

No. 65352-1-I

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**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

W.H. HUGHES, JR., CO., INC.,

Appellant

v.

KEVIN DAY AND CHARLOTTE DAY; MICHAEL C. BAKER AND
KRIS E. BAKER; HENRY F. KNAPP AND BEVERY M. KNAPP;
ROBERT C. LEGRANDE AND LYNN J. LEDGRANDE,

Respondents

REPLY BRIEF OF APPELLANT

KEANE LAW OFFICES
T. Jeffrey Keane, WSBA 8465
100 NE Northlake Way, Suite 200
Seattle, WA 98105
206/438-3737 / fax 206/632-2540
Email: tjk@tjkeanelaw.com
Attorneys for Appellant

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I. INTRODUCTION

Respondents live in homes whose values were significantly enhanced by appellant's labor and expenditure. Respondents argue that their enrichment has not been unjust due to their payment of nominal fees to the City of Auburn; and alternately that they are entitled to retain the unjust enrichment because, they argue, Hughes acted as a volunteer toward them. The fees did not adequately compensate Hughes, Hughes did not act voluntarily toward respondents, and any payback agreement is inapplicable to the current dispute. Respondents remain unjustly enriched at Hughes' expense to this day. The trial court erred. This case should be reinstated.

II. ARGUMENT

A. Hughes Has Established the Elements of Unjust Enrichment

The doctrine of unjust enrichment is based upon a contract implied at law. The elements of a contract implied in law are: "(1) the defendant receives a benefit, (2) the received benefit is at the plaintiff's expense, and (3) the circumstances make it unjust for the defendant to retain the benefit without payment." *Young v. Young*, 164 Wn.2d 477, 484-85, 191 P.3d 1258 (2008). 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.” *Id.* at 484. Here, (1) the respondents received the twin benefits of sewer connection and heightened property values, (2) at the expense of Hughes, which (3) increased the value and eventual resale price of respondents’ properties. These circumstances created a contract implied at law between Hughes and respondents.

Respondents ask the court to adopt the decision in *Farwest Steel Corp. v. Mainline Metal Works, Inc.*, 48 Wn.App. 719, 741 P.2d 58 (1987), in which third party “incidental” beneficiaries were held immune from suit for unjust enrichment. Agreement with respondents’ argument would effectively permit retention of unjustly gained benefits by parties who take affirmative action to gain the benefit without paying for it. This would amount to retention of a benefit under circumstances which make it unjust, a result in violation of Washington precedent. *Dragt v. DeTray, LLC*, 139 Wn.App. 560, 576, 161 P.3d 473 (2007).

The Washington Supreme Court in *Nelson v. Appleway Chevrolet, Inc.*, 129 Wn.App. 927, 935-36, 121 P.3d 95 (2005), *aff’d* 160 Wn.2d 173 (2007), re-embraced the general principals of unjust enrichment. In that case, a car dealer listed the Business & Occupation tax as a line item on the invoice for customer Nelson’s new car. The court held that this was unjust enrichment of the dealer, since B&O taxes were legislatively intended to be levied upon business owners, not customers. “In effect,”

the court wrote, “Appleway has made Nelson pay Appleway’s taxes.” *Id.* at 697-99. The court held that restitution was the proper remedy:

The new *Restatement (Third) of Restitution* addresses the confusion surrounding unjust enrichment claims. While historically understood as an equity action, restitution has roots in both *equity* and the law. The original justification, dating back to Lord Mansfield’s decision in *Moses v. Macferlan* has given way to a modern understanding, based on a transaction’s legal validity. Specifically, any transaction not adequately supported by law is voidable. *See* Restatement (Third) of Restitution, § 1 cmt. B at 3 (“Unjustified enrichment is enrichment that lacks an adequate legal basis: it results from a transfer that the law treats as ineffective to work a conclusive alteration in ownership rights.”)

Id., citing Rest. (Third) of Restitution and Unjust Enrichment, § 1 cmt. B (Discussion Draft 2000). As in *Appleway*, Hughes has, in effect, been made to pay respondents’ bill for sewer improvements.

Washington recognizes three elements of a claim for unjust enrichment: the conferral of a benefit by one party upon another; the recipient’s knowledge that the benefit has been conferred; and the recipient’s inequitable retention of the benefit. *Id.* at 484-85. Inequitable retention is defined as “circumstances that make it inequitable for the receiving party to retain the benefit without paying its value.” *Dragt*, 139 Wn.App. at 576.

It is undisputed that Hughes was required to construct the sewer as a condition of permitting for the Auburn Place development—the City of Auburn did not construct the sewer, nor did Hughes voluntarily build the

line. It is similarly undisputed that, without Hughes' construction of the line, respondents would still be reliant on septic tanks. Respondents gained the benefits of sewer access and improved property values courtesy of Hughes' construction.

Respondents also do not dispute awareness of the benefit. Respondents Day, in particular, admit to having "inquired into how the project was progressing" as Hughes worked on the sewer line.¹

The third element of unjust enrichment—inequitable retention—is also clearly present here. The court in *Chandler v. Washington Toll Bridge Authority*, 17 Wn.2d 591, 137 P.2d 97 (1943) considered the question of unjust enrichment:

In Restatement of the Law of Restitution, p. 461, § 112, the rule is stated as follows: 'A person who without mistake, coercion or request has unconditionally conferred a benefit upon another is not entitled to restitution, except where the benefit was conferred under circumstances making such action necessary for the protection of the interests of the other or of third persons.'

Cases falling within the exception to this rule generally occur when the person performs the noncontractual duty of another to supply necessities to a third person, or performs another's duty to a third person in an emergency. The rule has also been applied when it has appeared that one has performed another's duty to the public, or has preserved another's life, health, property or credit.

Chandler at 102-03. Respondents argue that, since Hughes will—at some indeterminate point in the future—receive compensation from other

¹ Brief of Respondents Day and Baker, at 3.

adjoining landowners for its construction of the sewer line, respondents' retention of benefits is not inequitable.² However, the third element of unjust enrichment is clearly met in this case, as the circumstances make it unjust for respondents to retain the benefit of sewer access without payment to Hughes. Respondents specifically engineered their connection to the sewer line to ensure that they gained the benefit in exchange for the least possible outlay. Enrichment or benefit "includes any form of advantage." *Irwin Concrete v. Sun Coast Prop.*, 33 Wn.App. 190, 194, 653 P.2d 1331 (1982). In addition to the concrete benefit of sewer connection, respondents continue to retain the benefit of increased property values on their respective homes. CP 279. Respondents do not dispute that their homes increased in value following connection to the sewer, nor do they dispute that they have paid nothing for this increased property value. Directing respondents to pay their fair *pro rata* share of the sewer construction costs is not unfair or inequitable because respondents retain their sewer access, and are continuing beneficiaries of the improvements made by Hughes, with Hughes' money.

² Brief of Respondents LeGrande, at 23.

B. RCW 35.91.020 Does Not Prevent Hughes From Obtaining Reimbursement From Respondents for Their Sewer Access

Respondents assert that RCW 35.91.020, the statute permitting payback agreements, is meant to *protect* property owners who connect to a utility line prior to entry of a Payback Agreement. The agreement was entered into pursuant to RCW 35.91.020(4), which reads:

The provisions of such contract [with the owner of real estate for sewer facilities] shall not be effective as to any owner of real estate not a party thereto unless such contract has been recorded in the office of the county auditor of the county in which the real estate of such owner is located prior to the time such owner taps into or connects to said water or sewer facilities.

Hughes was prevented from obtaining repayment from defendants by their quick action and Auburn's failure to protect Hughes' repayment interests.

Respondents request that the court interpret the Legislature's intent in drafting RCW 35.91.020 as, essentially, encouraging property owners to connect to utility lines prior to entry of a Payback Agreement.³ This result is contrary to the public interest in reimbursing contractors for constructing utilities which benefit municipalities. When construing a statute, the court's objective is to carry out the legislature's intent. *Lake v. Woodcreek Homeowners Ass'n*, 168 Wn.2d 693, 704, 229 P.3d 791 (2010).

³ Brief of Respondents LeGrande, at 16.

Negotiation and entry of the Payback Agreement in this case took an inordinately long time—it was not finalized until nearly three years after completion of the sewer line. The Legislature certainly did not intend to provide a loophole through which quick-on-the-draw property owners could gain utility access at a fraction of the cost their more patient neighbors would ultimately be assessed. Hughes should not be penalized for abiding by the delayed administrative and bureaucratic processes which would partially reimburse him for construction costs.

C. Hughes Did Not Act As A Volunteer Toward Respondents

Finally, respondents argue that, since the initial decision to construct the Auburn Place development was voluntarily made by Hughes, the construction of the sewer connection required by the City of Auburn as a condition of Auburn Place permitting was consequentially also voluntary.

One is a “volunteer” if, in making payment, “he has no right or interest of his own to protect and acts without obligation, moral or legal.” *Rainier Nat. Bank v. Wells*, 65 Wn.App. 893, 829 P.2d 1168 (1992), *citing Newcomer v. Masini*, 45 Wn.App. 284, 288-89, 724 P.2d 1122 (1986). Whether one’s actions were voluntary is determined in light of the circumstances, including:

(1) whether the benefits were conferred at the request of the party benefitted; (2) whether the party benefitted knew of the payment, but stood back and let the party make the payment, and (3) whether the benefits were necessary to protect the interests of the party who conferred the benefit or the party who benefitted thereby.

Ellenburg v. Larson Fruit Co., Inc., 66 Wn.App. 246, 251, 835 P.2d 225 (1992) (internal citations omitted).

A mere volunteer may not recover on a claim for unjust enrichment. *Young*, 614 Wn.2d at 484. Hughes was not a volunteer. It was required to construct the sewer line by the City of Auburn, which had the legal right to condition its construction permits on the installation of utility lines. CP 211. Hughes acted with obligation, and its actions conferred benefits upon respondents of which respondents were fully aware.

The fact that Hughes complied with the City's legal requirements in order to build his development does not make those actions "voluntary." Where a party is compelled to effect a transfer of benefits and "the effect of the legal compulsion will have been to create an improper distribution . . . [r]estitution . . . is supported not merely by considerations of private justice between the parties, but by recognition of the fact that the misapplication of the state's coercive means deprives them of their ordinary justification as legalized coercion." *Davenport v. Washington Educ. Ass'n*, 147 Wn.App. 704, 197 P.3d 686 (2008), citing

RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT, topic 3 introductory note at 288 (Discussion Draft, 2001).

Respondents also argue that the benefits they received were “not necessary to protect the[ir] interests.”⁴ This is patently false. The increased property values and sewer connections received by defendants were necessary to protect their interests in their respective properties. As neighboring properties received sewer access, defendants would have been at a disadvantage had they continued to rely on septic systems. The retention of these benefits continues to unjustly enrich respondents at Hughes’ expense.

III. CONCLUSION

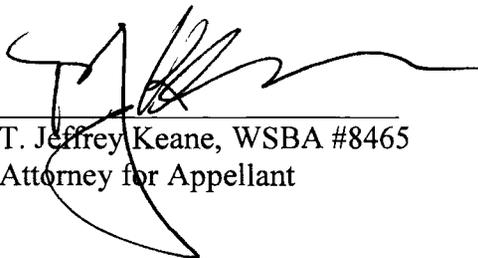
Whether or not respondents have been unjustly enriched at Hughes’ expense is a jury question. Hughes has presented clear facts and law demonstrating its claims are both permitted and supported by Washington precedent.

Hughes respectfully requests that this Court reverse the order of dismissal and remand this case for further proceedings.

⁴ Brief of Respondents LeGrande, at 29.

Respectfully submitted this 20 day of January, 2011.

KEANE LAW OFFICES

By: 
T. Jeffrey Keane, WSBA #8465
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on January 20th, 2011, copies of the following document:

1. REPLY BRIEF OF APPELLANT

was served on counsel at the following address and by the method(s) indicated:

Brian J. Hanis
Hanis Irvine Prothero
6703 S. 234th Street, Suite 300
Kent, WA 98032
Fax: 253/893-5007

John G. Fritts
Wilson Smith Cochran Dickerson
1215 4th Avenue, Suite 1700
Seattle, WA 98161
Fax: 206/623-9273

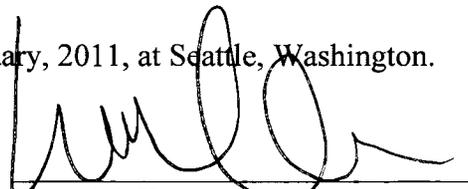
Joyce Heritage
Heritage Law Offices
P.O. Box 50
Cle Elum, WA 98922
Fax: 888/357-7377

David M. Jacobi
Wilson Smith Cochran Dickerson
1215 4th Avenue, Suite 1700
Seattle, WA 98161
Fax: 206/623-9273

- U.S. Mail
- Fax
- Legal messenger
- Express mail

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

DATED this 20th day of January, 2011, at Seattle, Washington.



Laura M. Keane