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STATE OF WASHINGTON

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No. 46198-6-II

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

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TACOMA SCHOOL DISTRICT NO. 10, a political subdivision  
of the State of Washington,

Petitioner/Appellee,

and

OSCAR SCHOCK, "JANE DOE" SCHOCK  
husband and wife,

Respondent/Appellants,

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APPEAL FROM THE SUPERIOR COURT FOR PIERCE COUNTY  
STATE OF WASHINGTON  
THE HONORABLE JERRY T. COSTELLO

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APPELLANTS' REPLY BRIEF

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## I. INTRODUCTION

TSD sued to eject Schock. Schock agrees he can be ejected, but asserts that he has a simultaneous contractual right to payment for the improvements he made. Schock counterclaimed for payment alleging the existence of a contract and asserting equitable rights. TSD did not answer the counterclaim. The lower court granted TSD summary judgment on its ejectment claim and denying the counterclaim giving it the right to obtain an ejectment order.

TSD asserts that discussions evidencing an oral contract are inadmissible. Even if denied, Schock asserts there is ample other admissible undenied and undeniable evidence to defeat summary judgment.

Schock also argues that because he claims no interest in the property, that TSD's arguments regarding Statute of Frauds, lack of authority by the business manager and hearsay are misplaced.

## II. ARGUMENT

### A. If Statements by Business Manager are Excluded, There Still is Abundant Evidence of a Contract's Existence to Defeat Summary Judgment.

TSD's case hinges upon the correctness of its assertion that "...Schocks rely *solely* on [Oskar Schock's] declaration in which he asserts....[he] had conversations in which the District's business manager,

Toney Shelton promised....” [to pay Schock for the improvements he made]. Response at 10. While only objecting to the admissibility of Schock’s testimony about discussions with Shelton, the carefully parsed statement does not address the balance of Schock’s declaration, the admissibility of which has not been challenged. Given the well briefed presumptions to which the non-moving party in a Summary Judgment motion is entitled, even if the Shelton conversations are excluded, there is abundant remaining evidence to allow a trier of fact to conclude that a contract exists.

Schock’s position does not rely “solely” on his conversation with Shelton. While there is no writing from TSD clearly reflecting a contract, there never was a denial (CP 153 at 17-19 and Appellant Brief at 20) and Schock had the next best thing: 1) repeated consistent statements from him on the existence and terms of the agreement; 2) TSD’s multiple requests for information and its repeated restatement of what it understands Schock’s position to be; 3) TSD’s 40 year failure to deny the contract’s existence or that its business manager lacked contractual authority; 4) Schock’s obvious property additions; 5) TSD’s decision to not file declarations or pleadings to rebut Schock’s assertion that a contract was made or to challenge the balance of Schock’s declaration. The decision not to deny the existence of the alleged contract in its

declarations is sufficient to deny summary judgment on the counterclaim. *Ashwell-Twist Co. v. Burke*, 13 Wn.App. 641, 643, 536 P.2d 686 (1975) (reversing summary judgment where declaration failed to deny alleged ordering of home repairs by insurance agent). Even if the failure to deny in pleadings is not an absolute bar to TSD's Summary Judgment Motion, failure to deny the contract is persuasive on its existence.

1. Repeated Statements by Schock. After noting his frustration with the case, Judge Costello correctly noted "on the one hand we have Mr. Schock's very long term residency on this property and his adamancy—his continued assertions that he is entitled to compensation. RP 30, 13-16.

Schock made his position known in at least four (4) writings: 1) January 15, 1988 letter to Personnel Manager Tanagi, CP 91; 2) April 6, 1990 letter to the Board of Directors, CP at 101; 3) September 10, 1990 letter to Lillian Barna, CP 107; 4) His Declaration, CP 81-114.

2. TSD's Acknowledgement of Schock's Position.

TSD acknowledged to Schock that it was either partially or fully aware of Schock's position and/or attempted to deal with it in at least eleven (11) separate writings none of which deny the existence of an agreement: 1) December 3, 1987 letter from Tanagi, CP 89; 2) December 18, 1987 letter from Tanagi, CP 90; 3) February 1, 1988 letter from

Tanagi, CP 92; 4) April 5, 1988 letter from Business Manager Nick Schaffer CP 93; 5) February 15, 1989 letter from Business Manager Ben Soria, CP 94-95 at 95; 6) March 8, 1990 letter from Superintendent Barna, CP 96-99 at 98; 7) May 8, 1990 letter from Superintendent Barna, CP 103; 8) July 31, 1990 letter from Superintendent Barna, CP 105; 9) March 11, 1991 letter from Helmlinger, Director of Grounds, CP 108, Par. 4; 10) March 27, 1991 minutes of meeting, CP 109-111 at 110 and 111; 11) While not a communication to Schock, TSD indicated its awareness of Schock's position in a 1989 report to the Directors by Benjamin Soria, CP 120-128. Of specific note in the above communications are the following:

- TSD Personnel Manager Gerry Tanagi sent Schock two letters in December 1987 requesting a written breakdown of all improvements that he made to the Camp residence and auxiliary buildings, "the approximate cost" of the improvements as well as the dates they were made. CP 89-90 (12/3/87 and 12/18/87 Tanagi Letters to Schock).
- In a 1988 letter during these discussions, TSD Business Manager Nick Schaefer told Schock that TSD was interested in seeing records regarding "your cost for the improvements" stating that he had a "goal of reaching a mutually agreeable solution on the issue." CP 93 (4/5/88 Schaefer Letter to

Schock).

- During extensive discussions between Schock and TSD officials concerning payment for the improvements in 1988 and 1989, TSD Business Manager Benjamin Soria agreed that the TSD would work “to resolve the issue of the value of the improvements completed by you.” CP 50-51 (2/15/89 Soria Letter to Schock).
- In January 1990, the TSD, through an internal auditor, has acknowledged that “Mr. Schock most certainly improved the value of the site with his remodeling efforts.” CP 124 (Charles Cuzetto Report to TSD regarding Camp Taylor Caretaker Arrangement January 1990). This included amounts for both materials and labor. See also CP 128 (Cuzetto conclusion stating “there is no doubt that Mr. Schock has substantially enhanced the value of the Camp Taylor site through his remodeling efforts”).
- In February 1990, TSD Business Manager Soria acknowledged to the TSD Board of Directors that because the TSD may owe Schock the difference between the current assessed value and the assessed value prior to the improvements, “the potential liability may be in excess of

\$300,000.” CP 118 (“Board Brief: Camp Taylor; February 1990).

3. TSD’s Failure to Deny Contract’s Existence or the Lack of Authority of the Business Manager to Enter into Agreement.

A “...failure to deny an admission, after opportunity to do so, is convincing proof of the fact admitted.” *Williams v. Joslin*, 65 Wn.2d 696, 699, 399 P.2d 308 (1965). See also *Crown Paving & Constr. Co. v. Walla Walla County*, 122 Wash. 144, 146, 210 P. 357 (1922) (failure to deny facts asserted in a complaint regarding a contract acts as an admission); *Elliott v. Puget Sound & Central American S.S. Co.*, 22 Wash. 220, 226, 60 P. 410 (1900) (“the answer alleges an express warranty which was admitted by a failure to deny”); *Pacific Cable Const. Co. v. McNatt*, 2 Wash. 216, 218, 27 P. 869 (1891) (failure to deny liability can be considered evidence that contract existed).

TSD never communicated to Schock that the business manager lacked authority to make an agreement. For the same reasons, TSD’s failure to deny that he had authority is evidence of his authority. See Section II-D Reply.

At one point the TSD’s Superintendent Barna arguably implied that an agreement did not exist when she wrote in a May 8, 1990 letter to Schock, “A review of our records and all of the information you have

provided to us to date about the alleged arrangement with Mr. Shelton does not substantiate your claim.” And she goes on: “Therefore I am denying your claim for **reimbursement based upon the increase value of property.**” CP 103, Par. 3. Emphasis added. Hence, although the measure of compensation was denied, the contract’s existence never was rebutted.

And Superintendent Barna even acknowledged that the matter still was open in a July 31, 1990 letter. “...Do you have any information which would substantiate or help support your claim? If so, my staff will review it. *Unless* such information is forthcoming however, we view your claim for compensation for improvements to the property as closed.” CP 105. Emphasis added. Construed in Schock’s favor, this means that if additional information is forthcoming, that the matter remains open.

Schock then replied by his September 10, 1990 letter (CP 107) and participated in the well documented March 27, 1991 (CP 109-112) meeting that was attended by Susan Schreurs, general counsel (CP 108) for the School District. No conclusion was reached and nothing happened until 2012.

The point is that if one seeks to interpret Superintendent Barna’s May 1990 letter as denying the business manager promised Schock compensation for improvements, the letter she issued nearly three months

later continues to indicate that Schock may be entitled to compensation under another computational method. TSD's failure (even with General Counsel Schreurs involvement) to deny its existence evidences the contract's existence, and as we will see, left open the statute of limitations (Section II-B, Reply).

4. No Pleadings or Declarations Denying the Agreement and Plaintiff did not Deny its Existence in an Answer to the Counterclaims.

The Superior Court Civil Rules require a reply to a counterclaim; it is not optional. CR 7(a). *Beers v. Ross*, 137 Wn.App. 566, 573, 154 P.3d 277 (2007). The reply must fairly meet the substance of any averment denied. CR 8(b). *Id.* Failure to deny an averment in a counterclaim constitutes an admission. CR 8(d). *Jansen v. Nu-West, Inc.*, 102 Wn.App. 432, 438, 6 P.3d 98 (2000) (rejecting the contention made during summary judgment arguments that “defenses to a counterclaim are preserved without filing a reply”), rev. denied 143 Wn.2d 1006, 20 P.3d 945 (2001); *Lee v. Swanson*, 190 Wash. 580, 584, 69 P.2d 824 (1937) (failure to deny allegations made in a complaint constitute admission of the truth of those allegations).

5. Case Law Does Not Support TSD's Position.

To oppose admission of Shelton's statement, TSD cites *Meissner vs. Simpson Timber*, 69 Wn.2d 949, 421 P.2d 674 (1966) (where the only

evidence was the assertion of an agreement at a dinner conversation) and *Dwinnell's Central Neon v. Cosmopolitan Chinook Hotel*, 21 Wn.App. 929, 933, 587 P.2d 191 (1978) (statement by defendant that “it was widely known and publicized” that a hotel had been purchased was a “bare allegation” with no factual evidence to back it up. Both cases deal with attempts to defeat a Summary Judgment Motion with unsupported, uncorroborated facts and do not contain anything resembling three written summaries, 11 opportunities to deny and massive visible permanent physical property improvements all of which occurred well before there was a hint of litigation, many of which involved in-house General Counsel Schreurs.

TSD also cites a recent case for the argument that Schock has presented insufficient “meeting of the minds” evidence to survive summary judgment. Response at 12, citing *Kofmehl v. Baseline Lake*, 167 Wn.App. 677, 275 P.3d 328 (2012), *aff'd* 177 Wn.2d 584 (2013). In *Kofmehl*, however, the court explicitly did not determine the “meeting of the minds” issue on summary judgment as the court was asked to do here. *Kofmehl*, 167 Wn.App. at 695.

B. Schock Was Not Required to File a Declaratory Action Within Three Years of the May, 1990 Letter Because Discussions Continued and There Was No Decision From Which to Appeal.

TSD argues that Schock should have filed a declaratory judgment action by 1993. But TSD's argument turns entirely on the accuracy of its statement that "...the Schocks knew in 1990 that the District would not compensate them for their improvements to CJT." Response at 30.

The relevant responding facts are essentially the same as the argument that TSD's silence is evidence of the contract's existence. (Reply Section II-A) By March 8, 1990 letter, Superintendent Barna acknowledged the dispute Schock had with the TSD, denied Schock's claim based upon the "increased value of the property" and gave him 30 days to appeal to the Board. (CP 96-99 at 98.) Schock appealed. (CP 100-102). Ms. Barna responded for the Board by May 8, 1990 letter again denying the claim "based upon the increased value of the property." (CP 103-104)

Ms. Barna's May letter (also sent to TSD's in house attorney) failed to deny the contract's existence and all of Schock's claims. At the most, the decision resulted in a denial of the compensation based upon the "increased property value" that Schock submitted. Schock considered the issue open and "... this to be a reiteration of the district's disagreement with my valuation method." (Schock's Decl, CP 85, 86.)

Ms. Barna agreed with Schock's interpretation when on July 31, 1990 she wrote:

In a letter dated April 6, 1990 you again reference an “original agreement” with the District. You have not produced documentation to support the existence of such an agreement, despite our requests that you do so. **Do you have any other information which would substantiate or help support your claim?** If so, my staff will review it. **Unless** such information is forthcoming, however, we view your claim for compensation for improvements to the property as closed.

The letter then set up a meeting which eventually was held in March, 1991, attended by TSD’s in house counsel, documented by minutes and then was not followed up on by action or decision.<sup>1</sup>

Ms. Barna’s letter is telling because it: 1) states that TSD did not close the matter three months earlier; and 2) told Schock that the matter would be closed **unless** he produced evidence-- which he did. If TSD acted confused, so was Schock.

TSD argues that because Schock could have filed a declaratory judgment when the TSD first denied his claim for compensation in 1990, his counterclaim must be dismissed because it violates the three year statute of limitations and in support cites *Ford v. Int’l Harvester*, 399 F.2d 749 (9<sup>th</sup> Cir. 1968) and *Schreiner Farms v. Am. Tower*, 173 Wn.App. 154, 293 P.3d 407 (2013).

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<sup>1</sup> TSD has not argued that the statute ran from the March 1991 meeting.

*Ford* does not apply because it involved an attempt to enforce an oral agreement but was dismissed because it was filed more than three years after Ford was “fully aware” that the defendant had no intention to honor the contract. *Ford*, 399 F.2d at 752. As set forth above, unlike *Ford*, Schock did not become “fully aware” that TSD had finally (i.e., with no recourse) refused to honor the agreement until 2012.

*Schreiner*, 173 Wn.App. at 156, is similarly inapplicable. It involved application of the “discovery rule” to an action based on the transfer of a written lease that occurred more than six years before the case was filed. The moment of the *Schreiner* breach was obvious, but for the reasons described above, the TSD’s action was not clear. TSD cites additional cases to argue that Schock failed to comply with the 30 day statute of limitations found in RCW 28A.645.010. Response at 31-32, citing *Haynes v. Seattle School District No. 1*, 111 Wn.2d 250, 758 P.2d 7 (1988) and *Schmidtke v. Tacoma School District No. 10*, 69 Wn.App. 174, 848 P.2d 203 (1993).

In *Haynes*, the school district clearly notified an employee on a specific date that when she returned from a sabbatical leave, she would be assigned to a non-supervisory certificated position rather than the one she left. She waited two years after the school board’s decision to file her lawsuit which was dismissed as untimely under the 30 day statute.

*Haynes*, 111 Wn.2d at 252. For the reasons above set forth, Schock had no date from which to measure the 30 day appeal date.

In *Schmidtke*, the court dismissed an employee's lawsuit seeking additional retirement credits for part-time work where it was filed in court more than 30 days after the school board's "final decision" to deny her appeal from her last grievance. *Schmidtke*, 69 Wn.App. at 179. *Schmidtke* noted that any ambiguity about the date of the final decision was resolved when the district sent the employee a letter explicitly stating that it had reviewed the matters she submitted through the grievance process and that it would not "review the matter further." *Id.* at 180. With Schock, the most that can be said is that there was disagreement with measure of compensation (CP 105, 106).

Finally, TSD argues that it did not "reopen" Schock's claim in 1991. Response at 33-34. In support of this argument, it cites *In re Tragopan Properties*, 164 Wn.App. 268, 263 P.3d 613 (2011). But *Tragopan* had "acknowledged" a debt by listing it in bankruptcy proceedings after the six year statute of limitations had run on the promissory note. The court held that this was insufficient to find that the debtor's lawsuit was timely filed. Those facts are not analogous to the ones at issue here. Here, there was no note and TSD clearly continued or reopened discussion on Schock's claim, met with both him and his

attorney to re-discuss the facts and proposal and then never officially closed it. Schock is not barred by the statute of limitations.

C. The Oral Contract Does Not Violate the Statute of Frauds, RCW 64.04.010 Because Schock Only Claims a Contract Interest in the Right to be Compensated Upon His Departure, and if Applicable, Only Goes to the Issue of Ejectment and Not Compensation.

TSD implies but has not briefed the issue of whether the right to compensation before his departure constitutes a “conveyance of real estate” to Schock and thereby triggering the Statute of Frauds. If Schock’s position of being compensated before his departure is interpreted as falling within the statute of frauds, then it supports TSD’ claim for ejectment but does nothing to rebut Schock’s claim for reimbursement.<sup>2</sup> In other words, TSD seeks to bootstrap its argument on the statute of frauds into a defeat of Schock’s right to reimbursement on the property.

If it is not apparent from briefing (CP 162 at 17, Opening Brief 27) and oral argument “...we are not making a claim there is any fee simple interest in the property (“.... we are just saying there’s a contractual arrangement to pay him before he leaves.”) RP 22:8-10. (See also RP 21:5-9,) Schock is not: seeking a fee interest, a deed; the right to block a sale; a right to convey an interest in the improvements or the right to enforce a lien-- even though he may have initially made the claim. To the

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<sup>2</sup> TSD makes no reference to RCW 19.36 et seq. Contracts and Credit Agreements requiring writings.

extent one of the above described property interests is interpreted as still being claimed, it is hereby conceded. But stated another way, if TSD chooses to eject Schock, much like a builder who now must be paid for his work, it must compensate him lest it be in breach of the agreement—and the time for compensation is the time of departure.

The court asked (as did TSD in its response) (Response at 22) why in essence, Schock did not first move and then sue. RP at 21:10-5. The simple answer is that the contract requires payment upon his departure. CP 86. If he moved, it would be construed as a waiver of the right to be compensated. A more complex answer is that Schock made the improvements, understanding that he would be paid for his investment so that now, in his late 70s he can buy a new home with the money he put into CJT. CP 5-11, 87 at 21 and 22 and 149 at 15, 12-18. If he moved, TSD would be in breach and Schock would be in interim housing thereby increasing the sums due by TSD. If Schock moves and the facilities are vandalized, there is concern that TSD will assert that the premises have declined in value.<sup>3</sup> Schock continues to reside at the Camp and to provide caretaker services to TSD, as acknowledged by TSD in its pleadings to the trial court below. The TSD has accepted his caretaker services even

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<sup>3</sup> The Order Granting Plaintiff's Motion for Summary Judgment allows TSD to "present a separate motion and order on Writ of Ejectment and/or restitution for entry by the court" (RP 196-198).

though it has asked him to leave. CP 27 (Declaration of TSD Chief Operations Officer Sam Bell dated February 27, 2014 stating that Schock “is the onsite caretaker” at the Camp).

D. Because Schocks Claim Only a Contract Interest, the Statements by the Business Manager are Admissible under ER 801(d)(2)(iv).

As Schock argued below (RP 21:4-5) and as all but conceded in TSD’s footnote in its opening Summary Judgment brief (CP 16), the business manager’s statements are admissions by a party opponent when speaking with authority and discussing interests that do not involve property conveyances. Because Schock only claims a contractual right to reimbursement, the statements are admissible under ER 801(d)(2)(iv).

E. Material Fact Issues Exist Regarding Whether TSD Business Manager Shelton had Sufficient Apparent Authority to Enter Into the Oral Agreement with Schock.

TSD asserts that its business manager had no authority to enter into the agreement with Schock and that “Schocks are unable to produce... other admissible evidence establishing Board of Director approval [of the Schock agreement] Reply at 26-27. But speaking for the Board, Ms. Barna, did nothing to assert that the Business Manager lacked contractual authority. (CP 96-99 at 98 and CP 105-106). Moreover, for over 40 years no one ever raised the issue of whether Toney Shelton had authority to enter into the Schock agreement. (See Section II-A Reply)

TSD argues that a finding of apparent authority is unjustified because Schock has no evidence that it “had knowledge of, or consulted [sic] to, the alleged oral agreement.” Response at 16. But as argued in Schock’s opening brief (Appellant’s Opening Brief at 22 and 23), no such knowledge or consent is required for this court to find “apparent authority” and Shelton’s statements are admissible as a matter of law. To support its argument that any promise Shelton made is unenforceable because he lacked authority, TSD relies on *McCormick v. Lake Wash. Sch. Dist.*, 99 Wn.App. 107, 992 P.2d 511 (1999). In *McCormick*, the court held that a “special services” coordinator for a school district lacked statutory authority to make a promise of employment to a certified teacher. The teacher, relying on *Schoonover v. Carpet World*, 91 Wn.2d 173, 588 P.2d 729 (1978) (salesman placed in a position where it logically could be inferred where he had authority to hire sales personnel) argued that the coordinator had “apparent authority” to make the promise. *McCormick*, 99 Wn.App. at 113. In holding that the coordinator was unauthorized, the court relied on a specific statute that clearly states that a teacher can only be hired by written order signed by a majority of the school board. *Id.*, citing RCW 28A.405.210 (also setting out school board approval of each teacher contract).

The facts presented here are more like *Schoonover* than *McCormick*. The statutes that TSD relies on are not analogous to the statute that the court relied on in that case. The statutes here give a school board “exclusive control of all school buildings and other property, real or personal, owned by the district” and also give a school board the ability to “purchase, lease, receive and hold real and personal property in the name of the district...” RCW 28.57.135; RCW 28A.335.090(1). See Response at 25-26.

But those statutes do not require a written order approved by a majority of the school board in order to legally recognize a promise to pay a caretaker for improvements he made to its property as was the case in *McCormick*. They are decidedly more general in nature. The other cases cited by TSD are similarly not helpful in deciding this issue. Response at 42, citing *Jones v. Best*, 134 Wn.2d 232, 950 P.2d 1 (1988) (real estate agent never promised to accept a reduced commission) and *Havens v. C&D Plastics*, 124 Wn.2d 158, 876 P.2d 435 (1994) (finding that there was no clear and definite promise of permanent employment subject only to dismissal for just cause).

F. Material Fact Disputes Exist Regarding Whether the Doctrine of Part Performance Takes the Oral Agreement Outside the Writing Requirement of the Statute of Frauds.

Schock's counsel made an analogy during the summary judgment arguments that the oral agreement was "in very loose terms" like a lease, RP 21:10-22:1. But the word "lease" was only used by way of analogy: Schock's arrangement instead is more as "in kind" compensation for his work as caretaker at the Camp. It does not fit within the usual definition of a "lease", i.e., "a contract by which a rightful possessor of real property conveys the right to use and occupy that property in exchange for ... rent." *Black's Law Dictionary* (7<sup>th</sup> Ed. 1999) at 898. The cases cited by TSD in its Response are not applicable here since both involved the enforceability of written leases. *Blanc's Café v. Corey*, 110 Wash. 242, 188 P. 759 (1920) (action to enforce written lease allowed even though plaintiff never took possession); *Family Med. Bldg. v. DSHS*, 104 Wn.2d 105, 702 P.2d 459 (1985) (upholding enforcement of five year option to renew in ten year written lease even though defendant did not occupy the property after the ten years).

Even if the statute of frauds applies to this unusual situation, the doctrine of part performance relieves Schock of the requirement that the oral agreement be in writing to be enforceable. The cases cited by TSD in its response do not support the need for a written instrument in Schock's circumstances since Schock is only asking to be compensated (or reimbursed) using a specific valuation method; he is not asking for

“specific performance” as TSD alleges.

*Berg v. Ting* involved a written instrument that purported to grant an easement from one property owner to an adjacent property owner. Response at 23-24, citing *Berg v. Ting*, 125 Wn.2d 544, 886 P.2d 564 (1995). The court held the writing to be invalid because it was insufficiently specific. On the question of whether the part performance doctrine excused the writing requirement, the court held that “where specific performance is sought,” an oral agreement must be proved by “clear and unequivocal evidence.” *Berg* at 561.

Unlike *Berg*, Schock requests payment—not title. When a party merely asks for damages and not the right to occupy property, the “clear and unequivocal” evidence standard does not apply. See Response at 23, citing *Kruse v. Hemp*, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993) (higher standard of proof does not apply where party is seeking “legal damages”).

G. Written Authorization by the TSD Board of Directors is Not Required in These Circumstances.

Schock is not contesting the TSD’s authority to sell the Camp. Nor is he contesting its control of it. Furthermore, Schock continues to occupy the Camp with the full acknowledgement of TSD as continuing “in kind” compensation for his caretaker services, services which TSD continues to accept even though it has asked him to vacate. No written

authorization by the School Board is required in these circumstances and the cases cited by TSD do not support a finding that the statute applies here. Response at 26, citing *Mukilteo Educ. Ass'n v. Mukilteo Sch. Dist No. 6*, 11 Wn.App. 675, 524 P.2d 441 (1974) (written policy approved by the school board required to enforce military service salary credit for employees) and *Properties Four v. State*, 125 Wn.App. 108, 105 P.3d 416 (2005) (purchase and sale agreement for 160 acres in Lacey not funded or approved by state legislature could not be enforced).

H. Schock has Sufficiently Pled Counterclaims for Unjust Enrichment and Promissory Estoppel.

TSD argues that Schock did not sufficiently plead Counterclaims. Response at 35-38. While designated as “Alternative Claims in the Answer (CP 8-10) they were designated as such in the proposed order on summary judgment. (CP196-198 at 197) And while the terms “unjust enrichment” and “promissory estoppel” do not appear as labels in his Answer, sufficient facts were plead to comply with Washington law regarding “notice pleading” requirements. *Hough v. Stockbridge*, 152 Wn.App. 328, 338, 216 P.3d 1077 (2009) (counterclaim for “abuse of process” permitted even though term not used in pleading where facts were sufficiently pled to satisfy Washington’s “general notice pleading” requirements).

Unjust enrichment is defined as “the method of recovery for the value of the benefit retained absent any contractual relationship because notions of fairness and justice require it.” *Young v. Young*, 164 Wn.2d 477, 483, 191 P.3d 1258 (2008). Three elements must be established: (1) a benefit conferred by the plaintiff, (2) defendant’s appreciation of the benefit, and (3) defendant’s acceptance or retention of the benefit “under such circumstances as to make it inequitable for the defendant to retain the benefit without the payment of the value.” *Young*, 164 Wn.2d at 484. Facts supporting each of the elements were sufficiently pled in Schock’s Alternative Claims section of his Answer to put TSD on notice that he was asserting a counterclaim for unjust enrichment.

Schock has also similarly pled sufficient facts to place TSD on notice of a counterclaim for promissory estoppel. He does not assert this as an affirmative defense as TSD argues in its Response but rather as a counterclaim. Response at 37-38.

Promissory estoppel is a “promise which one should reasonably expect to cause reliance and which does cause justifiable reliance.” *Corbit v. J.J. Case Compnay*, 70 Wn.2d 522, 539, 424 P.2d 290 (1967). Five prerequisites are required: (1) a promise which (2) the promissor should reasonably expect to cause the promisee to change his position and (3) which causes the promisee to change his position (4) justifiably relying

upon the promise, in such a manner that (5) injustice can be avoided only by enforcement of the promise. Id.

Facts supporting each of the elements were sufficiently pled in Schock's Alternative Claims section of his Answer to put TSD on notice that he was asserting a counterclaim for promissory estoppel. The cases cited by TSD do not support a conclusion that this counterclaim (or one for unjust enrichment) should be dismissed. *Atlas Supply, Inc. v. Realm, Inc.*, 170 Wn.App. 234, 287 P.3d 606 (2012) (reversing trial court's refusal to award attorneys fees to plaintiff who successfully defended compulsory counterclaims); *Lane v. Skamania County*, 164 Wn.App. 490, 265 P.3d 156 (2011) (upholding trial court's dismissal of counterclaim filed more than three years after trial and after a second appeal).

Finally, TSD asserts that no claim for promissory estoppel can survive summary judgment because it never made a legally enforceable "promise" to Schock to compensate him based on the appraisal method. Response at 41-43. It asserts that the only evidence of a promise Schock has is his own uncorroborated hearsay testimony. Response at 42. (See Section II-A).

Respectfully submitted this 20th day of October, 2014.

A handwritten signature in cursive script, reading "Paul Alvestad". The signature is written in black ink and is positioned above a horizontal line.

L. PAUL ALVESTAD, WSBA #10892

Attorney for Appellants

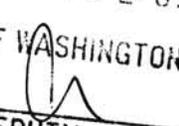
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COURT OF APPEALS  
DIVISION II  
2014 OCT 20 PM 2:59  
STATE OF WASHINGTON  
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DEPUTY

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

TACOMA SCHOOL DISTRICT NO. 10, a  
political subdivision of the State of  
Washington,

Plaintiff/Appellee

v.

OSCAR SCHOCK, "JANE DOE" SCHOCK,  
husband and wife, and any other individuals  
residing at 19607 Bay Road KPS,

Defendants/Appellants.

**Court of Appeals No. 46198-6-II**

**Pierce County Cause No. 13-2-08661-7**

**CERTIFICATE OF SERVICE OF  
APPELLANTS' REPLY BRIEF**

I, DIANA K. WAXLER, Paralegal, on behalf of L. PAUL ALVESTAD, hereby certify  
that on the 20th day of October, 2014, I placed with ABC Legal Messenger, a true and correct  
copy of the Appellants' Reply Brief to:

Counsel for Plaintiff/Appellee:  
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Certificate of Service of  
Appellants' Reply Brief - 1

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I hereby certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 20th day of October, 2014.

GORDON & ALVESTAD, PLLC

By *Diana K. Waxler*  
DIANA K. WAXLER for  
L. Paul Alvestad, WSBA #10892