

NO. COA14-521

NORTH CAROLINA COURT OF APPEALS

Filed: 20 January 2015

CLARENCE EARL BUTLER,
Plaintiff,

v.

Pasquotank County
No. 94-CVD-334

VIKKI ELAINE BUTLER (now Reid),
Defendant.

Appeal by Plaintiff from order entered 27 January 2014 by
Judge Robert P. Trivette in Pasquotank County District Court.
Heard in the Court of Appeals 6 October 2014.

Frank P. Hiner, IV, for Plaintiff.

*The Twiford Law Firm, P.C., by Edward A. O'Neal, for
Defendant.*

STEPHENS, Judge.

Plaintiff Clarence Earl Butler appeals from the trial
court's order awarding \$20,492.64 and attorneys' fees to his ex-
wife Defendant Vikki Elaine Butler (now Reid) based on the
court's finding that Plaintiff was unjustly enriched when he
received the entirety of 24 months of federal retirement pension
benefits that Defendant was entitled to share in based on the
qualified domestic relations order ("QDRO") incorporated into

the parties' divorce settlement. Because we agree with Plaintiff's argument that Defendant's failure to receive her court-ordered portion of his federal retirement benefits resulted solely from her own failure to comply with federal law and the terms of the order, we hold that the trial court erred in its findings of fact and conclusion of law that Plaintiff was unjustly enriched. Accordingly, we reverse.

Facts and Procedural Background

Plaintiff and Defendant were married to each other on 21 April 1972. They separated on or about 4 March 1992, and on 12 May 1994, Plaintiff filed a complaint in Pasquotank County District Court for absolute divorce, accompanied by a Separation and Property Settlement Agreement ("Separation Agreement") drafted by Defendant's attorney and executed by the parties on 20 April 1994. At the time of the parties' separation, Plaintiff was employed as a Federal Civilian Employee with the Norfolk Naval Shipyard. Paragraph 15F of the Separation Agreement, entitled "Retirement Benefits," provided in relevant part that:

The marital interest in [Plaintiff's] retirement benefits with the Norfolk Naval Shipyard shall be divided proportionately between the parties based on [Plaintiff's] length of service and the coincident turn of the parties' marriage. The parties agree to enter into a [QDRO] immediately following or simultaneously with the entry of a divorce

judgment, which [QDRO] shall provide for a proportionate division (as defined in the preceding sentence) of [Plaintiff's] Norfolk Naval Shipyard retirement benefits payable when [Plaintiff] begins receiving such retirement benefits. The [QDRO] shall then be submitted to both the Norfolk Naval Shipyard and to the court of competent jurisdiction for approval and entry.

On 19 September 1994, a judgment of absolute divorce was entered incorporating the Agreement and, simultaneously, upon consent of all parties, the court entered a QDRO, referred to in the Agreement as an "Order for Division of Federal Civil Service Retirement Plan," drafted by Defendant's attorney. Paragraph 1 of the QDRO provided the formula for computing Defendant's share of Plaintiff's benefits and Paragraph 4 directed the United States Office of Personnel Management ("OPM") to pay Defendant's share directly to her. Paragraph 7 of the QDRO provided that Defendant "shall be entitled to receive the benefits specified herein only in accordance with law and the terms of the Civil Service Retirement Spouse's Equity Act of 1984" and further stated that Defendant "shall comply with all terms and conditions of the Act" Paragraph 13 of the QDRO provided that a copy of the order "shall be served upon [OPM], Civil Service Retirement System, as the Administrator of the Retirement Plan herein, and the Administrator shall determine

within a reasonable period of time whether this order can be administered by the Retirement System."

Plaintiff continued his employment in the federal civil service at the Norfolk Naval Shipyard until his retirement in October 2009. Prior to his retirement, in August 2009, Plaintiff—who had served as an active duty enlisted member of the United States Air Force from 11 July 1972 until his honorable discharge on 10 July 1978—paid \$10,381.50 to the Defense Finance and Accounting Service in order to add his six years of active duty Air Force service to the computation of his overall federal civilian retirement benefits. By the time Plaintiff retired, Defendant had remarried, and Plaintiff did not inform her of his retirement. In fact, Plaintiff had been erroneously informed at a pre-retirement seminar he attended that because of her remarriage, Defendant would not be entitled to receive any share of his benefits. Beginning in November 2009 and continuing through October 2011, Plaintiff received his full retirement benefits from OPM, without any deductions for Defendant's share.

Sometime in 2011, Defendant discovered that Plaintiff had retired two years earlier. When she contacted OPM to inquire why she had not received any portion of the benefits she was entitled to share in under the QDRO, Defendant learned that the

QDRO had never been filed with OPM. Defendant subsequently filed a copy of the QDRO with OPM and began receiving her share of Plaintiff's benefits in November 2011.

On 11 June 2012, Defendant sent Plaintiff a letter requesting that he reimburse her \$25,616.63 in retirement back pay plus \$200 in attorneys' fees. When Plaintiff refused, Defendant filed a Motion in the Cause in Pasquotank County District Court seeking (1) damages for Plaintiff's failure to advise her of his receipt of 24 months of unreduced retirement benefits and his refusal to repay her share; (2) specific performance of the Separation Agreement and a modification of the QDRO to proportionally increase her share of Plaintiff's benefits in light of his additional six years of credited employment from his military service; (3) liquidated damages; and (4) attorneys' fees.

Defendant's motion was heard on 9 October 2013. Defendant testified that, prior to this litigation, she had not had any contact with Plaintiff since their divorce. Most of Defendant's testimony focused on her allegation that Plaintiff violated the Separation Agreement by failing to inform her that he had purchased additional years of credited employment. When Plaintiff testified, he admitted to having received 24 months of

unreduced retirement benefits, but asserted that he had done nothing to breach the Separation Agreement, noting that it did not require him to do anything regarding Defendant's share of his retirement benefits, as both federal law and the terms of the QDRO explicitly conditioned Defendant's receipt of her share on her filing a copy of the QDRO with OPM. Defendant acknowledged that it was her and her attorney's responsibility to submit the QDRO to OPM and that until her discovery to the contrary in 2011, she had believed that her attorney had done so shortly after the 1994 divorce proceeding concluded. Toward the end of the hearing, the trial court asked Defendant's counsel:

THE COURT: . . . [H]ow is it that it's [Plaintiff's] problem for the two year period —how come [Plaintiff] is responsible for that back payment based upon all this other information that indicates that it's clearly your client's duty to make sure that OPM is notified[?] I mean [Defendant] may have a gripe with [her lawyer from the divorce proceeding], she may have a gripe with OPM.

[Defendant's counsel]: She doesn't have a remedy against OPM.

THE COURT: Well, just because she doesn't have a remedy that doesn't mean it makes [Plaintiff] the party.

[Defendant's counsel]: I'm not saying that he's a bad guy, Your Honor.

THE COURT: I'm not saying he's a bad guy

either, but why is he supposed to pay for [Defendant's lawyer from the divorce proceeding] or OPM's mistake?

[Defendant's counsel]: He has received her money. That's exactly what it is. He received her money. It's not that he's paying back something that all of a sudden popped up. If he had—if he hadn't gotten her money I wouldn't ask—I'm not asking him to do anything but give back to her what the Separation Agreement says she is entitled to receive. The Separation Agreement divides it and he got it and she's entitled to have it paid back to her.

THE COURT: Okay.

[Defendant's counsel]: And that is just as simple as I know how to make it, Your Honor.

THE COURT: I just find it hard to believe—again, you know, I don't think that I'm at all unique as a District Court Judge. You gentlemen are unique, and I appreciate that, but I just can't believe that these facts haven't come before a district court and there is not a case right on point. This just seems like something that would have happened again and again and again. And so it just—there's no case law on this?

[Defendant's counsel]: I didn't find any case law on it, on point.

THE COURT: All right. That's fine.

[Defendant's counsel]: But I'll tell you what I did find. I did find that interpretation of separation agreement divided these retirement benefits. The fact is that he received her benefits and he will be unjustly enriched by her share of those benefits. I can tell you and I'm going to—

[Plaintiff's counsel] when he gets tired of it, he can stop me, but it is not unusual for OPM to lose these papers. I had a case exactly—

[Plaintiff's counsel]: I'm going to stop him.

[Defendant's counsel]: Well, I gave him the nod ahead of time. I didn't want him tearing out of that chair.

THE COURT: That's why I don't understand why there's not a case on it. I mean, that's my point. I can't believe this is the first time this has ever happened.

[Plaintiff's counsel]: Judge, I know [Defendant's counsel] has looked, and I have looked, and I haven't found anything.

On 27 January 2014 the trial court entered an order denying Defendant's claims for specific performance and liquidated damages but granting relief, as well as attorneys' fees, on her claim for her share of the retirement benefits Plaintiff received between 2009 and 2011. In its findings of fact, the trial court found that

Plaintiff has been unjustly enriched by receiving 24 months of unreduced federal retirement pension when Defendant received nothing—Defendant, during these 24 months, should have received 17.66% of Plaintiff's federal retirement pension. Thus . . . , Plaintiff should pay Defendant \$20,492.64.

Accordingly, in its conclusions of law, the court held that

Plaintiff has been unjustly enriched by

erroneously receiving and retaining Defendant's share of the CSRS benefits in the amount of \$20,492.64.

The trial court also awarded \$4,000 in attorneys' fees to Defendant, based on a provision in the Separation Agreement entitling the prevailing party to recover suit costs in the event litigation proved necessary for its enforcement. Plaintiff gave written notice of appeal on 14 February 2014. In his appeal, Plaintiff contends that the trial court: (1) erred in its finding of fact and conclusion of law that Plaintiff was unjustly enriched; (2) erred by admitting improperly authenticated evidence; and (3) abused its discretion by awarding attorneys' fees to Defendant when both parties "prevailed" on some claims, and by failing to make findings regarding the reasonableness of that award.

Standard of Review

Under North Carolina law, it is well established that "[t]he standard of review on appeal from a judgment entered after a non-jury trial is whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment." *Cartin v. Harrison*, 151 N.C. App. 697, 699, 567 S.E.2d 174, 176 (citation and internal quotation marks omitted), *disc. review*

denied, 356 N.C. 434, 572 S.E.2d 428 (2002). We review the trial court's conclusions of law *de novo*. See *Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 517, 597 S.E.2d 717, 721 (2004).

Analysis

Plaintiff first contends that the trial court erred in its finding of fact and conclusion of law that he was unjustly enriched as a result of receiving two years of unreduced retirement benefits. Specifically, Plaintiff argues that unjust enrichment is not an appropriate remedy here, given that Defendant's failure to receive her court-ordered share of his federal retirement benefits resulted solely from her own failure to comply with federal law and the terms of the QDRO. We agree.

Unjust enrichment is "a claim in quasi contract or a contract implied in law." *Booe v. Shadrick*, 322 N.C. 567, 570, 369 S.E.2d 554, 556, *rehearing denied*, 323 N.C. 370, 373 S.E.2d 540 (1988). The doctrine has been described as

the result or effect of a failure to make restitution of, or for, property or benefits received under such circumstances as to give rise to a legal or equitable obligation to account therefor. It is a general principle underlying various legal doctrines and remedies, that one person should not be permitted unjustly to enrich himself [or herself] at the expense of another.

Watson Elec. Constr. Co. v. Summit Cos., LLC, 160 N.C. App. 647, 652, 587 S.E.2d 87, 92 (2003) (emphasis omitted). However, this Court has recognized that, "the mere fact that one party was enriched, even at the expense of the other, does not bring the doctrine of unjust enrichment into play. There must be some added ingredients to invoke the unjust enrichment doctrine." *Id.* Indeed, as we recently explained, there are five elements to a *prima facie* claim for unjust enrichment:

First, one party must confer a benefit upon the other party. . . . Second, the benefit must not have been conferred officiously, that is it must not be conferred by an interference in the affairs of the other party in a manner that is not justified in the circumstances. . . . Third, the benefit must not be gratuitous. . . . Fourth, the benefit must be measurable. . . . Last, the defendant must have consciously accepted the benefit.

JPMorgan Chase Bank, Nat'l Ass'n v. Browning, __ N.C. App. __, __, 750 S.E.2d 555, 559 (2013) (citations, internal quotation marks, and emphasis omitted). Thus, in order to prevail on a claim of unjust enrichment, a plaintiff must show that "property or benefits were conferred on a defendant under circumstances which give rise to a legal or equitable obligation on the part of the defendant to account for the benefits received." *Norman v. Nash Johnson & Sons' Farms, Inc.*, 140 N.C. App. 390, 417, 537

S.E.2d 248, 266 (2000), *disc. review denied*, 353 N.C. 378, 547 S.E.2d 13 (2001). However, "[t]he recipient of a benefit voluntarily bestowed without solicitation or inducement is not liable for their value." *Wright v. Wright*, 305 N.C. 345, 350, 289 S.E.2d 347, 351 (1982) (citation and internal quotation marks omitted). Moreover, we have long recognized that "equity will not afford relief to those who sleep upon their rights, or whose condition is traceable to that want of diligence which may fairly be expected from a reasonable and prudent man." *Pearce v. N.C. State Highway Patrol Voluntary Pledge Comm.*, 310 N.C. 445, 451, 312 S.E.2d 421, 426 (1984) (citation and internal quotation marks omitted). Indeed, "[t]hose who seek equitable remedies must do equity, and this maxim is not a precept for moral observance, but an enforceable rule." *Kennedy, D.D.S., P.A. v. Kennedy*, 160 N.C. App. 1, 15, 584 S.E.2d 328, 337 (citation and internal quotation marks omitted), *appeal dismissed*, 357 N.C. 658, 590 S.E.2d 267 (2003).

In the present case, we note as an initial matter that the parties' appellate briefs offer wildly divergent accounts of the proceedings below. For example, Defendant argues that because Plaintiff did not make his argument against unjust enrichment before the trial court, he has failed to preserve the issue for

our review as required by our Rules of Appellate Procedure and is now attempting to "swap horses after trial in order to obtain a thoroughbred upon appeal." *State v. Benson*, 323 N.C. 318, 322, 372 S.E.2d 517, 519 (1988), *abrogated in part on other grounds by State v. Hooper*, 358 N.C. 122, 591 S.E.2d 514 (2004). However, a careful review of the record reveals that, apart from Defendant's passing reference to the term toward the end of the hearing, the first time the words "unjust enrichment" were utilized in this litigation was in the trial court's order awarding it as a remedy. Defendant's Motion in the Cause did not specifically seek unjust enrichment as a remedy, nor did the parties meaningfully address its applicability during the 9 October 2013 hearing. We therefore conclude that Plaintiff had no opportunity to make this argument at trial, and because "the appealing party cannot be charged with impermissibly *swapping* horses when it never mounted one in the first place," *Rolan v. N.C. Dept. of Agric. & Consumer Servs.*, __ N.C. App. __, __, 756 S.E.2d 788, 795 (2014), we reject Defendant's argument to the contrary as baseless.

Defendant also contends in her brief that this case was actually pled and tried on a theory of breach of contract. However, the record before us flatly contradicts that claim. On

the one hand, the first cause of action in Defendant's Motion in the Cause deals with Plaintiff's receipt of 24 months of unreduced retirement benefits, but it fails to allege the *prima facie* elements of a claim for breach of contract. If anything, Defendant's request for specific performance on her second cause of action makes clear that she was seeking equitable relief, rather than a legal remedy. On the other hand, during the 9 October 2013 hearing, Defendant did not allege that her failure to receive her share of the retirement benefits resulted from Plaintiff's breach of any legal duty he owed to her. But perhaps the most significant reason that Defendant could not have prevailed below on a theory of breach of contract is that this is not a contract case. Our Supreme Court has long recognized that separation agreements lose their contractual nature and become orders of the court upon incorporation into a divorce judgment. See, e.g., *Walters v. Walters*, 307 N.C. 381, 386, 298 S.E.2d 338, 342 (1983) ("These ordered separation agreements, as consent judgments, are modifiable, and enforceable by the contempt powers of the court, in the same manner as any other judgment in a domestic relations case."). As the proper remedy for violation of such an order is by an action for contempt, see *id.*, there simply is no basis for a breach of contract claim

here. We therefore disregard as meritless Defendant's argument that, notwithstanding the plain meaning of the language used in the trial court's order awarding her the remedy of unjust enrichment, she prevailed below on a theory of breach of contract.

For his part, Plaintiff argues that the trial court erred in ordering unjust enrichment as a remedy because Defendant's failure to receive her court-ordered share of his federal retirement benefits resulted solely from her own failure to comply with federal law and the terms of the QDRO. In support of this argument, Plaintiff cites our recent decision in *Holmes v. Solon Automated Servs.*, __ N.C. App. __, 752 S.E.2d 179 (2013), which he contends establishes that unjust enrichment is an inappropriate remedy for a party who does not receive the benefit she hoped to under an agreement her counsel bargained for simply because of her own failure to meet the terms and conditions agreed upon.

In *Holmes*, we reviewed an opinion and award from the North Carolina Industrial Commission denying the plaintiff's estate's breach of contract claim to enforce the terms of a mediated settlement agreement. After suffering a compensable injury at work, the plaintiff reached a comprehensive settlement agreement

with his employer, the terms of which included the funding of a Medicare Set-Aside Allocation ("MSA"). *Id.* at ___, 752 S.E.2d at 180. The agreement provided that the MSA would be funded in part by \$19,582.37 in seed money and in part by annual payments of \$9,247.23 per year for eighteen years in annuity benefits for ongoing medical expenses, but its terms explicitly conditioned payment of these annuity benefits on the plaintiff's survival. *Id.* When the plaintiff died unexpectedly before the agreement was finalized, the employer refused to pay both the seed money and the annuity benefits to his estate. *Id.* at ___, 752 S.E.2d at 181. After finding that the purpose of the MSA agreement, which was "to protect Medicare from bearing the burden of future medical expenses arising from this workers' compensation case," had been frustrated by the plaintiff's failure to satisfy the implied condition of survival, *id.*, the Commission denied his estate's claim for payment of both the seed money and the annuity benefits. *Id.* at ___, 752 S.E.2d at 182. The plaintiff's estate appealed to this Court, arguing that the defendants would be unjustly enriched if allowed to retain the MSA funds. We agreed with the plaintiff's estate's argument regarding the seed money and reversed the Commission's decision because, in contrast to the annuity benefits, the MSA agreement treated the

seed money as a guaranteed benefit of a specific sum without any language conditioning payment on the plaintiff's survival. *Id.* at ___, 752 S.E.2d at 185. However, based on the express terms of the MSA agreement, we rejected the estate's unjust enrichment claim regarding the annuity benefits. In affirming the Commission's decision denying payment of the annuity benefits, we reasoned that because the plaintiff "did not survive a single year, we conclude that [he] failed to meet an explicit condition precedent in the contract, survival." *Id.* at ___, 752 S.E.2d at 184.

Here, Plaintiff contends that Defendant should be similarly barred from recovery under a theory of unjust enrichment because of her failure to satisfy an explicit condition precedent in the terms of the QDRO that was bargained for and drafted by her own attorney. Specifically, the QDRO expressly states that it is OPM, rather than Plaintiff, that is responsible for paying Defendant her share of Plaintiff's retirement benefits. The QDRO also provides that Defendant is only entitled to receive those benefits "in accordance with law" and that she must "comply with all terms and conditions of the [Civil Service Retirement Spouse's Equity] Act." The Act expressly authorizes payments of a federal employee's retirement benefits to a former spouse if a

court so orders, but by its own terms it is only applicable "after the date of receipt [by OPM] of written notice of such decree, order, or agreement, and such additional information and documentation as [OPM] may prescribe." Act of Sept. 15, 1978, Pub. L. No. 95-366, 92 Stat. 600 (amending the Civil Service Retirement Act to authorize compliance by the Civil Service Commission with the terms of court orders regarding divorce, annulment, and legal separation), *codified at* 5 U.S.C. 8345(j)(2) (2012). Furthermore, Part 838 of the Code of Federal Regulations, which provides guidance for OPM's handling of court orders affecting federal employee retirement benefits, provides that "[c]laimants are responsible for . . . [f]iling a certified copy of court orders and all other required supporting information with OPM." 5 C.F.R. 838.123 (2014). In addition, the Code mandates that before OPM can make direct payments to a retired federal employee's former spouse, the "former spouse (personally or through a representative) must apply in writing to be eligible for a court-awarded portion of an employee annuity." 5 C.F.R. 838.221. While the rationale behind these requirements is more likely based on increasing administrative efficiency, rather than barring recovery of benefits by former spouses, the implication is clear: OPM will not pay benefits to

a retired federal employee's former spouse until it has received her application and a copy of the court order awarding them. Here, the QDRO drafted by Defendant's own counsel is not quite so explicit insofar as it only states that a copy "shall be served upon OPM," but it does specifically state that Defendant must comply with the Act's terms and conditions. At trial, Defendant admitted during cross-examination that she understood it was her responsibility to file the Retirement Order with OPM, and that she believed that her attorney had done so. Nevertheless, OPM had no record of any filing prior to Defendant's 2011 inquiry.

Thus, based on both federal law and the terms that the parties agreed to, the burden was on Defendant to file the QDRO with OPM, and that burden was not met until 2011. While we recognize that the procedural posture of this case is not directly analogous to *Holmes*, insofar as it deals with enforcement of a court order rather than a claim for breach of contract, we nevertheless find its logic persuasive. We therefore conclude that, as in *Holmes*, Defendant's injury here was caused by her own failure to satisfy an express condition precedent—namely, filing a copy of the QDRO with OPM.

While we acknowledge that it may seem unfair to deny Defendant her share of Plaintiff's retirement benefits that she would have been legally entitled to had she filed a copy of the QDRO with OPM, it is well established that "[t]hose who seek equitable remedies must do equity, and this maxim is not a precept for moral observance, but an enforceable rule." *Kennedy, D.D.S., P.A.*, 160 N.C. App. at 15, 584 S.E.2d at 337. The trial court's attempt to fashion an equitable remedy here, without the benefit of controlling precedent, is understandable but erroneous because "equity will not afford relief to those who sleep upon their rights, or whose condition is traceable to that want of diligence which may fairly be expected from a reasonable and prudent man." *Pearce*, 310 N.C. at 451, 312 S.E.2d at 426.

Moreover, we emphasize that while it is true as a general matter that a trial court has broad discretion to grant equitable relief and shape its remedies accordingly, unjust enrichment is a specific remedy that can only be applied when certain preconditions are present. The mere fact that one party benefited at the expense of another is not sufficient to invoke such remedy unless all five of the elements of the *prima facie* case are met. See *JPMorgan Chase Bank, Nat'l Ass'n*, ___ N.C. App. at ___, 750 S.E.2d at 559. Here, Plaintiff clearly benefited by

receiving 24 months of unreduced federal retirement benefits as a result of Defendant's failure to file a copy of the QDRO with OPM. The benefit Plaintiff received is measurable, which satisfies the fourth required element of unjust enrichment, see *id.*, and nothing in the record suggests that the benefit to Plaintiff resulted from Defendant's unjustifiable or officious interference in his affairs or desire that he keep her share of his benefits as a gift, thereby satisfying the second and third elements. See *id.* Indeed, as discussed above, the benefit to Plaintiff resulted solely from Defendant's failure to take action.

Plaintiff argues that this means Defendant cannot satisfy the first *prima facie* element's requirement that she conferred a benefit upon him, see *id.*, based on the definition of the term "confer" provided by the 1980 edition of the *Random House College Dictionary*, which Plaintiff contends implicitly requires knowing or conscious action. While we are generally reluctant to resort to decades-old dictionary definitions to resolve contemporary legal conflicts, Plaintiff's argument has some merit insofar as case law from this Court and our Supreme Court typically contemplates unjust enrichment as an appropriate remedy only in situations where the complaining party

intentionally and deliberately undertook an action with an expectation of compensation or other benefit in return. See, e.g., *Wright*, 305 N.C. at 351, 289 S.E.2d at 351 (analyzing unjust enrichment claims arising from mistaken but good faith improvements to another person's property); *JPMorgan Chase Bank, Nat'l Ass'n*, ___ N.C. App. at ___, 750 S.E.2d at 560 (analyzing unjust enrichment claims arising from unsolicited payments on deeds of trust). Here, by contrast, there is no suggestion that Defendant's failure to file a copy of the QDRO with OPM was done intentionally or with any expectation of benefit to Plaintiff or remuneration to herself. Thus, Defendant cannot satisfy the first required element of the *prima facie* case for unjust enrichment.

Furthermore, the record suggests that the fifth *prima facie* element is also lacking here because there is no evidence that Plaintiff consciously received the benefit. See *id.* at ___, 750 S.E.2d at 559. During the trial, Plaintiff testified that prior to his retirement, he was informed that because Defendant had remarried, she would not be entitled to receive any share of his benefits. Although this advice proved incorrect, Plaintiff testified further that at no point during his first two years of receiving retirement benefits did OPM offer any indication that

Defendant was still entitled to receive a share. Neither the QDRO nor the Settlement Agreement obligated Plaintiff to notify Defendant of his retirement or take any further action regarding her share of his retirement benefits. Further, nothing in the record suggests that Plaintiff acted in bad faith, was aware that the QDRO had not been filed, or did anything to prevent Defendant from filing it.

Under these circumstances, Defendant perhaps could have asserted a claim against the attorney who represented her in her divorce proceedings and failed to file the QDRO with OPM. However, the law is clear that she has no claim for unjust enrichment on these facts. Thus, we hold that the trial court erred in its finding of fact and conclusion of law that Plaintiff was unjustly enriched and, accordingly, we vacate its award to Defendant. Because this issue is dispositive, we need not reach Plaintiff's additional arguments concerning the propriety of the trial court's admission of allegedly improperly authenticated evidence, nor his contention that the trial court abused its discretion by awarding attorneys' fees to Defendant. Accordingly, the trial court's order is

REVERSED.

Chief Judge MCGEE and Judge DIETZ concur.

