**DISTRICT OF COLUMBIA COURT OF APPEALS**

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**Nos. 07-CV-1003 & 07-CV-1025 (XAP)**

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PEARLINE PEART,
Appellant/Cross-Appellee

v.

NICOLE JACKSON,
Cross-Appellant,

and

DISTRICT OF COLUMBIA HOUSING AUTHORITY,
Appellee.

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On Appeal from the Superior Court of the District of Columbia
(Morin, J.) 2007 LTB 1003

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# BRIEF FOR APPELLANT

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Barbara McDowell (#414570)*
Julie Becker (#471080)
Peter Wilson**
LEGAL AID SOCIETY OF THE
DISTRICT OF COLUMBIA
1331 H Street, N.W., Suite 350
Washington, D.C. 20005
(202) 628-1161

David A. Reiser (#367177)
ZUCKERMAN SPAEDER LLP
1800 M Street, N.W., Suite 1000
Washington, D.C. 20036
(202) 778-1800

*Counsel for Argument
** Admitted in New York; practicing under
the supervision of Barbara McDowell

## RULE 28(a)(2)(A) STATEMENT

The parties below were:

Defendant/Counter Claimant Pearline Peart, represented by the Legal Aid Society of the District of Columbia, Denise Buffington, Julie Becker, and Emily Helms.

Plaintiff/Counterclaim Defendant Nicole Jackson, represented herself.

Intervenor District of Columbia Housing Authority, represented by Clifford E. Pulliam.

No amici appeared below.

On appeal the parties are:

Appellant/Cross-Appellee Pearline Peart, represented by the Legal Aid Society of the District of Columbia, Barbara McDowell, Julie Becker and Peter Wilson, and Zuckerman Spaeder LLP and David Reiser.

Cross-Appellant Nicole Jackson, represented by Loewinger & Brand, PLLC, Kenneth J. Loewinger, and Patricia B. Millerioux.

Appellee District of Columbia Housing Authority, represented by Hans E. Froelicher, IV and Clifford E. Pulliam.

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## QUESTION PRESENTED

Whether the District of Columbia Housing Authority was unjustly enriched when the court awarded the Housing Authority the entire amount the tenant recovered from her landlord on her claim for abatement of rent – which the Housing Authority had done nothing to recover – denying the tenant compensation for the costs of winning the judgment for the Housing Authority's benefit.

## STATEMENT OF THE CASE

This appeal concerns the distribution of a judgment recovered by a tenant, Pearline Peart, on her counterclaim for rent abatement against her landlord, Nicole Jackson, because of extensive housing code violations that breached the implied warranty of habitability in her lease. The District of Columbia Housing Authority (DCHA), which pays all of Ms. Peart's rent under the Section 8 Housing Choice Voucher Program (HCVP), had a claim against Ms. Jackson for her breach of its own contract with her, because many of the conditions that violate the D.C. housing code also violate the federal regulations and the Housing Assistance Payments (HAP) contract governing Section 8 rentals. However, DCHA never pursued such a claim against the landlord. Instead, after Ms. Peart had already won a default on her counterclaim, DCHA intervened and filed a complaint seeking for itself everything Ms. Peart might recover from the landlord. DCHA's complaint did not allege any cause of action against the landlord, and was, in essence, a claim against Ms. Peart to prevent her from being unjustly enriched. After Ms. Peart proved damages, while DCHA remained on the sidelines, the trial judge (Morin, J.), awarded DCHA all of the rent abatement, refusing to compensate Ms. Peart for the costs of winning the victory from which DCHA reaped the benefit.

**1. Ms. Peart's Tenancy.** In December 2002, Ms. Peart signed a lease for a three-bedroom apartment at 40 Todd Place, N.E., with Nicole Jackson, a landlord. 4/27/07 Tr. at 19. (A030).[1] Ms. Peart lived in the apartment with her three children. Id. Ms. Peart and Ms. Jackson agreed to a monthly rent of $1,373. Id. at 20. (A031).

At the same time that Ms. Peart signed her lease, DCHA entered into a HAP contract with Ms. Jackson. That contract was entered into pursuant to the HCVP. The HCVP is a subsidized housing program established by the federal government and administered locally by DCHA "for the purpose of aiding low-income families in obtaining a decent place to live and of promoting economically mixed housing." 42 U.S.C. § 1437f(a). Tenants participating in the program sign an ordinary lease with a landlord in the private housing market and pay a portion of their income toward the monthly rent. The remaining rent is paid directly to the landlord by DCHA under a HAP contract. See 24 C.F.R. § 982.451; see generally 42 U.S.C. § 1437f. In the District of Columbia, certain HCVP tenants may receive a 100% rent subsidy. See District of Columbia Housing Authority, ADMINISTRATIVE PLAN FOR THE HOUSING CHOICE VOUCHER PROGRAM 37. Ms. Peart is one such tenant. 4/27/07 Tr. at 20. (A031).

Federal regulations require DCHA to ensure that landlords participating in the HCVP maintain tenants' units in accordance with federal housing quality standards. See 24 C.F.R. 982.404(a). The federal housing quality standards are similar but not identical to the standards imposed by the District housing code. Responsibility for the enforcement of the federal standards lies primarily with DCHA. See 24 C.F.R. § 982.404(a)(2); 24 C.F.R. § 982.453(b). DCHA is required to inspect HCVP tenants' units "prior to the initial term of the lease, at least annually during assisted occupancy, and at other times as needed, to determine if [a] unit meets

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[1] References to the Rule 30(f) Appendix are cited "(A__)".

the [federal housing quality standards]." 24 C.F.R. § 982.405(a). If the unit does not satisfy the federal standards, DCHA "must take prompt and vigorous action * * * includ[ing] termination, suspension or reduction of housing assistance payments and termination of the HAP contract." 24 C.F.R. § 982.404(a)(2). DCHA may also recover "overpayments" or an "abatement or other reduction of housing assistance payments" made to the landlord. 24 C.F.R. § 982.453(b).

**2. Housing Code Violations.** Ms. Peart and her children endured many dangerous and unsanitary conditions in their apartment during their tenancy. 4/27/07 Tr. at 34 (A045). Ms. Jackson failed to provide adequate heat in Ms. Peart's apartment, forcing Ms. Peart and her family to "use the oven" for heat in winter months. Id. at 24, 34 (A035, A045). The water was once cut off for two days because Ms. Jackson failed to pay the bill, forcing the Pearts to use bottled water and preventing them from showering. Id. at 27, 34 (A038, A045). Ms. Jackson also failed to repair the Pearts' broken toilet. Id. at 26, 34 (A037, A045). The Pearts could not safely enjoy their back deck, which was rotten, id. at 29, 34 (A040, A045), or their back yard, because the gate was broken, permitting strangers to come in and out. Id. at 28, 34 (A039, A045).[2]

Ms. Peart repeatedly asked Ms. Jackson to make repairs to the unit. Ms. Peart testified that she spoke with an individual named AJ, a maintenance man and agent of Ms. Jackson, and requested repairs to her kitchen faucet, back door, toilet, and back deck. 4/27/07 Tr. at 24-26 (A035-37); id. at 30 (A041). None of these repairs was made, forcing Ms. Peart to attempt some repairs herself.

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[2] Ms. Peart also described a number of other housing code violations in her apartment, including leaks, mold, broken closet doors, a malfunctioning kitchen faucet, a broken lock on the back door, and "substantial wall damage." See 4/27/07 Tr. at 19-30 (A030-41).

**3. The Rent Dispute.** Notwithstanding the monthly rent of $1,373 agreed to in Ms. Peart's lease, Ms. Jackson unilaterally increased Ms. Peart's monthly rent to $1,500 in August 2006. 4/27/07 Tr. at 20 (A031). Ms. Jackson presented Ms. Peart with a document that she characterized as a new lease, bearing the revised rent of $1,500, and told her to sign that document or vacate her apartment. Id. at 21 (A032). In light of that threat, Ms. Peart signed the document. Id. ("I signed it because she told me that if I didn't sign it I have to find somewhere to live."). For each of the next three months, Ms. Peart paid Ms. Jackson $127 out of her own pocket, a sum that represented the difference between the new rent and the amount being paid to Ms. Jackson by DCHA.

After paying Ms. Jackson for three months, Ms. Peart learned from a DCHA employee that the increase in her rent was not authorized. 4/27/07 Tr. at 23 (A034) ("[W]hen I went to [DCHA] they told me that I shouldn't pay [Ms. Jackson] anything because my rent was zero."). Ms. Peart stopped paying Ms. Jackson any additional money. Id.

**4. The Suit For Possession.** On January 12, 2007, Ms. Jackson sued Ms. Peart in landlord-tenant court, seeking possession of her apartment and $531 in unpaid rent and late fees. The complaint alleged that Ms. Peart had not paid her rent for three months. Ms. Peart, through counsel, filed an answer, counterclaim, and recoupment, seeking, among other things, an abatement of the "rent paid to [Ms. Jackson] from the beginning of [Ms. Peart's] tenancy * * * based on [Ms. Jackson's] breach of the implied warranty of habitability." See Verified Answer, Counterclaim, Recoupment and Jury Demand at 4 (A097). Ms. Peart also sought a recoupment of the money she had paid to Ms. Jackson under the purportedly revised lease. Id.

The case was set for a scheduling conference before Associate Judge Robert Morin on March 9, 2007. After Ms. Jackson failed to appear, the case was continued for two weeks. Ms.

Peart proceeded to obtain records from DCHA and to file discovery requests with Ms. Jackson.[3] On March 23, 2007, Ms. Jackson again failed to appear in court. The court granted Ms. Peart's motion to dismiss the complaint and entered a default with respect to the counterclaim. An ex parte proof hearing on the counterclaim was scheduled for April 27, 2007. Ms. Peart continued to prepare for trial, and to secure evidence of housing code violations.

**5. The Proof Hearing.** On April 25, 2007, two days before the proof hearing, DCHA moved to intervene in the case and filed a Complaint for Declaratory Judgment. See District of Columbia Housing Authority's Complaint for Declaratory Judgment (DCHA Complaint) (A068). DCHA did not state a cause of action or allege any facts that would have entitled it to recover from Ms. Jackson for breach of the HAP contract. See id.; see also District of Columbia Housing Authority's Brief In Support Of Its Claim To Abatement Funds (DCHA Brief) 4 (A072) ("[N]o breach [of the HAP contract] has been claimed by DCHA in this case."). Instead, DCHA asserted a derivative right to any moneys recovered by Ms. Peart on her claim that her "unit breached the warranty of habitability." DCHA Complaint 3 (A070). DCHA stated that it sought to "recover these sums only in the event [the trial court] determine[d] Ms. Peart [wa]s entitled to the relief sought in her counterclaim." Id. The essence of DCHA's claim was that Ms. Peart would be unjustly enriched if she recovered money DCHA had paid on her behalf. DCHA Brief 18 (A089) ("[I]t is unjust enrichment DCHA is attempting to prevent in this case.").

At the proof hearing, Ms. Peart introduced 37 exhibits in support of her claim. These included photographs of housing code violations, DCHA records of past inspections of her unit, and receipts from her self-help repairs. 4/27/07 Tr. at 13-15 (A024-26). Ms. Peart also testified concerning the housing code violations in her unit and Ms. Jackson's failure adequately to make

[3] Ms. Peart's counsel formally notified DCHA of her counterclaim in a letter dated March 30, 2007. (A091-92) (praecipe filed with the Court).

repairs. Id. at 15-34 (A026-45). As Ms. Peart explained, "we can't really do nothing because it's unsafe, and I really wouldn't like to be [in the apartment]." Id. at 30 (A041).

For its part, DCHA informed the trial court that it was "after 100% of whatever abatement might be deemed proper," but did not offer any proof of facts that would entitle it to relief against Ms. Jackson. 4/27/07 Tr. at 4 (A015). Counsel for DCHA acknowledged that he had "not seen the evidence" of any housing code violations, id. at 12 (A023), and that he did not "know the facts about what inspections took place or didn't take place." Id. at 5 A016). He did not present any argument with respect to the amount of the abatement to be recovered from Ms. Jackson. Id. at 33 (A044).

The trial court agreed that the housing code violations were "substantial" and "abate[d] the rent for 30% as requested [by Ms. Peart]." 4/27/07 Tr. at 35 (A046). The court also awarded Ms. Peart $487.86 "as moneys that she overpaid [Ms. Jackson], and/or expended for housing code violations." Id. The court ordered briefing on the question of what percentage of the judgment should be awarded to DCHA.

**6. The Final Order.** On July 17, 2007, the trial court issued a Final Order awarding DCHA the entirety of the judgment on Ms. Peart's claim against Ms. Jackson, and denying Ms. Peart's request that she be permitted to charge her attorneys' fees against the judgment. As to Ms. Peart's claim to a share of the abatement, the court credited the "real and persuasive arguments that so-called 'zero-rent' tenants will have less incentive to bring claims for rent abatement because of [un]inhabitable conditions," but concluded that "tenants cannot personally recover abatement funds." Final Order 3 (A003) (citing Anderson v. D.C. Housing Authority, 923 A.2d 853 (D.C. 2007)).

As to Ms. Peart's claim to attorneys' fees, the court acknowledged that "the common fund exception allows an award of attorney fees from the governmental treasuries," but suggested that the court must be "strict in its application" of that doctrine. Final Order 3 (A003). The court reasoned that the beneficiary of Ms. Peart's labors was not DCHA, but, instead, the individual participants in the HCVP, and suggested that it would be infeasible to determine "whether any participant in the DCHA/HUD program will receive any clearly recognizable and traceable personal benefit." Id. This appeal followed.

## SUMMARY OF THE ARGUMENT

Courts have the equitable power to prevent the unjust enrichment of an eleventh-hour intervenor. Ms. Peart won a judgment on her counterclaim against the landlord based on violations of her lease. DCHA, the intervenor here, did not assert any claim against the landlord. It did not present any evidence or perform any meaningful work in this case. Yet DCHA received 100% of the moneys collected on Ms. Peart's counterclaim because of her labors. That result is at odds with well-recognized principles of unjust enrichment, and should be reversed.

Ms. Peart's claim to attorneys' fees rests on the rule of equity that a party that knowingly receives the benefit of valuable services must provide compensation. The disfavor with which equity views the uncompensated enjoyment of valuable services has been widely recognized since the early common law. In this case, DCHA failed to enforce its contractual rights against Ms. Jackson, and intervened in Ms. Peart's claim against Ms. Jackson only at the last possible moment. By so doing, DCHA captured the benefit of Ms. Peart's legal services, but refused to provide compensation. The order DCHA invites this Court to affirm would permit the government to subsidize its legal costs at tenants' expense. This Court should reject that invitation. The consequence for future cases would be that Section 8 tenants and their lawyers

have little or no incentive to pursue rent abatement counterclaims, weakening enforcement of the housing code for such tenants and diminishing recoveries that benefit the HCVP.

The Superior Court erred as a matter of law in concluding that it could not award Ms. Peart any portion of the rent abatement awarded on her counterclaim. The court concluded that it could not sufficiently trace the benefits of Ms. Peart's recovery to individual beneficiaries of the HCVP, but that was the wrong analysis. DCHA was the beneficiary of Ms. Peart's efforts and it was obligated to compensate her. Moreover, even if the class of HCVP participants, rather than DCHA, were viewed as the beneficiary, there can be no doubt that a recovery of funds that can be used to replenish HCVP's resources benefited the class. There is no requirement that the benefits of a government program be precisely traced to particular individuals.

Government agencies are not exempt from the ordinary principles of unjust enrichment. Contractors routinely hold government agencies liable in equity for the value of services they have provided when, for whatever reason, they cannot recover under contract. Restrictions on DCHA's use of "public funds" once it wins a recovery have no bearing on whether DCHA must pay restitution for the services Ms. Peart rendered in winning the counterclaim. As DCHA conceded below, Ms. Peart was entitled to sue Ms. Jackson for failing to maintain her apartment in an adequate state of repair in violation of the implied requirements of her lease. If DCHA had not intervened, Ms. Peart would have been entitled to the very moneys now at issue. In contrast to Anderson v. D.C. Housing Authority, 923 A.2d 853 (D.C. 2007), where the Court addressed claims based on DCHA's HAP contract, no portion of a tenant's recovery for lease violations can be characterized as "public funds" unless and until the amount that should be paid to the tenant and to DCHA respectively has been determined. Only funds actually recovered by DCHA on the basis of a tenant's own contractual counterclaim are public funds, so restrictions on the use of

funds awarded to DCHA under the HCVP are not relevant to how a recovery should be apportioned between the tenant and DCHA.

DCHA's own complaint in intervention asserted what amounts to an unjust enrichment claim against Ms. Peart. See Multi-Family Management, Inc. v. Hancock, 664 A.2d 1210, 1222 (D.C. 1995). However, Ms. Peart would not be unjustly enriched by receiving compensation from DCHA for the work that produced the recovery, and without which DCHA would have recovered nothing.

## ARGUMENT

## THE FINAL ORDER UNJUSTLY ENRICHED DCHA AT MS. PEART'S EXPENSE.

### A. DCHA Was Unjustly Enriched Because It Knowingly Received The Benefit Of Ms. Peart's Labor But Did Not Provide Compensation.

As this Court and other courts have recognized, it is unjust for a party knowingly to accept the benefit of valuable services without providing reasonable compensation. See, e.g., Brown v. Brown, 524 A.2d 1184, 1186 (D.C. 1987); Zaleski v. Congregation of the Sacred Hearts, 256 A.2d 424 (D.C. 1969). Unjust enrichment "occurs when a person retains a benefit (usually money) which in justice and equity belongs to another." Jordan Keys & Jessamy, LLP v. St. Paul Fire And Marine Insurance Co., 870 A.2d 58, 63 (D.C. 2005) (quoting 4934, Inc. v. D. C. Department of Employment Services, 605 A.2d 50, 55 (D.C. 1992)). "In such a case, the recipient of the benefit has a duty to make restitution to the other person if the circumstances of its receipt or retention are such that, as between the two persons, it is unjust for the recipient to retain it." 4934, Inc., 605 A.2d at 55-56. Whether a party has been unjustly enriched is a question of law. Kramer Assocs., Inc. v. Ikam, Ltd., 888 A.2d 247, 254 (D.C. 2005).

1. The general prohibition against unjust enrichment is premised on the power of a court sitting in equity "to give a more specific relief, and more adapted to the circumstances of

the case, than can always be obtained by the generality of the rules of the positive or common law." William Blackstone, 1 COMMENTARIES ON THE LAWS OF ENGLAND 92. The flexibility of equity has long permitted courts to fashion judgments to prevent the knowing but uncompensated enjoyment of valuable services in cases where, because of the absence of a contract between the parties, there can be no recovery at law. For example, a plaintiff seeking recovery from a defendant that acquired the plaintiff's money, but refused to perform a promised service, was often unable to obtain legal relief. See James Barr Ames, The History of Assumpsit, 2 HARV. L. REV. 53, 67 (1888) (collecting cases). Similarly, the courts of law were often unable to provide relief where a plaintiff alleged that his partner in business received an undue percentage of the profits after the winding up of their partnership, because the appropriate writ in such cases was "a very cumbersome, inconvenient, and tardy remedy." Joseph Story, COMMENTARIES ON EQUITY JURISPRUDENCE, AS ADMINISTERED IN ENGLAND AND AMERICA 517.

The law courts gradually relaxed the requirements of the writ system, allowing plaintiffs to recover the value of services rendered even where there was no contract between the parties. See Ames, 2 HARV. L. REV. at 66-69; Moses v. MacFerlan, 2 Burr. 1005, 1012 (K.B. 1760) (Mansfield, J.) ("If the defendant be under an obligation, from the ties of natural justice; to 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."); William A. Keener, A TREATISE ON THE LAW OF QUASI-CONTRACTS 190 ("[T]he defendant, having unjustly profited by services to which the plaintiff was entitled, must compensate the plaintiff therefor.").

The principle that a party that knowingly accepted the benefit of valuable services should provide compensation similarly pervades early American law. State courts frequently ordered the payment of attorneys' fees by parties that knowingly benefited from legal services in spite of

the absence of a valid contract between the attorney and the beneficiary of his services. See, e.g., Brigham v. Foster, 89 Mass. 419, 421 (1863) ("[T]he defendant, after choosing to avail himself of the professional services of the plaintiff, cannot now avoid a personal liability for the payment of a reasonable compensation therefor."); accord, e.g., Pixley v. Western Pacific R.R. Co., 33 Cal. 183, 195-196 (1867); Percy v. Clary, 32 Md. 245, 252 (1870); Hauss v. Niblack, 80 Ind. 407, 412-413 (1881); Lindner v. Hine, 48 N.W. 43, 44 (Mich. 1891); Taussig v. St. Louis and Kirkwood R.R. Co., 65 S.W. 969, 969-970 (Mo. 1901). Many courts also recognized that a plaintiff could recover the value of services or goods purportedly contracted for by a defendant that lacked contractual capacity because of mental illness or minority of age. While the common law rule held that such contracts were voidable by the minor or mentally ill party, the general practice was to imply an obligation to provide compensation in cases where the defendant actually enjoyed the benefit of the goods or services. See, e.g., Gay v. Ballou, 4 Wend. 403, 405 (N.Y. 1830); Weed v. Beebe, 21 Vt. 495, 500 (1849); Riley v. Mallory, 33 Conn. 201, 206 (1866); Trainer v. Trumbull, 6 N.E. 761, 762 (Mass. 1886); Senseney v. Repp, 94 Md. 77, 79 (1901). Such cases reaffirmed that a service provider was not without a remedy where another party knowingly enjoyed the benefit of its services without providing compensation.

2. This Court has repeatedly endorsed similar principles. See, e.g., Brown, 524 A.2d at 1186 ("[A] promise to pay will be implied in law when one party renders valuable services that the other party knowingly and voluntarily accepts.") (citing Zaleski, 256 A.2d 424). For example, a case involving the installation of snow guards on a church roof turned on whether the church pastor had agreed to the placement of the guards across the entire roof, or instead only within a limited area. Zaleski, 256 A.2d at 425-426. Because the Court concluded that the pastor had acquiesced in the placement of guards within a limited area, but "requested that no

more guards be installed," the church was not unjustly enriched when, unbeknownst to the pastor, the guards were nevertheless installed across the entire roof. Id. at 427. As Zaleski teaches, the essential element of an unjust enrichment claim is the expectation of the parties at the time the goods or services at issue are conveyed. Where the enriched party is on notice that it is receiving valuable services for which the service provider would reasonably expect compensation, equity will afford a remedy.

The Court recently reaffirmed these principles in Jordan Keys. See 870 A.2d at 62. In that case, Jordan Keys, a law firm, sought attorneys' fees from St. Paul Fire and Marine Insurance Company, which provided excess liability insurance to a hospital. The hospital retained Jordan Keys to defend it in a medical malpractice action, but failed to pay its legal expenses and soon filed a petition in bankruptcy. After the plaintiffs in the malpractice action agreed to seek money only out of the hospital's excess liability insurance, the hospital "tendered its defense to [St. Paul's]." Id. at 60. St. Paul retained new counsel, and the bankruptcy court ordered Jordan Keys to turn over its legal files to the new law firm. Id. Jordan Keys, which had not been paid for its work, sued St. Paul, "ask[ing] the court to award it more than $67,000 in unpaid legal services allegedly provided to the Hospital, together with interest, costs, and counsel fees." Id. at 61.

This Court affirmed the denial of Jordan Keys' claim to attorneys' fees on a theory of unjust enrichment because "St. Paul was not *unjustly* enriched." Jordan Keys, 870 A.2d at 66 (emphasis in original). The Court reached that conclusion because St. Paul's receipt of the benefit of Jordan Keys' labor was "contemplated from the outset of the malpractice suit." Id. at 65. Indeed, Jordan Keys conceded that "St. Paul received nothing that it would not have expected to be given had the Hospital not gone bankrupt." Id. at 66. Jordan Keys reaffirms the

availability of unjust enrichment to recover the value of services provided to a party that had no right to the services.

3. The general rule that a party must pay compensation for services to which it is not entitled and knowingly accepts governs here. In contrast to Zaleski, DCHA accepted Ms. Peart's services, explicitly conditioning its recovery on her success. In contrast to Jordan Keys, DCHA had no contractual or other right to the services of Ms. Peart's lawyers. Ms. Peart and her counsel never agreed, expressly or by implication, to provide legal representation to DCHA in its claim. Because DCHA failed either to enforce its own rights against Ms. Jackson or promptly to intervene in this litigation, there was no indication until the eve of trial that DCHA would share in the funds recovered on Ms. Peart's claim. Indeed, since learning of the decrepit condition of Ms. Peart's apartment, DCHA did not take any of the actions open to it that would have protected its financial interest in this case at its own expense.

First, from the date it learned of the conditions in Ms. Peart's apartment, DCHA could have terminated its HAP contract with Ms. Jackson and sought an abatement of moneys already paid. See 24 C.F.R. § 982.404(a)(2); 24 C.F.R. § 982.453(b). Despite being on notice of the conditions in the apartment, which repeatedly failed housing inspections conducted by District employees, DCHA did not take legal action against Ms. Jackson. Had it done so, DCHA was entitled to recover from Ms. Jackson under the terms of the HAP contract, but only at the cost of its own attorneys' labor.[4]

[4] Apparently, DCHA has adopted a policy against seeking abatement of rent for breaches of the HAP contract. District of Columbia Housing Authority, Administrative Plan 84 ("The owner must be given time to correct the failed items."). That policy choice by DCHA, however, does not entitle DCHA to benefit from a tenant's enforcement of a counterclaim based on lease violations without compensating the tenants.

Second, DCHA could have allowed Ms. Peart to litigate her claim, and subsequently pursued a freestanding action against Ms. Peart for its share of the judgment. Cf. Multi-Family Management v. Hancock, 664 A.2d 1210, 1220 (D.C. 1995) (Ferren, J., concurring in part) ("[A]ny right HUD ultimately may have to a portion of the abatement proceeds would not be legally prejudiced by a court order for payment of all rent abatements to the tenant, since any judgment to which HUD is not a party cannot have a preclusive effect on HUD's contract rights vis-à-vis tenant or landlord."). Here, again, DCHA would have borne its own fees in any litigation against Ms. Peart, and would not have been entitled to a costless recovery.[5]

Third, DCHA could have decided that the value of the judgment it was entitled to recover from Ms. Jackson was not worth the cost of litigation. If DCHA had reached that conclusion, Ms. Peart would have remained free to pursue a claim against Ms. Jackson based on the breach of the implied warranty of habitability, for "it is certainly fairer to compensate the tenant fully than it is to allow the landlord, which failed to act diligently and responsibly as a landlord, to retain rent payments made on the tenant's behalf." Multi-Family, 664 A.2d at 1221.

DCHA did none of those things. Instead of paying its own way in a lawsuit against Ms. Jackson, or deciding that the costs of suit outweighed the benefits, DCHA sought a free ride. By intervening in this case on the eve of trial and filing a derivative claim to all of the moneys recovered by Ms. Peart without having performed any of the underlying work, DCHA attempted to recover from Ms. Jackson at Ms. Peart's expense. DCHA's choice was in no way dictated by Ms. Peart's litigation, because Ms. Peart's claim could not have prejudiced DCHA in any future action. Multi-Family, 664 A.2d at 1220. By refusing to allow Ms. Peart to recover her expenses,

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[5] To the extent DCHA simply relied on facts already proved by Ms. Peart to establish its right to recovery in such a case, the equities would similarly dictate that Ms. Peart would be entitled to retain the value of her labor.

the trial court allowed DCHA to capture the benefit of Ms. Peart's legal services without providing compensation.[6] That result is at odds with this Court's understanding of unjust enrichment, see, e.g., Zaleski, 256 A.2d at 427, and with two hundred years' rejection of the principle that a party may knowingly receive valuable services with providing compensation.

### B. Ms. Peart Was Entitled To Charge Her Attorneys' Fees Against The Common Fund Recovered From Ms. Jackson.

To prevent unjust enrichment in cases where one party recovers a money judgment in which others will share, this Court and other courts have recognized the equitable power to fashion fee awards out of the recovery. Typically, this involves apportioning the costs of legal services among the beneficiaries of a "common fund" created by the litigation. See John P. Dawson, Lawyers And Involuntary Clients: Attorney Fees From Funds, 87 HARV. L. REV. 1597, 1625-1626 (1974) ("The announced purpose of the 'common fund' device for awarding fees is to reach and prevent a peculiar form of unjust enrichment."). In such cases, the courts permit litigants to "charg[e] attorney fees to funds that have been created, increased, or protected by successful litigation." Id. 1597; see, e.g., District of Columbia v. Green, 381 A.2d 578, 580 (D.C. 1977).

In the leading case, the plaintiff, Francis Vose, held a large number of bonds secured by land owned by the State of Florida and held in trust. See Trustees v. Greenough, 105 U.S. 527,

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[6] The correct measure of Ms. Peart's attorneys' fees in this case is the fair market rate for the legal services provided, because, for purposes of calculating attorneys' fees, it is irrelevant "whether representation was provided by private or nonprofit counsel." Link v. District of Columbia, 650 A.2d 929, 934 (D.C. 1994); see also Blum v. Stenson, 456 U.S. 886, 895 (1984) ("In determining the amount of fees to be awarded, it is not legally relevant that plaintiffs' counsel * * * are employed by * * * a privately funded non-profit public interest law firm."); Lively v. Flexible Packaging Association, 930 A.2d 984, 988 (D.C. 2007) (endorsing the Laffey Matrix as one means of calculating reasonable attorneys' fees).

528 (1881). Vose sued the trustees, alleging that they "were wasting and destroying the fund," and prevailed, "secur[ing] and sav[ing]" a "large amount of the trust fund." Id. at 529. Vose then sought to charge his attorneys' fees to the moneys he restored to the trust, arguing that he "bore the whole burden of this litigation, and advanced most of the expenses which were necessary for the purpose of rendering it effective and successful." Id.

The Supreme Court affirmed an award of attorneys' fees, recognizing that to do otherwise "would not only be unjust to [Vose], but * * * would give to the other parties entitled to participate in the benefits of the fund an unfair advantage." Greenough, 113 U.S. at 532. Drawing on the flexibility afforded by its equitable power, the Court looked past the absence of a contract between Vose and his fellow bondholders, and instead acknowledged the chancery courts' "long-established control over the costs and charges of the litigation to be exercised as equity and justice may require, including proper allowances to those who have instituted proceedings for the benefit of a general fund." Id. at 536.

This Court has frequently applied the "common fund" or "common benefit" doctrine. See, e.g., Passtou, Inc. v. Spring Valley Center, 501 A.2d 8, 11 (D.C. 1985); Launay v. Launay, Inc., 497 A.2d 443, 449 (D.C. 1985); In re Antioch University, 482 A.2d 133, 136 (D.C. 1984); see also National Treasury Employees Union v. Nixon, 521 F.2d 317, 320 (D.C. Cir. 1975). As the Court has observed, "the doctrine operates to spread litigation costs proportionately among all the beneficiaries so that the active beneficiary does not bear the entire burden alone and the 'stranger' beneficiaries do not receive these benefits at no cost to themselves." Passtou, 501 A.2d at 12 (citing Vincent v. Hughes Air West, Inc., 557 F.2d 759, 769 (9th Cir. 1977)).

This case falls squarely within the rule set down in Greenough. Ms. Peart recovered a money judgment from Ms. Jackson, and was concededly entitled to retain at least the money she

expended on repairs to her apartment. To the extent DCHA was entitled to claim the remaining money, it could do so only as a "stranger beneficiar[y]," Passtou, 501 A.2d at 12, because it did no meaningful work in this case. By declining to exercise its "long-established control over the costs and charges of the litigation" to prevent DCHA from receiving the benefit of Ms. Peart's labor without compensation, the trial court permitted precisely the wrong identified by the Supreme Court in Greenough. 113 U.S. at 536.

### C. The Trial Court Erred In Requiring That Ms. Peart Trace A "Personal Benefit" To Individual HCVP Participants.

In denying Ms. Peart's claim to attorneys' fees, the trial court suggested that application of the common fund doctrine was infeasible because "there is no way to ensure whether any participant in the [HCVP] will receive any clearly recognizable and traceable personal benefit." (A003). That analysis, which required Ms. Peart to identify the precise benefit that would flow to individual HCVP participants as a result of her litigation, was erroneous. It is DCHA, and not individual HCVP participants, that directly benefitted from Ms. Peart's litigation, and is therefore liable for unjust enrichment. In any event, in cases where a corporation will predictably disburse its share of a common fund to an identifiable group, attorneys' fees are appropriately charged to the corporation's share of the fund, because the corporation can efficiently distribute the costs together with the benefits.

The Final Order implicitly assumes that the actual beneficiary of Ms. Peart's litigation is not DCHA itself, but, instead, an unidentified class of HCVP participants. As explained above, that assumption is not correct, because it is DCHA, and not a class of HCVP participants, that

was unjustly enriched.[7] It is DCHA itself that received a gratuitous recovery by intervening on the eve of trial. That DCHA is required to disburse its share of the funds recovered to HCVP participants does not mean that it was not enriched at Ms. Peart's expense.

In any case, this Court has recognized the equitable power both to charge fees against a party where the plaintiff "actually bring[s] money into the court" and to "order[] a party before it to pay attorneys' fees out of monies it owes to non-party beneficiaries of the litigation." Passtou, 501 A.2d at 13. The essential element of either variety of common fund claim is that the plaintiff identify "a mechanism for effectuating an award of fees." Id. Even if the Court conceives of the beneficiaries in this case as HCVP participants, rather than DCHA, Ms. Peart's attorneys' fees would be appropriately charged against the fund she recovered on her claim. The Supreme Court has held that a plaintiff may charge its attorneys' fees against moneys recovered for the benefit of corporate shareholders, even where only the corporation itself is a party to the litigation. See Hall v. Cole, 412 U.S. 1, 7 (1973); Mills v. Electric Auto-Lite Co., 393 U.S. 375, 393-395 (1970). "Under these circumstances, reimbursement of the plaintiffs' attorneys' fees out of the corporate treasury simply shift[s] the costs of litigation to the class that has benefited from them and that would have had to pay them had it brought the suit." Hall, 412 U.S. at 7 (citing Mills, 396 U.S. at 397).

### D. The Principles of Unjust Enrichment Apply To Public And Private Parties Alike.

DCHA argued below that the trial court was powerless to award Ms. Peart a share of the abatement because the moneys she recovered from Ms. Jackson were "public funds" to which

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[7] Ms. Peart argued in part before the trial court that the beneficiaries of her labors were other HCVP participants, and not DCHA. While the argument pressed here differs somewhat from her argument below, the legal basis of her claim to attorneys' fees remains unchanged.

Ms. Peart "never acquired a legal right." (A002) (quoting Anderson v. D.C. Housing Authority, 923 A.2d 853, 864 (D.C. 2007)). The trial judge relied on that analysis as the basis for rejecting Ms. Peart's claim to a share of the abatement funds on the ground that she was entitled to compensation for enduring substandard living conditions, but correctly did not invoke that rationale with regard to her claim to compensation for the legal services DCHA accepted.

The fact that DCHA is a public agency receiving public funds has no bearing on its liability in equity for the value of Ms. Peart's attorneys' fees. The Final Order suggests there is some impropriety in "allowing individuals to seek an award of otherwise recovered public funds." (A003). But there is no reason to suppose that public agencies can expropriate valuable services with impunity. Other courts have recognized that public agencies – and, in particular, public housing agencies – are liable in equity for the value of services performed to their benefit. For example, the D.C. Circuit entertained the unjust enrichment claim of Trans-Bay Engineers, a construction company that contracted with More Oakland Residential Housing, Inc. (MORH) to build a housing project for low-income tenants. Trans-Bay Engineers and Builders, Inc. v. Hills, 551 F.2d 370 (D.C. Cir. 1976). MORH was a "creature[] of HUD * * * created and fully financed to carry out a government inspired social purpose of rehabilitating and constructing housing for low income families." Id. at 382 (quotation omitted). After MORH defaulted on the interest payments on the project mortgage, it assigned the outstanding mortgage to HUD. These actions precluded Trans-Bay from recovering under its contract with MORH for the full value of its services, because the contract provided for a 10% "holdback" payable only after a "final closing of the mortgage financing * * * [which was] no longer possible because of the project owner's default." Id. at 374-375.

Trans-Bay nevertheless sued HUD, alleging, among other claims, that "[HUD] ha[d] been unjustly enriched by the value of Trans-Bay's uncompensated construction services." Trans-Bay, 551 F.2d at 381. The D.C. Circuit agreed, holding that "[t]he undisbursed mortgage proceeds created by the holdback constitute[d] an identifiable res subject to the control of [HUD] upon which an equitable lien can be placed." The court brushed aside the suggestion that HUD could, by contract, frustrate fundamental principles of equity, concluding that "[a] court of equity has the power * * * to avoid unjust enrichment from the services rendered." Id at 382; accord, e.g., Spring Construction Co. v. Harris, 562 F.2d 933 (4th Cir. 1977).

The Second Circuit has applied similar reasoning. See Niagara Mohawk Power Corp. v. Bankers Trust Co. of Albany, 791 F.2d 242 (2d Cir. 1986); S.S. Silberblatt, Inc. v. East Harlem Pilot Block, 608 F.2d 28 (2d Cir. 1979). Niagara Mohawk involved a residential complex owned by Mulberry, a corporation financed and effectively operated by HUD. After Mulberry defaulted on its mortgage payments, HUD "made several attempts to shore up Mulberry," and established a "Project Improvement Account" that "provide[d] an infusion of cash" to the struggling project. 791 F.2d at 243. Mulberry, which was "in arrears in paying * * * utility services," was sued by Niagara Mohawk, the utility company for the project. Id. Niagara Mohawk received a default judgment against Mulberry, but, because Mulberry was judgment-proof, it attempted to execute the judgment upon HUD's Project Improvement Account. Id. Niagara Mohawk argued that HUD was unjustly enriched by the value of services the utility company had provided to the project, because if it "had not continued to supply gas and electricity to the project's tenants [without compensation], the tenants would not have paid the rents that accrued ultimately to the benefit of HUD." Id. at 244.

The Second Circuit concluded that although it should have been obvious to Niagara Mohawk that HUD had "earnestly hoped to shield itself from any liability to it, * * * justice would dictate that the rather transparent veil created by HUD be pierced to permit a decision based on substance rather than form." Niagara Mohawk, 791 F.2d at 245 (quoting Silberblatt, 608 F.2d at 40). Of equal significance, the court concluded that Niagara Mohawk's recovery did "not depend upon whether some portion of the [Project Improvement Account] was earmarked for it," and therefore held that it did not need to reach the question whether there would otherwise be restrictions on the use of the moneys in that account. Id. For Niagara Mohawk to recover in equity, it was enough to demonstrate that HUD had knowingly received the benefit of its services without compensation.

The legal services provided to DCHA by Ms. Peart are not meaningfully distinguishable from the services provided in Trans-Bay, Niagara Mohawk, and similar cases. Such cases make clear that DCHA's status as a public entity has no bearing on its liability in equity. It is of no moment that the funds in its possession might be characterized as "public"; the crucial point is that DCHA has knowingly accepted valuable services, and should therefore be required to pay reasonable compensation. The trial court's suggestion that the decision whether to prevent DCHA's unjust enrichment is a "legislative judgment[] about the propriety of allowing individuals to seek an award of otherwise recovered public funds" (A003), is at odds with this well-settled rule.

This Court's holding in Anderson is not to the contrary, for two independent reasons. First, a broad interpretation of Anderson's discussion of "public funds" would be inconsistent with the proposition that government agencies are subject to liability for unjust enrichment. In each and every such case, moneys received by the agency would be "public funds," but that has

nothing to do with a court's determination whether the agency should receive money owed on a judgment won by a third party. Moreover, the Supreme Court has expressly rejected the proposition that government-imposed restrictions on a fund limit the authority of a court to prevent the government from being unjustly enriched by legal work done on its behalf. United States v. Equitable Trust Co., 283 U.S. 738, 744-45 (1931) (awarding attorneys' fees for work performed by attorneys for next friend of an incompetent Indian to recover restricted funds, both prior and subsequent to government's intervention in the litigation). Second, in Anderson, this Court understood the tenant to be asserting a claim derived from DCHA's rights under the HAP contract. Even if the recovery on DCHA's claim could be thought of as being "public funds" in some sense even before it is remitted to the agency, the same is not true of DCHA's unjust enrichment-based claim against Ms. Peart seeking the fruits of her lease violation counterclaim. See Multi-Family, 664 A.2d at 1221.

To be sure, the trial court was required to "properly allocate[]" the moneys in its possession between Ms. Peart and DCHA. Anderson, 923 A.2d at 865. But the tenant in Anderson only sought "compensation for having had to endure living in the indisputedly poor conditions in her home," 923 A.2d at 865, and not the value of her work in recovering that abatement under a theory of unjust enrichment. The trial court rejected Ms. Peart's similar claim, and she does not seek review of that ruling here. Anderson does not decide the question raised by Ms. Peart's appeal, namely, whether the trial court retained the equitable power to apportion the judgment to avoid unjustly enriching DCHA. In any event, the Anderson court's discussion of the character of DCHA's rent payments as "public funds" came after the Court had already rejected each of Anderson's affirmative theories for recovering a greater portion of the rent abatement. Thus, the outcome of the decision would have been the same regardless of the

portion of the opinion discussing "public funds." Consequently, the discussion is obiter dicta, and is not binding in this case, which presses an unjust enrichment theory not considered in Anderson.

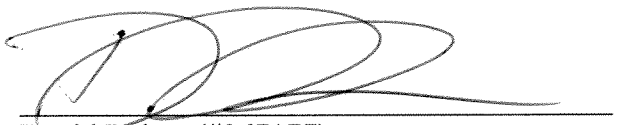
The logic of the Final Order, which would bar an award of attorney's fees against DCHA under all circumstances, invites DCHA to delay its intervention in tenants' abatement suits until the last possible moment, secure in the knowledge that its eventual recovery will be subsidized by tenants and their attorneys. Cf. Anderson, 923 A.2d at 866 (emphasizing that DCHA was entitled to recover because it intervened once it "reasonably should have known of its interest in the case"). Such an inequitable result is not required by the holding of Anderson, and should not be sanctioned by this Court.

## CONCLUSION

The Final Order, which denied Ms. Peart compensation for the costs of winning a judgment for DCHA's benefit, should be reversed.

Respectfully submitted.

Barbara McDowell (#414570)
Julie H. Becker (#471080)
Peter G. Wilson*
Legal Aid Society of the District of Columbia
1331 H Street, N.W., Suite 350
Washington, D.C. 20005
PH: (202) 628-1161



David Reiser (#367177)
ZUCKERMAN SPAEDER LLP
1800 M Street, N.W.
Suite 1000
Washington, D.C. 20036
PH: (202) 778-1800
***Counsel for Appellant***

* Licensed in the State of New York,
practicing under the supervision of Barbara McDowell.

## CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing Brief for Appellant to be delivered by first-class mail, postage prepaid, this 19th day of March 2008, to:

Hans E. Froelicher, IV
Clifford E. Pulliam
District of Columbia Housing Authority
1133 N. Capitol Street, N.E.
Washington, D.C. 20002
*Counsel for Appellee*

Kenneth J. Loewinger
Patricia B. Millerioux
Loewinger & Brand PLLC
471 H Street, N.W.
Washington, D.C. 20001
*Counsel for Cross-Appellant*

David Reiser