

No. 295508



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

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SCOTT and GAYLENE YOUNG, husband and wife,

Respondents/Cross Appellants.

v.

BOB FRANK CONSTRUCTION, LLC, a Washington limited liability  
company,

Appellant/Cross Respondent,

---

APPELLANT/CROSS RESPONDENT BOB FRANK  
CONSTRUCTION, LLC'S BRIEF

---

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## **I. ASSIGNMENTS OF ERROR**

The trial court erred in:

1. Determining that there was no contract between the parties;
2. The measure of damages awarded to Bob Frank

Construction, LLC;

3. Awarding attorneys fees to the Youngs; and
4. Entering the April 20, 2011 Judgment.

## **II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Whether there was a valid, enforceable contract between the parties.
2. Whether the trial court's measure of damages was adequate based on the evidence.
3. Whether the Youngs were the prevailing party and entitled to recover attorneys' fees.
4. The trial court erred in entering the following findings of facts in the May 24, 2010, Findings of Fact and Conclusions of Law:
  32. Selling price of the home was never firmly established or agreed upon.
  34. There were no discussions or mutual agreements reached regarding the definitive dollar and cent impact, if any, on the ultimate selling price.

(CP at 2415).

5. The trial court erred in entering the following conclusions of law in the May 24, 2010, Findings of Fact and Conclusions of Law:

1. Whatever agreement and/or mutual understandings existed, they never rose to the level of factual or material enforceable representations.

5. The parties never reached mutual assent on essential terms of the purchase and sale of the subject real property.

6. The parties' initial agreements rose only to the level of agreements to agree and nothing more.

9. Agreements that may have been reached, did not rise to the level of agreements that required specific performance.

17. An appropriate remedy under the circumstances is to compensate defendant by allowing him to retain the \$50,000 payment received May 17, 2007, any materials/supplies provided by plaintiffs plus interest in excess of the \$50,000 retained that is incurred on the construction loan for the period beginning April 1, 2008 until September 30, 2010 or closing after sale of the house, whichever event occurs first.

(CP at 2416, 2417).

6. The trial court erred in entering the following order in the April 11, 2011, Findings of Fact and Conclusions of Law:

Defendant be awarded damages in the amount of \$50,000.00, the value of the materials/supplies provided by plaintiffs, plus interest in excess of the \$50,000 retained that is incurred on the construction loan for the period beginning April 1, 2008 until September 30, 2010 or closing after sale of the house, whichever event occurs first.

7. The trial court also erred when it entered the November 9, 2010, Judgment based on the order regarding the amount of damages awarded to Bob Frank Construction.

8. The trial court erred in entering the following finding of fact in the April 11, 2011, Findings of Fact and Conclusions of Law:

17. Bob Frank Construction, LLC was ultimately awarded the principal amount of \$31,751.50, and a Judgment for that amount was entered by the Court on November 9, 2010.

(CP at 4096).

9. The trial court erred in entering the following conclusions of law in the April 11, 2011, Findings of Fact and Conclusions of Law:

6. Since Bob Frank Construction, LLC only recovered a Judgment for the principal amount of \$31,751.50, out of the \$1,040,600 that Bob Frank Construction, LLC sought in its claim against the Youngs, Bob Frank Construction, LLC was not the prevailing party in this lawsuit.

7. The Youngs successfully defended against Bob Frank Construction, LLC's claim to enforce the March 21, 2007 Purchase and Sale Agreement document, and Bob Frank Construction, LLC's attempt to force the Youngs to purchase the property and house for a price of \$1,040,600. As such, the mutuality of remedy theory set forth in *Kaintz v. PG, Inc.*, 147 Wn.App. 782, 789, 197 P.3d 710 (2008) is applicable to the Youngs' claim for attorney fees and costs.

8. The Youngs were successful in their sixth cause of action that the Court declare that the March 21, 2007 Purchase and Sale Agreement document as an unenforceable contract to purchase the property.

9. The Youngs were the substantially prevailing party in this lawsuit. The Court applies the proportionality approach to determine the amount of attorney fees and costs to award to the Youngs.

14. Considering the fact that Bob Frank Construction, LLC was seeking to force the Youngs to pay \$1,040,600 for the purchase of the house and property, [ ].

16. The Court concludes that the total amount of \$158,676.01 in attorney fees and costs was reasonably incurred by the Youngs in defending against the enforcement of the March 21, 2007 Purchase and Sale Agreement.

(CP at 4097-4099).

10. This appeal is also based on the trial court's order in the April 11, 2011, Findings of Fact and Conclusions of Law granting the Youngs' motion for attorney fees and costs and awarding them \$158,676.01, and the Judgment the court entered on April 20, 2011. (CP at 4100; 4101-4103).

### **III. STATEMENT OF THE CASE**

In 2007, Scott and Gaylene Young (the "Youngs") contacted their realtor, Eric Eden, regarding their desire to purchase a new home. (CP at 2413.) The realtor, who had assisted the Youngs with the purchase of their previous home, showed the Youngs a parcel of real property located at 5117 Camus Lane, Veradale, Washington. (CP at 2413.)

The Youngs thought the home constructed on the 5117 Camus Lane lot was "beautiful" and learned that it was built by Bob Frank

Construction, LLC. (CP at 1783). As a result, the Youngs were interested in engaging Bob Frank Construction to build them a custom home. (CP at 2413.) The Youngs' realtor contacted Bob Frank Construction to set up a meeting. (CP at 2413).

On March 21, 2007, the Youngs and Bob Frank met to discuss the Youngs' desire to construct and purchase a house at 5206 Camus Lane, in Veradale, Washington (hereinafter referred to as "the house"). (CP at 2413). The Youngs' realtor accompanied the Youngs to this meeting with Bob Frank. (CP at 1770-1771.)

As a result of the March 21, 2007, meeting, the Youngs and Bob Frank Construction signed a "Real Estate Purchase and Sale Agreement with Earnest Money Provision." (CP at 2413).

The parties treated the Real Estate Purchase and Sale Agreement with Earnest Money Provision as a lot reservation agreement. (CP at 2413). The Real Estate Purchase and Sale Agreement with Earnest Money Provision was prepared and completed by the Youngs' realtor. (CP at 1766-1767.)

Pursuant to the Real Estate Purchase and Sale Agreement with Earnest Money Provision, the Youngs paid Bob Frank Construction \$1,250. (CP at 2414; CP at 1775-1776.)

There was no purchase price or closing date agreed as of the March 21, 2007, meeting. (CP at 2414). The parties were to determine purchase price and closing date at a later date. (CP at 2414).

On March 30, 2007, the parties again met regarding construction of the Youngs' house. (CP at 1786-1788). As with the previous meeting, the Youngs were accompanied by their realtor. (CP at 1788-1789).

The purpose of the March 30, 2007, meeting was so the Youngs and Bob Frank could discuss the cost of building a house similar to the house at 5117 Camus Lane, but place the Youngs' house on the vacant lot at 5206 Camus Lane. (CP at 1788; 430-432).

The Youngs were not interested in purchasing the existing house located at 5117 Camus Lane because they did not like the layout of that lot. (CP at 1782). The Youngs found the layout of the vacant lot, located at 5206 Camus Lane, more desirable. (CP at 1773-1774). Specifically, the Youngs admit that the 5206 Camus Lane lot was superior to the other similar lots in the neighborhood, given that it was more rounded, had a nicer yard, was surrounded by common area and open space, felt bigger, and was more useable. (CP at 1773-1774).

As a result of the March 30, 2007, meeting, the Youngs and Bob Frank Construction signed an Addendum stating that the Youngs wished to proceed with construction. (Ex P-5). The parties also signed a Custom

Construction Proposal wherein it was agreed that the purchase price would be at least \$880,000. (Ex P-5); (CP at 1768; 1794).

As was the case with the Real Estate Purchase and Sale Agreement, the Addendum was drafted and prepared by the Youngs' agent and representative, realtor Eric Eden. (CP at 1788).

The agreed-upon price of \$880,000 included allowances as detailed in the "allowance sheet" attached to the Custom Construction Proposal, and also provided that the agreed-upon price did not include any costs associated with the construction of the driveway, retaining walls, or pool. (Ex P-5).

The parties also agreed in the March 30, 2007, Custom Construction Proposal that the "Agreement [was] contingent upon builder/seller & Purchaser agreeing on final dollar amounts + specs, etc.," and that at the removal of the purchasers' contingency, the "Buyer & Seller will enter into a construction agreement contract." (CP at 1792-1793).

The Youngs and Bob Frank Construction agreed to build on the lot located at 5206 Camus Lane, a custom house similar to the house built on 5117 Camus Lane, but with several changes/upgrades. (CP at 2414). Bob Frank Construction told the Youngs that construction costs would be

greater at 5206 Camus Lane, than those associated with the earlier construction of the house at 5117 Camus Lane. (CP at 2415).

The Youngs' requested modifications of the original design of the 5117 Camus Lane house were significant to the extent that construction costs and details of comparison between 5117 and 5206 became less and less practical and/or achievable. (CP at 2415).

At the March 30, 2007, meeting, and during subsequent conversations between Bob Frank Construction and the Youngs, the Youngs expressed their desire to make numerous custom changes to their house. (CP at 452-453). For instance, the Youngs, among other things, desired to add a detached four-car garage in addition to the attached four-car garage, enlarge the deck, add a pool house and paver bricks on the back, change the location of the theater room, add square footage to the two downstairs bedrooms, change the design of the kitchen, change the utility room to make it bigger, and add Pella doors (i.e., french doors) to the master room and downstairs great room. (CP at 452-453; 1800-1802).

Following their meeting on March 30, 2007, the parties engaged and participated in a six-week series of extensive email correspondence regarding specifications, design, questions, and changes regarding the Youngs' custom home. (RP at January 27, 2010, pp. 93-144); (Ex D-105). For instance, on April 3, 2007, Bob Frank Construction forwarded the

Youngs the plans for the basement and main floor of the house, which had been changed to reflect the Youngs' custom specifications and revisions. (Ex D-105).

On April 5, 2009, the Youngs responded that the main floor plans looked good, pending some minor alterations, but that they wanted to make some further changes to the basement. (RP at January 27, 2010, pp. 99-100); (Ex D-105). Email correspondence regarding the specifications and design of the Youngs' custom home continued throughout April 2007 and into May 2007. (Ex D-105); (RP at January 27, 2010, pp. 93-144).

On May 17, 2007, the parties met again to discuss the Youngs' custom home changes and their corresponding costs. (CP at 509). As a result of the May 17, 2007, meeting, the parties agreed and signed a second Custom Construction Proposal, wherein it was agreed that based upon the Youngs' changes, the purchase price would be \$1,040,600. (Ex P-9); (CP at 1799-1804). The Youngs admit they were in mutual agreement that \$1,040,600 would be the purchase price, and that they were "committed" to moving forward with their house. (CP at 1799-1804; 1824-1825).

After the parties executed the second Custom Construction Proposal, the parties agreed that the Youngs would make a payment of \$50,000 to Bob Frank Construction and that construction of the Youngs'

custom home would commence. (Ex P-9); (CP at 1806-1807; 120-121; 1225-126).

On May 17, 2007, the Youngs made a payment of \$50,000 to Bob Frank Construction. (CP at 2414); (Ex D-108). Upon payment of \$50,000, the Youngs authorized Bob Frank to proceed with constructing the Youngs' custom home. (CP at 2414).

On May 29, 2007, the Youngs sent Bob Frank Construction an email to confirm that it had received their \$50,000 payment. (Ex D-105, DR 73). On that same date, Bob Frank replied that he had received the Youngs' payment and stated that he would obtain the appropriate building permits and schedule the on site digging to begin "in about 2 weeks." (Ex D-105, DR 73).

The Youngs have admitted when they paid Bob Frank Construction \$50,000, they "were committed" to moving forward with the construction of their house. (CP at 1807). The Youngs understood and agreed after the payment of the \$50,000, Bob Frank Construction would obtain building permits and begin digging on the vacant lot the Youngs had selected, or at least the Youngs were aware of that fact. (CP at 1807); (Ex D-105, DR 73). The parties further understood and agreed that additional documentation, including but not limited to closing documents,

would be executed by the parties when construction on the Youngs' custom home was complete. (CP at 1762).

Bob Frank Construction proceeded to work with the Youngs to design, revise, and actually construct a custom home for the Youngs. (Ex D-105); (RP at January 27, 2010, pp. 93-144). The Youngs' custom home was built to the Youngs' particular and specific specifications. (Ex D-105); (RP at January 27, 2010, pp. 93-144).

Throughout the year long construction process, Bob Frank Construction addressed specific inquiries and requests by the Youngs for their home including, but not limited to their theater room, driveway approach, retaining walls, windows, interior structures such as walls and stairway rotations, consistent with custom home construction. (CP at 2414). There were also discussions regarding components in the Youngs' theater room with a subcontractor, and some allowances for materials to be directly supplied by the Youngs. (CP at 2414).

The Youngs had agreed with Bob Frank Construction to a purchase price of at least \$1,040,600 for their custom home (CP at 1799). The Youngs' financing was not a contingent condition of their agreement to construct the house. (CP 2414-Finding 19; 2415-Finding 29).

After nearly a year of construction, and when construction of their custom home was substantially complete, the Youngs submitted their

agreement with Bob Frank Construction to their lender and requested a home loan for their purchase price of \$1,040,600. (CP at 1850); (RP at January 26, 2010, pp. 152-155, 190). Based upon a purchase price of \$1,040,600, the Youngs wanted a loan financing the amount of \$850,000 (CP at 1856).

The Youngs' lender, Scott Rudy at Wells Fargo, granted and approved the Youngs for a loan based upon the \$1,040,600 sale price. RP at January 26, 2010, pp. 177-178 and p. 189. However, the Youngs' home's appraisal came in lower than the sales price, so Wells Fargo approved the Youngs for a loan amount at 80% of their home's appraised value. (RP at January 26, 2010, pp. 168, 184, 187). Scott Rudy testified the Youngs had sufficient assets to approve the loan and to make the larger than expected down payment. (RP at January 26, 2010, pp. 184-187).

The Youngs were never denied a loan for the purchase price of \$1,040,600 to buy their custom home. (RP at January 26, 2010, pp. 177-178). Rather, the Youngs decided not to follow through with the Wells Fargo loan or the entire purchase based on their lender's appraisal of their custom home. (CP at 1854). Because the Youngs chose many personal details and upgrades for their custom home, its value did not necessarily

appraise as high as the Youngs' construction costs. (CP 2415); (RP at January 26, 2010, p. 192).

Appraised values of custom homes do not necessarily reflect costs of specialized upgrades and detailed structures unique to the purchaser's requirements, and may not equate with a fair market selling value at a given time. (CP at 2415-Finding 26, 28).

After March 17, 2008, despite seeing the low appraisal from their lender, the Youngs permitted construction to continue on their custom home to continue. Additional communications with Bob Frank Construction continued regarding the Youngs' construction requests and materials. (CP at 2414).

As compared to the house existing at 5117 Camus Lane, the Youngs made significant construction additions, modifications, and alterations to their house at 5206 Camus Lane, which included:

- a) building square footage and specification increases;
- b) in-home theater with additional necessary components and accessories;
- c) a pool;
- d) a steeper and larger driveway; and
- e) miscellaneous other changes, but in total significant revisions to interior construction details. (CP at 2415).

Despite having participated in a year's worth of construction, on April 1, 2008, the Youngs sent Bob Frank Construction a letter indicating they were rescinding their agreement to purchase unless Bob Frank Construction reduced the purchase price to their lender's appraisal amount of \$850,000. (CP at 2414).

The terms and conditions of the Youngs' financing were not part of their agreement with Bob Frank Construction. (CP at 2414-Finding 19; 2415-Finding 29). So, despite the Youngs' lender's low appraised value, the appraised value was unrelated to the construction agreement. Denying the Youngs' request, Bob Frank Construction did not agree to lower the agreed cost of the house (\$1,040,600) to the lender's appraised value (\$850,000). The Youngs then refused to close on their house and gave notice they were rescinding their agreement with Bob Frank Construction. (CP at 2414-Finding 25).

Due to the Youngs' refusal to close and their attempt to rescind their agreement with Bob Frank Construction, no further documents, including but not limited to the parties' anticipated closing documents, were entered into by the parties.

The Youngs then filed this lawsuit on May 8, 2008, alleging seven causes of action: (1) Conversion; (2) Quantum Merit / Unjust Enrichment; (3) Violation of RCW 64.06.040(3) and 64.060.030; (4) Intentional

Misrepresentation; (5) Negligent Misrepresentation; (6) Uniform Declaratory Judgments Act – Unenforceability of Purchase and Sale Agreement; and (7) Consumer Protection Act Violation. (CP at 6-10).

The Youngs sued Bob Frank Construction for the return of their \$1,250 lot reservation fee; for the return of their \$50,000 payment; for the return of their \$500 pool retainer; and for reimbursement to the Youngs of the \$23,401.04 in direct expenses which the Youngs had paid for items in their home. (CP at 2-10).

Bob Frank Construction counterclaimed, asserting four causes of action: (1) breach of purchase and sale agreement with addendum; (2) breach of construction contract; (3) wrongful rescission; and (4) quantum meruit and unjust enrichment. (CP at 24-28). Because this was unique real property and a custom home that it had constructed for the Youngs, Bob Frank Construction requested specific performance of the contract, or alternatively an award of money damages for breach of contract and quantum meruit. (CP at 28).

After numerous motions and briefing, the parties proceeded to a bench trial, ending with a favorable ruling for Bob Frank Construction. The trial court entered Findings of Fact and Conclusions of Law and a Judgment in favor of Bob Frank Construction, in which it specifically concluded that the Youngs did not meet their burden on alleged issues of

action, denied the Youngs' damages or any other relief, and ordered that their claims are denied and that they take nothing. (CP at 2413-2417); (CP at 2669-2670).

The trial court ordered that Bob Frank Construction could keep the \$1,250 lot reservation fee, the \$50,000 deposit already paid, and could recover additional construction loan interest above these amounts through September 30, 2010 or when the house sold, whichever event occurred first. (CP at 2669-2670; 2413-2417).

The trial court denied cross motions by the parties for reconsideration of the trial court's May 24, 2010, Findings of Fact and Conclusions of Law and November 9, 2010, Judgment. This timely appeal of the trial court's decisions regarding the amount of damages awarded to Bob Frank Construction followed.

Subsequent to filing the appeal, the court entered additional Findings of Fact and Conclusions of Law, and a Judgment, in which it awarded the Youngs attorneys' fees and costs because it now determined that the Youngs were the prevailing party. (CP at 4092-4100).

#### **IV. ARGUMENT**

##### **A. Standard of Review**

The appropriate measure of damages for a given cause of action is a question of law, reviewed de novo. Fisher Props., Inc. v. Arden-

Mayfair, Inc., 106 Wn.2d 826, 843, 726 P.2d 8 (1986); Womack v. Von Rardon, 133 Wn.App. 254, 263, 135 P.3d 542 (2006).

The standard of review for an award of attorney fees is abuse of discretion. Scott Fetzer Co. v. Weeks, 122 Wn.2d 141, 147, 859 P.2d 1210 (1993).

An appeals court will not disturb the findings of the trial court unless there is no credible evidence to sustain them, or unless the evidence clearly preponderates against them. Williams Tilt-Up Contractors, Inc. v. Schmid, 52 Wn.2d 429, 430-31, 326 P.2d 41 (1958).

**B. The Trial Court Did Not Adequately Award Damages to Bob Frank Construction.**

Bob Frank Construction prevailed in this matter on its claim of quantum meruit and unjust enrichment, and the trial court awarded Bob Frank Construction damages on those issues.

However, the trial court did not adequately award Bob Frank Construction the damages it incurred in reliance on the Youngs' actions, commitments, and unjustified refusal to purchase the house, erred in only awarding interest on the construction loan, and erred in cutting off the award of damages as of September 30, 2010. Rather, the trial court should have awarded Bob Frank Construction \$1,040,600, which was the minimum contract price agreed to by the parties.

Alternatively, the trial court should have awarded Bob Frank Construction the total construction cost and other damages it incurred in reliance on the Youngs' actions, commitments, and unjustified refusal to purchase their house; or in addition to awarding the house to Bob Frank Construction, the trial court should have also awarded all the monthly carrying costs Bob Frank Construction actually incurs until the house sells.

1. **Bob Frank Construction Prevailed on Its Claims of Quantum Meruit and Breach of Contract.**

Bob Frank Construction prevailed in this matter on its claim of quantum meruit/unjust enrichment and breach of contract. Quantum meruit was an alternative contract claim pled to allow Bob Frank Construction to recover even if the Purchase and Sale Agreement was voided. See Young v. Young, 164 Wn.2d 477, 485, 191 P.3d 1258 (2008) (quantum meruit is the method of recovering the reasonable value of services provided under a contract implied in fact); Giedra v. Mount Adams School Dist. No. 209, 126 Wn.App. 840, 850, 110 P.3d 232 (2005) (even a party performing services under a void contract may recover for work actually done under quantum meruit).

The trial court's May 24, 2010, Findings of Fact and Conclusions of Law support the conclusion that Bob Frank Construction prevailed on

its claim of quantum meruit and breach of a contract implied in fact. (CP at 2413-2417).

The Youngs and Bob Frank Construction agreed that Bob Frank Construction would build a custom house for the Youngs at 5206 Camus Lane similar to the home built on 5117 Camus Lane, but with several changes and upgrades. (CP at 2414). The parties had a series of meetings over time addressing specific inquiries and requests by the Youngs including, but not limited to a theater room, driveway, retaining walls, windows, interior structures such as walls and stairway rotations, at the house, all consistent with custom home construction. (CP at 2414). The parties continued to meet, discussed a detail allowance sheet, and construction started. (CP at 2414).

As of May 17, 2007, the parties agreed to \$1,040,600, but with reference to potential further adjustments. (CP at 2414). On May 17, 2007, the Youngs paid Bob Frank Construction \$50,000, and construction by agreement was moving forward. (CP at 2414).

The Youngs continued to communicate with Bob Frank Construction regarding significant construction additions, modifications, alterations, requests, and materials for the house, and allowed construction to continue until April 1, 2008. (CP at 2414, 2415). To its detriment, Bob Frank Construction reasonably relied on the Youngs actions, and

expended significant time, labor and money responding to their requests and constructing the house in expectation of completing construction and subsequent sale to the Youngs. (CP at 2416).

The Youngs committed to purchase the house, and the Youngs knew that Bob Frank Construction was relying on their commitments and actions as it actually performed by constructing the Youngs custom home as they directed. (CP at 2416). By April 1, 2008, when the Youngs gave notice of rescission and indicated that they weren't going to buy the house, the vast majority of the construction was completed, resulting in an injustice to Bob Frank Construction. (CP at 2417).

Thus, Bob Frank Construction prevailed on its claim of quantum meruit, and the trial court concluded that there was a contract implied in fact between the parties.

The appropriate measure of damages for quantum meruit/unjust enrichment is the reasonable value of the benefit conferred. RWR Management, Inc. v. Citizens Realty Co., 133 Wn.App. 265, 135 P.3d 955 (Div. 3, 2006). In quantum meruit cases, Washington courts measure the reasonable value of the benefit conferred in a variety of ways. See, i.e., Losli v. Foster, 37 Wn.2d 220, 232, 222 P.2d 824 (1950) (actual cost of labor and materials); Irwin Concrete, Inc. v. Sun Coast Properties, Inc., 33 Wn.App. 190, 653 P.2d 1331 (Div. 2, 1982) (contract price).

As set forth in detail below, the trial court's May 24, 2010, Findings of Fact and Conclusions of Law also establish part performance and promissory estoppel, which support the conclusion that the parties had a contract implied in fact.

**2. Specific Performance is an Appropriate Remedy.**

The trial court erred by not awarding specific performance to Bob Frank Construction. The May 24, 2010, Findings of Fact and Conclusions of Law establish part performance and promissory estoppel, and entitle Bob Frank Construction to specific performance.

An agreement to convey an estate in real property, though required by the statute of frauds to be in writing with the formal requisites specified for a deed, may be proved without a writing, given sufficient part performance. Miller v. McCamish, 78 Wn.2d 821, 826, 479 P.2d 919 (1971). Specific performance will be granted where the acts allegedly constituting the part performance point unmistakably and exclusively to the existence of the claimed agreement. Id.

Part performance is found where two of the following three factors are found: 1) delivery and actual possession; 2) payment or tender of consideration; 3) making of permanent, substantial, and valuable improvement. Kruse v. Hemp, 121 Wn.2d 715, 724-25, 853 P.2d 1373 (1993); Powers v. Hastings, 93 Wn.2d 709, 717, 612 P.2d 371 (1980).

Under the doctrine of promissory estoppel, a promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee, and which does induce action or forbearance, is binding if injustice can be avoided only by enforcement of the promise.

Matzger v. Arcade Building & Realty Co., 80 Wn.2d 401, 141 P. 900 (1914).

[The general doctrine of estoppel] applies not only to estop one who receives and retains a benefit from denying the validity of the transaction from which he receives it, but it also *applies to estop one party to a transaction from denying the validity of the transaction which, if not sustained as valid, would put the other party, who has acted on the faith of the first party's attitude therein, in a materially worse position than he would otherwise have been.*

Id. (emphasis added).

Under Washington law, the equitable doctrine of promissory estoppel requires: (1) [a] promise which (2) the promisor should reasonably expect to cause the promisee to change his position and (3) which does cause the promisee to change his position (4) justifiably relying upon the promise, in such a manner that (5) injustice can be avoided only by enforcement of the promise. Havens v. C&D Plastics, Inc., 124 Wn.2d 158, 171–172, 876 P.2d 435, 442 (1994). Promissory estoppel does not require mutual assent as to any terms, it merely requires

a promise which is justifiably relied upon to a party's detriment. Id. at 172.

A promise is a "manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made." McCormick v. Lake Washington School Dist., 99 Wn.App. 107, 992 P.2d 511 (1999) (promissory estoppel may be used as an offensive sword to validate and enforce justifiably relied upon promises).

Where specific performance of the agreement is sought, the contract must "be proven by evidence that is clear and unequivocal and which leaves no doubt as to the terms, character, and existence of the contract." Miller, 78 Wn.2d at 829, 479 P.2d 919 (quoting Granquist v. McKean, 29 Wn.2d 440, 445, 187 P.2d 623 (1947)); see Williams v. Fulton, 30 Wn.App. 173, 178, 632 P.2d 920, review denied, 96 Wn.2d 1017 (1981); Powers v. Hastings, 93 Wn.2d 709, 713-17, 612 P.2d 371 (1980) ("clear and unequivocal" evidence standard applies where specific performance sought, but lesser standard applies where damages sought).

Washington courts have applied promissory estoppel to specifically enforce promises where the alleged contract failed for lack of essential terms and certainty. Seattle First Nat'l Bank, N.A. v. Siebol, 64 Wn.App. 401, 824 P.2d 1525 (1992); see also Luther v. National Bank of

Commerce, 2 Wn.2d 470, 484, 98 P.2d 667, 673 (1940) (court specifically enforced conveyance for the transfer of real property under doctrine of promissory estoppel).

In Siebol, a lender orally promised to make a loan to the borrower. Siebol, 64 Wn.App. at 404. Relying upon the lender's promise, the borrower proceeded to make certain improvement to his business and opened his business. Id. After opening his business in reliance on the lender's oral promise to loan, the lender informed the borrower that it could not provide certain portions of the requested loan. Id. When the borrower was unable to make his loan payments, the lender sued for foreclosure. Id. at 405. The borrower counterclaimed, seeking among other things, damages resulting from the lender's oral promise to loan. Id.

The lender argued that its promise to loan was unenforceable because as a result of lack of certainty as to essential terms. Id. at 408 fn.5. On appeal, the Washington Court of Appeals did hold that the oral promise allegedly constituting a contract to lend was unenforceable, and thus stated that the lender's "arguments the court should have concluded the alleged oral contract failed for lack of certainty are, therefore, pointless." Id.

Despite the lack of an underlying enforceable contract, the Court of Appeals applied the doctrine of promissory estoppel to grant the

borrower the relief he sought on his counterclaim, and enforce the parties' agreement:

The court's findings of fact upon which the equitable remedy is based are supported by substantial evidence. The findings support the court's conclusion an equitable offset is warranted on the basis of promissory estoppel. Mr. Wheat's representations constituted a promise upon which he knew Mr. Siebol was relying. Mr. Siebol leased a lot and spent \$60,000 on improvements based on the oral loan commitment; he would not have borrowed money from Seafirst to open a new business had it not promised to finance his used car inventory. Based on the parties' agreement and his previous course of dealings with the bank, Mr. Siebol's change of position was justified and it would be unjust not to enforce the promise.

Id. at 408.

In Luther, the deceased induced a nurse to quit her hospital job and nurse him at his home for the rest of his life by orally agreeing to build her a house, deed it to her, and devise and bequeath her all his property by will. Luther, 2 Wn.2d at 474. The nurse kept her end of the bargain, and even married the deceased upon his request, but the deceased died and never transferred, deeded, or otherwise conveyed to the plaintiff the house he built for her. Id.

The nurse sued the executor of the decedent's estate to enforce the parties' agreement. The decedent's estate argued that the agreement was unenforceable on various grounds, including that the agreement was not

sufficiently clear and certain as to material terms and was invalid due to indefiniteness.

The Court held that the doctrine of promissory estoppel was applicable, and specifically enforced the parties' agreement, despite the fact that it was an agreement for the transfer of real property which was not in writing, because to hold otherwise would have resulted in a gross injustice. Id. at 487.

In this case the trial court determined that there was a contract implied in fact and entered findings of fact and conclusions of law clearly establishing part performance and promissory estoppel. Specifically, findings 8, 17, 18, 24, 30, 35, 38, and conclusions 10, 14, 15, 16 in the trial court's May 24, 2010, Findings of Fact and Conclusions of the Law establish Bob Frank Construction's part performance. (CP at 2414-2417). Findings 6, 7, 8, 9, 11-18, 24, 35, 38, and conclusions 10-16 in the trial court's May 24, 2010, Findings of Fact and Conclusions of the Law establish promissory estoppel. (CP at 2414-2417). These findings and conclusions establish each of the elements of part performance and promissory estoppel set forth above.

Specific performance should have been awarded by the trial court because there is clear and unequivocal evidence regarding the terms, character, and existence of the contract implied in fact between the parties.

The parties' agreed to the subject matter and a minimum price, Bob Frank Construction acted in reliance on those agreements, and thus the requirements for the formation of a contract were fulfilled. (CP at 2414-2417).

The Youngs made a promise to pay at a minimum \$1,040,600 in exchange for Bob Frank Construction's design, fabrication, and actual construction of their custom home and, upon completion, the conveyance of the house to them. (Ex P-9 and P-10); (CP at 2414); (CP at 1799-1804; 1824-1825).

The Youngs also testified that they were committed to pay at a minimum \$1,040,600 based on the plans set forth as of May 17, 2007:

Q [Ms. Fulgham] Okay. You've been handed what has been marked as deposition Exhibit No. 3, do you recognize your signature on that document?

A. [Ms. Young] Yes.

Q. [Ms. Fulgham] And your signature is there below the total bid \$1,040,600 figure?

A. [Ms. Young] Yes.

Q. [Ms. Fulgham] And why did you sign this document?

A. [Ms. Young] Well this was the final proposal for the house. So that's, so we went over this, Bob, Scott, and I, and then we all signed it. We agreed this is what the price was going to be.

(CP at 1799).

Q. [Ms. Fulgham] So at this point it looks to me like you have an agreement, you've reached the price, he says, I need 50 grand to get started, you give him the 50 grand and he gets started?

MR. RIES: Object to the form to the extent that it calls for a legal conclusion and object to foundation.

A. [Ms. Young] Yeah, I mean basically, yeah, it was a verbal agreement that we are going to do this, so, yeah, I mean we were committed. We wouldn't have given him \$50,000 if we weren't committed.

Q. [Ms. Fulgham] Well, it was more than a verbal agreement, we've got a million 40 in writing and you signed it.

A. [Ms. Young] Yeah, for the bid proposal, yeah.

Q. [Ms. Fulgham] An you signed it and that's the price you agreed to pay?

A. [Ms. Young] Yes.

Q. [Ms. Fulgham] And in exchange for that price, he agreed to build you a house with these amenities, kitchen cabinets?

A. [Ms. Young] Yes.

(CP at 1806-1807).

Furthermore, the Youngs by seeking a loan for a purchase price of \$1,040,600, the Youngs clearly and conclusively demonstrated their intention and agreement to buy the house at that price. The Youngs had agreed to a purchase price of at least \$1,040,600 (CP at 1799), and after construction of their custom home was substantially complete, the Youngs

requested a loan with a purchase price for the home of \$1,040,600. (CP at 1850); (RP at January 26, 2010, pp. 152- 155). The Youngs wanted a loan for \$850,000 and expected the balance to come from the sale of their existing house (CP at 1856-1857). The Youngs were not denied the loan. (RP at January 26, 2010, p. 178). Rather, they decided not to follow through with the loan based on their lender's appraisal. (CP at 1854).

Appraised values of custom homes do not necessarily reflect the costs of upgrades and structures unique to the purchaser's requirements, and may not equate with a fair market selling value at a given time. (CP at 2415-Finding 26, 28). As a result, the Youngs' appraisal was not a valid basis for the Youngs to back out of the agreement, and in any event, Bob Frank Construction had already substantially completed the construction by that time. (CP at 2417-Conclusion 16). If the Youngs' appraisal had come in higher than their contract price, certainly Bob Frank Construction was not free to raise the price. After obtaining the appraisal from their lender, the Youngs still wanted to complete the purchase of their custom home for the appraised value of \$850,000 instead of the agreed upon \$1,040,600. (CP at 2414-Finding 25).

The record also includes specific details regarding the subject matter of the contract, *i.e.*, the specific design plans for construction of the house (Ex P-8, Ex P-11), an allowance sheet setting forth the cost

allowance of specific items (Ex P-9), and an agreement recognizing that there would be additional costs. (Ex P-10).

Furthermore, the Youngs and Bob Frank Construction had numerous email correspondences over a series of approximately 12 months concerning every aspect of the construction of the house. (RP at January 27, 2010, pp. 93-144); (Ex D-105). The trial court found that the parties had a series of on site construction meetings over time addressing specific inquiries and requests by the Youngs (CP at 2414), and that the Youngs paid \$50,000 to Bob Frank Construction on the same day as they signed the agreement to pay \$1,040,600. (CP at 2414). Gaylene Young testified that they paid the \$50,000 with knowledge that it would cause Bob Frank Construction to continue to proceed with the construction of the house:

Q. [Ms. Fulgham] You paid the \$50,000?

A. [Ms. Young] Yes.

Q. [Ms. Fulgham] Do you know what it was going to be used for?

A. [Ms. Young] To start a project.

Q. [Ms. Fulgham] That's what you intended and that's what you wanted?

A. [Ms. Young] Yes.

Q. [Ms. Fulgham] For him to start building your house?

A. [Ms. Young] Yes.

Q. [Ms. Fulgham] And did you do that?

A. [Ms. Young] Yes.

(CP at 1806). The Youngs also knew that Bob Frank Construction would start digging on the construction site after payment of the \$50,000. (Ex D-105, DR 73).

The trial court found that Bob Frank Construction reasonably relied on that promise and determined that it expended significant labor, money, time, and effort constructing the (CP at 2414).

Bob Frank Construction is entitled to specific performance based on the trial court's finding of a contract implied in fact, part performance, and promissory estoppel. There is no doubt as to the terms, character, and existence of a contract implied in fact between the parties. The parties did not just enter into an agreement to agree – the writings and the contract-performing actions of the parties establish that they fully intended to have a binding contract, and there was testimony that further closing documentation would be executed. (CP at 1762). As such, the trial court should have specifically enforced the implied in fact contract between the parties and awarded Bob Frank Construction \$1,040,600.

3. **The Trial Court's Finding of No Mutual Assent was an Abuse of Discretion.**

The trial court's record, as set forth in the foregoing discussion, also establishes that there were enforceable agreements and representations made between the parties. The trial court's determination that there was no mutual assent was erroneous because the trial court's May 24, 2010, Findings of Fact and Conclusions of Law regarding a contract implied in fact establishes that there was mutual assent deduced from the circumstances. (CP at 2413-2417).

This evidence establishes a contract. See Jacob's Meadow Owners Ass'n v. Plateau 44 II, LLC, 139 Wn.App. 743, 162 P.3d 1153 (Div. 1, 2007) (evidence established that contract existed between contractor and subcontractor). The manifestation of mutual assent requires that each party to the contract either make a promise or begin performance. Saluteen-Maschersky v. Countrywide Funding Corp., 105 Wn.App. 846, 22 P.3d 804 (Div. 1, 2001). As set forth above, the trial court record in this case establishes that the parties made promises to one another, and that both parties began performance, *e.g.*, the Youngs paid \$50,000; Bob Frank Construction constructed the house. (CP at 2413-2417).

As a result, the trial court's May 24, 2010, Finding 32 and 34 are in error because there is no credible evidence to support these findings.

Similarly, there also is no credible evidence to sustain the trial court's May 24, 2010, Conclusion 1, 5, 6, 9, and 17. The evidence as set forth above clearly preponderates against those findings and conclusions.

4. **Alternatively, Bob Frank Construction Should Be Awarded the Cost to Construct the House.**

Even if it's determined that specific performance is not available because of alleged doubt as to the terms, character, and existence of the contract, Bob Frank Construction is entitled to recover money damages for the actual cost of labor, materials, and services provided because a lesser standard applies to this inquiry. See Powers v. Hastings, 93 Wn.2d 709, 713-17, 612 P.2d 371 (1980) ("clear and unequivocal" evidence standard applies where specific performance sought, but lesser standard applies where damages sought); Young v. Young, 164 Wn.2d 477, 485, 191 P.3d 1258 (2008) (quantum meruit is the method of recovering the reasonable value of services provided under a contract implied in fact); Giedra v. Mount Adams School Dist. No. 209, 126 Wn.App. 840, 850, 110 P.3d 232 (2005) (even a party performing services under a void contract may recover for work actually done under quantum meruit); Losli v. Foster, 37 Wn.2d 220, 232, 222 P.2d 824 (1950) (damages recoverable in quantum meruit were actual cost of labor and materials).

The actual construction and estimated closing costs of 5206 Camus were \$882,420.89. (RP at January 28, 2010, pp. 299-300); (Ex P-40). Closing costs refer to excise tax, real estate commission, insurance, and other costs associated with closing a sale of the house. This amount does not include the hard carrying costs incurred after April 2008 that would have been the Youngs' separate responsibility had they purchased the house. (RP at January 28, 2010, pp. 299-300).

Based on the clear, unequivocal evidence regarding the actual costs to construct the house, Bob Frank Construction should be awarded, at the very least, \$882,420.89 in damages under a theory of quantum meruit.

5. **Alternatively, the Trial Court Should Have Awarded Bob Frank Construction all the Carrying Costs Incurred Until the House Sells.**

The trial court erred by only awarding Bob Frank Construction interest on the construction loan, and then erred by arbitrarily cutting off that award on September 30, 2010, or the date the house sold, whichever event occurred first. The house did not sell prior to September 30, 2010, and has not yet sold, so the trial court entered a judgment for damages against the Youngs that calculated the construction interest through September 30, 2010. (CP at 2669-2670).

Evidence was presented to the trial court that as a result of the Youngs' unjustified refusal to buy the house, Bob Frank Construction

incurred, and continued to incur, monthly carrying costs in addition to the construction loan interest that was awarded by the trial court. (CP at 2495-2600); (Ex P-39).

There also was evidence presented to the trial court that Bob Frank Construction did everything it could to sell the house, and that Bob Frank Construction would accept a reasonable offer that would result in a break-even of the house's construction costs and estimated closing costs. (CP at 2467-2600).

No evidence supports the trial court's September 30, 2010, cut-off date for damages.

The Job Cost Detail Report for 5206 Camus, sets forth the categories of monthly carrying costs associated with the home for insurance, taxes, utilities, and other hard costs Bob Frank Construction incurred, and continues to incur, on a monthly basis as a result of the Youngs' unjustified refusal to purchase the house. (Ex P-39).

Between April 2008 and April 2010, Bob Frank Construction incurred the following hard carrying costs associated with the Youngs' unjustified refusal to purchase the home:

Utilities	\$ 4,271.82
Property and Casualty Insurance:	3,768.44
Property Taxes:	19,777.78
Bella Vista Home Owners Assoc.:	1,475.00
Landscaping as required by CC&Rs:	<u>25,000.00</u>

\$54,293.04

(CP at 2495-2600).

These costs continue and are costs the Youngs would have been responsible for had they purchased the house. These costs are in addition to the \$2,725.05 in monthly construction interest damages already awarded by the trial court. (CP at 2417). These monthly carrying costs are also in addition to the actual construction cost and the estimated closing costs set forth above and testified to by Bob Frank at the time of trial. (RP at January 28, 2010, pp. 299-300).

No evidence in the trial court record supports the trial court's conclusion that damages should arbitrarily be cut off on September 30, 2010. Based on the trial court's May 24, 2010 Findings of Fact and Conclusions of Law, Bob Frank Construction's efforts to sell the house, the very poor real estate market conditions, and the unique fixtures and changes the Youngs requested in the house, there was no basis in law or fact to place a September 30, 2010, cut-off date on the ongoing carrying costs and damages Bob Frank Construction incurred.

In addition, the home was custom built according to the Youngs' specifications. (CP at 2413-2417). It is not a spec home built to satisfy or be sold to an average home buyer. The trial court recognized that Bob Frank Construction made reasonable efforts to mitigate any loss arising

out of this project. (CP at 2416). As a result, Bob Frank Construction is now left trying to sell the home at a price that an average home buyer will accept, while trying to recover the actual costs of constructing the Young's very unique, and specifically designed custom home.

Extraordinary efforts were made to sell the home, including staging the house, particularly given the constraints in the upper-end real estate market. (CP at 2467-2469; 2602-2605). At the time of trial, Bob Frank Construction had not received a single offer on the house. (RP at February 1, 2010, p. 55). And except for the one unreasonable Jondal offer, there have been no other offers on the home. (CP at 2496-2497).

Bob Frank Construction's extraordinary efforts to sell the house continued. As of June 2010, the home was staged with furniture and Pamela Fredrick continued to market and showcase the home in the Dupont Registry, Portfolio Homes, realtor.com, zillow.com, and numerous other websites and other real estate publications. (CP at 2467-2469; 2602-2605). She also held public open houses and broker open tours. (CP at 2467-2469). Pamela Fredrick testified that she is doing everything possible to attract buyers. (CP at 2467-2469).

Unfortunately, the Spokane real estate market continued to be extremely slow in the \$600,000 to \$1,200,000 price point, and there is a shortage of buyers in that price point. (CP at 2602-2605). As of June 23,

2010, there were 65 listings, one pending sale, and only three homes closed since January 1, 2010, in 5206 Camus's price point. (CP at 2467-2469; 2602-2605).

Bob Frank Construction should not have to take a loss on construction of the Youngs' custom home. The trial court found that the Youngs specifically requested construction of their house, and that Bob Frank Construction reasonably relied on the Youngs' representations in constructing their house pursuant to the Youngs' ongoing requests, specifications, and timeline. (CP at 2413-2417). Based on the trial court's findings that The Youngs made representations they would purchase their custom home, and that Bob Frank Construction relied on those representations, the Youngs should bear the expense of a downturn in the market.

Based on i) the law set forth herein regarding the measure of damages for quantum meruit, part performance, and promissory estoppel; ii) the trial court's findings and conclusions regarding a contract implied in fact; iii) the trial court's findings and the evidence presented at trial regarding the essential terms of the implied in fact contract; and iv) the evidence presented at trial of the cost of labor, materials, and monthly carrying costs incurred by Bob Frank Construction in reliance on the Youngs' representations, the damages awarded to Bob Frank Construction

by the trial court were inadequate and in error. Furthermore, there was no basis in law or fact for the trial court's completely arbitrary September 30, 2010 damages cut-off date.

C. **The Trial Court Erred When It Awarded Attorneys' Fees and Costs to the Youngs.**

On April 11, 2010, the trial court determined that the Youngs were the substantially prevailing party and awarded the Youngs \$158,676.01 in attorneys' fees and costs. (CP at 4092-4100). The trial court also entered a judgment for that amount against Bob Frank Construction. (CP at 4101-4103).

The trial court's award of attorneys' fees to the Youngs was an abuse of discretion because: 1) the trial court's May 24, 2010, Findings of Fact and Conclusions of Law clearly sets forth that Bob Frank Construction is the prevailing party; 2) the trial court erroneously concluded that Bob Frank Construction only recovered \$31,751.50, and then used that figure as a basis to determine that Bob Frank Construction was not the prevailing party in the lawsuit (CP at 4096; 4097); 3) the trial court erroneously concluded that the Youngs successfully defended against Bob Frank Construction's claim to enforce the purchase and sale agreement and that the mutuality of remedy theory applies (CP at 4097-4098); 4) the trial court erroneously concluded that the Youngs were

successful in their sixth cause of action (CP at 4098); and 5) the trial court erroneously concluded that the Youngs were the substantially prevailing party (CP at 4098).

**1. The Youngs Did Not Prevail.**

The Youngs cannot be considered the prevailing party, or substantially prevailing party, under any interpretation of the trial court's May 24, 2010, Findings of Fact and Conclusions of Law and the November 10, 2010, Judgment entered in this case.

The prevailing party is the one "in whose favor final judgment is rendered." RCW 4.84.330; Schmidt v. Cornerstone Invs., Inc., 115 Wn.2d 148, 164, 795 P.2d 1143 (1990); Ennis v. Ring, 56 Wn.2d 465, 473, 341 P.2d 885, 353 P.2d 950 (1959). If neither party wholly prevails, then the party who substantially prevails is the prevailing party. Rowe v. Floyd, 29 Wn.App. 532, 535, 629 P.2d 925 (1981). The determination of who is the substantially prevailing party turns on the extent of relief afforded the parties. Id.

As previously discussed, there is no question that Bob Frank Construction prevailed in this matter on its claim of quantum meruit/unjust enrichment. The Court determined that "Defendant, in reasonable reliance upon plaintiffs' actions, expended significant labor and money responding to plaintiffs' requests in expectation of completing construction and

subsequent sale to plaintiffs.” (CP at 2416). The trial court awarded Bob Frank Construction \$50,000, the value of materials provided by the Youngs, and interest in excess of \$50,000. (CP at 2669-2670; 2413-2417).

The trial court’s May 24, 2010, Findings of Fact and Conclusions of Law explicitly state that the Youngs are afforded no relief. Specifically, the trial court determined:

Plaintiffs have not met their burden on alleged issues of action and therefore no damages or relief is awarded.

Plaintiffs’ claims are denied and that they take nothing thereby;

As plaintiffs have not met their burden on alleged issues of action, no damages or relief are awarded.

(CP at 2417).

Similarly, the trial court’s November 2010 Judgment states that “Plaintiffs’ claims are denied and that they take nothing thereby.” (CP at 2669-2670). The Youngs were not awarded any damages or relief by the trial court, whereas Bob Frank Construction was awarded damages totaling \$31,751.50, the \$50,000 down payment, and the house. (CP at 2413-1417; 2669-2670).

The Youngs cannot be considered the prevailing party under Washington law because no judgment was rendered in their favor and they were awarded no damages and no relief. Whereas Bob Frank

Construction was awarded \$81,751.50 in damages and relief, plus the house. Based on the foregoing, the trial court's April 11, 2011, order that the Youngs are the substantially prevailing party is in error.

2. **The Youngs Cannot Be Deemed the Prevailing Party Simply Because Bob Frank Construction Did Not Recover All Damages It Prayed For.**

The Court determined that the Youngs are the prevailing party because Bob Frank Construction only recovered \$31,751.50 out of the \$1,040,600 it prayed for. (CP at 4097). However, it's clear that under Washington law the fact that Bob Frank Construction didn't receive all the damages it prayed for cannot be the basis for determining that the Youngs are the prevailing party.

A party need not recover its entire claim in order to be considered the prevailing party. Silverdale Hotel Associates v. Lomas & Nettleton Co., 36 Wn.App. 762, 774, 677 P.2d 773 (1984) (finding that a party does not prevail on an issue simply because damages awarded to opposing party on that issue were not as high as prayed for).

First, although it's inconsequential to determining the prevailing party, it should be noted that the trial court awarded Bob Frank Construction \$31,751.50, the \$50,000 down payment, plus the proceeds of the house when it sells. The trial court's decision fails to recognize that the trial court awarded Bob Frank Construction the \$50,000 and the

proceeds of the house when it sells. Although, as previously discussed, awarding Bob Frank Construction the house without awarding the monthly carrying costs until it sells is an inadequate award under Washington law, the total recovery is still higher than indicated by the trial court's decision.

Based on the fact that Bob Frank Construction recovered an award of \$31,751.50, the \$50,000 down payment, plus the proceeds when the house sells, and the trial court's conclusion that no damages or relief is awarded to the Youngs, Bob Frank Construction is the prevailing party, especially in light of Silverdale.

**3. The Youngs Are Not Entitled to Recover Fees Under the Mutuality of Remedy Theory.**

The Court erroneously determined that the Youngs were entitled to recover attorneys' fees pursuant to the mutuality of remedy theory set forth in Kaintz v. PLG, Inc., 147 Wn.App. 782, 790, 197 P.3d 710 (2008). (CP at 4097-4098).

In order to award fees under the mutuality of remedy theory, case law requires the court to determine who is the "prevailing party." Kaintz, 147 Wn.App. at 789; Labriola v. Pollard Group, Inc., 152 Wn.2d 828, 839, 100 P.3d 791 (2004); Herzog Aluminum, Inc. v. General American Window Corp., 39 Wn.App. 188, 197, 692 P.2d 867 (1984). As set forth

above, the Youngs cannot be the prevailing party, or substantially prevailing party, in this matter based because the Youngs received nothing while Bob Frank Construction received a judgment in its favor.

Furthermore, the Youngs cannot not be considered the prevailing party under Kaintz, or any of the other case for application of the mutuality of remedy theory.

In Kaintz, the court determined that the plaintiff was the prevailing party because judgment was entered dismissing the defendant's claim with prejudice. Kaintz, 147 Wn.App. at 790. The defendant did not prevail on any of its claims and the court's determination that the contract was unenforceable was dispositive of the entire matter. The Labriola and Herzog cases are similar. In Labriola, the court specifically determined that the employee was the prevailing party when a non-compete agreement was held unenforceable and all of the opposing party's claims were dismissed. Labriola, 152 Wn.2d at 840. Similarly, in Herzog, the court determined that the defendant was entitled to fees as the prevailing party because it recovered a judgment dismissing the plaintiff's entire cause of action. Herzog, 39 Wn.App. at 197.

In Kaintz, Labriola, and Herzog, fees were awarded to the prevailing party under the mutuality of remedy theory only after the opposing parties' were entirely unsuccessful on their claims and it was

determined that the contract's unenforceability was dispositive of the entire matter. Kaintz, 147 Wn.App.715; Labriola, 152 Wn.2d at 842; Herzog, 39 Wn.App. at 197. In each of those cases the opposing party was *entirely* unsuccessful and recovered no damages or relief.

In this case, the trial court's determination that the purchase and sale agreement never existed was not dispositive of the entire matter, and did not prevent Bob Frank Construction from prevailing on its contract claim of quantum meruit/unjust enrichment. Bob Frank Construction's claims were not dismissed and the Youngs did not prevail on any of their claims. Judgment was entered in Bob Frank Construction's favor.

Thus there is no support for an award of fees under the mutuality of remedy theory and the trial court's decision to the contrary is in error.

4. **Alternatively, Fees Should Not Be Awarded Because Neither Party Prevailed, or Both Parties Prevailed on Major Issues.**

One of the issues in this case was whether there was a contract between the parties. The Youngs sought declaratory relief that there was no contract, and Bob Frank Construction asserted that there was a contract in fact, or alternatively, a contract implied in fact (quantum meruit).

Although it is clear that the Youngs were awarded no damages or relief, assuming for the sake of argument that the Youngs were awarded

some relief on the contract issue, Washington courts have held that when both parties to an action are afforded some measure of relief, and there is no singularly prevailing party, neither party is entitled to attorneys' fees. Phillips Building Co., Inc. v. An, 81 Wn.App. 696, 702-03, 915 P.2d 1146 (1996); American Nursery Prods. v. Indian Wells Orchards, 115 Wn.2d 217, 235, 797 P.2d 477 (1990); see also Rowe v. Floyd, 29 Wn.App. 532, 535-36, 629 P.2d 925 (1981) (court held that neither party entitled to recover fees where one party recovered damages, and other party prevailed on forfeiture claim). Alternatively, where both parties prevail on major issues, there is no prevailing party and no fees are awarded. Puget Sound Serv. Corp. v. Bush, 45 Wn.App. 312, 320-21, 724 P.2d 1127 (1986).

There is no question that Bob Frank Construction prevailed on the contract issue by establishing that there was a contract implied in fact, and in being award damages under the theory of quantum meruit, which was an alternative contract claim pled to allow Bob Frank Construction to recover even if the contract was voided. See Young v. Young, 164 Wn.2d 477, 485, 191 P.3d 1258 (2008) (quantum meruit is the method of recovering the reasonable value of services provided under a contract implied in fact); Giedra v. Mount Adams School Dist. No. 209, 126 Wn.App. 840, 850, 110 P.3d 232 (2005) (even a party performing services

under a void contract may recover for work actually done under quantum meruit). The trial court could have awarded Bob Frank Construction the entire amount it prayed for under quantum meruit, but instead, the trial court awarded \$31,751.50, the \$50,000 down payment, and the house. Although the trial court erroneously limited the amount of damages, Bob Frank Construction prevailed on the contract issue by establishing that there was a contract implied in fact.

Quantum meruit was a major contract claim in this case and Bob Frank Construction spent a large portion of the trial reviewing e-mails with the Youngs establishing that Bob Frank Construction relied on the Youngs representations regarding construction of the house. (RP at January 27, 2010, pp. 93-144). The trial court made numerous findings of fact and conclusions of law regarding the quantum meruit, part performance, and promissory estoppel issues, *i.e.*, Findings of Fact 11, 12, 13, 14, 15, 16, 17, 18, 24, 35, 37, 38; and Conclusions of Law 10, 12, 13, 14, 15, 16. (CP at 2413-2417).

The trial court did not award any damages or relief to the Youngs on any of their claims. The Youngs did not prevail on the contract issue just because the award to Bob Frank Construction was not as high as it prayed for. As stated above, a lower-than-prayed-for damage award is not

sufficient to prevail on an issue. Silverdale Hotel Associates v. Lomas & Nettleton Co., 36 Wn.App. 762, 774, 677 P.2d 773 (1984).

In sum, it's clear that the trial court denied all the Youngs' claims. However, if it's determined that the trial court's May 24, 2010, Findings of Fact and Conclusions of Law somehow provides relief to the Youngs, then there is no singularly prevailing party in this matter, so neither party is entitled to attorneys' fees. Alternatively, both parties prevailed on major issues so there is no prevailing party and no fees can be awarded.

**D. The Trial Court Erred When it Entered the April 20, 2011 Judgment Without Proper Notice to Bob Frank Construction.**

Washington Superior Court Civil Rule 54(f) states that no order or judgment shall be signed or entered until opposing counsel have been given five days' notice of presentation and served with a copy of the proposed judgment. CR 54(f). There are three exceptions to the rule, but none of them apply in this case.

Entry of the April 20, 2011, Judgment was in violation of CR 54(f) and should be vacated because 1) the Youngs did not properly serve a copy of the proposed judgment on Bob Frank Construction, 2) Bob Frank Construction did not approve the form of the proposed judgment, 3) Bob Frank Construction did not waive notice of presentment, 4) the April 20, 2011, Judgment was signed and entered without a presentment, and 5) the

April 20, 2011, Judgment was signed and entered prior to the five day notice requirement.

After the oral argument regarding attorneys' fees on January 28, 2011, there were numerous and conflicting versions of the parties' multiple proposed findings/conclusions and judgments submitted to the trial court after the hearing on attorneys fees. (CP 3602-4091).

On April 11, 2011, the trial court entered Findings and Conclusions on the Youngs' motion for attorneys' fees. (CP at 4092-4100). On April 15, 2011, the Youngs' counsel e-mailed the Court with a copy of a proposed judgment based on the April 11, 2011, Findings of Fact and Conclusions of Law. (CP at 4195). The Youngs copied Bob Frank Construction on the email to the trial court, and admit that they did not properly serve a copy of the proposed judgment on Bob Frank Construction. (CP at 4120-4121). The trial court signed and entered the Youngs' proposed judgment on April 20, 2011, without presentment and prior to the five-day notice requirement. (CP at 4101-4103).

In addition to vacating the April 20, 2011, Judgment based on the procedural defects, the April 20, 2011, Judgment should be vacated so that additional language can be inserted to properly characterize the trial court's decision in the underlying bench trial. Specifically, the April 20, 2011, Judgment should reference the trial court's underlying decision that

the Youngs did not meet their burden on alleged issues of action and therefore no damages or relief was awarded to them, and that the Youngs' claims were denied and that they take nothing thereby. (CP at 2417).

Insertion of this language is necessary to fully and accurately describe the trial, the November 9, 2010, Judgment, and the April 20, 2011, Judgment.

Based on the foregoing, Bob Frank Construction requests this Court to vacate the April 20, 2011, Judgment.

#### **V. CONCLUSION**

For the foregoing reasons, Bob Frank Construction respectfully requests that the Court grant its appeal and award Bob Frank Construction \$1,040,600 for specific performance; alternatively, \$882,420.89 for the actual cost of labor and materials; alternatively, all the monthly carrying costs incurred from April 2008 until the house sells.

Bob Frank Construction also requests that the trial court's April 11, 2011 order awarding attorneys' fees and costs to the Youngs be reversed and the Judgment entered on April 20, 2011 be vacated.

RESPECTFULLY SUBMITTED this 13th day of June, 2011.

LUKINS & ANNIS, P.S.

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13<sup>th</sup> day of June, 2011, I caused to be served a true and correct copy of Appellant/Cross respondent Bob Frank Construction, LLC's Brief by the method indicated below, and addressed to all counsel of record as follows:

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