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RESTITUTION — UNJUST ENRICHMENT — COLORADO SUPREME COURT HOLDS DEFENDANTS LIABLE FOR FULL PROFITS FROM THE SALE OF A HOME BY APPLYING UNJUST ENRICHMENT THEORY TO AN INFORMAL AGREEMENT BETWEEN CLOSE RELATIVES. — *Lewis v. Lewis*, 189 P.3d 1134 (Colo. 2008).

One conception of unjust enrichment doctrine is that it is an amorphous area of law that enables judges to distribute damages according to their own sense of justice.<sup>1</sup> Another conception is that it is a far more formalistic doctrine intended to address specific factual situations.<sup>2</sup> Recently, in *Lewis v. Lewis*,<sup>3</sup> the Colorado Supreme Court applied an unjust enrichment theory to hold that the sellers of a house were liable to their former daughter-in-law for the full profit from the sale, even though the daughter-in-law had never formally owned the house. This award was rooted in the finding that the defendants acted in “deviation from the parties’ mutual purpose.”<sup>4</sup> Although the language of “mutual purpose” seems to ring of contract as opposed to unjust enrichment, the court’s emphasis on the “confidential relationship” between the parties made the holding cohere with certain pre-established areas of unjust enrichment doctrine, specifically the theories of fiduciary duty and constructive trust. Furthermore, the court’s award was the correct one given the interests at stake.

In September 1984, Cassandra and Sammy Lewis were married.<sup>5</sup> They spent the first two years of married life in the home of Sammy’s parents, Frank and Lucy (“the Lewises”), but in 1986 the couple moved into a home that the Lewises had purchased for them.<sup>6</sup> The initial cost of the home was \$29,500.<sup>7</sup> The Lewises made the down payment of \$5,000, and the title to the home remained in their names.<sup>8</sup> However, Cassandra and Sammy paid the Lewises \$236.46 per month to compensate them for mortgage payments.<sup>9</sup> At trial, Cassandra testified that this arrangement had been set up because the Lewises were concerned that Sammy’s drinking problem would prevent him from

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<sup>1</sup> See Emily Sherwin, *Restitution and Equity: An Analysis of the Principle of Unjust Enrichment*, 79 TEX. L. REV. 2083, 2095–96 (2001) (describing how some view restitution as a field of law in which “rules simply should not apply[,] . . . [and] courts should have full discretion to decide as they deem best”).

<sup>2</sup> See *id.* at 2089 (noting that most cases “can be fit without much difficulty into the comparatively concrete doctrinal categories described in the body of the first *Restatement*”).

<sup>3</sup> 189 P.3d 1134 (Colo. 2008).

<sup>4</sup> *Id.* at 1144.

<sup>5</sup> *Id.* at 1136.

<sup>6</sup> *Id.* at 1136–37.

<sup>7</sup> *Id.* at 1137.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

making monthly mortgage payments.<sup>10</sup> Over the course of the next fourteen years, Sammy and Cassandra lived in the home as if they were its title owners. Not only did they compensate the Lewises for the mortgage payments each month, but they also made considerable improvements to the property without consulting the Lewises.<sup>11</sup>

Ultimately, the Lewises expressed their desire to give the home to their son and daughter-in-law formally. Frank explored the option of changing title but discovered that this would require refinancing the house. The Lewises claimed to have gone to their son offering to give him the home if he paid the rest of the mortgage and repaid the full down payment, but they never told Cassandra about the offer.<sup>12</sup>

In September 2000, when the Lewises still owned the home, Cassandra and Sammy separated, and Cassandra moved out of the house with her two daughters. Soon after the separation, on November 22, 2000, the Lewises sold the house to an unrelated buyer for \$122,000.<sup>13</sup>

Cassandra sued the Lewises claiming that she owned the home. She argued, first, that the home was a gift from the Lewises to Cassandra and Sammy. In the alternative, she argued that she was entitled to the total profits from the sale of the house under an unjust enrichment theory.<sup>14</sup>

The state trial court found in favor of Cassandra for \$103,879.86 under the theories of unjust enrichment and resulting trust.<sup>15</sup> This was the total profit from the sale minus the remaining mortgage balance of \$12,154.63 and the initial \$5,000 down payment.<sup>16</sup> The court found that there was a “confidential relationship” between the parties, which meant that the Lewises had a “duty to deal fairly” and that they breached this duty when they sold the property without letting Cassandra know about her option to purchase it.<sup>17</sup>

The court of appeals reversed.<sup>18</sup> It found that Cassandra and Sammy’s failure to take advantage of the “purchase option” before the sale of the house made them “mere tenants.” The court therefore held

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 1138.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 1139. In describing the principles that motivated its opinion, the trial court implied that both restitution and reliance interests were at stake. During the fourteen years that she had lived in the home, Cassandra paid the mortgage and made improvements to the property, but the Lewises were the ones who profited from the increased value of the property. Furthermore, the court found that if not for the trusting relationship between the parties, the bargain would have been reduced to writing or Cassandra and Sammy would have purchased another property. *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

that “the enrichment of the Lewises by the contribution of Sammy and Cassandra to the property was not unjust.”<sup>19</sup>

The Colorado Supreme Court reversed, reinstating the trial court’s judgment for the plaintiff and holding that the defendants had been unjustly enriched by the profit they made from the sale of the house.<sup>20</sup> Writing for the majority, Justice Martinez<sup>21</sup> first explained that in order to prove unjust enrichment in Colorado the plaintiff must show that “(1) the defendant received a benefit (2) at the plaintiff’s expense (3) under circumstances that would make it unjust for the defendant to retain the benefit without commensurate compensation.”<sup>22</sup>

The court did not question the trial court’s determination that the Lewises had received a benefit and that this benefit was at the expense of the plaintiff. Instead, it turned its attention to the third prong of the test: whether it would be unjust for the Lewises to retain the benefit that they had received.<sup>23</sup> The court noted that in some cases it had created a particularized third prong,<sup>24</sup> and, given the special character of the relationship at issue in *Lewis*, it was necessary to do so here. It characterized *Lewis* as presenting the common circumstance of a “failed gift or failed contract between close family members” resulting in a claim of unjust enrichment.<sup>25</sup> The court noted that in “various familial legal circumstances, [it had] found that the parties’ mutuality of purpose in agreeing to the gift or making the agreement [was] informative in determining whether one party ha[d] been unjustly enriched.”<sup>26</sup> Drawing from this “diverse jurisprudence” of divorce, trust, and inheritance law, the court concluded that the intentions of the parties should inform the third prong of the unjust enrichment test in an unjust enrichment suit involving family members.<sup>27</sup> Justice Martinez wrote that “when close family members or confidants act with a mu-

<sup>19</sup> *Id.* at 1140.

<sup>20</sup> *Id.* at 1144.

<sup>21</sup> Justice Martinez was joined by Chief Justice Mullarkey and Justices Hobbs and Bender.

<sup>22</sup> *Lewis*, 189 P.3d at 1141 (quoting *Salzman v. Bachrach*, 996 P.2d 1263, 1265–66 (Colo. 2000)).

<sup>23</sup> *Id.* at 1141–42.

<sup>24</sup> For example, the court had found that a contractor had to show malfeasance on the part of a landlord in order to meet the requirements of the third prong of the unjust enrichment test in cases where a contractor sued a landlord for work performed on the landlord’s property at the request of a tenant. See *DCB Constr. Co. v. Cent. City Dev. Co.*, 965 P.2d 115, 123 (Colo. 1998).

<sup>25</sup> *Lewis*, 189 P.3d at 1142.

<sup>26</sup> *Id.* at 1143. In fact, though they did involve “familial circumstances,” none of the cases the court cited formally involved the question of whether a party had been unjustly enriched. In *Denver Foundation v. Wells Fargo Bank, N.A.*, 163 P.3d 1116, 1122 (Colo. 2007), the court assessed whether funds from a trust should be turned over to a nonprofit by examining the intent of the settlors. In *In re Balanson*, 25 P.3d 28, 37–38 (Colo. 2001), the court determined whether gifts between spouses were marital property by examining the intent of the parties. And in *In re Estate of Jenkins*, 904 P.2d 1316 (Colo. 1995), the court looked into whether a bequest extended to adopted children by examining the intent of the benefactor.

<sup>27</sup> *Lewis*, 189 P.3d at 1143.

tual purpose, unjust enrichment occurs when one party benefits from an action that is a significant deviation from that mutual purpose.”<sup>28</sup> The court stated that here both parties had intended for Cassandra and Sammy to “obtain full and complete possession of the property.”<sup>29</sup> By selling the house “without providing Cassandra the opportunity to assume ownership, the Lewises were unjustly enriched as a result of acting in significant deviation from the parties’ mutual purpose.”<sup>30</sup>

Justice Eid dissented.<sup>31</sup> The majority’s theory, she wrote, was flawed in that it bore “no resemblance to . . . unjust enrichment.”<sup>32</sup> Indeed, the court’s focus on the mutual intent of the parties directly conflicted with unjust enrichment doctrine. Contract law is concerned with the intent of the parties, whereas the “centerpiece” of unjust enrichment is the claim that a “benefit has been unjustly retained.”<sup>33</sup>

By examining the intent of the parties as opposed to the benefit received, Justice Eid argued, the court failed to award appropriate damages under an unjust enrichment theory. The Lewises may well have benefited at the expense of Cassandra, but this benefit came in the form of the mortgage payments and the improvements to the property.<sup>34</sup> If the court wanted to award damages in order to restore Cassandra, it should have awarded her only the value of her contributions.<sup>35</sup> The result of the court applying its mutuality of purpose analysis to a case where there was a failed contract or gift is that there was an “award[] [of] contract damages where no contract existed.”<sup>36</sup>

In fact, the majority’s analysis was not the outlier that the dissent suggested. By rooting its approach in the “confidential relationship” between the parties, the court implicitly linked its award to unjust enrichment doctrines that would allow for the award of the full value of the property. The relationship between the parties made *Lewis* closely analogous to cases involving breaches of fiduciary duties remedied by the creation of constructive trusts — theories that would have provided for a similar award. These theories provide a legal basis for the court’s award under an unjust enrichment theory. Principles of fairness and the need to insulate confidential familial relationships from legal formalities also made the award the best available to the court.

One potential explanation for the court’s award of the full value of the house’s appreciation is that it was intended to force the defendants

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<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 1144.

<sup>30</sup> *Id.*

<sup>31</sup> Justice Eid was joined by Justices Rice and Coats.

<sup>32</sup> *Lewis*, 189 P.3d at 1145 (Eid, J., dissenting).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 1146.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 1145.

to disgorge the profits that they had made as a result of their unjust enrichment by the value of the plaintiff's improvements to the property.<sup>37</sup> The problem with this explanation for the court's award is that the profit obtained by the defendants did not *originate* in the plaintiff's contributions. Some courts award full disgorgement of profits even if that profit was only realized after a substantial appreciation in the value of the initial investment.<sup>38</sup> But in those cases the original seed of the ultimate profit is the plaintiff's loss.<sup>39</sup> In *Lewis*, the plaintiff's contributions to the value of the home likely increased the value of the home, but most of the profit appeared to have originated in the defendants' original purchase. The award of the full profit can only be squared with unjust enrichment doctrine if the enrichment originated in more than the plaintiff's improvements to the property, which do not equal the ultimate award.

The court supplied such a basis in *Lewis* in its emphasis on the confidential relationship between the parties. The injustice, after all, was the Lewises' defiance of the mutual purpose of the parties. This explanation, however, must contend with the dissent's suggestion that the award was a sloppy invocation of contract law inconsistent with the unjust enrichment doctrine.

In fact, the award *can* be reconciled with unjust enrichment doctrine — or more specifically with equitable remedies that seek to correct unjust enrichment — because it is closely analogous to cases involving a breach of a fiduciary duty remedied by the creation of a constructive trust.<sup>40</sup> The emphasis on a “confidential relationship” between the parties hints at the creation of a relationship that entails

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<sup>37</sup> The dissent acknowledged that the defendants may have been unjustly enriched by the improvements to the property and the monthly mortgage payments. *Id.* at 1146. Colorado courts in situations like this often award only the value of the plaintiff's contribution. *See, e.g.*, *Salzman v. Bachrach*, 996 P.2d 1263 (Colo. 2000). In *Salzman*, a couple had built a home together but placed it only in the name of the defendant. When the couple separated, the defendant forced the plaintiff off of the property, and the plaintiff sued. The plaintiff won his claim for unjust enrichment, but he was only awarded the value of his contribution to the property, not the complete value of the property. Colorado law, however, does allow courts to force the disgorgement of the defendant's profits made as a result of the unjust enrichment. *See, e.g.*, *Univ. of Colo. Found., Inc. v. Am. Cyanamid Co.*, 153 F. Supp. 2d 1231, 1243 (D. Colo. 2001).

<sup>38</sup> *Cf.* RUSSELL L. WEAVER ET AL., *PRINCIPLES OF REMEDIES LAW* 127 (2007) (describing how the concept of “tracing” in the award of equitable remedies will often result in the award of all of the profits made on an investment as long as that investment was realized through luck as opposed to “skill”).

<sup>39</sup> *See Univ. of Colo. Found.*, 153 F. Supp. 2d at 1241–42 (describing how the plaintiffs were owed the value of the defendant's profit that resulted from the defendant's unjust enrichment by the plaintiffs' invention even though this profit would not equal “actual damages”).

<sup>40</sup> It is the court's emphasis on a “confidential relationship” between the parties and the defendants' defiance of the parties' “mutual purpose” — precisely the factors that made the dissent question whether the court's decision was consistent with unjust enrichment doctrine — that makes its award consistent with these other approaches to unjust enrichment.

something like fiduciary duties, and cases involving a breach of a fiduciary duty often mirror the facts at issue in *Lewis*. These cases tend to involve one party to a confidential relationship receiving a benefit individually when there was an obligation to seek a more mutually beneficial result.<sup>41</sup> Though fiduciary relationships are often formal relationships of confidentiality and trust — for example, trustee-beneficiary, attorney-client — the informal but shared expectations of the parties arising outside of a formal contracting scenario tend to loom large in these cases, just as they did in the court's opinion in *Lewis*.<sup>42</sup> Perhaps the *Lewis* court recognized something like a fiduciary relationship in the “confidential relationship” at issue in the case. Though the house never formally became Cassandra and Sammy's, this approach would give them an equitable claim to the property because of the shared expectations of the parties in a relationship of trust. In this case, an appropriate remedy for a breach of this fiduciary duty would have been the award of a constructive trust over the property around which these duties revolved.<sup>43</sup>

The creation of a constructive trust would have been consistent with an unjust enrichment theory. Though a breach of a fiduciary duty is reminiscent of a tort,<sup>44</sup> the remedy of a constructive trust is firmly rooted in principles of restitution and unjust enrichment. According to the newest draft of the *Restatement (Third) of Restitution*, a court may establish a constructive trust where the defendant is the trustee of property for the benefit of the plaintiff if the defendant is “unjustly enriched by the acquisition of legal title [to that] property . . . at the expense of the claimant or in violation of the claimant's rights.”<sup>45</sup> Furthermore, the fact that a constructive trust is a recognized remedy for a breach of fiduciary duty<sup>46</sup> is consistent with the restitution interests that are at stake in fiduciary duty cases. An earlier draft of the *Restatement* insisted that “[g]ain resulting from breach of fiduciary duty is a prime example of the unjust enrichment that the

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<sup>41</sup> See, e.g., *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928) (“Joint adventurers, like copartners, owe to one another, while the enterprise continues, the duty of the finest loyalty.”).

<sup>42</sup> See, e.g., *Arnold v. Maxwell*, 111 N.E. 687, 689 (Mass. 1916) (describing business partners' duty to disclose to each other information relevant to their agreement or “mutual understanding”).

<sup>43</sup> See, e.g., *Sieger v. Sieger*, 202 N.W. 742, 743 (Minn. 1925) (“The conduct of defendant as found by the court shows that she obtained the title to this property in bad faith, and in taking advantage of a fiduciary relation. She did this in such an unconscientious manner that she should not in equity and good conscience be permitted to keep it. Under such circumstances equity will impress a constructive trust upon it in favor of the husband.”).

<sup>44</sup> Cf. *Boatright v. Derr*, 919 P.2d 221, 227 (Colo. 1996) (referring to a claim that an attorney breached his fiduciary duty as a tort claim).

<sup>45</sup> RESTATEMENT (THIRD) OF RESTITUTION § 55 cmt. b (Tentative Draft No. 6, 2008).

<sup>46</sup> See GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, *THE LAW OF TRUSTS AND TRUSTEES* § 484 (rev. 2d ed. 1978).

law of restitution condemns.”<sup>47</sup> The award is rooted in principles of restitution, because, in the reasoning of some courts, it is not intended to punish the defendant or to address an injury to the plaintiff but to “‘put right’ the . . . relationship that has been tainted.”<sup>48</sup> This explanation for the overlap between fiduciary duties and the unjust enrichment of the breaching party coheres with the court’s decision in *Lewis*; even though Cassandra and Sammy never fully possessed the home, Frank and Lucy held it for the benefit of their children as caring parents. When the Lewises abused this relationship and sold the house, they were unjustly enriched by the full value of the house not because they formally took the house from Cassandra and Sammy but because they took advantage of a confidential relationship that had caused the plaintiff to let down her guard.

One could argue that this explanation for the court’s award could not possibly be right because the relationship at issue never formally entailed fiduciary duties. Indeed, Colorado courts tend not to recognize the existence of fiduciary duties outside of certain specified categories of relationships.<sup>49</sup> But even when courts have not gone as far as to recognize the existence of fiduciary duties, informal but confidential relationships — where many of the interests are similar to those at issue in fiduciary duty cases — are often sufficient for the award of a constructive trust over the property at issue.<sup>50</sup> In fact, Colorado courts have awarded a constructive trust over property because one party to a confidential relationship abused the trust of the other party in order to acquire that property.<sup>51</sup> These cases follow a pattern similar to that at issue in *Lewis*. They tend to involve (1) parties to a confidential relationship forming a shared expectation; (2) one party to that relationship defying this expectation for the benefit of himself or a third party;

<sup>47</sup> RESTATEMENT (THIRD) OF RESTITUTION § 43 (Tentative Draft No. 4, 2005).

<sup>48</sup> *In re Estate of Corriea*, 719 A.2d 1234, 1241 (D.C. 1998) (quoting *Perl v. St. Paul Fire & Marine Ins. Co.*, 345 N.W.2d 209, 214 (Minn. 1984)).

<sup>49</sup> Colorado courts do allow for confidential relationships to give rise to fiduciary duties, but only if those relationships meet a rigorous four-part test that includes the requirement that “the alleged trustee assumed a primary duty to represent the other party’s interest in the subject of the transaction.” *Jarnagin v. Busby, Inc.*, 867 P.2d 63, 67 (Colo. App. 1993). Though the trial court did find the existence of a “confidential relationship,” it is unlikely that it could have found that the Lewises’ primary responsibility was to serve the best interests of Cassandra; this would seem to defy the “mutual purpose” language that is prevalent in the opinion and seems to describe a relationship that is more equal than the traditional trustee-beneficiary relationship.

<sup>50</sup> Where courts have added more formal requirements for the establishment of a constructive trust, a confidential relationship between the parties is often among them. *See, e.g., Sharp v. Kosmalski*, 351 N.E.2d 721, 723 (N.Y. 1976).

<sup>51</sup> *See, e.g., In re Marriage of Heinzman*, 579 P.2d 638, 640 (Colo. App. 1977) (holding that a man who gave a woman an interest in property based on the assumption that she would marry him was the beneficiary of a constructive trust over the property when the formal marriage never occurred).

and (3) a court awarding the full value of the property that the plaintiff would have received if his or her expectations had been met.<sup>52</sup>

The majority's award of the full value of the home was thus a possible award under an unjust enrichment approach. It was also the right award. Equitable doctrines are often wielded in recognition of the fact that informal interpersonal relationships sometimes impede parties from meeting the formal requirements of contract, tort, or property law.<sup>53</sup> Similarly, the court in *Lewis* understood that the parties' informal relationship gave Cassandra an interest in the value of the whole home on fairness grounds.<sup>54</sup> One could respond that courts promote efficiency and predictability by requiring formalities.<sup>55</sup> Yet, there is social value in maintaining informal parental relationships; requiring formalities may burden these relationships. Awarding Cassandra only the value she contributed would have encouraged people in Cassandra's situation to seek formal title to their houses more aggressively. But it would also have eroded the trust inherent in these types of familial relationships.

Perhaps the dissent in *Lewis* was correct that this case was not a typical unjust enrichment case, but that is only because the relationships between the parties made it unlike the typical unjust enrichment case. Even if the plaintiff never formally had title to the home, the defendants were unjustly enriched by the retention of their profits because of their duties to their son and daughter-in-law and the parties' shared informal expectations. Given the nature of the relationship between the parties and the ways in which courts have addressed similar relationships, the outcome in *Lewis* appears to fit logically within a broader legal context and was the best award available to the court because it protects these sorts of informal and confidential familial relationships.

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<sup>52</sup> See, e.g., *Nockelun v. Sawicki*, 602 N.Y.S.2d 190, 191 (App. Div. 1993) (after a niece (1) convinced her aunt to convey her a house — which the niece was set to inherit — before the aunt's death in order to avoid having it attached by creditors, and (2) did not reconvey that house to her aunt when the aunt needed title to the house in order to obtain a loan, the court held that the niece held the house in a constructive trust for her aunt).

<sup>53</sup> See, e.g., *Rase v. Castle Mountain Ranch Inc.*, 631 P.2d 680, 688 (Mont. 1981) (Shea, J., concurring) (agreeing with the majority that the title owner of a ranch on which a group of people had informally lived during certain seasons was holding the land in constructive trust for these people but writing that "[this case] demonstrates the difference between ownership of land owned by residents of Montana and ownership of land owned by outside corporations who use this state as an economic playground").

<sup>54</sup> Cf. James Steven Rogers, *Restitution for Wrongs and the Restatement (Third) of the Law of Restitution and Unjust Enrichment*, 42 WAKE FOREST L. REV. 55, 79 (2007) (arguing that even when property or contract law does not itself "dominate the question," unjust enrichment can be the sole basis for recovery).

<sup>55</sup> See Randy E. Barnett & Mary E. Becker, *Beyond Reliance: Promissory Estoppel, Contract Formalities, and Misrepresentations*, 15 HOFSTRA L. REV. 443, 449 (1987).