

No. 65352-1-1

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

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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

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**BRIEF OF APPELLANT**

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## I. INTRODUCTION

Hughes constructed a sewer line down a street in Auburn where one previously did not exist. He was required to do so because he wanted to build a subdivision and he could not get the project permitted without building a new sewer trunk line.

The line did more than serve the subdivision. It enabled defendants in this case to convert property which was variously unbuildable (septic systems could not perc), or had building limits (septic fields consumed much of defendants' properties), into property with municipal sewer service. This greatly enhanced defendants' use of their property and similarly enhanced their property values.

Typically parties like the defendants would be subjected to a "payback" agreement under which they would be compelled to help finance the sewer line. But that payback agreement—negotiated between Hughes and the City of Auburn—took years to conclude. In the interim, defendants obtained connection permits from the City of Auburn and connected to the sewer. Due to a quirk in the payback statute, if connection has occurred before a final payback agreement is reached between developer and City, parties who connected in the interim cannot be bound by a payback agreement which arises after they connect.

To redress this anomaly, and to recoup some of the \$445,347.00 Hughes spent to build the sewer line, he sued the defendants for unjust enrichment.<sup>1</sup> These facts present a classic case of unjust enrichment since defendants paid nothing and gained much due to the efforts of Hughes.

## **II. ASSIGNMENT OF ERROR**

### **A. Assignments of Error**

1. The trial court erred when it granted summary judgment and dismissed plaintiff's unjust enrichment case when genuine issues of fact exist.

2. The trial court erred when it denied plaintiff's motion for reconsideration and cited bad faith as a "factor" in deciding whether unjust enrichment occurred.

### **B. Issues Pertaining to Assignments of Error**

1. Does an issue of fact exist regarding whether defendants were unjustly enriched? (Assignment of Error 1).

2. Whether the trial court erred in concluding that "bad faith" is a "factor" in analyzing unjust enrichment claims? (Assignment of Error 2).

3. Even assuming bad faith is an element of unjust enrichment, did questions of fact exist regarding the bad faith of

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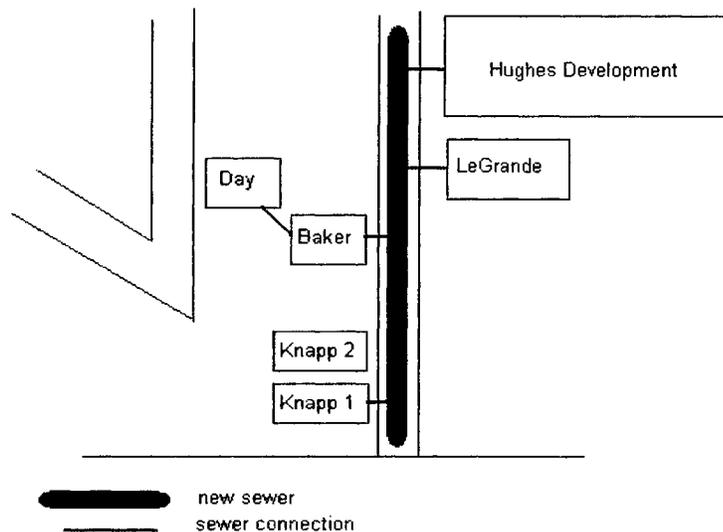
<sup>1</sup> Even under the Payback Agreement, Hughes would only recoup about half of his total cost in building the sewer line.

defendants in obtaining something of value from Hughes for nothing?  
(Assignment of Error 2).

### III. STATEMENT OF THE CASE AND PROCEDURE RELEVANT TO REVIEW

#### A. Factual Background

Among the earliest tasks during subdivision construction is installation of sewer lines. To begin construction of his subdivision, Hughes began building the sewer line down 112<sup>th</sup> Avenue East in Auburn.



This allowed properties previously outside the catchment of the City of Auburn's municipal sewer system to connect to the system.

The sewer line was completed in November 2005. CP 230. As discussed further below, certain defendants had watched eagerly as Hughes constructed the line. *Id.* As early as 2004, defendant Day

inquired of the City of Auburn regarding the steps he would need to take to obtain sewer service on his “single-family, vacant lot.” CP 60. Day’s circumstance was particularly complex since his property did not abut 112<sup>th</sup> Ave. SE. He needed to access the new sewer through a neighbor’s property, defendant Baker. CP 49. A letter from Auburn’s Department of Public Works to Day informed him that the requirements included:

- Easement and joint side sewer agreement recorded against your property and your neighbor’s property
- Side sewer permit prior to construction
- An E-One single-family grinder pump system
- Extension of public sewer main along 112<sup>th</sup> Ave SE
- Resolution of any applicable latecomers or payback assessments associated with the sewer main extended along 112<sup>th</sup> Ave SE

CP 60. Since the Day property is located along 111<sup>th</sup> Avenue SE, sewer service to the Day property required construction of a side sewer, through which the Days would receive sewer service by way of a joint connection with the Baker property. CP 49. The Baker property adjoined 112<sup>th</sup> Ave. SE but the Day property did not. Day’s solution was to access the sewer through the Baker property. To accomplish this, Kevin Day negotiated a “Joint Side Sewer Agreement, Sanitary Sewer Easement & Hold Harmless Agreement” with the prior owners of the Baker property in November 2004. The Bakers, as purchasers of the property, were subject to this agreement, which allocated maintenance costs for the joint sewer

connection and subjected the Baker property to a perpetual easement benefitting the Days' sewer connection. CP 52-58.

In December 2005, almost immediately after Hughes completed construction of the sewer line, defendants Baker and Day quickly obtained connection permits from the City and connected to the sewer. CP 212. Defendant Kevin Day states that he "took care of all necessary paperwork and costs for the connections of my property as well as the Baker property," although the Bakers did pay for their connection permit. CP 49.

Hughes had no say in whether connection permits could be issued. Defendants Knapp and LeGrande connected in May 2007 and July 2008, respectively. CP 213. The Payback Agreement between Hughes and the City of Auburn was not completed until September 2008. CP 216. Under the terms of RCW 35.91.020(4), the payback statute, those already connected to a new sewer could not be taxed under the provisions of a subsequent payback agreement. CP 217. Those living along 112<sup>th</sup> Avenue SE who did not connect before the Payback Agreement was reached are bound by the agreement and must pay a pro rata share of Hughes' costs at the time they connect to the sewer line he built. CP 216.

Thus, defendants consist of a small group of uniquely situated and opportunistic persons who exploited the willingness of the City of Auburn

to both require Hughes to build a sewer line and to issue connection permits to a few households prior to entry into the payback agreement.

Defendants' properties were greatly improved by the connection. Previously, defendants' properties were serviced by septic systems, which are suboptimal for several reasons, including limitations on building size due to lot dedication to septic fields. CP 214. In fact neither the Day nor the Knapp properties could be built upon at all since their soil was so poor it would not even sustain a septic system. CP 214-15. In short, these parties went from holding property which was unusable for construction to property upon which they could build substantial houses. Defendant Day, for example, built a 4,000 square foot house once the property was served by sewer. CP 231. This substantial construction was impossible without municipal sewer access. *Id.*

All other residents who have or will connect to the sewer will pay thousands for this enhanced utility service—between \$4,791.00 and \$36,569.00—pursuant to the terms of the Payback Agreement. CP 216. Even when those sums are paid in the future, Hughes will have borne 50% of the total sewer line costs, alone. *Id.*

The property values of each defendant's home increased immediately upon hooking up to the sewer. Plaintiff's real estate expert stated:

Each of the defendants' properties in this case were benefited by Hughes' installation of the sanitary sewer line. They were benefited because an attachment to a sewer line heightens the resale value of any property. They benefited in that sewers allow for more building and development than do septic tanks. They benefited by no longer having to service and maintain a septic tank, and they benefited because removal of their septic tanks would allow for greater use of their property. Each defendant is indebted to Hughes for construction of the sanitary sewer line that made their sewer connections possible.

CP 280. For defendant Day, the sewer line changed his unbuildable lot into one upon which he then built a 4,000 square foot home. CP 231. Mr. Hughes, who has worked as a real estate developer and contractor for over 25 years, states that "[t]here can be little argument that homes with sewer access have higher market value, and can be built larger, than homes without a sewer line. . . each defendant gained property value as a result of the sewer line made available to them by my company." CP 230-31.

## **B. Procedural History**

Hughes filed this lawsuit for unjust enrichment against the four defendants on December 10, 2009. CP 9-13. Defendants collectively moved for summary judgment just over two months later. Their motions variously asserted that Hughes could not meet the elements of unjust enrichment; that bad faith was an element of unjust enrichment; that Hughes acted as a volunteer toward defendants; and that Hughes' claim was barred by the theory of laches.

Plaintiff opposed the motions. On March 12, 2010, the trial court granted defendants' respective motions for summary judgment. CP 290-97. Hughes filed a motion for reconsideration of the order(s) granting defendants' motions for summary judgment. CP 298-307. On April 5, 2010, the trial court denied Hughes' motion for reconsideration. CP 308-9. The court's letter ruling referenced the law the trial court said it relied upon. The trial court concluded that bad faith was a "factor" in unjust enrichment. The court stated:

Indeed, bad faith is not an element, *per se*, of unjust enrichment. However, the presence or absence of bad faith is a factor in any decision in equity . . . Had there been unrebutted evidence of bad faith on the part of defendants, the court would have considered it as a factor; conversely, the unrebutted evidence of a lack of bad faith is also a factor.

CP 309. None of the cases cited by the court stand for the proposition that bad faith is included as an element of unjust enrichment under Washington law. This appeal followed.

#### **IV. ARGUMENT**

##### **A. Bad Faith Is Not An Element of Unjust Enrichment.**

##### **1. The Elements of Unjust Enrichment Do Not Include Proof Of Bad Faith By The Defendant(s).**

There are only three elements of unjust enrichment in Washington: the conferral of a benefit by one party upon another; the receiving party's

knowledge of the benefit; and the receiving party's inequitable retention of the benefit. *Young v. Young*, 164 Wn.2d 477, 484-85, 191 P.3d 1258 (2008). As the trial court noted in its minute order denying reconsideration, "plaintiff [argues] that the court erred by finding that bad faith is an element of unjust enrichment. Indeed, bad faith is not an element, *per se*, of unjust enrichment." CP 308.

Having correctly concluded that unjust enrichment does not require a finding of bad faith, the trial court repudiated its own conclusion and ruled that no "unrebutted evidence of bad faith on the part of defendants" had been submitted. From this, the trial court reasoned that no issue of fact existed regarding whether unjust enrichment had occurred here, and thus there had been no unjust enrichment. This conclusion is unsupported by Washington law, including this Court's own decision in *Venwest Yachts, Inc. v. Schweickert*, 142 Wn.App. 886, 176 P.3d 577 (2008). In analyzing unjust enrichment, according to this court, "the question is whether the enrichment was unjust, not whether the holder of the property acted with bad motive or malicious intent." *Venwest* at 898, citing *Brooke v. Robinson*, 125 Wn.App. 253, 257, 104 P.3d 674 (2004).

Unjust enrichment captures precisely what happened here: defendants availed themselves of a valuable commodity and did not pay for it. Washington has long recognized the doctrine. There is nothing in

the cases to support the trial court's decision that plaintiff had to show defendants' bad faith in order to prevail.<sup>2</sup> Unjust enrichment is defined as the "general principle that one person should not be permitted to unjustly enrich himself at [the] expense of another, but should be required to make restitution of or for property or benefits received, retained or appropriated, where it is just and equitable that such restitution be made." *Bailie Communications, Ltd. v. Trend Business Systems, Inc.* 61 Wn.App. 151, 159, 810 P.2d 12 (1991), citing BLACK'S LAW DICTIONARY, 1535-36 (6<sup>th</sup> Ed. 1990). For purposes of applying the doctrine, a person has been unjustly enriched when he has profited or enriched himself at another's expense, contrary to equity. *Cox v. O'Brien*, 150 Wn.App. 24, 206 P.3d 682 (2009).

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<sup>2</sup> *Klinke v. Famous Recipe Fried Chicken, Inc.*, 24 Wn.App. 202, 600 P.2d 1034 (1979) (franchisor not unjustly enriched by efforts and expenditures of franchisee made in reliance on franchisor's promise to issue a franchise in return for those efforts where franchisor abandoned efforts to gain authority to do business in the state; no bad faith mentioned); *Truckweld Equipment Co., Inc. v. Olson*, 26 Wn.App. 638, 618 P.2d 1017 (1980) (trucks modified by supplier were sold to satisfy bank loan to corporation, sole shareholder not unjustly enriched because bank's security interest was superior to supplier's; no mention of bad faith); *Foundation for the Handicapped v. Dept. of Social & Health Serv. Of Washington State*, 97 Wn.2d 691, 648 P.2d 884 (1982) (state was not unjustly enriched by collecting funds from non-legally disabled residents of special home to help pay for care of legally disabled residents; no mention of bad faith); *Seattle Mortg. Co., Inc. v. Unknown Heirs of Gray*, 133 Wn.App. 479, 136 P.3d 776 (2006) (mortgage holder not unjustly enriched by extinguishment of city PUD's lien against decedent's house where increase in home value was minimal and mortgage holder had not been notified of lien; no discussion of bad faith); *Thola v. Henschell*, 140 Wn.App. 70, 164 P.3d 524 (2007) (chiropractor whose employee urged clients of her former employer to transfer care to her new employer was unjustly enriched; no discussion of bad faith).

Nothing in Washington case law requires that the unjustly enriched act in bad faith. *Venwest, supra*, is instructive. There a yacht dealer accepted a \$150,000.00 deposit on a vessel but the customer never signed a contract and decided to abort the purchase. Venwest claimed that it earned the money upon receipt and need not return it merely because the purchase did not move forward. Though plaintiff did not share this belief of defendant, she did not accuse the company of bad faith nor did the ruling in favor of the purchaser require any proof that the dealer acted in bad faith. This comports with existing Washington law. *Venwest Yachts, Inc. v. Schweickert*, 142 Wn.App. at 889; *Young v. Young*, 164 Wn.2d 477, 484-85, 191 P.3d 1258 (2008).

In *Trane Co. v. Randolph Plumbing*, 44 Wn.App. 438, 722 P.2d 1325 (1986), a general contractor, Randolph, incorporated six blowers into a project but never paid the subcontractor (Griggs) or the supplier (Trane) for the items. Because Griggs was insolvent, the supplier, Trane, sued the general contractor. The appellate court stated that relief under the theory of unjust enrichment was available to Trane since it delivered the blowers at Griggs' request and Randolph accepted the blowers, knowing their source. The Court of Appeals sustained the trial court's determination that Randolph had been unjustly enriched and had to pay Trane for the blowers. Nowhere in *Trane Co.* does any discussion of bad faith appear.

Sampling other Washington unjust enrichment cases demonstrates that a finding of bad faith is not required to sustain a claim for unjust enrichment.<sup>3</sup>

Decisions from other jurisdictions are in accord with Washington law. In *Floor Covering Union & Industry Welfare Trust v. Tompkins*, 761 F.Supp. 101, 102-02 (D.Or. 1991), a former union member continued to receive medical benefits from a union trust fund after he was no longer an eligible participant. The court ordered the defendant to reimburse the trust fund for all benefits received when he was ineligible, and concluded that even though the member had not acted in bad faith to receive the benefits, the fund was entitled to equitable restitution. The court reasoned that

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<sup>3</sup> See *Chandler v. Washington Toll Bridge Authority et al.*, 17 Wn.2d 591, 137 P.2d 97 (1943) (contract providing for payment only if work on project commenced within certain time period made replacement contractor merely an “incidental beneficiary” of original contractor’s work; no mention of bad faith); *Town Concrete Pipe of Wash., Inc. v. Redford*, 43 Wn.App. 493, 501, 717 P.2d 1384 (1986) (contractor could not recover on theory of unjust enrichment where he began work with knowledge that borrower was having problems obtaining financing and where another contractor had a lien against the project; no discussion of bad faith); *Dragt v. Dragt/DeTray, LLC*, 139 Wn.App. 560, 577, 161 P.3d 473 (2007) (non-managing members of an LLC, who could not afford payments, were unjustly enriched by payments made by managing member; duty of good faith discussed only with regard to duties owed by fiduciaries); *Bailie Commc’ns, Ltd. v. Trend Bus Sys. Inc.*, 61 Wn.App. 151, 159-60, 810 P.2d 12 (1991) (timeshare holders cosigned mortgage, which was then assigned to guarantor, whose president infused capital into the guarantor company instead of paying as agreed; discussion of three elements of unjust enrichment, no mention of bad faith); *Pierce County v. State*, 144 Wn.App. 783, 185 P.3d 594 (2008) (State unjustly enriched by County’s payment for care of patients in County facilities while awaiting admission to State hospital; no discussion of bad faith); *Young v. Young*, 164 Wn.2d 477, 484-85, 191 P.3d 1258 (2008) (tenant/improvers awarded the market value of improvements made to prevent unjust enrichment of property owner; no mention of bad faith).

under unjust enrichment theory, the defendant's state of mind was irrelevant.

In their briefing on summary judgment, defendants relied heavily upon *Farwest v. Mainline Metal Works, Inc.*, 48 Wn.App. 719, 741 P.2d 58 (1987) for the proposition that a benefited third party is not liable under unjust enrichment in the absence of misdeeds by the third party against the claimant. The district court in *Reisenfeld & Co. v. Network Group, Inc., et al.*, 277 F.3d 856 (6<sup>th</sup> Cir. 2002) adopted the reasoning of *Farwest*, but was then overturned by the Sixth Circuit. In *Reisenfeld*, a sub-broker entered into a written commission agreement with a broker, which provided that the broker would pay him a commission if a deal was reached between a sublessor and sublessee. The Sixth Circuit held that when the broker failed to pay the commission, the sub-broker had a valid claim for unjust enrichment against the sublessor, even though the sublessor had not acted in bad faith and was not a party to the commission agreement. The court noted that “the grounds for a claim of unjust enrichment are not that narrow. Unjust enrichment also results from a failure to make restitution where it is equitable to do so. That may arise when a person has passively received a benefit which it would be unconscionable for him to retain.” *Reisenfeld* at 861, citing *Cosby v. Cosby*, 141 Ohio App.3d 320, 750 N.E.2d 1207, 1213 (2001).

The court in *Gagne v. Vaccaro*, 225 Conn. 390, 766 A.2d 416 (2001), *aff'd* 80 Conn.App. 436, 835 A.2d 491 (2003) held that a successor attorney was not required to prove bad faith on the part of the prior attorney in order to recover fees under the theory of unjust enrichment. Gagne initially agreed to represent a client, but did not memorialize the relationship in writing, as required by state statute. The client later hired Vaccaro after his case progressed too slowly, on the condition that Vaccaro compensate Gagne from any settlement obtained for Gagne's work on the case, which the court found comprised "85 to 90 percent" of the total work on the case. *Gagne* at 420. The case arose when the attorneys could not work out their dispute over their respective entitlement to fees. The court found that bad faith by Vaccaro was not required in order for Gagne to recover under unjust enrichment. In short, bad faith had nothing to do with the application of unjust enrichment.

**2. Whether Unjust Enrichment Has Occurred Is a Question of Fact Which Cannot Be Resolved On Summary Judgment.**

Whether enrichment has been unjust and made at the expense of another is a question of fact. *Cox v. O'Brien, supra*, at 37-38. In *Kenney v. Read*, 100 Wn.App. 467, 997 P.2d 455 (2000), the Court of Appeals held that a genuine issue of material fact existed as to whether a letter of credit beneficiary's retention of a portion of the letter's proceeds

constituted unjust enrichment, precluding summary judgment for the beneficiary.

**B. The Trial Court Erroneously Denied Plaintiff's Motion for Reconsideration Relying Upon Authority Which Did Not Support the Decision.**

In denying plaintiff's motion for reconsideration, the trial court independently and improperly asserted that "the presence or absence of bad faith is a factor in any decision in equity." CP 308. Perhaps that would be true if the matter required analysis of the plaintiff's good or bad faith. But the trial court turned even that possible on its head by concluding that plaintiff had to show the defendants acted in bad faith in order to sustain an unjust enrichment claim. The court itself provided the authority upon which it relied. None of the cases the court referenced in its letter opinion supports the court's decision. None of them even discuss unjust enrichment, save discussion of it in a dissent in one of the cases cited by the trial court. CP 308.

**1. Breach of Contract Cases Relied Upon by the Trial Court Are Inapposite.**

The plaintiff in *State ex rel. Union Sav. & Loan Ass'n v. Superior Court*, 176 Wn. 482, 484, 30 P.2d 231 (1934) committed material breach of a real estate contract and subsequently sought to invoke equitable remedies against the owners of the property in question. The court found

that the plaintiff's conduct itself constituted bad faith, and thus he was not entitled to equitable relief. In this nearly 80 year old case the focus of the court was on the good or bad faith of the plaintiff who, having made an equitable claim with "unclean hands" was not permitted to advance it. The only possible application of *Union Savings and Loan* to this case would require evidence that Hughes—the party seeking equitable relief, not the defendants—had acted in bad faith. No such allegations have been made. No proof of same even exists.

The trial court also cited *J.L. Cooper & Co. v. Anchor Securities Co.*, 9 Wn.2d 45, 113 P.2d 845 (1941). The case provides no support for the trial court's decision. Corkery sold his insurance brokerage to J.L. Cooper, and was then hired by Anchor, where he solicited Cooper's customers in violation of a covenant not to solicit. After learning of the solicitation, Cooper refused to pay Corkery the share of proceeds required under the sale agreement. Cooper sued Corkery, seeking an injunction to restrain Corkery from further solicitation. In defending the suit, Corkery argued that Cooper had "unclean hands" and was thus not entitled to equitable remedies. The trial court agreed with Corkery and dismissed Cooper's suit. On appeal, the appellate court found that Cooper's refusal to pay was an "entirely different transaction" from Corkery's solicitation, and held that the lack of "deceit, false representations, or dishonest

behavior” by Cooper proved his “clean hands.” The doctrine of clean hands is not now and has never been at issue in this case. Only one set of transactions—defendants’ connecting to the sewer—is at bar. *J.L. Cooper* offers nothing pertinent to analyzing Hughes’ claims.

**2. The Trial Court Also Erroneously Relied Upon Equitable Tolling Cases Which Have No Application Here.**

Without explanation, the court relied upon a trio of cases which concern equitable tolling of administrative appeal periods. In *Prekeges v. King County*, 98 Wn.App. 275, 990 P.2d 405 (1999), a resident who opposed the construction of a cell tower visited the project office the day before the comment period ended and asked to review the permit application. The office manager said he could come in on September 3, a week after the comment period closed. The project planner confirmed by voicemail that he would consider late comments. The planner issued a Determination of Nonsignificance on September 9, triggering the 14-day appeals process. The resident saw the notice of decision posted at the site a week after the deadline for appeal had passed. He urged that the appeals period should be equitably tolled due to: 1) the office manager’s refusal to let him access the claim file prior to the comment deadline; and, 2) the planner’s voicemail message lulling him to think he could submit late comments. On appeal, the court sustained the trial court’s determination

that equitable tolling did not rescue plaintiff from his tardily filed appeal. It is unclear why the trial court felt this case had application here.

The court also cited to the dissent in *Hesthagen v. Harby*, 78 Wn.2d 934, 481 P.2d 438 (1971). The case involved heirs who had not been notified of an estate who then sued the administrator and the original heirs of the deceased after the statute of limitations had run. The administrator's perfunctory and unsuccessful efforts to identify all of decedent's heirs before making distributions from the estate were so inadequate as to constitute malfeasance. The trial court vacated the distribution of the estate and required a "do over." In his dissent, Justice Hamilton wrote that an equitable constructive trust imposed on liquid estate proceeds, distributed three years prior to the filing of the heirs' suit, was not an appropriate remedy under the circumstances. Justice Hamilton's dissent and the discussion in it have virtually nothing to do with this case.

The plaintiffs in *Nickum v. City of Bainbridge Island*, 153 Wn.App. 366, 223 P.3d 1172 (2009) sued the city after learning that it had waived SEPA requirements for Verizon's construction of a cell tower extension near their home. The city had issued its permit to Verizon on September 14, 2007. Plaintiffs did not receive notice of the construction until they saw work being done weeks later, and filed an appeal, which

was dismissed as untimely due to a local ordinance mandating a 14-day time period for appeals. Plaintiffs filed a Land Use Petition Act (“LUPA”) action and argued that equitable tolling should apply. The court disagreed. By filing a late administrative appeal, the plaintiffs failed to even utilize much less exhaust their administrative remedies -- which is a jurisdictional prerequisite to bringing a LUPA action. Plaintiffs could maintain their case only if equitable tolling was invoked. The court found that the “predicates for equitable tolling”—bad faith, deception, or false assurances—were not present. The court’s conclusion that plaintiff could not ignore the LUPA statute by resorting to equitable tolling is, again, inapplicable to this case.

**3. A Case Regarding Whether a Plaintiff With Unclean Hands Can Prosecute an Unjust Enrichment Claim Has No Bearing Here.**

The trial court also cited to *Whitworth Water Dist. No. 2 v. City of Spokane*, 15 Wn. App. 634, 550 P.2d 1181 (1976). There the water district sued the city for providing water service to a customer, Dahlen, who resided in the water district’s territory. The district had sought to charge Dahlen approximately \$15,000.00 for improvements before he could receive water service, which he considered unreasonable. While he negotiated with the district, Dahlen sought and received water service through the City of Spokane, although he lived outside Spokane’s

municipal boundary. The court found that since the Water District had committed bad faith in its attempts to overcharge Dahlen, it was not entitled to utilize equitable theories of recovery. It appears the case is simply a restatement of the rule that a plaintiff in equity must have clean hands. The Water District did not have clean hands. The case analyzed the bad faith of the plaintiff, not the defendant. It is unclear why the trial court thought this case applied here.

**4. A Case Regarding Trustee Discretion Cited By the Trial Court Has No Relation to This Case.**

*Occidental Life Ins. Co. of Cal. v. Blume*, 65 Wn.2d 643, 399 P.2d 76 (1965) was an interpleader action brought by Occidental Life to determine disbursement of an experience rating refund earned by premium-paying members of Washington Teamsters Welfare Trust. Former members of Washington Teamsters Welfare Trust intervened and argued that they were entitled to a pro rata share of the refund, which was earned during their membership. The trial court directed that the refund be disbursed between all those who were beneficiaries of WTWT during the six-month policy period during which the refund was earned, including the former member intervenors, and burdened the disbursement with a lien to pay the intervenors' attorney's fees.

The question before the court was whether the Welfare Trust's trustee determination that the intervenors would be excluded from the reimbursement pool could be trumped by the trial court's invocation of its inherent equity jurisdiction to manage trusts. The appellate court found that since "the record is devoid of evidence of fraud, malice, bad faith, or arbitrary conduct" by the trustees, equitable intervention was inappropriate since the trust instrument gave the trustees broad power to act as they did. *Occidental Life* is completely inapplicable to plaintiff's case. No trust is present here, and there is no question of whether the court should invoke equity jurisdiction. Unjust enrichment is an equitable claim and equity jurisdiction is already present. *Occidental Life* is irrelevant.

None of the cases cited by the trial court arise from facts remotely analogous to those here. None support the decision of the court.

**C. If Bad Faith Is An Element of Unjust Enrichment—  
Despite the Absence of Any Washington Authority for  
the Proposition—Defendants' Conduct Created An  
Issue of Fact Regarding the Presence of Bad Faith by  
Defendants.**

The foregoing makes clear that Washington has never recognized bad faith as an element when applying unjust enrichment. But the trial court found that plaintiff had to show bad faith in order to avoid summary judgment. In its order, the trial court stated: "Had there been unrebutted evidence of bad faith on the part of the defendants, the court would have

considered it as a factor; conversely, the un rebutted evidence of a lack of bad faith is also a factor.” CP 309. Even if the trial court imposed a burden on plaintiff not required under the law, the actions of defendants in obtaining sewer service without payment to Hughes created an issue of fact regarding defendants’ bad faith.

The trial court wholly failed to consider the evidence of bad faith before it in plaintiff’s opposition to summary judgment and in its motion for reconsideration. Where there is “any misrepresentation or deception, any utilization of inside knowledge or strategic position,” a finding of bad faith may be appropriate. *Manufacturers Trust Co. v. Becker*, 338 U.S. 304, 311, 70 S.Ct. 127 (1949).

Here, there remain issues of fact regarding the manner in which the defendants obtained sewer service without regard for the cost of installing the line which served them. The record is filled with evidence regarding the Day/Baker defendants carefully monitoring the project to obtain sewer service quickly, and prior to imposition of any payback obligation:

- Mr. Hughes: “Defendant Day made repeated phone calls to plaintiff, asking when the sewer line would be completed.” CP 212.
- Mr. Hughes further states: “While I supervised construction of the sewer line along 112<sup>th</sup> Avenue SE, I noticed that these property owners seemed to be carefully monitoring the sewer construction project. Mr. Day, in particular, called me all the time. He told me he had paid \$38,000.00 for his lot but he

could not do anything without a sewer stub available to him. . . Mr. Day was keenly interested in knowing when the sewer line would be finished and called me frequently to inquire about that.” CP 229.

- Mr. Hughes: “Indeed, Mr. Day’s phone calls became so frequent that Mr. Hughes eventually had to ask him to direct all future communication to Steven Toschi, the subcontractor working on the sewer extension. Mr. Day then called Mr. Toschi at least once a month, and sometimes as often as once per week, throughout the construction of the sewer.” CP 302.
- Mr. Toschi states: “Before construction began on the sewer extension down 112<sup>th</sup> Avenue SE, I began receiving phone calls from a Kevin Day. Prior to construction, Mr. Day would ask me when I planned to begin building the sewer. These calls occurred approximately once per month. . . . Mr. Day hooked his property up to the extension in December 2005, just a few weeks after the sewer was finished.” CP 307.
- Beverly and Henry Knapp state: “we saw the work crews working on the [City’s water and sewer lines . . . we selected a modular home [for our undeveloped parcel] sometime in May 2006. . . Then, we made an inquiry and initial application with the City of Auburn to hook into the City’s sewer and water lines.” CP 96.
- Mr. Hughes: “As the Knapps admit, they built a house on their second lot once the sewer line was installed since without that sewer service they could not build on that lot at all.” CP 230.
- The Bakers allowed Kevin Day to act on their behalf with regard to negotiation, payment, construction, and connection to the sewer line, apparently without ever inquiring as to the legality of Mr. Day’s actions. CP 49.

Mr. Hughes also noticed that Mr. Baker paid considerable attention to the progress of the sewer project. CP 212. Defendants Baker and Day both connected to the sewer within a month of its completion (CP 212),

evidencing their desire to obtain benefit without payment, since no payback agreement was yet in existence at the time they connected.

The case heavily relied upon by defendants on summary judgment, *Farwest v. Mainline Metal Works, Inc.*, 48 Wn.App. 719, 741 P.2d 58 (1987), is an action in contract, with no application to unjust enrichment theory. In *Farwest*, a third party (Farwest) which had contracted to provide materials to a subcontractor (Mainline) sued the general contractor (Hensel) for unjust enrichment regarding the materials Farwest provided to Mainline. The court found that although Hensel was enriched by Farwest's actions, such enrichment was not unjust because Hensel did not contribute to Farwest's loss nor "acquiesce in or encourage" the contract between Farwest and Mainline. Hensel was a "mere incidental beneficiary" of the contract so without elevation to third party beneficiary status Farwest could enforce nothing against Hensel. *Farwest*, 48 Wn.App. at 732-33. The crucial distinction between *Farwest* and the present case is that *Farwest* is a contract case wherein the enriched party was wholly uninvolved in the underlying contract. Here, there was no contract. Defendants did not "incidentally" connect their properties to plaintiff's sewer line. They directly contributed to plaintiff's loss by their connection, since those already connected are statutorily prohibited from being made party to a Payback Agreement.

All defendants were doubtless aware (or, at worst, questions of fact exist on that subject since Mr. Day, and Mr. Hughes, provided diametrically opposing declarations to the trial court, CP 49-71 and CP 228-56) that the sewer was being constructed by a private entity, and not by the City of Auburn. Defendant Kevin Day even knew the identity and contact information of Hughes and Mr. Toschi, as evidenced by his unrelenting phone calls. Defendants each took advantage of their inside knowledge and strategic position as neighbors to the construction to hook up to the sewer shortly after its completion. They have all been enriched by plaintiff's work, and a genuine issue of material fact exists as to whether their retention of the enrichment is inequitable.

## **V. CONCLUSION**

The trial court erroneously found that the presence or absence of bad faith must be considered in determining whether defendants in this case have been unjustly enriched. Plaintiff was never required to produce such proof and his case should not have been dismissed for the reasons provided by the trial court.

In light of the foregoing, plaintiff requests that this case reverse the dismissal and reinstate this case against defendants.

DATED this 20 day of September, 2010.

KEANE LAW OFFICES



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**CERTIFICATE OF SERVICE**

I hereby certify that on September 21, 2010, copies of the following document:

- 1. BRIEF OF APPELLANT

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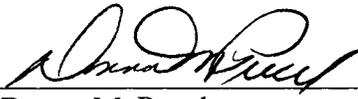
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COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
2010 SEP 21 AM 9:00

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

DATED this 21<sup>st</sup> day of September, 2010, at Seattle, Washington.

  
\_\_\_\_\_  
Donna M. Pucel