

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 23, 2002

Cornelia G. Clark
Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 02-0234-FT
STATE OF WISCONSIN**

Cir. Ct. No. 97-CV-45

**IN COURT OF APPEALS
DISTRICT III**

SAMUEL SERENE,

PLAINTIFF-RESPONDENT,

V.

MATHY CONSTRUCTION COMPANY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Pepin County:
DANE F. MOREY, Judge. *Reversed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Mathy Construction Company appeals a judgment compensating Samuel Serene for topsoil used in a construction project.¹ The trial

¹ This is an expedited appeal under WIS. STAT. RULE 809.17. All references to the Wisconsin Statutes are to the 1999-2000 version.

court concluded that a quasi-contract existed based on Mathy's unjust enrichment. Because we conclude that Serene failed to establish unjust enrichment, we reverse the judgment.

¶2 The dispositive facts are not in dispute. Mathy, the prime contractor on a highway project, contracted with Central Sand & Gravel to provide materials and services, including topsoil. Without Mathy's knowledge, Central took topsoil from Serene's property without his permission. When the Department of Transportation paid Mathy \$27,854.40 for the topsoil, that full amount was paid to Central. At that time, Mathy only owed Central the retainage to be paid upon completion of the contract. When Serene notified Mathy that Central had not paid him for the topsoil, Mathy told Serene that he would be paid out of the \$3,000 retainage. However, the State required Mathy to send the retainage to the State to cover wages and fringe benefits for Central employees. After Serene failed in his effort to recover from Central due to Central's bankruptcy, he brought this action against Mathy.

¶3 To establish a quasi-contract based on unjust enrichment, Serene had to establish that: (1) he conferred a benefit on Mathy; (2) Mathy had knowledge or appreciation of the benefit; and (3) it would be inequitable for Mathy to retain or accept the benefit without paying for it. *See Watts v. Watts*, 137 Wis. 2d 506, 531, 405 N.W.2d 303 (1987). Serene presented no evidence that Mathy did not pay for the topsoil. The parties agreed that Mathy paid Central \$27,854.40 and, upon instructions from the State, paid the retainage for the benefit of Central's employees. Equity is not achieved by requiring Mathy to pay twice.

¶4 When property is wrongfully converted, a constructive trust arises on the property "as long as it can be followed and identified in whosoever hands it

may come, except those of a bona fide purchaser for value and without notice.” See *Ross v. Specialty Risk Consultants*, 2000 WI App 258, ¶16, 240 Wis. 2d 23, 621 N.W.2d 669. When the property is sold to a bona fide purchaser, the trust attaches to the price or proceeds in the hands of the vendor, in this case Central. *Id.* Serene’s right of recovery is against Central, not Mathy.

¶5 The trial court’s decision and Serene’s brief suggest that Mathy’s status as prime contractor justifies implying a contract between Mathy and Serene. Generally, the liability of an independent contractor may not be imputed to a general contractor. See *Jacob v. West Bend Mut. Ins. Co.*, 203 Wis. 2d 524, 543, 553 N.W.2d 800 (Ct. App. 1996). Serene has cited no authority to support the proposition that an independent subcontractor’s liability for theft should be imputed to the general contractor.

¶6 Finally, Serene contends that Mathy’s promise to pay Serene out of the retainage provides its own basis for Mathy’s liability. A promise to pay the debt of another is void unless consideration for the promise is expressed in writing. See WIS. STAT. § 241.02(1)(2). The record discloses no consideration for Mathy assuming Central’s debt and no written contract.

By the Court.—Judgment reversed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

