

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 3, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 98-0016

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

SOMMERS CONSTRUCTION CO., INC.,

PLAINTIFF-APPELLANT,

V.

ROCK ROAD COMPANIES, INC.,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Rock County:
MICHAEL J. BYRON, Judge. *Affirmed.*

Before Dykman, P.J., Eich and Deininger, JJ.

PER CURIAM. Sommers Construction Co., Inc. appeals from a judgment dismissing its unjust enrichment claim against a general contractor for construction work that Sommers performed as a sub-subcontractor, and for which the general contractor was paid. Because we agree with the trial court that

Sommers failed to show that the general contractor was not obligated to pay the balance of the funds it received to anyone else, we affirm.

Rock Road Companies, Inc. contracted with the State to provide several items of work for a street improvement project in Janesville. Rock Road, in turn, hired subcontractor Bowens Concrete Construction to install 3975 linear feet of curb and gutter at \$6.50 per foot, including both labor and materials. Bowens was unable to complete the project, however, and contracted with Sommers to step in and perform the curb and gutter work. After Bowens agreed to pay Sommers \$7.50 per foot and to provide the concrete, Sommers installed 3353 linear feet of curb and gutter. Another company, Schultz Construction, finished the final 640 feet of curb and gutter.

The State paid Rock Road \$65,795.18 for the entire project, \$25,954.50 of which was itemized for the curb and gutter work. Rock Road paid out \$56,250.77 of the total amount it received from the State, leaving it with \$9,544.41. Out of that \$56,250.77, Rock Road paid Schultz \$5,120.00 for its curb and gutter work, leaving \$20,834.50 of the State's payment allocated for that purpose. Rock Road also paid Bowen a portion of the contract price for the work which it had performed. Neither Sommers nor the concrete supplier, Lycon, Inc. received any payment. Sommers filed suit against Rock Road for breach of contract and unjust enrichment. The trial court dismissed the contract claim on the grounds that no contract existed between Sommers and Rock Road. It also dismissed the unjust enrichment claim on the grounds that it was not inequitable for Rock Road to keep the funds when Sommers had failed to show that Rock Road had received more money for the project than it owed to others. Sommers appeals from the latter determination.

The review of an unjust enrichment claim presents a mixed question of fact and law. *Waage v. Borer*, 188 Wis.2d 324, 328, 525 N.W.2d 96, 97-98 (Ct. App. 1994). The trial court's factual determinations will be upheld unless they are clearly erroneous. Section 805.17(2), STATS. The application of those facts to the legal standard for unjust enrichment, however, presents a question of law which we review *de novo*. *Waage*, 188 Wis.2d at 328, 525 N.W.2d at 98.

A plaintiff may recover on a quasi-contract claim for unjust enrichment when the plaintiff has conferred a benefit upon the defendant, the defendant appreciates or knows of the benefit, and retention of the benefit without payment would be inequitable. *Quinnell's Septic & Well Service, Inc. v. Dehmlow*, 152 Wis.2d 313, 316, 448 N.W.2d 16, 18 (Ct. App. 1989). The parties agree that Sommers conferred an appreciated benefit upon Rock Road. Their dispute centers on whether it was equitable for Rock Road to retain that benefit without paying Sommers.

It is not inequitable to refuse to pay a subcontractor for beneficial work when the benefit recipient has paid or is obligated to pay someone else the value of the benefit. *Puttkammer v. Minth*, 83 Wis.2d 686, 690, 266 N.W.2d 361, 363-64 (1978). This prevents double recovery from a general contractor by both a subcontractor and sub-subcontractor for the same work.

The trial court was unable to determine the extent of Rock Road's obligations to any other entity based upon the record before it,¹ but ruled that it was not inequitable for Rock Road to retain the funds it had received from the

¹ The trial court declined to determine whether either Bowen or Lycon might have been a necessary party to the suit because neither Sommers nor Rock Road raised the issue.

State in order to protect itself from a potential claim from Bowens or Lycon. This raises the threshold question of which party in an unjust enrichment action bears the burden of proving or disproving the benefit recipient's obligation to a third party. Sommers maintains that Rock Road should not be allowed to avoid an unjust enrichment claim which has been put in suit based on a potential claim which has not, and may never be, asserted in court.

While we agree that an unjust enrichment claimant need not make the impossible showing that the benefit recipient will not make any future payments to third parties, we conclude that, once a benefit recipient has made a *prima facie* showing of third-party indebtedness, the party asserting the unjust enrichment claim bears the burden of negating the existence of any conflicting legal obligations asserted by the benefit recipient. *See generally Ward v. Jannke*, No. 97-2145, *slip op.* (June 10, 1998) (discussing the sufficiency of plaintiff's evidence to show inequity in alleged unjust enrichment situation). This means that it is the unjust enrichment claimant's responsibility to join the named third parties, if necessary, in order to negate their claims. We therefore reject Sommers' argument that Rock Road is barred from asserting the existence of other possible claimants due to its failure to join them.

Rock Road presented the trial court with an exhibit showing that it had paid or was obligated to pay \$10,801.68 more than it had received from the State for the Bowens subcontract. This constituted a *prima facie* showing that it would not be inequitable for the general contractor to retain the benefit conferred by Sommers.

Sommers challenged the inclusion of payment to Lycon² in Rock Road's calculation of its obligations. It presented evidence sufficient to show that Rock Road had not yet paid Lycon, which had supplied \$20,346.09 worth of concrete for the total project, about \$9,000 of which was used on the curbs and gutters. Sommers was also successful in showing that Lycon was in the same contractual position with Bowens as was Sommers, and that if Rock Road paid either Sommers or Lycon, it could set off that amount against what it would otherwise owe to Bowens.³ However, Sommers failed to rebut Rock Road's contentions that it had made an oral guarantee of payment to Lycon, which it had not made to Sommers, and that Lycon, as a materials supplier, might have greater lien rights than would Sommers. In addition, Sommers conceded that Lycon might have its own claim for unjust enrichment against Rock Road. Therefore, the trial court's finding that it could not determine Rock Road's liability to Lycon on the record before it was not clearly erroneous, and the trial court properly concluded that Sommers had failed to show that it would be inequitable to require Sommers to look to Bowens rather than Rock Road for payment.

² Neither party has fully briefed the status of Bowen's claim, although Sommers suggests that Bowen's default has relieved Rock Road of any further agreement to Bowen, and the contract itself would appear to allow a setoff for any amounts which Rock Road paid directly to a sub-subcontractor. *See* n.3 below.

³ Paragraph 9 of the subcontract agreement provides:

All prices stated in paragraph 1 are to include all labor, materials, equipment, rent, supplies, taxes, insurance, and all other items of cost necessary to complete Subcontractor's work. In the event that Contractor pays any charges payable by Subcontractor, Contractor shall be reimbursed in full within five (5) days after written demand upon Subcontractor. Contractor may set off any amounts owned to Subcontractor for such amounts.

In light of our decision, we need not address the proper measure of liability when a contractor attempts to shift losses from one item of a contract to another.

By the Court.—Judgment affirmed.

This opinion will not be published in the official reports. *See* RULE 809.23(1)(b)5, STATS.

