

1990

# Vivian M. Scheller and Steven D. Tollstrup v. Dixie Six Coporation : Brief of Appellee

Utah Court of Appeals

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Walter P. Faber; Attorneys for Plaintiff/Appellee.

Craig G. Adamson; Eric P. Lee; Dart, Adamson and Kasting; David Wahltquist; Kirton, McConkie and Poelman; Attorneys for Defendant/Appellant.

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900392CA

Case No. 900392-CA

Priority 16

APPEAL FROM THE JUDGMENT OF THE  
THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY  
THE HONORABLE LEONARD H. RUSSON, PRESIDING

Attorneys for Plaintiffs/Appellees

DAVID WAHLQUIST  
60 East South Temple, Suite 1800  
Salt Lake City, UT 84111  
Telephone: (801) 328-3600

**FILE**

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES . . . . .	(ii)
STATEMENT OF ISSUES AND NATURE OF PROCEEDINGS . . . . .	1
STATEMENT OF ISSUES PRESENTED FOR REVIEW AND APPLICABLE STANDARD OF REVIEW . . . . .	2
STATEMENT OF THE CASE . . . . .	2
STATEMENT OF THE FACTS . . . . .	3
SUMMARY OF ARGUMENTS . . . . .	6
ARGUMENT	
I.    AS REQUIRED BY THE LAW OF THE CASE ESTABLISHED BY THIS COURT'S EARLIER OPINION, THE TRIAL COURT CORRECTLY REFUSED TO REINTERPRET THE AGREEMENT. . . . .	7
II.   THE TRIAL COURT CORRECTLY CALCULATED THE AMOUNT DIXIE WAS ENTITLED TO RECEIVE FOR ITS SERVICES UNDER QUANTUM MERUIT AS REQUIRED BY THIS COURT'S PRIOR OPINION. . . . .	9
CONCLUSION . . . . .	11
CERTIFICATE OF MAILING . . . . .	12
ADDENDUM . . . . .	13
A.    JUDGMENT OF TRIAL COURT ON REMAND	
B.    DEFENDANT'S EXHIBIT 19	
C. <u>Scheller v. Dixie Six Corporation</u> , 753 P.2d 971 (Utah App. 1988).	
D. <u>Davies v. Olson</u> , 746 P.2d 264 (Utah Ct. App. 1987)	

## TABLE OF AUTHORITIES

<u>CASES:</u>	<u>PAGE</u>
<u>C &amp; J Industries, Inc. v. Bailey</u> , 669 P.2d 855 (Utah 1983). . . . .	7
<u>Conder v. A. L. Williams &amp; Associates, Inc.</u> , 739 P.2d 634 (Utah App. 1987). . . . .	7
<u>Corbett v. Fitzgerald</u> , 709 P.2d 384 (Utah 1985) . .	7
<u>Davies v. Olson</u> , 746 P.2d 264 (Utah Ct. App. 1987).	9
<u>Major v. Benton</u> , 647 F.2d 110 (10th Cir. 1981). . .	7
<u>Ron Case Roofing and Asphalt Paving, Inc. v.</u> <u>Blomquist</u> , 773 P.2d 1382 (Utah 1987) . . . . .	2
<u>Scheller v. Dixie Six Corporation</u> , 753 P.2d 971 (Utah App. 1988) . . . . .	4, 9
<u>Searle v. Allstate Life Ins. Co.</u> , 676 P.2d 1308 (Cal. 1985). . . . .	7
<u>White v. Murtha</u> , 377 F.2d 428 (5th Cir. 1967) . . .	7

IN THE COURT OF APPEALS FOR THE STATE OF UTAH

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VIVIAN M. SCHELLER and	)	
STEVEN D. TOLLSTRUP,	)	
	)	Case No. 900392-CA
Plaintiffs/Appellees,	)	
	)	Priority 16
vs.	)	
	)	
DIXIE SIX CORPORATION,	)	
	)	
Defendant/Appellant.	)	

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STATEMENT OF JURISDICTION AND NATURE OF PROCEEDINGS

The Court of Appeals of Utah has jurisdiction of this appeal under §78-2a-3(2)(j) (U.C.A. 1986). This is a matter assigned to the Court of Appeals by the Supreme Court and principally involves a question whether the prior interpretation of a contract by this Court in an earlier appeal of this case became the law of the case and therefore foreclosed a different interpretation of the contract by the trial court on remand. Upon remand, the trial court refused Dixie's request to reinterpret the contract but instead followed this Court's mandate in the earlier decision to determine the value of Dixie's non-sale efforts under quantum meruit. In this appeal Dixie asserts that the trial court improperly refused to reinterpret the contract and improperly calculated under quantum meruit the amount the trial court awarded for Dixie's non-sale efforts under an implied in fact contract.

STATEMENT OF ISSUES PRESENTED FOR REVIEW  
AND APPLICABLE STANDARD OF REVIEW

Although Dixie's brief states three issues, the first two appear to be substantially included within the question concerning the scope of the law of the case doctrine. It is submitted that the following two issues include all substantive questions on appeal.

I. WHETHER THE TRIAL COURT, AS REQUIRED BY THE LAW OF THE CASE ESTABLISHED IN THIS COURT'S PRIOR OPINION, CORRECTLY REFUSED TO REINTERPRET THE PARTIES' AGREEMENT.

Applicable Standard of Review: Lower court judgments rendered as a matter of law are subject to appellate review without giving deference to the lower court's conclusion. Ron Case Roofing and Asphalt Paving, Inc. v. Blomquist, 773 P.2d 1382 (Utah 1987).

II. WHETHER THE TRIAL COURT CORRECTLY CALCULATED THE AMOUNT DIXIE WAS ENTITLED TO RECEIVE FOR ITS SERVICES UNDER QUANTUM MERUIT AS REQUIRED BY THIS COURT'S PRIOR OPINION.

Applicable Standard of Review: Lower court judgments rendered as a matter of law are subject to appellate review without giving deference to the lower court's conclusion. Ron Case Roofing and Asphalt Paving, Inc. v. Blomquist, 773 P.2d 1382 (Utah 1987).

STATEMENT OF THE CASE

Dixie's appeal herein follows a trial on remand required by this Court's prior decision solely to determine under quantum meruit the value of Dixie's non-sale services under an implied in fact contract. At the remand trial the

trial court determined that it was subject to the law of the case established by this Court and refused to reinterpret the parties' agreement which had been extensively reviewed by this Court in its earlier decision. After receiving conflicting evidence from the parties concerning the value in quantum meruit of Dixie's non-sale efforts, the trial court found that Dixie was entitled to receive \$36,000 for such efforts.

#### STATEMENT OF THE FACTS

1. In March, 1980 Scheller entered into a written agreement wherein Dixie agreed to subdivide, develop and market Scheller's property. (R. 72)

2. Thereafter, in a single sale Dixie sold the entire property without subdividing or developing but claimed that Dixie was nonetheless entitled to one-half of the "profits" under the agreement. (R. 3)

3. Scheller then commenced this action to prevent such allocation because Dixie had not subdivided and developed the property. (R. 2)

4. After the lower court ruled for Dixie in 1985, Scheller appealed to the Utah Supreme Court which assigned the appeal to this Court. (R. 129, 139)

5. On appeal, this Court extensively reviewed the parties' agreement, and then affirmed the trial court's award to Dixie of a sales commission of \$72,600 and out-of-pocket expenses of \$77,761 under the agreement but reversed in regard to the allocation of on of the "profits" to Dixie because

Dixie had not subdivided, developed and marketed the property and remanded solely for determination of the value and award in quantum meruit for Dixie's non-sale services. (R. 330) Scheller v. Dixie Six Corporation, 753 P.2d 971 (Utah App. 1988).

6. Following this Court's earlier decision, Dixie petitioned the Utah Supreme Court for a writ of certiorari which was denied. (R. 431 T. Vol. I 156)

7. Thereafter, in the trial on remand, Judge Russon refused Dixie's request to reinterpret the agreement on the ground that he was subject to the law of the case established by this Court's decision to remand solely to determine the value under quantum meruit of Dixie's non-sale efforts. (R. 431, T. Vol. I, p. 156)

8. Byron Parker (R. 431, T. Vol. I, p. 15), Jerry Webber (R. 431, T. Vol. I, p. 113), and Richard Moffit (R. 431, T. Vol. I, p. 148) testified for Dixie at the remand trial as to the value of Dixie's non-sale efforts.

9. Mr. Parker, Dixie's project manager, testified that he kept no records of the time he spent on the partnership's project or specifically the conditional use permit. He also admitted that the R-M zoning had previously been obtained by Scheller and not by Dixie and that the Buyer of the property, Busch Development, did not use the plans or the conditional use permit obtained by Dixie but Busch obtained its own plans and



conditional use permit. (R. 431, See T. Vol. I, pp. 68, 71-72, 75-78).

10. Mr. Webber, Dixie's real estate expert, admitted he did not know how long it would take or how much it would cost to obtain a conditional use permit. He also admitted he did not know what its value would be. (R. 431, T. Vol. I, pp. 133, 142).

11. Mr. Moffit, Dixie's development expert, testified that he did not know how much time Dixie spent in obtaining plans and governmental approval for a conditional use permit. (R. 432, T. Vol. II, p. 24).

12. Scheller's development expert, Mr. Charles Davis, testified that the efforts performed by Dixie are typically not calculated separately but are usually included as a portion of the services rendered in earning the sales commission on the sale. He also testified that any additional efforts in obtaining a conditional use permit should have taken only 20 to 40 hours and would have been charged out in the period 1980 to 1982 at the rate of \$50.00 to \$75.00 an hour. (R. 432, T. Vol. II, pp. 48-49).

13. After taking conflicting evidence from both parties Judge Russon determined that the value of Dixie's non-sales efforts in quantum meruit was \$36,000 and that Scheller should receive the balance of the sale proceeds claimed by Dixie. (R. 416).

14. Dixie kept \$301,439.52 as its share of the "profits" in addition to the expenses of \$77,026.11 and a sales commission of \$72,600.00. (Defendant's Exh. 19).

15. Under Judge Russon's order, Scheller is entitled to receive the balance of the sales proceeds; \$301,439.52 plus interest thereon less the \$36,000.00. (R. 416)

16. Dixie appealed Judge Russon's decision to the Utah Supreme Court which again assigned the case to this Court. (R. 418)

#### SUMMARY OF ARGUMENTS

This Court's earlier, express and extensive opinion interpreting the parties' written agreement became the law of the case which controls all subsequent proceedings in the case in that regard. Dixie is not entitled to have this Court reinterpret the agreement in Dixie's favor.

The application of quantum meruit in this case requires that there be a review of past services to determine their reasonable market value without reference to what the parties might theoretically have agreed as to the value of such services prior to the time the services were rendered. The trial court correctly applied quantum meruit under the situation of an implied in fact contract.

## ARGUMENT

I. AS REQUIRED BY THE LAW OF THE CASE ESTABLISHED BY THIS COURT'S EARLIER OPINION, THE TRIAL COURT CORRECTLY REFUSED TO REINTERPRET THE AGREEMENT.

The prior express interpretation of the written agreement and the ruling by this Court based on such interpretation is the law of the case and is thereafter binding on all subsequent proceedings in this case. See Corbett v. Fitzgerald, 709 P.2d 384 (Utah 1985); C & J Industries, Inc. v. Bailey, 669 P.2d 855 (Utah 1983).

In its brief, Dixie has cited two cases from other jurisdictions, Major v. Benton, 647 F.2d 110 (10th Cir. 1981); and Searle v. Allstate Life Ins. Co., 676 P.2d 1308 (Cal. 1985), to the effect that the law of the case is not "inflexible" and may be disregarded to avoid an unjust result. In both the Major and Searle cases, however, the appellate court determined that the issue was not restricted by the law of the case rule because the issue involved therein was either not considered in the lower court's decision or there had been a misapplication of existing principles by the lower court. Neither of such factors is present in this case.

A widely followed explanation of the law of the case rule is contained in White v. Murtha, 377 F.2d 428 (5th Cir. 1967), a portion of which explanation this Court cited in Conder v. A. L. Williams & Associates, Inc., 739 P.2d 634 (Utah App. 1987). The White decision stated the rule at 377 F.2d 431 as follows:

The "law of the case" rule is based on the salutary and sound public policy that litigation should come to an end. It is predicated on the premise that "there would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions or speculate of chances from changes in its members," and that it would be impossible for an appellate court "to perform its duties satisfactorily and efficiently" and expeditiously "if a question, once considered and decided by it were to be litigated anew in the same case upon any and every subsequent appeal" thereof.

While the "law of the case" doctrine is not an inexorable command, a decision of a legal issue or issues by an appellate court establishes the "law of the case" and must be followed in all subsequent proceedings in the same case in the trial court or on a later appeal in the appellate court, unless the evidence on a subsequent trial was substantially different, controlling authority has since made a contrary decision of the law applicable to such issues, or the decision was clearly erroneous and would work a manifest injustice. (Emphasis added.)

In its earlier published decision in this case this Court expressly interpreted the parties' agreement and discussed at length the question whether Dixie was entitled under the provisions of the agreement to take one-half of the "profits" in spite of the fact that Dixie had not subdivided or developed the property as was required by the agreement.

Because there was a full review of the agreement by this Court in its earlier decision, any further review of the agreement was foreclosed. In addition, this Court remanded only to determine under quantum meruit in regard to a contract implied in fact the reasonable value of Dixie's non-sale efforts. Under those circumstances, the trial court properly refused to reinterpret the parties' agreement under the law of the case doctrine.

II. THE TRIAL COURT CORRECTLY CALCULATED THE AMOUNT DIXIE WAS ENTITLED TO RECEIVE FOR ITS SERVICES UNDER QUANTUM MERUIT AS REQUIRED BY THIS COURT'S PRIOR OPINION.

In reviewing the agreement between the parties, this Court in its earlier decision determined that "no contract existed as to the allocation of proceeds in the event the property was sold undeveloped" and that the conduct of the parties established a contract "implied in fact as to the allocation of the proceeds if the property was sold prior to development." Scheller v. Dixie Six Corp., 753 P.2d 971, 975 (Utah App. 1988).

In its earlier decision, this Court cited its opinion in Davies v. Olson, 746 P.2d 264 (Utah Ct. App. 1987), wherein it explained the measure of damages under quantum meruit in an implied in fact contract situation such as in this case. In Davies, this Court followed the general rule that when the parties have left the amount of the compensation unexpressed, "courts will infer that the parties intended the amount to be the reasonable market value of the . . . services." 746 P.2d at 269.

In its earlier opinion herein, this Court determined that Dixie was entitled to recover in quantum meruit for the reasonable value of its non-sale efforts such as acquiring plans and obtaining governmental approval in anticipation of development. This Court then remanded to the trial court the sole question of determining the value of Dixie's non-sale efforts in that regard.

At the remand trial Dixie's manager acknowledged that Scheller had already obtained the necessary R-M zoning before Dixie was involved. In addition, Busch Development, who purchased the undeveloped property from Dixie, obtained its own conditional use permit and plans. In fact, much of the negotiation for governmental approval for the conditional use permit obtained by Dixie, (which permit was not used by Busch), was performed by independent architectural and engineering firms whose compensation was included in the expenses for which Dixie was paid by Scheller. (R. 431, T. Vol. I, p. 72-73)


On the other side, Scheller's development expert, Charles Davis, testified that the efforts performed by Dixie are typically included in the services performed in earning the sales commission, (which Dixie has also already received). He further testified that any additional efforts in obtaining a conditional use permit, even if arranged to be paid for separately, should have taken only 20 to 40 hours and would have cost \$50.00 to \$75.00 an hour during the period 1980 to 1982.

On the conflicting evidence regarding the market value of Dixie's actual non-sale efforts, the trial court on remand determined that the value of such non-sale efforts was \$36,000. The trial court correctly applied quantum meruit as stated by this Court.

CONCLUSION

The trial court, as required by the law of this case established by this Court in its prior decision, correctly restricted the remand proceedings to a consideration of testimony and evidence regarding the market value of Dixie's non-sale efforts. On disputed evidence, the trial court, as finder of fact, properly applied the doctrine of quantum meruit set forth in this Court's prior opinion in its ruling that the value of Dixie's non-sale efforts was \$36,000. There are no grounds for upsetting the trial court's decision. Moreover, the trial court further held, pursuant to this Court's prior decision, that Scheller is entitled to the balance of the sale proceeds plus interest and Dixie should be ordered to forthwith account for and disburse to Scheller those amounts.

Respectfully submitted this 10<sup>th</sup> day of July, 1991.

  
WALTER P. FABER, JR.

  
RICHARD M. MATHESON

CERTIFICATE OF MAILING

I hereby certify that I caused four true and correct copies of the foregoing to be mailed to Craig G. Adamson and Eric P. Lee, 310 South Main, #1330, Salt Lake City, UT 84101, and to David Wahlquist, 60 East South Temple, Suite 1800, Salt Lake City, UT 84111 this \_\_\_\_\_ day of July, 1991.

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ADDENDUM

- A. JUDGMENT OF TRIAL COURT ON REMAND
- B. DEFENDANT'S EXHIBIT 19
- C. Scheller v. Dixie Six Corporation, 753 P.2d 971  
(Utah App. 1988).
- D. Davies v. Olson, 746 P.2d 264 (Utah Ct. App. 1987)

# JUDGEMENT

WALTER P. FABER, JR. (A1026)  
Attorney for Plaintiffs  
2102 East 3300 South  
Salt Lake City, UT 84109  
Telephone: 486-5634

APR 17 1990

*R. Adamson*

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR THE  
COUNTY OF SALT LAKE, STATE OF UTAH

VIVIAN M. SCHELLER and  
STEVEN D. TOLLSTRUP,

Plaintiffs,

vs.

DIXIE SIX CORPORATION,

Defendant.

2156139  
4-20-90  
JUDGMENT

8:00am

Civil No. 830906862CV

JUDGE LEONARD H. RUSSON

This matter came on for trial on the 21st day of November, 1989, at the hour of 10:00 o'clock a.m. The plaintiffs were represented by Walter P. Faber, Jr. and Richard M. Matheson. Defendant was represented by Craig G. Adamson and John T. Evans.

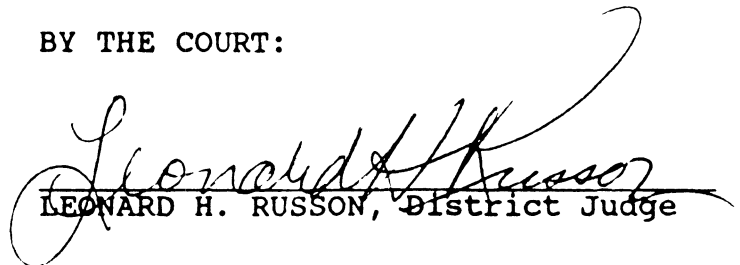
This matter was remanded to this court by the Utah Court of Appeals for the sole purpose of determining the value of the non-sale efforts of the defendant, Dixie Six, the general partner, to the plaintiffs, Scheller and Tollstrup, the limited partners, under a theory of quantum meruit outlined by the Court of Appeals in its decision. The court having reviewed the file, the decision of the Court of Appeals, the evidence submitted and the argument advanced by each of the parties at the trial after remand and having entered its findings and conclusions of law and being fully informed in the matter, and good cause appearing therefor, it is hereby

ORDERED, ADJUDGED, AND DECREED that

Dixie Six be awarded the sum of \$36,000.00 for its non-sale efforts and that Scheller and Tollstrup receive the balance of the sale proceeds plus interest thereon in accordance with the Court of Appeals decision.

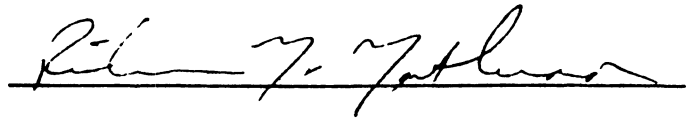
DATED this 17<sup>th</sup> April day of ~~March~~, 1990.

BY THE COURT:

  
LEONARD H. RUSSON, District Judge

CERTIFICATE OF SERVICE

I hereby certify that on the 27<sup>th</sup> day of March, 1990, I caused a true and correct copy of the foregoing to be delivered to Craig G. Adamson and Eric P. Lee, attorneys for defendant, 310 South Main, Suite 1330, Salt Lake City, UT.



# Busch Payments Received by Dipie Sil

Bryson Parker Accounting - 1/13/87

Thru to and including -

To 1/13/87 Total # payments 365,297.56

Craig Davidson Accounting

5/31/88 payment 7,354.25

5/16/89 payment 78,408.82

451,065.63

Bryson Parker Accounting

Dipie Sil Expenses

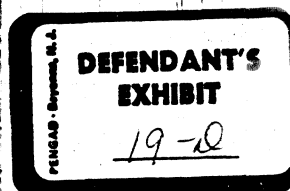
77,026.11

374,039.52

6% Sales Commission

72,600.00

301,439.52



*Corp.*, 618 P.2d at 505. "[I]t cannot be adopted as a general precept of contract law that, whenever one party to a contract can show injury flowing from the exercise of a contract right by the other, a basis for relief will be somehow devised by the courts." *Mann*, 586 P.2d at 464.

The judgment below is reversed. The parties shall bear their own costs on appeal.

GREENWOOD and ORME, JJ.,  
concur.



Vivian M. SELLER and Steven D.  
Tollstrup, Plaintiffs and Appellants,

v.

DIXIE SIX CORPORATION, Defendant  
and Respondent.

No. 860147-CA.

Court of Appeals of Utah.

April 25, 1988.

Limited partners in real estate limited partnership filed suit seeking declaratory judgment limiting general partner to recovery of its expenses plus 6% sales commission for sale of undeveloped partnership property. The Third District Court, Salt Lake County, Dean E. Conder, J., concluded that limited partners were estopped from claiming that general partner had not performed in accordance with partnership agreement, and limited partners appealed. The Court of Appeals, Orme, J., held that: (1) limited partners were not estopped by their actions from asserting that general partner did not perform as provided under agreement; (2) "develop" within meaning of partnership agreement meant build, and agreement did not contemplate sale of property without development; and (3) parties' conduct established contract implied in

fact as to allocation of proceeds if property was sold prior to development, and general partner was entitled to recovery in quantum meruit for reasonable value of its non-sale efforts.

Affirmed in part, reversed and remanded in part.

#### 1. Partnership ¶366

Limited partners in real estate limited partnership, who contended that general partner's right to share equally in profits from sale of property was only triggered if the property was developed, were not estopped from contesting general partner's entitlement to profits upon sale of undeveloped property by virtue of their previous agreement to two minor sales of undeveloped property and to proposed sale which never took place.

#### 2. Partnership ¶366

"Develop," within meaning of real estate limited partnership agreement that provided that purpose of partnership was to develop property, meant build, and division of profits upon sale of property before any building had taken place could not be determined by reference to agreement.

See publication Words and Phrases for other judicial constructions and definitions.

#### 3. Partnership ¶366

Conduct of parties to real estate limited partnership agreement that provided that purpose of partnership was to develop property established contract implied in fact as to allocation of proceeds if property was sold prior to development, and general partner was entitled to recovery in quantum meruit for reasonable value of its non-sale efforts; limited partners requested general partner to perform work of developing property and general partner clearly expected to be compensated for such services, and limited partners knew or should have known that general partner expected compensation beyond sales commission it would receive for just selling property.

Walter P. Faber, Jr., Watkins & Faber, Salt Lake City, for plaintiffs and appellants.

Craig G. Adamson (argued), Mark A. Larsen, Lawrence K. Hurless, Dart, Adamson, and Parken, Salt Lake City, for defendant and respondent.

Before BILLINGS, GARFF, and ORME, JJ.

### OPINION

ORME, Judge:

Appellants Scheller and Tollstrup appeal from a judgment awarding defendant Dixie Six Corporation what they contend is an excessive distribution pursuant to a limited partnership agreement between the parties. We reverse in part and remand.

### Facts

Vivian Scheller and her son Steven Tollstrup ("Scheller"), owned approximately twenty-four acres of property in Salt Lake County which they intended to have developed to produce long-term income. In the spring of 1979, Mrs. Scheller approached Hal Larsen, an officer of Dixie Six Corporation, about working with her and her son to develop the property. On March 3, 1980, the parties formed a limited partnership known as D.S.T., Ltd., with Dixie Six as the general partner and Mrs. Scheller and her son as limited partners. Pursuant to the limited partnership agreement, Dixie Six contributed \$10,000 toward the initial capital and Scheller conveyed the property to D.S.T.

The partnership agreement provided that the purpose of the partnership was to "subdivide, develop and market" the property. The words "subdivide, develop and market" were left undefined. The agreement contained a formula for the allocation of the partnership's receipts, which may be summarized as follows:

- (a) First, to reimburse the actual expenses relative to the subdividing, de-

velopment, improvement and sale of the property,

- (b) Second, to payment to the Limited Partners for the real property, calculated at \$30,000 per acre.
- (c) Third, one-half of the remainder to Dixie Six and one-half of the remainder to the Limited Partners.

In addition, the agreement provided that Dixie Six could charge the partnership a real estate commission not exceeding 6% of the sales price of the property and, further, that Dixie Six had the unqualified right to sell the property at any time.

Following the signing of the agreement, Dixie Six hired Western Design, which began preparing plans, plats, and studies, and sought governmental approval to build an apartment and commercial complex on the site.

In April 1981, D.S.T. sold 1.2 acres of the property to Marvin Hendrickson, an officer and shareholder in Dixie Six, for \$36,000.00 and in February 1982, D.S.T. sold an additional 0.75 acres to Hendrickson. In both transactions, D.S.T. took no sales commission or other distribution and paid all of the proceeds to Scheller.

Once the plans for improvement on the site were completed in the fall of 1982, Dixie Six attempted to get financing for the project but was unsuccessful.<sup>1</sup> During this time, D.S.T. received an offer from P.F. West to purchase the remaining property. Dixie Six sought Scheller's consent to the proposed sale to P.F. West and Scheller consented, but the sale was never completed. Dixie Six subsequently discontinued its efforts to locate and obtain financing. Dixie Six then caused the remaining partnership property to be sold to Busch Development on June 30, 1983, for a sum in excess of \$1.2 million.

Prior to the sale of the property, Dixie Six informed Scheller that it intended to divide the proceeds from the sale according to the formula set forth in the partnership financing.

1. Articles IV and XIV of the agreement required Dixie Six, as one of its obligations, to obtain

agreement.<sup>2</sup> Scheller objected to allocation of the proceeds on that basis. The sale was concluded without the allocation issue having been resolved. On September 23, 1983 Scheller filed suit in district court seeking a declaratory judgment limiting Dixie Six to the recovery of its expenses plus the 6% sales commission for the sale of the property and to prohibit Dixie Six from sharing in the profit of the sale as set forth in the partnership agreement.

The trial court found that the partnership agreement did not define the words "subdivide, develop, and market" and concluded that Dixie Six did not violate the agreement by selling the property. The court also concluded that Scheller was estopped from claiming that Dixie Six had not performed in accordance with the contract because Scheller had knowledge of, and in fact acquiesced and approved of, all sales of the property. In addition, the court found that it would be inequitable to allow Scheller to accept the efforts of Dixie Six without allowing Dixie Six to recover as provided in the contract. Since the parties had expressly provided no alternative method of compensating Dixie Six for its services, the court found the formula as set forth in the partnership agreement to be enforceable.

Scheller argues that Dixie Six was not entitled to a full share of the profits from the sale of the property because it sold the property without "developing" it as required by the agreement. Scheller acknowledges that, while Dixie Six had the unqualified right to sell the property at any time, a right Scheller contends was given primarily for tax purposes, it had the obligation to "subdivide, develop and market" the property. Thus, Dixie Six's right to share in the proceeds according to the formula set forth in the agreement was contingent upon its fulfilling its obligation to "subdivide, develop and market" the property.

The trial court did not reach the issue of the meaning of the term "develop" as used

in the agreement because it determined that Scheller was "estopped" from taking the position that Dixie Six had not performed as provided in the contract. We find Scheller's conduct does not constitute estoppel.

#### Estoppel

[1] The elements of estoppel are: "conduct by one party which leads another party, in reliance thereon, to adopt a course of action resulting in detriment or damage if the first party is permitted to repudiate his conduct." *Barnes v. Wood*, 750 P.2d 1226, 1230, (Utah Ct.App. 1988) (quoting *Blackhurst v. Transamerica Ins. Co.*, 699 P.2d 688, 691 (Utah 1985)). The trial court concluded that appellants were estopped from asserting that Dixie Six could not sell the property unless it was "developed" because Scheller had knowledge of, acquiesced in, and approved of the two minor sales of property to Marvin Hendrickson and the proposed sale to P.F. West, all without any development having taken place. However, the trial court's conclusion confuses Scheller's position concerning sale of the property with Scheller's position concerning the allocation of proceeds upon sale.

Scheller has not asserted that Dixie Six could not sell the property unless it was "developed" as anticipated under the agreement but only that Dixie Six was not entitled to a full share of the proceeds for the sale of property unless it satisfied its obligations under the contract. Scheller's approval of the first two sales of property do not constitute an estoppel from objecting to the allocation of proceeds from the Busch sale for two reasons. First, the earlier sales of property, combined, constituted only 1.95 acres out of the total 24 acres owned by D.S.T. and involved land that was never intended for development. Second, Dixie Six took no sales commissions on these transactions and paid all the proceeds to Scheller. Therefore, Scheller

rather than the 6% provided in the agreement.

2. In their complaint, Scheller also claimed that Dixie Six had demanded a commission of 19%

had no reason to complain about the allocation of proceeds.

Nor can Scheller's approval of the proposed P.F. West sale form the basis of an estoppel from objecting to the allocation of proceeds from the Busch sale. The P.F. West sale was never completed and there were no proceeds to allocate. Thus, Scheller's failure to object to the allocation of proceeds from two sales in which Dixie Six took no proceeds and one proposed sale which never reached the point of allocation, is not conduct that could reasonably lead Dixie Six to believe that Scheller would not object to its claiming a full share of proceeds in the event of a consummated sale of undeveloped property. Any uncertainty in this regard was resolved when, nearly two months prior to closing of the Busch sale, Scheller's counsel wrote Dixie Six objecting to use of the agreement's formula for allocating sale proceeds if the property were sold undeveloped.

We hold that the trial court erred in concluding that Scheller was estopped by its own actions from asserting that Dixie Six did not perform as provided in the contract. Because the trial court decided the case on a theory of estoppel, it was not necessary for it to reach what we view as the pivotal issue in this case, namely the meaning of the term "develop" as used in the agreement. Since we find that Scheller's conduct did not give rise to an estoppel, the exact meaning of the term is critical.

*"Subdivide, Develop and Market"*

[2] Generally, the term "develop," when used in connection with real estate, is interpreted to mean "the converting of a tract of land into an area suitable for residential or business uses." *Prince George's County v. Equitable Trust Co., Inc.*, 44 Md.App. 272, 408 A.2d 781, 742 (1979). *Accord, Muirhead v. Pilot Properties, Inc.*, 258 So.2d 282, 283 (Miss.1972). Similarly, the word "developer," in common parlance, means "a person who develops real estate;

often: one that improves and subdivides land and builds and sells residential structures thereon." Webster's Third New International Dictionary 618 (1986).

The parties' agreement states in Article II that the purpose of the partnership is to "subdivide, develop, and market" the property. The use of these terms, or some variation, throughout the agreement, is consistent with the interpretation that "develop" means to build. For example, Article VI, with our emphasis, states as follows:

In addition thereto, Dixie shall contribute its expertise for the purpose of subdividing, developing and marketing the property; shall provide or obtain all *equipment, machinery* and personnel necessary for such subdivision, development and marketing; and shall obtain the necessary and sufficient *financing* for such subdivision, development and marketing, *using the property as security* thereof.

Viewing the contract as a whole, we would have little difficulty in concluding, as a matter of law, that the term "develop" as used in this agreement means "build."<sup>3</sup> Equipment, machinery, and secured lending suggest construction, not the mere planning, surveying, studying, and appraising which Dixie Six contends satisfied the obligation to "develop" the property. However, even if there is some ambiguity concerning what the parties intended when using the term "develop," the evidence compels the conclusion that the parties intended to mean "build." The formula allocating a full 50% of the net proceeds to Dixie Six is itself indicative of that result. If all Scheller anticipated was the sale of the property, it would have hired a real estate agent and paid the standard real estate commission. Common sense dictates that one does not offer someone *half* of the net profit on the sale of property for simply serving as an agent to sell property.

More importantly, the prior discussions and negotiations between the parties and their course of conduct assumed actual

3. Assuming that "develop" means "build," uncertainty remains as to what was to be built: a church, a race track, homes, a laundromat, or

even roadways, curbs, and gutters? Such uncertainty is inconsequential in adjudicating the parties' rights where nothing whatever was built.



building on the property. The trial court found that Dixie Six sought government approval for "the building of an apartment and commercial complex on the site." The court also found that prior to forming the partnership, the parties met on the site of the property and "discussed possible types and configurations of buildings which might fit on the land."

The parties' agreement contemplated the development of the property and did not anticipate the sale of the property undeveloped. Accordingly, the payment formula was premised on the sale of developed property. So certain were the parties that the property would be developed that they never contemplated a formula for the allocation of proceeds in the event of a sale of undeveloped property. Thus, there was simply no agreement between the parties as to the allocation of proceeds in the event that Dixie Six failed to develop the property as required by the agreement.

Absent a meeting of the minds on how to divide the proceeds in the event of sale without development, Dixie Six has no clear contractual right to recover anything in excess of the agreed commission and expense reimbursement. Nonetheless, Scheller concedes that Dixie Six may be entitled to some sort of equitable remedy.

#### *Quantum Meruit*

The trial court, considering it had no alternative method of compensation, determined it had to either award Dixie Six no additional compensation whatsoever or a full 50% of the profit from the sale of the property. It chose the latter rather than leave Dixie Six uncompensated for its efforts. While we agree with the trial court that it would be unfair to allow Scheller to profit from the work done by Dixie Six in anticipation of development, we do not agree that the only alternative is to give Dixie Six a 50% share of the net proceeds from the sale.

When a party, for some reason, is not entitled by the express terms of a contract to recover payment for services rendered, he or she might nonetheless be entitled to recover in quantum meruit. *Davies v. Ol-*

*son*, 746 P.2d 264, 268 (Utah Ct.App.1987). Recovery under quantum meruit presupposes that no enforceable contract exists. *Id.* In this case, while the parties entered into a contract, no contract existed as to the allocation of proceeds in the event the property was sold undeveloped.

Quantum meruit has two distinct branches, both rooted in justice to prevent one party's enrichment at the other's expense. *Id.* at 269. The first branch, contract implied in law or "quasi-contract," is really not a contract at all, but rather an action in restitution. *Id.* "The elements of a quasi-contract, or a contract implied in law are: (1) the defendant received a benefit; (2) an appreciation or knowledge by the defendant of the benefit; (3) under circumstances that would make it unjust for the defendant to retain the benefit without paying for it." *Id.* Recovery under quasi-contract or contract implied in law is measured by the value of the benefit conferred on the defendant and not by the detriment incurred by the plaintiff or, necessarily, the reasonable value of the plaintiff's services. *Id.*

The second branch of quantum meruit, contract implied in fact, is an actual contract established by conduct. *Id.* The elements of a contract implied in fact are: (1) the defendant requested the plaintiff to perform the work; (2) the plaintiff expected the defendant to compensate him or her for those services; and (3) the defendant knew or should have known that the plaintiff expected compensation. *Id.* Recovery in such cases is for the amount the parties can be said to have reasonably intended as the contract price. When the parties have left that amount unexpressed, courts will infer the amount to be the reasonable value of the plaintiff's services. *Id.*

[3] The conduct of the parties in this case established a contract implied in fact as to the allocation of proceeds if the property was sold prior to development. Scheller requested Dixie Six to perform the work of developing the property which necessarily involved the work of preparing plans, plats, and studies and securing governmental approval for construction on the site. Likewise, Dixie Six clearly expected

to be compensated for these services. Finally, Scheller knew or should have known that Dixie Six expected compensation for these services beyond the 6% sales commission it would receive for just selling the property.

It is reasonably clear that, in agreeing to the payment formula prescribed in the agreement, the parties contemplated that Dixie Six's 6% commission, a standard commission rate in the real estate industry, would compensate it for its efforts in marketing the property while the 50% share in the net profits would reward it for its efforts in subdividing and developing the property. Thus, if there had been a mere sale, 6% of the selling price would represent an appropriate allocation to Dixie Six. However, while it cannot be said that Dixie Six satisfied its obligation to develop the property, the trial court nonetheless found that Dixie Six had expended efforts which enhanced the property, including acquiring plans for development of the property and obtaining governmental approval for development in accordance with the plans. As explained above, Dixie Six is entitled to a recovery in quantum meruit for the reasonable value of its non-sale efforts.

Accordingly, we affirm the judgment insofar as it awards Dixie Six the reimbursement of its expenses and a sale commission of 6%. The judgment is reversed insofar as it also allowed Dixie Six 50% of the net sale profits, with remand for a determination of the amount of additional compensation to which Dixie Six is entitled under a theory of quantum meruit. The parties shall bear their own costs of appeal.

BILLINGS and GARFF, JJ., concur.



STATE of Utah, Plaintiff and Appellant,

v.

Curtis OWENS, Defendant and Respondent.

No. 870342—C.A.

Court of Appeals of Utah

April 29, 1988.

Defendant was convicted in the Fourth District Court, George E. Ball, J., of theft of rented property, but the court granted new trial. The State appealed. The Court of Appeals, Jackson, J., held that State could not appeal order granting new trial.

Appeal dismissed.

#### 1. Criminal Law §-975

Motion for new trial generally is permitted for correcting errors made in trial court, or for reviewing conviction obtained by unfair or unlawful methods.

#### 2. Criminal Law §-919(1)

Witness intimidation by prosecutor can warrant new trial if it resulted in denial of defendant's right to fair trial. U.C.A.1953, 77-35-24(a).

#### 3. Criminal Law §-1024(7)

In granting a new trial, trial court did not, in substance, grant arrest of judgment, but looked beyond record to prosecutor's and witness' affidavits and found improper prosecutorial behavior warranting new trial, and State could not appeal from such order. U.C.A.1953, 77-35-26.

David L. Wilkinson, Atty. Gen., David B. Thompson, Asst. Atty. Gen., Salt Lake City, for the State.

Before JACKSON, BENCH and BILLINGS, JJ.

Ron DAVIES and Dan Mehr, dba  
Davies & Mehr Construction,  
Plaintiffs and Respondents,

v.

Timothy R. OLSON, William S. Lund,  
Wasatch Bank, Utah Valley Bank, and  
Household Finance Corporation, De-  
fendants and Appellants.

Ron DAVIES and Dan Mehr, dba  
Davies & Mehr Construction,  
Plaintiffs and Appellants,

v.

Timothy R. OLSON, William S. Lund,  
Wasatch Bank, Utah Valley Bank, and  
Household Finance Corporation, De-  
fendants and Respondents.

Nos. 860145-CA, 860146-CA.

Court of Appeals of Utah.

Nov. 24, 1987.

Construction company brought action against owners seeking recovery for services in constructing duplexes. The Fourth District Court, Utah County, Robert J. Bullock, J., found in favor of construction company, and both parties appealed. The Court of Appeals, Billings, J., held that: (1) there was no enforceable written or oral contract absent meeting of minds as to contract price; (2) owners were not denied due process due to fact that judgment was based on quantum meruit, theory which was not pled; and (3) statutory interest was calculable from date on which owner signed settlement statement used for closing on financing.

Affirmed in part, reversed in part and remanded.

#### 1. Contracts ¶29(3)

Finding that there was no enforceable written or oral contract between owner and contractor was supported by evidence that parties did not agree on contract price and that contractor never signed proposed contract.

#### 2. Accord and Satisfaction ¶4

Settlement statement fixing sale under construction contract which was used for closing on financing did not constitute "executory accord," because there was no meeting of the minds.

#### 3. Trial ¶6(1)

Hearing in civil action must be prefaced by timely notice which adequately informs parties of specific issues they must be prepared to meet.

#### 4. Pleading ¶427

Issues not expressly raised in pleadings may be tried by implied consent of parties.

#### 5. Constitutional Law ¶310

Proof of quasi-contract under allegation of breach of express contract does not violate due process, absent surprise or prejudice. U.S.C.A. Const.Amend. 14.

#### 6. Constitutional Law ¶310

##### Pleading ¶427

Defendants in breach of contract action were not denied due process due to trial court's award of damages based on unpled theory of quantum meruit, where supplemental hearing focused on plans and specifications underlying cost breakdown under construction contract, and on additional costs plaintiffs incurred because of defendant's requested changes in specifications. U.S.C.A. Const.Amend. 14.

#### 7. Appeal and Error ¶1178(6)

In contractor's action to recover for costs incurred in constructing duplexes, judgment which awarded contractor damages based on theory of quantum meruit, but which gave owner credit for prior judgment based on initial cost breakdown was inconsistent, and required remand for determination of damages under quantum meruit.

#### 8. Implied and Constructive Contracts ¶55

Recovery under quantum meruit presupposes that no enforceable written or oral contract exists.

9. Implied and Constructive Contracts  
⇐2

Elements of "quasi-contract," or contract implied in law, are: defendant received benefit; appreciation or knowledge by defendant of benefit; under circumstances that would make it unjust for defendant to retain benefit without paying for it.

See publication Words and Phrases for other judicial constructions and definitions.

10. Implied and Constructive Contracts  
⇐110

Measure of recovery under quasi-contract, or contract implied in law, is value of benefit conferred on defendant, and not detriment incurred by plaintiff, or necessarily reasonable value of plaintiff's services.

11. Contracts ⇐27

Elements of "contract implied in fact" are: defendant requested plaintiff to perform work; plaintiff expected defendant to compensate him or her for those services; and defendant knew or should have known that plaintiff expected compensation.

See publication Words and Phrases for other judicial constructions and definitions.

12. Interest ⇐37(1)

Statutory legal rate of interest is applied from date payment is due to judgment date. U.C.A. 1953, 15-1-1.

13. Interest ⇐39(2.30)

Day on which settlement statement was signed which was used at closing on financing for construction project was day that owner acknowledged obligation to pay contractor for services in constructing duplexes, and determination of interest due thus began on that date. U.C.A. 1953, 15-1-1.

Dallas H. Young, Jr., Jerry L. Reynolds, Provo, for defendants and appellants.

Gary D. Stott, Lynn S. Davies, Salt Lake City, for defendants and respondents.

1. The first trial was held on August 2, 1982 and September 13, 1982. The supplemental hearing was held on April 4, 1985, April 10, 1985, and

Before GARFF, ORME and BILLINGS, JJ.

BILLINGS, Judge:

Both parties appeal from the trial court's May 17, 1985 judgment against defendant Olson, purporting to award plaintiffs their reasonable costs (plus interest) incurred in constructing four duplexes for defendants. We affirm the trial court's finding that there was no contract, and the court's conclusion that *quantum meruit* was, therefore, the proper theory of recovery. We, however, reverse the finding of no liability on the part of defendant Lund. We remand for findings as to whether he (1) requested plaintiffs to perform work and if so, to what extent, and/or (2) received any benefits as a result of plaintiffs' construction of the duplexes, and an entry of a judgment consistent with those findings and our opinion. We further reverse the trial court's calculation of damages against defendant Olson and remand for a determination of the reasonable value of plaintiffs' services in constructing the duplexes, and an entry of a judgment in that amount against defendant Olson.

FACTS

The following facts were developed in a bifurcated trial held on five nonconsecutive days over a two-year eight-month period.<sup>1</sup> Plaintiff Davies and defendant Olson orally agreed that Davies would construct four duplexes for Olson. The parties originally agreed that plaintiff Davies would construct the duplexes for "cost plus \$6,000 builder's profit per duplex." Based on this oral agreement, plaintiff Davies prepared a cost breakdown and submitted it to Wasatch Bank for acquisition of long-term financing, and to defendant Olson. Subsequently, defendant Olson requested numerous changes and additions to the original specifications for the duplexes.

Soon thereafter, defendants, in an attempt to establish a ceiling price on the

April 16, 1985. The confusion and inconsistencies in the judgment are largely attributable to the unfortunate interruptions in the trial.

cost of construction at \$72,070 per duplex, prepared a contract and submitted it to plaintiffs. In his letter to plaintiffs, defendant Olson stated that the purpose of the proposed contract was "mainly to satisfy [defendant] Lund" as he was concerned about fixing a ceiling price. This contract, however, was never executed.

A settlement statement, dated July 7, 1981 and signed by defendant Lund, fixed the contract sales price at \$128,500. This settlement statement was used at the closing with Wasatch Bank. Wasatch Bank provided permanent financing, which was insufficient to cover plaintiffs' construction expenses. Consequently, plaintiffs initiated an action against, among others, defendants Olson and Lund, alleging claims of fraud, breach of contract, and foreclosure of mechanics' liens. (The foreclosure claim was resolved).

After the initial trial on August 2, 1982 and September 13, 1982, the trial court entered judgment on August 4, 1983 against defendants Lund and Olson for \$23,741.54<sup>2</sup> plus 12% interest accruing from July 7, 1981. The court found there was no agreement among the parties as to the total price to be paid for the construction of the duplexes. The court, however, based on the initial cost breakdown prepared by plaintiff Davies, found defendants jointly liable for \$23,741.54. The court then found that plaintiffs were additionally entitled to recover from defendant Olson the reasonable costs incurred because of defendant Olson's requested changes in the duplex specifications.<sup>3</sup> The court then directed counsel to negotiate and submit a figure as to the reasonable costs plaintiffs incurred because of defendant Olson's requested changes. The parties failed to reach an agreement. Consequently, a supplemental hearing was held on April 4, 1985, April 10, 1985, and April 16, 1985,

2. The court found the cost per duplex to be \$78,395. Multiplying that figure by the number of duplexes built (4), and subtracting the construction costs paid by defendants, \$289,838.46, yielded a judgment in the amount of \$23,741.54.

3. The court did not enter judgment against defendant Lund for this additional recovery, find-

focusing on the following issues previously reserved by the trial court:

1. What were the plans and specifications upon which plaintiffs and defendants relied in the cost breakdown?
2. What modifications were subsequently made to those plans and specifications upon defendant Olson's requests?
3. What were the reasonable costs of the requested modifications which were actually made by plaintiffs?

The trial court, in its final judgment of May 17, 1985, found there was no meeting of the minds between the parties "as to plans and specifications which formed the basis of the cost breakdown," and, therefore, that it erred in basing its August 4, 1983 judgment on that document. The court concluded that in order to prevent unjust enrichment of defendant Olson, plaintiffs were entitled to recover their reasonable costs of construction from him.<sup>4</sup> The court, however, was silent as to defendant Lund's liability. The court awarded plaintiffs \$51,778.96 plus interest "at the legal rate of interest," accruing from July 7, 1981, the date the settlement statement was executed. The trial court calculated the May 17, 1985 judgment as follows:

Reasonable cost of construction	\$208,708.96
Less adjustment for water meters	1,850.00
NET CONSTRUCTION COST	\$206,858.96
Less the Amount of the August 4 Judgment <sup>4</sup>	\$18,580.00
May 17, 1985 Judgment to Plaintiffs	\$51,778.96

Both parties appeal from the May 17, 1985 judgment.

## I. SUFFICIENCY OF THE EVIDENCE

[1] On appeal, we are asked to determine whether there is sufficient evidence to support the trial court's finding of no enforceable written or oral contract. The

ing that defendant Lund merely assisted defendant Olson in acquiring long-term financing.

4. The court credited defendant Olson with payment of \$78,395 per duplex, multiplied by the number of duplexes built (4), or \$313,580. See Note 2, *supra*.

DAVIES v. OLSON

Cite as 746 P.2d 264 (Utah App. 1987)

trial court's findings of fact will not be set aside unless "clearly erroneous." Utah R.Civ.P. 52(a); *State v. Wright*, 744 P.2d 315 (Utah Ct.App.1987); *State v. Walker*, 743 P.2d 191, 198 (Utah 1987). A review of the record amply supports the trial court's findings (1) that there was no meeting of the minds as to the contract price, an essential term of a construction contract; (2) that there was no meeting of the minds as to which plans and specifications formed the basis of the cost breakdown prepared by plaintiff Davies; and (3) that the parties did not intend the settlement statement to constitute an executory accord.

Testimony at trial conflicted significantly as to the contract price. Plaintiff Davies testified that he and defendant Olson orally agreed that plaintiff Davies would construct the four duplexes for cost plus \$6,000 builder's profit per duplex. Defendant Olson, on the other hand, while conceding that cost plus \$6,000 was discussed, denied that he agreed to an open-ended deal. Subsequent to the oral conversation between plaintiff Davies and defendant Olson, plaintiff Davies prepared a cost breakdown and submitted it to Wasatch Bank and to defendant Olson. Thereafter, defendant Olson prepared a written contract with a provision that cost was not to exceed \$72,070 per duplex, evidently attempting to appease defendant Lund's concern about cost. Defendant Olson presented this proposed contract to plaintiff Davies, claiming Davies said that he would sign it. This contract, however, was never executed.

Given the disparity in the testimony regarding the contract price, the trial court's finding that there was no meeting of the minds as to the contract price is not clearly erroneous.

[2] We also affirm the trial court's finding that the settlement statement used for closing on the financing did not constitute an "executory accord," because there was no meeting of the minds. See *Golden Key Realty, Inc. v. Mantaa*, 699 P.2d 720, 733 (Utah 1985); *Sugarhouse Finance Co. v. Anderson*, 610 P.2d 1869, 1872 (Utah 1980). The settlement statement lists the contract

price as \$128,500. At trial, conflicting testimony was introduced regarding whether defendant Olson ever agreed to this figure. Defendant Olson testified that he never agreed to a contract price in excess of \$116,000 per unit. Similarly, defendant Lund's position is that he signed the settlement statement merely to assist defendant Olson to acquire long-term financing, but that the settlement statement did not constitute an acknowledgment of specific amounts owed to plaintiffs. After reviewing the record, we do not believe the trial court's finding that the parties did not intend the settlement statement to constitute an executory accord is clearly erroneous.

II. DUE PROCESS

Defendants contend that they were denied due process of law because the trial court's May 17, 1985 judgment was based on *quantum meruit*, a theory which was not pled, nor reserved by the trial court. We disagree.

[3-5] A hearing must be prefaced by timely notice which adequately informs the parties of the specific issues they must be prepared to meet. *Nelson v. Jacobsen*, 669 P.2d 1207, 1212 (Utah 1983). Issues not expressly raised in the pleadings, however, may be tried by the implied consent of the parties. *General Ins. Co. v. Carnicero Dynasty Corp.*, 545 P.2d 502, 506 (Utah 1976). Implied consent may be found where evidence is introduced without objection. *Id.* Moreover, proof of a quasi-contract under an allegation of a breach of an express contract does not violate due process, absent surprise or prejudice. *North Tillamook County Sanitary Authority v. Great American Ins. Co.*, 46 Or.App. 173, 611 P.2d 319, 321 (1980).

[6] *Quantum meruit* was, at least inferentially, an issue at the supplemental hearing. The supplemental hearing focused on the plans and specifications underlying the cost breakdown and the additional costs plaintiffs incurred because of defendant Olson's requested changes in the duplex specifications. There is no showing that defendants were surprised or prevent-

ed from presenting all evidence pertaining to the reasonable costs of construction or the benefits defendants received, nor that they were prejudiced by the trial judge relying on the theory of *quantum meruit*. Furthermore, any possible prejudice defendants may have suffered is cured by our remand for a new trial on the issue of damages.

### III. DEFENDANT LUND'S LIABILITY

The trial court, in its final May 17, 1985 judgment, without any supportive findings or explanation, relieved defendant Lund of liability. The court did this although it had previously held him liable for the \$23,741.54 judgment. We are unable to ascertain whether the court found that defendant Lund requested plaintiffs to perform services, and if so, to what extent, or whether any benefit was conferred upon defendant Lund by plaintiffs' construction of the duplexes. If defendant Lund requested services and received a benefit which would be unjustly retained, he is liable under *quantum meruit*.<sup>5</sup> Consequently, we remand to the trial court for findings on this issue and an entry of judgment consistent with our opinion.

### IV. MEASURE OF DAMAGES

Despite our approval of the trial court's decision to base recovery on *quantum meruit*, we, nonetheless, reverse the May 17, 1985 judgment because we find that it is legally and factually inconsistent.

In its August 4, 1983 judgment, the trial court based plaintiffs' damages on the cost breakdown and held both defendants liable.

[7] In its May 17, 1985 judgment, the court determined that there was no meeting of the minds as to the plans and specifications underlying the cost breakdown, reversing its prior conclusion. The court, therefore, premised its May 17, 1985 judgment strictly on *quantum meruit*. Nonetheless, in calculating the measure of dam-

ages assessed against defendant Olson, the court gave defendant Olson credit for the August 4, 1983 judgment—a judgment based on a theory that the court had rejected. Further, the court did not indicate whether defendant Lund was still bound by the earlier judgment entered against him. By giving defendant Olson credit for the August 4, 1983 judgment, an earlier judgment which the May 17, 1985 judgment, on its face, seems to supercede, the trial court, in effect, reduced the amount of plaintiffs' recovery. The trial court did not indicate whether it intended the May 17, 1985 judgment to be in addition to the August 4, 1983 judgment, or instead of it.<sup>6</sup> In light of these observations, we find that the May 17, 1985 judgment is internally inconsistent and, if enforced, patently unfair to plaintiffs under any interpretation of the evidence. Therefore, we reverse and remand for a determination of damages under *quantum meruit*.

[8] Because we remand for further proceedings, we attempt to provide some guidance to the trial court. See *Utah Farm Production Credit Ass'n v. Watts*, 787 P.2d 154, 158 (Utah 1987). *Quantum meruit* is an action initiated by a plaintiff to recover payment for labor performed in a variety of circumstances in which that plaintiff, for some reason, would not be able to sue on an express contract. Recovery under *quantum meruit* presupposes that no enforceable written or oral contract exists. See *Blue Ridge Sewer Improvement Dist. v. Lowry & Assoc., Inc.*, 149 Ariz. 373, 718 P.2d 1026 (Ct.App.1986). Confusion surrounds the use and application of *quantum meruit*; see, e.g., *Interform Co. v. Mitchell*, 575 F.2d 1270 (9th Cir.1978) (attempting to apply Idaho law); *Hartwell Corp. v. Smith*, 107 Idaho 134, 686 P.2d 79 (Ct.App.1984), because courts have used the terms *quantum meruit*, contract implied in fact, contract implied in law, quasi-contract, unjust enrichment, and/or restitution without analytical preci-

5. Of course, the court, on remand, could find other theories of recovery against defendant Lund based upon the evidence, including partnership or joint venture.

6. The earlier judgment was not made final pursuant to Utah R.Civ.P. 54(b) and therefore would seem to be legally merged into or superceded by the May 17 final judgment.

sion. See, e.g., *Euramca Ecosys v. Roediger Pittsburgh, Inc.*, 581 F.Supp. 415, 422 (E.D.Ill.1984) (discussing quasi-contract claim in *quantum meruit* litigation); *Idaho Lumber, Inc. v. Buck*, 109 Idaho 737, 710 P.2d 647, 655-57 (Ct.App.1985); *Sharp v. Laubersheimer*, 347 N.W.2d 268, 270 (Minn.1984); *Ellis-Jones, Inc. v. Western Waterproofing Co.*, 66 N.C.App. 641, 646-47, 312 S.E.2d 215, 218 (1984).

*Quantum meruit* has two distinct branches. Both branches, however, are rooted in "justice," see *Lakeshore Fin. Corp. v. Comstock*, 587 F.Supp. 426, 429 (W.D.Mich.1984), to prevent the defendant's enrichment at the plaintiff's expense. See *Hazelwood Water Dist. v. First Union Management, Inc.*, 78 Or.App. 226, 715 P.2d 498 (1986).

[9,10] Contract implied in law, also known as quasi-contract or unjust enrichment, is one branch of *quantum meruit*. A quasi-contract is not a contract at all, but rather is a legal action in restitution. See 1 A. Corbin, *Corbin on Contracts* § 19, at 44, 46 (1963). The elements of a quasi-contract, or a contract implied in law, are: (1) the defendant received a benefit; (2) an appreciation or knowledge by the defendant of the benefit; (3) under circumstances that would make it unjust for the defendant to retain the benefit without paying for it. See *Berrett v. Stevens*, 690 P.2d 553, 557 (Utah 1984) (using the term "unjust enrichment"). The measure of recovery under quasi-contract, or contract implied in law, is the value of the benefit conferred on the defendant (the defendant's gain) and not the detriment incurred by the plaintiff, see *First Inv. Co. v. Andersen*, 621 P.2d 683, 687 (Utah 1980), or necessarily the reasonable value of the plaintiff's services.

[11] A contract implied in fact is the second branch of *quantum meruit*. A contract implied in fact is a "contract" established by conduct. See Restatement (Second) of Contracts § 5 comment a (1961). The elements of a contract implied in fact are: (1) the defendant requested the plaintiff to perform work; (2) the plaintiff expected the defendant to compensate him or her for those services; and (3) the de-

fendant knew or should have known that the plaintiff expected compensation. See *Kints v. Read*, 28 Wash.App. 781, 626 P.2d 52, 55 (1981); see also Restatement (Second) of Contracts § 5 comment a (1981) (providing that terms of promise or agreement are those expressed in language of parties or implied in fact from other conduct); 1 S. Williston, *Williston on Contracts* § 3, at 8-10 (1957) (defining implied in fact contracts as obligations arising from mutual agreement and intent to promise where parties do not express agreement and promise in words); 1 A. Corbin, *Corbin on Contracts* § 18 (1963) (noting that implied contracts impose contractive duty by reason of promissory expression and are no different than express contracts, although different in mode of expressing assent). "Technically, recovery in contract implied in fact is the amount the parties intended as the contract price. If that amount is unexpressed, courts will infer that the parties intended the amount to be the reasonable market value of the plaintiff's services." Kovacic, *A Proposal to Simplify Quantum Meruit Litigation*, 85 Am.U.L. Rev. 547, 556 (1986).

In the case before us, the trial court correctly found that there was no express contract, and thus that plaintiffs' recovery must be based on *quantum meruit*. The court further held that plaintiffs should recover their reasonable costs of constructing the duplexes. The court correctly found a contract implied in fact. It is undisputed that defendant Olson orally requested plaintiff Davies to construct the duplexes, that plaintiffs expected Olson to compensate them for those services, and that Olson knew that plaintiffs expected compensation. Thus, we remand as to defendant Olson for a determination of the reasonable value of plaintiffs' services in constructing the duplexes, and an entry of judgment against him for that amount.

We are unable to determine what the court found as to defendant Lund. Thus we remand as to defendant Lund for findings on whether he requested plaintiffs to perform work, and if so, to what extent, or whether he received any unjust benefits as



a result of plaintiffs' efforts. These findings will support the court's conclusion as to whether defendant Lund is liable to plaintiffs under *quantum meruit*—a contract implied in law, or *quantum meruit*—a contract implied in fact, or neither. As is explained more fully *supra*, the measure of damages may differ depending on the theory adopted.

#### V INTEREST

In awarding damages, the applicable legal rate of interest must also be determined. The 1981 amendment to section 15-1-1 increased the legal rate of interest from 6 percent to 10 percent. Utah Code Ann. § 15-1-1 (1986).

[12] The statutory legal rate of interest is applied from the date payment is due to the judgment date. See *Lignell v. Berg*, 593 P.2d 800, 809 (Utah 1979).

[13] The trial court found July 7, 1981, the date defendant Lund signed the settlement statement, as the due date, as that was the date the benefit was conferred. It was also on this date that defendants acknowledged an obligation to pay plaintiffs for their services in constructing the duplexes. We find that this determination is supported by substantial evidence and therefore will not disturb it on appeal. See *id.* at 810. Based on this factual determination, we find the appropriate rate of interest is 10 percent.

The May 17, 1985 judgment is affirmed in part and reversed in part. The case is remanded for further proceedings consistent with this opinion. Each party to bear its own costs.

GARFF, and ORME, JJ., concur.



The STATE of Utah, Plaintiff  
and Respondent,

v.

Rick PURSIFELL, Defendant  
and Appellant.

No. 860361-CA.

Court of Appeals of Utah.

Dec. 2, 1987.

Defendant was convicted by jury in the Third District Court, Salt Lake County, J. Dennis Frederick, J., of burglary, attempted burglary, theft, and vehicle burglary, and defendant appealed, alleging he was denied Sixth Amendment right to effective assistance of counsel. The Court of Appeals, Orme, J., held that: (1) trial court's inquiry into defendant's expression of dissatisfaction with court-appointed counsel was sufficient; (2) defendant's complaints did not warrant substitution of counsel; and (3) defendant failed to sustain burden of proving ineffective assistance of counsel.

Affirmed.

#### 1. Criminal Law § 641.10(2)

Indigent defendant has constitutional right to appointed counsel, but has no constitutional right to lawyer other than one appointed, absent good cause. U.S.C.A. Const. Amend. 6.

#### 2. Criminal Law § 641.10(2), 1152(1)

Whether to appoint different lawyer for indigent defendant who expresses dissatisfaction with court-appointed counsel, but has no constitutional right to appointment of different lawyer, is matter committed to sound discretion of trial court, and will be reversed only for abuse of discretion. U.S.C.A. Const. Amend. 6.

#### 3. Criminal Law § 641.10(2)

Upon indigent defendant's complaint concerning court-appointed counsel, court must balance potential for last minute delay and propensity for manipulation of system against competing concern about likely