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No. 68843-0-I

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

KARM ENTERPRISES, INC., a Washington corporation and
JOHN SJONG, an individual and resident of the State of Washington,

Appellants,

v.

BLUE ACE, LLC, a Washington limited liability corporation, and
MICHAEL BURNS, and his marital community,

Respondents.

BRIEF OF RESPONDENTS

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I. INTRODUCTION

This matter remains a simple case cast against a complex regulatory backdrop that makes it seem more complicated than it actually is. In 2004, the parties entered into a written agreement (the “Vessel Purchase Agreement”) whereby Blue Ace, LLC (hereinafter referred to collectively with Michael Burns and his marital community as “Blue Ace”) acquired the vessel BLUE ACE (ex STORFJORD), Official Number 569573, from Karm Enterprises, Inc. (hereinafter referred to collectively with appellant John Sjong as “Karm”). At the same time, Blue Ace acquired the option to purchase Federal License Limitation Program license number LLG4513 (“LLG4513”) and its catch history, and the parties incorporated that option the Vessel Purchase Agreement. When the Vessel Purchase Agreement was entered into, however, the continued viability of LLG4513 was in question because it was subject to an administrative appeal. And in 2007, that appeal was resolved against Karm, the result being the termination of LLG4513 by the National Marine Fisheries Service (“NMFS”), with such termination taking effect on January 1, 2008. The future fishing rights eligibility associated with LLG4513 was permanently extinguished by this act, and no purchase of fishing rights occurred, all in accordance with the terms of the Vessel Purchase Agreement.

In its complaint below, Karm alleged that at roughly the same time LLG4513 was terminated, the parties entered into an oral agreement pursuant to which Blue Ace would pay roughly \$2,000,000.00 if LLG4513 ever resulted in fishing privileges. Blue Ace has consistently denied the existence of that oral agreement. At roughly the same time, an association of harvesters that included Blue Ace succeeded in forming the Freezer Longline Conservation Cooperative (the "FLCC"), a voluntary fishery cooperative that allocates available catch by private agreement among its members. Blue Ace's harvest share allocation was negotiated in connection with the admission of the Vessel and is codified in the FLCC's membership agreement – a contract between all of the members of that cooperative. Because LLG4513 was terminated by NMFS, however, Karm was not eligible to become a member of the FLCC or obtain a harvest share allocation under the FLCC membership agreement. None-the-less, in the action below, Karm sought compensation for the harvest share allocation that Blue Ace received under the FLCC membership agreement, alleging that it was based on the LLG4513 catch history and therefore the rightful property of Karm, not Blue Ace, which was allegedly unjustly enriched at Karm's expense.

Ultimately, the merits of Karm's unjust enrichment claim – and the determination of whether or not the trial court erred in dismissing that claim on summary judgment – come down to the simple question of what interest, if any,

that Karm held with respect to LLG4513 following the termination of that license by NMFS. Blue Ace successfully argued to the trial court that Karm's exclusion from the fishery resulting from the termination of LLG4513 effectively terminated any "enrichment interest" Karm could have held with respect to LLG4513 or its catch history. Accordingly, as the trial court correctly concluded, any allocation that Blue Ace obtained under the FLCC membership agreement arose purely as a matter of negotiation and contract between FLCC members and was independent of any benefit conferred by or obtained at Karm's expense. And because Karm has failed to articulate any legal basis that contradicts this conclusion on appeal, the trial court's grant of summary judgment should be affirmed.

II. ASSIGNMENT OF ERROR

A. Assignment of Error.

1. The trial court did not err in granting summary judgment with respect to Karm's claims of unjust enrichment because (a) Blue Ace could not have been unjustly enriched at Karm's expenses as a matter of law because it held no conferrable benefit insofar as LLG4513 was concerned; (b) Karm neither pleaded nor argued to the trial court the "contractual interference" theory of unjust enrichment that it now advances on appeal; and (c) Karm's new "contractual

interference” theory of unjust enrichment is both barred by the statute of limitation and fails on its merits as a matter of law.

B. Issues Pertaining to Assignment of Error.

1. Because Karm failed to plead or otherwise allege that its claim of unjust enrichment was based on interference with its contractual rights under the Vessel Purchase Agreement in the trial court below, it should be prohibited from doing so for the first time on appeal.

2. Remand for findings of fact with respect to Karm’s new theory of recovery is unwarranted because recovery under that theory is barred by the statute of limitations.

3. The trial court properly concluded that because Karm held no conferrable benefit with respect to LLG4513 or its catch history Blue Ace could not have been unjustly enriched as a matter of law.

4. Any benefit that Blue Ace allegedly obtained with respect to a claim to the catch history of LLG4513 in FLCC membership negotiations could not have come at Karm’s expense due to the invalidation of that license by NMFS.

III. STATEMENT OF THE CASE

With a few notable exceptions, the statement of the case presented by Karm accurately frames the issues and factual background of this appeal. In the

interest of avoiding duplication, none of that is repeated here. Instead, Blue Ace offers the following points of clarification to supplement the background provided by Karm.

A. Karm's original theories of recovery were premised on enforcement of an oral agreement and unjust enrichment based on a benefit that Karm allegedly conferred directly upon Blue Ace.

In September of 2011, Karm brought suit to enforce an alleged oral agreement between it and Blue Ace that was purportedly entered into at a meeting between the principals of each party in October of 2007. CP 3. The substance of that agreement – the existence of which has been consistently denied by Blue Ace – is summarized in Karm's statement of the facts with no need for reiteration here. Brief of Appellants at 13-14. Ultimately, Karm's attempt to prove and enforce this alleged oral agreement were rejected by the trial court, however, on the basis of the statute of frauds, RCW § 62A.1-206(1) (2011). Karm has not appealed that ruling. Brief of Appellants at 17-18.

In anticipation of the statute of frauds defense, Karm's complaint alleged an alternative theory of recovery premised on unjust enrichment. CP 4-5. As originally pleaded and argued by Karm to the trial court, this claim was based on the allegation that Blue Ace unjustly enriched itself at Karm's expense by "obtaining individual fishing quota based on a wrongful presentation ... of catch history belonging to the plaintiffs." CP 4-5, 108. Indeed, Karm's request for

restitution was based on explicit claims that “[t]he catch history and quota share *belonging to the plaintiffs* were conferred on [Blue Ace; Blue Ace] had a knowledge and appreciation of these benefits being conferred on them[;]” and that Blue Ace “accepted these benefits under circumstances that make it inequitable for them to receive the benefits.” CP 5 (emphasis supplied).

Roughly four months after Karm’s complaint was filed, Blue Ace filed its motion for summary judgment. CP 23-43. In that motion, and in direct contradiction of Karm’s allegation that it had “conferred” a benefit vis-à-vis the use of the catch history associated with LLG4513, Blue Ace argued that it could not have been unjustly enriched as a matter of law. CP 33. Specifically, Blue Ace asserted that (a) no federal fishing right of any type could be issued on the basis of LLG4513; (b) no party could have gained admission to the FLCC on the basis of LLG4513; (c) LLG4513 and its history were non-transferrable as a matter of law; and (d) any benefit that Blue Ace did obtain in respect of LLG4513 or its catch history was a result of its negotiations with the FLCC members and not actual use of the LLG4513 catch history. CP 33-40. With respect to this last point – which appears to be where the merits of Karm’s current allegations of unjust enrichment now hinge – Blue Ace argued to the trial court that harvest share allocations were made to FLCC members as a matter of contract, and that Karm both lacked standing in these contractual negotiations and lacked the ability

to confer use of the history associated with LLG4513 to any party with standing in that group. CP 40-42. Accordingly, as Blue Ace argued, it was legally impossible for it to have been unjustly enriched by Karm because there was no benefit to be conferred by or advantage to be taken from Karm in connection with any such allocation. *Id.*

As Karm notes, the trial court accepted this argument, concluding that Blue Ace's allocation of FLCC quota was obtained "independent of anything that happened between" the parties, and granting summary judgment and dismissing all of Karm's claims. Brief of Appellants at 16-17. Indeed, the trial court explicitly found that Karm did not hold a "benefit to be conferred" for which "the law would require them in equity to pay" insofar as LLG4513 was concerned. RP 32. Karm has appealed this portion of the trial court's ruling only. Brief of Appellants at 17-18.

B. The procedural history of the case below explains why Blue Ace failed to contradict a number of the positions taken by Karm.

As previously noted, Karm filed its complaint against Blue Ace in September of 2011, alleging rights to recovery based on unjust enrichment and breach of oral agreement. CP 1, 6. Blue Ace's answer to that complaint was filed on September 29, 2011 – a scant nine days following its receipt of the complaint. CP 12. Between that time and when Blue Ace filed its motion for summary

judgment in January of 2012, neither party engaged in any form of discovery or motions practice. CP 161, 169. Accordingly, Blue Ace's motion for summary judgment was based solely on the facts of the case pleaded by Karm in its complaint and the declaration of Michael Burns that was submitted in connection with that motion. CP 30. For the purposes of summary judgment, and as compelled by Civil Rule 56(c), Blue Ace presumed the accuracy of the factual allegations pleaded by Karm. That was not because Blue Ace has conceded the accuracy of those statements. Instead, Blue Ace has taken the position that even if those statements of fact prove to be true, Karm's claims for relief still fail as a matter of law.

C. The record demonstrates that use of the LLG4513 catch history in connection with the federal buyback program was made jointly by Karm and Blue Ace.

Blue Ace's attempts to utilize the catch history associated with LLG4513 in the context with the federal capacity reduction program applicable to the Freezer Longline Sector were undertaken with the full knowledge and consent of Karm. Karm's briefing on appeal and before the trial court below contains extensive discussion of the federal capacity reduction program implemented with respect to the freezer longline sector (the "Buyback"). Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 2005 Pub. L. No. 108-448, 118 Stat. 2809, § 219(b). And in general, Karm's

description of the Buyback purpose and implementing regulations is accurate. As Karm notes, the decision to submit LLG4513 and its catch history into the Buyback program was jointly made and the result of a meeting between the parties in the fall of 2006, all of which was summarized by the contemporaneous notes of Karm's attorney, Henry Haugen. Brief of Appellants at 11-12; CP 139. Ultimately, the parties' attempts to include LLG4513 in the Buyback were defeated, but not for those reasons cited by Karm in its briefing – the Buyback regulations explicitly excluded interim and non-transferrable LLP licenses from participation, legally preventing either party from submitting LLG4513. RP 29; 50 C.F.R. § 600.1105(c)(3)(ii) (2010). Fairly read, nothing in the record before the Court evidences any attempt by Blue Ace to claim possession of the LLG4513 catch history in connection with the Buyback, and that process has no direct bearing on Karm's unjust enrichment claims.

IV. ARGUMENT

A. Karm's newly revised claims of unjust enrichment are barred by RAP 9.12 and the statute of limitations, RCW § 4.16.080(3).

The Court should not address the substance of Karm's argument on appeal because it relies on a novel theory of recovery that is unrelated to the theories of recovery it pleaded and argued below. Moreover, the Court should affirm the trial court's grant of summary judgment because any error resulting from its failure to

consider Karm's new theory of recovery is harmless; assuming the facts as articulated in Karm's appellate brief to be true, and as confirmed by Karm's prior submissions to the trial court, recovery under this new theory is barred by the statute of limitations.

1. RAP 9.12 prohibits Karm from introducing its new theory of unjust enrichment for the first time on appeal.

For the first time in this case, Karm contends that the basis of its unjust enrichment claim is whether Blue Ace violated Karm's "legally protected rights," thereby resulting in an "expense" to Karm. Brief of Appellants at 23. Karm admits that this question "was not addressed below." *Id.* Instead, Karm requests a second bite at the apple and remand to "develop the record necessary to interpret the Vessel Purchase Agreement under the 'context rule.'" *Id.* at 24. Because this case is on appeal from a decision on a motion for summary judgment, however, the scope of argument is limited to the evidence and issues raised below. Accordingly, Karm's new theory of unjust enrichment should be disregarded.

Washington Rule of Appellate Procedure ("RAP") 2.5 provides that "[t]he appellate court may refuse to review any claim of error which was not raised in the trial court." Additionally, there is a "Special Rule for Order on Summary Judgment" that permits this Court to "consider *only* evidence and issues called to the attention of the trial court" on review of a decision granting or denying

summary judgment. RAP 9.12 (emphasis supplied). Accordingly, an argument on summary judgment that was neither pleaded nor argued to the trial court cannot be raised for the first time on appeal. *Sourakli v. Kyriakos, Inc.*, 144 Wn. App. 501, 509, 182 P.3d 985 (2008) (citing *Sneed v. Barna*, 80 Wn. App. 843, 847, 912 P.2d 1035 (1996)) (applying RAP 9.12); *see also Rahman v. State*, 170 Wn.2d 810, 823-24, 246 P.3d 182 (2011) (holding that the State’s failure to timely cite a statute did not foreclose consideration of that statute on appeal from summary judgment, but recognizing that the Court’s review was limited to the evidence and issues called to the trial court’s attention).

Karm states that this Court “may affirm on a ground not addressed below only if it is ‘supported by the record and is within the pleadings and proof’ and the parties ‘have had a full and fair opportunity to develop facts relevant to the decision.’” Brief of Appellants at 19 (citing *Plein v. Lackey*, 149 Wn.2d 214, 222, 67 P.3d 1061 (2003); RAP 2.5(a)). Blue Ace does not disagree with this statement, so far as it goes, but Karm’s suggested application of the rule is inapt here. In *Plein*, the Washington Supreme Court agreed to consider for the first time on appeal the question of whether a party had signed a promissory note as an accommodation party under the Uniform Commercial Code (“UCC”). The trial court had granted summary judgment on a ground different from the accommodation party issue and the Court of Appeals reversed. The Washington

Supreme Court reinstated the trial court’s grant of summary judgment on basis of the accommodation party issue, but only after it determined that “the record is sufficiently developed for purposes of this issue” because “the record discloses that there is no material issue of fact as to Cameron’s status as an accommodation party.” *Plein*, 149 Wn.2d at 222. In reaching its conclusion, the Court recognized “the general rule is that parties may not raise a new issue for the first time in a petition for review.” *Id.* Although the Court did not explicitly address RAP 9.12 in its decision, it is clear that the appellate record was sufficiently developed on the issue of whether the party was an “accommodation party” under the UCC for the Court to address the issue on appeal. Moreover, in *Plein*, the Court was reinstating the trial court’s decision to grant summary judgment—here Karm argues that the trial court’s decision should be reversed on the basis of a new theory that is, by Karm’s own admission, unsupported by the record below. Karm’s reliance on *Plein* is misplaced.

The relief sought by Karm involves questions that are fundamentally factual, and Karm acknowledges as much. Karm states that “interpreting the agreement will require consideration of not only its language – which describes catch history as ‘property,’ something ordinarily subject to its owner’s control – but extrinsic evidence as well.” Brief of Appellant at 28 (citing *Roats v. Blakely Island Maint. Comm’n, Inc.*, 169 Wn. App. 263, 272, 279 P.3d 943 (2012)).

Then, Karm expressly states that “the record has not been adequately developed to include all the extrinsic evidence relevant to interpreting the Vessel Purchase Agreement in light of Restatement Section 39.” *Id.* Karm had every opportunity to plead and argue to the trial court that Blue Ace violated Karm’s “legally protected rights,” thereby resulting in an “expense” to Karm under Restatement Section 39. For reasons unknown to respondents and not relevant here, Karm failed to make this argument below. And in failing to do so, it waived the opportunity to make the argument on appeal. Under RAP 9.12, then, Karm’s new theory of unjust enrichment, which was not raised below and bears no semblance to any of the causes of action pleaded or argued in the trial court, must be disregarded.

2. The trial court’s failure to consider Karm’s newly articulated theory of recovery is harmless error because recovery under that theory is barred by the statute of limitations.

The Court need not remand this case for further fact finding because recovery under the theory of unjust enrichment adopted by Karm on appeal is barred by the statute of limitations. Claims based on “a contract or liability, express or implied, which is not in writing and does not arise out of any written instrument” *must* be commenced within three years. RCW 4.16.080(3). Claims for unjust enrichment are subject to this three-year statute of limitations. *Seattle Prof’l Eng’g Employees Ass’n v. Boeing Co.*, 139 Wn.2d 824, 837-38, 991 P.2d

1126 (2000) (noting that Washington courts apply three-year statute of limitations to unjust enrichment claims). Moreover, under RCW 4.16.080(3), the limitations period begins to run “when the party has the right to apply for relief.” *Lowden v. T-Mobile USA, Inc.*, 2009 U.S. Dist. LEXIS 21759 *10 (W.D. Wash. Feb 18, 2009) (quoting *Eckert v. Skagit Corp.*, 20 Wn. App. 849, 851, 583 P.2d 1239 (1978)). In order to recover, then, Karm was required to have initiated legal action within three years of the events giving rise to its claim for unjust enrichment.

Because Karm’s new theory of unjust enrichment is based on Blue Ace’s alleged interference with its legal right to control the pre-2004 catch history of LLG4513, as implicitly set forth in the Vessel Purchase Agreement, the statute of limitations period began to run in January of 2007. Karm’s theory of unjust enrichment is based on its assertion that Blue Ace enriched itself at Karm’s expense through a deliberate breach of the Vessel Purchase Agreement that, in turn, interfered with its right to control the LLG4513 catch history. Brief of Appellants at 23-27. Karm alleges that this deliberate breach occurred in January 2007 when Blue Ace met with other FLCC members to negotiate “the contractual distribution of the FLCC subsector’s Pacific cod allocation.” Brief of Appellants at 13. Karm further alleges that Blue Ace immediately benefitted from this breach by obtaining an allocation of quota under the FLCC membership

agreement that it would not have otherwise been entitled to. Brief of Appellants at 12-14. Moreover, Karm has repeatedly asserted that it became aware of this alleged breach shortly after it occurred, and that as early as October of 2007, principals of Karm and Blue Ace met to discuss the alleged breach. *Id.*; CP 3, 113-14, 144. Indeed, Mr. Tollessen recounts that at this meeting, he confronted Michael Burns, a principal of Blue Ace, and:

pointed out that per the Purchase and Sale Agreement by which we sold the vessel to him, that catch history did not belong to him. Since quota had been the objective of the parties and Blue Ace was to receive the quota, he had essentially invoked a provision of the Purchase and Sale Agreement in which Blue Ace had an option to buy the license LLG4513 and all catch history of the vessel for \$2,000,000, if the license LLG4513 was rendered transferrable.

CP 114. The uncontroverted record – as unilaterally established by Karm’s pleadings – plainly records the start of the statute of limitations period in January of 2007. However, Karm’s complaint was filed on September 20, 2011 – more than four and a half years after the point at which it had the right to obtain relief. CP 113-14; 144. Karm’s new claim of unjust enrichment – introduced for the first time on appeal – is therefore time barred under RCW 4.16.080(3), remand would be pointless, and the trial court’s failure to address the arguments that Karm now raises for the first time on appeal constitutes harmless error.

B. The trial court properly granted summary judgment with respect to Karm's unjust enrichment claim because no benefit was either conferred by Karm or obtained at Karm's expense.

As pleaded below, the sole basis of Karm's unjust enrichment claim was that Blue Ace took Karm's catch history to obtain a harvest share allocation from the FLCC. Summary judgment was therefore appropriate because, as Blue Ace convinced the trial court, it was a legal impossibility for it to have done so. And while on appeal Karm has entirely abandoned the theory of unjust enrichment articulated in its complaint, it has also failed to establish that the unjust enrichment standards proffered by Blue Ace in its summary judgment motion were not appropriately applied to the cause of action actually raised by Karm below.

Karm assigns error to the possibility that the trial court improperly relied on the passage from *Young v. Young*, 164 Wn. 2d 477, 484, 191 P.3d 1258 (2008), cited by Blue Ace in its motion for summary judgment. Moreover, Karm asserts that the *Young* language quoted by Blue Ace describing the standard for unjust enrichment was "incomplete" because it only suffices for claims involving a benefit directly conferred by a plaintiff on the defendant. Brief of Appellants at 20-22. However, Karm failed to argue otherwise below, waiving any such argument on appeal. Moreover, a review of the entire *Young* quote reveals nothing so injurious to Blue Ace's case—the Washington Supreme Court was

simply restating the standard using slightly different language in the second paragraph than it did in the first. Further, Karm insinuates that reliance on Black's Law Dictionary is somehow insufficient, yet the Washington Supreme Court relied on that language in *Young*. Karm instead advocates that this Court should rely on language that is allegedly from an introductory note to topic 1 of chapter 5 of the Restatement without citing any case law showing that Washington appellate courts have adopted that language. Brief of Appellants at 22. In sum, Karm has failed to establish that the standard for evaluating its unjust enrichment claim considered by the trial court below was inaccurate, incomplete, or otherwise contradictory to Washington law – particularly in the context of the arguments that Karm advanced below.

Karm pleaded and consistently argued to the trial court that Blue Ace misappropriated the LLG4513 catch history and obtained FLCC quota that it should otherwise have been entitled to. CP 3, 5. Karm alleged that Blue Ace was directly enriched by obtaining a fishing right that should have been granted to Karm. Given that, the trial court appropriately evaluated whether or not a benefit was conferred by determining whether Karm gave “possession of or some other interest in money, land, chattels, or choses in action, perform[ed] services beneficial to or at the request of the other, satisfie[ed] a debt or duty of the other, or in any way add[ed] to the other’s security or advantage.” RESTATEMENT

(FIRST) OF RESTITUTION § 1 (1937); *see also Family Med. Bldg., Inc. v. Dep't of Soc. & Health Servs.*, 37 Wn. App. 662, 670, 684 P.2d 77 (1984), *aff'd in part and rev'd in part on other grounds*, 104 Wn.2d 105, 702 P.2d 459 (1985). Moreover, within the parameters of the claim of unjust enrichment made by Karm to the trial court, restitution was appropriate *only* to the extent that a benefit was conferred *by the party asserting the unjust enrichment claim*. RESTATEMENT (SECOND) OF CONTRACTS § 370 (1981).

Given Karm's asserted basis of recovery, the trial court correctly determined that unjust enrichment was a legal impossibility. Upon termination of LLG4513, Karm had no remaining interest in the fishery and no valid claim to FLCC quota. CP 52, 108-09; RP 32-33. Termination of LLG4513 rendered Karm legally ineligible to participate in the fishery. 2005 Consolidated Appropriations Act, Pub. L. No. 108-447, 118 Stat. 2809 (2004). Moreover, Karm was excluded from FLCC membership both contractually and legally. *Id.*; *see also* The Freezer Longline Conservation Cooperative Membership Agreement, recitals A and B (CP 73) (restricting membership to those fishermen who held non-interm and transferrable LLP licenses); *see also* 15 U.S.C. § 521 (1934) (Fishermen's Collective Marketing Act, which limits cooperative membership to fishermen); *United States v. Hinote*, 823 F. Supp. 1350 (S.D. Miss. 1993) (for Fishermen's Collective Marketing Act purposes, "fishermen"

include only qualified harvesters); RCW § 24.36.250(1) (Washington Fish Marketing Act, which restricts cooperative membership to persons “engaged in the production of fishery products to be handled by or through the association”). Accordingly, Karm held no cognizable claim for FLCC quota, whether based on the catch history of LLG4513 or otherwise, and lacked the ability to confer any benefit with respect to the LLG4513 catch history – to Blue Ace or any other person whatsoever.

Ultimately, Karm’s claim for unjust enrichment was properly dismissed by the trial court because Blue Ace could not have taken that which either could not be legally transferred or did not exist. Prior to 2008, the entirety of Karm’s property interest (if any) in the catch history associated with LLG4513 was legally non-transferrable. *See* 50 C.F.R. § 679.4(k)(6)(ix) (2010); 50 C.F.R. § 679.43(p) (2010)). From 2008 onwards, that interest was extinguished altogether. CP 52, 64-71. Moreover, because Karm was ineligible to participate in both the fishery and FLCC membership negotiations, it lacked any ability to assert an interest in or otherwise confer a benefit with respect to the LLG4513 catch history. As Karm’s attorney admitted to the trial court, FLCC quota allocations were made on the basis of multiple factors and in the context of party negotiations. RP 27. Karm lacked standing to participate in these negotiations, however. CP 108-09. Accordingly, and as the trial court properly noted, the

FLCC allocation was made “independent of anything that happened” between the parties to this action. RP 28. More fundamentally, however, because Karm possessed absolutely no interest in either FLCC quota or the contractual negotiations that gave rise to that quota, Blue Ace could not have obtained any benefit in those negotiations at Karm’s expense. Accordingly, the trial court properly determined that Karm’s unjust enrichment claim was without legal merit and appropriately granted summary judgment in favor of Blue Ace.

C. Karm’s new theory of unjust enrichment lacks merit because the termination of LLG4513 by NMFS rendered any right Karm held to “control” the catch history associated with LLG4513 illusory.

On appeal, Karm has advanced a new and far more intricate theory of unjust enrichment. Abandoning its arguments below, Karm no longer asserts that Blue Ace absconded with the LLG4513 catch history in order to obtain FLCC quota. Instead, Karm now alleges that the Vessel Purchase Agreement vested it with implicit rights to “control” the LLG4513 catch history and that Blue Ace violated these contractual rights when it allegedly made claim to FLCC quota on the basis of that catch history. As this alleged violation of Karm’s implicit contractual right resulted in a benefit to Blue Ace – as Karm’s new theory alleges – Karm believes that it is entitled to compensation for unjust enrichment.

Karm’s remake of its unjust enrichment claim on appeal still fails as a matter of law. As a threshold matter, it is important to note that Karm’s theory of

recovery is based on a limited exception in the Restatement and is otherwise unsupported by Washington law. Moreover, Karm's theory fails within the framework articulated by the Restatement itself. More fundamentally, however, Karm's renewed arguments do not succeed as a matter of law because of the absolute termination of its interest in the freezer longline fishery and FLCC that resulted from the termination of LLG4513 by NMFS. At the end of the day, any implicit right to "control" the catch history associated with LLG4513 that Karm held was only as real as its ability to use that history in any meaningful sense. The record unequivocally establishes that insofar as Karm was concerned, the LLG4513 catch history had no potential use whatsoever. Accordingly, its right to "control" that history was illusory and there could have been no interference with that right by Blue Ace as a matter of law.

- 1. Under the Restatement criteria on which Karm relies, the asserted legal harm is a "garden variety" breach of contract claim for which adequate compensation could have been realized had Karm pleaded it below.**

Karm's new theory of unjust enrichment is a poorly disguised allegation that Blue Ace breached the Vessel Purchase Agreement. Karm has abandoned its earlier assertions that Blue Ace obtained FLCC quota at its expense (*see e.g.*, CP 105-06) and now claims the Blue Ace interfered with an implied term of the Vessel Purchase Agreement granting Karm exclusive control over the LLG4513

catch history. Karm further asserts that this interference gives rise to its claim for unjust enrichment because it was an “opportunistic breach” and is therefore exempt from the general prohibition that a duty imposed by contract is not a “legally protected interest” insofar as the law of unjust enrichment is concerned. Brief of Appellants at 24-27; RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT (“RESTATEMENT”) (2011) §§ 39, 44. Karm fails to show why this exception to the general rule set forth in the Restatement should apply here. Indeed, absent this showing, the Court should reject Karm’s efforts to introduce a new breach of contract claim under the guise of a revised unjust enrichment theory.

Karm’s recitation of the provisions of Section 39 and 44 of the Restatement are accurate to a point. As a general rule, a claim of unjust enrichment premised on interference with “other protected interests” cannot arise in respect to a duty imposed by contract. RESTATEMENT § 44(1). A limited exception to this premise is allowed in the case of an “opportunistic breach.” RESTATEMENT § 39. Notably, however, an opportunistic breach arises only if “the available damage remedy affords inadequate protection to the promise’s contractual entitlement.” *Id.* And as comment (c) to Section 39 of the Restatement notes, “[i]f the promise’s contractual entitlement is adequately

protected by a judgment for money damages, there is no claim to restitution by the rule of this section.” *Id.*

Karm has offered no explanation for why its new claims could not have proceeded directly under the terms of the Vessel Purchase Agreement. The “legally protected interest” in the pre-2004 catch history of LLG4513 that Blue Ace allegedly violated would be adequately and appropriately addressed under a straightforward breach of contract theory. Moreover, as Karm’s sole requested remedy is monetary relief (CP 5), there is no apparent reason that a breach of contract claim could not have adequately compensated its loss. Indeed, the scenario described in Karm’s brief hardly resembles the types of “opportunistic breach” described in Section 39 of the Restatement¹ – if the Vessel Purchase

¹ Indeed, as the comments and illustrations to Section 39 elucidate, an “opportunistic breach” is one in which one party breaches an agreement to obtain a greater benefit than that which is available under the agreement itself. Examples include a property owner who breaks a purchase agreement in order to sell his property at a better price (illustration 1), or a government agent who violates confidentiality provisions of his employment agreement to publish a book about his government service (illustration 4). In each case, the wronging party breaches a clear contractual obligation in order to obtain a greater profit. The damages to the wronged party are difficult to articulate and do not necessarily correspond to the profits realized by the wronging party. Nonetheless, the remedy is disgorgement of those profits to prevent the unjust enrichment.

In the present case, there is no clear contractual provision that was breached or interfered with – instead, Karm argues that the case should be remanded so that the trial court can examine the circumstances surrounding formation of the Vessel Purchase Agreement (presumably for the purpose of finding an implicit obligation with respect to the LLG4513 catch history). Moreover, under Karm’s analysis, the damages to it and the profits realized by Blue Ace correspond; Karm seeks compensation for the value of the “quota” obtained by Blue Ace because “quota had been the objective of the parties” all along. Indeed, Karm has explicitly

Agreement is construed to contain the implicit limitations that Karm alleges, the damages resulting from its breach would appear to equal the unjust enrichment damages that Karm asserts in this action.

Of course, the real issue is that Karm did not plead a breach of contract claim below and is barred from doing so now. RAP 2.5. Instead, Karm has opted to introduce this new claim via its existing causes of action, notwithstanding the disparity between the theory of unjust enrichment advanced on appeal and that pleaded and argued below. In failing to assert why its damages in contract would be insufficient, however, Karm has failed to establish why the general prohibition on unjust enrichment claims based on interference with a legally protected *contractual* interest should not apply in this case. Accordingly, the decision of the trial court should be upheld.

2. There could have been no “expense” to Karm because its “legally protected right” to control the catch history associated with LLG4513 became illusory upon termination of LLG4513 by NMFS.

Karm’s new theory of unjust enrichment turns on the allegation that Blue Ace interfered with its contractual right to control the pre-2004 catch history

asserted that Blue Ace “essentially invoked a provision in the [Vessel] Purchase and Sale Agreement in which Blue Ace had an option to buy the license LLG4513 and all catch history of the vessel for \$2,000,000, if the license LLG4513 was rendered transferable.” CP 114. If all of this is true, then, there is no discernable reason that Karm’s new theory of unjust enrichment should not be best addressed as the breach of contract claim it really is.

associated with LLG4513. This theory of unjust enrichment suffers the same fundamental flaw as that articulated in Karm's original complaint and resolved on summary judgment – because the revocation of LLG4513 rendered Karm ineligible to participate in the fishery, become a member of the FLCC, or obtain FLCC quota, there was no interest for Karm to “control” insofar as the catch history of LLG4513 was concerned. Accordingly, and even if Blue Ace were to have acted as Karm alleges, there could have been no interference with Karm's purported legal rights insofar as the LLG4513 catch history is concerned.

Catch history exists as a matter of historical fact, but is not intrinsically valuable. BRUCE A. KING, *Admiralty Law Institute Symposium: The Uniqueness of Admiralty and Maritime Law*, 79 Tul. L. Rev. 1259, 1320 (2005). Only in the context of a scheme that confers some type of benefit to its holder does catch history obtain value. *Id.* at 1320-21. A party's ability to derive some benefit from catch history is premised upon that party's eligibility to participate in the benefit scheme. Likewise, in a vacuum, catch history can neither be “controlled” nor held exclusively. Again, the question of control arises only in the context of a scheme that makes that history relevant to some benefit. *Id.* at 1321. Accordingly, the concept of “controlling” catch history is a misnomer – the real issue is whether or not a party has the right to obtain some benefit via claim to the catch history. It follows, then, that a person's right to “control” catch history

arises only when that history becomes relevant to some form of benefit. It also follows that a person's ability to control their catch history depends on their eligibility to participate in the scheme for which benefit is sought.

Karm's new theory of unjust enrichment fails because Karm was not eligible to participate in the freezer longline fishery sector following the termination of LLG4513. Although the catch history associated with LLG4513 may not have "disappeared" when NMFS terminated that license in 2007,² termination of LLG4513 rendered that catch history irrelevant in the context of the current fishery management regime. *See generally*, 50 C.F.R. § 679.4(k) (2010). Termination also extinguished any potential claim that Karm has in respect of the FLCC or FLCC quota. 2005 Consolidated Appropriations Act, Pub. L. No. 108-447, 118 Stat. 2809 (2004), CP 53. Accordingly, Karm's right to "control" the LLG4513 catch history following termination of that license was illusory and could not have been violated by Blue Ace, regardless of the means by which Blue Ace was awarded harvest share allocation under the FLCC membership agreement.

² By this same logic, there are likely hundreds of thousands (if not millions) of pounds of catch history in the various Alaskan fisheries managed by NMFS that continue to exist in the same sense as the LLG4513 catch history does, but that are otherwise irrelevant for the purposes of current fishery management because that history failed to yield fishing privileges for its holders.

Both parties agree that the FLCC membership agreement is a private contract unregulated by NMFS, and that the allocations of quota made under the FLCC membership agreement arise purely as a matter of agreement among the FLCC members. Brief of Appellants at 14-15; CP 53, 109. It is also uncontested that following termination of LLG4513, Karm lacked any legal basis for obtaining membership in the FLCC or obtaining quota under its membership agreement. CP 53. Upon termination of LLG4513, Karm had no remaining interest in the freezer longline sector and no valid claim to FLCC quota. Blue Ace was able to join the FLCC because it acquired and fished a second qualifying license from 2004 onward. CP 52; Brief of Appellants at 7. Karm was not eligible to join the FLCC because LLG4513 was interim, non-transferrable, and ultimately revoked. CP 52. The termination of LLG4513 rendered Karm ineligible to participate in the fishery. Moreover, FLCC membership was contractually and legally limited to those fishermen who held non-interim and transferrable LLP licenses. CP 53. Accordingly, Karm had no cognizable claim for quota under the FLCC membership agreement, whether based on the catch history of LLG4513 or otherwise.

Karm's lack of standing in the FLCC and with respect to its membership agreement evidences the illusory nature of its right to "control" the fishing history of LLG4513 following termination of that license. On appeal, Karm has

abandoned its earlier claims that the award of FLCC quota was obtained as a matter of right with respect to the LLG4513 catch history. Instead, Karm has implicitly adopted Blue Ace's position below that Blue Ace obtained its FLCC quota via its negotiations with the other FLCC members. And while these negotiations may have given weight to the Taggart allocations that were allegedly premised on the catch history of LLG4513, it is uncontested that the ultimate award of quota to Blue Ace did not occur as a matter of right because of its interest (purported or actual) in that catch history, but because the members of the FLCC explicitly agreed to that allocation. Brief of Appellants at 13-15. Accordingly, that history may have had "a value in and of itself because the FLCC said it did," but Karm lacked the ability to realize that value because its lack of eligibility to participate in the FLCC precluded it from ever asserting "control" of the history.

For this reason, and presuming Karm's allegations that Blue Ace relied upon a claim to the LLG4513 catch history to obtain its FLCC quota to be true, doing so could not have interfered with any protected right held by Karm to control that history. When LLG4513 was invalidated by NMFS in 2008, any interest in the freezer longline sector that Karm held in respect of the LLG4513 catch history likewise terminated, and without eligibility to participate in the

freezer longline sector or the FLCC, the catch history alone did not give rise to a legal interest that could be controlled or interfered with.

D. If the Court remands, it should do so with instructions that the trial court's award of costs and fees should be upheld because Karm has abandoned each of the claims that were resolved on summary judgment below.

Karm admits that it is not seeking to reverse the dismissal of its breach of oral contract claim or contesting that attorneys' fees and costs are available to the substantially prevailing party under the Vessel Purchase Agreement. Brief of Appellants at 3. As explained above, Karm has raised entirely new arguments on appeal with regard to its unjust enrichment claim. Notwithstanding Karm's admission that it only appeals part of the trial court's decision, and in spite of the fact that it admits its arguments on appeal have never been raised below, Karm seeks reversal of the attorneys' fees granted below.

Karm relies on *Marassi v. Lau*, 71 Wn. App. 912, 916, 859 P.2d 605 (1993), *abrogated on other grounds by Wachovia SBA Lending, Inc. v. Kraft*, 165 Wn.2d 481, 200 P.3d 683 (2009) (citations omitted), for the proposition that if this case is remanded, the trial court should be instructed to revisit the issue of attorneys' fees and costs based on the "extent of the relief afforded the parties." Brief of Appellants at 34. However, by conceding each of its arguments below

and raising entirely new arguments on appeal, Karm has only bolstered Blue Ace's prevailing party status.

Blue Ace should not be penalized by Karm's decision to change the basis of its argument well after the trial court entered its final judgment on Blue Ace's motion for summary judgment. In its Complaint, Karm characterized its unjust enrichment claim as follows:

The catch history and quota share belonging to the plaintiffs were conferred on the defendants. Defendants had a knowledge and appreciation of these benefits being conferred on them. The defendants accepted these benefits under circumstances that make it inequitable for them to receive the benefits.

CP 5 (emphasis supplied). As noted above, Karm now states that the "crux of this case is therefore the 'legally protected rights' of Karm violated by Blue Ace, and *not whether there was a 'benefit conferred by the plaintiff on the defendant, as Blue Ace argued.'*" Brief of Appellants at 23 (emphasis supplied). Karm thus attempts to convince this Court that Blue Ace, not Karm, framed the arguments below to focus on whether a benefit had been conferred.

Blue Ace successfully defended against Karm's arguments below on summary judgment and it did so by responding directly to and defeating each argument raised by Karm. Blue Ace is the substantially prevailing party. The award of attorneys' fees and costs by the trial court was proper and should be affirmed, regardless of the outcome of this appeal, as it would be inequitable for

this Court to do otherwise. Accordingly, even if this Court remands, it should do so with instructions to the trial court that the award of attorneys' fees and costs should stand.

E. Blue Ace should be awarded its attorneys' fees and costs on appeal.

Blue Ace is entitled to its attorneys' fees and costs on appeal. In general, "where a prevailing party is entitled to attorney fees below, they are entitled to attorney fees if they prevail on appeal." *Gray v. Bourgette Constr., LLC*, 160 Wn. App. 334, 345, 249 P.3d 644 (2011). The trial court awarded attorneys' fees to Blue Ace pursuant to the written agreement between the parties, which provided that the substantially prevailing party in any dispute between the parties arising out of or relating to the agreement shall be awarded their reasonable attorneys' fees and costs. CP 59. Karm has not challenged the basis of this award. Brief of Appellants at 17-18. Blue Ace, the substantially prevailing party below, was properly awarded its fees and costs. A request for attorneys' fees on appeal must comply with RAP 18.1, which requires the party requesting fees to "devote a section of its opening brief to the request for the fees and expenses." Having so complied, Blue Ace is entitled to its attorneys' fees and costs on appeal.

V. CONCLUSION

The trial court's dismissal of Karm's claims on summary judgment should be affirmed. On appeal Karm has preemptively abandoned each of the arguments

it made below, instead advancing an entirely new theory under the topic of unjust enrichment. Introduction of this new theory is barred at this stage under the Rules of Appellate Procedure, however. Moreover, even if introduced as plead by Karm in its opening brief, the claim is patently barred by the statute of limitation, rendering the trial court's failure to consider it harmless error. Moreover, both theories of unjust enrichment advanced by Karm through the course of this litigation suffer from the same defect – the termination of LLG4513 and the impact of that termination on Karm's role in the freezer longline fishery rendered any right or interest that Karm held with respect to LLG4513 catch history valueless. As the trial court properly concluded, Blue Ace could not have unjustly enriched itself under the uncontested facts and law of this case. Accordingly, Karm's claims should be dismissed and the ruling of the trial court granting summary judgment and awarding costs and fees to Blue Ace should be upheld.

RESPECTFULLY SUBMITTED this 22nd day of October, 2012.

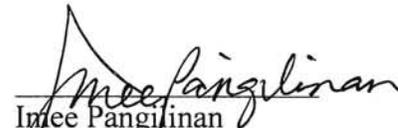
HOLMES WEDDLE & BARCOTT, P.C.

A handwritten signature in black ink, appearing to read 'R. Shawn Griggs', written over a horizontal line.

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Certificate of Service

I certify that I arranged for a copy of the foregoing "Brief of Respondents" to be delivered via legal messenger to attorneys for Appellants, Mr. Andrew P. Richards of Mundt MacGregor LLP, 4005 20th Avenue W, Ste. 221, Seattle, WA 98199, on October 22, 2012.


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