

Case No. 94335-4

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IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

Washington State  
Supreme Court

No. 76024-6-I

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON, DIVISION I

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ESHMAIL SHAHREZAEI,

Petitioner

v.

F.P.H. CONSTRUCTION, INC., a Washington corporation,

Respondent.

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ANSWER TO PETITION FOR REVIEW

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## I. INTRODUCTION

This Petition for Review fails to meet the criteria established by this Court for granting review. Framed as raising significant questions of law under the Constitution, this Petition does nothing of the kind.

Considering the rulings at issue, the trial court properly exercised its discretion in granting Respondent's Motion to Amend and in granting Respondent's Motion for Partial Summary Judgment under quantum meruit as the record of admissible evidence reflects that Petitioner held himself out as an owner of the Bistro, requested the work from FPH Construction, which then performed the work with the expectation of payment.

These two routine rulings fail to give rise to significant Constitutional questions and the Petition for Review should be denied.

## II. RESTATEMENT OF THE CASE

This case is a straight forward collection action arising from the work undertaken by the Respondent, F.P.H. Construction Inc. ("FPH"), between June 2006 and March 2010, for a now defunct nightclub and bar located in Silverdale, Washington known as the Old Town Bistro and Wine Bar (the "Bistro").

As pointed out in the prior briefing before the court of appeals, Eshmail ("Essie") Shahrezaei fails to cite to the record in significant places, misstates the record, and simply offers argument instead of facts for much

of his Statement of the Case. For example, Eshmail claims “all invoices were sent to Mahmoud only and none to Eshmail.” Petition, p. 3. However, the record reflects Eshmail and not Mahmoud signed the checks for the business, including those checks tendering payment to FPH. (CP 97, 117-120). Similarly, there is no support in the record for the statement that Eshmail “for a limited period of time, was helping Mahmoud, as a family member, with the restaurants’ daily business activities.” Petition, p. 2. No citation is made to the Clerks Papers because none exists. The undisputed record before the trial court reflects that defendants Mahmoud (“Mike”) Shahrezaei and his brother, Eshmail, held themselves out as co-owners of the Bistro. (CP 96). Stephanie Nevarez, the Bistro’s restaurant manager, states Mike and Essie called themselves the “owners” of the business and their business cards and Employee Handbook similarly identified both Mike and Essie as the “owners” and “proprietors.” (CP 96-97, 111, 113-114). Both brothers signed the Nevarezes’ departure paperwork when Stephanie and her husband decided to leave the business. (CP 115-116). Because of the Petitioner’s omissions and errors in his Statement of the Case, this Restatement of the Case is offered to advise this court of the record before the trial court.

The contracted for work consisted of three phases. The first phase included certain preliminary and incidental work undertaken at the direction

of Mahmoud Shahrezaei, between June 2006 and April 2009 on a cost plus basis. This work is identified as Job No.s 042 and 1131. FPH was paid for that work. (CP 167, 233).

The final two phases were undertaken in late 2009 through March 2010 pursuant to two written contracts that appear to be signed by Mahmoud and Eshmail. Mike Brown, FPH's President, testifies this signing took place in his presence. (CP 167, 170-190). This work is identified as Job Nos. 1278, 1278.1 and 1295. (CP 232). The first contract is dated November 4, 2009, and covers a fire suppression system with a fixed price of \$82,921.00. The second contract is dated January 25, 2010, and covers a grease trap and associated work for a fixed price of \$19,320.00. The contracts include (a) a provision for the assessment of late fees of 5% on each invoice that was not paid within 10 days of the due date; and (b) a provision providing for the accrual of interest at 18% per annum on unpaid amounts from each due date. (CP 167, 170-190, 232).

FPH billed the Defendants approximately \$120,000.00 for this work of which \$53,878.62 was not paid. (CP 167, 233, 237-262). The remaining unpaid balance for those jobs, through August 31, 2015, including principal, interest and late fees, after deduction for all payments made, totals \$99,104.96. (CP 233). This amount did not include any attorney fees or litigation costs. (CP 233).

The written discovery responses received from defendants do not dispute these facts. (CP 229-230). In the written discovery responses made on behalf of Mahmoud Shahrezaei, he admits he is an owner of the Bistro and he signed the Contracts. The only witness he identifies is himself. His only defense is that “he paid more than sufficient amount for the work that was done.” Yet, when asked about all payments he made to the Plaintiff, he responded, “Misplaced during move; not available.” Similarly, when asked about records or evidence related to any defective work, he again replied, “Misplaced during move; not available.” (CP 229-230).

Defendant C&SH ENTERPRISES LLC’s discovery responses are essentially identical with those of Mahmoud. (CP 230).

The written discovery responses made on behalf of Eshmail Shahrezaei deny he signed the contracts. But these responses were not signed by Eshmail Shahrezaei but by his attorney. (CP 230).

Ms. Stephanie Nevarez, the Bistro’s restaurant manager, states she believes the signature on the Contracts is Essie’s signature. (CP 97). She states that while employed at the Bistro, she saw multiple documents that she knows were signed by Essie and she is familiar with his signature. (CP 97, 117-120). When asked to compare the signatures on the two Contracts to the checks she knows to have been signed by Essie, Ms. Nevarez

concludes she is certain that it is Essie's signature on both Contracts. (CP 97).

Ms. Hannah McFarland, a Certified Document Examiner through the National Associations of Document examiners, who has testified as an expert witness over 60 times and frequently examines documents to determine the authenticity of signatures, states Essie's signature on the two Contracts is genuine. (CP 192-194). Ms. McFarland examined several exemplars of Essie's signatures from documents he is known to have signed (CP 222-228) and compared them to the signatures on both Contracts (CP 199-219). It is her opinion that Essie signed both Contracts:

Based upon the available evidence it is my professional opinion that each "Eshmail Shahrezaei" signature, Q1 and Q2, is genuine. Characteristics of the exemplars that are also found in Q1 and Q2 include the signatures being executed very quickly so that the shape of many letters is deteriorated, consistent right slant, letter size and placement." (CP 194).

On November 30, 2002, Plaintiff filed its Complaint For Monies Due. (CP 3-16).

Paragraph VII of the complaint reads, in part, as follows:

"The reasonable value of the work exceeds \$89,900.00. The LLC has received the value and benefit of such work and would be unjustly enriched if it were allowed to retain the benefit of such work." (CP 4).



Plaintiff's Prayer for Relief requests the judgment of \$38,733.90, plus interest, plus fees and costs and "For such other and further relief as the court deems property." (CP 5).

When the complaint was originally prepared, it identified defendant Eshmail Shahrezaei as the spouse of Mahmoud Shahrezaei, (i.e. Mahmoud Shahrezaei and Eshmail Shahrezaei, husband and wife). (CP 3-16).

On June 21, 2013, Eshmail Shahrezaei, pro se, filed a separate Answer, which in part stated [Eshmail] is not the spouse of Mahmoud Shahrezaei, without further explanation. (CP 17-19). The Petition here, again, misstates the record claiming the Answer states, "Mahmoud and Eshmail are brothers, not husband and wife." Petition, p. 6.

On February 12, 2014, an Order was entered transferring the case to Mandatory Arbitration.

Eshmail's Statement of the Case, again with no citation the record, contends Plaintiff took no action to amend its complaint prior to arbitration. This assertion is wrong. Prior to the arbitration, Plaintiff's counsel notified counsel for the Defendants and it would be making an oral motion to amend the complaint to conform with the evidence, including that Mahmoud Shahrezaei and Eshmail Shahrezaei were brothers and not husband and wife and there were two written contracts instead of one. (CP 49-50). The Arbitration Award reflects this motion was granted as the August 18, 2014,

Arbitration Award was made against “Defendants Mahmoud Shahrezaei and Eshmail Shahrezaei, and their marital communities, jointly and severally.” (CP 20-21).

On September 3, 2014, the Defendants filed a request for trial de novo.

On February 25, 2015, Plaintiff filed a motion to amend the complaint. The proposed Amended Complaint was attached as *Exhibit 1* to the motion. (CP 22-48). This motion was supported by the Declaration of Ronald C. Templeton advising that an oral motion to amend was made prior to arbitration. (CP 49-50).

On March 18, 2015, Defendants filed an opposition to the Motion to Amend. (CP 51-53).

On March 18, 2015, Plaintiff filed its reply to Defendants filed an opposition to the Motion to Amend. (CP 54-55).

On March 20, 2015, an Order was entered allowing Plaintiff to amend its Complaint. (CP 57-58).

Eshmail’s Statement of the Case, again with no citation the record, argues the Motion to Amend was simply a “pretext” to add Mahmoud and Eshmail’s spouses to the case. Petition, p. 6. Notwithstanding this is purely argument and not a factual statement, it is also inaccurate as Plaintiff

originally attempted to name Mahmoud's spouse (naming Eshmail incorrectly), and then move to amend the Complaint prior to arbitration.

On March 24, 2015, the Amended Complaint for Monies Due was filed with the court. (CP 59-83). Paragraphs VII and VIII read as follows:

The reasonable value of the work exceeded \$120,000.00. The Defendants received the value and benefit of such work and were unjustly enriched to the extent it failed to pay the contracted amounts due to Plaintiff.

Defendants are justly indebted to Plaintiff for the principal sum of \$54,733.90 plus interest as provided in the Contract at 18% per annum in an amount to be proven at the time of trial or further hearing.

(CP 61). Plaintiff's Prayer for Relief requests the judgment of \$54,733.90, plus interest, plus fees and costs and "For such other and further relief as the court deems property." (CP 62).

On September 2, 2015, Plaintiff filed its Motion for Partial Summary Judgment against Defendants Mahmoud Shahrezaei and Eshmail Shahrezaei and C&SH ENTERPRISES, LLC. (CP 84-94). The motion was supported by the Declarations of Stephanie Nevarez (CP 95-165), Michael Brown (CP 166-190), Hannah McFarland (CP 191-228), David A. Weibel (CP 229-230), and Grace Van Dyke (CP 95-165).

On September 8, 2015, Defendants Mahmoud Shahrezaei and C&SH ENTERPRISES, LLC filed a Notice of Withdrawal of Request for Trial De Novo.

On September 21, 2015, Defendant Eshmail Shahrezaei filed his Response to Plaintiff's Motion for Summary Judgment. (CP 265-267). This Response was supported by the one page Declaration of Eshmail Shahrezaei, which states, in part, "I have never entered into any contract or agreement with Plaintiff"; and "I also have not benefitted from any work or services provided by Plaintiff." (CP 263-264).

On September 28, 2015, Plaintiff filed its Reply to the Defendants' Responses. (CP 260-276).

On November 5, 2015, Plaintiff filed a Motion for Default against Defendant Jane Doe Shahrezaei I, wife of Mahmoud Shahrezaei and a Motion for Default against Defendant Jane Doe Shahrezaei II aka Mary Shahrezaei, wife of Eshmail Shahrezaei.

On November 23, 2015, the trial court granted Plaintiff's Motions for Default against Defendant Jane Doe Shahrezaei I, wife of Mahmoud Shahrezaei, and Defendant Jane Doe Shahrezaei II aka Mary Shahrezaei, wife of Eshmail Shahrezaei.

On January 12, 2016, Plaintiff filed its Motion for (1) Judgment on Arbitration Award as to Defendants Mahmoud Shahrezaei and C&SH ENTERPRISES LLC, (2) Default Judgment against Defendants Jane Doe Shahrezaei I, wife of Mahmoud Shahrezaei, and Defendant Jane Doe Shahrezaei II aka Mary Shahrezaei, wife of Eshmail Shahrezaei, and (3)

Judgment against Eshmail Shahrezaei based on the trial court's summary judgment order. This Motion was supported by the Declarations of David A. Weibel, Michael Brown (CP 166-190) and Grace Van Dyke (CP 95-165). As no opposition was made by any Defendant, the court entered Final Judgment on January 22, 2016. (CP 281-283).

On February 19, 2016, Defendant Eshmail Shahrezaei filed his Notice of Appeal. (CP 284-287).

An unpublished opinion affirming the trial court was filed by the court of appeals on January 17, 2017. After a Motion for Reconsideration was denied this Petition was brought.

### III. ARGUMENT

#### A. Grounds for Review

In ruling on a Petition for Review this Court applies the considerations set forth in RAP 13.4(b). Under these considerations review will be accepted by this Court only:

- (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
- (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or
- (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
- (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

B. Review Should be Denied as the Trial Court Did Not Manifestly Abuse its Discretion in Granting Leave to Amend.

Under CR 15(a), a party may amend their complaint “by leave of court or by written consent of the adverse party.” CR 15(a). Rule 15(a) specifically provides that leave to amend “shall be freely given when justice so requires.” CR 15(a). These rules serve to facilitate proper decisions on the merits, to provide parties with adequate notice of the basis for claims and defenses asserted against them, and to allow amendment of the pleadings except where amendment would result in prejudice to the opposing party. *Caruso v. Local Union No. 690*, 100 Wn.2d 343, 349, 670 P.2d 240 (1983).

The decision to grant leave to amend the pleadings is within the discretion of the trial court. *Sprague v. Sumitomo Forestry Co.*, 104 Wn.2d 751, 763, 709 P.2d 1200 (1985); *Lincoln v. Transamerica Inv. Corp.*, 89 Wn.2d 571, 577, 573 P.2d 1316 (1978). Therefore, review of the trial court's decision to grant or deny leave to amend, is under a manifest abuse of discretion test. *Caruso*, 100 Wn.2d at 351, 670 P.2d 240. The trial court’s decision “will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” *State ex rel.*

*Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971); *Wilson v. Horsley*, 137 Wn.2d 500, 505-06, 974 P.2d 316, 318 (1999).

In this case, Defendants were not prejudiced by the amendment because they were on notice prior to arbitration, and well prior to the Motion to Amend, that Plaintiff intended to pursue its claims against both Mahmoud Shahrezaei and Eshmail Shahrezaei, and their respective spouses.

The original Complaint named as Defendants C&SH Enterprises, LLC, and Mahmoud Shahrezaei and Eshmail Shahrezaei, *husband and wife*. (CP 3-16) (emphasis added).

After receiving Defendants' answers (CP 17-19), Plaintiff's counsel notified counsel for the Defendants prior to the arbitration Plaintiff would be making an oral motion to amend the Complaint to conform with the evidence, including that Mahmoud Shahrezaei and Eshmail Shahrezaei were brothers and not husband and wife and there were two written contracts instead of one. (CP 49-50).

The Arbitration Award reflects this motion was granted as the August 18, 2014, Arbitration Award was made against "Defendants Mahmoud Shahrezaei and Eshmail Shahrezaei, *and their marital communities, jointly and severally*." (CP 20-21) (emphasis added).

On February 25, 2015, Plaintiff filed a motion to amend the Complaint. The proposed Amended Complaint was attached as *Exhibit 1* to the motion (CP 22-48). This motion was supported by the Declaration of Ronald C. Templeton advising that an oral motion to amend was made prior to arbitration. (CP 49-50).

Petitioner argues the motion to amend was simply a “pretext” to add Mahmoud and Eshmail’s spouses to the case. Petition, p. 6. However, it is evident from the record that Plaintiff originally attempted to name Mahmoud’s spouse (naming Eshmail incorrectly), then moved to amend the Complaint prior to arbitration to add the spouse, and the Arbitration Award reflected the award was made against both “Mahmoud Shahrezaei and Eshmail Shahrezaei, and their marital communities, jointly and severally.”

There is no showing of undue delay or surprise and the trial court did not manifestly abuse its discretion when it granted the Motion to Amend.

C. Review Should be Denied as the Trial Court Properly Granted Respondent’s Motion For Partial Summary Judgment on its Quantum Meruit Claim.

Petitioner’s second basis for seeking review is centered on the testimony of Ms. Hannah McFarland, a handwriting expert, who expresses the opinion that Eshmail Shahrezaei signed the two written contracts. This



testimony was just one piece of evidence supporting Respondent's Motion For Partial Summary Judgment. Even if it were not considered, the remaining undisputed admissible evidence before the court provides a sufficient factual basis and support entry of this Judgment.

Quantum meruit is a remedy to recover 'a reasonable amount for work done.' It literally means "as much as he deserved." *Eaton v. Engelcke Mfg., Inc.*, 37 Wn. App. 677, 680, 681 P.2d 1312, 1314 (1984) (affirming quantum meruit award on basis of contract implied in fact).

Recovery in quantum meruit is proper when there "is an agreement depending for its existence on some act or conduct of the party sought to be charged and arising by implication from circumstances, which according to common understanding shows a mutual intention on the part of the parties to contract with each other. The services must be rendered under such circumstances as to indicate that the person rendering them expected to be paid therefor, and that the recipient expected, or should have expected, to pay for them." *Young v. Young*, 164 Wn.2d 477, 485-86, 191 P.3d 1258 (2008) (quoting *Johnson v. Nasi*, 50 Wn.2d 87, 91, 309 P.2d 380 (1957)).

1. *The Record Reflects Eshmail Shahrezaei Requested FPH to Provide Contractor Services*

Eshmail was an owner of the Bistro restaurant. He identified himself as an "owner" of the Bistro on his business card, in the

Bistro's Employee Handbook, in his communication with Mike Brown and Stephanie Nevarez and on Ms. Nevarez's departure paperwork. (CP 96-97, 111, 113-116. 167-168). In the record before the trial court Eshmail did not dispute this.

Two written contracts were prepared describing the scope of work; namely, for the installation of fire suppression system and grease interceptor vault system. (CP 167, 170-190, 232).

On the first page of both written contracts the contracting parties are identified as FPH and Mahmoud Shahrezaei and Eshmail Shahrezaei as the business "owners." (CP 170, 179). And it is evident from the fact that Eshmail Shahrezaei as an owner of the business wrote out and signed several checks making payment to FPH for the contracted for work that he requested this work. (CP 97, 117-120).

Collectively, these facts reflect by implication a mutual intention on the part of the parties to contract with each other.

2. *FPH Expected Payment for the Work it Performed*

This element cannot seriously be disputed. The two written contracts Eshmail claims he did not sign contain terms requiring payment for services. (CP 167, 170-190, 232). FPH performed the work called for under the contracts and invoiced the Petitioner for this work. (CP

167-168, 229-230, 233, 237-262). Eshmail has claimed the invoices were not addressed to him, but no citation to the record is given for this proposition. See Petition, p. 3. It is of no consequence, in any event, as Eshmail Shahrezaei, as a business owner, wrote out and signed several checks making payment to FPH for the contracted for work. (CP 97, 117-120). A fact he does not dispute.

Consequently, the undisputed record reflects services were rendered under such circumstances as to indicate that FPH expected to be paid for them.

3. *Eshmail Shahrezaei knew FPH expected payment for the work it performed*

This element too cannot be disputed. In this case, the services rendered by FPH clearly indicate it expected to be paid for its service, and Eshmail expected, or should have expected, to pay for them. Eshmail himself knew FPH expected to be paid because he personally wrote and signed checks payable to FPH for the work performed under the contracts.

Given that Eshmail Shahrezaei does not contest he is an owner of the Bistro restaurant, that he and his brother agreed with FPH for work to improve the restaurant, that FPH performed the work in a workman like manner, and the FPH expected to be paid and has not been

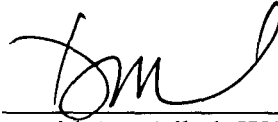
paid in full for the work performed, partial summary judgment was properly granted under the doctrine of quantum meruit.

IV. CONCLUSION

This Court should deny review.

RESPECTFULLY SUBMITTED this 26 day of April, 2017.

TEMPLETON HORTON WEIBEL PLLC

A handwritten signature in black ink, appearing to read 'D. Weibel', is written over a horizontal line.


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**CERTIFICATE OF SERVICE BY MAIL**

I certify that I caused to be mailed, a copy of the foregoing **ANSWER TO PETITION FOR REVIEW** postage prepaid, via U.S. mail on the 26<sup>th</sup> day of April, 2017, to the following counsel of record at the following addresses:

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