

71867-3

71867-3

NO. 71867-3 - I

---

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

---

RED LETTER MINISTRIES,

Appellant,

v.

CITY OF NORTH BEND,

Respondent.

---

**BRIEF OF APPELLANT**

---

Stephen Pidgeon, Attorney at Law, P.S.  
3002 Colby Avenue, Suite 306  
Everett, Washington 98201  
(425)605-4774

---

2014 AUG -7 PM 2:11  
COURT OF APPEALS  
DIVISION I

## TABLE OF AUTHORITIES

<i>Adams v. Wilson</i> , 264 Md. 1, 284 A.2d 434 (1971).....	16
<i>Bernal v. American Honda Motor Co.</i> , 87 Wn.2d 406, 416, 553 P.2d 107 (1976).....	13
<i>Central Credit Collection Control Corp. v. Grayson</i> , 7 Wn. App. 56, 499 P.2d 57 (1972).....	13
<i>Ciminski v. Finn Corp.</i> , 13 Wn. App. 815, 537 P.2d 850 (1975).....	13
<i>Cohens v. Virginia</i> , 19 U.S. (6 Wheat) 264, 404, 5 L.Ed. 257 (1821).....	22
<i>Crown Plaza Corp. v. Synapse Software Sys.</i> , 87 Wn. App. 495, 500-01, 962 P.2d 824 (1997).....	14
<i>Dehahn v. Innes</i> , 356 A.2d 711 (Me. 1976).....	17
<i>Duckworth v. Langland</i> , 95 Wn. App. 1, 7, 988 P.2d 967 (1998).....	14
<i>Garbell v Tall's Travel Shop, Inc.</i> , 17 Wn. App. 352, 563 P.2d 211 (1977).....	14
<i>Granquist v. McKean</i> , 29 Wn.2d 440, 187 P.2d 623 (1947).....	18
<i>Howarth v. First Nat'l Bank</i> , 540 P.2d 486, 490 (Alas. 1975), <i>aff'd</i> , 551 P.2d 934 (Alas. 1976).....	14
<i>Karnofsky v. 4548 Main St., Inc.</i> , 192 N.Y.S.2d 577 (Sup. Ct. 1959).....	14
<i>Korslund v. DynCorp Tri-Cities Servs., Inc.</i> , 156 Wn.2d 168 , 177, 125 P.3d 119 (2005).....	12, 15
<i>LaPlante v. State</i> , 85 Wn.2d 154, 531 P.2d 299 (1975).....	13
<i>McDonald v. Murray</i> ,	

83 Wn.2d 17, 515 P.2d 151 (1973).....	13
<i>Miller v. McCamish</i> , 78 Wn.2d 821, 479 P.2d 919 (1971).....	18, 21
<i>Old West Enterprises, Inc. v. Reno Escrow Co.</i> , 86 Nev. 727, 476 P.2d 1 (1970).....	14
<i>Peacock Realty Co. v. E. Thomas Crandall Farm, Inc.</i> , 108 R.I. 593, 278 A.2d 405 (1971).....	16
<i>Pine Corp. v. Richardson</i> , 12 Wn. App. 459, 530 P.2d 696 (1975).....	13
<i>Powers v. Hastings</i> , 20 Wn. App. 837, 839-842, 582 P.2d 897 (1978).....	15,18,19,20,21
<i>Richardson v. Taylor Land &amp; Livestock Co.</i> , 25 Wn.2d 518, 529, 171 P.2d 703, 710 (1946).....	21
<i>Saluteen-Mschersky v. Countrywide</i> , 105 Wn.App. 846, 552 (2001).....	14
<i>Sealock v. Hackley</i> , 186 Md. 49, 52-53, 45 A.2d 744, 746 (1946).....	15
<i>Trossbach v. Trossbach</i> , 184 Md. 47, 42 A.2d 905.....	16
<i>U.S. v. Will</i> , 449 U.S. 200, 216, 101 S. Ct. 471, 66 L.Ed.2d 392, 406 (1980).....	22
<i>Wilber Dev. Corp. v. Les Rowland Constr., Inc.</i> , 83 Wn.2d 871, 523 P.2d 186 (1974).....	13
<i>Wolf v. Crosby</i> , 377 A.2d 22 (Del. Ch. 1977).....	17
<i>Zlotziver v. Zlotziver</i> , 355 Pa. 299, 302, 49 A.2d 779, 781 (1946).....	16
CR 56(c).....	12, 15
2 A. Corbin, Corbin on Contracts § 498, at 683 (1950).....	17

6 J. Moore Federal Practice ¶ 56.17 [11] (2d ed. 1976).....	13
Trautman, <i>Vacation and Correction of Judgments in Washington</i> , 35 Wash. L. Rev. 505, 530.....	22
Trautman, <i>Motions for Summary Judgment: Their Use and Effect in Washington</i> , 45 Wash. L. Rev. 1, 5 (1970).....	13
RCW 62A.2-201(3)(b).....	14, 17
RAP 18.1.....	23
North Bend Municipal Code, section 3.30.010.....	7

TABLE OF CONTENTS

INTRODUCTION.....	6
ASSIGNMENTS OF ERROR.....	7
ISSUES.....	8
STATEMENT OF THE CASE.....	8
ARGUMENT.....	12
Summary Judgment is Inappropriate As to Oral Contracts	12
Genuine Issues of Material Facts Are Present	15
Defendants are not deserving of judgment as a matter of law	18
The Court Erred in Entering Judgment Against a Non-Party	22
CONCLUSION.....	23
CERTIFICATE OF SERVICE.....	24

## INTRODUCTION

In 2010, the City of North Bend created a new road that went over the private property of the Alpine Chiropractic Clinic. The building used for the clinic was a five bedroom residential home that had been converted and recently remodeled. In lieu of destroying the building, on July 10, 2010, North Bend Mayor Ken Hearing contacted Salli DeBoer, the President of Red Letter Ministries, to inquire whether she would have an interest in the building.

An agreement was reached where the City gave the building to Red Letter Ministries on the condition that Red Letter would move the building at its own expense. The offer was made and accepted that the City would lease a particular parcel of land to Red Letter for One Dollar per year to cite the building. Red Letter accepted the offer, sought permits, and moved the house to the property in question.

Red Letter then sought further memorialization of this agreement, and pursued a Purchase and Sale Agreement and Ground Lease to secure its understanding. The City Council initially approved, but on substantially different terms than the original agreement upon which Red Letter had at least partially performed.

When the negotiations over further writings broke down, the City sought a federal grant to destroy the building that had already been given to Red Letter Ministries. Red Letter brought its complaint in the Superior

Court on causes of promissory estoppel and breach of contract, and sought and received injunctive relief.

The City of North Bend answered, asserted affirmative defenses and counterclaims against Red Letter under theories common to civil litigation given the facts. In its answer, the City admitted that written agreements detailing the oral agreement did exist, but denied the enforceability of any of its terms, claiming in part that the Mayor acted ultra vires to his authority in giving away a building that had no value to the City, but rather was an expense.

The North Bend Municipal Code, section 3.30.010 allows the mayor and city administrator are authorized, without further action by the city council, to purchase or enter into contracts for materials, equipment, supplies, and services, not otherwise subject to other provisions of state law or city code, in amounts up to \$7,500.

Following the interchange of discovery, the City of North Bend moved for summary judgment. Following a hearing, Judge Lumm granted the City's motion, dissolved the preliminary injunction, dismissed all of Red Letter's claims with prejudice, and entered judgment against Salli DeBoer individually and Red Letter Ministries on the City's counterclaims for breach of contract and misrepresentation.

#### **ASSIGNMENTS OF ERROR**

The Court erred in granting summary judgment when material issues of fact were present in contravention to Civil Rule 56.

The Court erred in granting summary judgment when the moving party was not deserving of judgment as a matter of law.

The Court erred in awarding attorney fees against Salli DeBoer, a non-party to the action.

### **ISSUES**

Did the Court err by granting summary judgment in favor of the Defendant City of North Bend, when factual issues concerning the validity of the oral contract between plaintiff and defendant were present?

Did the Court err by granting summary judgment in favor of the Defendant City of North Bend, when North Bend was not deserving of judgment as a matter of law, given that the statute of frauds was met by the admission of North Bend in its pleadings?

Did the Court err in awarding attorney fees in favor of North Bend to be paid by Salli DeBoer, a non-party to the action?

### **STATEMENT OF THE CASE**

Red Letter Ministries (hereafter, “RLM”), a religious organization serving the needs of the homeless, was contacted by the City of North Bend (hereafter “North Bend” or “the City”) in 2010 regarding having RLM move a single-family residence that had been remodeled in 2000 and used successfully as a chiropractic clinic. CP 130, ¶ 7. The City had acquired the building pursuant to a condemnation action to build a road. CP 130, ¶ 13.

On June 10, 2010, North Bend Mayor Kenneth Hearing called DeBoer, the President of RLM, CP 129, ¶ 2. and offered RLM ownership of the house and a five-year ground lease for the property located at 342 Bendigo Blvd North, North Bend, Washington, King County Tax Parcel No. 857090-0063. CP 130, ¶ 8.

The offer made by Mayor Hearing of the City of North Bend was then accepted by DeBoer on behalf of RLM. CP 130, ¶ 12.

Mayor Hearing went on in his offer, saying verbatim: “We will give you the house, and a city lot for one dollar per year lease on the land next to the sewer plant.” CP 131, ¶ 15.

This term was immediately accepted by DeBoer. CP 131, ¶ 16. The acceptance was again affirmed with an overt “yes” from DeBoer as to the all of the terms proposed by Mayor Hearing. CP 131, ¶ 17.

This was the creation of the agreement, and the extent of the agreement. At no time did Mayor Hearing place any restrictions on the use of the property by RLM. CP 131, ¶ 18. Rather, the discussion included that RLM would use the house and the ground lease to accomplish RLM’s mission, which included housing local homeless families. CP 131, ¶ 19.

Mayor Hearing did not disclose any condition precedent to the transaction, and did not make the transaction contingent on receiving City Council approval of a written agreement. CP 133-33, ¶ 36. Mayor Hearing did not disclose to DeBoer that the City Council would be

required to approve any written contracts for the sale of the house of the lease of the land. CP 133, ¶ 37.

Pursuant to the terms of the agreement, RLM made application for and received a building permit for the relocation of the house. CP 133, ¶ 39.

RLM went on then to perform on the contract, and at RLM's expense and behest and with the City's full knowledge and cooperation, RLM moved the house to the Bendigo Boulevard Property. CP 133, ¶ 40.

By July 2, 2010, RLM had implemented a long-term plan to make the house habitable, and to properly place the house on the Bendigo property, and had secured a team that including an architect, an engineer, and many local volunteers, including two general contractors. CP 133, ¶¶ 45, 46, 47, 48.

On July 20, 2010, the City Public Works Director, Ron Garrow, acknowledged the City's agreement to give RLM the house, and to enter into the ground lease if RLM moved the house. CP 134, ¶ 56. Also see, CP 140, City Council Minutes noting the oral agreement between Mayor Hearing and RLM.

The City, however, delayed entering into a written agreement until after RLM had moved the house from the condemned property to the Bendigo property. CP 134, ¶ 57. When such a contract was finally drafted, the City had added substantially to the understanding between the parties, including in one of its draft a provision that RLM believed would have

nullified the ground lease and reverted ownership of the house to the City if more than two cars were ever parked on the property. CP 134, 135 ¶ 59.

The City Council approved a ground lease on September 7, 2010. CP 135 ¶ 66. The Purchase and Sale Agreement and the Ground Lease were attachments to City of North Bend Resolutions 1476 and 1477. CP 135 ¶ 67.

However, the proposed documents prepared by the City contained many provisions which were never bargained for or discussed when RLM accepted the agreement, and which were never bargained for or discussed when RLM moved the house in good faith reliance on the promises of Mayor Hearing.

RLM went on to try and achieve a written document from the City Council that actually reflected the agreement as it was made. CP 136, ¶ 78.

RLM finally executed a written agreement on January 31, 2012 that RLM believed “clearly memorialized the terms of the parties’ verbal agreement.” CP 136, ¶ 79.

The City then refused to sign the written agreement that RLM had executed. CP 137, ¶ 81.

The City thereafter obtained a federal grant of \$9,000 to demolish the house. CP 137, ¶ 86.

During the course of litigation, the City filed its answer, affirmative defenses and counterclaims. CP 395-402. All of the City’s

counterclaims were asserted against Red Letter. CP 400. The Court nonetheless entered judgment against Salli DeBoer individually. CP 637.

RLM's complaint sought in addition to equitable and injunctive relief, "all applicable remedies, including, but not limited to, injunctive relief ordering the City of North Bend and Mayor Hearing to transfer title to the house . . . and execution of the five year lease on the same parcel; CP 4; and for "[s]uch other and further relief as the Court may deem just and appropriate." CP 5.

## **ARGUMENT**

### **Summary Judgment is de novo on appeal.**

The Court of Appeals reviews summary judgment rulings de novo, engaging in the same inquiry as the trial court. *Korlund v. DynCorp Tri-Cities Servs., Inc.*, 156 Wn.2d 168 , 177, 125 P.3d 119 (2005). "Summary judgment is proper if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Id.* (citing CR 56(c)). All facts and reasonable inferences are construed most favorably to the nonmoving party. *Id.* "Summary judgment should be granted if reasonable persons could reach but one conclusion from the evidence presented." *Id.*

#### **1.0 Summary Judgment is Inappropriate As to Oral Contracts**

First, RLM claims the existence of an oral contract. CP 131-139. This claim is not merely the bare assertion of the claimant, but is

buttressed by the recognition of the agreement by the City Council of the City of North Bend itself. CP 134, ¶ 56. CP 140.

A motion for summary judgment should be granted only if, after considering the pleadings, affidavits, depositions, and all reasonable inferences drawn therefrom in favor of the nonmoving party, a trial court determines that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *LaPlante v. State*, 85 Wn.2d 154, 531 P.2d 299 (1975); *Wilber Dev. Corp. v. Les Rowland Constr., Inc.*, 83 Wn.2d 871, 523 P.2d 186 (1974); *McDonald v. Murray*, 83 Wn.2d 17, 515 P.2d 151 (1973); *Ciminski v. Finn Corp.*, 13 Wn. App. 815, 537 P.2d 850 (1975). A summary judgment should not be used as a means to “cut litigants off from their right to a trial.” *Bernal v. American Honda Motor Co.*, 87 Wn.2d 406, 416, 553 P.2d 107 (1976). Summary judgment as a means to avoid a useless trial is more appropriate in some cases than in others. See 6 J. Moore, *Federal Practice* ¶ 56.17 (2d ed. 1976). Summary judgment may be appropriate in resolving the dispute over an unambiguous written contract. See *Pine Corp. v. Richardson*, 12 Wn. App. 459, 530 P.2d 696 (1975); *Central Credit Collection Control Corp. v. Grayson*, 7 Wn. App. 56, 499 P.2d 57 (1972); Trautman, *Motions for Summary Judgment: Their Use and Effect in Washington*, 45 Wash. L. Rev. 1, 5 (1970); 6 J. Moore *Federal Practice* ¶ 56.17 [11] (2d ed. 1976). However,

Oral contracts are often, by their very nature, dependent upon an understanding of the surrounding circumstances, the intent of the

parties, and the credibility of witnesses. If a dispute exists with respect to the terms of the oral contract, then summary judgment is not appropriate. Instead, the trier of fact in a trial setting should make the final determination with respect to the existence of the contractual agreement.

*Howarth v. First Nat'l Bank*, 540 P.2d 486, 490 (Alas. 1975), *aff'd*, 551 P.2d 934 (Alas. 1976). See *Old West Enterprises, Inc. v. Reno Escrow Co.*, 86 Nev. 727, 476 P.2d 1 (1970); *Karnofsky v. 4548 Main St., Inc.*, 192 N.Y.S.2d 577 (Sup. Ct. 1959); directly cited from *Garbell v Tall's Travel Shop, Inc.*, 17 Wn. App. 352, 563 P.2d 211 (1977).

“Generally, the trier of fact in a trial setting should make the final determination with respect to the existence of an oral contract; disputes about oral contracts should not be decided by summary judgment.”

*Saluteen-Mschersky v. Countrywide*, 105 Wn.App. 846, 552 (2001), *citing Duckworth v. Langland*, 95 Wn. App. 1, 7, 988 P.2d 967 (1998). “This is because resolution of disputes over the existence of oral contracts depends on the credibility of witnesses.” *Saluteen-Mschersky v. Countrywide*, 105 Wn.App. 846, 552 (2001), *citing Crown Plaza Corp. v. Synapse Software Sys.*, 87 Wn. App. 495, 500-01, 962 P.2d 824 (1997).

The record indicates that an oral contract was reached between Mayor Hearing and Salli DeBoer, who at all times was acting within the scope of her duties as President of Red Letter Ministries. This oral contract was acknowledged by the City Council of North Bend in its own minutes, and the statute of frauds governing the oral agreements under RCW 62A.2-201(3)(b).

(3) A contract which does not satisfy the requirements of subsection (1) of this section but which is valid in other respects is enforceable:

(b) If the party against whom enforcement is sought admits in his or her pleading, testimony, or otherwise in court that a contract for sale was made.

Here, such facts are present on the record, and the court erred in granting summary judgment as genuine issues of material fact were present. It appears that the trial judge did in fact make conclusions concerning the credibility of witnesses and did not construe the facts most favorably to the non-moving party. The province of his decision belonged rightly at trial, not at summary judgment, and therefore, error is present, and this Court should reverse.

## **2.0 Genuine Issues of Material Facts Are Present**

“Summary judgment is proper if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” *Korslund v. DynCorp Tri-Cities Servs., Inc.*, 156 Wn.2d 168 , 177, 125 P.3d 119 (2005), (*citing* CR 56(c)). All facts and reasonable inferences are construed most favorably to the nonmoving party. *Id.*

“Summary judgment should be granted if reasonable persons could reach but one conclusion from the evidence presented.” *Id.*

As to the existence of an oral contract, and the genuine issues of fact that are present, consider the discussion in *Powers v. Hastings*, 20 Wn. App. 837, 582 P.2d 897 (Wash. Ct. App. Div. One 1978):

“In *Sealock v. Hackley*, 186 Md. 49, 52-53, 45 A.2d 744, 746 (1946), the statute of frauds was offered to prevent the enforcement of an oral contract to convey land and during trial defendant admitted in his testimony the existence of the contract, the parties and the consideration. The court held that the statute did not bar enforcement of the agreement and stated:

“As stated in *Trossbach v. Trossbach*, 184 Md. 47, 42 A.2d 905, the admissions of a party in the form of testimony constitute sufficient "memoranda" or "writings" under the Statute of Frauds, for recorded testimony is regarded as equivalent to signed depositions. The purpose of the Statute of Frauds is to protect a party, not from temptation to commit perjury, but from perjured evidence against him. Admissions of a party in testifying, while evidence in form, are in essence not mere evidence, but make evidence against him unnecessary.

“On the same issue the Supreme Court of Pennsylvania stated:

“The statute of frauds, however, does not absolutely invalidate an oral contract relating to land but is intended merely to guard against perjury on the part of one claiming under the alleged agreement. Accordingly, if the title holder admits, either in his pleadings or his testimony, that he did in fact enter into the contract, the purpose of the statute of frauds is served and the oral agreement will be enforced by the court: ... Here defendant, in his testimony, admitted the making of the agreement as claimed by plaintiff.

“(Citations omitted.) *Zlotziver v. Zlotziver*, 355 Pa. 299, 302, 49 A.2d 779, 781 (1946). Other courts have likewise interpreted and recognized this rule: *Peacock Realty Co. v. E. Thomas Crandall Farm, Inc.*, 108 R.I. 593, 278 A.2d 405 (1971) (court held the statute of frauds writing requirement for conveyances of land will not bar enforcement of a broker's claim for a commission on a land sale when defendant admits in testimony the

existence and terms of the agreement). *Adams v. Wilson*, 264 Md. 1, 284 A.2d 434 (1971) (the court held the statute of frauds provision providing contracts not to be enforced in 1 year must be in writing is not a bar to enforcement of a contract where the party to be charged has admitted the contract in testimony). *Wolf v. Crosby*, 377 A.2d 22 (Del. Ch. 1977) (holding that the rule permitting an admission of an oral agreement and the simultaneous assertion of the statute of frauds as a bar to the enforcement of such an agreement should no longer be recognized). And Corbin has stated:

“Let us proceed, therefore, with a general consideration of what constitutes a sufficient note or memorandum. We may well start with this one general doctrine: There are few, if any, specific and uniform requirements. The statute itself prescribes none; and a study of the existing thousands of cases does not justify us in asserting their existence. Some note or memorandum having substantial probative value in establishing the contract must exist; but its sufficiency in attaining the purpose of the statute depends in each case upon the setting in which it is found. A memorandum that is sufficient in one case may well be held insufficient in another. A complete admission in court by the party to be charged should dispense with the necessity of any writing whatever.

2 A. Corbin, *Corbin on Contracts* § 498, at 683 (1950).

“In addition, the Uniform Commercial Code, RCW 62A.2-201(3)(b), recognizes that an oral contract for the sale of goods even though in excess of the \$500 limit imposed, is enforceable if ‘the party against whom enforcement is sought admits in his pleadings, testimony or otherwise in court that a contract for sale was made ...’ See *Dehahn v. Innes*, 356 A.2d 711 (Me. 1976) (holding that the salutary principle embodied in RCW 62A.2-201(3)(b) is applicable to a contract for the sale

of goods alone but also should apply equally to the instant contract involving both goods and real estate).

“Obviously the purpose of the statute of frauds is to prevent a fraud, not to perpetuate one, and in this regard the courts of this state are empowered to disregard the statute when necessary to prevent a gross fraud from being practiced. *Granquist v. McKean*, 29 Wn.2d 440, 187 P.2d 623 (1947). The legislative intent in enacting the statute was to prevent fraud resulting from the uncertainty inherent in oral contracts of this nature. *Miller v. McCamish*, 78 Wn.2d 821, 479 P.2d 919 (1971). Directly cited from *Powers v. Hastings*, 20 Wn. App. 837, 839-842, 582 P.2d 897 (1978):

### **3.0 Defendants are not deserving of judgment as a matter of law**

The Court in *Powers v. Hastings, op. cit.*, considered issues very similar to the current facts and the factors that indicated that the statute of frauds did not bar the oral contract. The court found that the defendant had admitted on six different occasions the existence of the lease with the option to purchase:

These occasions were:

Defendants in their answer and amended answer admitted the existence of a lease with an option to purchase. *Powers v. Hastings*, 20 Wn. App. 837, at 843.

1. Defendants in their answer and amended answer admitted the existence of a lease with an option to purchase.

2. Defendant filed an affidavit which spells out with particularity every aspect of the lease and option to purchase.

3. In testifying at the trial, defendant Hastings in open court admitted the existence of the agreement with an option to purchase.

4. At the trial plaintiffs' attorney, in referring to the defendant Hasting's deposition, queried him in open court:

5. Plaintiffs' counsel introduced Hastings' affidavit, designated exhibit 32, into the court record.

6. The contents of the affidavit relating to the lease and option to purchase were again corroborated by Hastings later in the trial. *Powers v. Hastings*, 20 Wn. App. 837, at 843-845. [End of citation].

These factors are quite consistent with the underlying facts in this case. For instance, Defendants admit that RLM had negotiated a Purchase and Sale Agreement and a Ground Lease with the City. CP 396, ¶¶ 8.

Defendants admit that RLM had returned signed copies of a Purchase and Sale Agreement, Ground Lease, and Financial Statements with the City. CP 396, ¶¶ 9.

On July 20, 2010, the City Public Works Director, Ron Garrow, acknowledged the City's agreement to give RLM the house, and to enter into the ground lease if RLM moved the house. CP 134, ¶ 56. Also see, CP 140, City Council Minutes noting the oral agreement between Mayor Hearing and RLM.

In short, the facts are on "all fours."

As the Court reasoned in *Powers, supra*:

“The statute of frauds was enacted to prevent frauds. Here both parties specifically testified as to the existence of an oral lease with an option to purchase defendants' farm and also to its particulars. The feared uncertainty and potential for fraud, inherent in such oral agreements and which is the basis for the statute of frauds' bar against enforcement, are clearly removed by their testimony. Therefore, we hold that to apply the statute of frauds to bar enforcement of the option agreement in the subject case would constitute a gross fraud.” *Powers v. Hastings*, 20 Wn. App. 837, 845.

“We further hold that the testimony of defendant Hastings in open court as to the details of the oral lease with option to purchase constitutes sufficient ‘memoranda’ or ‘writings’ to satisfy the statute of frauds, for we view recorded court testimony as equivalent to signed depositions.” *Powers v. Hastings*, 20 Wn. App. 837, 845.

The record also indicates, and Defendants admit that “Red Letter moved the house.” CP 396, ¶¶ 8. Such a move based upon the declaration of Salli DeBoer gives rise to an inference of partial performance. The Court in *Powers* also considered the issue of partial performance:

“Also, it is apparent that even absent the written and court admissions by the parties that an oral lease and option to purchase agreement existed, there was in the subject case substantial evidence before the jury of part performance. Part performance will support an

action for damages. *Powers v. Hastings*, 20 Wn. App. 837, 845; citing *Miller v. McCamish*, 78 Wn.2d 821, 479 P.2d 919 (1971). The Court noted that the “plaintiff moved onto the property pursuant to the lease with an option to purchase agreement and that he converted the same into a dairy farm and made substantial improvements in the approximate amount of \$14, 250.” *Powers, op. cit.* at 847.

The Court went on to conclude that “[t]his testimony, if believed by the jury, would satisfy the three requirements set forth as guidelines in *Richardson v. Taylor Land & Livestock Co.*, 25 Wn.2d 518, 529, 171 P.2d 703, 710 (1946), which require that the acts of part performance be sufficient to remove the oral agreement from the statute of frauds and must point unequivocally to the agreement sought to be enforced. The principle elements or circumstances involved in determining whether there has been sufficient part performance to unequivocally point to the contract are (1) delivery and assumption of actual and exclusive possession of the land, (2) payment or tender of the consideration, whether in money or property or services, and (3) the making of permanent, substantial and valuable improvements, referable to the contract. *Powers, op. cit.* at 847.

Because an oral agreement was in place, and because material issues of fact exist as to whether the statute of frauds had any application, and because RLM did at least partially perform on the contract giving rise to an articulable claim for damages, the City of North Bend was not

deserving of judgment as a matter of law. This Court should therefore reverse the order granting summary judgment in its entirety.

#### **4.0 The Court Erred in Entering Judgment Against a Non-Party**

All of the City's counterclaims were asserted against Red Letter. CP 400. The Court nonetheless entered judgment against Salli DeBoer individually. CP 637. There is nothing on the record indicating that Salli DeBoer was ever served pursuant to CR 4, and nothing perfected for the appellate record. As a consequence, the Superior Court never had jurisdiction over Salli DeBoer.

In Trautman, *Vacation and Correction of Judgments in Washington*, 35 Wash. L. Rev. 505, 530, the author notes that:

There is no time limit as a judgment entered without jurisdiction is void. The court has said that this is true without regard to laches.... Just as the one year statutory time limit does not apply, so likewise it is not necessary to show a defense upon the merits. The law requires no showing other than that the defendant was, in fact, not served with process or that there was no jurisdiction over the subject matter. This results from the fact that the power to vacate such judgments does not arise from the statutes or rule; it is an inherent power of the court.

“Whenever a judge acts where he/she does not have jurisdiction to act, the judge is engaged in an act or acts of treason. *U.S. v. Will*, 449 U.S. 200, 216, 101 S. Ct. 471, 66 L.Ed.2d 392, 406 (1980); *Cohens v. Virginia*, 19 U.S. (6 Wheat) 264, 404, 5 L.Ed. 257 (1821).

The trial court erred in entering judgment against Salli DeBoer individually when it never had jurisdiction over her. Such a judgment is void *ab initia*, and this Court should reverse the trial court on this issue.

## 5.0 Conclusion

In conclusion, the trial court erred in entering summary judgment on the motion of defendants. RLM asserts the existence of an oral contract to sell the house which was the subject of the City's condemnation, and to enter into a ground lease on City property as promised by the Mayor of North Bend. Defendants have admitted as much, while denying whether an enforceable contract existed, or whether there was part performance of the contract, or whether the Mayor had the authority to enter into the contract. All such theories, given the record, indicate that there are genuine material issues of fact present in this case, and that the Defendant City of North Bend is not deserving of judgment as a matter of law. The judgment entered against Salli DeBoer is also void for lack of jurisdiction, so the order as entered is error.

Appellant Red Letter Ministries therefore asks this Court to deny summary judgment on the City of North Bend's motion, to vacate the order granting summary judgment entered by the King County Superior Court on April 2, 2014, and to remand the case back to the Superior Court to establish a new trial schedule.

Further, Appellant seeks an award of attorney's fees pursuant to RAP 18.1.

///

///

///

Signed in Everett, this 5th day of August, 2014.



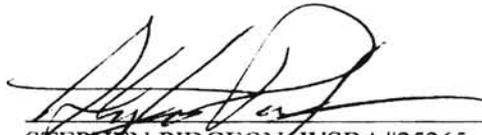
STEPHEN PIDGEON, WSBA#25265  
Attorney at Law, P.S.  
3002 Colby Avenue, Suite 306, Everett, WA 98201  
(425)605-4774

**CERTIFICATE OF SERVICE**

The undersigned now certifies that a true copy of the foregoing in this action was served on the following:

Kenyon Disend, PLLC  
The Municipal Law Firm  
11 Front Street South  
Issaquah, WA 98027-7090

by electronic mail, and by first class, U.S. Mail, postage prepaid, this 6th day of August, 2014.



STEPHEN PIDGEON, WSBA#25265  
Attorney at Law, P.S.  
3002 Colby Avenue, Suite 306, Everett, WA 98201  
(425)605-4774