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Turcott v. Estate of Bates Respondent's Brief Dckt. 45920

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Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

DEANN C. TURCOTT, Plaintiff/Appellant, vs. THE ESTATE OF CLARENCE D. BATES, CLINTON D. BATES PERSONAL REPRESENTATIVE, ET AL., Defendants/Respondents.	SUPREME COURT CASE NO: 45920-2018 KOOTENAI COUNTY NO. CV-16-6970

RESPONDENTS' BRIEF

Appeal from the District Court of the First Judicial District for Kootenai County.
Honorable Rich Christensen, Presiding

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I. STATEMENT OF THE CASE

A. Nature of the Case.

One conversation and a misguided and unilateral sense of entitlement - that is what the Plaintiff/Appellant, Deann Turcott's ("Deann") case is all about. Based upon one single conversation in an attorney's office in 2006 regarding her father's 1996 will, Deann believed that she was entitled to do whatever she wanted on her father's property because she unilaterally assumed she was going to inherit the property - despite the fact that she admitted at trial that during that one single conversation in 2006 her father never discussed, promised or represented to her that his 1996 will would be left unchanged for the remainder of his life[1].

Not only did Deann do whatever she wanted on her father's property, she did it all for her own intended personal direct financial advantage. She repaired her father's equipment so that she could raise her hay on her father's land[2] [3] so that she could feed her cattle that she raised on

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[1]Deann admitted so at trial. However, she has failed to provide a transcript of the trial and, as more fully argued below, her appeal is fatally flawed.

[2]Deann stated in Defendants' Exhibit KK that she paid the "entire tax bill on #8600 in exchange for the use of the land. **We will continue to do improvements on the 255 acres in exchange for use of [Clarence's] the land and equipment**, dad as he is retired. We [Deann and her husband] claim the farm income & expenses on our taxes, starting in year 2013." R Vol. II, p. 1115 (bolded emphasis added). The term #8600 is a short cut name used by the litigants for a parcel of real property presently owned by the Trust (and formerly owned by Clarence Bates). See, R, Vol. I, p. 368.

[3]The undersigned has two (2) volumes of appellate record, but neither volume is endorsed with a volume number. The 1st volume, the Clerk's Record on Appeal, is designated herein as R Vol. I. The 2nd volume, the Clerk's Certificate of Exhibits, is designated herein as R Vol. II.

her father's land to sell both the hay and cattle to third parties - and keep all of the proceeds for herself. She even claimed the proceeds as income on her own federal tax returns.[4]

Deann's actions in this matter were undertaken on her own initiative and for her own intended personal financial gain. The Trial Court correctly ruled that Deann's claimed damages sounded in unjust enrichment and not in quantum meruit.

B. Proceedings Below.

Deann originally filed this action against her father, Clarence Bates ("Clarence"), Clarence's wife, Janet Bates (Janet) and Clinton Bates, the son of Clarence and the brother of Deann ("Clint") seeking the enforcement of an alleged oral contract to make a will and for monetary damages. R Vol. I, pgs. 29-31.[5] Following a partial summary judgement motion, the Trial Court dismissed Clint and Janet personally from the action. Janet, in her capacity as a co-trustee of The Bates Family Trust Dated the 20th Day of November, 2016 remained as a defendant. R Vol I, p. 190. Clint was ultimately awarded his attorneys fees against Deann pursuant to Idaho Code § 12-121. R Vol. I, pgs. 258-260. Clint later became re-involved in the case as the Personal Representative of the Estate.

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[4]As there is no trial transcript, Defendants' Exhibits II (R Vol. II, p.1111) and JJ (R Vol. II, p. 1112) demonstrate that Deann sold hay to third parties. Defendants' Exhibit BBB (R Vol. II, pgs. 1179 - 1181) shows that in 2015 Deann and her husband claimed $14,125.00 in income from the "Sales of livestock, produce, grains, and other products you raised" on their federal tax returns (R Vol. II, p. 1181, Part I, Section 2) .

[5]During the litigation, Clarence passed away and the Estate of Clarence Bates (the "Estate") was substituted in as the real party in interest.

On July 11, 2017, and prior to trial, Deann made an election in open Court not to pursue her claims relating to her alleged contract to make a will and instead elected to pursue only monetary damages. T Vol. II, p. 4 L. 20 - p. 7, L. 5 (July 11, 2017, Plaintiff's Motion for Reconsideration).[6]

Following a two and half (2½) day trial and after hearing the oral testimony of eleven (11) witnesses and the deposition testimony of one (1) of Deann's expert witnesses, as well as considering all of the admitted exhibits, the Court awarded Deann the total sum of $136,402.50 in unjust enrichment damages, of which amount, $130,000.00, represented the value of Deann's personal residence that she constructed on her father's land. The remaining amount of the unjust enrichment award, $6,402.50, was for barn repair and other miscellaneous expenses, including a $136.14 expenditure for taxes and insurance. R Vol. I, pgs. 366 - 380.

After the entry of the Court's Memorandum Decision and Order, Deann moved the Trial Court to reconsider its decision and to substitute a quantum meruit measure of damages for the unjust enrichment measure of damages utilized by the Trial Court. In the event that the Trial Court did not reconsider its decision on the measure of damages, Deann made the motion "TO THE EXTENT THAT THIS COURT IS NOT GOING TO RE-EVALUATE THIS CASE AS IF

[6]The undersigned has two (2) different appellate transcripts, one for a March 20, 2018 hearing and the other for a July 11, 2017 hearing. However, the transcripts are not endorsed with a Volume number. The undersigned originally requested the March 20, 2018 transcript and thereafter requested the July 11, 2017 transcript. Therefore, the undersigned is designating the March 20, 2018 transcript as Volume I and the July 11, 2017 transcript as Volume II.

QUANTUM MERUIT IS THE PROPER MEASURE OF DAMAGES, THEN IT WAS ERROR TO AWARD ANY FURTHER SUMS OTHER THAN $136.14 THAT THE COURT FOUND CLARENCE TO SPECIFICALLY ASKED DEANN TO PAY. It is error to include any additional sums beyond the value of the home **because no evidence exists of the value of benefit conferred upon Clarence from the expenditures of those sums**." R Vol. I, p. 383 (Full capitalization in the original, bolded emphasis added).

The Trust and the Estate objected to Deann's request that the Court reconsider its finding that unjust enrichment was the correct measure of damages. Obviously, the Trust and the Estate did not object to Deann's alternative motion to reduce the damage award by $6,266.36. R Vol. I, p. 421. The Trial Court declined to reconsider its original ruling, stating, *inter alia*, that:

> "And the Court, again, looked at the issues, specifically this -- the issues of quantum meruit and unjust enrichment, and which equitable remedy most fits this situation. After looking at it all, the Court will stand by its decision to apply the equitable remedy of unjust enrichment in this matter.
>
> "The Court based its decision on the substantial evidence presented at trial. The Court is also free in a court trial to find reasonable inferences from the evidence . . .
>
> "I found the plaintiff's [Deann's] argument novel in this matter, not that I didn't pay attention to it, and I looked at it, but I could not – the Court did not come to the conclusion that it erred in applying unjust enrichment as the equitable remedy in this case. . . . The Court did not find from the evidence presented that any reasonable or any reasonable inferences that the plaintiff [Deann] should be compensated under a theory of – under a theory of unjust enrichment nor any other theory for other claimed damages such as the forestry work the fencing work, or the farming work, and therefore Plaintiff's motion is denied."

T Vol. I, p. 12, L.. 3 - T Vol. I, p. 13, L. 16 (March 20, 2018, Motion for Reconsideration).

C. Additional Issues Presented on Appeal.

1. The Estate and the Trust Are Withdrawing Their Cross Appeal.

2. The Estate and the Trust Are Seeking an Award of Their Attorneys Fees. on Appeal Pursuant to Idaho Code § 12-121.

3. There Are No Additional Issues Presented on Appeal.

II. ARGUMENT.

A. In the Absence of a Proper Record on Appeal, the Court must Assume There Is Substantial Competent Evidence to Support the Trial Court's Decision.

Deann has not provided any portion of the trial transcript for a two and half (2½) day trial having a dozen witness[7]. Yet, she claims that the Trial Court committed error and requests that the Appellate Court remand this matter "with instructions to vacate the existing judgment and recalculate Deann's claims for damages based on quantum meruit" Appellant' Opening Brief, pgs. 6, 7 and 8. In the alternative, Deann requests that if the Appellate Court "determines that unjust enrichment is the proper measure of damages, then it should remand this matter with instructions for the District Court to award Deann a sum of money for the tax benefits conferred upon Clarence." Appellant's Opening Brief, p. 9. She concludes, in a conclusionary way, that "the evidence is undisputed" and that '[i]t was an error for the District Court to conclude that

[7]The testimony of one witness, Deann's fencing expert witness Anthony Nestor, was via a deposition transcript which is part of the record. R Vol. II, pgs. 979-999. The Trial Court did note that it could not "properly weigh the evidence [of Mr. Nestor's testimony] as if it were presented live and in person" and later found that the testimony of the Trust and the Estates' fencing expert witness that the fence had no value was "credible and supported by the evidence presented." R Vol. I, p. 373.

unjust enrichment was the proper measure of damages." Appellant's Opening Brief, p. 10. All of this alleged error and "undisputed evidence" (which was actually disputed at trial) - but no trial transcript for the Appellate Court to review.

There is ample case law that has long held that the appellant has the initial burden of providing the Appellate Court a proper record on appeal. Examples of long established Idaho precedent are:

> "On appeal the appellant must carry the burden of showing that the district court committed error. Error will not be presumed on appeal but must be affirmatively shown on the record by appellant. Where an incomplete record is presented to this Court, the missing portions of that record are to be presumed to support the action of the Trial Court. Therefore, upon the record before us, we are unable to conclude that the district court erred in holding that the intent of the parties was to include in their contract a provision mandating submission of claims or disputes to arbitration under AIA rules. For this reason we affirm the district court's decision to submit the parties' dispute to arbitration and its order confirming the arbitration award."

Rutter v. McLaughlin, 101 Idaho 292, 293 (1980).

> "The state brings this appeal to test whether, after assigning rights to child support to the state, an ex-wife can then bind the state by a release to her ex-husband from all obligations for past due child support. Unfortunately, however, the record is insufficient for this Court to decide the case. This Court is bound by the record presented upon appeal. In the present case there are no minutes indicating what occurred at the Trial Court level; there is no reporter's transcript indicating what testimony was taken. The appellant has the initial burden of presenting a record sufficient to enable an Appellate Court to decide the case. Appellant has not met this burden, with no explanation why an adequate record has not been prepared. If the record was defective through no fault of appellant, the situation might be viewed differently. However, no adequate showing has been made which excuses the appellant from presenting an adequate record on appeal so that this Court can properly evaluate the claimed errors. Appellant and respondent have attempted to present the facts which were elicited at the hearing of this case to this Court by way of post-trial affidavits of counsel, a clearly unacceptable procedure. In the

absence of an adequate record, or a sufficient reason for the failure to produce a record, we affirm the Trial Court."

State ex rel. Hodges v. Hodges, 103 Idaho 765, 765-766 (1982) (entire case quoted).

"Because the Shireys have failed to provide this Court with an adequate record on appeal from which the Court may intelligently review the soundness of the Trial Court's discretionary conduct, the Trial Court must be presumed to have acted properly and sustained."

Farmers Nat. Bank v. Shirey, 126 Idaho 63, 72 (1994).

"[T]his Court must presume that the missing transcript substantially and competently supports this finding, and all other findings of fact challenged by the estate [appellant], because the estate waived preparation of a trial transcript."

In re Estate of Boyd, 134 Idaho 669, 674, (App. 2000).

"It is the responsibility of the appellant to provide a sufficient record to substantiate his or her claims on appeal. In the absence of an adequate record on appeal to support the appellant's claims, we will not presume error."

Belk v. Martin, 136 Idaho 652, 660 (2001).

"The appellant, of course, bears responsibility to furnish the Court with a record sufficient to substantiate the claim. Without the transcript, we will not presume error."

City of Coeur d'Alene v. Simpson, 142 Idaho 839, 844 (2006).

"As to the Frittses' original motion for a new trial, we have no basis on which to determine whether the district court was correct in denying the Frittses' motion for a new trial. In their motion, the Frittses challenged the district court's Findings. There is no transcript of the trial and we are therefore unable to review the factual findings made by the district court and the evidentiary basis for those findings. In the absence of a proper record on appeal, we must assume there is substantial competent evidence to support the Trial Court's decision."

Fritts v. Liddle & Moeller Const., Inc., 144 Idaho 171, 174 (2007).

Deann is merely asking that the Appellate Court to second guess the Trial Court based upon an incomplete record. For this reason alone, the Trial Court's decision should be affirmed.

B. The Trial Court Did Not Err in Awarding Unjust Enrichment Damages.

> "Contracts implied-in-law and those implied-in-fact are two distinct concepts. A contract implied-in-fact is a true contract whose existence and terms are inferred from the conduct of the parties. Such a contract is grounded in the parties' agreement and tacit understanding. In contrast, a contract implied-in-law is not a true contract at all. It is a legal fiction, a non-contractual obligation created by the courts to provide a contractual remedy where none existed at common law. It is 'imposed by law for the purpose of bringing about justice and equity without reference to the intent or the agreement of the parties and, in some cases, in spite of an agreement between the parties.'"

Kennedy v. Forest, 129 Idaho 584, 587 (1997).

> "Both quantum meruit (implied-in-fact contracts) and unjust enrichment (implied-in-law contracts) are 'measures of equitable recovery.' 'The application of equitable remedies is a question of fact because it requires a balancing of the parties' equities.'"

Clayson v. Zebe, 153 Idaho 228, 280 P.3d 731, 735 (2012).

> "Because imposition of an equitable remedy requires a balancing of the equities, which is inherently a factual determination, the district court's imposition of equitable servitudes should be reviewed for an abuse of discretion. Whether a district court abused its discretion is a three-pronged inquiry to determine whether the district court: (1) correctly perceived the issue as one of discretion; (2) acted within the boundaries of such discretion and consistently with the legal standards applicable to the specific choices before it; and (3) reached its decision by an exercise of reason. Absent a clear showing of abuse, a district court's exercise of discretion will not be overturned."

West Wood Investments, Inc. v. Acord, 141 Idaho 75, 82 (2005).

> "The equitable principles of unjust enrichment, quasi-contract, or quantum meruit are remedies founded on an agreement implied-in-law to give reasonable value for services performed. To justify recovery, a plaintiff must not only show he rendered valuable services, but also must show that the defendant has been unjustly enriched and the plaintiff would be unjustly penalized if the defendant were permitted to retain the benefits of the services without paying. Ordinarily, when one party renders services for another, which are accepted by him, the law creates an obligation, called an implied-in-law contract, on his part to pay a reasonable compensation.
>
> In order to establish a prima facie case for an implied-in-law contract, the plaintiff must show that there was (1) a benefit conferred upon the defendant by the plaintiff; (2) appreciation by the defendant of such benefit; and (3) acceptance of the benefit under circumstances that would make it inequitable for the defendant to retain the benefit without payment to the plaintiff of the value thereof. The services must be rendered under such circumstances as to indicate that the person rendering them expected to be paid, and that the recipient expected, or should have expected to pay for them. The actual intent of the party upon whom the benefit is conferred is immaterial, so long as a reasonable person in the same circumstances would have understood that a benefit had been conferred and that the conferring party did so in reasonable expectation of payment."

In Re Estate of Boyd, 134 Idaho 669, 673 (App. 2000).

Under the foregoing string of Idaho precedent, the initial question of which equitable remedy is available to a litigant is a factual one resulting from "a balancing of the parties' equities." Clayson v. Zebe, 153 Idaho 228, 280 P.3d 731, 735 (2012). On appeal, Deann is required to demonstrate that at trial she established her three (3) point prima facia factually based claim to quantum meruit damages AND she must also demonstrate on appeal how the Trial Court abused its discretion in determining that unjust enrichment was the proper measure of damages for the particular fact pattern before the Trial Court. She has not done so on appeal. Instead of referencing trial exhibits, citing trial testimony and pointing out where in the record the Trial Court abused its discretion, all that she has done on appeal is merely argue that quantum

meruit is the proper measure of damage in this particular instance based upon four (4) cited cases and virtually no citation to the record.

Moreover, the cases cited by Deann are all distinguishable from the instant matter. As the trial transcript would bear out, Deann did all of the claimed work at her own initiative and directly for her own intended personal benefit. In all of the cases cited by Deann, the plaintiffs undertook the alleged work for the intended direct benefit of the defendants.

In Barth v. Canyon County, 128 Idaho 707 (1996) the plaintiff (a county employee) sought quantum meruit damages for worked performed for the benefit of the defendant. The plaintiff's claims were denied denied based upon lack of constitutional and statutory considerations. 128 Idaho at 711.

In Nagele v. Miller, 73 Idaho 441 (1953) the plaintiff, alleging that she was employed by the decedent, claimed implied contract damages against the decedent's estate. On appeal, the Supreme Court found the plaintiff failed to establish at trial that she rendered the "alleged services in the expectation of being paid," that she failed to show that the "deceased knew of the rendition of the alleges services and voluntarily accepted the same" and that she failed to provide "probative evidence as to the reasonable value of the services rendered." 73 Idaho 445.

In Farrell v. Whiteman, 146 Idaho 604 (2009), the plaintiffs was specifically hired by the defendant to provide the defendant architectural services. The plaintiff was entitled to quantum meruit damages during the period he was not a registered contractor.

It is unclear exactly what the plaintiff in Hartley v. Bohrer, 52 Idaho 72 (1932) did for the defendant, other than the work being of "an extraordinarily hard and disagreeable nature." 52 Idaho at 77. However, the plaintiff's attorney acknowledges that the work was for performed for the benefit of the defendant. 52 Idaho at 72.

In all of Deann's cited cases, the defendant was the intended primary beneficiary of the plaintiff's work, which is not the case in this matter. As the complete record would demonstrate, Deann did the work for herself and she was the intended beneficiary - not her father. She constructed a house for her own personal use; she farmed the fields so that she could raise and sell hay (and keep the proceeds); she fenced the fields so that she could raise cattle and she fixed the barn so that she could store hay for her cattle that she then sold to third parties.[8]

While it is true that Clarence was aware of what Deann was doing and may have incidently/indirectly benefitted from *some* of the work she performed, the overwhelming bulk of the work was done for the direct intended benefit of Deann and at her own sole initiative. In their pre-trial brief (R Vol. I, pgs. 300 - 301), the Trust and the Estate argued that Deann's actions were more in line with cases sounding in unjust enrichment. The cases cited by the Trust and the Estate were the following: Continental Forest Products, Inc. v. Chandler Supply Co., 95 Idaho 739 (1974) (the defendant mistakenly received and retained plywood from the plaintiff.

[8]The Trial Court noted that the farming was "done for the benefit of Plaintiff [Deann] and her husband . . . The evidence shows hay was raised on the ranch, was fed to Plaintiff's livestock or sold by Plaintiff, and the proceeds of the same were kept by Plaintiff." R Vol. I, pgs. 374-375.

The defendant refused to pay the plaintiff and the plaintiff was entitled to unjust enrichment damages); Hertz v. Fiscus, 98 Idaho 456 (1977) (the plaintiff remodeled a restaurant he was leasing from the defendant. The plaintiff later defaulted on the lease but was entitled to seek unjust enrichment damages against the defendant for a portion of the remodeling work); Idaho Lumber, Inc. v. Buck, 109 Idaho 737 (App. 1985) (the plaintiff was entitled to unjust enrichment damages for goods provided to a tenant of the defendant).

These line of cases stand for the proposition that the defendant did not seek some benefit from the plaintiff. But rather, through the plaintiff's own actions the defendant incidently/indirectly realized some type of benefit. That is exactly what we have in this matter.

When Deann undertook the work, Clarence was long retired from farming and had sold off his cattle years before.[9] And all of the work and improvements that Deann did on her father's land were for her own use and benefit. She undertook fencing on Clarence's property for her own cattle. She repaired the barn for her cattle, her horse and for the storage of her hay. She farmed Clarence's fields for her crops. She constructed residential improvements on Clarence's

[9]As noted earlier, Deann stated in Defendants' Exhibit KK that she paid the "entire tax bill on #8600 in exchange for the use of the land. **We will continue to do improvements on the 255 acres in exchange for use of [Clarence's] the land and equipment**, **dad as he is retired**. We [Deann and her husband] claim the farm income & expenses on our taxes, starting in year 2013." R Vol II, p. 1115 (bolded emphasis added). And, as argued at the trial level by the Estate and the Trust, as Clarence was retired and not raising any hay or cattle, he did not need, nor did he directly benefit from, the work Deann alleges to have undertaken on his land. The Trial Court acknowledged this fact. R Vol. I, p. 369 ("Clarence had retired from farming at that time and had previously sold off his livestock").

property for her own personal use. Everything Deann did was for herself and specifically intended for her own personal benefit. Clarence did not ask her to undertake any of the work or improvements, Deann just did it at her own initiative for her own purposes and benefit. Any damages that Deann may have, if any, sound in unjust enrichment and not quantum meruit.

Moreover, any unjust enrichment claims, if any, are further diminished by the fact that the improvements were, as admitted by Deann[10], in-kind rent payments for her use of Clarence's property and equipment. See, Hettinga v. Sybrandy, 126 Idaho 467, 471 (1994) (son-in-law operating dairy operation on in-law-parents' property for son's own financial advantage was not entitled to unjust enrichment damages for improvements son made to the farm). The Hettinga Court also stated that "[r]ecovery for unjust enrichment is unavailable if the benefits to the Sybrandys were created incidentally by Mr. Hettinga in pursuit of his own financial advantage." Id. A corollary rule is that where a "tenant places improvements upon leasehold in absence of agreement, tenant is not entitled to compensation from landlord". Id. And, "[t]he doctrine of unjust enrichment does not operate to rescue a party from the consequences of a bargain which turns out to be a bad one." George v. Tanner, 108 Idaho 40, 43 (1985).

Everything that Deann did she did for her own financial gain and for herself. She is the one that was intended to directly benefit from her actions - not her father - and she did it all on her own accord and initiative. Her actions fall squarely under unjust enrichment and not

[10]Defendants' Exhibit KK, R Vol. II, p. 1115.

quantum meruit.

C. The Fact That Deann Was the Direct and Intended Beneficiary of Her Own Work Is Relevant.

1. Factual Disputes on Appeal.

Prior to addressing the substance of Deann's arguments set forth in Section B of her Appellate Brief there are some factual inaccuracies - or at least factual disputes - set forth in Section B that would have been avoided had there been a transcript on appeal. Those disputed factual issues are as follows:

a. Appellant's Opening Brief, p. 7 - Deann states that "[i]t is undisputed that when Deann and her husband were doing all of this work, everyone, including Clarence, understood that she was to inherit half the property and her father knew that was why she was doing all this work." This alleged statement of fact was not established at trial.

b. Appellant's Opening Brief, p. 7 - Deann claims that she uprooted her "life on reliance on her father's promise to leave her the land." This alleged statement of fact was disputed by Deann herself at trial when she testified that her father made no such promise.

c. Appellant's Opening Brief, p. 8 - Deann claims that she undertook the work for herself and "for her brother Clint." Again, that was

not established at trial. She did sue Clint, but her actions in doing so were so frivolous and groundless that Clint was awarded his attorneys fees pursuant to Idaho Code § 12-121. R Vol. I, pgs. 258-260.

d. Appellant's Opening Brief, p. 8 - Deann alleges that "Clarence knew that Deann expected to be compensated for all this work by way of inheriting half the property." Once again, this factual assertion was not established at trial.

2. The Farming Improvements Were for Deann's Own Personal and Direct Benefit and Quantum Meruit Is Not Applicable.

> "The doctrine of quantum meruit is a remedy for an implied-in-fact contract and permits a party to recover the reasonable value of services rendered or material provided on the basis of an implied promise to pay. An implied-in-fact contract is grounded in the parties' agreement and tacit understanding that there is a contract. 'The general rule is that where the conduct of the parties allows the dual inferences that one performed at the other's request and that the requesting party promised payment, then the court may find a contract implied in fact."

Gray v. Tri-Way Const. Services, Inc., 147 Idaho 378, 387; 210 P.3d 63 (2009) (bolded emphasis added).

This general rule is found in Andrews v. Aikens, 44 Idaho 797 (1927) (The plaintiff undertook property management services at the request of the defendant and for the benefit of defendant - "paying over profits and returns" to the defendant - and the plaintiff was allowed to seek damages under quantum meruit); Peavey v. Pellandini, 97 Idaho 655 (1976) (The plaintiff

fed and cared for 900 head of the defendant's cattle for two months at the request of and benefit for the defendant and the plaintiff was allowed to seek damages under quantum meruit when he wasn't paid); and Farrell v. Whiteman, 152 Idaho 190 (2012) (The defendant hired the plaintiff to undertake architectural services for the defendant at a time the plaintiff was not licensed to act as an architect. The plaintiff was allowed to seek damages under quantum meruit when he wasn't paid). All of these cases affirm the general rule that for quantum meruit damages, the defendant must have requested/sought some benefit from the plaintiff and that the defendant was the intended beneficiary of the plaintiff's efforts.

On the other hand, "[u]njust enrichment exists where '(1) there was a benefit conferred upon the defendant by the plaintiff; (2) appreciation by the defendant of such benefit; and (3) acceptance of the benefit under circumstances that would be inequitable for the defendant to retain the benefit without payment to the plaintiff for the value thereof.' 'The substance of an action for unjust enrichment lies in a promise, implied by law, that a party will render to the person entitled thereto that which in equity and good conscience belongs to the latter.'" Stevenson v. Windermere Real Estate/Capital Group, Inc., 152 Idaho 824, 275 P.3d 839, 842 (2012).

The general principal behind unjust enrichment is that although the defendant did not request or seek a benefit from the plaintiff, the plaintiff nonetheless incidently conferred some benefit upon the defendant which, in equity, would be unjust for the defendant to retain. This

general principal is found in Continental Forest Products, Inc. v. Chandler Supply Co., 95 Idaho 739, 518 P.2d 1201 (1974) (The defendant mistakenly received and retained unordered goods from the plaintiff. The defendant refused to pay for the retained goods and the plaintiff was entitled to unjust enrichment damages); Hertz v. Fiscus, 98 Idaho 456 (1977) (the plaintiff/tenant "with the knowledge and consent" of the defendant/landlord "extensively" remodeled the premises. The plaintiff later defaulted on the lease but was entitled to seek unjust enrichment damages against the defendant for a portion of the remodeling work) and Idaho Lumber, Inc. v. Buck, 109 Idaho 737 (App. 1985) (The plaintiff was entitled to unjust enrichment damages for goods provided to a tenant of the defendant).

These line of cases stand for the proposition that the defendant did not directly seek some benefit from the plaintiff. But rather, through the plaintiff's own unilateral actions the defendant incidently/indirectly realized some type of benefit. That is exactly what we have in this matter.

All of the work and improvements that Deann did were for her own use and benefit. She undertook fencing on Clarence's property for her own cattle. She repaired the barn for her cattle, her horse and for the storage of her hay. She farmed Clarence's fields for her crops.[11] She constructed residential improvements on Clarence's property for her own personal use. Everything Deann did was for herself and for her own personal benefit. Clarence did not ask her

[11]The Trial Court noted that the farming was "done for the benefit of Plaintiff [Deann] and her husband . . . The evidence shows hay was raised on the ranch, was fed to Plaintiff's livestock or sold by Plaintiff, and the proceeds of the same were kept by Plaintiff." R Vol. I, pgs. 374-375

to undertake any of the work or improvements, Deann just did it at her own initiative for her own purposes. Any damages that Deann may have, if any, sound in unjust enrichment and not quantum meruit. Moreover, any unjust enrichment claims, if any, are further diminished by the fact that the improvements were, as admitted by Deann, in-kind rent payments for her use of Clarence's property and equipment.

3. The Farming Improvements Were In-kind Rent.

As stated earlier, Deann admitted in Defendants' Exhibit KK that she paid the "entire tax bill on #8600 in exchange for the use of the land. **We will continue to do improvements on the 255 acres in exchange for use of [Clarence's] the land and equipment**, dad as he is retired. We [Deann and her husband] claim the farm income & expenses on our taxes, starting in year 2013." R Vol. II, p. 1115 (bolded emphasis added). And the Trial Court, referencing Defendants' Exhibit KK, noted that Deann's "statement and the corresponding use of the land for raising hay for Plaintiff's cattle or for sale by Plaintiff presents a quid pro quo arrangement (paying taxes for use of land and equipment) which prevents application an unjust enrichment or quantum meruit recovery." R Vol. I, pgs. 376-377. "Because quantum meruit is a species of implied contract, such recovery will not normally lie where there is an [enforceable] express contract governing the relationship of the parties." Bakker v. Thunder Spring-Wareham LLC, 141 Idaho 185, 190 (2005).

D. Clarence's Alleged Tax Savings Is Not an Appealable Issue.

1. Deann Did Not Raise the Issue of Awarding "Deann the Amount of Money She Saved Clarence in Property Taxes" at Trial.

In Section C of her Opening Brief, Deann argues that the she should be awarded unjust enrichment damages in "the amount of money she saved Clarence in property taxes by her efforts to maintain his property tax exemptions." Appellant's Opening Brief, p. 8. However, that particular issue - how much, if anything, did Clarence save on taxes - was never raised at trial.[12] "Generally, issues not raised below may not be considered for the first time on appeal." Sanchez v. Arave, 120 Idaho 321, 322 (1991). "Furthermore, appellate review is limited to the arguments and theories presented below." Obenchain v. McAlvain Const., Inc., 143 Idaho 56, 57 (2006). Because this issue was not raised at the trial level, it cannot now be raised at the appellate level.

2. Even If the Issue Was Raised at the Trial Issue, Deann Admits That There Is No Evidence to Support Her Claim to Damages.

In Section C of her Appellate Brief, Deann further argues that she is entitled to an unspecified amount of unjust enrichment damages for an issue that was not even raised at trial. But even it was raised at trial, which is wasn't, Deann has judicially admitted that she presented

[12]The tax savings issue was first raised by Deann in her "Plaintiff's Amended Memorandum In Support of Motion For Reconsideration" that was filed on March 6, 2018 - four (4) months after the trial. R Vol I, pgs. 403-406. The Estate and the Trust noted this fact in their "Objection to Plaintiff's Motion for Reconsideration" with various statements of disbelief such as "[t]he issue of reducing 'Clarence's tax burden" as posited by the Amended Memorandum was not raised in the Amended Complaint nor at trial and it is not properly before the Court at this time . . .[h]er current argument that her efforts provided Clarence a 'tax savings' of $54,182.61 comes out of post-trial nowhere." R Vol. I, pgs. 419-420.

no evidence to sustain an unjust enrichment award above and beyond $130,136.14.

As noted above, after the entry of the Court's Memorandum Decision and Order, Deann moved the Trial Court to reconsider its decision and to substitute a quantum meruit measure of damages for the unjust enrichment measure of damages utilized by the Trial Court. In the event that the court did not reconsider its decision on the measure of damages, Deann made the motion "TO THE EXTENT THAT THIS COURT IS NOT GOING TO RE-EVALUATE THIS CASE AS IF QUANTUM MERUIT IS THE PROPER MEASURE OF DAMAGES, THEN IT WAS ERROR TO AWARD ANY FURTHER SUMS OTHER THAN $136.14 THAT THE COURT FOUND CLARENCE TO SPECIFICALLY ASKED DEANN TO PAY. It is error to include any additional sums beyond the value of the home **because no evidence exists of the value of benefit conferred upon Clarence from the expenditures of those sums**." R Vol. I, p. 383 (Full capitalization in the original, bolded emphasis added).

Deann has judicially admitted that there is no evidence to support any unjust enrichment award above and beyond $130,136.14. "A judicial admission is a statement made by a party or attorney, in the course of judicial proceedings, for the purpose, or with the effect, of dispensing with the need for proof by the opposing party of some fact." Sun Valley Potato Growers, Inc. v. Texas Refinery Corp., 139 Idaho 761, 765 (2004). "The question of whether a statement constituted a judicial admission is a matter of law. A judicial admission is a formal act or statement made by a party or attorney, in the course of judicial proceedings, for the purpose, or

with the effect, of dispensing with the need for proof by the opposing party of some fact. The party making a judicial admission is bound by the statement and may not controvert the statement on trial or appeal. . . . In considering whether a statement is a judicial admission, the courts are to determine if giving 'conclusive effect to the statement [is] consistent with public policy upon which the rule is based.' To be a judicial admission a statement must be a deliberate, clear, and unequivocal statement of a party about a concrete fact within that party's knowledge. If the statement is equivocal it does not qualify as a judicial admission." Strouse v. K-Tek, Inc., 129 Idaho 616, 618-619 (Ct. App. 1997).

Deann was very clear and unequivocal in the post trial proceedings that the Trial Court erred in awarding unjust enrichment damages in excess of $130,136.14 because she admits that she presented no evidence to support an unjust enrichment claim for anything more than $130,136.14. She is in no position now to claim that she is entitled to unjust enrichment damages in excess of $130,136.14 for a tax savings issue that never was raised at trial.

3. Even If the Issue Was Raised at the Trial Issue, and Even If Deann Had Introduced Evidence to Support this Claim, Any Tax Savings That Clarence Incurred Were a Form of Rent.

Deann admitted in Defendants' Exhibit KK that she paid the "entire tax bill on #8600 in exchange for the use of the land. **We will continue to do improvements on the 255 acres in exchange for use of [Clarence's] the land and equipment**, dad as he is retired. We [Deann and her husband] claim the farm income & expenses on our taxes, starting in year 2013." R Vol.

II, p. 1115 (bolded emphasis added). And the Trial Court, referencing Defendants' Exhibit KK, noted that Deann's "statement and the corresponding use of the land for raising hay for Plaintiff's cattle or for sale by Plaintiff presents a quid pro quo arrangement (paying taxes for use of land and equipment) which prevents application an unjust enrichment or quantum meruit recovery." R Vol. I, pgs. 376-377. "Recovery cannot be had for unjust enrichment where there is an [enforceable] express contract covering the same subject matter." Thomas v. Thomas, 150 Idaho 636, 643 (2011).

All of the work and improvements that were performed by Deann were at her own initiative and intended for her own personal benefit. She has admitted that her father was retired and that she was undertaking the improvements and incurring costs as in-kind rent for her use of her father's land and equipment. She has admitted that she failed to provide any evidence at trial to sustain an award of more than $130,136.14. She has also failed to specifically demonstrate how the Trial Court abused its discretion and has failed to provide a complete record on appeal. For all of those reasons, her appeal should be dismissed.

E. The Estate and the Trust are entitled to an award of their attorneys fees on appeal pursuant to Idaho Code § 12-121.

> "The Kings and the Lows request attorney fees pursuant to Idaho Code section 12-121. Idaho Code section 12-121 states, '[i]n any civil action, the judge may award reasonable attorney's fees to the prevailing party or parties when the judge finds that the case was brought, pursued or defended frivolously, unreasonably or without foundation.' I.C. § 12-121. 'Such circumstances exist when an appellant has only asked the Appellate Court to second-guess the Trial Court by reweighing the evidence or has failed to show that the Trial Court incorrectly applied well-established law.' 'Ordinarily, attorney fees

> will not be awarded where the losing party brought the appeal in good faith and where a genuine issue of law was presented.'
>
> "Both the Kings and the Lows argue that they are entitled to attorney fees under Idaho Code section 12-121 because the Fuquays have done nothing more than assert the same arguments that failed before the district court, without adding significant analysis or authority. They are correct. '[A]ttorney fees on appeal have been awarded under Section 12-121 when appellants failed to add any new analysis or authority to the issues raised below that were resolved by a district court's well-reasoned authority.'This Court has awarded fees under Section 12-121 when an appellant presents 'substantially the same arguments on appeal as it did before the district court on judicial review and failed to add significant new analysis or authority to support its arguments.'"

Fuquay v. Low, 162 Idaho 373, 397 P.3d 1132, 1138 (2017)

> "'Under I.C. § 12-121, attorney fees are awarded to the prevailing party if the court is left with the belief that the proceeding was brought, pursued or defended frivolously, unreasonably, or without foundation.' Further, 'Under I.C. § 12-121, a party is entitled to attorney's fees if the appeal merely invites the appellate court to second guess the trial court on the weight of evidence.'

Strong v. Intermountain Anesthesia, P.A., 160 Idaho 27, 33 (2016).

In this matter, Deann is merely re-hashing her Trial Court arguments to have the Appellate Court second guess the Trial Court based upon an incomplete appellate record and she is further attempting to introduce a "tax savings" issue that was never raised in the pleadings or at trial.

Through out this litigation, Deann has thumped the quantum meruit drum - its been a single monotonous note with no melody. In her post trial Closing Brief she insists that quantum meruit is applicable in this matter because Clarence knew of the work. Period. R Vol. I, p. 346 ("The fact that he [Clarence] knew that Deann was doing it is enough to entitle her to make a

claim in quantum meruit"). In her Motion for Reconsideration, she reiterates this single note with no elaboration. R Vol. I, p. 382 ("Prior Idaho precedent cited in Deann's closing brief establishes that the owner of the property . . . only be aware that it was being done"). And, again, in her Plaintiff's Corrected Memorandum in Support of Motion for Reconsideration as to Document Title Only. R Vol. I, p. 386 ("Prior Idaho precedent cited in Deann's closing brief establishes that the owner of the property . . . only be aware that it was being done"). And yet again in her Plaintiff's Amended Memorandum in Support of Motion for Reconsideration. R Vol. I, p. 392 ("Prior Idaho precedent cited in Deann's closing brief establishes that the owner of the property . . . only be aware that it was being done"). And yet again in her Plaintiff's Reply to Defendant's Objection to Plaintiff's Motion for Reconsideration. R Vol. I p. 424 ("A case for quantum meruit only requires a showing that the owner of the property know that the work is being done").

In response to this single note argument, the Trial Court stated:

> "And the Court, again, looked at the issues, specifically this -- the issues of quantum meruit and unjust enrichment, and which equitable remedy most fits this situation. After looking at it all, the Court will stand by its decision to apply the equitable remedy of unjust enrichment in this matter.
>
> "The Court based its decision on the substantial evidence presented at trial. The Court is also free in a court trial to find reasonable inferences from the evidence . . .
>
> "**I found the plaintiff's [Deann's] argument novel in this matter, not that I didn't pay attention to it, and I looked at it, but I could not – the Court did not come to the conclusion that it erred in applying unjust enrichment as the equitable remedy in this case**. . . . The Court did not find from the evidence presented that any reasonable or any reasonable inferences that the plaintiff [Deann] should be compensated under a theory of – under a theory of unjust enrichment nor any other theory for other

> claimed damages such as the forestry work the fencing work, or the farming work, and therefore Plaintiff's motion is denied."

T Vol. I, p. 12, L. 3 - T Vol I, p. 13, L. 16 (bolded emphasis added) (March 20, 2018, Motion for Reconsideration).

Now on appeal, and without any effort to elaborate on her one note argument, Deann is making the same identical argument that she made throughout the trial proceedings, that "Idaho precedent holds that the person receiving the benefit of work need only know that it is occurring for quantum meruit to apply" Appellant's Opening Brief, p. 5. An award of attorneys fees pursuant to Idaho Code § 12-121 is appropriate "when an appellant presents 'substantially the same arguments on appeal as it did before the district court on judicial review and failed to add significant new analysis or authority to support its arguments.'" Fuquay v. Low, 162 Idaho 373, 397 P.3d 1132, 1138 (2017). That is what Deann has done with this appeal, merely re-hash the argument that Clarence knew of the work so she is automatically entitled to quantum meruit damages, end of story. She does not make any effort to explain why the fact that she was the direct and intended beneficiary of the work is not a relevant factor for the Trial Court "balancing" the parties' equities for the application of an equitable remedy. Clayson v. Zebe, 153 Idaho 228, 280 P.3d 731, 735 (2012). She makes no effort to demonstrate to the Appellate Court that she established a prima facie case for an implied-in-law contract. In Re Estate of Boyd, 134 Idaho 669, 673 (App. 2000) . And she has also failed to demonstrate to the Appellate Court how the Trial Court abused is discretion in its resolution of a factual issue relating to the application of an

equitable remedy. West Wood Investments, Inc. v. Acord, 141 Idaho 75, 82 (2005). Nope, none of that. Just the one note thump that Clarence knew that Deann was doing the work so quantum meruit applies - never mind that Clarence did not request her to do the work and that she pocketed all of the money.

Not only is she re-hashing her arguments, she is merely asking the Appellate Court to second guess the Trial Court based upon an incomplete record. Based upon what is before the Appellate Court, the Trust and the Estate are entitled to an award of their attorneys fees on appeal pursuant to Idaho Code § 12-121.

III. CONCLUSION.

Based upon the foregoing, the Trial Court's decision should be affirmed and the Estate and the Trust should be awarded their attorneys fees on appeal pursuant to Idaho Code § 12-121.

Dated October 31, 2018.

HOLMES LAW OFFICE, P.A.

/s/
By: Edwin B. Holmes, Attorney for
the Trust and the Estate

CERTIFICATE OF SERVICE

I, EDWIN B. HOLMES, a resident attorney of the State of Idaho (ISB No. 4668), do hereby certify that on October 31, 2018 I served, or caused to be served, a true and correct copy of the foregoing document upon the following person as indicated:

ARTHUR M. BISTLINE
BISTLINE LAW PLLC
iCOURT: service@bistlinelaw.com
[x] iCOURT

/s/
_____
EDWIN B. HOLMES