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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

ORIGINAL

No. 268802-III

COURT OF APPEALS

STATE OF WASHINGTON

DIVISION III

WASHINGTON TRUST BANK, a Washington banking corporation,
Respondent

v.

RIVER GORGE, a partnership; TBM SYNDICATE, a
partnership, MARVIN CHAMBERLAIN and
MRS MARVIN CHAMBERLAIN, and the marital
community comprised thereof,
Petitioners

PETITION FOR REVIEW

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TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities.....	ii
A. IDENTITY OF PETITIONERS.....	1
B. COURT OF APPEAL DECISION.....	1
C. ISSUES PRESENTED FOR REVIEW.....	1
D. STATEMENT OF THE CASE.....	2
1. Statement of Facts.....	2
2. Proceedings Below.....	10
E. ARGUMENT.....	11
F. CONCLUSION.....	18
APPENDIX.....	20

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Table of Cases</u>	
Washington cases:	
<u>Bennion v. Comstock Inv. Corp.</u> , 18 Wn.App. 266 (1977).....	16
<u>Chandler v. Washington Toll Bridge Authority</u> , 17 Wn.2d 591 (1943)	12, 13, 16, 17
<u>Costanzo v. Harris</u> , 64 Wn.2d 901 (1964).....	15, 16
<u>Farwest Steel Corp. v. De Santis</u> , 102 Wn.2d 487 (1984)	16
<u>Farwest Steel Corporation v. Mainline Metal Works, Inc.</u> , 48 Wn. App. 719 (Div. I, 1987), <i>review denied by</i> 109 Wn.2d (1009) (1987), Division III	15
<u>Lynch v. Deaconess Medical Center</u> , 113 Wn.2d 162 (1989)	13, 14, 16
<u>Truckweld Equip. Co. v. Olson</u> , 26 Wn. App. 638 (1980).....	16
<u>Young v. Young</u> , 164 Wn2d 477 (2008).....	13, 16

A. IDENTITY OF PETITIONERS

River Gorge, a Washington partnership, TBM Syndicate, a Washington partnership, and Marvin Chamberlain, a single man, request review of the Court of Appeals decision terminating review designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Petitioners seek review of the decision of Division III of the Court of Appeals of the State of Washington rendered in its Unpublished Opinion in Washington Trust Bank, a Washington corporation, Respondent, v. RIVER GORGE, a partnership; TBM SYNDICATE, a partnership, MARVIN CHAMBERLAIN and MRS. MARVIN CHAMBERLAIN, and the marital community comprised thereof, Appellants, Docket No. 26880-2-III, filed on January 6, 2009, for which reconsideration was denied on February 4, 2009. A copy of the decision is in the Appendix at pages A-1 through A-14. A copy of the order denying Petitioners' motion for reconsideration is in the Appendix at page A-15.

C. ISSUES PRESENTED FOR REVIEW

1. Cattle owners leased cattle to a dairy. The dairy had the right to milk the cattle and retain the proceeds of such milk in return for paying

rent and feeding the cattle. The dairy failed to pay a hay grower for the hay it fed the cattle. Were the owners of the cattle unjustly enriched by the hay when they did not contribute, in any way, to the hay grower's loss or act in bad faith?

2. Did Division III err in finding unjust enrichment on the basis that the cattle owners received a benefit where there are no circumstances rendering such enrichment unjust?

D. STATEMENT OF THE CASE

1. Statement of Facts

Defendant, Dr. Marvin Chamberlain ("Chamberlain") is a veterinarian, specializing in livestock, having his principal place of business in Moses Lake, Washington. (CP 178).

Mr. Russell Dan Reynolds ("Reynolds") is a dairyman residing in Quincy, Washington. Dan Reynolds has owned and operated a sole proprietor dairy business in Grant County, Washington, (the "Reynolds Dairy") since 1995. (CP 130, 137, 144, 145, 179). Reynolds filed a Chapter 7 bankruptcy in 2005. (CP 6). By reason of his discharge in bankruptcy, Reynolds is not a party to this lawsuit.

Jerry Hodges (“Hodges”) was, at all times relevant, a hay farmer who sold hay to Reynolds on credit. (CP 159). Reynolds' obligation to Hodges was discharged in bankruptcy.

Washington Trust Bank (“WTB”) provided financing to Hodges' hay farming enterprise and has accepted an assignment from Hodges of all claims and causes of action Hodges has relating to the hay sold to Reynolds. (CP 6-7, 168-169).

In October of 1998, Reynolds and Chamberlain entered into a partnership known as River Gorge Holsteins (“River Gorge”). The purpose of River Gorge was to invest in registered dairy cattle. (CP 179). Contemporaneously, Reynolds, Chamberlain and Dr. Dean Koesel entered into a partnership known as TBM Syndicate (“TBM”). Like River Gorge, the purpose of TBM was to invest in registered dairy cattle. (CP 179).

Chamberlain also acquired a registered dairy cattle herd which he solely owned, separate and apart from River Gorge and TBM. (CP 136, 143; 179). Similarly, Reynolds owned his own dairy cattle which he maintained at the Reynolds Dairy. (CP 143).

A basic understanding of a cow's cycle in a dairy is necessary to this case. A young cow, known as a heifer, is artificially inseminated so that it

will give birth and begin producing milk. Upon giving birth, the cow is considered to be “in milk” and is a producing cow. The offspring of the cow is separated from its mother at birth. If the calf is male, after it is weaned, it is removed from the dairy and, generally, sold. If the calf is female, it is raised until it is mature and can be bred so that it will become a producing dairy cow. If a cow is infertile, does not produce milk or is, for other reasons, unacceptable to the dairy, that cow becomes a cull and is removed from the dairy and sold. (CP 131-134, 179).

It is not uncommon for dairies to lease dairy cattle from outside parties. (CP 150-151). A standard rent is one dollar per day per head in milk. (CP 150). Under the terms of such agreements, the dairy is responsible to provide, at its sole expense, all feed, veterinary care and other expenses of maintaining the herd and raising the offspring of the herd, including bulls and culls, so long as such cattle are on the dairy premises. (CP 182-183).

From their inception, River Gorge, TBM and Chamberlain (sometimes hereinafter referred to collectively as the “Petitioners”) leased their cattle to the Reynolds Dairy. (CP 179-180). Under the terms of the lease agreements between the Petitioners and Reynolds Dairy, Reynolds Dairy was to pay the Petitioners rent of one dollar (\$1.00) per day for each

cow that was in milk. (CP 136; 179-180). Reynolds owed this rental payment regardless of whether the dairy was profitable or losing money. (CP 143, 144). The Reynolds Dairy was solely responsible to provide and pay for the cost of all feed, veterinary care and other expenses of maintaining the Petitioners' herds and raising the herds' offspring, including calves, milking cattle and dry cattle while those cattle were on the dairy premises. The Reynolds Dairy was responsible to provide all care to bull calves and cull cows until such animals were removed from the Reynolds Dairy premises. (CP 155-156; CP 179-180).

Under the lease between the Petitioners and Reynolds Dairy, heifer calves would remain on the Reynolds Dairy from birth until they were 9 to 10 months of age. During that period, Reynolds was responsible to care for the calves. (CP 131, 134). At 9 to 10 months of age, the calves were moved to property owned by Chamberlain until they were 22 to 23 months of age during which period Chamberlain paid for the feed. After that, the heifers were bred and returned to the dairy to calve and milk, after which Reynolds provided the feed. (CP 131, 135).

Petitioners profited from the lease arrangement with the Reynolds Dairy in the form of the rent of \$1.00 per day per head in milk, the value of

the culls and bulls which could be sold, and any increase in the size of the herd. (CP 180). Petitioners had no interest, whatsoever, in the milk or the proceeds of the milk produced by the leased herd. (CP 138, 139, 140, 143 144, 180).

The milk, the proceeds from the milk and the profits from the dairy belonged solely to Reynolds. (CP 24, 48, 49, 138, 139, 140, 143, 144, 149 180). Chamberlain had no interest in the dairy. (CP 144). All payments received upon the sale of the milk came in the form of checks payable solely to Reynolds and not to the Petitioners. (CP 149). Consistent therewith, Reynolds was solely responsible for the costs of the dairy and any losses which the sole proprietorship might suffer. (CP 47, 180). Reynolds was responsible for feeding the cattle and the costs associated therewith. (CP 65, 155, 180). Reynolds was responsible for providing straw or other bedding materials for the cattle (CP 65). Reynolds was the sole person obligated on the Reynolds Dairy's Washington Trust operating line of credit for the dairy. (CP 144). Petitioners had no obligation to contribute to the Reynolds Dairy's feed costs, veterinary costs, straw or other bedding materials or any other expenses and, consistent therewith, Reynolds never requested that they

contribute to such expenses or make any deduction from or offset against the rent Reynolds paid to Petitioners (CP 65, 146-149, 152, 180).

Jerry Hodges delivered hay to Mr. Reynolds from the spring of 2002 until April, 2005, which was fed to the cattle at the Reynolds Dairy. (CP 153-154, 159-161). Initially, Reynolds would pay Hodges at the time of delivery of each load of hay. (CP 161). This changed in the summer of 2002, when Reynolds quit paying for each load and started to fall behind in his obligation to Hodges. (CP 161). From 2003, to April, 2005, Hodges delivered 4,551,860 pounds of hay at a total price of \$246,787.90. During that period, Reynolds paid only \$32,235.80 to Hodges, leaving an unpaid balance of \$214,552.10. (CP 177).

During the time Hodges was delivering hay to Reynolds Dairy, Hodges knew the following facts:

- a. Chamberlain and Reynolds were partners in River Gorge (CP 83, 85, 86, 162, 164-165);
- b. That River Gorge produced dairy cows (CP 86, 164, 165);
- c. That River Gorge owned a portion of the herd on the Reynolds Dairy (CP 85, 164, 165);
- d. That Reynolds was obligated to pay rent on the River Gorge cattle (CP 87, 166-167); and
- e. That the proceeds of the milk were being paid by the purchasers of the milk directly to Reynolds and not to Chamberlain, River Gorge or TBM (CP 165).

It was Hodges' specific understanding that Reynolds, not River Gorge or any of the Petitioners, was obligated to pay for the hay Hodges delivered to Reynolds. In this respect, Hodges testified as follows:

Q. In your - - over the course of obviously this three-year period we're talking about and your conversations with Mr. Reynolds, was it ever discussed or did you discuss with Mr. Reynolds whose obligation it was to feed the River Gorge cattle?

A. Specifically I don't think we discussed it, because I guess it's obvious. It depends on where the cattle are. If they are at Reynolds' facility, of course, he is responsible. If they are at Marvin's facility, then he would be responsible. But, specifically, we didn't discuss that.

Q. So just a common-sense approach?

A. Right.

(CP 168).

All payments Hodges received were by check written on Reynolds' account. (CP 83, 84, 162-163). No payment to Hodges ever originated from Chamberlain (CP 83, 162). Hodges never spoke with Chamberlain about the unpaid hay account. (CP 83, 162). Hodges never made an effort to contact Chamberlain about getting payment on the unpaid hay account. (CP 170). On the financial statements Hodges prepared for his bank, Washington Trust, he identified the unpaid hay account receivable under the name "Dan Reynolds" and never identified an account receivable under the name of

Chamberlain, River Gorge or TBM Syndicate. (CP 170). In fact, it never occurred to Hodges that Chamberlain might have any responsibility for the unpaid hay account until after all of the cattle on the Reynolds Dairy, including the Petitioners' cattle, were sold at auction on June 3 and 4, 2005.

At deposition, Hodges testified as follows:

Q. When is the first time that it occurred to you that perhaps Mr. Chamberlain might have some responsibility for this bill?

A. I really don't recall that. I guess I'm not very versed in law.

...

Q. I'm not asking you for a legal opinion. I am not asking you whether he is or is not. Just the first time that it occurred that he might be.

A. I would imagine, when I saw that he was taking half of the money from the sale and thinking that, hey, I'm someone that's owed money out of this, too.

...

Q. Now, was it at that time, at the time of the sale, that you realized that he had an interest in some of the herd?

A. Oh, I knew he had an interest in it before the sale was even conducted.

Q. Okay. So then it should not have been a surprise that he took some of the money?

A. No, it wasn't a surprise. I knew he was going to get some. I knew he was going to get half of it.

(CP 171-172)

The last load of hay Hodges sold to Reynolds was delivered on April 16, 2005. (CP 173). A few days later, Hodges decided not to deliver any

more hay to Reynolds (CP 173). Hodges filed a lien which resulted in the commencement of a frivolous lien lawsuit by Reynolds. (CP 174).

All of the cattle on the Reynolds Dairy, including the Petitioners' cattle, were sold at auction on June 3 and 4, 2005. The proceeds of the sale of the River Gorge cattle were split between Chamberlain and Reynolds. The proceeds from sale of the TBM cattle were split between Chamberlain, Reynolds and Koesel. The monies from the sale of the cattle owned solely by Chamberlain were paid to Chamberlain. Finally, the proceeds from the sale of cattle owned solely by Reynolds were paid to Reynolds. (CP 181).

Reynolds filed for bankruptcy protection on July 29, 2005. Hodges received approximately \$70,000 through the bankruptcy. (CP 175).

2. Proceedings Below

Washington Trust Bank commenced this lawsuit before the Grant County Superior Court on May 22, 2006. (CP 1-10). The parties filed cross-motions for summary judgment. (CP 14-15, 108-109). On December 11, 2007, the Honorable Evan E. Sperline entered an order granting Washington Trust Bank's motion for partial summary judgment and denying Petitioners' cross-motion for summary judgment. (CP 199-203).

Petitioners filed a motion for reconsideration of the trial court's ruling on the cross-motions for summary judgment on December 21, 2007 (CP 204-215) which was denied by order of the trial court dated January 22, 2008 (CP 225).

On February 13, 2008, Petitioners filed their Notice for Discretionary Review. (CP 226-233). Washington Trust Bank joined in Petitioners' Motion for Discretionary Review. On April 16, 2008, the Commissioner's Ruling was issued granting the Motion for Discretionary Review.

The parties presented oral argument before Division III on December 3, 2008. The Court of Appeals rendered its Unpublished Opinion on January 6, 2009, in which Division III found that although Reynolds was not acting for and on behalf of the Petitioners when he contracted to buy the hay from Hodges and, by reason thereof, the Petitioners are not contractually liable for the price of the hay, the Petitioners were, nonetheless, unjustly enriched by the hay and, therefore, liable under quasi-contract.

E. ARGUMENT

Petitioners seek review under RAP 13.4(b)(1) and (2) on the basis that the ruling of Division III directly conflicts with the entire line of decisions of both the Supreme Court and the Court of Appeals concerning the necessary

elements of unjust enrichment. Washington case law has repeatedly and consistently held that a contract will not be implied at-law merely because a third-party was benefited thereby. There must be some circumstance or act by the benefited party beyond mere enrichment which renders the enrichment unjust. Division III erred in holding that the Petitioners were unjustly enriched solely on the basis that they received a benefit.

In Chandler v. Washington Toll Bridge Authority, 17 Wn.2d 591 (1943), Chandler, a bridge builder, alleged that the Washington Toll Bridge Authority was unjustly enriched when it used the design Chandler previously prepared under a contract with another party in the construction of the Tacoma Narrows Bridge for which services Chandler was never paid. The Supreme Court found that there was no unjust enrichment holding that although the State was benefited, the mere fact that a third party received an incidental benefit did not give rise to a claim for recovery under the doctrine of unjust enrichment. Chandler, 17 Wn.2d at 605. The Supreme Court stated:

The mere fact that respondent has been benefited or enriched by the work which appellant performed is not in itself sufficient to justify a recovery by appellant in the case at bar. Before a recovery may be had in such a case, it must appear that not only was the party sought to be held enriched, but the enrichment must be unjust.

"Even where a person has received a benefit from another, he is liable to pay therefor only if the circumstances of its receipt or retention are such that, as between the two persons, it is unjust for him to retain it. The mere fact that a person benefits another is not of itself sufficient to require the other to make restitution therefor." Restatement of the Law of Restitution, p. 13, § 1 (c).

Chandler, 17 Wn.2d at 601.

In Young v. Young, 164 Wn.2d 477 (2008), the Supreme Court found unjust enrichment after a property owner specifically requested the claimant make improvements to property for which the owner knew the claimant expected compensation and then refused to pay compensation upon completion. Young, 164 Wn.2d at 480-483. In describing the elements of unjust enrichment, the Supreme Court stated:

"Three elements must be established in order to sustain a claim based on unjust enrichment: a benefit conferred upon the defendant by the plaintiff; an appreciation or knowledge by the defendant of the benefit; and the acceptance or retention by the defendant of the benefit under such circumstances as to make it inequitable for the defendant to retain the benefit without the payment of its value." Bailie Commc'ns, 61 Wn. App. at 159-60.

Young, 164 Wn.2d at 484.

Similarly, in Lynch v. Deaconess Medical Center, 113 Wn.2d 162 (1989), the Supreme Court considered whether an attorney is entitled to

compensation from one other than his client when his services incidentally benefit the third-party. The attorney was hired by a patient to pursue a claim against MSC for failure to pay medical expenses. The attorney was successful in getting MSC to reverse its denial and cover the claim resulting in payment of the client's indebtedness to Deaconess Medical Center. In holding that the hospital was not unjustly enriched, this Court stated:

From our review of the record, it is apparent that a quasi contract did not exist between Mr. Lynch and Deaconess Hospital. Mr. Lynch has failed to satisfy the first element of a quasi contract as set forth in Trane Co. v. Randolph Plumbing & Heating, supra. First, Deaconess Hospital was not unjustly enriched by Mr. Lynch's services. Ms. Tenney owed Deaconess \$ 8,056.86 for its medical services. Deaconess only recovered that amount which was owed and which had been declared uncollectible. Deaconess has been incidentally benefited by Mr. Lynch's services. A person can be enriched by merely receiving a benefit. Restatement of Restitution § 1, comment a (1937). However, the mere fact that a person benefits another is not sufficient to require the other to make restitution. Restatement § 1, comment c. It is well established that unjust enrichment and liability only occur where money or property has been placed in a party's possession such that in equity and good conscience the party should not retain it. Molander v. Raugust-Mathwig, Inc., 44 Wn. App. 53, 61, 722 P.2d 103, review denied, 106 Wn.2d 1017 (1986); Town Concrete Pipe of Wash., Inc. v. Redford, 43 Wn. App. 493, 717 P.2d 1384 (1986).

Lynch, 113 Wn.2d at 165-166.

Opinions out of the Courts of Appeals are in accord that there must be some circumstances or act by the benefited party beyond mere enrichment which renders the enrichment unjust. For instance, in Farwest Steel Corporation v. Mainline Metal Works, Inc., 48 Wn. App. 719, 732 (Div. I, 1987), *review denied* by 109 Wn.2d 1009 (1987), Division One described the general rule as follows:

The mere fact that a third person benefits from a contract between two other persons does not make such third person liable in quasi contract, unjust enrichment, or restitution. Moreover, where a third person benefits from a contract entered into between two other persons, in the absence of some misleading act by the third person, the mere failure of performance by one of the contracting parties does not give rise to a right of restitution against the third person. In other words, a person who has conferred a benefit upon another, by the performance of a contract with a third person, is not entitled to restitution from the other merely because of the failure of performance by the third person.

Under Washington case law, in order for there to be unjust enrichment, the benefited party must contribute in some fashion to the claimant's loss. Farwest Steel Corporation, 48 Wn. App. at 732-733. The Farwest Court noted that in each instance in which unjust enrichment has been found there has been "some clear act of bad faith by the defendant resulting in the defendant's unjust enrichment at the plaintiff's expense." Farwest, 48 Wn. App. at 733. In Costanzo v. Harris, 64 Wn.2d 901 (1964), a

partnership directly and affirmatively took a third-party's hay to feed its own cattle.¹ In Young v. Young, 164 Wn.2d 477, 486 (2008), the Supreme Court found unjust enrichment after a property owner specifically requested that the claimant make improvements to property for which the owner knew the claimant expected compensation and then refused to pay compensation upon completion. On the other hand, where there has been no clear act of bad faith resulting in the enrichment, Washington courts have refused to apply unjust enrichment. Lynch v. Deaconess Medical Ctr., 113 Wn.2d at 166; Farwest Steel Corp. v. De Santis, 102 Wn.2d 487 (1984) at 492-493; Chandler v. Washington Toll Bridge Authority, 17 Wn.2d 591 (1943); Truckweld Equip. Co. v. Olson, 26 Wn. App. 638, 646 (1980); Bennion v. Comstock Inv. Corp., 18 Wn. App. 266, 274 (1977).

The published opinions of the Supreme Court and the Court of Appeals have been unequivocal and consistent in holding that enrichment alone is not sufficient to justify a recovery in quasi-contract. Yet, that is the only factor present here and identified by Division III to support its finding

¹ Costanzo v. Harris, 64 Wn.2d 901 (1964) can be distinguished from the present case insofar as the partnership in that case directly used a third-party's hay to satisfy the partnership's direct obligation to feed its own cattle whereas here the obligation to feed the Partnerships' cattle was delegated by contract to Reynolds who purchased the hay to satisfy his obligation to feed the Partnerships' cattle. The important distinctions are the identity of the party bearing the obligation to feed the cattle and the identity of the party who took and received the hay from the seller.

that the Petitioners were unjustly enriched. Specifically, the Court of Appeals held that since the Petitioners received a benefit and because that benefit was substantial they were unjustly enriched. Specifically, Division III stated:

Here, the benefit received by the partnerships from Mr. Hodges was substantial. The sole asset of the partnerships were their cattle, which increased in number while residing at Mr. Reynolds' dairy, consuming hay provided by Mr. Hodges. Therefore, akin to *Costanzo*, it would be unjust for the partnerships to retain the substantial benefit of the feed provided to their cattle without making any payment.

Appendix at page A-12.

The magnitude of the benefit, in itself, will not support a finding of unjust enrichment. As the Court stated in Chandler, the mere fact of benefit or enrichment is not sufficient. 17 Wn.2d at 601. The benefit at issue in Chandler, \$82,000, accruing prior to 1936, was far greater in magnitude than the approximately \$150,000 at issue in this case, yet this Court found that there was no unjust enrichment. 17 Wn.2d at 593; CP 175 and 177.

The defendants in this case did not commit an act of bad faith or in anyway contribute to Hodges' loss. The Petitioners did not coerce Hodges to sell hay to Reynolds or even request that he do so. The Petitioners did not even know that Hodges was unpaid until after all of the hay was sold and delivered to Reynolds. There is not one scintilla of evidence tending to cast any blame for Hodges' loss upon the Petitioners. Moreover, the Petitioners did not receive the benefit of the hay without paying for it. While it is true that the Petitioners did not pay the price of the hay to Hodges, which is not surprising as they did not have a contract with Hodges, they did fully pay Reynolds for the hay. The price the Petitioners agreed to pay for the care of the cattle including their feeding, was granting possession and use of the cattle and the right to retain the proceeds of the milk to Reynolds, which they fully did. The Partnerships received nothing more than they paid for. Any benefit the Partnerships received cannot be said to be unjust.

F. CONCLUSION

The Court of Appeals found that the Petitioners were unjustly enriched solely because they received a benefit. This ruling directly conflicts with rulings of the Supreme Court and the Court of Appeals holding that the mere fact that someone is benefited or enriched is not sufficient to justify

recovery for unjust enrichment. There must be some act of bad faith or other circumstances beyond mere enrichment which renders the enrichment unjust. No such circumstance exists in this case and none was found by Division III. For the foregoing reasons, the Petitioners respectfully request the Supreme Court accept review.

DATED this 3rd day of March, 2009.

Respectfully submitted,

RIES LAW FIRM, P.S.

A handwritten signature in black ink, appearing to read 'C. F. Ries', written over a horizontal line.

Christopher F. Ries, WSBA #23584
Attorney for Appellant

APPENDIX

	<u>Page</u>
COURT OF APPEAL - UNPUBLISHED OPINION filed 01/06/09	A-1
ORDER DENYING MOTION FOR RECONSIDERATION filed 02/04/09	A-15

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

**WASHINGTON TRUST BANK, a
Washington banking corporation,**

Respondent,

v.

**RIVER GORGE, a partnership; TBM
SYNDICATE, a partnership; MARIN
CHAMBERLAIN and MRS. MARVIN
CHAMBERLAIN and the marital
community comprised thereof,**

Appellants.

No. 26880-2-III

Division Three

UNPUBLISHED OPINION

BROWN, J. — Russell Dan Reynolds, Marvin Chamberlain, D.V.M., and Dean Koesel, D.V.M., formed two separate partnerships, which purchased, bred, and sold registered dairy cattle. The cattle from both partnerships lived at a dairy owned by Mr. Reynolds. Mr. Reynolds was responsible for providing feed for the cattle, and for approximately three years, he purchased hay for the cattle from Jerry E. Hodges. Mr. Reynolds failed to pay for a majority of the hay delivered. Mr. Hodges assigned any claim related to the hay bill to Washington Trust Bank. Washington Trust Bank sued both partnerships, and the trial court granted partial summary judgment in its favor,

finding the partnerships liable for the hay bill. The partnerships appeal. We find the partnerships liable for the hay bill under the doctrine of unjust enrichment, and affirm.

FACTS

Mr. Reynolds, as a sole proprietor, operated a dairy located in Quincy, Washington. In 1998, Mr. Reynolds and Dr. Chamberlain formed a partnership, known as River Gorge Holsteins ("River Gorge"). The purpose of the partnership was to purchase, breed, and eventually sell registered dairy cattle. The River Gorge cows spent the first portion of their lives at Mr. Reynolds' dairy, and then were transferred to Dr. Chamberlain's property for a period of time. After Dr. Chamberlain artificially inseminated the cows, they were transferred back to Mr. Reynolds' dairy, where they calved and were then milked.

Also in 1998, Mr. Reynolds, Dr. Chamberlain, and Dr. Koesel formed a partnership known as TBM Syndicate. The purpose of the partnership was also to purchase, breed, and eventually sell registered dairy cattle. Like the River Gorge cows, the TBM Syndicate cows spent the first portion of their lives at Mr. Reynolds' dairy, then were transferred to Dr. Chamberlain's property, and returned to Mr. Reynolds' dairy after they were artificially inseminated. The TBM Syndicate cows remained at Mr. Reynolds' dairy to calve and give milk.

While their cattle remained at Mr. Reynolds' dairy, River Gorge and TBM Syndicate (collectively "the partnerships") charged Mr. Reynolds rent in the amount of one dollar per day, per cow. This rent was only charged for the days each cow

produced milk. Any profits from the sale of milk from the partnership cows belonged to Mr. Reynolds; the partnerships were not entitled to these profits.

Further, while the partnership cattle were at Mr. Reynolds' dairy, Mr. Reynolds was responsible for purchasing feed for the cattle. Mr. Reynolds was also responsible for other expenses associated with maintaining the partnership cattle, including veterinary costs.

From spring 2002 through April 2005, Mr. Reynolds purchased hay to feed the partnership cattle from Mr. Hodges. Initially, Mr. Reynolds paid Mr. Hodges when the hay was delivered. During the summer of 2002, the regular payments ceased, and from that point through April 2005, Mr. Reynolds made limited payments to Mr. Hodges. Mr. Reynolds incurred a substantial obligation for the hay he accepted without making payments. All payments received from Mr. Reynolds by Mr. Hodges came in the form of a check written in Mr. Reynolds' name only or via automatic withholdings from the milk proceeds received by Mr. Reynolds.

The partnership cattle were bred while at Mr. Reynolds' dairy, increasing the size of the herds. All of the partnership cattle consumed the hay purchased by Mr. Reynolds from Mr. Hodges.

On June 3-4, 2005, the partnerships sold their cattle at an auction. The proceeds from the River Gorge cows were split equally between Dr. Chamberlain and Mr. Reynolds. The proceeds from the TBM Syndicate cows were split equally between Dr. Chamberlain, Mr. Reynolds, and Dr. Koesel.

Mr. Hodges' hay bill remained outstanding. He assigned any claim regarding this bill to Washington Trust Bank ("Washington Trust").

Washington Trust sued the partnerships and Dr. Chamberlain, alleging Mr. Reynolds purchased the hay from Mr. Hodges on behalf of the partnerships, and therefore, the partnerships are liable for the hay.¹ Washington Trust moved for partial summary judgment on the issue of liability, arguing it was entitled to relief based on partnership liability, or the alternative, based on the doctrine of unjust enrichment. The partnerships filed a cross-motion for partial summary judgment, also on the issue of liability.

In support of their motions, both parties submitted excerpts from Mr. Hodges' deposition. Mr. Hodges deposed he knew Dr. Chamberlain and Mr. Reynolds were partners in River Gorge. He further deposed he knew River Gorge owned a portion of the cattle on Mr. Reynolds' property, and that Mr. Reynolds "was supposed to pay some sort of . . . rent on the cattle." Clerk's Papers (CP) at 87. Mr. Hodges deposed he sold the hay to Mr. Reynolds' business, "Dan Reynolds Dairy." CP at 85. He further deposed he did not contact Dr. Chamberlain about the hay bill, "[b]ecause he wasn't the person I dealt with on the hay." CP at 170. Mr. Hodges deposed he had an account

¹ In addition to the partnership cows, Dr. Chamberlain also leased his own cows to Mr. Reynolds. Therefore, Washington Trust also alleged Dr. Chamberlain is liable for the hay his cows consumed because Mr. Reynolds purchased this hay as Dr. Chamberlain's agent. However, it appears Washington Trust only proceeded against Dr. Chamberlain on a theory of partnership liability. The trial court only ruled on Dr. Chamberlain's liability as a partner for hay consumed by the partnership cows. Further, in its brief, Washington Trust acknowledges it "is not seeking to recover from the

receivable for Mr. Reynolds, but not for Dr. Chamberlain or River Gorge. Additionally, Mr. Hodges deposed he and Mr. Reynolds did not discuss who had the obligation to feed the River Gorge cattle.

Additionally, both parties submitted excerpts from Mr. Reynolds' deposition. Mr. Reynolds deposed the milk proceeds he received from the River Gorge cattle went toward their expenses, including the hay they consumed. In addition, Mr. Reynolds deposed he did not ask Dr. Chamberlain or Dr. Koesel to contribute to the hay bill because "I didn't think they would." CP at 148.

In support of its motion, Washington Trust submitted excerpts from Dr. Koesel's deposition. When asked if Mr. Reynolds ever discussed the hay bill with him, Dr. Koesel stated, "[n]ot specifically. Before the sale, he just mentioned he owed for hay." CP at 64-65.

In his declaration submitted in support of the partnerships' motion, Dr. Chamberlain declared, "I did not know [Reynolds Dairy] was having difficulties paying for feed." CP at 180. He further declared, "I did not become aware of the problem with the unpaid hay account or the extent of that account until April, 2005, when [Mr.] Reynolds told me that he could no longer continue to afford to operate the dairy or provide feed to the cattle." CP at 181.

After a hearing on the motions, the trial court granted Washington Trust's motion for partial summary judgment, and denied the partnerships' motion. The trial court ruled

Partnerships for the hay consumed by cattle owned solely by . . . Dr. Chamberlain." Resp't Br. at 14.

the partnerships, and Dr. Chamberlain, are liable for the hay from Mr. Hodges, consumed by the partnership cattle. The partnerships unsuccessfully moved for reconsideration.

We accepted discretionary review.

ANALYSIS

The issue is whether the trial court erred in granting partial summary judgment in favor of Washington Trust, ruling the partnerships are liable for the hay from Mr. Hodges, consumed by the partnership cattle. The partnerships contend the hay bill is a debt incurred by Mr. Reynolds on his own behalf, not on behalf of the partnerships. Alternatively, the partnerships contend Washington Trust is not entitled to relief under the doctrine of unjust enrichment.

We review a trial court's grant of summary judgment de novo, engaging in the same inquiry as the trial court. *Lybbert v. Grant County*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000). Summary judgment is proper if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). "A material fact is one that affects the outcome of the litigation." *Owen v. Burlington N. & Santa Fe R.R.*, 153 Wn.2d 780, 789, 108 P.3d 1220 (2005). When considering a summary judgment motion, the court must construe all facts and reasonable inferences in the light most favorable to the nonmoving party. *Lybbert*, 141 Wn.2d at 34. Further, summary judgment "may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages." CR 56(c).

In its motion for discretionary review, the partnerships acknowledged there are no genuine issues of material fact.² Accordingly, the issue before us is whether Washington Trust was entitled to judgment as a matter of law.

Partnership Liability

The partnerships first contend the hay bill is a debt incurred by Mr. Reynolds on his own behalf, not on behalf of the partnerships.

“Each partner is an agent of the partnership for the purpose of its business.”

RCW 25.05.100(1). Furthermore:

An act of a partner, including the execution of an instrument in the partnership name, for apparently carrying on in the ordinary course the partnership business or business of the kind carried on by the partnership binds the partnership, unless the partner had no authority to act for the partnership in the particular matter and the person with whom the partner was dealing knew or had received a notification that the partner lacked authority.

RCW 25.05.100(1).

In addition, “when a contract is made in the name of an individual but for the benefit of the partnership, there is implied liability on the part of other partners even though they are not named.” *Barnes v. McLendon*, 128 Wn.2d 563, 572, 910 P.2d 469 (1996) (citing *Warren v. Rickles*, 129 Wash. 443, 445, 225 P. 422 (1924), *aff’d*, 134 Wash. 701, 234 P. 673 (1925)). However, “[i]n order to bind unnamed partners, the obligation must be within the scope of the partnership business or the proceeds must be

² For the first time in their reply brief, the partnerships assert “there are genuine issues of fact warranting trial for which the trial court’s ruling must be overturned.” Reply Br. of Appellant at 17. However, Washington appellate courts will not consider

used in the business or for the benefit of the firm.” *Id.* at 573 (citing *Collyer v. Egbert*, 200 Wash. 342, 348-49, 93 P.2d 399 (1939)).

Here, the business of the partnerships was to purchase, breed, and eventually sell registered dairy cattle. Thus, feeding the partnership cattle was for “carrying on in the ordinary course the partnership business or business of the kind carried on by the partnership.” RCW 25.05.100(1).

However, the more difficult question is whether Mr. Reynolds was acting in his capacity as a partner when he purchased feed for the partnership cattle. Although Mr. Reynolds was a partner in River Gorge and TBM Syndicate, Mr. Reynolds was also a sole proprietor operating a dairy. As a sole proprietor, Mr. Reynolds paid rent in exchange for receiving the milk from the partnership cows. All parties agree he was also responsible for purchasing feed for the partnership cattle. Further, according to Mr. Reynolds, the milk proceeds from the River Gorge cattle were used to cover their expenses, including the hay they consumed.

In light of these established facts, it cannot be said that Mr. Reynolds’ purchase of hay from Mr. Hodges was in his capacity as a partner of River Gorge and TBM Syndicate. Rather, Mr. Reynolds’ purchase of hay was in his capacity of a sole proprietor operating a dairy. When the partnerships leased their cattle to Mr. Reynolds individually, and agreed to allow Mr. Reynolds to keep the milk proceeds, he assumed the obligation to provide feed to the cattle.

arguments raised for the first time in a reply brief. *Lewis v. City of Mercer Island*, 63 Wn. App. 29, 31, 817 P.2d 408 (1991).

Likewise, contrary to the assertion of Washington Trust, Mr. Reynolds did not have actual or apparent authority to purchase hay on behalf of the partnerships. See *King v. Riveland*, 125 Wn.2d 500, 507, 886 P.2d 160 (1994) (stating “[a]n agent’s authority to bind his principal may be of two types: actual or apparent”).

“When an agent has actual authority to act on behalf of the principal, the agent’s exercise of the authority binds the principal.” *Blake Sand & Gravel, Inc. v. Saxon*, 98 Wn. App. 218, 223, 989 P.2d 1178 (1999). “Actual authority may be express or implied.” *King*, 125 Wn.2d at 507. “Implied authority is actual authority, circumstantially proved, which the principal is deemed to have actually intended the agent to possess.” *Id.* Implied actual authority depends upon objective manifestation from the principal to the agent. *Id.* The most common example of implied actual authority is when “the agent has consistently exercised some power not expressly given to the agent and the principal, knowing of the same and making no objection, has tacitly sanctioned continuation of the practice.” *Id.*

Here, the partnerships did not expressly or impliedly authorize Mr. Reynolds to purchase hay on behalf of the partnerships. Rather, Mr. Reynolds assumed the responsibility of purchasing hay for the partnership cattle in his capacity of a sole proprietor operating a dairy.

Regarding apparent authority, “[a]n agent has apparent authority to act for a principal only when the *principal* makes objective manifestations of the agent’s authority ‘to a third person.’” *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 555, 192 P.3d 886 (2008) (quoting *King*, 125 Wn.2d at 507). Further, “a principal’s objective

manifestations 'must cause the one claiming apparent authority to actually, or subjectively, believe that the agent has authority to act for a principal [and] be such that the claimant's actual, subjective belief is objectively reasonable.'" *Id.* (quoting *King*, 125 Wn.2d at 507). "The burden of establishing apparent authority rests on the one asserting its existence." *State v. French*, 88 Wn. App. 586, 595, 945 P.2d 752 (1997).

Here, although Mr. Hodges knew of the existence of River Gorge, and that this partnership owned a portion of the cattle on Mr. Reynolds' property, neither River Gorge nor TBM Syndicate made any manifestations to Mr. Hodges that would lead him to believe Mr. Reynolds was acting with the apparent authority of the partnerships. See *Ranger Ins. Co.*, 164 Wn.2d at 555. Mr. Hodges acknowledged he solely dealt with Mr. Reynolds. Accordingly, Washington Trust cannot establish Mr. Reynolds had apparent authority to act on behalf of the partnerships. See *French*, 88 Wn. App. at 595.

Unjust Enrichment

Next, the partnerships contend Washington Trust is not entitled to relief under the doctrine of unjust enrichment.

"Unjust enrichment is the method of recovery for the value of the benefit retained absent any contractual relationship because notions of fairness and justice require it." *Young v. Young*, 164 Wn.2d 477, 484, 191 P.3d 1258 (2008). A claim of unjust enrichment requires proof of three elements: "(1) the defendant receives a benefit, (2) the received benefit is at the plaintiff's expense, and (3) the circumstances make it unjust for the defendant to retain the benefit without payment." *Id.* at 484-85.

Here, the partnerships received a benefit at the expense of Mr. Hodges, in that their cattle were sustained by the hay provided by him. Thus, the remaining question is whether it would be unjust for the partnerships to retain this benefit without paying for it. See *Young*, 164 Wn.2d at 484-85. Washington Trust argues the doctrine of unjust enrichment applies here, relying on *Costanzo v. Lawrence*, 64 Wn.2d 901, 395 P.2d 93 (1964).

In *Costanzo*, Sam Lawrence and Norman Harris formed a partnership, with the purpose of purchasing, breeding, feeding, and selling cattle. Subsequently, Mr. Lawrence and Mr. Harris moved their cattle onto a ranch owned by the plaintiff. *Id.* at 902. They entered into a lease with an option to purchase the ranch, with Mr. Harris named as the lessee. *Id.* Mr. Lawrence did not sign the lease, but he did participate in the lease negotiations, helped pay rent, and retained the right to exercise the option to purchase if Mr. Harris chose not to. *Id.* The plaintiff stored a large amount of hay on the ranch. *Id.* The lease provided if Mr. Harris exercised the option to purchase, the hay would be sold to him at a set price; if not, Mr. Harris could either pay for or replace any hay consumed. *Id.*

Mr. Lawrence and Mr. Harris later terminated their partnership. *Id.* Mr. Harris then exercised the option to purchase the plaintiff's ranch, without paying for the hay. *Id.* The plaintiff sued Mr. Lawrence and Mr. Harris for the value of the hay stored at the ranch. *Id.* The trial court found in favor of the plaintiff, concluding the partnership was unjustly enriched by the hay consumed by the partnership cattle. *Id.* at 902-03. On appeal, our Supreme Court affirmed. *Id.* at 903-04. The court concluded "the record

contains substantial evidence to support the trial court's finding that the partnership was unjustly enriched to the extent of the hay consumed by the partnership cattle." *Id.* at 903. Further, the court found that even though the plaintiff knew of both partners, and only one partner, Mr. Harris, signed the lease, the non-contracting partner, Mr. Lawrence, received a benefit. *Id.* at 903-04.

Here, the benefit received by the partnerships from Mr. Hodges was substantial. The sole asset of the partnerships were their cattle, which increased in number while residing at Mr. Reynolds' dairy, consuming hay provided by Mr. Hodges. Therefore, akin to *Costanzo*, it would be unjust for the partnerships to retain the substantial benefit of the feed provided to their cattle without making any payment.

The partnerships argue although they received an incidental and indirect benefit from the hay, they were not unjustly enriched, because purchasing hay was solely Mr. Reynolds' obligation under his lease of the partnerships' cattle. In support of this argument, the partnerships cite to *Farwest Steel Corp. v. Mainline Metal Works, Inc.*, 48 Wn. App. 719, 741 P.2d 58 (1987). There, a third party who had contracted to provide materials to a subcontractor sued the general contractor for materials it provided to the subcontractor, under a theory of unjust enrichment. *Id.* at 720-21. The court found that although the general contractor was enriched by the actions of the third party, the enrichment was not unjust. *Id.* at 732-33. Instead, the general contractor was "a mere incidental beneficiary" of the contract between the subcontractor and the third party. *Id.* at 732. The court reasoned the general contractor did not contribute to the third party's

loss, in that it did not “acquiesce in or encourage the contract” with the third party. *Id.* at 732-33.

However, unlike here, *Farwest Steel Corp.* did not involve a partnership. *Id.* at 721-22. Here, the benefit accruing to the partnerships from the contract between Mr. Hodges and Mr. Reynolds was not merely incidental. To the contrary, the primary asset of the partnerships, their cattle, was sustained by this third party contract. Thus, it would be unjust to allow the partnerships to retain this benefit without payment. Accordingly, Washington Trust is entitled to relief against the partnerships, under the doctrine of unjust enrichment, for the hay consumed by the partnership cattle. In addition, Dr. Chamberlain is liable, jointly and severally, for this obligation. See RCW 25.05.125(1) (in general, “all partners are liable jointly and severally for all obligations of the partnership”).

The trial court did not err in granting partial summary judgment in favor of Washington Trust.

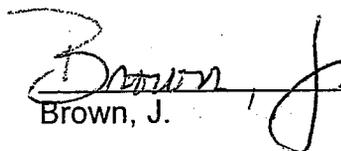
Affirmed.

A majority of the panel has determined this opinion will not be printed in the

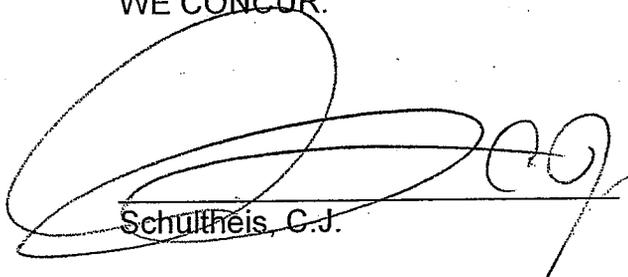
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Wash. Trust Bank v. River Gorge

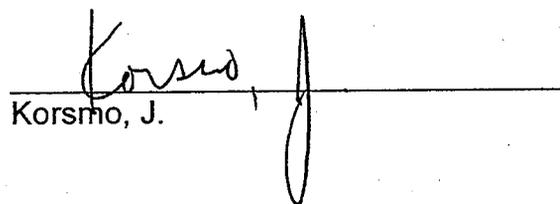
Washington Appellate Reports, but it will be filed for public record pursuant to RCW

2.06.040.


Brown, J.

WE CONCUR:


Schultheis, C.J.


Korsmo, J.

FILED

FEB -4 2009

**COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON**

COURT OF APPEALS, STATE OF WASHINGTON, DIVISION III

**WASHINGTON TRUST BANK, a
Washington banking corporation,**

Respondent,

v.

**RIVER GORGE, a partnership; TBM
SYNDICATE, a partnership; MARVIN
CHAMBERLAIN and MRS. MARVIN
CHAMBERLAIN and the marital
community comprised thereof,**

Appellants.

No. 26880-2-III

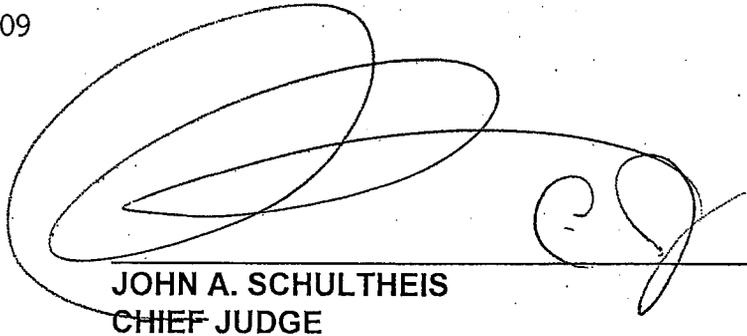
**ORDER DENYING MOTION
FOR RECONSIDERATION**

THE COURT has considered appellants' motion for reconsideration of this Court's opinion under date of January 8, 2009, and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, appellants' motion for reconsideration is hereby denied.

DATED: February 4, 2009

FOR THE COURT:



**JOHN A. SCHULTHEIS
CHIEF JUDGE**