

1995

Shui Kwong Chan and Grace Chan v. Eddie NG,  
Grace Scott, individuals, and The Pearl Restaurant,  
Inc. A utah corporation : Response to Petition for  
Rehearing

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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SHUI KWONG CHAN and )  
GRACE CHAN, )  
 )  
 Plaintiffs and )  
 Appellees, )  
 )  
 vs. )  
 )  
 EDDIE NG, GRACE SCOTT, )  
 individuals, and )  
 THE PEARL RESTAURANT, INC. )  
 a Utah corporation, )  
 )  
 Defendants and )  
 Appellants. )

Case No. 950206-CA

Priority 15

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**APPELLANTS' RESPONSE TO PETITION FOR REHEARING**

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From Decision of The Court of Appeals Reversing and  
Remanding a Portion of a Judgment of the Third  
District Court, Pat B. Brian, District Judge, Presiding

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**FILED**

APR - 4 1996

COURT OF APPEALS



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This response and answer is submitted to Appellees' Petition for Rehearing as requested by the Court of Appeals.

## I. ARGUMENT

A. The Court of Appeals Did Not Err in Ordering that the Judgment be Reformed Because the Trial Court Employed an Improper Measure of Damages.

In its memorandum decision, this Court correctly held that the trial court erred in determining the amount of benefit conferred by plaintiffs on defendants. As this court noted, the trial court improperly based its conclusion of law regarding damages on the amount invested by plaintiffs, rather than on the value of the benefit conferred on defendants.

Such an error by the trial court is the only possible source of the \$180,000.00 figure contained in its conclusions of law. One of the court's findings of fact was that "approximately \$180,000.00 was paid directly or indirectly to defendants by plaintiffs." (R. 582). The court then translated this figure, which equalled the exact total of the various sums it found plaintiffs had invested in the venture, into a conclusion of law regarding the value of the benefits plaintiffs conferred on defendants. In doing so, the court failed to employ the proper measure of damages for an action based on unjust enrichment, which is "the value of the benefit conferred on the defendant (the defendant's gain), and not the detriment incurred by the plaintiff." *Davies v. Olson*, 746 P.2d 264, 269 (Utah. App. 1987). This

Court was thus correct in holding that the trial court erred in calculating the amount of the judgment.

B. Even if the Trial Court Attempted to Employ the Proper Measure of Damages, Its Failure to Make Requisite Findings of Fact is Reversible Error.

In their petition for Rehearing, plaintiffs seem to argue that it is just a coincidence that the \$180,000.00 benefit which the trial court concluded was conferred on defendants matches precisely the amount the court found plaintiffs invested in the venture. Seizing on two particular items of damages they unsuccessfully sought to recover at trial, plaintiffs now contend that the trial court arrived at the \$180,000.00 figure not by totalling the amounts plaintiffs invested, but rather by considering in its conclusions of law certain benefits conferred on defendants which the court neglected to detail in its findings of fact. This contention advanced to justify the trial court's incorrect judgment is both factually and legally untenable.

First, the argument fails on its face because, even if these particular benefits had been conclusively proven at trial to have been conferred on defendants (which they were not), the sum of their respective values does not equal the difference between the \$128,761.00 outlined in the trial court's findings of fact and the \$180,000.00 specified in its erroneous conclusion of law. Had the trial court in fact been considering the items plaintiffs allege, it would have used the amounts identified by plaintiffs to arrive at a more precise total of plaintiffs' damages.

Moreover, at this stage of the appeal, plaintiffs conveniently abandon additional items of alleged damages which they claimed previously, so as to come as close as possible to the trial court's \$180,000.00 figure. Plaintiffs argued at trial that they actually conferred on defendants a benefit of \$194,469.00. (Ex. P-64). The fact that the trial court used the round number of \$180,000.00 in its conclusions of law indicates that it was relying specifically on the amount the evidence showed had been invested, and not on the value of any benefits conferred.

Furthermore, even if the court understood the proper measure of damages, it failed to make specific findings of fact in support of the \$180,000.00 figure. A failure to enter adequate findings of fact on material issues may be reversible error. *Reid v. Mutual of Omaha Ins. Co.*, 776 P.2d 896, 899 (Utah 1989). Plaintiffs argue that if the facts pertaining to an issue are clear, uncontroverted, and capable of supporting only a finding in favor of the judgment, a failure to make findings of fact on that issue is harmless error. *Kinkella v. Baugh*, 660 P.2d 233, 236 (Utah 1983). Plaintiffs then conveniently select two particular items of damages which they sought at trial, the combined value of which happens to roughly approximate the difference between the amounts contained in the trial court's findings of fact and in its conclusions of law, and draw the conclusion that factual findings on these items should simply be implied because the evidence pertaining to them was uncontroverted.

Even indulging plaintiffs' unwarranted assumption that these are the mysterious missing elements of damages on which the court relied, their assertion that the evidence on these items was uncontroverted is simply not true. The value of the funds used by plaintiffs to purchase equipment for their own use after assuming control of the restaurant was one of the items most vigorously contested by defendants at trial. Defendants presented evidence that they never saw these funds, had no control over how they were spent, and did not receive a benefit from the goods purchased with them. Contrary to plaintiffs' assertions, defendants maintained at trial that they received no benefit from any of the items listed in item 6 of plaintiffs' Exhibit 64, not just the dim sum steam table, and they offered evidence to substantiate this claim. (R. 575, 893-94, 922-27, 1066).

Similarly, there was controverted evidence pertaining to the alleged benefit from the \$28,487.69 SBA loan payment as well. Defendants stipulated only that Grace Scott received this amount of money from an unspecified source, not from the plaintiffs. (R. 902). The bank account on which the check was drawn was controlled jointly by plaintiffs and defendants and contained money deposited by both. (R. 803). Because of this fact, defendants argued at trial that obligations satisfied from this account were paid at least in part by defendants. A reference to this loan payment was included in defendants' proposed findings of fact only because

corollary findings compensating defendants for their deposits to the account were also requested.

C. Plaintiffs' Arguments Are Based on an Illegitimate Reversal of the Burden of Proof.

As illustrated above, there was substantial evidence controverting the benefits plaintiffs alleged to have conferred on defendants but which were absent from the trial court's judgment. Plaintiffs' recommendation that this Court supply missing elements of alleged damages on which the trial court failed to make findings is entirely inappropriate.

The burden of proof in an action for unjust enrichment is on the plaintiff to establish the value of the benefit conferred on the defendant. *See Zitterkopf v. Bradbury*, 783 P.2d 1142, 1144 (Wyo. 1989); 66 Am. Jr. 2d *Restitution and Implied Contracts* § 164 (1973). Plaintiffs' argument that this Court should simply assume the requisite findings unless they were sufficiently disproven by defendants illegitimately reverses this burden. This Court was therefore correct in concluding that the trial court committed reversible error by failing to make requisite findings on controverted issues in support of its conclusions of law.

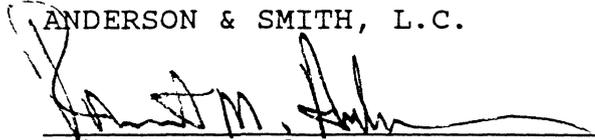
## II. CONCLUSION

For the foregoing reasons, defendants request that this Court deny appellees' Petition for Rehearing.

DATED this 4th day of April, 1996.

Respectfully submitted,

ANDERSON & SMITH, L.C.

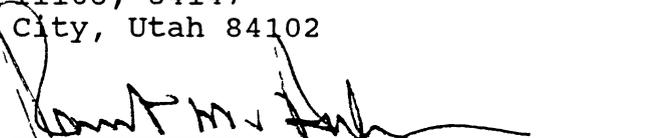
A handwritten signature in black ink, appearing to read "Robert M. Anderson", written over a horizontal line.

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Attorneys for Appellants/Defendants

**CERTIFICATE OF SERVICE**

I hereby certify that I caused to be hand-delivered this 4th day of April, 1996, two copies of the foregoing APPELLANTS' RESPONSE TO PETITION FOR REHEARING to the following:

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