jim and Shannon Young incurred. The trial court erred in so limiting their recovery. The Court of Appeals' decision instructing the trial court to apply the correct measure of recovery should be affirmed.

III. STATEMENT OF THE CASE

Judith Young is independently wealthy, being the beneficiary of trusts established by her grandfather and mother worth many millions of dollars. FoF 3; RP 94-95.¹ 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.

¹ FoF and CoL refer to the trial court's Findings of Fact and Conclusions of Law, which are attached to this Supplemental Brief as Appendix A.

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. He and Shannon, who was studying to become a nurse, have four children. FoF 67.

The Ranch Property

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.

As Judith Young knew when she bought the ranch property, 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 them for the work by purchasing another property

for Jim and Shannon Young near her property. FoF 53.

The Improvements

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 to improve 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.

The Lawsuit

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 claim 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 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. 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. However, 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 and ordered the parties to proceed to trial. FoF 151; CP 572-574.

The Trial

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 measure or 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 (emphasis added).

During trial, Michael Summers again testified that it would have cost Judith Young \$760,382.00, in calendar year 2000 dollars, to hire a contractor to perform the work that Jim and Shannon Young had performed. RP 418-19. See also FoF 155-156; RP 382-457. Mr. Summers clarified 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 estimate what it would have cost Judith Young in March 2005. Id. Judith Young offered no contrary testimony.

Jan Henry, the realtor who had sold the property to Judith Young, also testified that in 1998, the property was worth 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 only \$300,000.00 or \$400,000.00 of that increase was on account of the natural increase of the value of real property over time. In other words, Jan Henry's opinion was that \$750,000.00 to \$1,150,000.00 of the increase in the value of the property was the result of the work done to improve it by Jim and Shannon Young. FoF 162; RP 556-557.

Judith Young did offer an expert to contradict Ms. Henry's testimony. But the trial court found, as a fact, that Ms. Henry's opinions and testimony were accurate and credible. FoF 163. The trial court specifically rejected the contrary opinions offered by Judith Young's expert as not credible. FoF 167.

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:

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.

CoL 5. However, because Jim and Shannon Young had not themselves incurred all the costs that were components of Mr. Summers' cost estimate,² the trial court declined to award the entire amount another contractor would have charged Judith Young for the work to Jim and Shannon Young:

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

² See Verbatim Report of Proceedings, March 30, 2005 (Exhibit B to the Findings of Fact and Conclusions of Law), p. 10.

...

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, based on only \$501,8966.00.³

Jim and Shannon Young timely appealed, asserting that the trial court applied an incorrect measure of recovery. The Court of Appeals agreed and reversed. The Court of Appeals held:

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 v. Cole*, 98 Wn.2d 375, 382, 655 P.2d 245 (1982). Where the party seeking recovery is not at

³ 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.

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....

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.

Court of Appeals Decision, pp. 8-10. The Court of Appeals remanded, with instructed the trial court to enter a judgment based on the correct measure of recovery.

IV. STANDARD OF REVIEW

The issue of the proper measure of recovery is an issue of law. *Kobza v. Tripp*, 105 Wn. App. 90, 95, 18 P.3d 621 (2001). Therefore, it is subject to *de novo* review.

V. ARGUMENT

In an unjust enrichment case, the appropriate measure of damages is generally the greater of: (1) the cost the owner would incur 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.

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).

Jim and Shannon Young cited these cases to the trial court. Judith Young did not dispute that they articulated the correct measure of recovery. See CP 513-15; 589-90. The trial court adopted these standards in its conclusions of law. CoL 5. Therefore, they are the law of the case. RAP 2.5(a).

In any event, Washington Courts have repeatedly applied both the market cost and increased value measures of recovery.

1. Market Cost.

The leading Washington case employing the market cost measure of recovery is this Court's decision in *Noel v. Cole*, 98 Wn. 2d 375, 655 P.2d 245 (1982).

In *Noel*, a contractor performed work for the State installing a logging road and other improvements upon timber land. 98 Wn. 2d at 377. This Court held to the contract pursuant to which the State had hired the contractor to be invalid. Id. at 381. This Court nevertheless held that the contractor,

who had acted without fault, was entitled to a remedy in unjust enrichment.

Id. at 382.

Because the contractor had not been at fault, this Court held that the contractor was entitled to recover the market value of its services, i.e., what it would have cost 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. See also Restatement (Second) of Contracts, § 371, Comment a (1981) (recovery is based on market price).

In *Noel*, this Court held that an unjust enrichment claimant's recovery should be limited to the actual cost the claimant incurred **only if** the claimant was at fault. *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). This distinction has been recognized and applied in many other Washington decisions. See, e.g., *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 price for 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 that Jim Young was a licensed and bonded contractor. FoF 5. The trial court found that, like any other 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 found that, like any other 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.

Most importantly, 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, under the expectation and

upon the agreement that they would ultimately be paid for their work. FoF 53; CoL 3. Because Jim and Shannon Young had acted without fault, Jim and Shannon Young were entitled to be paid what Judith would have had to pay any other contractor for the same work.

The trial court had explicitly accepted, as accurate and credible, Michael Summers' opinion that it would have cost Judith Young \$760,382.00 (in year 2000 dollars) to hire a contractor to perform the work. FoF 75-77; 157. Therefore, as the Court of Appeals held, this is the amount which Jim and Shannon Young are entitled to recover.

2. **Increased Value.**

In the alternative, Jim and Shannon Young were entitled to recover the amount by which their work had increased the value of the property. Several Washington cases have applied this alternative measure of recovery. See *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); *Hardgrove v. Bowman*, 10 Wn. 2d 136, 137-38, 116 P.2d 336 (1941) (the same).

Here, the trial court explicitly accepted, as accurate and credible, expert 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 pp. 11-12, *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 a recovery of at least \$750,000.00, based on the amount by which their work increased the value of the property.

3. **The Trial Court Erred In Not Applying Either of These Measures of Recovery.**

Although it explicitly accepted and adopted Jim and Shannon Young's description of the proper measure of recovery, the trial court limited Jim and Shannon Young to recovering its approximation of the costs that they had incurred in performing the work. See Transcript of Trial Court's March 30, 2005 opinion (attached to the Trial Court's Findings and Conclusions as Exhibit B), p. 10.

Under *Noel*, whether Jim and Shannon Young expended all the costs a general contractor would have incurred is irrelevant. See 98 Wn. 2d at 383. Where, as here, the party seeking recovery is not at fault, the measure of recovery is what it would have cost the landowner to obtain the same services and improvements on the market, including a reasonable profit. Id. Because Jim and Shannon Young performed all the work in good faith, and without

fault, the trial court erred in limiting their recovery to its approximation of their costs. *Noel*, 98 Wn.2d at 383, n. 6.

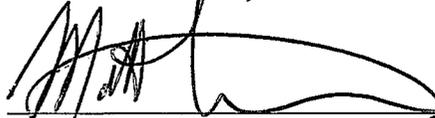
In sum, based on the facts explicitly found by the trial court, Jim and Shannon Young established that it would have cost Judith Young \$760,382.40 (in year 2000 dollars), and between \$912,455.40 and \$950,477.50 (in year 2005 dollars) to hire a contractor to perform work of the exact kind and quality which they performed. Jim and Shannon Young also established that their six plus years of hard work improving this property had increased the fair market value of the property between \$750,000 and \$1,150,000. The trial court plainly erred by limiting Jim and Shannon Young's recovery only to \$501,866.00.

VI. CONCLUSION

The Court of Appeals correctly determined that the trial court had employed an improper measure of recovery. The Court of Appeals' decision should be affirmed.

DATED this 5 day of July, 2007.

OWENS DAVIES, P.S.



Matthew B. Edwards, WSBA No. 18332
Attorneys for Jim and Shannon Young

VII. APPENDICES

Appendix A – Trial Court’s Findings of Fact and Conclusions of Law.

Appendix B – Judgment.

Appendix C – Michael Summers’ Cost Estimate (Trial Ex. 87).

Appendix D – *Realmark Developments, Inc., v. Ranson*, 214 W. Va. 161, 588 SE.2d 150 (2003).

Appendix E – *Robertus v. Candee* 205 Mont. 403, 670 P.2d 540 (1983).

Appendix

“A”

FILED
SUPERIOR COURT
THURSTON COUNTY, WASH.

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BY DEPUTY

SUPERIOR COURT OF WASHINGTON
FOR THURSTON COUNTY

JUDITH YOUNG,

Plaintiff,

vs.

JAMES M. YOUNG and SHANNON YOUNG,
husband and wife; and STATE OF
WASHINGTON, DEPARTMENT OF LABOR &
INDUSTRIES,

Defendants.

NO. 03-2-00937-4

~~PROPOSED~~ ME
FINDINGS OF FACT AND
CONCLUSIONS OF LAW

This matter came on regularly for trial on Monday, March 14 through Friday, March 18, 2005. The Court took a view of the premises and heard opening statements on Monday, March 14. The Court heard the testimony of witnesses on Tuesday, March 15, Wednesday, March 16, and Thursday March 17. The Court heard closing arguments on Friday, March 18.

The Court considered the testimony of the following witnesses:

1. Judith Young
2. James Young
3. Shannon Young
4. Michael Summers

FINDINGS OF FACT AND CONCLUSIONS OF LAW-1
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- 5. Jan Henry
- 6. Murphy Wagar
- 7. William Knight, and
- 8. Gene Weaver

In addition, the Court admitted numerous exhibits into evidence as shown on the list which is attached hereto as Exhibit A and incorporated by reference herein.

The Court issued its oral decision on Wednesday, March 30, 2005 at 11:00 a.m. A copy of the transcript of the Court's oral decision is attached hereto as Exhibit B and incorporated by reference herein.

After the Court rendered its oral decision, but prior to entry of these findings of fact, conclusions of law, and judgment, the Court heard:

- ▶ Jim and Shannon Young's Motion for Reconsideration re Double Credit for ServPro Invoice;
- ▶ Jim and Shannon Young's Motion for an Award of Attorney's Fees Related to Late Disclosed Opinions of Gene Weaver;
- ▶ Judith Young's Motion for Clarification Regarding Offset of Delinquent Interest Payments;

A copy of the Court's ruling on those motions is incorporated by reference herein.

Based on the foregoing, the Court hereby enters Findings of Fact and Conclusions of Law as follows:

1 **FINDINGS OF FACT**

2 **PARTIES**

- 3 1. The plaintiff, Judith Young, is a single individual.
- 4 2. Judith Young resides in a mobile home on an approximately 200 acre piece of
- 5 property located in rural Georgia.
- 6
- 7 3. Judith Young is independently wealthy.
- 8 4. The defendants, James M. ("Jim") and Shannon Young, are a married couple.
- 9 5. Jim Young is a licensed and bonded contractor engaged in the businesses of timber
- 10 cutting, clearing, grading, dozing, and concrete slab construction.
- 11
- 12 6. Shannon Young is not currently employed outside of the home.
- 13 7. Jim and Shannon Young have four children.

14 **RELATIONSHIP PRIOR TO PURCHASE**

15 **OF THURSTON COUNTY PROPERTY**

- 16 8. Judith Young is Jim Young's aunt.
- 17 9. Although they had previously been acquainted, Judith Young and Jim and Shannon
- 18 Young began developing a close relationship in 1993 when they all traveled to Minneapolis,
- 19 Minnesota at the time of Judith Young's mother's last illness and death.
- 20 10. Between 1993 and 1997, Judith Young and James and Shannon Young kept in
- 21 regular contact over the telephone.
- 22
- 23 11. Throughout this time, and until they moved onto the Thurston County property, Jim
- 24 and Shannon Young lived in a house which they owned in Shelton, Washington.
- 25
- 26
- 27
- 28

1 19. In 1997, and at all times since, Judith Young has kept numerous animals on her
2 property in Georgia in addition to her otters, including horses, llamas, dogs, cats, and birds.

3 1997 VISIT BY JIM AND SHANNON YOUNG

4 20. In 1997, Jim and Shannon Young, for the first time, visited Judith at her property
5 in Georgia, and stayed with Judith Young for approximately one week.
6

7 21. Prior to and during Jim and Shannon Young's 1997 visit to Judith Young's property
8 in Georgia, Judith Young had told Jim and Shannon Young she did not like her neighbors, did not
9 like living in Georgia, and that she wanted to move herself, her otter conservation center, and her
10 animals elsewhere.

11 22. During their visit to Judith Young in Georgia in 1997, Jim and Shannon Young
12 installed a concrete slab underneath Judith Young's garage near her mobile home. Jim and
13 Shannon Young also did other work repairing and maintaining Judith Young's property.
14

15 23. Jim and Shannon Young did this work without any intent that they be paid for it.

16 24. Judith Young discussed with Jim and Shannon Young the possibility of moving to
17 Washington state.
18

19 25. Judith Young had told Jim Young she wanted to find a property to move to with
20 natural springs, because well water gave her otters gall stones.

21 PURCHASE OF THURSTON COUNTY PROPERTY

22 26. In the spring of 1998, Jim Young was asked to hay certain property located in
23 Thurston County, Washington (the "Thurston County property").

24 27. The Thurston County property had not been lived on and properly maintained for
25 about ten years.
26

27 28. The Thurston County property had a house ("the Ranch House") located on it.
28

1 29. Although it was structurally sound, the Ranch House was in poor condition. The
2 roof had leaked, which had caused water damage to much of the interior dry-wall, carpeting, and
3 flooring. Most of the appliances and toilets did not work.

4 30. In addition to the Ranch House, there were a number of outbuildings and facilities
5 located on the Thurston County property. These outbuildings and facilities included a garage, a
6 shop building, a three story barn, two manure lagoons, an old, derelict farm house, a granary, and
7 several smaller outbuildings, some of which were derelict.

8 31. All of these buildings had not been maintained during the period the property had
9 been left vacant, such that all the buildings were in substantial need of maintenance and repair.
10

11 32. Because the property had not been occupied or cared for for several years, the land
12 itself was in a run-down condition.
13

14 33. The fields on the property were full of rocks and stumps. There was some fencing
15 on the property, but it was incomplete and in poor repair. The roads on the property had not been
16 maintained. Numerous cars had been abandoned on the property. There was a substantial amount
17 of debris left in the outbuildings and scattered throughout the property. Tansy (a noxious weed
18 subject to control by the Thurston County Noxious Weed Control Authority) was growing on the
19 property.
20

21 34. At the time Jim Young was asked to hay the Thurston County property, its owner
22 had listed the property for sale.

23 35. The owner of the property had employed Jan Henry, a licensed real estate agent
24 who had been involved in the purchase and sale of real estate in Thurston County for many years,
25 to assist in the marketing and sale of the property.
26

1 36. Jim Young did not actually hay the Thurston County property because the fields
2 were too full of rocks to permit him to use his haying equipment.

3 37. However, Jim and Shannon Young brought the Thurston County property to the
4 attention of Judith Young.
5

6 38. Despite the poor condition of the property, Jim and Shannon Young believed that
7 the property had characteristics that might make it desirable for Judith Young.

8 39. The property was about as large as Judith Young's property in Georgia, and thus
9 would afford her the privacy that she desired.

10 40. There were also natural springs located upon the property, which Judith Young
11 desired to use to supply water for her otters.
12

13 41. Jim and Shannon Young fully described the Thurston County property to Judith
14 Young, including both its current run-down condition and its potential for development.

15 42. Jim and Shannon Young also sent Judith Young numerous pictures of the property.

16 43. Judith Young discussed with Jim and Shannon Young plans for improving the
17 property for her use.
18

19 44. Judith Young asked Jim and Shannon Young to do, and Jim and Shannon Young
20 agreed that Jim and Shannon Young would do, the work necessary to fix up the property for Judith
21 Young.
22

23 45. Judith Young agreed that Jim and Shannon Young would do all the work necessary
24 to prepare the Thurston County property for Judith's, her otters', and her other animals' use, prior
25 to Judith Young moving out to the Thurston County property.
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1 46. Judith Young told Jim and Shannon Young that even after Judith Young had moved
2 onto the Thurston County property, that they should continue to live nearby, and that they should
3 continue to assist her in improving and maintaining the property, and operating her otter facility.

4 47. Judith Young decided to purchase the Thurston County property.

5 48. Pursuant to Judith Young's instructions, in June 1998 Jim Young submitted written
6 offers to purchase the Thurston County property.

7 49. The owner of the Thurston County property received several offers to purchase the
8 property at prices comparable to the prices offered by Judith Young. However, the owner elected
9 to accept Judith Young's offers to purchase the property because Judith Young's offers were not
10 contingent upon financing.

11 50. In June and July 1998, after Jim Young had submitted offers to purchase the
12 Thurston County property on behalf of Judith Young, but before for the sale of the Thurston
13 County property to Judith Young had closed, Jim Young traveled, at Judith Young's request, to
14 Judith Young's property in Georgia to perform further work for Judith Young upon her property
15 there.

16 51. Jim Young had an acquaintance, Murphy Wagar, travel with him to Georgia to
17 assist him in performing the work that Judith had requested him to do upon her property there.

18 52. During the course of this visit, Jim Young discussed with Judith Young the issue
19 of how he and Shannon Young would be paid for the work he and Shannon Young had been and
20 would continue to be doing for Judith Young, both to fix up the Thurston County property and for
21 the work that Judith Young had requested him to do to improve her property in Georgia.

22 53. As a result of his conversations with Judith Young, Jim Young reasonably and in
23 good faith formed the belief that Judith Young had agreed to pay him for the work that Judith
24

1 Young had asked Jim and Shannon Young to do both on the Thurston County property and her
2 property in Georgia by buying Jim and Shannon Young a property of their own near the Thurston
3 County property.

4 54. Judith Young purchased the Thurston County property without ever having herself
5 seen the property.

6 55. Because Judith Young did not want to leave her otters in Georgia, Judith Young
7 executed a power of attorney authorizing Shannon Young to sign the necessary documentation to
8 close the purchase and sale of the Thurston County property on her behalf.

9 56. The purchase of the Thurston County property closed in late July/early August,
10 1998.

11 57. Judith Young paid a total purchase price for the Thurston County property of
12 \$1,050,000.00.

13 58. The \$1,050,000.00 purchase price of the property reflected the fair market value
14 of the property at the time of its acquisition by Judith Young.

15 59. The legal description of the Thurston County property is:

16 Parcel A:

17 The west half of the Northeast quarter, and that part of the east quarter of the
18 Northwest quarter of Section 14, Township 16 North, Range 2 West, W.M., lying
19 northerly of Creek; excepting therefrom county road known as 143rd Avenue
20 (formerly McDuff Road) along the North boundary.

21 Parcel B:

22 Parcel 1 of Large Lot Subdivision No. LL-0525, as recorded June 23, 1989 in
23 Volume 3 of Large Lot Subdivision, pages 451 through 453 inclusive, under
24 Recording No. 8906230062, Records of Thurston County Auditor.

1 68. During these visits Jim Young built five new otter pens, repaired and layed concrete
2 for six additional pens, installed a concrete pad in front of the otter pens, installed a septic system
3 for the otter conservation center office, helped set up the office and replaced the floor of the office,
4 performed road repair work, installed the foundation of a dog barn, assisted with the installation
5 of a new well, cleared approximately 40 acres of land, and performed miscellaneous general labor
6 including the mowing of fields, repairing of fencing, and the performance of plumbing and
7 electrical work upon Judith Young's house.
8

9 **IMPROVEMENTS TO THURSTON COUNTY PROPERTY**

10 69. Shortly before the closing of the purchase, the Thurston County property was
11 vandalized.
12

13 70. Prior to the episode of vandalism, Judith Young and Jim and Shannon Young had
14 not discussed the possibility of anyone living on the property prior to Judith Young moving
15 herself, her otters and her other animals onto it.

16 71. However, after the vandalism, Judith Young agreed that Jim and Shannon Young
17 and their family should move onto the property, in order to prevent additional acts of vandalism.
18

19 72. Judith Young also understood that Jim and Shannon Young's move onto the
20 property would facilitate Jim and Shannon Young's efforts to clean up, improve, and get the
21 property ready for Judith Young's planned move with her otters and other animals onto the
22 property.

23 73. Judith Young never asked Jim and Shannon Young to pay rent, either at the time
24 they first moved onto the property, or at any time thereafter.
25

26 74. Jim and Shannon Young began cleaning up the Thurston County property,
27 improving it, and getting it ready for Judith Young's move onto the property.
28

1 75. As part of this effort, Jim and Shannon Young, acting in the good faith, reasonable
2 belief that this was within the scope of the work which Judith Young had asked them to do,
3 performed all of the work to improve the property that is described in defendants' Exhibit 87.
4

5 76. The Court specifically find that defendants' exhibit 87 accurately describes the
6 work performed by Jim and Shannon Young on the property between the time when Judith Young
7 originally purchased the Thurston County property and the time of trial.

8 77. The description and enumeration of the work contained in Defendants' Exhibit 87
9 is incorporated by reference herein.

10 78. All of the work which Jim and Shannon Young performed on the Thurston County
11 property was of good and workmanlike quality or better, and was of at least the quality or better
12 than what Judith Young would have be obtained had Judith Young hired a contractor to perform
13 similar work.
14

15 79. Jim and Shannon Young either performed all the work on the Thurston County
16 property themselves, or, to the extent they paid for or bartered with others to provide materials,
17 services, or labor, supervised the work.
18

19 80. Jim and Shannon Young either owned or obtained the heavy equipment, machinery,
20 and tools that were used to improve the Thurston County property.

21 81. Jim and Shannon Young's efforts initially focused on improving the Thurston
22 County property, cleaning up the grounds, clearing the area where the otter pens were to be
23 installed, and improving the outbuildings.

24 82. Between 1998, when the sale of the property closed and the end of 2000, Jim and
25 Shannon Young paid all of the expenses associated with the improvement and upkeep of the
26 Thurston County property.
27

1 83. By approximately the end of calendar year 2000, Jim and Shannon Young had done
2 substantially all the work to the outbuildings and grounds described in Defendants' Exhibit 87.
3 The only work described in Defendant's Exhibit 87 which Jim and Shannon Young had not
4 substantially finished was the remodeling and upgrading of the Ranch House.
5

6 84. Shortly after Jim and Shannon Young occupied the Ranch House, they made a
7 limited number of repairs to it. They replaced the roof. They addressed the mold that had grown
8 up where the drywall and floors had become wet. They removed the rugs, leaving plywood floors
9 exposed. They repaired the old, existing toilets and appliances.

10 85. After Jim and Shannon Young had made these limited repairs to the Ranch House,
11 Jim and Shannon Young did not make further substantial repairs to the Ranch House until
12 November 2001, as described below.

14 86. The Thurston County property had no fair market rental value in light of the
15 condition it was in at the time it was first occupied by James and Shannon Young.

16 CONTACT BETWEEN PARTIES

17 87. After the purchase of the Thurston County property had closed, Judith Young and
18 Jim and Shannon Young kept in constant contact.
19

20 88. Originally, this contact occurred primarily by telephone.

21 89. Later, in approximately mid-2000, after Jim and Shannon acquired a computer with
22 an Internet connection, this contact also occurred via e-mail. Even then, the parties continued to
23 constantly call one another.

24 90. Jim Young and Judith Young would also discuss the work Jim and Shannon Young
25 were doing during Jim Young's frequent trips to Georgia to work on her property.
26
27
28

1 98. In April 2000, Jim Young seriously injured himself with a chain saw. This
2 interfered with his ability to earn income in that year.

3 99. In December 2000 and January 2001, Judith Young asked Jim Young to travel to
4 Los Angeles, first to check on the health of her father, and then to attend his funeral together with
5 her.
6

7 100. Judith Young then asked Jim Young to travel to Georgia to perform further work
8 on her property there for her.

9 101. Because of the impact on their finances caused by Jim Young's injury in April
10 2000, and because Judith Young had asked Jim Young to travel away from Thurston County, on
11 her behalf, for an unusually long period of time, Shannon Young for the first time asked Judith
12 Young for reimbursement for some of the out-of-pocket expenses which Jim and Shannon Young
13 had incurred in improving the Thurston County property.
14

15 102. Judith Young agreed to reimburse Jim and Shannon Young for some of the out-of-
16 pocket expenses which Jim and Shannon Young had incurred.

17 103. On January 18, 2001, Judith Young wired Jim and Shannon Young the sum of
18 \$52,984.41.
19

20 104. Of this amount \$35,250.00 was reimbursement for out-of-pocket expenses that Jim
21 and Shannon Young had incurred in performing work upon and improving the Thurston County
22 property.

23 105. The balance of the funds wired by Judith Young to Jim and Shannon Young in
24 January 2001 was for reimbursement for property taxes, insurance, and for the cost of a survey
25 Judith Young had directed Jim Young to have performed on her property.
26
27
28

1 106. In February 2001, after Judith Young made this payment, Jim Young traveled to
2 Georgia to Judith Young's property and performed further work for her there.

3 107. In March 2001, Judith Young reimbursed Jim and Shannon Young \$6,009.90 for
4 work that had been performed to a well located upon the Thurston County property.
5

6 CATTLE RANCH AGREEMENT

7 108. Sometime in 2000, Judith Young made the decision that she was not going to move
8 out to the Thurston County property after all.

9 109. However, Judith Young did not immediately communicate her decision to Jim and
10 Shannon Young. Judith Young continued to permit Jim and Shannon Young to continue to work
11 to improve the Thurston County property, and never suggested or directed Jim and Shannon
12 Young to stop performing work on the repairing and improving the property.
13

14 110. By April 2001, Jim and Shannon Young had begun to suspect that Judith Young
15 had decided not to move out to the Thurston County property after all.

16 111. Jim and Shannon Young raised with Judith Young the possibility of developing the
17 Thurston County property into a working cattle ranch.
18

19 112. After discussing this proposal for a period of approximately two months, both
20 Judith Young and Jim and Shannon Young each in good faith formed the belief that they had
21 reached an agreement.

22 113. Jim and Shannon Young reasonably and in good faith believed and understood that
23 their agreement with Judith Young to develop the property into a working cattle ranch included
24 the following:
25

- 26 ● Judith Young was to contribute \$150,000.00 in cash, and a one half interest in the
27 property;
28

- 1 ● Jim and Shannon Young were to forego any claim for payment for the work that
- 2 they had performed for Judith on her property in Georgia or on her property in
- 3 Thurston County;
- 4 ● Jim and Shannon were to contribute at least \$150,000.00 worth of cattle and
- 5 equipment;
- 6 ● Jim and Shannon Young, as part owners of the Thurston County property, would
- 7 assume full responsibility for paying the real property taxes and insurance on the
- 8 property;
- 9 ● Jim and Shannon were to contribute all of their time and labor, over a 5 to 7 year
- 10 period, necessary to develop the property into a working cattle ranch;
- 11 ● At the end of that period the property, cattle, and equipment would be sold and the
- 12 proceeds of the sales split equally between Jim and Shannon, and Judith Young.

13 114. Judith Young's understanding of the terms of their agreement substantially differed

14 from Jim and Shannon Young's understanding. In particular, Judith Young believed that she had

15 not agreed to contribute one-half interest in the property.

16 115. The "agreement" was never reduced to a writing.

17 116. On or about June 11, 2001, acting in the belief that she had reached full agreement

18 with Jim and Shannon Young, Judith Young had \$150,000.00 wired from her account to Jim and

19 Shannon Young.

20 117. Acting in the good faith belief that they had reached an agreement with Judith

21 Young, Jim and Shannon Young accepted the \$150,000.00 payment from Judith Young.

22 118. Acting in the good faith belief that they had reached an agreement with Judith

23 Young, Jim and Shannon Young began developing the property as a cattle ranch.

24 119. Acting in the good faith belief that they had reached an agreement with Judith

25 Young, beginning in June of 2001, and continuing up until the time the complaint in this action

26 was filed, Jim and Shannon Young paid the property taxes on the Thurston County property.

119(a) At all times pertaining to the matters referenced in these Findings, Judith Young acted in good faith as well.

JS
me

1 120. The total amount of property taxes which Jim and Shannon Young paid for the
2 Thurston County property during this time period was \$10,677.00.

3 121. Beginning in June of 2001, and continuing up to the time of trial, Jim and Shannon
4 Young paid to have the Thurston County property insured.
5

6 **FLOOD AND RANCH HOUSE REMODEL**

7 122. In October 2001, a pipe burst in the interior of the Ranch House.

8 123. Jim and Shannon made a claim upon their insurance on account of the resulting
9 flood.

10 124. Their insurer directed ServPro, a contractor specializing in flood restoration and
11 repair, to prepare an estimate for the work necessary to dry out and repair some of the flood
12 damage.
13

14 125. ServPro prepared an estimate for its work totaling \$19,914.92.

15 126. The insurer subsequently issued a check made payable jointly to Jim and Shannon
16 Young and ServPro.

17 127. Shannon Young cashed the insurer's check, which she deposited in Jim and
18 Shannon Young's bank account.
19

20 128. Shannon Young then immediately wrote a check to ServPro for the work that it had
21 performed.

22 129. The work performed by ServPro in response to the flood, for which the insurer paid
23 Jim and Shannon Young, and for which Jim and Shannon Young paid ServPro, constituted work
24 that was not included in work described by Michael Summers in Defendants' Exhibit 87.
25

26 130. Prompted by the October 2001 flooding incident, Jim and Shannon Young began
27 to substantially remodel and improve the interior of the Ranch House.
28

1 151. In September, 2004, the Court heard the parties' cross-motions for summary
2 judgment. The Court granted the Defendants' Motion to Dismiss Judith Young's claim for
3 conversion and damages. Otherwise the Court denied the cross-motions.
4

5 152. Although it had not been addressed by the pleadings in this matter, at the time of
6 trial both parties sought to introduce evidence pertaining to Judith Young's November 1996 loan
7 of \$150,000.00 to Jim and Shannon Young, and of the payments Jim and Shannon had made with
8 respect to that indebtedness.

9 153. The issue of Jim and Shannon Young's indebtedness to Judith Young pursuant to
10 that 1996 loan was tried to the Court with the consent of both parties.
11

12 TRIAL WITNESSES

13 154. The trial of this matter occurred in March of 2005.

14 155. At the trial, Jim and Shannon Young presented the cost estimate and testimony of
15 Michael Summers, a professional cost engineer.

16 156. Mr. Summers described and provided an estimate of the cost that Judith Young
17 would have incurred to have the work performed by Jim and Shannon Young performed by a third
18 party.
19

20 157. The Court specifically finds Michael Summers' testimony, opinions, and cost
21 estimate (Defendants' Exhibit 87) to be accurate and credible.

22 158. The defendants also presented the testimony of Jan Henry.

23 159. Ms. Henry offered her opinion as to the fair market value of the property at the
24 time of its original acquisition by Judith Young.
25

26 160. In her opinion, the Thurston County property's \$1,050,000 sale price accurately
27 reflected its fair market value at the time.
28

1 161. In addition, Jan Henry opined that the Thurston County property is currently worth
2 between \$2.2 and \$2.5 million.

3 162. Jan Henry further opined that approximately \$300-\$400,000 of the increase in the
4 value of the property would have occurred even if Jim and Shannon Young had never performed
5 any work on the property.
6

7 163. The Court specifically finds Jan Henry's testimony and opinions to be accurate and
8 credible.

9 164. The plaintiff presented the testimony of Gene Weaver.

10 165. Mr. Weaver, who is a licenced real estate agent, testified that in his opinion the
11 current fair market value of the property is approximately \$1,150,000.00.
12

13 166. However, the Court finds that the comparable sales upon which Gene Weaver based
14 his opinion as to the value of the property were not truly comparable, and his testimony was
15 otherwise unreliable.

16 167. The Court specifically finds that Mr. Weaver's testimony and opinions are not
17 credible, and rejects them.
18

19 **FACTUAL FINDINGS RE: UNJUST ENRICHMENT**

20 168. Judith Young asked Jim and Shannon Young to perform work upon the Thurston
21 County property.

22 169. Judith Young was at all times aware of the work that Jim and Shannon Young were
23 performing at the Thurston County property.

24 170. Between July 1998 and March 2005, Jim and Shannon Young performed work
25 improving the Thurston County property that substantially enhanced its value.
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UNJUST ENRICHMENT--RIGHT TO RECOVER

2. Jim and Shannon Young performed work for Judith Young upon her properties in Thurston County and in Georgia to Judith Young's knowledge, which have substantially enhanced the value of those properties.

3. Judith Young, by asking Jim and Shannon Young to perform work improving her properties, impliedly promised to pay therefore.

4. It would be unjust for Judith Young to retain the benefit of Jim and Shannon Young's work without having to pay Jim and Shannon Young therefore.

UNJUST ENRICHMENT--MEASURE OF DAMAGES--THURSTON COUNTY PROPERTY

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.

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

7. Instead, the Court concludes the gross value of the work related to the Thurston County property for which Jim and Shannon Young should be entitled to recovery under the theory of unjust enrichment is \$501,866.00.

8. In concluding that Jim and Shannon Young should recover based on a gross value of \$501,866.00, the Court considered the following factors.

A. Michael Summers, the cost engineer, whose testimony the Court has generally accepted as credible, testified that it would have cost Judith Young approximately

1 \$760,382.00 in calendar year 2000 dollars to hire a general contractor to perform the same work
2 Jim and Shannon Young in fact performed to improve her property, as set forth in his cost estimate
3 (Defendants' Trial Exhibit 87).

4
5 B. Under the circumstances of this case, the Court concludes that Jim and
6 Shannon Young should not be entitled to recover the general contractor's costs identified on page
7 9 of Mr. Summers' estimate (including mobilization/demobilization costs; the cost of providing
8 supervision, tools and general equipment; the cost for debris disposal; a markup for overhead and
9 profit; and construction contingency; the cost of bonds, insurance and business taxes; and the cost
10 of Washington State sales tax).

11
12 C. Therefore, the Court limits Jim and Shannon Young's recovery to the
13 amount of \$501,866.00.

14 **UNJUST ENRICHMENT--MEASURE OF**
15 **DAMAGES--GEORGIA PROPERTY**

16 9. The Court concludes the value of the work that Jim Young performed on the
17 Georgia property, for which he is entitled to recover, is \$40,000.00.

18 10. In reaching this conclusion, the Court considered the following factors:

19 A. The Court made no award for the work Jim Young did in clearing land on
20 Judith Young's Georgia property. Clearing land was not really a central goal of what Judith
21 Young was asking Jim Young to do in regards to helping her on the Georgia property.

22
23 B. The Court concludes that Mr. Young is entitled to recover \$30,000.00 for
24 his work building five new otter pens, plus an additional \$10,000.00 for other work that was done
25 on the Georgia property, including but not limited to the foundation work around setting up an
26 office and various road repairs.

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17. In reaching this conclusion, the Court considered the following factors:

A. The November 1996 loan and Jim Young's performance of the work for which they are entitled to an offset are closely related. Jim and Shannon Young were encouraged to perform work for Judith Young, both on her Georgia property and upon the Thurston County property, by the fact that Judith Young had extended this loan.

B. Jim and Shannon Young had completed substantially all of the work for which they are seeking to recover by way of unjust enrichment by March of 2002.

C. Michael Summers estimate of what it would have cost Judith to hire subcontractors to perform the work which Jim and Shannon Young in fact performed on the Thurston County property (Defendants' Trial Exhibit 87), which the Court has accepted as factually accurate, is expressed in calendar year 2000 dollars. Mr. Summers testified that his cost estimate would have been 15%-20% higher had it been expressed in calendar year 2005 dollars.

D. In light of the foregoing, the Court, in the exercise of its discretion, concludes that the offset of the \$150,000.00 on account of Jim and Shannon Young's improvements to the property should be treated as having occurred in March 2002, thereby extinguishing any obligation that Jim and Shannon Young may have to pay interest payments accruing since that date.

18. The Court concludes it should award Jim and Shannon Young \$13,600.50 in fees incurred in responding to the late-disclosed opinions of Gene Weaver for the reasons set forth in the Court's Order Granting Motion for an Award of Attorney's Fees Related to Late Disclosed Opinions of Gene Weaver.

1 19. Therefore, the Court concludes that after accounting for these offsets, the total
2 amount which the Court awards to Jim and Shannon Young to account for the value by which the
3 work performed by Jim and Shannon has enhanced the value of Judith's property, is as follows:
4

5 Award with Respect to Thurston County Property	\$501,866.00
6 Award with Respect to Georgia Property	+\$40,000.00
7 Award for Real Estate Taxes Paid	+\$10,677.00
8 Offset for Reimbursement Payments Already Made by Judith Young	-\$278,856.00
9 Offset for Sale of Horse	-\$2,000.00
10 Offset for November 1996 Loan	-\$150,000.00
11 Fees Relating to the Late Disclosed Opinions of Gene Weaver	+\$13,600.50 ^{ME} \$5,000.00
12 Total Judgment to James and Shannon Young	\$135,287.50

ME \$126,687.00

13 RENTAL VALUE CLAIM

14 20. The plaintiff, Judith Young has asked the Court to award her an offset based on her
15 claim that there is a rental value associated with the Thurston County property. The Court
16 concludes that it should not award Judith Young any such offset.

17 21. In reaching this conclusion, the Court considered the following factors:

18 A. Judith Young never asked Jim and Shannon Young to pay rent and never
19 intended that the Thurston County property generate a rental income;

20 B. There was no evidence establishing the fair market rental value of the
21 Thurston County property in light of its condition at the time Jim and Shannon Young first
22 occupied it;

23 C. It would be unfair to Jim and Shannon Young for Judith Young to recover
24 and enhanced rental value in light of the improvements made to the Ranch House by Jim and
25 Shannon Young. This would effectively permit Judith Young to charge Jim and Shannon Young
26
27

28 OWENS DAVIES, P.S.
926 - 24th Way SW • P. O. Box 187
Olympia, Washington 98507
Phone: (360) 943-8320
Facsimile: (360) 943-6150

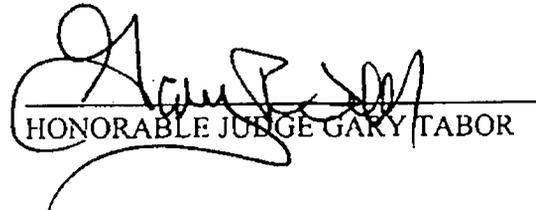
1 rent based on the improvements Jim and Shannon Young themselves made to the Ranch House,
2 and for which they have not yet been entirely reimbursed.

3 D. Although Judith Young attempted to offer expert testimony as to the fair
4 market value of this property in light of its current condition, the testimony established that there
5 is currently no market in Thurston County for the rental of properties of this quality.
6

7 E. The value contributed by Jim and Shannon Young's ongoing maintenance
8 of the property exceeded the rental value associated with the property.

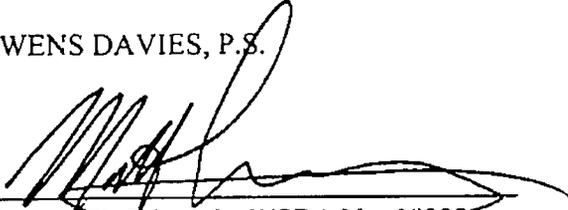
9 22. Any conclusion of law more properly characterized as a finding of fact is hereby
10 adopted as such.

11 DATED this 15 day of April, 2005.

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13
14
15 
HONORABLE JUDGE GARY TABOR

16 Approved as to form only;
17 right to appeal reserved:

18 OWENS DAVIES, P.S.

19
20 
21 Matthew B. Edwards, WSBA No. 18332
22 Attorneys for Jim and Shannon Young

23 Approved as to form only;
24 notice of presentation waived:

25
26 Alan Swanson, WSBA No. 1181
27 Attorneys for Judith Young

SUPERIOR COURT OF WASHINGTON FOR THURSTON COUNTY	
Judith Young	Plaintiff,
vs.	
James & Shannon Young	Defendants.

NO. 03-2-00937-4

**EXHIBIT LIST/STIPULATION
AND ORDER FOR RETURN OF
EXHIBITS (EXLST/STPORE)**

JUDGE Gary R. Tabor
Clerk: Doug Bales
Court Reporter: Pam Jones
Date: March 14, 2005
Type of Hearing: Bench Trial

Offered By	Number of Exhibit	Admitted? Date	Title or Name of Exhibit
Plaintiff	1		1996 Log Cabin Loan
Plaintiff	1-1	3-15-08	Part of Exhibit No. 1
Plaintiff	1-2	3-15-05	Part of Exhibit No. 1
Plaintiff	1-3		Part of Exhibit No. 1
Plaintiff	1-4		Part of Exhibit No. 1
Plaintiff	1-5	3-15-05	Part of Exhibit No. 1
Plaintiff	1-6		Part of Exhibit No. 1
Plaintiff	1-7		Part of Exhibit No. 1
Plaintiff	2		Purchase and Loan Documents
Plaintiff	3		Bank Records and Summaries James and Shannon Young
Plaintiff	4A	3-16-05	Young Ranch Account
Plaintiff	4B	3-16-05	Continuation of 4A
Plaintiff	5		Summary Compilations of Invoices, Statements, Receipts, ECT.

EXHIBIT A

Offered By	Number of Exhibit	Admitted? Date	Title or Name of Exhibit
Plaintiff	6		Expenses and Disbursements
Plaintiff	7		Insurance Records
Plaintiff	7-1		Tax Records
Plaintiff	8	3-15-05	Emails
Plaintiff	9	3-15-05	Deposits by Judy Young
Plaintiff	10	3-15-05	Miscellaneous
Plaintiff	11		Reports
Plaintiff	12	3-17-05	Jim & Shannon Young's Summary of Personal Income Tax Returns
Plaintiff	13	3-17-05	Photos
Plaintiff	14		Wetlands, Soils Report
Plaintiff	15	3-17-05	Photo
Plaintiff	16	3-17-05	Photo
Plaintiff	17	3-17-05	Photo
Plaintiff	18	3-17-05	Map
Plaintiff	19	3-17-05	Photos
Plaintiff	20	3-17-05	Table
Plaintiff	21		
Plaintiff	22		
Plaintiff	23		
Plaintiff	24		
Plaintiff	25		
Plaintiff	26		
Plaintiff	27		
Plaintiff	28		
Plaintiff	29		
Plaintiff	30		
Plaintiff	31		
Plaintiff	32		
Plaintiff	33		
Plaintiff	34		

Initial Only:

Counsel for Plaintiff _____

Counsel for Defendant _____

Offered By	Number of Exhibit	Admitted? Date	Title or Name of Exhibit
Plaintiff	35		
Plaintiff	36		
Plaintiff	37		
Plaintiff	38		
Plaintiff	39		
Plaintiff	40		
Plaintiff	41		
Plaintiff	42		
Plaintiff	43		
Plaintiff	44		
Plaintiff	45		
Plaintiff	46		
Plaintiff	47		
Plaintiff	48		
Plaintiff	49		
Plaintiff	50		

Defendant	51	3-15-05	Statutory Warranty Deed
Defendant	52	3-15-05	Statutory Warranty Deed
Defendant	53	3-15-05	Deed of Trust
Defendant	54	3-15-05	Notice of Trustee's Sale
Defendant	55	3-15-05	Trustee's Deed
Defendant	56	3-15-05	Purchase and Sale Agreement
Defendant	57	3-15-05	Purchase and Sale Agreement
Defendant	58	3-15-05	Purchase and Sale Agreement
Defendant	59	3-15-05	Special Power of Attorney
Defendant	60	3-15-05	Statutory Warranty Deed
Defendant	61	3-15-05	Statutory Warranty Deed
Defendant	62	3-15-05	Statutory Warranty Deed
Defendant	63	3-15-05	Pledge Agreement

Initial Only:

Counsel for Plaintiff _____

Counsel for Defendant _____

Defendant	64	3-15-05	Deed of Trust
Defendant	65	3-15-05	Modification of Deed of Trust
Defendant	66	3-15-05	Schedule A to Judith Annie Young Revocable Trust Agency 25286020
Defendant	67	3-15-05	Promissory Note
Defendant	68	3-15-05	Schedule of Payments on Promissory Note
Defendant	69	3-15-05	Statutory Warranty Deed
Defendant	70	3-15-05	Last Will and Testament and Codicil of Lytton J. Shields
Defendant	71	3-15-05	Selected pages of the Statement of Account for Lytton J. Shields Trust
Defendant	72	3-15-05	In re Shields, 552 N.W. 581 (1996)
Defendant	73	3-15-05	Flight Information Summary re Trips to Georgia
Defendant	74	3-15-05	Summary of work performed at Otter Conservation Center created by Judith Young
Defendant	75	3-15-05	Summary of Labor Done in Georgia
Defendant	76	3-15-05	E-mail – Date January 2, 2001
Defendant	77	3-15-05	E-mail – Date February 20, 2001
Defendant	78	3-15-05	Receipt
Defendant	79	3-15-05	E-mail – April 25, 2001
Defendant	80	3-15-05	E-mail – June 11, 2001
Defendant	81	3-15-05	Letter – February 27, 2002
Defendant	82	3-15-05	Summary of Large Equipment Purchases
Defendant	83	3-15-05	Summary of Purchase/Sold Cattle
Defendant	84	3-15-05	Letter – September 10, 2002
Defendant	85	3-15-05	Letter – April 18, 2003
Defendant	86	3-15-05	Curriculum Vitae
Defendant	87	3-15-05	Report by Michael D. Summers
Defendant	88	3-15-05	Summary of Amounts Paid in June 1998
Defendant	89	3-15-05	Comparative Market Analysis
Defendant	90	3-15-05	E-mail – October 27, 2000
Defendant	91	3-15-05	E-mail – June 8, 2001
Defendant	92	3-15-05	Accounting
Defendant	93	3-15-05	Excerpts of the Telephonic Deposition Upon Oral Examination of John L. Jerry

Initial Only:

Counsel for Plaintiff _____

Counsel for Defendant _____

Defendant	94	3-17-05	Real Estate Tax Affidavit
Defendant	95	3-17-05	Real Estate Tax Affidavit
Defendant	96	3-17-05	Real Estate Tax Affidavit
Defendant	97	3-15-05	Letter
Defendant	98	3-15-05	Photo of Young Property
Defendant	99	3-15-05	Aerial Photo
Defendant	100	3-17-05	Copy of Check
Defendant	101		Wetland Ordinance
Defendant	102		Map
Defendant	103		Ordinance 13222
Defendant	104	3-17-04	Real Estate Excise Tax Affidavit
Defendant	105	3-17-05	Plat 3217404
Defendant	106	3-17-05	Real Estate Excise Tax Affidavit
Defendant	107	3-17-05	Real Estate Excise Tax Affidavit
Defendant	108	3-17-05	Complaint
Defendant	109	3-17-05	Real Estate Excise Tax Affidavit
Defendant	110	3-17-05	Notice of Moratorium
Defendant	111	3-17-05	Real Estate Excise Tax Affidavit
Defendant	112	3-17-05	Plat 3288762
Defendant	113	3-17-05	Real Estate Excise Tax Affidavit
Defendant	114	3-17-05	Continuing Forestland Obligation

Initial Only:

Counsel for Plaintiff _____

Counsel for Defendant _____

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SCANNED

A P P E A R A N C E S

For the Plaintiff: ALAN SWANSON
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For the Defendants: MATTHEW EDWARDS
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 PO Box 187
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1 March 30, 2005

Olympia, Washington

2 MORNING SESSION

3 Department 7

Hon. Gary R. Tabor, Presiding

4 APPEARANCES:

5 For the Plaintiff, Alan Swanson, Attorney at Law; For the
6 Defendants, Matthew Edwards, Attorney at Law

6 Pamela R. Jones, Official Court Reporter

7 * * * * *

8 THE COURT: Good morning. We're here in the
9 matter of Young vs. Young in Cause 03-2-937-4. This is a
10 time set aside by the Court for its ruling after having
11 heard a bench trial in this particular matter. We ran
12 out of time the week that that took place, and so we've
13 scheduled today. I understand that before the Court
14 announces its decision, Mr. Swanson, you wish to make a
15 motion in regard to a quieting of title.

16 MR. SWANSON: Yes, Your Honor, thank you. I
17 think now is as good a time as any to offer to the Court
18 what I have proposed is a stipulated decree quieting
19 title. I provided a copy to Mr. Edwards sometime during
20 the week of trial, provided him a copy now. I'm unsure
21 whether he's in a position to stipulate to it or not.

22 MR. EDWARDS: Your Honor, I don't object to
23 the Court granting his relief, but I would like
24 everything entered at the same time. It's important to
25 my clients that there not be a period of time where the

1 title is out of their hands but no judgment lien against
2 the property. I don't have any objection to having it
3 entered at the same time the Court enters whatever other
4 judgment it's going to enter in this matter.

5 THE COURT: Well, it does appear that there
6 was previously an agreement that there be a document that
7 quiets title and I will sign that. I guess I'll reserve
8 when it's actually signed, be it today or tomorrow or
9 some future period. It would appear to me that the
10 Court's decision can be reduced to writing one way or the
11 other fairly quickly.

12 So, in any event, I have the original and I'll set
13 that aside for just a few moments.

14 MR. SWANSON: And one remaining matter, Your
15 Honor, I wrote the Court a short letter last week. It's
16 my understanding that the defendants are not claiming any
17 prejudice as a result of the e-mails which were forwarded
18 to them after conclusion of taking the evidence, but I
19 would seek some clarification on that.

20 THE COURT: Well, this Court gave the
21 opportunity of the defendants, if they wished, to bring
22 any matters before me about e-mails. I received a letter
23 from Mr. Edwards saying he looked at the e-mails and was
24 not going to raise any issues. So then you sent a letter
25 saying, well, does that mean that there is no claim that

1 any of those issues would have been raised had there --
2 had they come to the attention of the parties earlier,
3 and I don't know whether we need to go that far or not,
4 but let me just inquire of Mr. Edwards. You're not
5 claiming any prejudice based upon your receiving those
6 matters only after the trial was completed, are you?

7 MR. EDWARDS: Your Honor, my understanding
8 was I had the option of either putting those e-mails in
9 or not and we've elected not to. I think it would be a
10 little strong to say that we're not -- we're waiving any
11 claim of prejudice. There is relevant material in those
12 e-mails that should have been produced earlier, and if
13 they had been, we could have inquired about them and
14 submitted them as part of the trial, but, as I said in my
15 letter, I don't think at this point that there is enough
16 there to justify reopening the trial, and we're electing
17 not to put those e-mails before you.

18 THE COURT: Well, it would appear to me that
19 there would not be a claim of error if this matter were
20 to be reviewed by a higher court if the Court in any way
21 forced someone to do something they did not wish to do,
22 and as I understand it, you're saying that the trial is
23 completed and you're satisfied with the information
24 that's been provided to the Court.

25 MR. EDWARDS: Correct.

1 THE COURT: So I think that's as far as we
2 have to go, Mr. Swanson.

3 Well, Counsel, I have to always when I rule first
4 of all look myself in the mirror and be able to believe
5 that I've done the best job that I can. Certainly
6 parties may disagree, but it's also my practice to take a
7 moment as I'm announcing a decision and look the parties
8 eye to eye. And Judith is not here today so I can't do
9 that, so I guess, Mr. Swanson, you'll have to convey my
10 eye contact to her.

11 In any event, I recall as an attorney that probably
12 the hardest time for me was the time awaiting a decision
13 by the trier of fact, and usually that's a jury, and
14 awaiting a jury's decision was always just torture. It
15 was really tough for me to accomplish much of anything
16 while I was waiting for a jury to come back, and I would
17 at least infer that perhaps it's a difficult time for the
18 parties and the attorneys in this matter as well, having
19 to wait, and I was glad we were able to find this time
20 relatively quickly so that I can announce my decision.

21 This was a very interesting case in lots of ways.
22 There's some novel issues, in my opinion. There are a
23 number of things that this case is not about, and many of
24 those things that it's not about originally appeared to
25 perhaps be issues, but those were resolved either by

1 agreement of the parties or tactical decisions or the
2 Court's rulings.

3 This case at one time concerned an issue about
4 whether or not there had been a conveyance by Jim Young's
5 name appearing on the deed, and the Court ruled that
6 there was no conveyance, that there was no written
7 conveyance under the statute of frauds which requires if
8 there's real property involved that there be a writing.
9 I indicated at the time I previously ruled that there
10 might be issues about oral contracts. As this matter was
11 presented to me at trial, issues about oral contracts
12 really were no longer on the table. It was not the
13 defendants' approach any longer that there had been an
14 oral agreement that the Court would be called upon to
15 decide upon or enforce.

16 This case was unusual in that by agreement of
17 parties even though Judith Young had filed the action to
18 quiet title, there had been a counterclaim by the defense
19 so the defense went first and, basically, acted as a
20 plaintiff would by presenting evidence first and having
21 rebuttal and the same in closing arguments.

22 This Court heard testimony over a period of several
23 days. I did go to the scene of the property in Thurston
24 County and view that property. That occurred prior to
25 our taking testimony but was, nevertheless, a view by a

1 trier of fact.

2 And I listened carefully to the parties as they
3 presented evidence and I considered the parties' legal
4 arguments, both orally and the written arguments that
5 were presented to me. I received from both sides trial
6 briefs in this matter. I think it's fair to say that the
7 central issue is whether or not Jim and Shannon Young are
8 entitled to some reimbursement for work that they did for
9 Judith Young either in Thurston County, on what I'll call
10 the Thurston County property, or in Georgia.

11 Under the doctrine of unjust enrichment, I've
12 considered the case law to that effect, and I have
13 compared that to what I understand the facts to be. And
14 everybody would like me to just get to the point, so I'm
15 going to try to do that here fairly quickly.

16 I do believe that there was work done for which the
17 defendants, Jim and Shannon Young, should be reimbursed.
18 I do find that the doctrine of unjust enrichment applies
19 at least to some expenses.

20 And in saying that, one of the difficulties of the
21 Court in making rulings is making it clear what figures
22 are involved. And someday maybe we'll have a courtroom
23 that has visual equipment that I can simply put something
24 up there. I have run off a copy -- this is not an
25 official court document but this is just for the parties

1 so you'll see what I've done, and I want to spend a few
2 moments going through that but I'll ask that copies of
3 that be provided to Counsel. That's at the risk of you
4 spending all your time now looking at the bottom line
5 instead of hearing anything that I say from this point
6 forward, but I thought it best to go ahead and give it to
7 you.

8 First of all, as to the amount of reimbursement
9 that Jim and Shannon Young are entitled to in the
10 Thurston County property, I want to call your attention
11 to Exhibit No. 87, first of all, so if you have Exhibit
12 87 before you; you can follow along. If you do not, I
13 think it's going to be clear what I've chosen to do.

14 I heard the testimony of the defense expert as to
15 his evaluation of the cost of the work done. And I'll
16 tell you that, for the most part, I accepted that
17 expert's opinion about the cost of work done. However,
18 when we get to the last page, and that's Page 9 of
19 Exhibit No. 87, I did not agree with a number of things
20 that that expert believed should be considered by the
21 Court.

22 First of all, the subtotal of the work, the actual
23 work done and its value, according to that expert, was
24 \$501,866. He then went on to say that there would be
25 things like mobilization and demobilization, supervision,

1 tools and general equipment, debris disposal, overhead
2 and profit. If a contractor had been in charge of
3 various subcontractors, a contingency fee of 5 percent
4 called a construction contingency fee, Washington State
5 sales tax, bonds, insurance, business taxes and so forth.
6 None of that money was expended.

7 This situation is somewhat unusual in that
8 Mr. James Young was, while he was a licensed and bonded
9 contractor in certain regards, was not for construction
10 but rather for his business of doing land-clearing and
11 also excavation, as I understand it. I don't feel it
12 appropriate to award any of those costs that a general
13 contractor would have perhaps incurred based upon the
14 facts before me. Mr. Young was residing on the property,
15 based upon, well, the facts in this case, and perhaps
16 I'll address those a little more here in a few moments.

17 In any event, it appears to me that rather than the
18 \$760,000 that the expert testified to, the Court is well
19 within its discretion to award a lesser amount and a more
20 appropriate amount of \$501,866.

21 Now, as to the Georgia property, you may wish to
22 refer to Exhibit No. 75 in that regard. That exhibit was
23 primarily Mr. Young's estimate of the work, value of work
24 that he did in Georgia. First of all, the testimony that
25 the Court heard was that Mr. Young first voluntarily went

1 to Georgia and paid his own way to get there, to show
2 interest in what was going on in Judith Young's life and
3 to see her setup there for the otter farm in Georgia, and
4 while there he made various suggestions about things that
5 could be done, and apparently they discussed improvements
6 that could be made to the otter pens. At one point he
7 brought a friend back and performed work to upgrade
8 various pens.

9 At one point there was a conversation, which I
10 think all three agreed that there was at least a
11 conversation about whether or not Mr. Young would be
12 paid. The divergence in testimony there was whether or
13 not there was actually a promise given, and this Court,
14 as I say, was not called upon to decide whether there
15 were any verbal contracts, so I'm not making a decision
16 about what was said or not said in regard to any oral
17 agreement. On the other hand, it appears clear that
18 there was at some point an offer by Judith Young to pay
19 Jim Young and that was declined, for whatever reason, and
20 as I say, perhaps I'll discuss that a little later.

21 In looking at these charges I'll tell you that one
22 of the areas here is \$50,000 for cleared land. I heard
23 very little testimony about that. I don't see that
24 clearing land was really a central goal of what Judith
25 Young was asking James Young to do in regard to helping,

1 and the figure that's listed there is basically what
2 Mr. Young says he would have charged for 40 acres
3 clearing under his usual course of business. I've
4 disregarded that. I'm not going to require reimbursement
5 for that.

6 Likewise, I'll tell you that up until the time that
7 Mr. Young was called upon to come in what I was told at
8 an inconvenient time for him in 2001, and when he went in
9 both March and April to construct some new pens it
10 appears that for whatever reason he chose not to ask for
11 reimbursement when it was offered. He said that's not
12 necessary.

13 In any event, the figure that I've listed here is
14 \$40,000. That's basically \$30,000 for building five new
15 pens plus an additional \$10,000 for various work that was
16 done, primarily the foundation work around setting up an
17 office and various road repairs. In any event, that's
18 perhaps a subjective figure on my part. But this whole
19 case is an issue of equity, and the Court is given great
20 discretion and so subjective decisions are what's to be
21 expected. I've given this my best consideration.

22 The Court then will note that the total amount for
23 reimbursement that I found under the doctrine of unjust
24 enrichment is \$541,866. However, there are clearly
25 offsets that need to be taken into account. Both parties

1 argued those offsets to me. Let me tell you how I
2 arrived at the figure of \$298,711.

3 That's primarily information that I gleaned from
4 several sources, and I've added an additional figure
5 there and I'll tell you about that as soon as I find the
6 right sheet there. There was \$6,009 for well work.
7 There was \$150,000 that was conveyed for the cattle ranch
8 as an advance by Judith Young for her part of the
9 so-called cattle ranch agreement. There was an amount of
10 \$87,597 was reimbursement, according to figures provided
11 by James and Shannon Young, and there was reimbursement
12 of \$35,250.

13 There's one other figure that I factored in there.
14 Those figures add up to \$278,856, and that's the amount
15 claimed in the exhibit and I will find that in just a
16 moment. The reimbursement of the \$87,000 is the exhibit
17 I'm looking for here. That's Exhibit 81.

18 Jim and Shannon Young agreed that the Service Pro
19 cleanup fee had already been reimbursed to them by
20 insurance and that's \$19,914.92, and I've added that
21 figure back in because Ms. Young paid that as part of the
22 reimbursement she was requested and it had already been
23 paid. So, she's entitled not only to her reimbursement
24 back but to be compensated for the money that had come
25 from insurance as to damage to the property that she

1 owned. So I've added that figure on and that comes up to
2 the figure \$298,711.

3 There's then the log house loan that was made in
4 1996, and it would appear to me that even though that
5 loan said that it was only -- well, it could be interest
6 only for a period of 10 years, and we've actually not
7 reached that 10-year period, when principle is due and
8 owing that appears to be an appropriate offset in this
9 particular case. I'm not dealing with interest; that's a
10 different issue. I'm only dealing with the amount that
11 was loaned, and the principle in that regard.

12 There was also the sale of the horse. I heard
13 testimony that it was sold for \$1,000. Everybody agreed
14 it clearly belonged to Judith Young. Then I heard
15 testimony by the buyer that he paid \$2,000 for the horse
16 and I didn't hear any rebuttal on that. I've assigned
17 the figure of \$2,000. And then added back in what would
18 be property taxes that were paid by Jim and Shannon Young
19 of \$10,677.

20 Thus, the Court's total award based upon the amount
21 of reimbursement that I've calculated as unjust
22 enrichment with offsets that Judith Young has either paid
23 or is entitled to, as well as property taxes that the
24 Young's paid, the total award is \$101,822.

25 Now let me say a few other things about what this

1 case was not about. This case is not about who's a good
2 person or who's a bad person. I recognize that when a
3 court hears testimony that one of its goals or jobs is to
4 rule on the credibility of people, but one can't always
5 ascribe particular motives to a thing that was done,
6 there might be arguments, and what I heard from both
7 sides was arguments about motives for various things that
8 were done.

9 If I can characterize this case, it would be using
10 an example that I already mentioned once before in this
11 case I think back when I was ruling in summary judgment.
12 I said it's two ships passing in the night. That's
13 really what I think this case was. I think that there
14 were some discussions that people didn't go into detail
15 about things that were said or perceived.

16 It's human nature when someone hears someone else
17 say something that they may construe that in the light
18 most favorable to them. We hear what we want to hear.
19 There's no doubt in my mind but that Jim and Shannon
20 Young heard what they wanted to hear in regard to this
21 so-called agreement about the cattle ranch. There's no
22 doubt in my mind that Jim Young heard what he wanted to
23 hear from Judith Young, and he believed that he was going
24 to be taken care of; exactly how, I'm not of the opinion
25 that even he was even sure. It was somewhat esoteric,

1 but he believed that was going to happen. But it was not
2 for me to decide, as I've said, about any verbal
3 contracts.

4 This is more about expectations, and even
5 expectations do not determine the final outcome of this
6 case. What's clear to me is that property in this case
7 was purchased in 1998, and I'm talking about the Thurston
8 County property, for \$1,050,000, and we heard testimony
9 from Ms. Henry that that was the fair market value of the
10 property or very close thereto. When I add up the monies
11 that were invested over a period of time by Judith Young,
12 the figures that I've already reiterated expended prior
13 to this trial is about \$1,328,856. Well, that's not
14 about -- that's the figure that I came up with.

15 The reimbursement figure that I've spoken of here,
16 although there were other offsets, was really that third
17 figure down, \$243,155. And when you add that up, that
18 means that she spent \$1,571,011.

19 What's the property value? I heard testimony from
20 experts by both the defense and the plaintiff and they
21 were at odds. Mr. Knight says the property is worth, in
22 his opinion, about \$1,150,000.

23 Mr. Edwards, I'll tell you that I believe you did a
24 commendable job pointing out that Mr. Knight did not take
25 into account a number of factors that should have been

1 considered in regard to his comparables, and in almost
2 every one of those comparables there was a problem. I'm
3 inclined to believe that Jan Henry's estimate, the
4 estimate of the defense, is much closer to reality, and
5 her opinion is \$2.2 to \$2.5 million. I don't know what
6 the property is ultimately going to be worth. As someone
7 has said, the real test of what property is worth is what
8 it sells for.

9 I'm told that Ms. Young is going to be listing the
10 property for sale or she's going to be selling it.
11 Clearly there are expenses in regard to selling property.
12 There's a real estate fee if listed by a realtor, there
13 are other costs that must be incurred, and so, the actual
14 net of any sale price is I guess really the bottom line
15 as far as Mrs. Young is concerned.

16 Why do I mention sale price? While the doctrine of
17 unjust enrichment says the value of the services or the
18 improved value of the property, whichever is greater,
19 that does not deal with equity because the third prong of
20 an unjust enrichment would be taking into account what's
21 fair, I would not think it fair if the value of
22 improvements far exceeded value of the property. I don't
23 find that here. It seems to me that the value of the
24 improvements clearly are taken into account in an
25 enhanced value to the property over the years.

1 Now, you heard my question of a witness about what
2 about simply inflation, if you will, I didn't use that
3 term, but whatever just the value of property increasing.
4 And I think that certainly a substantial portion of the
5 property's value today is due to the fact that property
6 values have just gone up, they are not making any more
7 property. On the other hand, the value to the house and
8 the outbuildings and the land immediately surrounding
9 those buildings clearly has been significantly enhanced
10 by the work that Jim and Shannon Young did.

11 I was talking a few moments ago about motives of
12 persons, and I said it wasn't for me to decide. The
13 parties here are human beings and everybody has their own
14 situations. They have good points and bad points; I
15 think it's fair to say everyone does. They have
16 qualities that are commendable and other qualities that
17 someone might criticize, and it's not my place here to
18 judge people, but I did want to indicate that in regard
19 to Judith Young, it's clear that she is a loving person
20 in many ways that she deeply cares for animals. And
21 while it's not an issue, in my opinion, and I ruled in
22 pretrial that we weren't concerned about one's financial
23 abilities, the fact that Ms. Young may have a substantial
24 yearly income is not really the issue.

25 On the other hand, to look at Ms. Young and her

1 lifestyle versus what others in her situation might
2 choose, is rather commendable, in the Court's opinion.
3 It appears that she was a generous person and she was
4 willing to reach out to Jim and Shannon in a number of
5 ways. Not only was there money that she conveyed to them
6 as a gift that I heard some reference to, but there was
7 her agreement to loan them money. There was also the
8 fact that when they turned in particular requests for
9 being reimbursed, she paid without question. She didn't
10 ask for any further accounting. All of those are
11 admirable qualities.

12 As to Jim and Shannon Young, the quality that
13 stands out, in my opinion, is their work ethic and the
14 fact that they are clearly hard workers. I'll tell you
15 that my view of the scene was very enjoyable. I enjoyed
16 seeing the property and I was very impressed with its
17 appearance.

18 While this Court is not an expert in construction
19 standards, it was clear to me that the improvements that
20 have been made were quality improvements, and I think
21 that was testified to by the experts as well, that those
22 improvements were well done, they were done in a manner
23 consistent with being very professional.

24 One of the issues that Mr. Swanson raised is if I
25 were going to consider offsets I consider an offset for

1 the fair rental value of the property, and it's clear
2 based upon my giving you this cheat sheet or sheet to
3 assist you that I've not factored that in, and I want to
4 tell you why. First of all, Ms. Judith Young did not
5 appear to be concerned about the property sitting there
6 without the other farm getting started initially on. She
7 didn't appear to be in any rush. She testified that she
8 thought that that might take some time. She didn't
9 indicate that it was her idea that the Youngs move onto
10 the property, it was their idea, but they discussed it
11 with her and she had no problem with that. There was
12 never any discussion of fair rental value.

13 I heard testimony from experts that the fair rental
14 value could be anything from just over \$3,000 to about
15 \$1,500 per month. On the other hand, this Court believes
16 that there would have to be consideration if one were
17 looking at that to the value of keeping the property
18 safe, if you will, a watchman-type situation. Often I
19 think in other situations people don't do anything to
20 property but watch it and receive compensation. That was
21 one factor.

22 Another factor was the regular maintenance that was
23 done. When hay grows, it either has to be cut or it's
24 going to be overgrown. When a driveway area is
25 constructed with bricks, those bricks are going to be

1 pushed up by the growth of vegetation unless that's
2 maintained and that had happened before. When there are
3 roads, roads deteriorate. When there are fences, fences
4 run down unless maintained. When there are buildings,
5 those buildings have maintenance, and it was clear to me
6 that this property had not only been updated by the
7 general improvements that I've addressed, but that there
8 was ongoing maintenance.

9 Finally, as to ongoing maintenance, there was
10 discussion about the tansy being pulled and someone would
11 have to be doing that or there would be the county
12 stepping in and doing it and charging someone for it.
13 All those factors led me to believe that what's fair here
14 is for there not to be any compensation for the rental
15 value required of the Youngs.

16 That kind of goes back to the same type of analysis
17 that I used as to the Georgia property, that a lot of
18 what was done in the Georgia property was done by
19 Mr. Young basically as goodwill. He simply did it and he
20 didn't ask for reimbursement; he turned it down when
21 offered.

22 It appears to me that, likewise, the rental value,
23 Ms. Judith Young never asked for rent. She never
24 discussed that project at all, it was something she did
25 not seem concerned about, and thus, I'm not factoring

1 that in in any way, shape or form.

2 I can't make anybody feel a particular way. One of
3 the things that I've tried to resolve in my own mind as a
4 judge is that people have a right to feel the way they
5 feel. I'm sorry to see families when they grow apart or
6 when they have disagreements that push them apart. I
7 wish it could be otherwise. Life is too short, in this
8 Court's opinion, for people to let animosity really
9 interfere with the way they live life, but day after day
10 people come before a court and they hire attorneys and
11 they present positions to the court based upon how they
12 see things.

13 Both sides in this particular case have had their
14 own opinions about how things were. While I've not
15 followed anybody's particular opinion, it would appear
16 that I've certainly awarded monies under unjust
17 enrichment that make the defendants in this case the
18 prevailing party. They do prevail in regard to the issue
19 of being entitled to reimbursement after offsets are
20 considered. On the other hand, Ms. Young has prevailed
21 and it was acknowledged even before the trial started
22 that title in this particular case to the Thurston County
23 property should be quieted and I've already said that
24 that is appropriate to do.

25 So it seems to me that I've covered what I've

1 chosen to do in this case. I've given you some of the
2 reasons for it, and I don't suggest that I understand
3 every aspect of what all this means for the future.
4 There is one issue that I would like to hear the parties'
5 input on, and that is, whether or not a judgment in this
6 case would appropriately involve some type of lien or
7 equitable trust. I think that's Mr. Edwards' position,
8 but I'll hear from him in that regard and then I'll hear
9 from Mr. Swanson before I make any decision in that
10 regard.

11 MR. EDWARDS: Your Honor, we would like the
12 Court to impose a constructive trust on the property or
13 the proceeds of this sale to make sure this judgment is
14 satisfied so we don't have to go to a different state to
15 attempt to collect it. I'm not sure if that's going to
16 be an issue or not, maybe Mr. Swanson can address that,
17 but absent some other arrangement we would ask the Court
18 to impose a constructive trust under the cases I cited to
19 you, and the recent Washington Court of Appeals case
20 involving the parents of the daughter, the Court has the
21 discretion to do that as part of its decision.

22 THE COURT: Mr. Swanson?

23 MR. SWANSON: Thank you, Your Honor. I
24 suppose part of the question will depend upon whether
25 Mr. Edwards and I can agree to the entry of a judgment

1 without submission of findings and conclusions, whether
2 or not we can yield the ground on any issues of appeal.
3 It would be my sense that I could hope we could enter
4 into that agreement.

5 With that understood, as the Court is well aware,
6 entry of any judgment automatically operates as a
7 judgment lien on any real estate in this county owned by
8 the judgment debtor. So I would suggest that that will
9 suffice and that the Court need not exercise any
10 discretion as Mr. Edwards suggests. I cannot represent
11 what Ms. Young will do, but it would be my understanding
12 that this is going to be -- that the Court's award here
13 will be taken care of. So, I think the Court need not
14 take that next step. I think the entry of a judgment
15 satisfies the concerns of defendant. No title company
16 will convey this property to any other purchaser without
17 this judgment being addressed. Thank you.

18 THE COURT: All right. Well, my thinking is
19 that that's probably true, Mr. Swanson, that indeed, a
20 judgment would be something that attaches to the property
21 that's owned here. If I'm mistaken in that regard, more
22 authority could be given to me, but it would be my intent
23 and I'd state that on the record, that this award be
24 taken care of when the property is sold. There are some
25 other issues about selling the property.

1 We heard testimony that property that's occupied is
2 going to sell for a higher value than that that isn't. I
3 understand that perhaps by simply not discussing the
4 case, or maybe it was the attorneys intending this, that
5 status quo has been preserved during the course of this
6 trial, and parties may take some position about whether
7 or not Jim and Shannon Young are going to have to move or
8 stay there while the property is listed. I'm not getting
9 in the middle of that. I've not made any decision about
10 that at all and that's up to the parties as far as I'm
11 concerned for the future.

12 Now, as to the equitable or, I should say, the
13 quieting title, I don't understand perhaps all of the
14 ramifications of quieting title before a judgment is
15 entered. But I don't think there was any disagreement
16 about quieting title. I don't really see any reason why
17 I should not sign the order quieting title even though
18 there's not an order today as to the judgment.

19 Mr. Edwards?

20 MR. EDWARDS: The problem with that, Your
21 Honor, is the title will transfer before the Court
22 actually enter a judgment, then there would be no
23 judgment lien that attaches to the property and the Court
24 would also lose its ability to impose a constructive
25 trust. Again, I don't have any problem with the Court

1 entering an order quieting title, I just would
2 respectfully request that that occur at the same time the
3 Court enters the monitory judgment so both of those
4 things attach to this property at the same time.

5 THE COURT: Well, counsel hadn't had a
6 chance to talk about whether or not you're going to agree
7 to the form of an order. My own thinking is that you
8 need not have findings and conclusions in a written order
9 because the Court announced those earlier here today.

10 The bottom line is I did find for the defendants
11 under the doctrine of unjust enrichment in a particular
12 amount and that's what the judgment should say. If
13 that's the case and parties agree to that, then I think
14 that an order could be prepared in the next day or so.
15 And so I guess I'll hold off for a couple days on signing
16 this order in the hope that that will spur everybody on
17 to getting that order presented to me and we can deal
18 with it all at the same time. If that doesn't happen,
19 then I'll entertain Mr. Swanson's motion at some point to
20 consider entering it even though we don't have that
21 judgment order.

22 Anything else we need to address?

23 MR. SWANSON: No, Your Honor.

24 MR. EDWARDS: No, Your Honor.

25 THE COURT: Counsel, thank you very much for

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an interesting case, and I'll say to you, Mr. Swanson, if you'll please convey to Ms. Judith Young my hope that her future goes well, best wishes for her and her endeavors in the future, and to Jim and Shannon Young, I wish you both the best as well. We'll be in recess.

MR. SWANSON: Thank you, Your Honor.

(Court in recess.)

CERTIFICATE OF REPORTER

STATE OF WASHINGTON)

COUNTY OF THURSTON)

I, PAMELA R. JONES, RMR, Official Reporter of the Superior Court of the State of Washington, in and for the County of Thurston, do hereby certify:

That I was authorized to and did stenographically report the foregoing proceedings held in the above-entitled matter, as designated by Counsel to be included in the transcript, and that the transcript is a true and complete record of my stenographic notes.

Dated this the 4th day of April, 2005.



PAMELA R. JONES, RMR
Official Court Reporter
Certificate No. 2154

Appendix

“B”

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FILED
SUPERIOR COURT
THURSTON COUNTY, WASH.

'05 APR 15 AIO:10

BY _____ 4
DEPUTY

SUPERIOR COURT OF WASHINGTON
FOR THURSTON COUNTY

JUDITH YOUNG,

Plaintiff,

vs.

JAMES M. YOUNG and SHANNON YOUNG,
husband and wife; and STATE OF
WASHINGTON, DEPARTMENT OF LABOR &
INDUSTRIES,

Defendants.

NO. 03-2-00937-4

JUDGMENT QUIETING TITLE AND
AWARDING DAMAGES

I. JUDGMENT SUMMARY

- | | | |
|----|-------------------------------|--------------------------------------------------------|
| 1. | Judgment Creditor: | James M. and Shannon Young |
| 2. | Judgment Creditor's Attorney: | Matthew B. Edwards
Owens Davies, P.S. |
| 3. | Judgment Debtor: | Judith Young |
| 4. | Principal judgment amount: | \$ 135,287.50 \$126,687.00 <i>ME</i> |
| 5. | Interest to date of judgment | \$-0- |
| 6. | Attorney Fees: | \$-0- |
| 7. | Costs: | \$3,830.43 |
| 8. | Other amounts: | \$-0- |

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05-9-00375-1

JUDGMENT QUIETING TITLE AND AWARDING DAMAGES - 1
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OWENS DAVIES, P.S.
926 - 24th Way SW - P. O. Box 187
Olympia, Washington 98507
Phone: (360) 943-8320
Facsimile: (360) 943-6150

ORIGINAL

1 9. Interest percentage on judgment 12%

2 10. Interest on attorney fees N/A

3 **II. JUDGMENT**

4 This matter came on regularly for trial on March 14-18, 2005. The Court announced its
5 oral decision on March 30, 2005.

6 Today, immediately prior to entering its judgment, the Court heard argument on the
7 following motions:

8 1. Jim and Shannon Young's Motion for Reconsideration re Double Credit for
9 ServPro Invoice;

10 2. Motion for an Award of Attorney's Fees Related to Late Disclosed Opinions of
11 Gene Weaver;

12 3. Judith Young's Motion for Clarification Regarding Delinquent Interest Payments.

13 In addition, the Court heard argument on the presentation of written findings of fact and
14 conclusions of law, and entered the same.

15 Based on the foregoing, the Court hereby directs the Clerk to enter a judgment, and enters
16 judgment, as follows:

17 1. The Court hereby QUIETS TITLE to Judith Young, and free of any right, claim or
18 interest asserted by Jim or Shannon Young (except for the judgment lien arising from the entry of
19 the Court's monetary judgment herein) to the following described real property:

20 Parcel A:

21 The west half of the Northeast quarter, and that part of the east quarter of the
22 Northwest quarter of Section 14, Township 16 North, Range 2 West, W.M., lying
23 Northerly of Creek; excepting therefrom county road known as 143rd Avenue
24 (formerly McDuff Road) along the North boundary.

25 OWENS DAVIES, P.S.
26 926 - 24th Way SW • P. O. Box 187
27 Olympia, Washington 98507
28 Phone: (360) 943-8320
Facsimile: (360) 943-6150

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Parcel B:

Parcel 1 of Large Lot Subdivision No. LL-0525, as recorded June 23, 1989 in Volume 3 of Large Lot Subdivision, pages 451 through 453 inclusive, under Recording No. 8906230062, Records of Thurston County Auditor.

Parcel C:

Parcel 2 of Large Lot Subdivision No. LL-0525, as recorded June 23, 1989 in Volume 3 of Large Lot Subdivisions, pages 451 through 453 inclusive, under Recording No. 8906230062, Records of Thurston County Auditor.

2. The Court hereby ENTERS A MONETARY JUDGMENT in favor of Jim and Shannon Young, husband and wife, and against Judith Young, a single individual, in the principal amount of ~~\$135,287.50~~ ^{126,677.00}. In addition, the Court hereby enters a monetary judgment in favor of Jim and Shannon Young, husband and wife, and against Judith Young, a single individual, for costs, in the amount of \$3,830.43. Interest shall accrue on all amounts awarded herein from the date of entry of this judgment at the rate of 12% per annum, until paid.

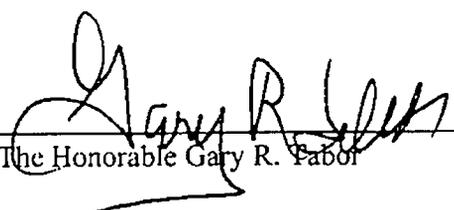
Handwritten initials/signature

3. The Court hereby DECLARES that any indebtedness or claimed indebtedness owed by Jim and Shannon Young to Judith Young is hereby extinguished. The indebtedness extinguished includes any and all claims for principal, interest, attorneys fees, or costs, arising out of the loan of \$150,000.00 from Judith Young to Jim and Shannon Young in November 1996, and/or any and all claims on account of or arising out of that Promissory Note dated November 21, 1996, a copy of which is attached hereto as Exhibit A.

4. The Court ORDERS Judith Young to file the original of said Promissory Note in the Court file in this action within 30 days of the date of entry of this order.

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DATED this 15 day of April, 2005.


The Honorable Gary R. Fabor

Presented by;
Right to Appeal Reserved:

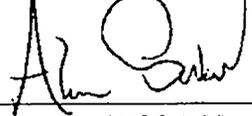
OWENS DAVIES, P.S.



Matthew B. Edwards, WSBA No. 18332
Attorneys for James M. and Shannon Young

Approved as to form;
Notice of Presentation Waived:

LAW OFFICES OF R. ALAN SWANSON, P.L.L.C.



R. Alan Swanson, WSBA No. 1181
Attorneys for Judith Young

Appendix

“C”

YOUNG RANCH CONSTRUCTION

Construction Cost Estimate (including work performed or contracted by James & Shannon Young as noted)

ITEM	DESCRIPTION	QUANTITY	UNIT	UNIT COST	TOTAL COST	COMMENT	
1	House (general)	4,800	SF				
	Replace Furnace	1	LS	11,296.00	\$11,296	Sunset Air	
	Window Coverings	1	LS	213.00	\$213	Home Depot	
	Relocate Furnishings during Construction	1	LS	2,000.00	\$2,000	Estimate 2 hours/week x 50 weeks	
	Daily Cleanup during Construction	1	LS	5,000.00	\$5,000	Estimate 5 hours/week x 50 weeks	
2	Subfloor						
	New Gas Lines for Appliances & Fireplace	1	LS	511.00	\$511	Suburban Propane	
3	Front Entryway	112	SF				
	Remove Underlayment & Carpet	112	SF	0.50	\$56		
	Remove & Replace GWB Walls	270	SF	1.30	\$351		
	Remove & Replace Insulation	270	SF	0.80	\$216		
	Remove Plates, Grilles, etc.	1	LS	30.00	\$30		
	Texture Walls	270	SF	0.15	\$41		
	Remove & Replace & Trim	70	LF	3.00	\$210		
	Paint Walls, Ceilings, Doors & Trim	382	SF	0.70	\$267		
	New Underlayment & Slate Tile	112	SF	10.00	\$1,120		
	4	Green Room	398	SF			
		Remove Underlayment & Carpet	398	SF	0.50	\$199	
Rebuild Archways		2	EA	500.00	\$1,000		
Repair Large Window Liner		28	LF	3.00	\$84		
Replace Side Windows		2	EA	300.00	\$600		
New French Door Assemblies		2	EA	600.00	\$1,200		
Remove & Replace GWB Ceiling		398	SF	1.60	\$637		
Remove & Replace Light Fixtures		1	LS	45.00	\$45		
Remove & Replace Plates, Grilles & Diffusers		1	LS	60.00	\$60		
Remove & Replace Insulation		398	SF	1.00	\$398		
Remove & Replace Trim		116	LF	3.00	\$348		
Texture Ceiling	398	SF	0.20	\$80			
Paint Ceilings & Trim	514	SF	0.80	\$411			
New Wallpaper	598	SF	1.00	\$598			
New Underlayment & Carpet	398	SF	5.00	\$1,990			

YOUNG RANCH CONSTRUCTION

Construction Cost Estimate (including work performed or contracted by James & Shannon Young as noted)

ITEM	DESCRIPTION	QUANTITY	UNIT	UNIT COST	TOTAL COST	COMMENT
5 Dining Room						
	Remove & Replace Subfloor	360	SF	1.60	\$576	
	Remove Underlayment & Carpet	360	SF	0.50	\$180	
	Remove & Replace Insulation	360	SF	0.90	\$324	
	Paint Ceiling & Trim	360	SF	0.80	\$288	
	Remove & Replace Trim	100	LF	3.00	\$300	
	New Underlayment & Pergo	360	SF	7.00	\$2,520	
6 SE Bed/Bath						
	Remove Underlayment & Carpet	176	SF	0.50	\$88	
	Remove Ceramic Tile Floor	176	SF	1.00	\$176	
	Remove & Replace GWB Walls	50	SF	1.00	\$50	
	Remove & Replace GWB Ceiling	686	SF	1.30	\$892	
	Remove & Replace Light Fixtures	243	SF	1.60	\$389	
	Remove & Replace Plates, Grilles & Diffusers	1	LS	0.45	\$0	
	Remove & Replace Insulation	1	LS	60.00	\$60	
	Texture Walls & Ceiling	929	SF	0.90	\$836	
	Remove, Strip, Refinish & Replace Doors	929	SF	0.12	\$111	
	Remove & Replace Trim	4	EA	100.00	\$400	
	Paint Walls, Ceilings & Trim	160	LF	3.00	\$480	
	New Underlayment & Pergo	929	SF	0.70	\$650	
	New Sheet Vinyl Flooring	176	SF	7.00	\$1,232	
		68	SF	8.00	\$544	
7 Office						
	No Work Done	0	LS	0.00	\$0	
8 S Bed/Bath						
	Remove & Replace Bath Subfloor	65	SF	1.60	\$104	
	Remove Underlayment & Carpet	65	SF	0.50	\$64	
	Remove Ceramic Tile Floor	127	SF	0.50	\$64	
	Remove & Replace GWB Walls	65	SF	1.00	\$65	
	Remove & Replace GWB Ceiling	500	SF	1.30	\$650	
	Remove & Replace Light Fixtures	177	SF	1.60	\$283	
	Remove & Replace Plates, Grilles & Diffusers	1	LS	45.00	\$45	
		1	LS	60.00	\$60	

YOUNG RANCH CONSTRUCTION

Construction Cost Estimate (including work performed or contracted by James & Shannon Young as noted)

ITEM	DESCRIPTION	QUANTITY	UNIT	UNIT COST	TOTAL COST	COMMENT	
8	S Bed/Bath (cont)						
	Remove & Replace Insulation	742	SF	0.90	\$668		
	Texture Walls & Ceiling	692	SF	0.12	\$83		
	Remove, Strip, Refinish & Replace Doors	4	EA	100	\$400		
	Remove & Replace Window Liners	40	LF	5.00	\$200		
	Remove & Replace Trim	120	LF	3.00	\$360		
	Remove & Replace Toilet	1	EA	500.00	\$500		
	Paint Walls, Ceilings & Trim	692	SF	0.70	\$484		
	New Underlayment & Pergo	127	SF	7.00	\$889		
	New Sheet Vinyl Flooring	50	SF	6.00	\$300		
	9	Laundry					
		Remove & Replace Subfloor	40	SF	1.60	\$64	
Remove Underlayment & Flooring		75	SF	0.70	\$53		
Patch Walls		1	LS	40.00	\$40		
Remove & Replace GWB Ceiling		75	SF	1.60	\$120		
Remove & Replace Light Fixture		1	EA	30.00	\$30		
Remove & Replace Plates, Grilles & Diffusers		1	LS	30.00	\$30		
Remove & Replace Insulation		40	SF	0.90	\$36		
Texture Walls & Ceiling		360	SF	0.12	\$43		
Remove, Strip, Refinish & Replace Doors		3	EA	100.00	\$300		
Remove & Replace Trim		120	LF	3.00	\$360		
Paint Walls, Ceilings & Trim		360	SF	0.70	\$252		
New Underlayment & Tile	75	SF	8.00	\$600			
10	Sun Room						
	Remove Floor Tile	416	SF	0.80	\$333		
	New Tile Floor & Base	416	SF	7.00	\$2,912		
	New Base Tile	100	LF	5.00	\$500		
11	Kitchen						
	Remove & Replace Subfloor	349	SF	1.60	\$558		
	Remove Underlayment & Flooring	349	SF	1.10	\$384		
	Remove & Replace Interior Walls	150	SF	5.00	\$750		

YOUNG RANCH CONSTRUCTION

Construction Cost Estimate (including work performed or contracted by James & Shannon Young as noted)

ITEM	DESCRIPTION	QUANTITY	UNIT	UNIT COST	TOTAL COST	COMMENT	
11	Kitchen (cont)	813	SF	1.30	\$1,057		
		Remove & Replace GWB Walls					
		175	SF	1.60	\$280		
		Remove & Replace Dropped Ceiling					
		175	SF	1.60	\$280		
		Remove & Replace GWB Ceiling					
		46	LF	10.00	\$460		
		Remove Old Cabinets & Countertops					
		1	LS	13,824.00	\$13,824	Lumbermen's Building Centers	
		New Cabinets & Countertops					
		1	LS	300.00	\$300		
		Remove & Replace Light Fixtures					
		1	LS	90.00	\$90		
		Remove & Replace Plates, Grilles & Diffusers					
11	Kitchen (cont)	1,662	SF	0.90	\$1,496		
		Remove & Replace Insulation					
		2	EA	600.00	\$1,200		
		Remove & Replace Skylight & Well					
		1	LS	18,153.00	\$18,153	McKinney's Appliance, Black Diamond Roofing	
		Gas Piping					
		See Above				\$0	
		1,162	SF	0.12	\$139		
		Texture Walls & Ceiling					
		1	EA	500.00	\$500		
Remove Garden Window							
200	LF	3.00	\$600				
Remove & Replace Trim							
1,162	SF	0.70	\$813				
Paint Walls, Ceilings & Trim							
349	SF	10.00	\$3,490				
New Underlayment & Slate Tile							
12	Living/Bar	558	SF	1.60	\$893		
		Remove & Replace Subfloor					
		558	SF	0.60	\$335		
		Remove Underlayment & Flooring					
		1,099	SF	1.30	\$1,429		
		Remove & Replace GWB Walls					
		558	SF	1.60	\$893		
		Remove & Replace GWB Ceiling					
		1	LS	60.00	\$60		
		Remove & Replace Light Fixtures					
		1	LS	60.00	\$60		
		Remove & Replace Plates, Grilles & Diffusers					
		2,215	SF	0.90	\$1,994		
		Remove & Replace Insulation					
		1	EA	300.00	\$300		
		Remove & Replace Window					
		1,657	SF	0.12	\$199		
Texture Walls & Ceiling							
150	LF	3.00	\$450				
Remove & Replace Trim							
1,657	SF	0.70	\$1,160				
Paint Walls, Ceilings & Trim							
528	SF	5.00	\$2,640				
New Underlayment & Carpet							
40	SF	12.00	\$480				
New Slate Tile @ Fireplace							

Appendix

“D”

214 W. Va. 161

**REALMARK DEVELOPMENTS, INC., a
West Virginia Corporation, Plaintiff
Below, Appellee,**

v.

**Clyde W. RANSON (Ransom), Jr., and
Judith J. Ranson (Ransom), De-
fendants Below, Appellants.**

No. 30895.

Supreme Court of Appeals of
West Virginia.

Submitted March 11, 2003.

Decided April 17, 2003.

After commercial tenants vacated premises upon expiration of lease, landlord sued tenants to recover rent and unpaid real estate taxes. Tenants asserted counterclaim alleging unjust enrichment due to improvements which tenants placed upon premises. The Circuit Court, Kanawha County, James A. Stucky, J., granted summary judgment for landlord on tenants' counterclaim, and thereafter entered judgment for landlord on its claims for rent and taxes. Tenants appealed. The Supreme Court of Appeals, 208 W. Va. 717, 542 S.E.2d 880, affirmed in part, reversed in part, and remanded for trial on unjust enrichment. On remand, the Circuit Court, James A. Stucky, J., directed verdict for landlord. Tenants appealed. The Supreme Court of Appeals, Maynard, J., held that: (1) tenants were entitled to a jury trial on unjust enrichment claim, and (2) measure of damages was the greater of the enhanced market value of the property or the cost of the improvements.

Reversed and remanded.

1. Appeal and Error \Leftrightarrow 893(1)

The standard of review of a directed verdict is de novo. Rules Civ. Proc., Rule 50.

2. Appeal and Error \Leftrightarrow 866(3), 927(7)

On appeal of a directed verdict, the Supreme Court of Appeals, after considering the evidence in the light most favorable to the nonmovant party, will sustain the granting of a directed verdict when only one rea-

sonable conclusion as to the verdict can be reached; but if reasonable minds can differ as to the importance and sufficiency of the evidence, a circuit court's ruling granting a directed verdict will be reversed. Rules Civ. Proc., Rule 50.

3. Appeal and Error \Leftrightarrow 893(1)

Where the issue on an appeal from the circuit court is clearly a question of law, the Supreme Court of Appeals applies a de novo standard of review.

4. Action \Leftrightarrow 22

In determining whether an action is legal or equitable in nature, a court examines both the issues involved and the remedy sought.

5. Action \Leftrightarrow 22

Generally, an action is one in equity if it is based on equitable rights and equitable relief is sought.

6. Jury \Leftrightarrow 14(2)

A right to trial by jury generally applies to an action for the recovery of money or damages, or a legal action for the recovery of money only, or an action in which only a money judgment is sought.

7. Jury \Leftrightarrow 14(2)

Essentially, the right to a jury trial applies where the legal remedy of damages is full and adequate and can do complete justice between the parties.

8. Jury \Leftrightarrow 14(2)

Tenants were entitled to a jury trial on unjust enrichment claim against landlord to recover money judgment for improvements made by tenants; the action was at law, even though unjust enrichment was the equitable reason.

9. Implied and Constructive Contracts \Leftrightarrow 3

The right to recover for unjust enrichment is based on the principles of equity.

10. Jury \Leftrightarrow 14(2)

A suit seeking monetary recovery under a theory of unjust enrichment is an action at law and, therefore, can be tried before a jury.

11. Jury ⇐28(10)

Tenants' acquiescence to the trial court's decision to conduct a bench trial was not a waiver of their right to a jury trial on unjust enrichment claim against landlord; the tenants continued to object to the trial court's decision and filed a demand for a jury trial and objected to the court's denial of jury trial following the pre-trial conference.

12. Implied and Constructive Contracts

⇐4

Restitution is allowed only to the extent the injured party has conferred a benefit on the other party by way of part performance of contract or reliance.

13. Implied and Constructive Contracts

⇐110

If a sum of money is awarded to protect a party's restitution interest on contract theory, it may, as justice requires, be measured by either (1) the reasonable value to the other party of what he received in terms of what it would have cost him to obtain it from a person in the claimant's position, or (2) the extent to which the other party's property has been increased in value or his other interests advanced; the greater of the above two measures should be used in cases in which work has increased the value of the defendant's property, but there is some discrepancy between the reasonable value of that work and the amount of enhancement.

14. Implied and Constructive Contracts

⇐110

The measure of damages for tenants' unjust enrichment claim against landlord was the greater of the enhanced market value of the property or the cost of the tenants' improvements to the property; modifying *Somerville v. Jacobs*, 153 W.Va. 613, 170 S.E.2d 805.

Syllabus by the Court

1. A suit seeking monetary recovery under a theory of unjust enrichment is an action at law and therefore, can be tried before a jury.

1. It appears that the Ransons' surname is actually "Ransom." However, they are called Ranson in the style of the case and in various documents

2. The measure of damages in an unjust enrichment claim is the greater of the enhanced market value of the property or the cost of the improvements to the property. To the extent that the Syllabus of *Somerville v. Jacobs*, 153 W.Va. 613, 170 S.E.2d 805 (1969), differs from this holding, it is hereby modified.

Charles E. Hurt, Esq., Charleston, for Appellants.

Timothy J. LaFon, Esq., Ciccarello, Del Giudice & LaFon, Charleston, for Appellee.

MAYNARD, Justice.

This case is before this Court for a second time. Realmark Developments, Inc., the appellee herein and plaintiff/counterclaim defendant below (hereinafter "Realmark") instituted this action to recover unpaid rent and real property taxes for property leased to Clyde and Judith Ranson, the appellants herein and defendants/counterclaim plaintiffs below (hereinafter "the Ransons").¹ The Ransons filed a counterclaim contending that Realmark was unjustly enriched by repairs and improvements they made to the property. The circuit court granted summary judgment to Realmark on its claim for unpaid rent and property taxes, and that ruling was upheld by this Court on appeal in *Realmark Developments Inc. v. Ranson*, 208 W.Va. 717, 542 S.E.2d 880 (2000) (hereinafter "*Realmark I*"). However, we remanded the case for a trial on the Ransons' unjust enrichment claim.

Upon remand, a bench trial was held. After the Ransons presented their case, Realmark filed a motion for a directed verdict. The circuit court granted Realmark's motion and entered judgment in its favor on April 2, 2002. The Ransons' appeal of that order is now before this Court.

In this appeal, the Ransons contend that the circuit court erred by denying them a jury trial; by refusing to allow their experts to testify regarding the cost of the labor and

filed in connection with this action. Thus, for consistency purposes, we refer to them as the Ransons.

materials they expended on the property; and by granting Realmark's motion for a directed verdict. Upon reviewing the petition for appeal, the entire record, and the briefs and argument of counsel, we find that the Ransons were entitled to a jury trial. We also find that the Ransons should have been allowed to present evidence of the cost of the improvements they made to the property for the purpose of determining damages. Therefore, we reverse the final order of the circuit court and remand this case for further proceedings consistent with this opinion.

I.

FACTS²

In 1991, the Ransons leased a building located in Charleston, West Virginia, from Realmark. The lease agreement provided that the Ransons had the option of purchasing the building at the end of the initial five-year-lease term. According to the Ransons, Realmark orally agreed that a portion of the rent paid by them under the lease would be applied toward the purchase price of the building. The Ransons also contend that Realmark promised to assist in financing the property at the end of the five-year lease, but subsequently refused to do so. As a result, they were unable to purchase the building.

The Ransons say they relied upon Realmark's promises and, consequently, expended a substantial sum of money to repair and remodel the building during the five-year-lease term. The lease agreement executed by the parties on May 31, 1991, included a purchase price for the property of \$195,000.00. However, at the end of the Ransons' five-year lease, Realmark sold the property to a third party for \$270,000.00.

Pursuant to this Court's decision in *Realmark I*, a trial was held on the Ransons' unjust enrichment claim on February 5 and 6, 2002. After the Ransons presented their case, Realmark moved for a directed verdict. The circuit court granted the motion, and the final order was entered on April 2, 2002. This appeal followed.

2. For additional background facts of this case,

II.

STANDARD OF REVIEW

[1, 2] As set forth above, the Ransons appeal the circuit court order granting Realmark's motion for a directed verdict. This Court has held that:

"The appellate standard of review for the granting of a motion for a directed verdict pursuant to Rule 50 of the West Virginia Rules of Civil Procedure is *de novo*. On appeal, this court, after considering the evidence in the light most favorable to the nonmovant party, will sustain the granting of a directed verdict when only one reasonable conclusion as to the verdict can be reached. But if reasonable minds could differ as to the importance and sufficiency of the evidence, a circuit court's ruling granting a directed verdict will be reversed." Syllabus Point 3, *Brannon v. Riffle*, 197 W.Va. 97, 475 S.E.2d 97 (1996).

Syllabus Point 6, *McCloud v. Salt Rock Water Pub. Serv. Dist.*, 207 W.Va. 453, 533 S.E.2d 679 (2000).

[3] The Ransons also assign errors in this case which raise questions of law. We have held that "[w]here the issue on an appeal from the circuit court is clearly a question of law . . . we apply a *de novo* standard of review." Syllabus Point 1, in part, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995). With these standards in mind, we now consider the parties' arguments.

III.

DISCUSSION

A. *Right to a Jury Trial*

The Ransons first contend that the circuit court erred by denying them a jury trial. During the pre-trial conference, the Ransons indicated that they wanted a jury trial, but Realmark objected. Realmark argued that the Ransons' claim was equitable in nature and therefore, they were not entitled to a jury trial. The trial court agreed with Realmark and held a bench trial.

see *Realmark I*.

"Prior to the introduction of the Rules of Civil Procedure, a right to a jury trial existed in an action at law. In an equitable dispute, however, the right to a jury trial did not exist." *Little v. Little*, 184 W.Va. 360, 362, 400 S.E.2d 604, 606 (1990). The distinction between law and equity was abolished by Rule 2 of the West Virginia Rules of Civil Procedure which provides that "[t]here shall be one form of action to be known as 'civil action.'" Nonetheless, "it has been recognized that the right to a jury trial depends upon whether one had that right prior to the adoption of the Rules." *Warner v. Kittle*, 167 W.Va. 719, 725, 280 S.E.2d 276, 280 (1981).

[4-8] In determining whether an action is legal or equitable in nature, both the issues involved and the remedy sought are examined. 47 Am.Jur.2d *Jury* § 34 (1995). Generally, an action is one in equity if it is based on equitable rights and equitable relief is sought. *Id.* at § 33. For example, an action for specific performance is purely equitable in nature, and traditionally, there has been no right to a jury trial in that type of case. *West Virginia Human Rights Comm'n v. Tenpin Lounge, Inc.*, 158 W.Va. 349, 354, 211 S.E.2d 349, 352 (1975) (citations omitted). By contrast, a "right to trial by jury generally applies to an action for the recovery of money or damages, or a legal action for the recovery of money only, or an action in which only a money judgment is sought." 50A C.J.S. *Juries* § 50 (1997). Essentially, "the right applies where the legal remedy of damages is full and adequate and can do complete justice between the parties." *Id.*

[9] In the case *sub judice*, the Ransons claim that Realmark was unjustly enriched by the improvements they made to the property at issue. In *Realmark I*, this Court explained that "if benefits have been received and retained under such circumstance that it would be inequitable and unconscionable to permit the party receiving them to avoid payment therefor, the law requires the party receiving the benefits to pay their reasonable value." 208 W.Va. at 721-22, 542 S.E.2d at 884-85. Clearly, the right to recover for unjust enrichment is based on the principles of equity. However, the remedy sought in

this case is a money judgment and, thus, is governed by law. In other words, "unjust enrichment . . . is but the equitable *reason* for requiring payment for value of goods and services received." *Nehi Beverage Co., Inc. of Indianapolis v. Petri*, 537 N.E.2d 78, 85 (Ind.Ct.App.1989) (emphasis in original).

[10, 11] As the *Petri* court explained:

"The theory on which the plaintiff in this suit seeks money damages, unjust enrichment, sometimes referred to as restitution, a contract implied in law, quasi-contract, or an action in *assumpsit*, is the product of a long tradition in law, and is an action at law. (*Board of Highway Commissioners v. City of Bloomington* (1911), 253 Ill. 164, 173, 97 N.E. 280, 284-85; *Dickerson Realtors, Inc. v. Frewert* (1974), 16 Ill. App.3d 1060, 1063, 307 N.E.2d 445, 448; see Restatement of Restitution, Introductory Note (1937); 1 Palmer, Restitution sec. 1.2 (1978); 1 A. Corbin, Contracts, sections 19, 20 (1 vol. ed.1952); Dobbs, Remedies sec. 4.2, at 232 (1976).) The confusion with equity emanates from the decision of the King's Bench in 1760 in the case of *Moses v. Macferlan*, 2 Burr. 1005, 97 Eng.Rep. 676, where Lord Mansfield stated that the defendant's obligation came 'from the ties of natural justice' founded in 'the equity of the plaintiff's case.' (See 1 Palmer, Restitution sec. 1.2, at 7 (1978); *Board of Highway Commissioners v. City of Bloomington* (1911), 253 Ill. 164, 173, 97 N.E. 280, 285.) As Palmer explains, the statement concerning the action of quasi-contract being equitable has been repeated many times, but merely refers to the way in which a claim should be approached 'since it is clear that the action is at law and the relief given is a simple money judgment.' (1 Palmer, Law of Restitution sec. 1.2, at 7 (1978).) . . ."

Id., quoting *Partipilo v. Hallman*, 156 Ill. App.3d 806, 109 Ill.Dec. 387, 510 N.E.2d 8, 11 (1987). Accordingly, we now hold that a suit seeking monetary recovery under a theory of unjust enrichment is an action at law and therefore, can be tried before a jury. Thus,

the Ransons are entitled to a jury trial.³

B. Exclusion of Expert Testimony

Although we have determined that this case must be remanded for a new trial, we feel it is necessary to address the Ransons' contention that the circuit court erred by not allowing them to present expert testimony regarding the cost of labor and materials they expended on the building. Prior to trial, Realmark filed a motion in limine to exclude the testimony of Hurford Bolyard and James White concerning the cost of the labor and materials which were used to improve the building leased by the Ransons. The Ransons claimed that they had not preserved all of the bills for the labor and materials, and therefore, they intended to present the testimony of Mr. Bolyard and Mr. White to establish their costs and the damages they sought to recover. However, Realmark asserted that the measure of damages in this instance is the increased value of the property as the result of the improvements. Since Mr. Bolyard and Mr. White were not qualified to render such an opinion, Realmark argued that their testimony should be excluded. The circuit court agreed.

As set forth above, we determined in *Realmark I* that the Ransons had a viable unjust enrichment claim because there was evidence that indicated that the Ransons made improvements to the property based upon their belief that Realmark would give them financial assistance so that they could exercise their option to purchase at the end of their five-year lease. In that regard, we said:

As indicated in Restatement, *Restitution* § 53(3), where a person acquires an interest in land as a result of an agreement with the owner, such as the leasehold interest acquired by the Ransons in the present case, under a mistake of law, that person is entitled to restitution for improvements which he places on the land as a result of the mistake. In the present

3. We note that Realmark also argued in this appeal that the Ransons eventually agreed with the trial court's decision to hold a bench trial during the pre-trial conference and, thus, waived their right to a jury trial. Having reviewed the transcript of the pre-trial proceedings, we refuse to characterize the Ransons acquiescence to the

case, it is the Ransons' claim that they believed that Realmark Developments, Inc., was legally obligated to assist them in financing their purchase of the property in question. While they may have been legally mistaken, their belief, if factually established, may entitle them to restitution under the restitution count of their amended counterclaim.

208 W.Va. at 722, 542 S.E.2d at 885.

[12] It is well established that "[r]estitution is allowed only to the extent the injured party has conferred a benefit on the other party by way of part performance or reliance." 22 Am.Jur.2d *Damages* § 56 (1988). Consistent with this principle, this Court has held:

An improver of land owned by another, who through a reasonable mistake of fact and in good faith erects a building entirely upon the land of the owner, with reasonable belief that such land was owned by the improver, is entitled to recover the value of the improvements from the landowner and to a lien upon such property which may be sold to enforce the payment of such lien, or, in the alternative, to purchase the land so improved upon payment to the landowner of the value of the land less the improvements and such landowner, even though free from any inequitable conduct in connection with the construction of the building upon his land, who, however, retains but refuses to pay for the improvements, must, within a reasonable time, either pay the improver the amount by which the value of his land has been improved or convey such land to the improver upon the payment by the improver to the landowner of the value of the land without the improvements.

Syllabus, *Somerville v. Jacobs*, 153 W.Va. 613, 170 S.E.2d 805 (1969).

The plaintiffs in *Somerville* reasonably relied upon a surveyor's report and mistakenly

court's decision as a waiver of their right to a jury trial. Instead, we find that the Ransons continued to object to the trial court's decision. In fact, they filed a "Demand for a Jury Trial and Objection to the Court's Denial of Jury Trial," following the pre-trial conference.

constructed a warehouse building on a lot owned by the defendants. The plaintiffs filed suit seeking \$20,500.00, the cost of the improvements they made to the defendants' property. The parties stipulated that the property in question had a fair market value of \$2,000.00 immediately prior to the erection of the building by the plaintiffs. They also agreed that the fair market value of the property after the improvements were made was \$19,500.00.

The trial court in *Somerville* entered judgment in favor of the plaintiffs and required the defendants to decide whether they wished to retain the building and pay the plaintiffs \$17,500.00 or convey title to the property to the plaintiffs for \$2,000.00 cash. This Court upheld the trial court's decision stating that "if the defendants retain the building and refuse to pay any sum as compensation to the plaintiff . . . they will be unjustly enriched in the amount of \$17,500.00, the agreed value of the building[.]" 153 W.Va. at 628, 170 S.E.2d at 813.

[13] In the case at bar, Realmark contends that the *Somerville* decision supports its contention that the Ransons can only recover the increased market value of the property after the improvements were made. However, since *Somerville* was decided, the rule with respect to the measure of damages in claims of unjust enrichment has evolved. It is now recognized that,

If a sum of money is awarded to protect a party's restitution interest, it may, as justice requires, be measured by either (a) the reasonable value to the other party of what he received in terms of what it would have cost him to obtain it from a person in the claimant's position, or (b) the extent to which the other party's property has been increased in value or his other interests advanced. The greater of the above two measures should be used in cases in which work has increased the value of the defendant's property, but there is some discrepancy between the reasonable value of that work and the amount of enhancement.

22 Am.Jur.2d *Damages* § 56 (1988).

[14] In *Robertus v. Candee*, 205 Mont. 403, 670 P.2d 540 (1983), the Supreme Court

of Montana explained why the measure of damages in this type of case can be either the *quantum meruit* value of the plaintiff's labor and materials or the value of the enhancement to the defendant's property. The Court stated:

There may be cases where the enhancement to the defendant's property will be far less than the *quantum meruit* value of the plaintiff's efforts. For example, where the improvement did not enhance the value of the property but did result in a pecuniary saving to the defendant, the enhancement measure would not reflect the unjust enrichment. Conversely, there may be cases where the value of the enhancement greatly exceeds the cost of the improvement, as in this case.

Thus the rule has evolved that the proper measure of damages in unjust enrichment should be the *greater* of the two measures. Restatement of Law, Contracts 2d § 371 comment b [(1981)]; 12 Williston, Contracts § 1480.

205 Mont. at 408-09, 670 P.2d at 543 (emphasis in original). In light of the above, we now hold that the measure of damages in an unjust enrichment claim is the greater of the enhanced market value of the property or the cost of the improvements to the property. To the extent that the Syllabus of *Somerville* differs from this holding, it is hereby modified. Therefore, upon remand, the Ransons should be afforded the opportunity to present evidence of the cost of the improvements they made to the property.

IV.

CONCLUSION

Accordingly, for the reasons set forth above, the final order of the Circuit Court of Kanawha County entered on April 2, 2002, is reversed, and this case is remanded to the court for further proceedings consistent with this opinion.

Reversed and remanded.



Appendix

“E”

**Edward ROBERTUS & Tim Robertus,
d/b/a Robertus Brothers, a partner-
ship, Plaintiffs and Respondents,**

v.

**Robert CANDEE, Defendant
and Appellant.**

No. 81-319.

Supreme Court of Montana.

Submitted on Briefs June 30, 1983.

Decided Aug. 25, 1983.

Rehearing Denied Oct. 13, 1983.

Lessees brought suit against lessor on theory of unjust enrichment and quantum meruit, alleging that lessor benefitted from their groundbreaking and farming due to his wrongful eviction of them from leased tract of land. Lessor counterclaimed as to unpaid rental on separate tract. The District Court of the Sixteenth Judicial District, in and for the County of Rosebud, A.B. Martin, J., entered judgment in favor of lessees on their claim and in favor of lessor on counterclaim. Lessor appealed. The Supreme Court, Morrison, J., held that: (1) where, by lessor's own admission, lessees were not required to farm leased tract during any particular season, lessor breached and terminated lease by his actions in informing lessees that they could no longer enter his land, entitling lessees to seek restitution for unjust enrichment conferred upon breaching and repudiating lessor as result of his harvesting and selling of wheat planted on tract by lessees; (2) lessees were entitled to recover from lessor, as damages for lessor's unjust enrichment following his repudiation of lease and harvest and sale of wheat, value of enhancement to property, determined by calculating cost of groundbreaking activity and adding value of unharvested wheat crop; and (3) trial court erred in awarding prejudgment interest to lessees.

Vacated and remanded.

1. Frauds, Statute of ⇐138(1)

Where one party repudiates a contract or breaches it by nonperformance, injured party may seek restitution of unjust enrichment whether statute of frauds applies or not.

2. Landlord and Tenant ⇐48

Where, by lessor's own admission, lessees were not required to farm leased tract during any particular season, lessor breached and terminated lease by his actions in informing lessees that they could no longer enter his land, entitling lessees to seek restitution for unjust enrichment conferred upon breaching and repudiating lessor as result of his harvesting and selling of wheat planted on tract by lessees.

3. Implied and Constructive Contracts ⇐3

Theory of unjust enrichment requires that a person who has been unjustly enriched at expense of another must make restitution to other.

4. Implied and Constructive Contracts ⇐110

Proper measure of damages in unjust enrichment should be greater of value of enhancement to property or cost of improvement to property, tempered by idea that it is only so much of enrichment which is unjust that may be awarded.

5. Landlord and Tenant ⇐48(2)

Lessees of unbroken land, which they broke and planted with wheat, were entitled to recover from lessor, as damages for lessor's unjust enrichment following his repudiation of lease and harvest and sale of wheat, value of enhancement to property, determined by calculating cost of groundbreaking activity and adding value of unharvested wheat crop.

6. Interest ⇐ 39(2)

In lessees' action brought against lessor for lessor's breach and repudiation of lease, trial court erred in awarding prejudgment interest to lessees in view of fact that lessees sought restitution for unquantified measure of unjust enrichment, rather than an ascertained or ascertainable amount. MCA 27-1-211.

7. Appeal and Error ⇐ 1010.1(6)

Supreme Court will not overturn findings of fact supported by substantial evidence.

8. Appeal and Error ⇐ 1012.1(3)

Where a trial court's findings are based upon substantial though conflicting evidence they will not be disturbed on appeal unless there is a clear preponderance of evidence against such findings.

9. Landlord and Tenant ⇐ 48(2)

In lessees' action brought against lessor for lessor's breach and repudiation of lease, evidence was sufficient to support value of groundbreaking work found by trial court and used to approximate enhancement in property value attributable to such work.

10. Appeal and Error ⇐ 878(1)

Failure to cross-appeal adverse ruling on matter separate and distinct from that sought to be reviewed by appellants precluded review of judgment. Rules of Appellate Civil Procedure, Rule 14.

John S. Forsythe, Forsyth, for defendant and appellant.

Crowley, Haughey, Hanson, Toole & Dietrich, Billings, for plaintiffs and respondents.

MORRISON, Justice.

Defendant Candee appeals from judgment following trial without jury in the Sixteenth Judicial Court, Rosebud County, in this action arising from the lease of Candee's ranchland by Robertus Brothers.

In February of 1977, Robertuses orally agreed with Candee to lease 850 acres of broken land from Candee at \$20 per acre (\$17,000), to be paid for in three install-

ments. They also agreed that Robertuses would lease about 1,250 acres of unbroken prairie land from Candee, break it and farm it at their own expense, with Candee receiving a one-quarter share of the crop, and Robertuses retaining the right to three or four crop years.

The final lease payment of \$8,000 on the 850-acre tract was due August 1, 1977; Robertuses did not pay it. Their crop had not been good and they alleged that the oral agreement allowed them to waive the \$8,000 payment in the event of crop failure. Those crop proceeds properly went to Robertuses.

In fall of 1977, a dispute arose as to the rental to be paid on the 1,250-acre tract. The parties attempted to renegotiate the lease of this tract and a possible buyback by Candee was discussed. At that time 1,000 acres had been broken, 680 acres disked, and 320 acres planted in wheat on the 1,250-acre parcel, all at the expense of the Robertus Brothers. Because of the renegotiations, the Robertus Brothers stopped planting and by the time they learned the buyback had fallen through, it was too late to plant any more wheat.

In March of 1978, Candee informed Robertuses that they could no longer enter his land and terminated both lease agreements. Candee harvested and sold the wheat on the 1,250 acres, netting and keeping \$26,180.59.

Robertuses brought suit against Candee on the theory of unjust enrichment and *quantum meruit*, alleging that Candee benefited from their ground-breaking and farming due to his wrongful eviction of them from the 1,250-acre tract. Candee counterclaimed as to the unpaid \$8,000 on the 850-acre tract. Evidence taken included the enhanced value of the newly-broken prairie land, the cost of production and the value of the wheat.

The District Court held there were two separate oral leases, one on the 1,250-acre tract, and one on the 850-acre tract. The court held that though the lease on the 1,250-acre tract was unenforceable, Candee had been unjustly enriched in the amount

of \$55,000. This amount included the increased land value, a three-quarter share of the wheat crop, and/or the value of the work, seed and fertilizer supplied by Robertuses. Candee was to pay interest from March 8, 1978, the day he notified Robertuses they were not to enter his land. The court also held that Robertuses owed Candee the final \$8,000 payment on the 850-acre tract.

Candee appeals the \$55,000 award to Robertuses. Robertuses do not cross-appeal, but ask for reversal of the \$8,000 award to Candee if this Court changes the District Court's findings pursuant to Rule 14, M.R. App.Civ.P.

We will modify the award.

Defendant Candee raises four issues on appeal:

1. Whether plaintiffs are entitled to damages under the theory of unjust enrichment.
2. Whether the District Court awarded a correct measure of damages.
3. Whether plaintiffs are entitled to interest prior to judgment.
4. Whether there is substantial evidence in the record to support the value of the ground-breaking work.

Defendant first argues that unjust enrichment is not an applicable theory. The trial court found that in this case the Statute of Frauds precluded plaintiffs from suing on the lease. Where the labor or money of a person has been expended in a permanent improvement which enriches the property of another, under an oral agreement which cannot be enforced under the Statute of Frauds, that person is entitled to an award for the amount by which such improvements unjustly enriches the property. *Smith v. Kober* (Neb.1922), 189 N.W. 377; Restatement of the Law, Contracts 2d § 375.

[1, 2] However, it is not necessary to reach the question of whether this agreement is within the Statute of Frauds. For, where one party repudiates a contract or breaches it by non-performance, the injured

party may seek restitution of the unjust enrichment whether the Statute of Frauds applies or not. *Gregory v. Peabody* (1928), 149 Wash. 227, 270 P. 825; Restatement of the Law, Contracts 2d § 373; *Epletveit v. Solberg* (1946), 119 Mont. 45, 57, 169 P.2d 722, 729. By defendant's own admission, the plaintiffs were not required to farm the 1250-acre tract during any particular season. Thus the trial court was correct in concluding that the *defendant* breached and terminated the lease by his actions in March of 1978. There is no question that plaintiff may seek restitution for the unjust enrichment conferred upon the breaching and repudiating defendant in this case.

The second issue raised by the defendant has merit. Defendant argues that the trial court improperly awarded *quantum meruit* damages for plaintiffs' investment in breaking ground on the 1,250-acre tract, and damages for the value of the improvement to the property. Both measures cannot properly be awarded.

It is not clear, from the District Court's findings of fact and conclusions of law, how the \$55,000 award was determined. However, it is apparent that the Court awarded a *composite* of enhanced land value, custom work, fixed costs and/or crop value.

[3] The theory of unjust enrichment requires that a person who has been unjustly enriched at the expense of another must make restitution to the other. Restatement of the Law, Restitution § 1; *Tulalip Shores, Inc. v. Mortland* (1973), 9 Wash. App. 271, 511 P.2d 1402; 66 Am.Jur.2d Restitution and Implied Contracts § 3 (1973). The measure of this equitable restitution interest is either the *quantum meruit* value of plaintiff's labor and materials or the value of the enhancement to the defendant's property. Restatement of the Law, Contracts 2d § 371; 12 Williston, Contracts § 1480. To award both would be to give double damages.

In this case the *quantum meruit* measure of damages would be the *market rate* for the custom work of ground breaking, fertilizing and planting and the cost of fertilizer and seed. Such measure was found by the

trial court to be \$29,479.61. The enhancement measure would be the net value of the unharvested crop (\$26,180.59) together with the increased value in the 1,000 acres attributable to the ground breaking.

There may be cases where the enhancement to the defendant's property will be far less than the *quantum meruit* value of the plaintiff's efforts. For example, where the improvement did not enhance the value of the property but did result in a pecuniary saving to the defendant, the enhancement measure would not reflect the unjust enrichment. Conversely, there may be cases where the value of the enhancement greatly exceeds the cost of the improvement, as in this case.

Thus the rule has evolved that the proper measure of damages in unjust enrichment should be the *greater* of the two measures. Restatement of Law, Contracts 2d § 371 comment b; 12 Williston, Contracts § 1480.

[4] We adopt this rule. But this rule must be tempered with the idea that it is only so much of the *enrichment* which is *unjust* that may be awarded the plaintiff. *Madrid v. Spears* (10th Cir.1957), 250 F.2d 51, 54. For example, the cost of surveying a tract of land into lots may be \$5,000, while the total value of the subdivided lots may be \$50,000 greater than the undivided tract. The landowner is *justly* entitled to the majority of the increase in value for his risk, idea, decision making and development activity. He is only *unjustly* enriched to the extent that the unpaid surveyor contributed to or caused the increase.

In this case the 1,000 acres of broken ground experienced an increase in market value of as much as \$168,000, while the cost of all labor and materials used in the ground breaking was no more than \$29,479.61. Part of the increase in value of the property is attributable to the property owner's risk and decision making in a real estate investment, part is attributable to other improvements to the property and part is attributable to plaintiffs' ground breaking. But it is only the latter part that the defendant is *not* entitled to, for which he has been unjustly enriched.

It would be very difficult to determine exactly how much of the \$168,000 increase is attributable to the ground breaking. However, in an activity such as ground breaking where all of the cost of the activity directly results in the improvement, the reasonable cost of the activity will give a court of equity a fair indication of the enhancement value attributable to such activity. Acc. *Madrid v. Spears* (10th Cir. 1957), 250 F.2d 51, 54.

In this calculation we will use the figures in plaintiffs' exhibit 11, which were found by the trial court to be the cost of plaintiffs' activities. Since all of the disking and tooling with the exception of the fertilizing and seeding directly resulted in improvement to the property, the cost of the ground breaking appears to be as follows:

Disking 680 ac. 3 times	2,040 ac.	
320 ac. 1 time	320	
		<hr/>
	2,360 ac. @ 6.28 =	\$14,702.80
Tool bar 320 ac. 3 times	960 ac. @ 3.91 =	\$ 3,753.60
		<hr/>
		\$18,456.40

[5] Based on this calculation we will assume that the value of the enhancement to the defendant's property attributable to the ground breaking activity is also \$18,456.40. In addition, the plaintiffs improved defendant's property to the extent of the value of the unharvested wheat crop, which the trial court found to be \$26,180.59. We conclude that the total unjust enrichment as measured by the enhancement to defendant's property is equitably valued at \$44,636.99. As this amount is greater than the \$29,479.61 *quantum meruit* measure of unjust enrichment, it is the proper award in this case.

[6] Defendant next challenges the prejudgment interest award. The applicable statute is section 27-1-211, MCA, which provides for recovery of interest where a person is "entitled to recover damages certain or capable of being made certain by calculation." In this case there was no ascertained or ascertainable amount where the plaintiff sought, in a court of equity, restitution for an unquantified measure of

unjust enrichment. The trial court erred in awarding prejudgment interest.

Finally defendant argues there is insufficient evidence to support the value of the ground breaking work found by the trial court. Only insofar as the value of the ground breaking work was used to approximate the enhancement in property value attributable to such work does this question remain an issue.

The trial court found plaintiffs' work to be fairly valued by the plaintiffs' expert using a computer calculation based on the type of equipment used, the number of acres involved and the number of applications of the equipment to the acreage, all of which were testified to at trial. Defendant challenges the finding, contending that the foundation for the data and method was insufficient, the assumptions used in the calculation were based on conflicting evidence, and the calculation improperly includes a measure of profit.

[7] Defendant's arguments are unpersuasive. This Court will not overturn findings of fact supported by substantial evidence. *Toeckes v. Baker* (1980), Mont., 611 P.2d 609, 37 St.Rep. 948; *Morgen & Oswood Const. Co. v. Big Sky of Montana* (1976), 171 Mont. 268, 275, 557 P.2d 1017, 1021.

[8] Where a trial court's findings are based upon substantial though conflicting evidence they will not be disturbed on appeal unless there is a clear preponderance of evidence against such findings. *Cameron v. Cameron* (1978), 179 Mont. 219, 587 P.2d 939.

[9] The trial court properly considered the plaintiffs' expert testimony and exhibits which were based on assumptions in evidence. The profit margin incorporated into the calculation is also proper since the cost of services for purposes of unjust enrichment is the market value of replacement services including the profit earned by those rendering the service. In this case, the actual cost of the labor to the plaintiff is irrelevant except as it demonstrates the replacement cost of such labor on the market.

[10] Pursuant to Rule 14 of the Montana Rules of Appellate Civil Procedure, plaintiffs ask this Court to review the trial court's award of \$8,000.00 plus interest to the Defendant on the 850-acre lease. Plaintiffs did not cross-appeal this ruling and therefore the judgment cannot be reviewed. Although Rule 14 provides for review by cross-assignment of error, this does not eliminate the necessity for cross-appeal by a respondent who seeks review of rulings on matters separate and distinct from those sought to be reviewed by appellants. *Johnson v. Tindall* (1981), Mont., 635 P.2d 266, 38 St.Rep. 1763; *Francisco v. Francisco* (1948), 120 Mont. 468, 470, 191 P.2d 317, 319.

The trial court found that the 850-acre lease was separate from the 1,250-acre lease. Therefore, a challenge to the amount owing on the separate lease raises an issue which is clearly separate and distinct from the issues raised on appeal by defendant.

The judgment and award in this cause is vacated and this case is remanded to the District Court with instruction to enter judgment in accordance with this opinion.

HASWELL, C.J., and HARRISON, SHEA and WEBER, JJ., concur.



The STATE of Montana, Plaintiff
and Respondent,

v.

Henry James GILLHAM, Defendant
and Appellant.

No. 82-366.

Supreme Court of Montana.

Submitted April 26, 1983.

Decided Oct. 6, 1983.

Defendant was convicted in the District Court of the 19th Judicial District,