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THE TIES OF NATURAL JUSTICE: RESTORING QUANTUM MERUIT FOR CONTRACTORS IN WASHINGTON

Adam B. Brotman

Abstract: Under Washington case law, quantum meruit is an appropriate means of recovery for contractors when substantial changes occur that are not covered by the contract and were not contemplated by the parties. The *Nelse Mortensen* and *Hensel Phelps* decisions severely limited quantum meruit by precluding contractors from recovering under this doctrine as a matter of law. This Comment examines how these two cases are at odds with the historical and philosophical underpinnings of quantum meruit, and with the Washington Supreme Court's decision in *Berg v. Hudesman*. Rather than apply *Hensel Phelps*'s plain meaning analysis, future quantum meruit decisions should follow *Berg*'s lead and interpret the parties' intentions in the context of their overall relationship.

If contract remedies were limited to protecting the expectation interests of the parties, awarding contract damages would be a relatively straightforward process. However, courts must take into account many countervailing forces when providing relief in contract disputes. Quantum meruit is one such force, and literally means "as much as deserved." Although quantum meruit has many different meanings in many different contexts, this Comment will specifically examine quantum meruit in the context of Washington construction litigation.

Under Washington case law, quantum meruit is an appropriate means of recovery for contractors in certain limited circumstances. Contractors are entitled to abandon the terms of their contracts and recover the reasonable value of their performance when substantial changes occur that are not covered by the contract and were not contemplated by the parties. Two cases have muddied this doctrine, however, by straying from principles previously set out by Washington courts. These cases are *Nelse Mortensen & Co. v. Group Health Cooperative*¹ and *Hensel Phelps Construction v. King County*.² Owners³ in Washington rejoiced because they believed that these cases dealt a severe blow to quantum

1. 17 Wash. App. 703, 566 P.2d 560 (1977). This opinion was adopted by the Washington Supreme Court with accompanying clarifying text at 90 Wash. 2d 843, 586 P.2d 469 (1978).

2. 57 Wash. App. 170, 787 P.2d 58 (1990).

3. The word "owner" in this Comment primarily refers to the person or company desiring to own a new structure. The term "owner" may also refer to a contractor dealing with a subcontractor. However, it should be noted that construction contracts are not limited to new structures. They may involve remodeling, tearing down old structures, improving roads, or any combination of these and other tasks.

meruit by precluding contractors from recovering under this doctrine as a matter of law. In fact, a national construction law treatise heralded *Hensel Phelps* as a triumph for owners and perhaps the beginning of the end for quantum meruit recovery in Washington.⁴ However, the Washington Supreme Court explicitly rejected the plain meaning approach to contract interpretation taken by *Hensel Phelps* in *Berg v. Hudesman*.⁵ In addition, a recent court of appeals decision involving quantum meruit may have limited *Hensel Phelps* to its facts.⁶ These apparently conflicting decisions have resulted in uncertainty and confusion for litigants.

This Comment suggests a means of clarifying the doctrine of quantum meruit as applied to construction litigation in Washington. First, it will examine the equitable history of the doctrine of quantum meruit. Second, it will analyze the line of Washington cases addressing quantum meruit in the area of construction litigation. Third, it will explain why *Nelse Mortensen*, and especially *Hensel Phelps*, should be seen as misapplications of quantum meruit, and why these decisions take an unrealistic approach to contract interpretation in construction litigation. Finally, this Comment will offer a proposal for the treatment of quantum meruit claims in the future.

I. THE EQUITABLE HISTORY OF QUANTUM MERUIT

An examination of England's historical development of remedies is necessary in order to understand the conceptual foundations of quantum meruit. Common law courts began as a result of the Magna Carta, which declared that appeals to justice should no longer be the king's responsibility alone.⁷ While the king filled these common law courts with justices to hear the common pleas, there remained a privy council (or "chancery") that handled matters concerning royal documents such as charters, writs, and grants.⁸

4. Bradley H. Bagshaw, *Quantum Meruit*, in *1991 Wiley Construction Law Update* 187, 199 (Steven M. Goldblatt ed.). This treatise went so far as to state that because of *Hensel Phelps*, if the contract unambiguously deals with changes, "the court will not resort to quantum meruit, regardless of how severe conditions become on the job." *Id.*

5. 115 Wash. 2d 657, 801 P.2d 222 (1990).

6. *Douglas Northwest v. O'Brien & Sons*, 64 Wash. App. 661, 828 P.2d 565 (1992).

7. Judy Beckner Sloan, *Quantum Meruit: Residual Equity in Law*, 42 DePaul L. Rev. 399, 404 (1992).

8. *Id.* A charter is an instrument emanating from the sovereign power, in the nature of a grant, either to the whole nation, or to a class or portion of the people, to a corporation, or to a colony or dependency, assuring to them certain rights, liberties, or powers. *Black's Law Dictionary* 235 (6th

The common law courts were rigid and inflexible, adamantly refusing to diverge from their formal system of writs and precedents. In contrast, the chancery court was more flexible and adapted its laws, procedures, and remedies in order to provide the most equitable results.⁹ Thus, two separate court systems were available to an aggrieved party: one in the courts at law that provided little flexibility and often left parties without a remedy, and the other in the chancery that provided a forum for achieving fair or equitable results. For obvious reasons, aggrieved parties soon began running to the chancery as their court of first resort.¹⁰

After *Slade's Case*¹¹ in 1602, the common law courts were anxious to offer the same equitable remedies as the chancery courts.¹² By allowing recovery in quantum meruit, the common law courts appropriated the substance of the equitable remedy of restitution by pretending that all contracts included a fictional promise that in the event of a breach, the breaching party would pay the reasonable value of any performance rendered by the nonbreaching party.¹³ Thus, quantum meruit in its original sense was merely a legal form of equitable restitution.¹⁴

Lord Mansfield, an eighteenth century jurist, explained these new developments in the common law in terms of their restitutionary nature and found a basis for them in Roman law.¹⁵ In words that capture the equitable ancestry of quantum meruit, Mansfield explained that “if the defendant be under an obligation, from the ties of natural justice, to

ed. 1990). The original writ was a mandatory letter from the king, issuing out of chancery, which was used in English practice for the commencement of personal actions. *Id.* at 1608.

9. Sloan, *supra* note 7, at 404–05.

10. *Id.* at 404.

11. 76 Eng. Rep. 1072 (K.B. 1602). Prior to *Slade's Case*, a defendant could escape liability for a debt by securing twelve persons who would swear they believed the defendant told the truth in denying that he owed the debt; this was known as a “wager of law.” The judges deciding *Slade's Case* rejected this irrational system for resolving contract disputes, and made available to litigants a remedy for collecting debts in which disputes over facts would be decided by juries. *Slade's Case* thus transformed *indebitatus assumpsit* (general *assumpsit*) into a complete substitute for debt. John P. Dawson, et al., *Cases and Comment on Contracts* 103–04 (5th ed. 1987).

12. Arthur Rosett, *Contract Law and Its Application* 341 (4th ed. 1988). *See also* Sloan, *supra* note 7, at 423.

13. Rosett, *supra* note 12, at 340–41.

14. Sloan, *supra* note 7, at 431.

15. *Id.* at 424. In fact, the principle at the heart of restitution is as ancient as Aristotle. Aristotle saw all wrongful acts as disturbing the equilibrium of the distribution of goods among members of society because they tended to produce equal gain to the wrongdoer and loss to the victim. Louis E. Wolcher, *The Accommodation of Regret in Contract Remedies*, 73 Iowa L. Rev. 797, 810 n.59 (1988).

refund; the law implies a debt, and gives this action founded in the equity of the plaintiff's case, as it were upon a contract."¹⁶

One explanation for allowing the nonbreaching party to abandon the contract in favor of a recovery in quantum meruit is that a breach after partial performance was not in the contemplation of the parties. It offends notions of "natural justice" to allow a breaching party to obtain goods and services for a price less than their reasonable value by virtue of the breach itself. Thus, courts use quantum meruit to require the breaching party to relinquish unjustified benefits in those situations where the contract does not govern the performance in any realistic sense.¹⁷

II. THE LINE OF QUANTUM MERUIT CONSTRUCTION CASES IN WASHINGTON

Quantum meruit recovery in Washington construction cases, although often involving full performance,¹⁸ is a spin-off of this type of restitutionary theory.¹⁹ Quantum meruit has spawned confusion among judges and lawyers alike because courts find themselves applying an equitable remedy in the face of an express contract between the parties.²⁰ Consequently, Washington quantum meruit cases in the area of construction litigation appear on the surface to be a discordant strain. However, with an eye to the equitable history of quantum meruit, the apparent contradiction in these cases between contractual and equitable remedies can be reconciled.

16. *Moses v. MacFerlan*, 97 Eng. Rep. 676 (K.B. 1760).

17. Rosett, *supra* note 12, at 341.

18. By allowing recovery in quantum meruit notwithstanding full performance, Washington courts have decided to stray from the traditional rule limiting a plaintiff who has fully performed to a remedy "on the contract," not in quantum meruit. See Dawson, et al., *supra* note 11, at 100.

19. See *Dravo Corp. v. L.W. Moses Co.*, 6 Wash. App. 74, 90, 492 P.2d 1058, 1069 (1971).

20. Rosett noted that "[u]se of this fiction, sometimes called 'quasi contract,' provided judges with a flexible tool to do justice, but muddied the conceptual stream of the law to the chagrin of law professors and the dismay of students." Rosett, *supra* note 12, at 341. See also Sloan, *supra* note 7, at 462 ("quantum meruit is not a dead issue—it simply is struggling beneath its own complexity.").

A. *The General Facts of a Typical Construction-Related Quantum Meruit Claim*

Before examining Washington's line of quantum meruit construction cases, it may be helpful to briefly describe a construction contract.²¹ While a construction contract often involves multiple parties and several layers of contractors and subcontractors, at its lowest common denominator it involves an owner²² and a contractor (the person or company desiring to build the new structure). At the outset, owners advertise their desire to own a structure that will be built pursuant to a set of contract documents. These contract documents often include design specifications, as well as standard terms of the contract. Based on these documents, various contractors submit price offers, known as bids, to the owner. The owner then accepts the most favorable bid and agrees to contract with the contractor.

In order to submit an accurate bid, the contractor must study the contract documents and calculate the costs of labor, material, equipment, overhead, and profit. The contractor relies on the fact that the design specifications will be constructable and accurate. Moreover, the contractor assumes that the design is complete and that the owner will not ask the contractor to deviate substantially from the provided design. Thus, before even putting the first shovel in the ground, the contractor offers to custom build a structure for a fixed sum of money. In this sense, the contractor is put in a precarious position.²³

B. *Pre-Nelse Mortensen Cases Focused on the Intentions of the Parties*

The seminal Washington decision applying quantum meruit in a construction claim is *Tribble v. Yakima Valley Transportation Co.*²⁴ In *Tribble*, the Washington Supreme Court held that quantum meruit was appropriate when railroad track contractors alleged that the owner changed the line and grade of the track such that the contractors were forced to remove 25 times more earth material than expected from the

21. This section is no way intended to be a comprehensive explanation of all construction contracts. There are as many different fact patterns as there are contracts.

22. See *supra* note 3.

23. This is not to say the owner is in a risk-free position. For example, owners rely on contractors' abilities to produce quality work in the time specified, and count on the integrity of the contractor to address problems in a manner consonant with honesty and good faith.

24. 100 Wash. 589, 171 P. 544 (1918).

job site.²⁵ The contract in *Tribble* contained a clause specifically addressing the possibility that the owner could change the line and grade.²⁶

The court found that the contractor's quantum meruit claim hinged upon whether the work eventually performed was beyond the reasonable contemplation of the parties at the time the contract was entered into.²⁷ The court explained that when quantum meruit is appropriate, the law releases the parties from their original written contract and leaves them to their remedies and defenses under what is in legal effect a new contract.²⁸ Because the court found the issue of the parties' contemplation to be a proper question for the jury, it affirmed the verdict allowing the contractors to recover the reasonable value of removing the extra material.²⁹

The next case in this line, *Schuehle v. City of Seattle*,³⁰ involved a bridge contractor who also was allowed recovery in quantum meruit because the owner sought to gain an advantage that was beyond the intentions of the parties. Seattle decided to downsize a bridge project, which in turn affected the way in which the contractor had planned to build the bridge. The supreme court held that the changes ordered by the city were not minor or inconsequential changes necessary for the practical performance of the contract,³¹ but were made in order to give the city an advantage not found in the contract.³² Of course, the court did not literally mean that the advantage was absent from the face of the contract documents. Rather, the court meant that the advantage was not within that bundle of legal rights and obligations that formed the more abstract contract between the parties.³³

25. *Id.* at 590-91, 171 P. at 545.

26. *Id.* at 593, 171 P. at 546. Other Washington cases also allowed recovery in quantum meruit despite a contractual provision that seemed to cover the disputed changes. See, e.g., *Schuehle v. City of Seattle*, 199 Wash. 675, 684, 92 P.2d 1109, 1113 (1939).

27. *Tribble*, 100 Wash. at 597, 171 P. at 547.

28. *Id.* at 605, 171 P. at 549. See also *supra* note 13 and accompanying text.

29. *Tribble*, 100 Wash. at 595, 597, 171 P. at 546, 547.

30. 199 Wash. 675, 92 P.2d 1109 (1939).

31. *Id.* at 680-81, 92 P.2d at 1111.

32. *Id.* at 682, 92 P.2d at 1112.

33. The contract and contract documents are not necessarily the same thing. A contract, in its abstract sense, is not necessarily a tangible item. A contract is "an agreement between two or more persons which creates an obligation to do or not to do a particular thing." *Black's Law Dictionary* 322 (6th ed. 1990). Thus, parties come together and contract with one another, and attempt to integrate their intentions in the contract documents. These contract documents are often referred to as the "contract."

In 1973, in *Edwards Contracting Co. v. Port of Tacoma*,³⁴ the supreme court once again upheld recovery in quantum meruit, this time for a contractor constructing a rail service yard. Although the original contract documents contemplated that the project would cross a different sewer construction project only five times, the contractor's work actually was delayed due to conflicts with the sewer project on more than 30 occasions. The trial court found that the delays "demolished" the contractor's intended time and cost projections.³⁵ On review, the supreme court held that the critical factor in application of quantum meruit is whether the contractor should have discovered or anticipated the changed condition.³⁶ The court found this was properly resolved as a question of fact, and thus allowed recovery in quantum meruit.³⁷

C. *Nelse Mortensen and Hensel Phelps Focused on the Contract Documents*

In 1977, the Washington Court of Appeals denied quantum meruit recovery in *Nelse Mortensen & Co. v. Group Health Cooperative*.³⁸ After examining several cases in which contractors had alleged damages from owner-caused delays, the court stated that the one controlling factor in each case had been the presence or absence of a clause that limited or barred the contractor's claim for damages.³⁹ According to the court, in every case in which recovery was allowed in quantum meruit, there had been no such limiting clause.⁴⁰

The supreme court adopted the full opinion of the court of appeals, and confirmed that the test for quantum meruit was whether the changed conditions had been within the contemplation of the parties.⁴¹ The court of appeals had held that the delays incurred by the contractor were not so

34. 83 Wash. 2d 7, 514 P.2d 1381 (1973).

35. *Id.* at 13, 514 P.2d at 1385.

36. *Id.*, 514 P.2d at 1386. See also *Bignold v. King County*, 65 Wash. 2d 817, 822, 399 P.2d 611, 614-15 (1965) (holding that the "critical question" in a quantum meruit claim is whether the contractor should have discovered or anticipated changed circumstances); *Rowland Constr. Co. v. Beall Pipe & Tank Corp.*, 14 Wash. App. 297, 304, 540 P.2d 912, 917 (1975).

37. *Edwards*, 83 Wash. 2d at 13, 514 P.2d at 1386.

38. 17 Wash. App. 703, 566 P.2d 560 (1977). This opinion was adopted by the Washington Supreme Court with accompanying clarifying text at 90 Wash. 2d 843, 586 P.2d 469 (1978).

39. 17 Wash. App. at 719, 566 P.2d at 569 (referring to a "no damage for delays" clause).

40. *Id.*

41. *Nelse Mortensen & Co. v. Group Health Coop.*, 90 Wash. 2d 843, 845, 586 P.2d 469, 470 (1978). Note that the supreme court found it necessary to clarify the test being applied by the court of appeals in this case, and did not mention the court of appeals's "controlling factor."

unreasonable as to fall outside the scope of the contract and warrant recovery in quantum meruit.⁴² Furthermore, the court of appeals had noted that the contractor had extensive experience in building hospitals, and thus should have known of the difficulties it would face on a complicated job of this type.⁴³

Thirteen years later, *Hensel Phelps Construction Co. v. King County*⁴⁴ exacerbated the quandary over whether a quantum meruit action should depend on the intention of the parties or on the contract documents. The *Hensel Phelps* court focused on the contract documents, and held recovery in quantum meruit to be inappropriate as a matter of law. In *Hensel Phelps*, a painting subcontractor had entered into a written contract for painting a county jail. Because of early delays in the project, the general contractor ordered several changes in the scope of the subcontractor's work.

These changes resulted in 1) an acceleration of each floor's time deadline from 45 days to 19 days; 2) "stacking of trades," meaning that the subcontractor had to work in the same area and at the same time as other subcontractors;⁴⁵ and 3) inefficiencies caused by previously undiscovered problems with the jail's security-based design.⁴⁶ But despite the difficulties encountered, the subcontractor never asked for time extensions or change orders. Rather, the subcontractor presented claims for extra compensation almost daily, as permitted under the subcontract, and received payment for practically every request.⁴⁷

The court of appeals upheld the trial court's dismissal of the subcontractor's quantum meruit claim. It stated that quantum meruit is based on the concept of mutual assent and its limits.⁴⁸ That is, a contractor cannot be presumed to have bargained away the right to claim

42. 17 Wash. App. at 726, 566 P.2d at 572.

43. *Id.*; see also *Lester N. Johnson Co. v. City of Spokane*, 22 Wash. App. 265, 588 P.2d 1214 (1978), in which the court allowed recovery in quantum meruit, distinguishing *Nelse Mortensen* because the key fact in *Nelse Mortensen* was the contractor's experience in hospital renovations. *Id.* at 271, 588 P.2d at 1218.

44. 57 Wash. App. 170, 787 P.2d 58 (1990).

45. In its opinion, the court treated the inefficiencies and disruptions caused by the stacking of trades as being encompassed by the claim for stacking of trades, as opposed to being separate claims. *Id.* at 177-79, 787 P.2d at 63-64.

46. The jail was designed to prevent escape by placing staircases from one floor to the next at opposite ends of the building, forcing workers to walk across the length of the building to go from one staircase to another. *Id.* at 172-73, 787 P.2d at 60.

47. *Id.* at 173, 787 P.2d at 60.

48. *Id.* at 174, 787 P.2d at 61.

damages resulting from unanticipated changes.⁴⁹ The court then fashioned a new two-step plain meaning test for deciding quantum meruit cases in construction litigation. The first step is to decide whether the contract documents contain any ambiguity from which a trier of fact could reasonably find that the changes were not contemplated by the parties.⁵⁰ If the court, by looking within the four corners⁵¹ of the document, determines that the contract unambiguously contemplates the changes, then no issue of fact exists and the quantum meruit claim must be dismissed as a matter of law. If, on the other hand, the provisions contain any ambiguity, issues of fact would exist, and resolution of the question would be for the trier of fact.⁵²

Applying this test in *Hensel Phelps*, the court found no ambiguity in the unusually extensive contract documents, and concluded that the quantum meruit claim had been properly dismissed as a matter of law.⁵³ The court also stated that the magnitude of the changes was irrelevant to the quantum meruit claim.⁵⁴ Instead, the court asserted that the nature of the problems encountered, not the magnitude, was determinative.⁵⁵ Finally, the court rejected application of the “cardinal change” doctrine.⁵⁶ Under this doctrine, which is used primarily in federal cases, a contractor may recover in quantum meruit when there has been a fundamental alteration of the contract beyond its original scope.⁵⁷ The *Hensel Phelps* court refused to apply this doctrine because there had been no change in the shape or square footage of painted surfaces.⁵⁸

After *Hensel Phelps*, litigators may have wondered whether quantum meruit recovery was essentially over for contractors in Washington. However, *Douglas Northwest Inc. v. Bill O'Brien & Sons Construction*⁵⁹ may have limited application of the *Hensel Phelps* rationale to the facts of that case. In *Douglas*, the trial court allowed a subcontractor on the

49. *Id.* Interestingly, this statement seems to suggest that quantum meruit should focus on the contemplation of the parties, not on the contract documents themselves.

50. *Id.* at 175–76, 787 P.2d at 62.

51. “Four corners” is defined as “the face of a written instrument.” *Black's Law Dictionary* 657 (6th ed. 1990).

52. *Hensel Phelps*, 57 Wash. App. at 175–76, 787 P.2d at 62.

53. *Id.*

54. *Id.* at 181, 787 P.2d at 65.

55. *Id.* at 181–82, 787 P.2d at 65.

56. *Id.* at 182–83, 787 P.2d at 65–66.

57. See *Air-A-Plane Corp. v. United States*, 408 F.2d 1030 (Ct. Cl. 1969).

58. 57 Wash. App. at 182–83, 787 P.2d at 65–66.

59. 64 Wash. App. 661, 828 P.2d 565 (1992).

construction of an apartment complex to recover in quantum meruit for labor and equipment inefficiencies⁶⁰ caused by the general contractor's delays and interruptions. The court of appeals distinguished the contractual provisions in *Hensel Phelps* as being "far more elaborate and detailed" than the provisions in *Douglas*.⁶¹ Thus, the court refused to find that any of the contractual provisions in *Douglas* addressed the subcontractor's labor and equipment inefficiency claim.⁶²

Douglas left contractors and owners alike with at least two questions. First, it was unclear whether contractors could simply label changes as owner-caused labor and equipment inefficiencies, and thereby recover in quantum meruit. Second, although *Douglas* referred to *Hensel Phelps* as authority for when a quantum meruit claim could be properly dismissed as a matter of law,⁶³ the opinion did not apply *Hensel Phelps*'s plain meaning test.⁶⁴

D. Berg v. Hudesman

Several months after the decision in *Hensel Phelps*, the supreme court addressed the issue of contract interpretation in *Berg v. Hudesman*.⁶⁵ In *Berg*, the court rejected the notion that contract terms can be unambiguous on their face. The court pointed out that the meaning of words depends on the context in which they are used. The court thus insisted that words in a contract do not define themselves, and that contractual terms cannot apply themselves to external objects and performances.⁶⁶ Consequently, in discerning the intentions of the parties, the court stated that a trial court should not limit itself to the four corners of the contract document, but should also look to the actual conduct of the contracting parties and the reasonableness of the parties' respective

60. Inefficiencies occur on a construction project when the original cost/revenue schedule becomes disrupted as a result of multiple owner-caused changes.

61. *Douglas*, 64 Wash. App. at 685, 828 P.2d at 579.

62. *Id.*, 828 P.2d at 579-80. The court in *Douglas* said that the contract was "silent as to the type of remedy available for O'Brien's labor and equipment inefficiency claim." *Id.*

63. *Id.* at 683, 828 P.2d at 578.

64. This is especially interesting since both decisions are from Division One of the Washington Court of Appeals.

65. 115 Wash. 2d 657, 801 P.2d 222 (1990).

66. *Id.* at 664, 801 P.2d at 227 (citing 3 A. Corbin, *Corbin on Contracts* § 536, at 27-28 (1960)).

interpretations of the contract.⁶⁷ The court termed this the “context rule” of contract interpretation.⁶⁸

III. FUTURE QUANTUM MERUIT CASES SHOULD FOCUS ON THE PARTIES’ INTENTIONS

While *Nelse Mortensen* may have overemphasized the importance of contractual clauses in addressing quantum meruit claims, the *Hensel Phelps* court took this focus too far in adopting a plain meaning approach to quantum meruit. These two cases are at odds with the historical and philosophical underpinnings of quantum meruit, and with *Berg*. As a result, future Washington courts must clarify the requirements of quantum meruit recovery for future litigants. Rather than apply *Hensel Phelps*’s plain meaning analysis, future courts should follow *Berg*’s lead and interpret the parties’ intentions in the context of their overall relationship.

A. *Nelse Mortensen Overemphasized Contractual Fine Print*

According to the court in *Nelse Mortensen*, the sole controlling factor in each delay case was the presence or absence of a clause that limited or barred a contractor’s claim for damages caused by the owner.⁶⁹ The *Hensel Phelps* opinion echoed this observation when it identified three cases, including *Tribble*, as standing for the proposition that recovery in quantum meruit has been allowed only in the absence of a contractual provision on point.⁷⁰

Tribble proves that this “controlling factor” approach is erroneous if applied to quantum meruit claims generally. In *Tribble*, the contractor sued for damages caused by an owner’s change in the line and grade of a railroad. The contract specifically reserved the right of the railroad to change the line and grade at any stage of work, and specifically set out the contractor’s remedy if such a change should increase the amount of work to be performed.⁷¹ Thus, there existed an unambiguous contractual provision directly addressing the difficulties that the contractor

67. *Id.* at 668, 801 P.2d at 229.

68. *Id.* at 667, 801 P.2d at 228.

69. *Nelse Mortensen & Co. v. Group Health Coop.*, 17 Wash. App. 703, 719, 566 P.2d 560, 569 (1977).

70. *Hensel Phelps Constr. Co. v. King County*, 57 Wash. App. 170, 175, 787 P.2d 58, 61 (1990).

71. *Tribble v. Yakima Valley Transp.*, 100 Wash. 589, 593, 171 P. 544, 546 (1918).

eventually encountered. Nevertheless, the supreme court allowed recovery in quantum meruit because the work performed was beyond the reasonable contemplation of the parties.⁷²

Consequently, the presence or absence of a clause that limits a contractor's damages is not the controlling factor in Washington construction quantum meruit cases. Rather, the factor that has consistently been labeled as critical in the application of this doctrine is whether the changes that occurred were within the reasonable contemplation of the parties at the time of contracting.⁷³ *Nelse Mortensen's* contract-oriented focus disregarded the flexible and equitable nature of quantum meruit. In a time when strict contract remedies often left aggrieved parties without an adequate remedy at law, quantum meruit developed as a doctrine that allowed judges the flexibility⁷⁴ to consider basic notions of fairness and to rectify an unjust enrichment. Today, quantum meruit should allow Washington courts the same flexibility to look beyond the strict contractual language in ascertaining whether changes on a construction job have extended beyond the original intentions of the parties.

Consider, for example, the quantum meruit recovery allowed a nonbreaching party in a partially performed contract. The underlying rationale for this classic type of quantum meruit recovery is twofold. First, the contractor has furnished something of value to the owner that cannot be measured by the original contract. Second, furnishing a partially built structure to the owner was not within the contemplation of the contractor at the time of contracting. Reference to the original contract documents under these circumstances would be like throwing a four-cornered document in the face of equity. One cannot reasonably value a partially completed building when the contract contemplated the entire house being built.⁷⁵ The appropriate resolution is to allow the contractor to abandon the contract, and to recover the fair market value of the work performed to date.

72. See *Schuehle v. City of Seattle*, 199 Wash. 675, 682, 92 P.2d 1109, 1113 (1939); *Lester N. Johnson Co. v. Spokane*, 22 Wash. App. 265, 588 P.2d 1214 (1978); *Douglas Northwest v. O'Brien & Sons*, 64 Wash. App. 661, 828 P.2d 565 (1992). These cases confirm that a contractual provision, although arguably on point, is not always controlling.

73. See, e.g., *Tribble*, 100 Wash. at 597, 171 P. at 547; *Bignold v. King County*, 65 Wash. 2d 817, 826, 399 P.2d 611, 614-15 (1965); *Edwards Constr. v. Port of Tacoma*, 83 Wash. 2d 7, 13, 514 P.2d 1381, 1386 (1973); *Hensel Phelps*, 57 Wash. App. at 174, 787 P.2d at 61.

74. Sloan concludes that quantum meruit demonstrates necessary flexibility in the law: "This Article has been a chronicle of the evolution and current application of this flexibility. Quantum meruit is equity's flexibility in law." Sloan, *supra* note 7, at 462.

75. For example, there is no realistic "fair market" for a roof and a frame.

Similarly, in construction cases warranting application of quantum meruit, contractors are not denying that they signed a contract. Rather, they are suing “off the contract.”⁷⁶ That is, they are asking the courts to look at the performance actually rendered, and are arguing that this performance is substantially different from that originally contemplated. In this sense, there are no longer any contractual terms that govern the performance actually rendered. Contractors are electing to recover on an implied agreement by the owner to pay the reasonable value of rendered services.⁷⁷

Following *Nelse Mortensen*, the Washington Legislature felt it necessary to clarify that contractors may still elect to recover on this implied agreement when appropriate, and cannot be held to have contracted away their right to sue off the contract. The court of appeals in *Nelse Mortensen* held that the contract did account for delays that the trial court earlier had held to be outside the contemplation of the parties, and hence unreasonable.⁷⁸ Presumably, the Legislature feared *Nelse Mortensen* would allow owners to use contractual clauses to artificially bar contractors’ rights to sue in quantum meruit. In 1979, the Legislature enacted Washington Revised Code section 4.24.360, which states that any clause in a construction contract that purports to waive, release, or extinguish the rights of a contractor to damages or an equitable adjustment arising out of unreasonable owner-caused delay is against public policy, and thus void and unenforceable.

The difficulty with *Nelse Mortensen* arises from its distracting and misguided language focusing on the contract documents rather than on the overall relationship of the parties. The court attempted to reconcile all prior cases involving delay and quantum meruit.⁷⁹ This is a difficult, if not impossible, task to perform in an area such as quantum meruit that is riddled with equitable, fact-specific considerations.⁸⁰ As a result, the court’s conclusion ignores prior precedent and mistakenly implies that a

76. A quantum meruit claim is not a breach of contract action. See *supra* note 18 and accompanying text.

77. See *supra* note 13 and accompanying text.

78. *Nelse Mortensen & Co. v. Group Health Coop.*, 17 Wash. App. 703, 721, 566 P.2d 560, 570 (1977).

79. Although the *Nelse Mortensen* court primarily reviewed “delay” cases, some of which did not even address quantum meruit, the court described its summary of the “pertinent cases” as falling within one of two classes: “Either the contractual provisions involved have been applied to defeat an attempted recovery by the contractor, or recovery has been allowed on the theory of quantum meruit.” 17 Wash. App. at 719, 566 P.2d at 569.

80. See Sloan, *supra* note 7, at 431.

quantum meruit claim should be decided by focusing on the contractual fine print.

B. Hensel Phelps *Missed the Mark*

The *Hensel Phelps* court took *Nelse Mortensen's* contractual focus another step by adopting an inflexible approach to quantum meruit claims. First, the court's plain meaning analysis assumes courts can ascertain the intentions of the parties when the words on the contract are unambiguous. Words, however, have no fixed meaning.⁸¹ Second, *Hensel Phelps* deemed the magnitude of changes irrelevant in quantum meruit claims. Both of these determinations demonstrate an unrealistic approach to contract interpretation and a misunderstanding of quantum meruit. Unless clarified by future Washington courts, *Hensel Phelps* will continue to be used by owners to put a de facto end to quantum meruit claims in the state.⁸² Moreover, artificially stifling quantum meruit claims may have undesirable effects on the cost of construction, the accuracy of assessing damages in legitimate construction claims, and contractors' abilities to fairly represent their claims in court.

1. Hensel Phelps's Plain Meaning Test is Unrealistic

Hensel Phelps not only misconstrued prior Washington cases, but also created a plain meaning approach to addressing quantum meruit claims that is unrealistic as a means of determining whether changes on a construction project went beyond the original contemplation of the parties. In a startling move, the court of appeals stated that trial courts should first look to the four corners of the contract to see if the contract unambiguously addresses the changes or disruptions experienced by the complaining party.⁸³ If so, the quantum meruit claim must be dismissed for lack of a genuine issue of fact.⁸⁴

This plain meaning test mirrors the rigid common law remedial limitations that quantum meruit was designed to prevent. The whole point of quantum meruit in construction cases is to look to the true

81. See *supra* notes 65–68 and accompanying text.

82. The author has attended several mediations, for example, in which owners have seized on the language in *Hensel Phelps* and have simply distributed the *Hensel Phelps* opinion and excerpts from the *Wiley Construction Law Treatise*, *supra* note 4, to impress upon contractors how *Hensel Phelps* has essentially eviscerated quantum meruit recovery for contractors in Washington.

83. *Hensel Phelps Constr. v. King County*, 57 Wash. App. 170, 175–76, 787 P.2d 58, 62 (1990).

84. *Id.*; see *supra* note 52 and accompanying text.

contemplation of the parties and provide equitable relief when the actual performance has gone beyond these original contemplations. Apparently the court believed such contemplations can be ascertained when the words in a contract are unambiguous. However, developments in the use of parol, or extrinsic, evidence in interpreting contracts⁸⁵ have shown that this is an unrealistic approach to ascertaining the intentions of the parties. Thus, a look at how the *Berg* decision, commentators, and judges have resolved the use of parol evidence in contract interpretation is helpful in understanding why *Hensel Phelps's* plain meaning analysis should not control future quantum meruit claims.

In *Berg*, the supreme court explicitly rejected the notion that the contemplation of the parties can be ascertained from within the four corners of the contract documents. The court emphasized the need to look beyond the contract documents, and to examine the context in which the contract was drafted.⁸⁶ *Hensel Phelps's* plain meaning test for quantum meruit claims is thus directly at odds with the *Berg* court's observation that words in a contract can have several different meanings in the absence of an understanding of the context in which the words were used by the parties.

Commentators have been no less critical of the plain meaning approach. For example, Corbin, Williston, and the Restatement of Contracts all suggest that courts should examine the circumstances surrounding the execution of a writing, even when the writing appears unambiguous on its face.⁸⁷ A Washington commentator endorsed and explained this view by stating that looking beyond the supposedly unambiguous contract language is the only way to yield interpretations that coincide with the meanings actually contemplated by the parties.⁸⁸

Further, the current consensus among judges in the area of contract interpretation confirms the notion that ascertaining the intentions of the parties from the face of a document alone is unrealistic. In rejecting the

85. This is not to be confused with the parol evidence rule, which relates to the question of integration and the role of parol evidence in ascertaining whether the contract documents were intended as a partial or a complete expression of all terms of the parties' agreement. *Berg v. Hudesman*, 115 Wash. 2d 657, 670, 801 P.2d 222, 230 (1990).

86. *Id.* at 668, 801 P.2d at 229; *see also supra* note 67 and accompanying text.

87. Arthur Corbin, *Corbin on Contracts* § 536 (1950); 3 Samuel Williston & George J. Thompson, *A Treatise on the Law of Contracts* §§ 609, 618, 629 (rev. ed. 1936); Restatement, *Contracts* § 230 (1932); *see also* 9 J. Wigmore, *Evidence* §§ 2461–2462 (1981); 2 E. Farnsworth, *Contracts* § 7.12, at 277–78 (1990); U.C.C. § 2-202 comment 2.

88. Warren L. Shattuck, *Contracts in Washington, 1937–1957: Part II*, 34 Wash. L. Rev. 345, 374–76 (1959).

plain meaning approach, Justice Traynor explained how a contract document may help one adduce the intentions of the parties, but by itself cannot conclusively establish the parties' intentions:

If words had absolute and constant referents, it might be possible to discover contractual intention in the words themselves and in the manner in which they were arranged. Words, however, do not have absolute and constant referents. . . . The meaning of particular words or groups of words varies with the verbal context and surrounding circumstances and purposes in view of the linguistic education and experience of their users and their hearers or readers (not excluding judges).⁸⁹

2. *The Nature of the Changes in a Quantum Meruit Claim Should Include Magnitude*

The *Hensel Phelps* court also rejected the subcontractor's claim that the magnitude of delay in that case was great enough to warrant recovery in quantum meruit. According to the court, the focus should be on the nature, not the magnitude,⁹⁰ of the delay. As a result, the court stated it was irrelevant that the subcontractor used nearly three times the amount of labor hours originally contemplated to perform its contract obligations, or that it used 26 painters instead of nine. Because the nature of the problems encountered by the subcontractor was supposedly addressed by the contract, the court found no basis for abandoning the contract in favor of quantum meruit.⁹¹

Taking *Hensel Phelps's* approach to its logical extreme, if a subcontractor used 10,000 times the amount of labor hours originally contemplated to perform its contractual obligations, the court would nevertheless deny recovery in quantum meruit. According to *Hensel Phelps*, magnitude even of this degree is irrelevant despite the astronomical inequities. Perhaps the problem initially lies in the fact that the *Hensel Phelps* court used the word "nature" as if it necessarily

89. *Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.*, 442 P.2d 641, 644 (Cal. 1968). See also Justice Holmes's statement that "a word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." *Towne v. Eisner*, 245 U.S. 418, 425 (1918), and Thomas M. Palay, *A Contract Does Not a Contract Make*, 1985 Wis. L. Rev. 561 (explaining that focusing on the contractual relation of the parties is a better way to understand what actually transpired between the parties than focusing on the terms of the contract documents).

90. *Hensel Phelps Constr. v. King County*, 57 Wash. App. 170, 181-82, 787 P.2d 58, 65 (1990).

91. *Id.* at 181-82, 787 P.2d at 65.

excluded magnitude. This is simply unwarranted, and ignores prior case law. The *Hensel Phelps* court failed to note that the *Rowland* court focused on the magnitude of changes when denying recovery in quantum meruit.⁹² Moreover, there is nothing to suggest that when the *Nelse Mortensen* court used the word “nature”⁹³ in describing the parties’ contemplations, it meant to exclude the concept of magnitude. In fact, in a section entitled “The Nature of the Delays,” the court emphasized the number of individual delay claims brought by the contractor.⁹⁴

If courts begin turning a blind eye to magnitude, contractors may circumvent the *Hensel Phelps* plain meaning test by simply providing a different name for the changes that occurred. For example, contractors could bring a claim for “inefficiencies” caused by owners’ actions,⁹⁵ or for owner-caused “impact costs.”⁹⁶ Since the terms “inefficiencies” and “impact costs” may not unambiguously appear on the face of a contract, the court could not find them to be contemplated by the parties under a plain meaning approach. Such semantic games would be a natural reaction to *Hensel Phelps*’s unrealistic assumption that the words on a contract establish the complete boundaries of the parties’ intentions.

In the long run, a plain meaning approach to quantum meruit claims may cause an increase in the cost of residential and commercial housing. If the courts ignore the true intentions of the parties, then contractors will have to be unrealistic in figuring their bids. Without an avenue for recourse in the event of substantial changes, contractors will begin building a contingency⁹⁷ into their bids in order to self-insure for the possibility of changes that go beyond the original intentions of the parties. The purpose of “changed site conditions” clauses in government

92. *S. L. Rowland Constr. Co. v. Beall Pipe & Tank Corp.*, 14 Wash. App. 297, 305, 540 P.2d 912, 917–18 (1975). *Hensel Phelps* did not discuss *Rowland* in its discussion of the irrelevance of magnitude.

93. *See Nelse Mortensen & Co. v. Group Health Coop.*, 17 Wash. App. 703, 727, 566 P.2d 560, 573 (1977) (holding that if “owner-caused delay in construction was of a nature contemplated by the parties, and specific provisions of their contract provide a remedy, or the contract otherwise supplies a means of compensation for such delay, then the delay cannot be deemed unreasonable to the extent the contract terms should be abandoned in favor of quantum meruit recovery”).

94. *Id.* at 710–13, 566 P.2d at 564–65.

95. This appears to be exactly what the contractor did in *Douglas Northwest v. O’Brien & Sons*, 64 Wash. App. 661, 685, 828 P.2d 565, 579–80 (1992), in which the court could not find a remedy for labor and equipment inefficiencies within the four corners of the contract, and thus found quantum meruit to be appropriate.

96. “Impact costs” occur on a project when the original cost/revenue schedule becomes disrupted as a result of multiple owner-caused changes.

97. A “contingency” in this context refers to an inflation of the contractor’s original bid amount.

construction contracts, for example, is to remove some of the gamble on subsurface conditions.⁹⁸ With this clause, contractors do not need to consider how large a contingency should be added to the bid in order to cover the risk of changed site conditions.⁹⁹ With quantum meruit available, the public benefits from more accurate bidding because contractors need not inflate their bids for risks that may not materialize.¹⁰⁰ Artificial contingencies create higher building costs, and these higher costs eventually translate into higher residential and commercial rental and building costs.

3. *An Illustration*

A brief example may help illustrate the flaws and dangers of the *Hensel Phelps* approach to quantum meruit claims. Imagine a contract between an owner and a contractor to build a one-story house on an ordinary looking piece of land. This hypothetical contractor has built hundreds of houses and is accustomed to the minor or inconsequential changes in plans that are necessary for the practical performance of a contract to build a house. Moreover, the contract between these parties contains a provision for something as specific as unanticipated wet subsurface conditions encountered by the contractor.

Now, imagine that after two weeks on the job, the contractor hits a natural spring while digging the foundation for the house.¹⁰¹ Through no fault of the contractor, water covers the entire construction site, causing chaos on the job and miring down the contractor's labor and equipment to the point of absurdity. However, in the interest of finishing the house in a reasonable amount of time, the contractor hires extra workers to clean the site and finish the job. Although the contractor asks for time extensions to avoid being assessed liquidated damages, the delays and extra effort caused by the water have resulted in substantial loss to the contractor. In the end, the owner receives the desired house for the original contract price, whereas the contractor loses a substantial amount of money.

98. "Subsurface condition" refers to the condition of the earth material that the contractor must build upon or remove; including, for example, density, soddenness, or the presence of boulders.

99. *Foster Constr. v. United States*, 435 F.2d 873, 887 (Ct. Cl. 1970).

100. *Id.*

101. For the purposes of this hypothetical, assume a reasonably prudent contractor in this contractor's position could not have anticipated the presence of a natural spring.

If the contractor brings a quantum meruit claim, the owner will argue that the “unanticipated subsurface water” clause in the contract could not be more unambiguous. However, the parties did not contemplate the possibility of an underground spring, and the contractual provision does not truly reflect what the parties were bargaining over. In such a case, the owner should be bound, by the ties of natural justice, to relinquish the unjustified benefits received at the contractor’s expense. That is, quantum meruit should allow the court the flexibility to look beyond the supposedly unambiguous contractual language, and rule that a substantial change occurred that went beyond the contemplation of the parties.

4. *Calculation of Damages in a Quantum Meruit Claim*

Quantum meruit provides the most accurate method for calculating a contractor’s damages in a case such as the above hypothetical. The nature of the construction business makes it practically impossible to quantify the damages caused by any single occurrence. Even when an expert attempts to quantify labor and equipment inefficiencies caused by substantial changes, it is extremely difficult to accurately estimate the inefficiencies. In contrast, quantum meruit provides the court an accurate and straightforward method of compensating a contractor. The courts will look at what the contractor has spent¹⁰² in performing the contract, and will add a reasonable profit.

Some cases have mentioned that this “total cost” method of recovery is disfavored because it assumes that the contractor’s actual expenditures are reasonable.¹⁰³ Both legal policy and common business sense militate against such a negative approach to the total cost method of figuring damages in a quantum meruit construction claim. First, with regard to legal policy, the decision in *Edwards Construction v. Port of Tacoma*¹⁰⁴ is instructive. The *Edwards* court stated that the reasonable costs allowed by the trial court were appropriate.¹⁰⁵ If a contractor incurs

102. This would include labor, equipment, materials, and overhead (both at the home office and at the site).

103. See, e.g., *S. L. Rowland Constr. Co. v. Beall Pipe & Tank Corp.*, 14 Wash. App. 297, 303–04, 540 P.2d 912, 917 (1975); *Modern Builders, Inc. v. Manke*, 27 Wash. App. 86, 93, 615 P.2d 1332, 1337 (1980) (stating that the “total cost basis is not a favored method of recovery when an express contract exists”). The court in *Rowland* apparently used the phrase “total cost method” interchangeably with the concept of quantum meruit. However, the total cost method refers to the method for calculating damages in a quantum meruit action in which the trier of fact has first determined that the threshold “substantial changes” have occurred.

104. 83 Wash. 2d 7, 514 P.2d 1381 (1973).

105. *Id.* at 15, 514 P.2d at 1386.

substantial damages, but the exact amount in dollars cannot be proved, the injured party will not be denied a remedy in damages because of lack of certainty.¹⁰⁶ The court in *Lester N. Johnson Co. v. Spokane* echoed this statement,¹⁰⁷ explaining that since the term "quantum meruit" literally means "as much as deserved," any method of calculating cost that results in a reasonable estimate of the value of the additional work is proper.¹⁰⁸ This makes sense in light of the fictional promise on the part of the owner to pay the reasonable value of any rendered services.

Second, the assumption that contractors' costs are reasonable is justified based on the inherent profit motivations that drive most business persons. Contractors are generally operating under the assumption that they will get paid a certain sum for specified work. If they do not spend money wisely, they will not make a profit. Thus, it is inherently in the best interests of contractors to keep their costs reasonable.¹⁰⁹

Furthermore, in most cases warranting application of quantum meruit, any other method of figuring damages is simply unfair to contractors because it forces them to essentially try a large number of individual cases. For example, if a quantum meruit claim involves 80 individual changes,¹¹⁰ forcing the contractor to prosecute 80 separate mini-trials on each claim would effectively deprive the contractor of a fair recovery. One need look no further than *Rowland*, in which the trial court broke down the contractor's action into 35 separate claims, which resulted in a three-month trial.¹¹¹ Miring the fact-finder in the minutia of calculating the cost of every change that occurred will likely confuse, and possibly mislead, a jury. Thus, allowing recovery in quantum meruit enhances accuracy and saves judicial resources.

106. *Id.*

107. 22 Wash. App. 265, 273, 588 P.2d 1214, 1219 (1978).

108. *Id.* at 274, 588 P.2d at 1220.

109. Although contractors may overbid or mistakenly bid a job, competition in the bidding process provides contractors an inherent interest in keeping their bids mistake-free since overly high bids may prevent contractors from receiving the contract, and mistakenly low bids will preclude contractors from realizing their intended profits.

110. In the above hypothetical, for instance, it might be that the water caused 80 different deviations from the original plans of the contractor.

111. *S. L. Rowland Constr. v. Beall Pipe & Tank Corp.*, 14 Wash. App. 297, 299, 540 P.2d 912, 914 (1975). The *Hensel Phelps* trial (a quantum meruit claim tried to a jury) lasted only three weeks.

IV. A PROPOSAL FOR HANDLING QUANTUM MERUIT CLAIMS

If future Washington cases do not explicitly reject *Hensel Phelps's* plain meaning approach to quantum meruit claims, or at least clarify quantum meruit recovery for contractors, trial courts may erroneously view the case as a proper application of quantum meruit. Rather than myopically focusing on the contract documents, future Washington courts should emulate how the courts treated quantum meruit claims prior to *Nelse Mortensen*: They should focus on the relation of the parties.

From *Tribble* to *Edwards*, Washington courts allowed a unique type of quantum meruit recovery. This occurred despite full performance, despite contractual provisions on point, and without the courts explaining what specific theory of quantum meruit recovery they were applying. This is praise, not criticism. By focusing on the contemplation of the parties, pre-*Nelse Mortensen* Washington cases were essentially taking a relational view¹¹² of contract interpretation in construction quantum meruit claims. That is, they were not attempting to ascertain the intentions of the parties by a strict reading of the contractual language. The courts realized that in the construction business, in which unanticipated problems are more the norm than the exception, it makes more sense to take an elastic approach to contract interpretation.

Therefore, in construction quantum meruit claims, courts should interpret the parties' intentions in the context of their overall relationship. Not only was this the approach taken by courts prior to *Nelse Mortensen*, but this "relational" method of contract interpretation is also in accord with the contextual principles of interpretation underlying the *Berg* decision. *Berg* adopted the Restatement (Second) of Contracts' proposal for determining the intentions of the parties, which emphasizes the importance of looking at "the situation and relations of the parties."¹¹³

This relational approach does not render the contract documents unimportant.¹¹⁴ Under such an approach, the contract documents remain

112. The relational view of contract law holds that the law should impose a greater duty of cooperation on the parties after contract formation because that is what most parties expect when entering significant contracts, regardless of what words are found on the face of the contract documents. Wolcher, *supra* note 15, at 808 n.51.

113. Restatement (Second) of Contracts §§ 212, 214(e) (1981). *Accord*, Ian R. Macneil, *Relational Contract: What We Do and Do Not Know*, 1985 Wis. L. Rev. 483, 502 ("we cannot even understand a promise outside its relational context").

114. See Ian R. Macneil, *The New Social Contract, An Inquiry into Modern Contractual Relations* 86 (1980).

an essential factor in the analysis. Parties have the fundamental right to contract with one another, and to rely on the courts to enforce those words that the parties have chosen to best integrate their agreement. However, the plain meaning or ambiguity of the contract language itself should not be an overly important factor, given that words have no fixed meaning outside the relationship of the parties. Certainly any supposed plain meaning should not be more important than the parties' true intentions.

Furthermore, inherent in the parties' scope of contracting powers is the limitation of the parties' contemplations. That is, by definition, the parties cannot contract for contingencies that are "off the contract." The contract should thus be only one element of the analysis in quantum meruit claims. Only by looking at the context in which the parties have contracted can a court determine whether changes that occurred were within, or beyond, the scope of the parties' intentions at the time of contracting.

V. THE CURRENT STATUS OF QUANTUM MERUIT IN WASHINGTON

It is important that future Washington courts understand the flaws in *Nelse Mortensen* and *Hensel Phelps*, and that they clarify quantum meruit recovery for future construction litigants. Even though clarification is certainly warranted in light of *Berg*, actually overruling *Hensel Phelps* may not be necessary. Both the *Nelse Mortensen* and *Hensel Phelps* courts employed equitable considerations that, even with a proper application of quantum meruit, may have yielded the same results.

In *Nelse Mortensen*, if the controlling factor had been the contemplation of the parties at the time of contracting, the case may have yielded the same results because, as the court stated, "an experienced hospital contractor such as Mortensen should have known of the general difficulties to be faced."¹¹⁵ In the eyes of the court, the equities may not have been in Mortensen's corner.¹¹⁶

Similarly, application of quantum meruit may not have been appropriate in *Hensel Phelps*. For example, the court made it clear that

115. *Nelse Mortensen & Co. v. Group Health Coop.*, 17 Wash. App. 703, 726, 566 P.2d 560, 572 (1977).

116. Additionally, the court in *Nelse Mortensen* noted that "78 of the items claimed for delay resulted in change orders for which nearly \$600,000 had already been paid." *Id.* at 721, 566 P.2d at 570.

the subcontractor presented written claims for extras almost daily, as permitted under the subcontract, and was paid for nearly everything asked.¹¹⁷ The subcontractor appeared to know how to obtain monetary relief under the subcontract at the time of performance. Thus, the subcontractor acted inconsistently by later asking to abandon this same subcontract in favor of a duplicate recovery in quantum meruit.

VI. CONCLUSION

Quantum meruit enables courts to provide remedies in construction disputes without turning a blind eye to equity. At times, the contract is the sole remedy for a contractor. There are, however, times when equity demands allowing contractors to abandon their contracts in favor of quantum meruit because the changes that occurred on a construction project were not within the contemplation of the parties at the time of contracting. *Nelse Mortensen* and *Hensel Phelps* should not be seen as the last word on quantum meruit recovery in construction disputes in Washington. The *Berg* decision confirms that *Hensel Phelps's* plain meaning approach to contract interpretation is unrealistic, and should be short lived in the line of construction quantum meruit cases. A clarification of quantum meruit and an explicit adoption of a relational approach to quantum meruit claims is appropriate in future Washington cases because of quantum meruit's ability to provide the courts with an accurate and flexible means of preventing injustice in construction disputes.

117. The subcontractor was paid approximately \$120,000. *Hensel Phelps Constr. v. King County*, 57 Wash. App. 170, 173, 787 P.2d 58, 60 (1990).