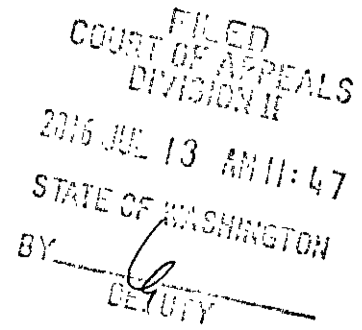

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

Case No. 48626-1-II

ESHMAIL SHAREZAEI,

Appellant,

v.

F.P.H. CONSTRUCTION, INC

Respondent.

BRIEF OF RESPONDENT F.P.H. CONSTRUCTION, INC.

David A. Weibel, WSBA #24031
TEMPLETON HORTON WEIBEL
PLLC
3212 NW Byron Street, Suite 104
Silverdale, Washington 98383
(360) 692-6415

TABLE OF AUTHORITIES

CASES

	Page
Amer. Linen Supply Co. v. Nursing Home Bldg. Corp., 15 Wn. App. 757, 767, 551 P.2d 1038 (1976))	33
Bailie Commc'ns, 61 Wn. App. at 159–60, 810 P.2d 12	26
Bill v. Gattavara, 34 Wn.2d 645, 650, 209 P.2d 457 (1949)	22
Caruso v. Local Union No 690, 100 Wn.2d 343, 351, 670 P. 2d 240 (1983)	17, 19
Dewey v. Tacoma Sch. Dist. No. 10, 95 Wn. App. 18, 23, 25–26, 974 P.2d 847 (1999)	22
Eaton v Engelcke Mfg., Inc., 37 Wn. App. 677, 680, 681 P.2d 1312, 1314 (1984)	22, 34
Everett v. Diamond, 30 Wn. App. 787, 791-92, 638 P.2d 605 608 (1981)	15, 27
In re Firestorm 1991, 129 W.2d 130, 135, 916 P.2d 411 (1996)	18
Grimwood v. Univ. of Puget Sound, Inc., 110 Wn.2d 355, 360, 753 P.2d 517, 519 (1988)	27, 33
Gross v. Lynnwood, 90 Wn.2d 395, 401, 583 P.2d 1197 (1978)	26
Hartley v State, 103 Wn.2d 768, 774, 698 P.2d 77 (1985)	18
Hill v. Cox, 110 Wn. App. 394, 404, 41 P.3d 495, 502 (2002).	16, 33
Johnson v. Nasi, 50, Wn.2d 87, 91, 309 p.2d 380 (1957)	23, 35

Johnson v. Recreational Equip., Inc., 159 Wn. App. 939, 954, 247 P.3d 18, 26 (2011).. 27

Keck v. Collins, 184 Wn.2d 358, 370, 357 P.3d 1080, 1086 (2015).. 18

King Aircraft Sales, Inc v. Lane, 68 Wn. App. 706, 715, 846 P.2d 550, 555 (1993).. 25

Lehrer v. State, Dept. of Social and Health Services, 101 Wn. App. 509, 516, 5 P.3d 722 (2000)......................... 29

Lincoln v. Transamerica Inv. Corp., 89 Wn.2d 571, 577, 573 P.2d 1316 (1978)... 17, 19

Morris v. McNicol, 83 Wn.2d 491, 494–95, 519 P.2d 7 (1974). 27

Moses v. Macferlan, 2 Burr, 97 Eng. Rep. 676, 678 (1760)... 23

Nevers v. Fireside, Inc., 133 Wn.2d 804, 809, 947 P.2d 721 (1997).. 18

Northwest Independent Forest Mfrs v. Department of Labor and Industries, 78 Wn. App. 707, 712, 899 P.2d 6 (1995).. 29

O'Brien v. McKelvey, 66 Wash. 18, 118 P. 885 (1911)........ 32

Olympic Fish Products v Lloyd, 93 Wn.2d 596, 602, 611 P.2d 737 (1980)... 18

Pac. Nw. Shooting Park Ass'n v. City of Sequim, 158 Wn. 2d 342, 352, 144 P.3d 276, 281 (2006)................ 21

Preston v. Duncan, 55 Wn.2d 678, 684, 349 P.2d 605 (1960).. 34

Richard v. Credit Suisse, 242 N.Y. 346, 152 N. E. 110, 111, 45 A.L.R.1041 (1926)............................... 34

Ross v. Raymer, 32 W.2d 128, 137, 201 P.2d 129 (1948)..... 23

Snohomish County v. Rugg, 115 Wn. App. 218, 61 P.3d 1184 (2002)... 28

Sourakli v. Kyriakos, Inc., 144 Wn. App. 501, 509, 182 P.3d 985 (2008), review denied, 165 Wn.2d 1017, 199 P.3d 411 (2009)...................................... 33

Sprague v. Sumitomo Forestry Co., 104 Wn.2d 751, 763, 709 P.2d 1200 (1985)..................................... 17, 19

State v. Adams, 107 Wn.2d 611, 620, 732 P.2d 149 (1987)... 21, 22

State v. Atkins, 26 Wn.2d 392, 174 P.2d 427 (1946).......... 32

State v. Bogart, 21 Wn.2d 765, 153 P.2d 507 (1944).......... 31

State v. Brunn, 144 Wash. 341, 258 P. 13 (1927).............. 32

State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)... 17, 19

State v Cont'l Baking Co., 72 Wn.2d 138, 143, 431 P.2d 993 (1967)... 23, 38

State ex rel. Employment Sec. Bd. v. Rucker, 211 Md. 153, 157–58, 126 A.2d 846 (1956)............................ 23

State v. Kennedy, 19 Wn.2d 152, 142 P.2d 247 (1943)........ 32

State v. McDonald, 116 Wash. 668, 200 P. 326 (1921)........ 31

State v. Ralph Williams' Nw. Chrysler Plymouth, Inc., 87 Wn.2d 298, 315, 553 P.2d 423 (1976).................. 22

State v. Smails, 63 Wash. 172, 115 P. 82 (1911).............. 32

United Fin. Cas. Co. v. Coleman, 173 Wn. App. 463, 471, 295 P.3d 763, 767 (2012)................................ 37

Wendle v. Farrow, 102 Wn. 2d 380, 382, 686 P.2d 480, 481 (1984)... 26

Williams v. W. Sur. Co., 6 Wn. App. 300, 305–06, 492 P.2d 596 (1972)... 22

Wilson v. Horsley, 137 Wn.2d 500, 505-06, 974 P.2d 316, 318 (1999)... 20

Wilson v. Steinbach, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982)... 18

Young v. Young, 164 Wn.2d 477, 483, 191 P.3d 1258, 1261 (2008)..22, 23, 36, 35

OTHER AUTHORITIES

CR 8(a)... 21

CR 8(f)... 21

CR 15(a)... 19

CR 56(e)... 15, 27

ER 701... 15, 27

ER 704... 15, 27

RAP 9.12... 33

TABLE OF CONTENTS

I. RESTATEMENT OF THE CASE 3

II. SUMMARY OF ARGUMENT 2

III. ARGUMENT 17

A. Standards of Review 17

1. Granting Plaitniff's Motion to Amend the Complaint 17
2. Pleading of Quantum Meruit 18
3. Motion to Partial Summary Judgment 32

B. The Trial Court Did Not Manifestly Abuse its Discretion in Granting Plaintiff's Motion to Amend its Complaint When It Allowed Plaitniff to Amend its Complaint to Conform with a Prior Motion to Amend Made at Arbitration 19

C. Plaintiff's Amended Complaint Properly Plead a Quantum Meruit Cause of Action 21

D. The Trial Court Properly Granted Plaintiff's Motion to Strike Eshmail Shahrezaei's Conclusory Statements 26

E. Defendant Eshmail Shahrezaei is Liable to FPH for Breach of the Signed Contracts 29

F. The Trial Court Properly Found Eshmail Shahrezaei Liable to FPH Under the Doctrine of Quantum Meruit for the Value of the Work Performed by FPH for the Benefit of Eshmail's Business 34

1. The Record Reflects Eshmail Shahrezaei Requested FPH to Provide Contractor Services 35
2. FPH Expected Payment for the Work it Performed 36
3. Eshmail Shahrezaei knew FPH expected payment for the work it performed 37

IV. CONCLUSION 38

I. 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"). The record in this case consists of the pleadings filed by each party, written discovery requests and responses thereto, and the declarations of Appellant and of F.P.H Construction employees Michael Brown, Grace Van Dyke, Stephanie Nevarez and Hannah McFarland, and David A. Weibel.

Throughout his Statement of the Case, Eshmail ("Essie") Shahrezaei fails to cite to the record, misstates the record make before the trial court and simply offers argument instead of facts. For example, Eshmail claims "Mahmoud paid the plaintiff a substantial portion of the contract price." Brief of Appellant, 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, Eshmail significantly downplays his ownership interest and involvement in the business. There is no support in the record for his statement, that Eshmail "for a limited period of time, was helping Mahmoud, as a family member, with the restaurants' daily business

activities." Brief of Appellant, p. 3. No citation is made to the Clerks Papers because none exist. 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 Nevarez's departure paperwork with Stephanie and her husband decided to leave the business. (CP 115-116) Neither brother disclosed to the Plaintiff that the business was actually a Limited Liability Company known as C&SH ENTERPRISES, LLC. (CP 96).

Because of the Appellant'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 when it entered the judgment that is now being appealed.

The contracted for work consisted of three phases. The first phase included certain preliminary and incidental work undertaken at the direction of Mike 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 took place in his presence. (CP 167, 170-190). This work is identified as Job No.s 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). Note, this amount does not include any attorney fees or litigation costs that FPH has already incurred or will continue to incur in the prosecution of this action. (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).

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

The discovery responses received on behalf of Eshmail Shahrezaei, however, deny he signed both Contracts, despite the fact that his unique signatures on the Contracts are identical to his signatures on several other documents that he is known to have signed and despite the fact that he signed both Contracts in the presence of Mike Brown. (CP 230).

Ms. Stephanie Nevarez, the Bistro's restaurant manager, states she believes the signature on the Contracts it 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 though 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. (CP 17-19).

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, falsely 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, and 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. Brief of Appellant, pp. 5-6. Notwithstanding this is purely argument and not a factual statement, it is also inaccurate as Plaintiff originally attempted to named 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 Plaintiffs 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).

In Eshmail's Statement of the Case he asserts, with no citation to the record, FPH argued it was entitled to recovery under the theory of quantum meruit for the first time in its Motion for Summary Judgment. Appellant Brief, p. 6. This statement is inaccurate as both the original complaint and amended complaint put the defendants on notice of this claim. (CP 4, 61).

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 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, of 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).

II. SUMMARY OF ARGUMENT

Appellant Eshmail Shahrezaei did not dispute the following facts before the trial court:

- That Eshmail is an owner of the Bistro restaurant;
- That Eshmail represented and held himself out to FPH as an owner of the Bistro restaurant;

- That three contracts for work (one oral, two written) were made with FPH for work to improve the Bistro restaurant;
- Mahmoud Shahrezaei is also an owner of the Bistro restaurant;
- The written contracts were admittedly signed by at least one of the owners of the Bistro restaurant;
- That FPH satisfactorily performed all the work;
- That Eshmail signed checks as an owner of the Bistro restaurant to pay for some, but not all of the work performed by FPH; and
- That FPH has not been paid in full for the work performed.

In addition, Eshmail Shahrezaei did not oppose or otherwise contest the following motions and orders:

- Motion and order for default and default judgment against Jane Doe Shahrezaei, wife of Mahmoud Shahrezaei, and defendant Jane Doe Shahrezaei, wife of Eshmail Shahrezaei; or
- Motion for Judgment on Arbitration Award as to defendants Mahmoud Shahrezaei and C&SH ENTERPRISES LLC.

Appellant Eshmail Shahrezaei only appeals the Final Judgment entered

against him on January 22, 2016.

Apart from a mere denial he did not sign the written contracts, Eshmail Shahrezaei's only opposition to Plaintiff's Motion for Partial Summary Judgment is his one page Declaration of consisting of the conclusory statements: "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). These statements were properly stricken by the trial court as conclusory and inadmissible.

On this record the trial court should be affirmed for the following reasons:

First, because the trial court did not manifestly abuse its discretion in granting Plaintiff's Motion to Amend its Complaint when it allowed Plaintiff to amend its complaint to conform with a prior Motion to Amend made at Arbitration.

Second, under Washington's notice pleading rules, the trial court properly found that Plaintiff's Amended Complaint pleaded a quantum meruit case of action. The elements of quantum meruit were sufficiently pleaded to put Eshmail Shahrezaei on notice of the claim and he can show no prejudice as he has appeared and defended this claim since the beginning.

Third, the trial court properly struck Eshmail Shahrezaei's

statements "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" as conclusory. Under CR 56(e), "supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." The rules of evidence provide that a witness may not make a conclusion of law. *Everett v. Diamond*, 30 Wn. App. 787, 791-92, 638 P.2d 605, 608 (1981) (citing the comment to ER 704); ER 701. As Eshmail Shahrezaei's statements are simply conclusions and not statements of fact, the trial court acted appropriately in not considering them.

Fourth, Eshmail Shahrezaei is liable to FPH for breach of contract. The two written contracts were called for the installation of fire suppression system and grease interceptor vault system. 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." Both written contracts have a signature page with two signatures by Mahmoud Shahrezaei and Eshmail Shahrezaei. Mahmoud Shahrezaei admits signing the contracts. FPH performed all the work called for under the contracts. The defendants paid for some, but not all of the work

without good cause or excuse. Eshmail wrote and signed checks payable to FPH for the contracted for work. Eshmail identified himself as an "owner" of the Bistro on his business card, in the Bistro's Employee Handbook, in his communications with Mike Brown and Stephanie Nevarez and on Ms. Nevarez's departure paperwork. According to their discovery responses, defendants have no defenses or evidence that suggests FPH should not be paid in full for this work performed.

Eshmail Shahrezaei cannot simply rest on his bare denial he signed the contracts. Washington case law provides merely denying responsibility is not enough to create a genuine issue of material fact. *Hill v. Cox*, 110 Wn. App. 394, 404, 41 P.3d 495, 502 (2002). Moreover, the defendants' former restaurant manager, Stephanie Navarez, states she is familiar with Essie's signature and she is certain that it is Essie's signature on both contracts. Ms. Hannah McFarland, a handwriting expert, also concludes that Essie signed both contracts. Accordingly the trial court's judgment should be affirmed because on these undisputed facts even when viewed in the light most favorable to the defendant Eshmail Shahrezaei breached his contracts with FPH and is liable for its damages.

Lastly, 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, the Eshmail knew FPH expected to be paid, and in fact wrote several checks in payment to FPH for the work it performed, the trial court properly held as a matter of law Eshmail Shahrezaei is liable to FPH for its damages under the theory of quantum meruit.

III. ARGUMENT

A. Standards of Review

1. Granting Plaintiff's Motion to Amend the Complaint

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, when reviewing the trial court's decision to grant or deny leave to amend, the appellate court applies a manifest abuse of discretion test. *Caruso v. Local Union No. 690*, 100 Wn.2d 343, 351, 670 P.2d 240 (1983). 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).

2. Pleading of Quantum Meruit

This court should interpret and apply CR 8 pleading requirements *de novo*. *See Nevers v. Fireside, Inc.*, 133 Wn.2d 804, 809, 947 P.2d 721 (1997); *In re Firestorm 1991*, 129 W.2d 130, 135, 916 P.2d 411 (1996).

3. Motion to Partial Summary Judgment

This court should review the trial court's entry of the November 23, 2015, Order Granting Plaintiff's Motion for Partial Summary Judgment *de novo*, engaging in the same inquiry as the trial court. *Hartley v. State*, 103 Wn.2d 768, 774, 698 P.2d 77 (1985); *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). Because the appellate court is in as good a position as the trial court to judge the evidence, the appellate court may substitute its judgment for that of the trial court about the facts as well the application to the law. *Keck v. Collins*, 184 Wn.2d 358, 370, 357 P.3d 1080, 1086 (2015).

All facts must be viewed most favorably to the party resisting the motion. The motion will be granted when, after viewing the pleadings, depositions, admissions and affidavits, and all reasonable inferences that may be drawn therefrom, in the light most favorable to the nonmoving party, it can be stated as a matter of law that (1) there is no genuine issue as to any material fact, (2) all reasonable persons could reach only one conclusion, and (3) the moving party is entitled to judgment. *Olympic Fish Products v. Lloyd*, 93 Wn.2d 596, 602, 611 P .2d 737 (1980).

B. The Trial Court Did Not Manifestly Abuse its Discretion in Granting Plaintiff's Motion to Amend its Complaint When It Allowed Plaintiff to Amend its Complaint to Conform with a Prior Motion to Amend Made at Arbitration.

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). 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).

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).

Appellant argues the motion to amend was simply a "pretext" to add Mahmoud and Eshmail's spouses to the case. Brief of Appellant, pp. 5-6. However, it is evident from the record that Plaintiff originally attempted to named Mahmoud's spouse (naming Eshmail incorrectly), and then move to amend the complaint prior to arbitration to add the spouses, and the arbitration award reflected the award was made against both "Mahmoud Shahrezaei and Eshmail Shahrezaei, and their marital communities, jointly and severally."

Consequently, the trial court did not manifestly abuse its discretion when it granted the motion to amend.

C. Plaintiff's Amended Complaint Properly Plead a Quantum Meruit Cause of Action.

Washington is a notice pleading state and merely requires a simple concise statement of the claim and the relief sought. CR 8(a); *Pac. Nw. Shooting Park Ass'n v. City of Sequim*, 158 Wn.2d 342, 352, 144 P.3d 276, 281 (2006). A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." CR 8(a). This court should construe a complaint liberally so as to do substantial justice. CR 8(f); *State v. Adams*, 107 Wn.2d 611, 620, 732 P.2d 149 (1987). "If a

complaint states facts entitling the plaintiff to some relief, it is immaterial by what name the action is called." *State v. Adams*, 107 Wn.2d at 620, 732 P.2d 149. But a complaint should adequately alert the defendant of the claim's general nature. *State v. Ralph Williams' Nw. Chrysler Plymouth, Inc.*, 87 Wn.2d 298, 315, 553 P.2d 423 (1976). A complaint is insufficient if it does not give the defendant "fair notice of what the claim is and the ground upon which it rests." *Williams v. W. Sur. Co.*, 6 Wn. App. 300, 305–06, 492 P.2d 596 (1972). Thus, a complaint must identify the legal theory upon which the plaintiff seeks relief. *Dewey v. Tacoma Sch. Dist. No. 10*, 95 Wn. App. 18, 23, 25–26, 974 P.2d 847 (1999).

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).

As the court in *Young* pointed out, Washington courts have historically used the phrases quantum meruit and unjust enrichment synonymously. *Young v. Young*, 164 Wn.2d 477, 483, 191 P.3d 1258, 1261 (2008) (*see e.g.* footnote 5). The *Young* court observes these phrases are, in turn, modern designations for the older doctrine of "quasi contracts." *Bill v. Gattavara*, 34 Wn.2d 645, 650, 209 P.2d 457 (1949). *Young v. Young*, 164 Wn.2d 477, 483, 191 P.3d 1258, 1261 (2008) (citing

State v. Cont'l Baking Co., 72 Wn.2d 138, 143, 431 P.2d 993 (1967) ("'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, (*quasi ex contractu*) ....'") (internal quotation marks omitted) (quoting *State ex rel Employment Sec. Bd. v. Rucker*, 211 Md. 153, 157–58, 126 A.2d 846 (1956) (quoting *Moses v. Macferlan*, 2 Burr. 1005, 97 Eng. Rep. 676, 678 (1760))).

A contract implied in fact is,

> [A]n 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, show 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 at 485-86, 191 P.3d 1258, 1262-63 (citing *Johnson v. Nasi*, 50 Wn.2d 87, 91, 309 P.2d 380 (1957) (citing Ross v. Raymer, 32 W.2d 128, 137, 201 P.2d 129 (1948))). "In other words the elements of a contract implied in fact are: (1) the defendant requests work, (2) the plaintiff expects payment for the work, and (3) the defendant knows or should know the plaintiff expects payment for the work." *Id.*

Contrary to Appellant's contention, FPH's theory of recovery was not first asserted in the Motion for Summary Judgment, but appears in

both the Complaint and Amended Complaint and was, therefore, properly before the trial court. (CP 1-16, 59-83).

Both the Complaint and Amended Complaint pleaded that Plaintiff and defendants entered into contracts wherein defendants requested work and the Plaintiff expected to be paid for the work and the defendants knew or should have known Plaintiff expected to be paid for the work.

Paragraph IV of the Amended Complaint states Plaintiff entered into a contract with defendants for installation of a fire sprinkler system and for the installation of a Grease Interceptor System. (CP 60).

Paragraph V of the Amended Complaint alleges Plaintiff performed the contracted for work. (CP 61).

Paragraph VI of the Amended Complaint alleges Plaintiff expected to be paid for the contracted for work but has not been paid. (CP 61).

Paragraph VII of the Amended Complaint alleges defendants received the benefit of the work and were unjustly enriched to the extent they failed to pay for the work. (CP 61).

And Paragraph VIII of the Amended Complaint states the amount defendants remain justly indebted to Plaintiff. (CP 61).

The Prayer for Relief in the Amended Complaint 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).

Under Washington notice pleading requirements, these allegations provide more than enough notice to defendants that Plaintiff intended to pursue a quantum meruit claim against them. Defendant Eshmail cannot contend he was confused or did not know the premises.

This is not a case where the plaintiff pleaded a breach of contract claim, but then later attempted to assert a tort claim or statutory violation. Here, both the Complaint and Amended Complaint assert a right to recovery under contract. The pleadings allege that defendants requested the work, they "received the benefit of the work" and were "unjustly enriched" to the extent they failed to pay for the work. The elements of quantum meruit were sufficiently pleaded to put Eshmail Shahrezaei on notice of the claim and he can show no prejudice as he has appeared and defended against this claim since the beginning. To suggest more specificity is required in pleading such a clam is at odds with to our state's notice pleading requirements.

Further, Plaintiff's Prayer for relief requests the equitable remedy, "for such other and further relief as the court deems property." Once a court of equity has properly acquired jurisdiction over a controversy, the court can grant whatever relief the facts warrant, including the granting of legal remedies. *King Aircraft Sales, Inc. v Lane*, 68 Wn. App. 706, 715, 846 P.2d 550, 555 (1993). And it is well established this court may

sustain the trial court's judgment upon any theory established by the pleadings and supported by the proof. *Wendle v. Farrow*, 102 Wn. 2d 380, 382, 686 P.2d 480, 481 (1984); *Gross v. Lynnwood*, 90 Wn.2d 395, 401, 583 P.2d 1197 (1978). Consequently, should this court find the claim is more properly considered as of one of unjust enrichment or implied in law, then this court can uphold the trial court on that basis as all the elements set for in the *Young* decision for unjust enrichment are met.[1]

D. The Trial Court Properly Granted Plaintiff's Motion to Strike Eshmail Shahrezaei's Conclusory Statements.

In Plaintiff's Reply Memorandum, it moved to strike the following statements from Eshmail Shahrezaei's Declaration:

> "*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 274-276)

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1 The *Young* court cites to *Bailie Commc'ns, Ltd. v. Trend Bus. Sys., Inc.* for the test for an unjust enrichment implied in law claim:

> "Three elements must be established in order to sustain a claim based on unjust enrichment: a benefit conferred upon the defendant by the plaintiff; an appreciation or knowledge by the defendant of the benefit, and the acceptance or retention by the defendant of the benefit under such circumstances as to make it inequitable for the defendant to retain the benefit without the payment of its value."

Bailie Commc'ns, 61 Wn. App. at 159–60, 810 P.2d 12 (quoting Black's Law Dictionary 1535–36 (6th ed.1990)). In other words the elements of a contract implied in law are: (1) the defendant receives a benefit, (2) the received benefit is at the plaintiff's expense, and (3) the circumstances make it unjust for the defendant to retain the benefit without payment. *Young v. Young*, 164 Wn.2d 477, 484-85, 191 P.3d 1258, 1262 (2008).

Under CR 56(e), "supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." The rules of evidence provide that a witness may not make a conclusion of law. *Everett v. Diamond*, 30 Wn. App. 787, 791-92, 638 P.2d 605, 608 (1981) (citing the comment to ER 704); ER 701. The statements made in Eshmail Shahrezaei's Declaration are nothing more than legal conclusions, inadmissible and were properly stricken.

Such statements do not give rise to a material issue of fact. A material fact "is a fact upon which the outcome of the litigation depends, in whole or in part." *Morris v. McNicol*, 83 Wn.2d 491, 494–95, 519 P.2d 7 (1974). An affidavit submitted in support of or in response to a motion for summary judgment "does not raise a genuine issue of fact unless it sets forth facts evidentiary in nature, i.e., information as to what took place, an act, an incident, a reality as distinguished from supposition or opinion." *Johnson v. Recreational Equip., Inc.*, 159 Wn. App. 939, 954, 247 P.3d 18, 26 (2011).

"[U]ltimate facts, conclusions of fact, conclusory statements of fact or legal conclusions are insufficient to raise a question of fact." *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 360, 753 P.2d 517, 519

(1988). An affidavit submitted in support of, or in response to a motion for summary judgment does not raise a genuine issue of fact unless it sets forth facts evidentiary in nature, i.e., information as to what took place, an act, an incident, a reality as distinguished from supposition or opinion; likewise, ultimate facts, conclusions of fact, conclusory statements of fact or legal conclusions are insufficient to raise a question of fact. *Snohomish County v. Rugg*, 115 Wn. App. 218, 61 P.3d 1184 (2002).

Here, Eshmail Shahrezaei makes conclusory statements that he has not "entered into any contract or agreement with plaintiff" and that "I also have not benefitted from any work or services provided by plaintiff." Notably, he does deny nor explain whether or not he is an owner of the Bistro (he denies he is an "officer"), he does not explain what his ownership interest is, why the work was needed, why the contracts have his name on the front of them and describe him as an owner, he does not say whether or not if he was present when the contracts were signed, he does not say whether he was present when the work was done, explain why he is listed as an owner for the business on his business cards, why he is named as an owner in the Bistro Employee Manual, why he signed Ms. Navarez's departure paperwork as an owner, nor does he explain why he signed checks for the business payable to FPH for work performed to improve the business.

Under Washington law, such Eshmail cannot make conclusory statements of "I have never entered into any contract or agreement" or I have not benefitted from any work," but must make statements of fact to support such a conclusions. He is required to provide the trial court with factual statements that show why he did not benefit from the work performed by FPH nor enter into an agreement with FPH.

E. Defendant Eshmail Shahrezaei is Liable to FPH for Breach of the Signed Contracts.

Generally, a plaintiff in a contract action must prove a valid contract between the parties, a breach, and resulting damage. *Lehrer v. State, Dept of Social and Health Services*, 101 Wn. App. 509, 516, 5 P.3d 722 (2000); *Northwest Independent Forest Mfrs. v. Department of Labor and Industries*, 78 Wn. App. 707, 712, 899 P.2d 6 (1995).

In this case, defendants Mahmoud Shahrezaei and Eshmail Shahrezaei Mahmoud and C&SH ENTERPRISES LLC did not dispute the following: (1) that a contract was entered into between the parties for the installation of fire suppression system and grease interceptor vault system (CP 167, 170-190, 232); (2) that this contracted for work was described in two written contracts (CP 167, 170-190, 232); (3) that 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); (4) that both written contracts have a signature page with

two signatures by Mahmoud Shahrezaei and Eshmail Shahrezaei (CP 178, 187, 194); (5) that Mahmoud Shahrezaei admits signing the contracts (CP 167, 229-230); (6) that FPH performed all the work called for under the contracts (CP 167-168, 229-230, 233, 237-262); (7) that FPH timely invoiced the defendants for this work (CP 167-168, 229-230, 233, 237-262); (8) that the defendants paid for some, but not all of the work (CP 229-233); (9) that Eshmail Shahrezaei wrote out and signed several checks making payment to FPH for the contracted for work (CP 97, 117-120); (10) that Eshmail identified himself as an "owner" of the Bistro on his business card, in the Bistro's Employee Handbook, in his communications with Mike Brown and Stephanie Nevarez and on Ms. Nevarez's departure paperwork (CP 96-97, 111, 113-116. 167-168), and (11) According to their discovery responses, defendants have no defenses or evidence that suggests FPH should not be paid in full for this work. When asked if he had any records or evidence of any defective work, Mahmoud Shahrezaei responded, "Misplaced during move; not available." (CP 229-230).

In the one page Declaration of Eshmail Shahrezaei made in opposition to Plaintiff's Motion for Partial Summary Judgment he states "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). As argued above these statements were properly stricken by the trial court as conclusory.

All admissible evidence indicates that Eshmail Shahrezaei signed both contracts. Mike Brown states that he personally witnessed Eshmail Shahrezaei signed both contracts in his presence. (CP 167-168).

The defendants' former restaurant manager, Stephanie Navarez, states she is familiar with Essie's signature and she is certain that it is Essie's signature on both contracts. (CP 96-97). 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. 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 96-97).

Ms. Hannah McFarland, a handwriting expert, also concludes that Essie signed both Contracts. (CP 191-194). Under Washington law, an expert may testify as to whether a signature is genuine. An expert may compare the disputed writing with a writing known to be genuine (commonly known as an *exemplar*). *State v. Bogart*, 21 Wn.2d 765, 153 P.2d 507 (1944). The exemplar need not be a document previously introduced for some other purpose; it may be any document introduced for comparison purposes. *State v. McDonald*, 116 Wash. 668, 200 P. 326

(1921). The trial court has a wide discretion in ruling upon objections to qualifications of a purported expert on handwriting. *State v. Kennedy*, 19 Wn.2d 152, 142 P.2d 247 (1943). It is Ms. McFarland's expert opinion that Essie Shahrezaei signed both Contracts.

Expert testimony is not required for handwriting identification, however. Handwriting may also be identified by a lay witness who is familiar with the person's handwriting. A witness with the requisite personal knowledge may identify another person's handwriting: "One who is familiar, in the usual and ordinary course of trading or business, with the signature of another is a competent witness upon the question of genuineness of the handwriting or signature. A case can hardly be imagined where a witness testifying to a familiarity with the handwriting of a particular person would not be competent to give his opinion. The weight of such testimony is, of course, for the jury." *State v. Brunn*, 144 Wash. 341, 258 P. 13 (1927). In one case an employee of a county auditor's office and a person who had held several clerical positions were held qualified by reason of their employment experience. *O'Brien v. McKelvey*, 66 Wash. 18, 118 P. 885 (1911); *see State v. Smails*, 63 Wash. 172, 115 P. 82 (1911) (bankers and accountants); *State v. Atkins*, 26 Wn.2d 392, 174 P.2d 427 (1946) (assistant bank cashier). In this same vein, Rule 901(b)(2) allows lay opinion for purposes of authenticating a

person's handwriting as a condition precedent to admissibility, so long as the witness's familiarity with the handwriting was acquired for purposes other than the litigation.

In his opening brief, Eshmail takes issue with Ms. McFarland's conclusions, (Appellant Brief, pp. 9-11) but this argument was not made to the trial court and should not be considered on appeal. "On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court." RAP 9.12. An argument neither pleaded nor argued to the trial court cannot be raised for the first time on appeal. *Sourakli v. Kyriakos, Inc.*, 144 Wn. App. 501, 509, 182 P.3d 985 (2008), review denied, 165 Wn.2d 1017, 199 P.3d 411 (2009).

Furthermore, Eshmail Shahrezaei cannot simply rest on his bare denial he signed the contracts. Merely denying responsibility is not enough to create a genuine issue of material fact. *Hill v. Cox*, 110 Wn. App. 394, 404, 41 P.3d 495, 502 (2002) (where loggers testified Mr. Cox ordered them to cut the trees around the cabin, the court found Mr. Cox's mere denied of the allegation insufficient to create a material issue of fact); *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 359–60, 753 P.2d 517 (1988) (citing *Amer. Linen Supply Co. v. Nursing Home Bldg. Corp*, 15 Wn. App. 757, 767, 551 P.2d 1038 (1976)). "'The very

object of a motion for summary judgment is to separate what is formal or pretended in denial or averment from what is genuine and substantial, so that only the latter may subject a suitor to the burden of a trial.'" *Preston v. Duncan*, 55 Wn.2d 678, 684, 349 P.2d 605 (1960) (quoting Judge (later Justice) Cardozo in *Richard v. Credit Suisse*, 242 N.Y. 346, 152 N. E. 110, 111, 45 A.L.R.1041 (1926)).

Consequently, the trial court's judgment should be affirmed because on these undisputed facts even when viewed in the light most favorable to the defendant Eshmail Shahrezaei breached his contracts with FPH and is liable for its damages.

F. The Trial Court Properly Found Eshmail Shahrezaei Liable to FPH Under the Doctrine of Quantum Meruit for the Value of the Work Performed by FPH for the Benefit of Eshmail's Business.

In the alternative to liability under the signed contracts, Eshmail Shahrezaei is liable to FPH under the doctrine of quantum meruit for the value of the work performed by FPH for the benefit of his business.

Again, as stated above, 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)).

The quantum meruit elements of (1) the defendant requests work, (2) the plaintiff expects payment for the work, and (3) the defendant knows or should know the plaintiff expects payment for the work are all met in this case.

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

In this case, the parties' agreement is evident in the actions and conduct of the parties.

Eshmail was an owner of the business. 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 defendants for this work. (CP 167-168, 229-230, 233, 237-262). Eshmail claims the invoices were not addressed to him, but no citation to the record is given for this proposition. Appellant Brief, p. 9. 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).

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.

Accordingly, under either the express Contracts or under the doctrine of quantum meruit, Eshmail Shahrezaei should be found to be liable for damages to FPH and the trial court properly entered judgment entered against him.

Furthermore, even if the court were find the statements in his declaration not to be conclusory, but statements of fact, the trial court could still resolve this issue for FPH because questions of fact may be determined on summary judgment as a matter of law where reasonable minds could reach but one conclusion. *United Fin. Cas. Co. v. Coleman*, 173 Wn. App. 463, 471, 295 P.3d 763, 767 (2012). 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, a reasonable mind can only reach one conclusion: That Eshmail Shahrezaei is liable to FPH for its damages under the theory of quantum meruit.

It would be unjust and contrary to public policy if the trial court were to find otherwise. *State v. Cont'l Baking Co.*, 72 Wn.2d 138, 143, 431 P.2d 993 (1967) (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).

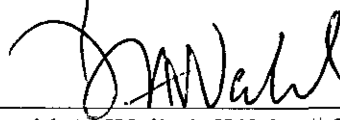
IV. CONCLUSION

As FPH's quantum meruit claim was properly plead and before the court, the trial court properly granted judgment against defendant Eshmail Shahrezaei. Here, as co-owners of the Bistro restaurant, he and his brother requested and agreed with FPH to perform work to improve their restaurant. It is evident Eshmail Shahrezaei knew FPH expected to be paid because he signed checks to FPH that paid for FPH's work. Eshmail Shahrezaei's declaration in opposition fails to raise a material issue of fact and contains only conclusory statements. The legal conclusions are inadmissible were properly stricken. For the reasons set forth above, the

Respondent respectfully requests that the Court of Appeals affirm the Trial Court's Order entered on January 22, 2016.

RESPECTFULLY SUBMITTED this 11 day of July, 2016.

TEMPLETON HORTON WEIBEL PLLC

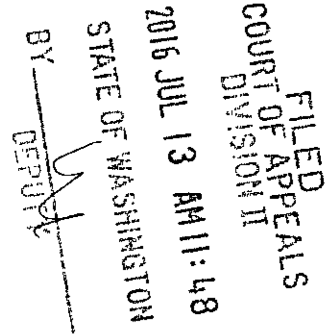


David A. Weibel, WSBA# 24031
Attorneys for Respondent.
3212 NW Byron Street, Suite 104
Silverdale, Washington 98383
(360) 692-6415

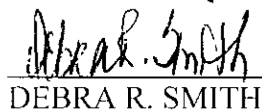
CERTIFICATE OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that on July 11, 2016, a true and accurate copy of the document to which this Certificate is affixed was sent via electronic mail and was deposited in the mails of the United States of America, by regular mail, postage prepaid, a properly stamped and addressed envelope directed to:

Ahmet Chabuk
11663 Ivy Lane N.W.
Silverdale, Washington 98383
achabuk@gmail.com



DATED this 11th day of July, 2016.



DEBRA R. SMITH

Templeton Horton Weibel PLLC
3212 NW Byron Street 3104
Silverdale, WA 98383
(360)692-6415