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DIVISION III  
STATE OF WASHINGTON  
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NO. 343901

COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION III

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Okanogan County Superior Court  
Case No. 11-2-00496-3

JEREMY J. MOBERG,

Appellant,

vs.

TERRAQUA, INC., a/k/a TERRAQUA ENVIRONMENTAL  
CONSULTING; MICHAEL B. WARD, a/k/a MICHAEL WARDSKI;  
and Unknown Corporation,

Respondents.

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AMENDED BRIEF OF RESPONDENTS

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## I. ASSIGNMENTS OF ERROR

Respondents Terraqua, Inc. and Michael Ward do not assign error to the trial court decision granting their motion for summary judgment dismissing all claims.

### Issues Pertaining to Assignments of Error

1. Where the trial court considered the pleadings, motions, arguments of counsel and documents on file, concluded that there were no genuine issues of material fact and that Terraqua, Inc. and Michael Ward were entitled to judgment as a matter of law, did the trial court properly grant summary judgment?
2. Appellant Moberg assigns error overall and does not address each specific cause of action in his complaint.
  - a. Where Moberg did not assign error to the summary judgment dismissing his claim for breach of contract, is that issue waived?
  - b. Where Moberg did not assign error to the summary judgment dismissal of Michael Ward individually, because at all times Michael Ward acted in his capacity as an officer of Terraqua, Inc., is that issue waived?
  - c. Where Moberg does not cite material facts, nor provide text of statutes and adequate argument addressing each statute, has he waived all claims relating to his employment status under Washington wage laws?
  - d. Where the trial court considered the pleadings, motions, arguments of counsel and documents on file, applied the terms of the parties' express contract and economic reality test, and concluded that there were no genuine issues of material fact as to Moberg's status as an independent contractor, did the trial

court properly grant summary judgment on Moberg's Washington wage law claims?

- e. Where Moberg did not present material facts establishing that any work he performed exceeded the terms of his express contract with Terraqua, or that Terraqua in any way unfairly profited from his efforts, did the trial court properly grant summary judgment on Moberg's claim of unjust enrichment?
- f. Where an express contract sets forth the terms of the agreement between Moberg and Terraqua, can Moberg recover on the theory of unjust enrichment for activities covered by the parties' contract?
- g. Where Moberg did not assign error to summary judgment dismissing his claim for promissory estoppel, is that issue waived?
- h. Where Moberg offered nothing more than his statements that Ward made vague and indefinite promises of a future partnership in Terraqua, did the trial court properly dismiss his claim for promissory estoppel?

## II. STATEMENT OF THE CASE

Respondent Terraqua, Inc. is a small, family-owned business operating from 1995 to present in Okanogan County; it provides fisheries research and consulting services to its clients. CP 480.

Respondent Michael Ward is the sole owner and principal officer of Terraqua. At all times relevant herein, Terraqua conducted some of its business by retaining independent contractors. Subcontracts were typically seasonal, for defined periods of one year or less, and each outlined the specific activities, tasks and data/research deliverables for field work projects for Terraqua's clients. Terraqua's major clients were governmental agencies, e.g. the Bonneville Power Administration. CP 478-487.

Appellant Jeremy Moberg first contracted with Terraqua in 2001. He and Terraqua executed Subcontractor Services Agreements (contracts) on a seasonal basis, and the scope of work, billing rates and number of hours Moberg invoiced varied, as negotiated from year to year. CP 484. The contracts specified, "Subcontractor will function as an Independent Subcontractor, with rights to control the means of performing services listed herein and to perform services for other clients."

As to equipment, the contract provided that, "Client will provide specialized equipment and supplies as necessary to perform the above services. Subcontractor will provide personal field gear and basic surveying

equipment.” Expenses were invoiced by Moberg, including mileage, equipment, computer rental, trailer rental and other direct costs that were negotiated with each separate contract. The contracts signed by Moberg each year provided: “Services shall be performed and scheduled July 1, 20\*\* and June 30, 20\*\*” and “Either party may terminate this Agreement with fourteen (14) days advance written notice to the other party...” These terms are consistent with every written contract between Terraqua and Moberg from 2003 to 2010. CP 576-627; compare, for example, contract of 2003 (CP 278) with contract of 2010 (CP 280). The contracts clearly identified the relationship with Moberg as that of an independent contractor.

Moberg’s conduct throughout his relationship with Terraqua indicates he considered himself an independent contractor, and operated as somebody in business for himself. In that regard, his 1040 U.S. Individual Tax Returns for the years 2007 through 2011 reveal claimed deductions for his personal *consulting business* (as a biologist/consultant) for depreciation, equipment, insurance, vehicles, computers, office space, utilities, travel and supplies, illustrating that he operated that business, invested in it and profited therefrom. CP 194-218; *see also* CP 727-799, summarizing tax return detail.

Additionally, Moberg negotiated the scope of his work (tasks he would undertake), his billing rates and rates for materials, equipment leased

to Terraqua (i.e. field trailer) and per diem rates. CP 220-223; CP 509-510; CP 590-591; CP 976. Moberg maintained his own office and charged other Terraqua subcontractors for use of his office space. CP 876-881.

Moberg's tax returns show that Moberg reported income, losses and expenses for a separate farming business as well. *Id.* And, although not reported on his taxes, Moberg granted newspaper interviews discussing his extensive marijuana growing business dating back twenty years, its profitability and his personal expertise as a premier pot grower in Washington. CP 715-723. This was his third commercial business, operated at the same time he consulted for Terraqua.

Moberg admits he *never* complained to Terraqua about his status as a subcontractor. CP 918. He also never pursued any administrative remedy, through the IRS or the Washington Department of Labor and Industries to challenge his alleged mischaracterization as an independent contractor. *See* CP 48; TR at 30; CP 512. Moberg even admits he did not seek advice from his many family members who are lawyers, regarding his employment status — until Terraqua declined to enter into another contract. CP 919.

Moberg advocated to others the benefits of establishing their own independent contracting businesses, stating he “wants to continue the model of contracting with Terraqua [sic.] as I think it benefits us the most.” CP 13.

Near the end of Moberg's fiscal year June 30, 2011 contract, Terraqua declined to enter into another contract with Moberg. CP 478-486; CP 966-967. Moberg submitted his final invoice #101 on July 5, 2011.

Between July 5, 2011 and April 11, 2012 Terraqua tried on numerous occasions to contact and arrange final payment in exchange for the final work products. CP 628-641. Specifically, Terraqua sought the BPA hard-copy research files and data which Moberg had not delivered to Terraqua as required in the contract specifications. CP 492-496. Although Moberg had agreed to turn over the work, Moberg did not follow through. CP 629-631.

On September 13, 2011 Moberg filed a Complaint against Terraqua and Michael Ward seeking damages for four (4) claims: breach of contract, promissory estoppel, unjust enrichment and failure to pay wages. CP 1059-1065. At that time he still had not turned over the data files and did not do so until six (6) months later in April 2012.

Okanogan County Superior Court Judge Christopher Culp granted Defendants Terraqua & Ward's motion for summary judgment on all four (4) claims by Order filed February 18, 2016. CP 169-172. Moberg filed a Motion for Reconsideration, CP 155-168, which was denied by the trial court on April 11, 2016. Notice of Appeal was filed by Moberg on April 25, 2016.

### III. SUMMARY OF ARGUMENT

This is a case involving an individual, Appellant Moberg, who worked happily as a seasonal independent contractor for Respondent Terraqua, for approximately ten (10) years.

Moberg executed Subcontractor Services Agreements (contracts) with Terraqua as an expressly identified independent contractor, his conduct and statements clearly showed he considered himself an independent contractor, and his tax returns reflected this status. Only after Terraqua ceased using his services as an independent contractor did Moberg become disgruntled and, for the first time, claim that he was an employee entitled to back wages and benefits. Also, after he was informed that his services were no longer needed, Moberg, for the *first time*, claimed he was promised a partnership interest in Terraqua.

The trial court considered the pleadings, documents, motions, declarations and arguments of counsel; it determined that material facts were not in dispute, and that Defendants Ward and Terraqua were entitled to a summary judgment dismissal of all claims.

## IV. ARGUMENT

### A. Standard of Review

An appellate court reviews a trial court's grant of summary judgment de novo; it considers all of the evidence presented to the trial court and engages in the same inquiry as the trial court. *Kim v. Lakeside Adult Family Home*, 185 Wn.2d 532, 547, 374 P.3d 121 (2016).

Summary judgment may be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. CR 56(c); *Preston v. Duncan*, 55 Wn.2d 678, 349 P.2d 605 (1960).

RAP 10.3(a)(5) provides what is to be included in a statement of the case:

A fair statement of the facts and procedure relevant to the issues presented for review, without argument. Reference to the record must be included for each factual statement.

Moberg has failed to set forth *any* facts in his Statement of the Case (Appellant's Brief at 1-2) supporting his assertion that material facts were in dispute regarding his employment status, or facts pertaining to his claim of unjust enrichment or promissory estoppel.

RAP 12.1 limits review to issues set forth in the briefs:

(a) Generally. Except as provided in section (b), the appellate court will decide a case only on the basis of issues set forth by the parties in their briefs.

(b) Issues Raised by the Court. If the appellate court concludes that an issue which is not set forth in the briefs should be considered to properly decide a case, the court may notify the parties and give them an opportunity to present written argument on the issue raised by the court.

Moberg has not identified specific errors and issues on appeal regarding claims alleged in his Complaint for breach of contract, individual liability of Ward, promissory estoppel, unjust enrichment, and failure to pay wages in violation of Washington's Wage Rebate Act (RCW 49.52.050) and failure to pay prevailing wages on public projects in violation of RCW 30.12.020. CP 1059-1065. Those issues are waived.

Moberg's assignment of error is generic (the court erred in granting summary judgment), and his stated issues are vague. He obliquely references Moberg's "employment status" without specifying anything about that status or why it should be addressed on appeal.

In the body of his brief he claims violation of Washington's Minimum Wage Act, RCW 49.46.130 (not alleged in his Complaint; CP 1064) and Washington's Wage Payment Act, RCW 49.48.010 (not alleged in his Complaint; CP 1064) without quoting or discussing the specifics of those statutes or how they apply to any facts in this case.

Moberg has done nothing more than throw up broad statements without adequate citation to facts in the record. Moberg has left it to Respondents Terraqua and Ward to conduct a factual review of the record, formulate his legal arguments, and then refute them. It is not sufficient to simply state there are disputed facts; Moberg must also demonstrate why those facts are *material*. He has failed to do so. Moberg has not sufficiently assigned specific error and issues on appeal, and therefore he has waived all claims. *See Christian v. Tohmeh*, 191 Wn. App. 709, 728, 366 P.3d 16 (2015) (passing treatment of an issue or lack of reasoned argument is insufficient to merit appellate review); *Goehle v. Fred Hutchinson Research Center*, 100 Wn. App. 609, 620, 1 P.3d 579 (2000) (appellate court would not consider an issue that plaintiff failed to assign as error); *Accord Mavroudis v. Pittsburgh-Corning Corp.*, 86 Wn. App. 22, 39-40 (2009) (an appellant who wishes to challenge sufficiency of evidence needs to outline evidence in its brief, point to deficiencies it contends exists, and cite to relevant authority; bare conclusory allegation that evidence is insufficient will not suffice, in that appellate courts are not in the business of searching the record in an effort to determine the nature of any alleged deficiencies to which the challenger may be referring, and then to search law for authority to support those same deficiencies).

Importantly, Moberg cannot raise for the first time in his reply brief matters that were required to be addressed in his opening brief — which Respondents anticipate Moberg will do. *Deutsche Bank Nat'l Tr. Co. v. Slotke*, 192 Wn.App. 166, 177, 367 P.3d 600 (2016).

**B. The Mere Existence of Disputed Facts Does Not Preclude Summary Judgment in Employment Status Actions.**

The fallacy in Moberg's argument is that he asserts an overly broad interpretation of the standard for summary judgment: he essentially claims if an issue is factual, it cannot be decided on summary judgment. What he overlooks is that a factual issue must be material, and he fails to address the materiality of any of the scant facts cited in his argument. Moberg argues violations of Washington's Wage Payment Act, RCW 49.48.010 and RCW 48.48.082(5)&(6); Wage Rebate Act, RCW 49.52.050 and RCW 49.52.070; Minimum Wage Act, RCW 49.46.130 and RCW 49.46 et. seq. and WAC 296-128-035. Moberg failed to set forth sufficiently the text of the statutes cited in his brief as required by RAP 10.4(c):

If a party presents an issue which requires study of a statute, rule, regulation, jury instruction, finding of fact, exhibit, or the like, the party should type the material portions of the text out verbatim or include them by copy in the text or in an appendix to the brief.

He has not set forth an argument specifically analyzing the application of those statutes as they pertain to the facts of this case, or even identified any

material facts supporting their application. Nonetheless, each of these statutes is irrelevant because Moberg was an independent contractor and the Fair Labor Standards Act and Washington Wage Laws do not apply to independent contractors. *Moba v. Total Transp. Servs., Inc.*, 16 F. Supp. 3d 1257 (W.D. Wash. 2014).

Moberg's inference that the trial court was overly focused on the contracts is disingenuous. The court rightly looked to the terms of those contracts for two reasons. First, Moberg sought to enforce the contract, claiming he was entitled to damages because Terraqua allegedly breached the written agreement by withholding payment of his final invoice. Second, the court legitimately looked at the terms of the parties' contract as one factor it considered, in addition to others, under the economic reality test. CP 2. This approach is supported by case law. *Id.*

In *Moba*, the court looked to the language of the parties' contract, containing terms remarkably similar to those between Moberg and Terraqua, to support its conclusion that the plaintiff truck drivers were independent contractors under the economic dependency test set forth in *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn. 2d 851, 858, 281 P.3d 289 (2012). The *Moba* court found, in part, that a contract which gives either party the power to terminate the agreement upon written notice

weighs in favor of independent contractor status. *Id.*, 16 F. Supp. at 1265. It granted summary judgment dismissing the truck driver's wage claim suit.

The economic dependence test outlined in *Anfinson* evaluates whether, as a matter of economic reality, a worker is dependent on the business to which he renders services or is in business for himself. 174 Wn.2d at 869, 871. The *Anfinson* court cited federal precedent interpreting the FSLA in suggesting the following *non-exclusive* list of factors to consider when applying this test. Neither the presence nor absence of any individual factor is determinative. *Barlow v. England*, 703 F.3d 497, 506 (10th Cir. 2012).

- The degree of the alleged employer's right to control the manner in which work is to be performed;
- The alleged employee's opportunity for profit or loss;
- The alleged employee's investment in equipment or materials required for his task or investment in employment of helpers;
- Whether the service requires a special skill;
- The degree of permanence of working relationship; and
- Whether the service rendered is an integral part of the alleged employer's business.

*Anfinson*, 174 Wn.2d at 871.

Material evidence regarding these economic dependence factors heavily favored the trial court's conclusion that Moberg was an independent contractor. Moberg's written contracts expressly gave him: a) independent contractor status with the right to control the work performed; b) the right to perform services for other clients; and c) the right to terminate the contracts on 14 days' written notice. CP 576-627: compare collected Subcontractor Services Agreement contracts. Moberg negotiated his billing rates each year. CP 220. Moberg was not expected to maintain set hours or report at specified times; he was fully responsible for monitoring his time and deliverables and invoicing his work to Terraqua. Terraqua subcontractors did not bill for all hours worked, particularly if they made mistakes and had to duplicate work. Corrective action was completed on their own time. CP 220-225; CP 876-884; CP 892-910; CP 945-948.

Michael Ward seldom interacted with subcontractors; he was not involved in their day-to-day operations, supervision, management or protocol development. Subcontractors joked by asking if Ward really existed. CP 876-884; CP 892-910; CP 945-948. In fact, Ward was on sabbatical for nearly three (3) years between 2007 and 2010, and was out of the country for 16 months during that time. CP 515.

The contracts were seasonal, leaving subcontractors the ability to develop other economic opportunities, particularly during the Fall, Winter

and Spring seasons. CP 220-222; CP 876-877. Moberg did operate other businesses (farming, listed as a separate business on his taxes; 20-year marijuana growing operation, income not reported on his taxes) during the years he worked as an independent contractor with Terraqua. CP 229-231; CP 727-799; CP 715-723. His invoiced hours, on an annual basis for the years 2003-2010 varied greatly. For most years, he invoiced many fewer hours than would be considered full time in an employment context. CP 221; CP 224-225.

During all times relevant herein, Moberg claimed federal income tax deductions for his personal *consulting business as a biologist* for depreciation, equipment, insurance, vehicles, computers, office space, utilities, travel and supplies, illustrating that he operated that business and invested in it. Moberg's consulting business provided services and equipment to Terraqua at a profit. CP 229-231; *see also* CP 727-799. Moberg's contract rates substantially exceeded the prevailing wage for comparable field biologists in the industry. CP 504; CP 509; CP 661-701.

Terraqua did not maintain office space for subcontractors. Moberg owned his separate office building and he charged other subcontractors rent for their use of this space for data work and meetings. CP 887-888; CP 896.

Terraqua's classification and use of independent contractors was examined during an audit by the Internal Revenue Service in 2009 covering

2006 to 2008 tax years. The audit also reviewed and included the independent contracts and the 1099 forms for business earnings that pertained to Moberg. The IRS auditor interviewed Terraqua's three (3) highest-earning independent contractors, including Moberg. The IRS audit made no finding against Terraqua in its practice or use of independent contractors. CP 531-575; CP 963.

Other Terraqua subcontractors did not consider themselves to be employees. CP 876-884, CP 892-910; CP 945-948. Moberg *never* complained to Terraqua about being classified as a subcontractor. CP 837-838; CP 963. In fact, Moberg communicated to other subcontractors the benefits of working as an independent contractor and advocated for that status. As Moberg stated, "I for one want to continue with the model of contracting with Terraqua [sic.] as I think it benefits us the most." CP 13.

The *only* evidence Moberg cites in his brief (Appellant's Brief at 9-10) is a declaration dated February 1, 2009 written by Ward at Moberg's request to serve as a character reference for Moberg in the context of his divorce and child custody proceedings. CP 148. Ward did not write the declaration to define the legal relationship between Moberg and Terraqua for purposes of Washington wage law; it was intended to illustrate Moberg's stability as a father in his court action to gain custody of his daughter. This is the *single* instance in which Ward referred to Moberg as an "employee"

as compared to numerous instances in which Moberg was described, or he described himself, as an independent contractor. In the context it was written, the declaration is immaterial. Further, based on its date and purpose, the declaration was not new evidence for purposes of reconsideration and clearly could have been produced for the original summary judgment hearing.

The trial court was very clear in its bench ruling that there were factual disputes. But, it also clearly stated that the disputed facts were *not material*.

And I would agree with you that there are questions of fact, but that's not what the summary judgment rule says. What it says in Rule 56 is, Are there any genuine issues as to material facts? **There's a difference between questions of fact and questions of material fact.**

\* \* \*

In other words, there, in my view, are *no genuine issues of any material facts related to the terms of the contracts*. Thus, they are binding and enforceable.

\* \* \*

Because while *he claims that he was illegally classified as a subcontractor and not an employee, the fact is that there's nothing in the evidence that suggests that he ever did anything to change that*, whether it was with Terraqua or with the IRS. There's just no evidence of that.

\* \* \*

Because the IRS returns of Mr. Moberg, as he said in his interrogatories, they speak for themselves. *And to me, that's substantial evidence of his acceptance of the fact that he was a subcontractor.*

And the last piece of evidence for Mr. Moberg's – for your client's purpose are his e-mails at the very end of his employment. And I could quote from them, but I don't think it's necessary. Because, again, they pretty much speak for themselves.

He was very happy with his experience with Terraqua. And, in fact, he said this the other day, *he was looking forward to working on his own contracts.* And I think it's particularly telling that he asked Mr. Ward for a reference, for a letter of recommendation.

\* \* \*

[B]ut again, in terms of a cause of action, no genuine issues of material fact with regard to wrongfully withholding a final paycheck. ***No genuine issues of material fact regarding any misclassification of Mr. Moberg as a subcontractor. I think he properly was, and he understood that.*** He knew it. He accepted it and, in effect, consented to it. It wasn't until after the relationship between Mr. Moberg and Terraqua was over than [sic.] anything suggesting his overall dissatisfaction.

RP 10-13 (emphasis and italics added); CP 54-55.

Moberg cherry picked language (Appellant's Brief at 7) from the trial court's decision to infer that the court considered nothing more than the language of the subcontractor agreements in concluding that Moberg was an independent contractor rather than an employee. Moberg's premise is that the Court's acknowledgment of the existence and clear terms of the written independent contractor agreements necessarily means the summary

judgment decision was based on contract theory alone. This inference is incorrect. The contracts were simply one factor, among many, the court considered.

The hearing excerpt quoted above indicates the court considered Moberg's conduct, his tax filings, his satisfaction with the independent contractor relationship and that he made no effort to change it, his statement that he was looking forward to working on his own contracts, and his clearly expressed satisfaction with his experience with Terraqua. In its final Order Denying Plaintiff's Motion for Reconsideration, the court expanded the factors it took into consideration in granting summary judgment, expressly applying the economic reality test:

Pursuant to LR 59, the court requested defendant's reply after reading *Anfinson vs. FedEx Ground Package Sys., Inc.*, 159 Wn. App. 35, 244 P.3d 32 (2010) affirmed 174 Wn.2d 581 (2012). Since this court's decision focused on contracts signed between the parties, it became necessary to review factors related to the ***economic reality of the relationship*** between Moberg and Terraqua. In this regard, defendant's reliance on the subsequent case, *Moba v. Total Transportation Services*, 13 F. Supp.3d 1257 (2014), is helpful. In *Moba*, the court cites Washington law and *Anfinson* before granting summary judgment.

Considering the evidence in the light most favorable to plaintiff, the court reaffirms its original decision. The contracts speak for themselves and applying the economic reality factors only confirms the plaintiff's status as an independent contractor. There are no genuine issues of material fact, and as a matter of law, defendant is entitled to summary judgment. Reconsideration is denied.

CP 1-2 (emphasis added). The court applied the correct legal standard to the material facts before it and properly awarded summary judgment.

**C. The Trial Court Properly Dismissed Moberg's Unjust Enrichment and Promissory Estoppel Claims.**

Moberg claimed that Ward orally promised to make him a partner in Terraqua. Moberg did not assign error to the issue of promissory estoppel and therefore it is waived.

Nonetheless, the extent of the alleged promise as asserted by Moberg was that he “understood” Ward offered him ownership in Terraqua. Ward allegedly promised to make him partner as an “ongoing theme” but it was not a formal commitment. CP 844-846; CP 851; CP 926. No writings confirm the alleged arrangement...no letters, no emails, no contracts, no offer of shares in the corporation. Nothing.

To succeed on a promissory estoppel claim, Moberg must prove *each* of the following five elements:

1. a promise;
2. which the promisor should reasonably expect to cause the promisee to change his position;
3. which does cause 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. *Wash. Educ. Ass'n v. Dep't of Ret. Sys.*, 181 Wn.2d 212, 224-25, 332 P.3d 428 (2014). Moberg never offered facts demonstrating that he changed his position, that he justifiably relied on the alleged promise, or that an injustice could be avoided only if he is given a partnership interest in Terraqua. He does not deny that he was fully compensated for the contracted-for services at his contracted-for rates; he even stated it was a fair rate. He simply wanted more because he believed Terraqua and Ward unfairly profited from the BPA contracts, and that he worked hard. CP 846-847.

Not every promise qualifies for promissory estoppel. “A statement of future intent is not sufficient to constitute a promise for the purpose of promissory estoppel. An intention to do a thing is not a promise to do it.” *Elliott Bay Seafoods, Inc. v. Port of Seattle*, 124 Wn. App. 5, 13, 98 P.3d 491 (2004). The “promises” claimed by Moberg pertained to, at best, a future intent. The terms assented to must be sufficiently definite, and this applies to claims of promissory estoppel as well. *Keystone Land & Development Company v. Xerox Corp.*, *supra*, 152 Wn.2d at 178; *Sandeman v. Sayres*, *supra*, 50 Wn.2d at 541. Moberg’s claims regarding estoppel were vague and indefinite. See, e.g., CP 845-846. Material facts were not in dispute, and, as a matter of law, the trial court properly granted summary judgment.

As to unjust enrichment, Moberg claims he worked hard for Terraqua and the value of the corporation increased over time. In his argument, he notes the increase in the value of Terraqua's government contracts between 2003 and 2011. He ignores the overall growth of the company, the increase in the number of other independent contractors engaged over the years and their contributions to Terraqua's ability to competitively bid on larger government contracts. Moberg's contributions to the overall value of the company were estimated to be at less than six percent (6%) in 2010 and 2011, the years he billed the greatest number of hours to Terraqua. CP 501.

“Unjust enrichment is the method of recovery for the value of the benefit retained *absent any contractual relationship* because notions of fairness and justice required it.” *Young v. Young*, 164 Wn.2d 477, 191 P.3d 1258 (2008). Both Moberg agreed they had an express contractual relationship. CP 1063, ¶ 16. Thus, *Duckworth v. Langland*, 95 Wn. App.1. 988 P.2d 967 (1998), pertaining to an oral partnership agreement, is irrelevant. In *Duckworth*, there was no contractual relationship between the parties, merely an oral agreement to share profits in an alleged oral partnership. All activity therein was tied directly to that alleged oral partnership.

All of Moberg's work conformed with his obligations under the contracts, and he was compensated according to the terms of those agreements. Review of the record shows he does not deny this. Moberg negotiated for and was compensated under those contracts, at generous rates, for each and every hour he provided services to Terraqua. The facts do not support his assertion that he ever worked the number of hours equating to a full-time job, much less such excessive hours that he should be entitled to a partnership interest, or that Terraqua was unjustly enriched. CP 243-244. The facts simply do not support his assertion that he worked over and above his contracted-for obligations thereby conferring a benefit on Terraqua which equates to unjust enrichment. Accordingly, no *material* facts were in dispute as to the claims of promissory estoppel or unjust enrichment, and the trial court properly determined, as a matter of law, that Moberg's claims should be dismissed.

#### **D. RECOVERABLE COSTS ON APPEAL**

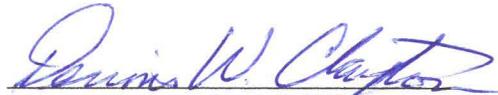
In the event Respondents substantially prevail on appeal, they are entitled to appellate costs, pursuant to RAP 14.2. RAP 14.3 identifies the type of costs recoverable. *Gamboa v. Clark*, 180 Wn.App. 256, 321 P.3d 1236 (2014).

**V. CONCLUSION**

In view of the foregoing, Respondents respectfully request that the judgment of the trial court granting summary judgment to Respondents, Terraqua, Inc. and Michael B. Ward, be affirmed.

DATED this 6<sup>th</sup> day of December, 2016.

Respectfully submitted,



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