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No. 46198-6-II

STATE OF WASHINGTON

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

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

Respondent,

v.

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

Appellants.

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**BRIEF OF RESPONDENT**

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## I. INTRODUCTION

For over forty years, the Tacoma School District (“District”) has owned Camp Joshua Taylor (“CJT”), a 15-acre parcel on the Key Peninsula in Pierce County. In 1968, the District allowed Oskar Schock to live on CJT in exchange for his services as caretaker of the property. Since that time, Mr. Schock and his family have lived rent free on the property.

In 2008, the District ceased using CJT as part of its educational program. In 2012, the District decided to sell CJT and it asked Mr. Schock to vacate the property. Mr. Schock refused.

Mr. Schock claims that an oral agreement from the early 1970s with the District’s business manager grants him an ownership interest in CJT and allows him to occupy CJT until he is paid for the improvements he made to CJT. Mr. Schock claims that this oral agreement allows him to be compensated for these improvements according to the “appraisal method” and that, as a result, he is owed more than \$300,000 for the improvements. Mr. Schock also claims the oral agreement requires that he be paid this amount as a precondition to his leaving CJT. Mr. Schock has also alleged that this oral agreement gave him a “first option to buy” CJT should the property ever be for sale.

The District’s business manager died in 1986 and the District has never acknowledged the existence of the alleged oral agreement with Mr. Schock. Indeed, in 1988 and 1990, the District denied the existence of

the oral agreement and rejected Mr. Schock's claim that he must be compensated for the improvements.

Because Mr. Schock refused to leave CJT, the District sued to eject him. The District moved for summary judgment claiming that ejectment was proper because it had superior title to CJT. The trial court granted the District's motion and dismissed the counterclaims raised by the Schocks.

There are several reasons why this Court should affirm the trial court's ruling. First, the District was entitled to ejectment as a matter of law because it established its right to CJT and because there was no proof of an oral agreement granting Mr. Schock the rights he claims in CJT. There was no proof that an oral agreement existed because there was no evidence of mutual assent between the parties to the essential terms of the contract.

Second, even if the oral agreement did exist, the agreement was unenforceable because it violated the statute of frauds. Under RCW 64.04.010, an agreement that conveys an interest in real estate must be in writing. Because the oral agreement purportedly conveys an interest in real estate—namely ownership of improvements and Mr. Schock's alleged right to occupy CJT until he is compensated for improvements—the oral agreement violated the statute of frauds. The agreement was also unenforceable because it violated state law providing that only the District's board of directors has the authority to convey interests in real property owned by the District.

Finally, the District denied Mr. Schock's claim in 1990. Because the statute of limitations for challenging this denial has passed, his oral

contract claim is untimely. For these reasons, the District requests that the Court affirm the ruling of the trial court.

## **II. RESTATEMENT OF THE ISSUES**

1. Under RCW 7.28.120, did the trial court properly grant ejectment when the District established superior title to CJT and when the Schocks failed to present a legally cognizable claim to the property?

2. Did the trial court properly reject the Schocks' oral agreement claim because there was no admissible evidence of the mutual assent necessary to form a contract?

3. Under RCW 64.04.010, did the trial court correctly hold that the Schocks' oral agreement, if it existed, would violate the statute of frauds because it purportedly grants the Schocks an ownership interest in CJT and the right to possess CJT without satisfying the requirements of RCW 64.04.010 that such agreements be in writing?

4. Did the trial court properly hold that the Schocks' oral contract claim was time-barred because the Schocks, after learning in 1990 that the District would not recognize or honor their alleged oral contract, waited for over 20 years before attempting to enforce their oral contract claim?

## **III. COUNTERSTATEMENT OF THE CASE**

In the 1965, the District began the process of acquiring what is commonly known as Camp Joshua Taylor ("CJT"), a 15-acre parcel on the Key Peninsula in Pierce County. Clerk's Papers (CP) at 26-27. A meeting

hall facility, two residential houses, and several barns/outbuildings currently are located on CJT. CP at 27. Historically, the District has used CJT as part of its educational curriculum. CP at 27.

In 1968, Oskar Schock moved onto the CJT property with his family and became the onsite caretaker at CJT. CP at 27. In exchange for providing caretaker services, Mr. Schock was allowed to reside at CJT without paying rent or electrical utilities, a benefit he enjoys to this date. CP at 27. As caretaker, Mr. Schock provided a physical presence at CJT and performed basic maintenance for the camp and its facilities. CP at 27.

In 2008, the District, because of changing educational program needs and the costs associated with keeping CJT in compliance with code requirements, stopped using CJT for educational programs. CP at 27. In 2012, the District notified Mr. Schock that the District had decided to sell CJT and that his services as caretaker were no longer required. CP at 38, 40. The District asked Mr. Schock to vacate CJT. CP at 28, 38. Mr. Schock refused to leave. CP at 28.

In April 2013, the District filed a Complaint seeking a writ of ejectment and to quiet title in CJT. CP at 1-4. The Schocks answered by claiming that an oral “contractual arrangement” gave them an ownership interest and “occupancy rights” in CJT. CP at 6-7. According to the Schocks, an oral agreement in the early 1970s with the District’s then business manager, Toney Shelton, gave the Schocks the right to possess CJT until they were compensated for more than \$300,000 in improvements Mr. Schock made to CJT. CP at 6-10, 67-68. In 1988, Mr. Schock claimed

that this oral agreement gave him “the first option to buy” CJT, should it ever be for sale. CP at 46.

In February 2014, the District moved for summary judgment, seeking an order of ejectment and dismissal of the Schocks’ counterclaims. CP at 12-25. Regarding these counterclaims, the District denied the existence of an oral agreement requiring Mr. Schock to be compensated for improvements prior to vacating CJT. The District also contended that even if there was an oral agreement, it was unenforceable because it violated both the statute of frauds and state law on the transfer of interests in school district real property. Even if the oral agreement existed and was enforceable, the statute of limitations on the Schocks claims expired more than 20 years ago. CP at 20-25.

At the March 28, 2014 hearing, the trial court granted the District’s motion for summary judgment and dismissed the Schocks’ counterclaims. In granting the District’s motion, the Honorable Jerry Costello of the Pierce County Superior Court noted that the oral agreement violated the statute of frauds and that it was barred by the statutes of limitations. Report of Proceedings (RP) at 30:11-31:8.

Mr. Schock timely appealed the summary judgment order. CP at 201-06. Throughout this litigation, Mr. Schock and one or more of his family members have remained in possession of CJT. CP at 28.

#### IV. ARGUMENT

##### A. Standard of review

An appellate court engages in de novo review of a trial court's grant of summary judgment and may affirm on any basis the record supports. *Graff v. Allstate Ins. Co.*, 113 Wn. App. 799, 802, 54 P.3d 1266 (2002). Summary judgment shall be granted if there is no genuine issue concerning any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Doherty v. Metro. Seattle*, 83 Wn. App. 464, 468, 921 P.2d 1098 (1996). The initial burden under CR 56(c) is on the moving party to prove that no issue is genuinely in dispute. *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005). Thereafter, the burden shifts to the non-moving party to establish that a triable issue exists. *Id.* Summary judgment is appropriate if reasonable persons could reach only one conclusion from all of the evidence. *Doherty*, 83 Wn. App. at 468.

Here, there are several reasons why the trial court correctly granted summary judgment. First, the District established ownership of CJT and this ownership permits the District to eject a caretaker who refuses to leave. Second, the Schocks failed to submit admissible evidence of an oral agreement granting them an ownership interest and entitling them to possess CJT sufficiently to defeat the District's summary judgment motion. Third, the alleged oral agreement allowing Mr. Schock to possess CJT, assuming that it exists, is unenforceable because it violates the statute of frauds and because a school district's business manager lacks the authority to convey an interest in real property. Fourth, a counterclaim seeking to

enforce this alleged oral contract is untimely because it violates two statute of limitations.

The following sections discuss these reasons in greater detail.

**B. Because the District had superior title to CJT, the trial court correctly granted ejectment under RCW 7.28.120.**

Ejectment is a cause of action that allows an owner to recover possession of his or her property. *See, e.g., Hill v. Hill*, 3 Wn. App. 783, 788, 477 P.2d 931 (1970). Ejectment is the proper cause of action to recover possession when an occupant of property is a tenant at will, such as a caretaker, who first entered upon the property with permission but then refuses to leave. *See, e.g., Najewitz v. City of Seattle*, 21 Wn.2d 656, 658, 152 P.2d 722 (1944) (caretaker is a tenant at will); *Turner v. White*, 20 Wn. App. 290, 292, 579 P.2d 410 (1978) (“a tenancy at will” is “terminable only upon demand for possession”); *Wuchner v. Goggin*, 175 F.2d 261, 270 (9th Cir. 1949) (ejectment used against a tenant at will).

Statutory authority for ejectment is found in RCW 7.28.010, which provides that “[a]ny person having a valid and subsisting interest in real property, and a right to the possession thereof, may recover the same by an action in the superior court of the proper county . . . and may have judgment in such action quieting or removing a cloud from plaintiff’s title.” RCW 7.28.010. In an ejectment action, the court determines which party has superior title:

The plaintiff in such action shall set forth in his complaint the nature of his estate, claim or title to the property and the defendant may set up a legal or equitable defense to

plaintiff's claims; and the superior title, whether legal or equitable, shall prevail. . . .

RCW 7.28.120.

Here, the District established its ownership of CJT through the declaration of Sam Bell and the exhibits attached to his declaration. CP at 26-41. Because the District has superior title to CJT, the trial court correctly granted the District's motion for summary judgment.

There are two reasons why this Court should affirm the summary judgment order. First, the Schocks failed to establish the existence of an oral agreement sufficient to overcome the District's summary judgment motion. Second, even if an oral agreement exists, it is unenforceable.

**C. The trial court correctly dismissed the counterclaims of the Schocks because these claims were based upon an alleged oral contract where the Schocks never established the essential elements of this contract and which, even if it existed, would be unenforceable.**

To support their oral contract claim in response to the District's summary judgment motion, the Schocks were required to submit admissible evidence sufficient to establish a genuine issue of material fact for every essential element of a contract. Because there was no evidence of mutual assent, the trial court properly declined to enforce the oral contract. Even if the alleged oral contract did exist, the contract would be unenforceable because it violates the statute of frauds, because the district administrator who allegedly entered into the agreement lacked the authority to do so, and because the oral contract claim was prohibited by two statute of limitations claims.

**1. The Schocks failed to present admissible evidence to establish the terms of the alleged oral contract sufficient to create a genuine issue of material fact.**

For a contract to exist, there must be “mutual assent” or a “meeting of the minds” on the essential terms of the agreement. *Lietz v. Hansen Law Offices, P.S.C.*, 166 Wn. App. 571, 585, 271 P.3d 899 (2012); *McEachern v. Sherwood & Roberts, Inc.*, 36 Wn. App. 576, 579, 675 P.2d 1266 (1984). The burden of proving a contract is on the party asserting it, and that party must prove each essential fact, including the existence of a meeting of the minds. *Saluteen-Maschersky v. Countrywide Funding Corp.*, 105 Wn. App. 846, 851, 22 P.3d 804 (2001).

Furthermore, to establish the existence of a contract sufficient to defeat summary judgment, a plaintiff must present more than his or her self-serving statements made in an affidavit or declaration. *See, e.g., Meyer v. University of Wash.*, 105 Wn.2d 847, 852, 719 P.2d 98 (1986) (“[i]ssues of material fact cannot be raised by merely claiming contrary facts.”); *Dwinell's Central Neon v. Cosmopolitan Chinook Hotel*, 21 Wn. App. 929, 933, 587 P.2d 191 (1978) (“[a]n affidavit containing bare allegations of fact without any supporting evidence is insufficient to raise a genuine issue of fact for purposes of a motion for summary judgment.”) (citing *Meissner v. Simpson Timber Co.*, 69 Wn.2d 949, 955, 421 P.2d 674 (1966)).

In *Meissner*, for example, the plaintiff alleged by affidavit that the defendant had orally promised to pay the plaintiff royalties. *Meissner*, 69 Wn.2d at 955. The plaintiff's assertion of the oral contract was the only evidence of the contract; no other corroborating evidence existed.

*Meissner*, 69 Wn.2d at 955. The plaintiff argued that his bare allegation was "sufficient to raise a genuine issue of fact as to whether a binding promise was made to him by defendant." *Meissner*, 69 Wn.2d at 955. The Court disagreed, holding:

This, however, is not the law. The same argument was made and rejected in *Reed v. Streib*, 65 Wash.2d 700, 706, 399 P.2d 338, 343 (1965). There, we said: Davis (the nonmoving party on a motion for summary judgment) was not justified in relying upon such bare allegations to carry him to trial. The purpose of the summary judgment rule is to permit the court to pierce such formal allegations of facts in pleadings when it appears that there are no genuine issues. Affidavits enjoy no special immunity and will be 'pierced' under the same circumstances. As we stated in *Lundgren v. Kieren* (64 Wash.2d 672), 393 P.2d 625 (1964): "the court pierces the formal allegations pleaded. Each party must furnish the factual evidence upon which he relies. *The whole purpose of summary judgment procedure would be defeated if a case could be forced to trial by a mere assertion that an issue exists without any showing of evidence.*"

*Meissner*, 69 Wn.2d at 955-56 (emphasis added).

Here, the Schocks acknowledge that they never signed any type of agreement with the District supporting their claims and that they had never seen a written agreement. CP at 70-71, 91, 111. Rather, to prove a meeting of the minds on the necessary elements of a contract, the Schocks rely solely on the Declaration of Oskar Schock, in which he asserts that between 1968 and 1971, Mr. Schock had conversations in which the District's business manager, Toney Shelton, promised that if the Schocks made improvements to the CJT, they would be compensated according to the "appraisal method." CP at 82, 142.

The purported statement attributed to Mr. Shelton, however, does *not* state that the appraisal method will be used or that Mr. Schock would be entitled to possess CJT until he was compensated for the improvements. Rather, as quoted in Appellant’s brief, Mr. Shelton allegedly stated that Mr. Schock would be reimbursed “after [CJT] had been appraised.” App. Br. at 11 (citing CP at 111).

Mr. Schock states that he “interpreted” this to mean that he would be compensated for the value added to CJT and that he “interpreted” the oral agreement “to mean that [he] would be compensated prior to vacating the premises.” Schock Decl, dated Mar. 17, 2014, at ¶ 3 (CP at 82). Mr. Schock’s latter interpretation, that he is entitled to be compensated prior to vacating CJT, is a new assertion: in his previous communications with the District he never made this claim. *See, e.g.* Schock’s letter dated January 15, 1988, CP at 91, and Schock’s letter dated April 6, 1990, CP at 100-102.

Moreover, in his 1988 letter, Mr. Schock stated that the oral agreement gave him the right to be reimbursed for the improvements. CP at 91. Mr. Schock now claims that he has the right to “full compensation” for his improvements. CP at 10. Reimbursement and compensation are not the same. In his 1988 letter, Mr. Schock also stated that the oral contract gave him the “first option to buy” CJT, should it ever be sold. CP at 91. In his Answer, however, Mr. Schock no longer claims that he has an option to buy CJT. CP at 5-11.

And in his 1988 letter setting forth the terms of his oral agreement, Mr. Schock makes no mention of a right to be compensated for the

improvements at some point in the future as a precondition to his leaving the property. CP at 91. Indeed, Mr. Schock never made this assertion until this lawsuit was filed.

Furthermore, in his deposition, Mr. Schock stated that he did not know key terms of the alleged agreement, such as who would pay for the appraisal or how to determine the appraised value of CJT. CP 73-74. While Mr. Schock assumes that the “appraisal method” meant that he would be compensated for the increased value of the CJT property measured before and after his improvement, in his deposition he admitted that he had no idea whether the before and after value should exclude increases in value of the CJT property due to overall increasing property values. CP at 74.

Mr. Schocks’ subjective interpretations and assumptions, however, do not provide evidence of the District’s mutual assent sufficient to constitute a meeting of the minds. *See Kofmehl v. Baseline Lake, LLC*, 167 Wn. App. 677, 695, 275 P.3d 328 (2012), *aff’d*, 177 Wn.2d 584 (2013) (“Whether there is a meeting of the minds is determined by the objective manifestations of the parties.”) Apart from Mr. Schock’s subjective interpretations, there is no evidence that the district ever agreed to pay Mr. Schock for the value allegedly added to CJT by his improvements or that it agreed to compensate him before Mr. Schock had to vacate the premises.

On the contrary, the District has consistently and repeatedly denied the Schocks’ assertion that it agreed to use the “appraisal method” to compensate Mr. Schock for his alleged improvements to CJT prior to the

Schocks being required to vacate CJT. In 1988, for example, the District informed Mr. Schock that “[t]he District does not accept your method of reimbursement based upon the appraised value of the improvements.” CP 49.

Two years later, the District again rejected Mr. Schocks assertion that he was entitled to be compensated based upon the appraisal method:

A review of our records and all of the information you have provided us to date about the alleged arrangement with Mr. Shelton does not substantiate your claim. Furthermore, the records indicate that you have been amply compensated for your labor as well as material which may have been used with District approval for improvements on the property. **Therefore, I am denying your claim for reimbursement based on the increased value to the property.**

Letter from Superintendent Barna to Schock, Mar. 8, 1990 (emphasis added) (CP at 54).

Appellants’ brief often misstates the record in an attempt to make it appear that the district agreed with Mr. Schock’s interpretation of the alleged oral agreement. On page 8 of the brief, for example, the Appellants state:

Soria made it clear to the Board that the terms of the agreement (with Schock) were that “*if the TSD ceases to use the camp, sells it, or no longer requires his services, the District owes him the difference between the assessed value prior to the time he was hired and the current assessed value of the property, due to improvements carried out by him.*”

App. Br. at 8. What counsel for the Appellant misleadingly fails to point out, however, is that District employee Soria’s statement actually begins:

**“It is Mr. Schock’s belief that** if the Tacoma School District ceases to use the camp, . . .” CP at 118 (emphasis added). By ignoring this beginning, the Appellants have improperly made it appear as if the District agreed with Mr. Schock’s interpretation.

And on page 6 of Appellant’s brief, the Shocks state that: “On February 1, 1988, [Mr.] Tanagi explicitly acknowledged ‘the terms of the agreement with Mr. Shelton.’” In reality, Mr. Tanagi simply acknowledged *receipt* of a letter from Mr. Schock where he stated his opinion of the terms of the alleged oral agreement with Mr. Shelton. CP at 92. Contrary to the Appellants’ unsupported assertion, there is no evidence of any District employee, including Mr. Soria or Mr. Tanagi, ever acknowledging the terms of an oral agreement allegedly made with Mr. Shelton.

Appellants also claim that summary judgment should not have been granted because: “Fact disputes exist over how the appraised value of the improvements would be calculated, if there was an option to purchase and when Schock would be paid.” App. Br. at 16. In support of this statement, Appellants cite only to “CP 172.” CP 172 is actually page 7 of the District’s Reply Memorandum in support of its summary judgment motion, a citation that does not support the statement made by the Appellants.

Because there was no evidence of a meeting of the minds, the Shocks have failed to meet their burden of proving every element of contract sufficient to overcome the District’s summary judgment motion.

**2. The alleged statements of Toney Shelton are inadmissible hearsay.**

In addition to Schocks' failure to present admissible evidence as to the existence of the oral agreement, the alleged statements of the District's former business manager, Toney Shelton, who died in 1986, are inadmissible to prove the existence of such a contract because the statements are hearsay. Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). The alleged statements by Mr. Shelton were made out of court more than 40 years ago. The alleged statements were not made by Mr. Shelton while testifying at trial or hearing. The alleged statements are now offered to prove the truth of the matter asserted, namely that there was a meeting of the minds on the terms of an oral agreement between the Schocks and the District regarding the Schocks' rights in CJT. For these reasons, the trial court correctly concluded that these statements are hearsay. RP at 30:23-24.

Appellants' argue, however, that these statements are not hearsay because they are statements by a party opponent under ER 801(d)(2)(iv). App. Br. at 17-18. A statement by the opposing party's employee under ER 801(d)(2) "is admissible against the opposing party only if the out-of-court declarant was acting within the scope of his or her authority in making the statement." K.B. Tegland, 5D Wash. Prac., *Handbook Wash. Evid. ER 801* (2013-14 ed.).

As Professor Tegland has noted:

[T]he proponent must establish the agent's authority to speak for the party, and must show that that the agent was acting within the scope of that authority when making the statement in question. The proponent need not provide direct proof of the agent's authority to speak for the party. The necessary authority may be inferred from the overall nature of the agent's authority to act on the party's behalf. **Statements by public authorities may be admissions if they are authorized by statute.**

K.B. Tegland, 5B Wash. Prac., *Evidence Law and Practice* § 801.48 (5th ed. 2007) (footnotes omitted) (emphasis added). The party seeking to admit this testimony “has the burden of establishing the agent's authority by a preponderance of the evidence.” *Id.*

Without citing to the record, the Schocks baldly assert that Mr. Shelton had “*apparent authority* to make statements on behalf of TSD.” App. Br. at 20.<sup>1</sup> A few pages later, Appellants argue—again without citing to the record—that Shelton “interacted with Schock ‘as if’ he had such authority to enter into contracts concerning TSD property. He clearly did so with TSD’s knowledge and approval.” There is no citation to the record to support the assertion that the District had knowledge of, or consulted to, the alleged oral agreement. Moreover, under Washington law, an agent’s authority to act cannot be established by the conduct of the agent; rather, apparent authority can only be established by the conduct of the principal. K.B. Tegland, 5B Wash. Prac., *Evidence Law and Practice* § 801.48 (5<sup>th</sup> ed. 2007).

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<sup>1</sup> Page 20 of Appellants’ brief does cite to RP at 21:4-5 to support their argument that Mr. Shelton had apparent authority, but this citation is to the oral argument of the Schocks’ counsel, Mr. Alvestad.

Here, the Schocks submitted no evidence establishing that Mr. Shelton, the District's business manager, was acting within his authority when he allegedly entered into the oral agreement granting an ownership interest in CJT, allowing Mr. Schock to be compensated according to the appraisal method, allowing him to occupy and possess CJT until he received this compensation, and granting Mr. Schock an option to buy CJT. Indeed, state law specifically authorizes only the board of directors to convey interests in real property. *See* Section IV.C.4 on page 25, *below*.

Because the Schocks did not meet their burden of establishing that the alleged statements of Mr. Shelton were the statements of a party opponent, the trial court correctly held that these statements were inadmissible as hearsay.

- 3. Even if the oral agreement exists, it is unenforceable because it violates the statute of frauds and because the district's business manager lacks the authority to convey an interest in district property.**
  - a) Because the alleged oral agreement seeks to convey an interest in property, it is prohibited by the statute of frauds.**

Washington's statute of frauds requires that: "Every conveyance of real estate, or any interest therein, and every contract creating or evidencing any encumbrance upon real estate, shall be by deed." RCW 64.04.010. The deed must meet certain statutory requirements: "Every deed shall be in writing, signed by the party bound thereby, and acknowledged by the party

before some person authorized by this act to take acknowledgments of deeds.” RCW 64.04.020.

An agreement that violates the statute of frauds is unenforceable:

Every conveyance of real estate, or any interest therein, and every contract creating or evidencing any encumbrance upon real estate, shall be by deed.” RCW 64.04.010. Every deed “shall be in writing, signed by the party bound thereby, and acknowledged.” RCW 64.04.020. It is the unusually strict but well-settled rule in Washington that to comply with these statutes, real estate subject to a conveyance must be described in sufficient detail that the court is not compelled to resort to extrinsic evidence in order to find out what was in the minds of the contracting parties. ***A purchase and sale agreement that fails to comply with the statute's requirements is unenforceable.***

*See, Kofmehl*, 167 Wn. App. at 689-690 (citations omitted) (emphasis added).

The purpose behind the statute is to prevent fraud arising from uncertainty and impulsive actions:

The purpose of the Statute of Frauds governing transactions in land is to prevent fraud arising from uncertain agreements. Also, the formal writing requirement of the Statute of Frauds helps to create a climate in which parties regard their land agreements as tentative until there is a signed writing. Thus, the real estate statute of frauds serves a cautionary function by stressing the significance of the land conveyance and preventing impulsive action.

D.K. DeWolf et al., 25 Wash. Prac., *Contract Law And Practice* § 3:3 (2d ed. 2000) (citations omitted).

The Schocks in their Answer asserted rights and claims to the CJT land under an oral agreement that would trigger the statute of frauds. The

Schocks, for example, claim that this oral agreement: (1) transfers to them an interest in the CJT property through ownership of improvements affixed to the land, (2) creates a debt from the District to the Schocks to be satisfied out of the land, and (3) gives them an option to purchase the property in the future. (CP at 7-8, 47) By further claiming the right to possess CJT, the Schocks have asserted an interest in the property. *See e.g., Blanc's Cafe v. Corey*, 110 Wash. 242, 244, 188 P. 759 (1920) (“where a party has a valid lease of real estate and the right to take possession of the property under his lease, he has a valid subsisting interest in the real property.”).

Indeed, at oral argument, counsel for the Schocks acknowledged that the alleged oral agreement was essentially a lease:

THE COURT: But if your client won't vacate the property, isn't he essentially claiming an interest in the property? . . . If he's not claiming an interest in the property, why doesn't he leave?

MR. ALVESTAD: The agreement was that he wouldn't have to leave until he is compensated for the – for what he has put into the property.

THE COURT: Doesn't that evince an interest in the property calling into question the Statute of Fraud?

MR. ALVESTAD: As a term of a lease.

THE COURT: Okay. Go ahead.

MR. ALVESTAD: It's, in essence, the right to use some property. **And it, in very loose terms, would be a lease. And he's entitled to be compensated before the lease is terminated. And that's what it is.**

RP at 21:10-22:1.

Because the Schocks are claiming interests in the real property (ownership of improvements and possession of CJT akin to a lease), the statute of frauds applies. *See, e.g., Family Med. Bldg., Inc. v. State, Dep't of Soc. & Health Servs.*, 104 Wn.2d 105, 108, 702 P.2d 459 (1985) (“There is no dispute that an agreement to lease for more than 1 year is within the statute of frauds.”).

The oral agreement by the Schocks is precisely the type of contract that mandates adherence to the statute of frauds. Without a written agreement, the uncertainty and need for extrinsic evidence discussed in *Kofmehl* and *Washington Practice* is unavoidable.

**b) The Schocks repeatedly claimed an interest in real property sufficient to trigger the statute of frauds.**

Confusingly, Appellants’ brief acknowledges that their Answer asserts a “title interest or a ‘compensable property interest’” in CJT, App. Br. at 26 n.2, while simultaneously attempting to disavow any interest in the property that would trigger the statute of frauds.

The Schocks claim that they are seeking only to enforce a contract and not to exercise any interest in the CJT property. App. Br. at 27-28. This attempt at avoiding the statute of frauds is refuted by the record.

The Schocks have repeatedly claimed an interest in CJT that allows them to occupy CJT unless and until they are compensated for their improvements to CJT, according to their alleged oral agreement with the

District. In their pleadings, for example, the Schocks claim at least *nine* times that the alleged oral agreement gives them the right to possess, occupy, and exercise dominion over CJT:

1. A “contractual arrangement with the District . . . provides them with occupancy rights until such time as they are fairly compensated” for their improvements to CJT. CP at 6-7 (Answer at ¶ 3.5);
2. This “contractual relationship” requires that “the District, as a precondition to regaining sole ownership and possession [of CJT], fairly compensate the Schocks for those improvements.” CP at 7 (Answer at ¶ 3.5);
3. The Schocks must be compensated before they will vacate CJT. CP at 7 (Answer at ¶ 3.7);
4. The District lacks the authority to eject the Schocks until the District compensates the Schocks for the improvements. CP at 8 (Answer at ¶ 4.1);
5. The District cannot possess CJT until it compensates the Schocks for the improvements. CP at 8 (Answer at ¶ 4.2);
6. The District does not have superior title to CJT because the Schocks “have superior ownership or a compensable interest to the Schock improvements.” CP at 8 (Answer at ¶ 5.1);
7. The Schocks are entitled to a decree that they have a “superior or compensable interest in the Schock improvements.” CP at 10 (Answer at ¶ 7.1);

8. The Schocks are entitled to a decree that they receive full compensation for their improvements “prior to the termination of their occupancy” in CJT. CP at 10 (Answer at ¶ 7.2);
9. The Schocks have a right to be “compensated prior to vacating the premises.” CP at 82 (Schock Decl. at ¶ 3)

And, in oral argument before the trial court, counsel for the Schocks admitted that the Schocks’ claim that they have the right to possess CJT until they were compensated for the improvements amounted to a leasehold interest in CJT. RP at 21:10-22:1. As the trial court noted, the Schocks refusal to vacate CJT, a refusal that continues to this day, supports the District’s assertion that the Schocks are claiming an interest in CJT sufficient to trigger the statute of frauds. RP at 21:10-15; 21:19-20; 30:15-20.

Indeed, the trial court asked the Schocks a question that gets to the heart of this issue:

THE COURT: But if your client won’t vacate the property, isn’t he essentially claiming an interest in the property? Otherwise, why not vacate and bring an action for quantum meruit, or what have you, independent of staying on the property? If he’s not claiming an interest in the property, why doesn’t he leave?

RP at 21:10-15.

The Schocks never answered this question at oral argument, nor do they answer it in their brief. To this day, the Schocks remain in control of CJT and have refused to leave. As the saying goes, the proof is in the pudding.

- c) **The part-performance doctrine does not remove the oral contract from the statute of frauds because this doctrine requires clear and unequivocal evidence of an oral contract whenever a party seeks specific performance.**

The Schocks also claim that the doctrine of part-performance removes the alleged oral contract from the statute of frauds. App. Br. at 28-33. Under the doctrine of part performance, an agreement to convey an interest in real property which is not in writing may be removed from the statute of frauds and proved without a writing, and specifically enforced, if there is sufficient part performance of the agreement. *Berg v. Ting*, 125 Wn.2d 544, 556, 886 P.2d 564 (1995).

The *Berg* court, however, stressed that whenever specific performance of the agreement is sought, the oral contract must be established by clear and unequivocal evidence: “[W]here specific performance of the agreement is sought, the contract must ‘be proven by evidence that is clear and unequivocal and which leaves no doubt as to the terms, character, and existence of the contract.’” *Berg*, at 556-57.

As the *Berg* court explained, “where specific performance is sought, the party relying on the part performance doctrine must prove by clear and unequivocal evidence the existence and all the terms of the contract.” *Berg*, 125 Wn.2d at 561. This clear and unequivocal evidence of the contract “is *in addition to* establishing that there has been part performance.” *Id.* In *Kruse v. Hemp*, 121 Wn.2d 715, 853 P.2d 1373 (1993), for example, the court declined to address the part performance doctrine because there was insufficient evidence of a contract. *Id.* at 725.

In their discussion of part performance, the Schocks suggest that this doctrine is governed by “the preponderance of the evidence” standard and not the “clear and unequivocal” standard. App. Br. at 31. The Appellants note that the preponderance of the evidence standard was used by the court in *Powers v. Hastings*, 93 Wn.2d 709, 717, 612 P.2d 371 (1980). App. Br. at 31.

In their extensive discussion of the *Powers* case on pages 28-33 of their brief, the Schocks fail to point out a key fact that distinguishes *Powers* from the case at hand. In *Powers*, former tenants were seeking only damages for the breach of an oral lease agreement. After receiving an eviction notice, the tenants left the premises and then sued for damages. *Powers*, 93 Wn.2d at 711. Because the plaintiffs were seeking damages for a breach of an oral contract and not specific performance of the contract, the court did not apply the clear and unequivocal standard. *Powers*, 93 Wn.2d at 717 (“Because legal damages rather than specific performance are sought, less than “clear and unequivocal” evidence suffices.”).

That is not the case here. Unlike the plaintiffs in *Powers*, the Schocks have never vacated the premises. Furthermore, the Schocks are suing for specific performance of their oral agreement. In their Answer, the Schocks assert that are entitled to a “decree” allowing the Schocks to occupy CJT until they receive “full compensation” for their improvements. CP at 10 (Answer at ¶ 7.2). Unlike the plaintiffs in *Powers*, the Schocks did not vacate the premises and then sue for damages.

Because the Schocks are seeking specific performance of their alleged oral agreement with the District, the Schocks must establish every element of this contract with clear and unequivocal evidence. The Schocks fail to meet their burden because they have offered no admissible evidence of a meeting of the minds on any contract terms. Because they did not meet the clear and unequivocal standard necessary to apply the part performance doctrine, the trial court correctly applied the statute of frauds to their claim.

**4. Because only the District's board of directors can transfer interests in real estate, the alleged oral contract is void and unenforceable.**

Under RCW 28A.335.090, only a school board can convey interests in real estate:

The board of directors of each school district shall have exclusive control of all school property, real or personal, belonging to the district; said board shall have power, subject to RCW 28A.335.120, in the name of the district, to convey by deed all the interest of their district in or to any real property of the district which is no longer required for school purposes. Except as otherwise specially provided by law, and RCW 28A.335.120, *the board of directors of each school district may purchase, lease, receive and hold real and personal property in the name of the district, and rent, lease or sell the same*, and all conveyances of real estate made to the district shall vest title in the district.

RCW 28A.335.090(1) (emphasis added). In 1968, this requirement was codified at RCW 28.57.135, which provided: (emphasis added):

**Corporate powers of school district.** A school district shall constitute a body corporate and shall possess all the usual powers of a corporation for public purposes, and in that name and style may sue and be sued, may purchase, hold and sell personal property and real estate, and enter into

such obligations are authorized by law. ***The board of directors of the school district shall have exclusive control of all school buildings and other property, real or personal, owned by the district.***

RCW 28.57.135 (emphasis added).

Because only the school board can enter into an agreement affecting real estate, the statements of a business manager are not binding upon the district. *Cf. Mukilteo Educ. Ass'n v. Mukilteo Sch. Dist. No. 6, Snohomish Cnty.*, 11 Wn. App. 675, 685, 524 P.2d 441 (1974) (“a school district can act only through its board of directors . . . the representations of the school superintendent and his assistant are not binding upon the Board, except as to the possible creation of rights based upon equitable estoppel.”) When an agent acts without authority to bind the governmental agency, the contract is ultra vires and void. *See, e.g., Properties Four, Inc. v. State*, 125 Wn. App. 108, 117, 105 P.3d 416 (2005), as amended (Feb. 8, 2005) (“a state agent cannot bind a governmental agency to a contract that is ultra vires”).

Under RCW 28.57.135, only the District’s Board of Directors could have entered into or authorized the District’s execution of an agreement that (1) transferred to the Schocks an interest in land through ownership of improvements affixed to real estate, (2) created a debt from the District to the Schocks to be satisfied out of land, and (3) granted an option to purchase land in the future. The District has reviewed its records and finds no indication that the District’s Board of Directors took any action approving the alleged oral agreement. CP at 42. Similarly, the Schocks are unable to produce any records or other admissible evidence establishing

Board of Director approval. Lacking the statutorily-required Board approval, the agreement is void and the trial court's dismissal of the Schocks' claims should be affirmed.

**5. The Schocks' failure to comply with two statutes of limitations bars their counterclaims based upon a breach of an oral contract.**

Even assuming the statute of frauds did not bar enforcement of the alleged oral agreement, two different statutes of limitations apply to reach the same result: the three-year statute of limitations governing oral contracts and the 30-day statute of limitations applicable to actions of school district boards of directors and officers.

**a) The statute of limitations for a breach of an oral contracts is three years.**

Under RCW 4.16.040, the following actions must be commenced with three years:

- (1) An action for waste or trespass upon real property;
- (2) An action for taking, detaining, or injuring personal property, including an action for the specific recovery thereof, or for any other injury to the person or rights of another not hereinafter enumerated;
- (3) Except as provided in RCW 4.16.040(2), **an action upon a contract or liability, express or implied, which is not in writing, and does not arise out of any written instrument; . . .**

RCW 4.16.040 (emphasis added).

Enforcing statutes of limitations like the one in RCW 4.16.040 serve important purposes:

We have held that the statute of limitations is not an unconscionable defense; that such statutes are vital to the welfare of society, and are to be favored in the law; that they stimulate to activity, and punish negligence. *Deering v. Holcomb* (Wash.) 67 Pac. 240. Courts do not look with favor on suits for stale demands.

*Liberman v. Gurensky*, 27 Wn. 410, 415, 67 P. 998 (1902).

Here, Mr. Schock first raised the issue of an agreement regarding the compensation for improvements in December 1987. CP at 46. When asked to provide a copy of the alleged agreement, Mr. Schock stated in January 1988 that he did not have a copy, but that the agreement was to use the “real estate appraisal method” to reimburse him for improvements and that he “would have the first option to buy” should CJT ever be for sale. CP at 47.

In a 1988 letter, the District denied that there was an oral contract allowing Schock to be reimbursed according to the appraisal method: “The District does not accept your method of reimbursement based upon the appraised value of the improvements.” Letter from N. Schaefer to Schock, dated April 5, `1988. CP at 49. Two years later, the District again denied Mr. Schock’s claim:

A review of our records and all of the information you have provided us to date about the alleged arrangement with Mr. Shelton does not substantiate your claim. Furthermore, the records indicate that you have been amply compensated for your labor as well as material which may have been used with District approval for improvements on the property. ***Therefore, I am denying your claim for reimbursement based on the increased value to the property.*** If you disagree with this determination, it should be raised with the

Board of Directors within 30 calendar days or the District will consider the matter resolved.

Letter from Superintendent Barna to Schock, dated Mar. 8, 1990. CP at 54 (emphasis added). The District repeated this rejection of Schock's claim in a letter dated May 8, 1990. CP at 59-60.

The District's denials provided the Schocks with the right to seek relief in court for declaratory judgment on the validity and enforceability of the alleged contract. *See* K.B. Tegland, 15 Wash. Prac., *Civil Procedure* § 42:30 (2d ed. 2009) ("A declaratory judgment action is an appropriate vehicle for determining rights with respect to real property.") Once the Schocks had the right to seek relief in court, their cause of action accrued. *See, e.g., Ford v. Int'l Harvester Co.*, 399 F.2d 749, 751 (9th Cir. 1968) (Applying Washington law and stating that in general "an action for breach of contract accrues at the date of breach" and "a cause of action accrues when the holder thereof first becomes entitled to sue"); *U.S. Oil & Ref. Co. v. Department of Ecology*, 96 Wn.2d 85, 91, 633 P.2d 1329 (1981) ("A cause of action accrues when a party has a right to apply to a court for relief."); *Rice v. Dow Chem. Co.*, 124 Wn.2d 205, 211, 875 P.2d 1213 (1994) ("The statute of limitation time period generally runs from the time an action has accrued.").

In *Ford*, for example, the Ninth Circuit applied Washington law to determine when the statute of limitations for a breach of an oral agreement accrued. *Ford*, 399 F.2d at 751. Applying Washington law, the Ninth Circuit held that the statute of limitations began to run when the plaintiff

knew that the defendant did not intend to honor an oral agreement. *Id.* at 752. Because more than three years had passed since the plaintiff knew that the defendant did not intend to honor the oral agreement, the court held that the suit was time-barred. *Id.* Recently, the Court of Appeals cited *Ford* when it held that a breach of a written contract was time-barred because the plaintiff, after learning of the breach, waited more than six years to file suit. *Schreiner Farms, Inc. v. Am. Tower, Inc.*, 173 Wn. App. 154, 161, 293 P.3d 407 (2013).

Here, the Schocks knew in 1990 that the District would not compensate them for their improvements to CJT. The statute of limitations began running at that time, and expired at the latest in 1993. *See, e.g., Ford, Schreiner Farms.*

The Schocks, however, contend that the statute of limitations for their breach of an oral contract claim did not begin to run until 2012, when the District notified the Schocks that they had to vacate CJT. In support, the Schocks cite *Schwindt v. Commonwealth Ins. Co.*, 140 Wn.2d 348, 997 P.2d 353 (2000), for the proposition that a contract claim accrues only when there is a breach of contract. *Schwindt*, however, dealt with breach of an express insurance contract which all parties acknowledged was an enforceable agreement. That is not the case at hand. In addition, the *Schwindt* court held that the statute of limitations began to run when the insurer denied coverage. *Id.* at 353 (“the statute of limitations began to run when Commonwealth wrongfully denied coverage.”)

Here, the District has never acknowledged an enforceable contract. Furthermore, the District *denied* Mr. Schock's claim to be reimbursed according to the appraisal method in 1990. In her March 1990 letter to Mr. Schock, Superintendent Lillian Barna wrote: "I am denying your claim for reimbursement based upon the increased value to the property." CP at 54. Thus, under *Schwindt*, the statute of limitations for the Schocks' oral contract claim began to run in March 1990. The claim is time-barred.

**b) Decisions of school boards and officers are subject to the 30-day statute of limitations found in RCW 28A.645.010.**

There is a second statute of limitations, one that specifically governs decisions of school boards and officers, that is found in RCW 28A.645.010. This statute states that:

Any person, or persons, either severally or collectively, aggrieved by any decision or order of any school official or board, within thirty days after the rendition of such decision or order, or of the failure to act upon the same when properly presented, may appeal the same to the superior court of the county in which the school district or part thereof is situated, by filing with the secretary of the school board if the appeal is from board action or failure to act, otherwise with the proper school official, and filing with the clerk of the superior court, a notice of appeal which shall set forth in a clear and concise manner the errors complained of.

RCW 28A.645.010, formerly codified at RCW 28A.88.010. The two codifications are identical. *Derrey v. Toppenish School Dist. No. 202*, 69 Wn. App. 610, 612 n.1, 849 P.2d 699 (1993)).

The thirty-day appeal period in RCW 28A.645.010 is a statute of limitations. *Haynes v. Seattle School District No. 1*, 111 Wn. 2d 250, 758 P.2d 7 (1988), *cert. denied*, 489 U.S. 1015 (1989); *Schmidtke v. Tacoma School District No. 10*, 69 Wn. App. 174, 178-79, 848 P.2d 203 (1993) (dismissing claims against school district because plaintiff failed to file her complaint within the thirty-day statute of limitation period of RCW 28A.645.010). As the *Haynes* court stated:

[W]e hold that the clear 30-day statutory limitation imposed by the State Legislature . . . on the time within which an appeal must be taken from a school board decision means what it says, and appeals taken after that time limit has expired are not timely.

*Haynes*, 111 Wn.2d at 251. The *Haynes* court also held that this 30-day period applies to acts of a school board, regardless of whether the acts are judicial or nonjudicial, and applied the 30-day period to a contract claim denied by a school board. *Id.* at 254-55. Like the statute of limitations governing oral contracts, the time period for challenging decisions of the school board and the District's officers has long passed.

**c) The Appellants' argument that the statute of limitations does not bar their oral contract claim is not supported by Washington law or the facts of this case.**

The Schocks argue that their oral agreement claim is not barred by any statute of limitations because the District "reopened" this claim in 1990. App. Br. at 36. As discussed below, this argument is without merit.

In April 1988, March 1990, and May 1990, the District denied Mr. Schock's claim that he was entitled to be compensated for improvements to CJT according to the appraisal method. In a July 31, 1990 letter to Mr. Schock, Superintendent Barna mentioned Mr. Schock's prior reference to an agreement with the District. Superintendent Barna then stated:

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 that 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.

Superintendent Barna's letter, dated July 31, 1990. CP at 61.

The Schocks' claim that this letter "reopened" the breach of contract claim. App. Br. at 36. According to the Appellants, this letter constituted a "new promise" to pay Mr. Schock and thereby satisfied the requirements of RCW 4.16.280. App. Br. at 37.

This argument fails, however, because Superintendent Barna's letter did not acknowledge a debt to Mr. Schock, nor did it obligate the District to pay Mr. Schock.

Under RCW 4.16.280, a claim to recover a debt or contractual obligation barred by the statute of limitations may be revived if the debtor acknowledges the debt in writing:

No acknowledgment or promise shall be sufficient evidence of a new or continuing contract whereby to take the case out of the operation of this chapter, unless it is contained in

some writing signed by the party to be charged thereby; but this section shall not alter the effect of any payment of principal or interest.

RCW 4.16.280.

The claim can be revived after the applicable statute of limitations has run only when the obligor acknowledges the obligation in writing, signs the writing and sends it to the person owed. There also must be a definite expressed promise on the part of the debtor to pay the debt, considering all of the surrounding circumstances. *Tragopan Properties*, 164 Wn. App. 268, 277-78, 263 P.3d 613 (2011) (citing *Griffin v. Lear*, 123 Wn. 199, 199-201, 212 P. 271 (1923)); *Lieberman*, 27 Wn. at 416. “A new promise must be clear, distinct, and unequivocal, as well as certain and unambiguous.” *Tucker v. Guerrier*, 170 Wn. 165, 168, 15 P.2d 936 (1932). The debtor’s intent to pay must be so clear and unequivocal from the writing that the intent to pay is naturally inferred or is necessarily implied. *Montreal v. Guse*, 51 Wn. 365, 371, 98 P. 1127 (1909). A mere expression of an intent to pay is insufficient. *Coe v. Rosene*, 66 Wn. 73, 75, 118 P. 881 (1911).

Here, the District never acknowledged any obligation allegedly owed to Schock in a manner sufficient to revive Schock’s untimely counterclaim under the statute of limitations. Neither Superintendent Barna’s letter, nor any communication from the District, acknowledges the debt nor the District’s obligation to pay Schock.

Because RCW 4.16.280 does not apply, the applicable statute of limitations barred Schock's counterclaim more than 20 years ago.

**D. Appellants' arguments that were never pled and that were raised for the first time in their summary judgment response brief should be rejected by this Court.**

In their brief in response to the District's summary judgment motion, the Schocks raised five new claims that they had never raised before. CP at 152-59. These new claims were the right to recover under RCW 7.28.160 (CP at 152); quantum meruit (CP at 155); unjust enrichment (CP at 157); promissory estoppel (CP at 158); and equitable estoppel (CP at 159). In their appellate brief, the Schocks drop their equitable estoppel claim, but again assert the four remaining claims even though they have never been pled. App. Br. at 39-42.

Like the trial court below, this Court should deny these newly asserted claims.

**1. Unjust enrichment, quantum meruit, and recovery under RCW 7.28.160 are compulsory counterclaims that must be pled.**

Under the civil rules, a party must raise compulsory counterclaims in its Answer. CR 13(a). A compulsory counterclaim is one that “arises out of the transaction or occurrence that is the subject matter of the opposing party's claim.” *Id.* Under CR 13(a), “a party must assert its compulsory counterclaims or those claims are forever barred.” *Atlas Supply, Inc. v. Realm, Inc.*, 170 Wn. App. 234, 237-38, 287 P.3d 606 (2012). Whether a party must include the compulsory counterclaim in its Answer depends upon when the counterclaim matured. *Lane v. Skamania Cnty.*, 164 Wn. App. 490, 499, 265 P.3d 156, 161 (2011) (“The relevant inquiry

under . . . CR 13(a) . . . is whether the later-asserted counterclaim matured before or after the answer was filed.”)

Here, the Schocks’ claims for quantum meruit, unjust enrichment and recovery under RCW 7.28.160 are compulsory because they all arise out of “the transaction or occurrence that is the subject matter of” this lawsuit. *See* CR 13(a). In addition, they all matured several years before the District filed this suit. Thus, the Schocks were required to plead these compulsory counterclaims in their Answer.

On the day before the summary judgment hearing, the Schocks filed a motion to amend their answer and counterclaims. *See* Defendants’ Motion to Amend Answer to Complaint and Counterclaim, filed March 27, 2014. CP at 182-91.<sup>2</sup> The Schocks filed this motion to amend approximately 11 months after the District filed suit and approximately 9 months after they filed their initial answer. CP at 1, 5.

The trial court has discretion to deny a party’s motion to amend their pleadings when amending the pleadings would prejudice the opposing party. *Lane.*, 164 Wn. App. at 502. In determining prejudice, “[u]ndue delay and unfair surprise are factors” that the appellate court may consider. *Id.* In *Lane*, for example, the court held that the trial court did not abuse its

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<sup>2</sup> The amended Answer attached to Schocks’ motion, raises several affirmative defenses, including “estoppel” and quantum meruit. CP at 190. The amended Answer, however, does not mention recovery under RCW 7.28.160, unjust enrichment, promissory estoppel or equitable estoppel. CP at 190.

discretion in denying a party's request to supplement their pleadings in 2010 to assert a claim that arose and matured in 2006. *Id.*

Here, the trial court did not abuse its discretion in refusing to consider the Schocks' last minute attempt to amend their pleadings to allow the Schocks to argue these new claims on the eve of the District's summary judgment motion. For this reason, the Court should affirm the trial court's rejection of these claims.

**2. Promissory estoppel is an affirmative defense barred under CR 8(c).**

Similarly, the Schocks' new claim based on promissory estoppel is barred because it is an affirmative defense that was only raised in response to the District's summary judgment motion. Estoppel is expressly identified as an affirmative defense that must be pled in an answer: CR 8(c):

**(c) Affirmative Defenses.** In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, *estoppel*, failure of consideration, fault of a nonparty, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitation, waiver, and any other matter constituting an avoidance or affirmative defense.

CR 8(c). In general, affirmative defenses that are not properly pled are deemed waived. *Harting v. Barton*, 101 Wn. App. 954, 962, 6 P.3d 91 (2000).

The Schocks' Answer does not mention estoppel or promissory estoppel as an affirmative defense. Under CR 8(c), the Schocks' claims based on estoppel and promissory estoppel should be barred.

In addition, the following sections discuss other grounds for dismissing these claims.

**3. The Schocks have failed to meet the requirements for applying RCW 7.28.160.**

One of the new compulsory counterclaims that the Schocks failed to plead is their claim that RCW 7.28.160 supports their right to be reimbursed for improvements to CJT. App. Br. at 39. This statute provides:

In an action for the recovery of real property upon which permanent improvements have been made or general or special taxes or local assessments have been paid by a defendant, or those under whom he or she claims, **holding in good faith under color or claim of title adversely to the claim of plaintiff**, the value of such improvements and the amount of such taxes or assessments with interest thereon from date of payment must be allowed as a counterclaim to the defendant.

RCW 7.28.160 (emphasis added).

In addition to the Schocks' failure to plead this statute in their Answer, this statute does not apply because the Schocks cannot establish that they hold the permanent improvements "in good faith under color or claim of title adversely to the claim of plaintiff."

First, as a tenant at will, the Schocks have no right to the permanent improvements unless there is a separate agreement to the contrary. W.B. Stoebuck, J.W. Weaver, 17 Wash. Prac., *Real Estate* § 6.41 (2d ed. 2004) ("Unless the parties agree the tenant may remove them, . . . buildings and other permanent improvements the tenant adds to the premises become

part of the leased land when annexed and must be left at the end of the leasehold.”)

Here, there is no separate agreement granting ownership of the improvements to the Schock. While the Schocks have argued that they have a “contractual arrangement” with the District for their ownership of the improvements, this argument fails because there is no evidence of a “meeting of a minds” with the District necessary to establish the essential terms of a contract. *See* Section IV.C.1 on page 9 above.

In addition, the phrase “color of title” is a term of art referring to a *written* document which purports to convey “good title, but that, for some reason that does not appear on its face, did not convey title.” W.B. Stoebuck, J.W. Weaver, 17 Wash. Prac., *Real Estate* § 8.20 (2d ed. 2004). Here, there is no written document.

Finally, because there is no oral contract allowing the Schocks to hold CJT, they are not holding CJT “in good faith under color or claim of title adversely to the claim of plaintiff,” as required by RCW 7.28.160. *See Payn v. Hoge*, 21 Wn.2d 32, 46, 149 P.2d 939 (1944). The *Payn* case is very similar to the case at hand. Like the Schocks, the tenants in *Payn* were caretakers who claimed that an oral contract gave them the right to possess the real property. *Id.* at 34. When the owner of the property asked the caretakers to vacate the property, the caretakers refused and instead sued for specific performance of an oral contract. *Id.* at 38. Like the Schocks, the tenants in *Payn* even argued that part performance of their caretaking duties removed their oral contract from the statute of frauds. *Payn*, 21 Wn.2d at

39. The *Payn* court rejected that argument because the caretakers could not establish the existence of an oral contract with “the clear and unequivocal proof, leaving no doubt as to the character, terms, and existence of the contract,” *Id.* at 39, which would be necessary to remove it from the statute of frauds. Because the caretakers could not establish the oral contract with sufficient proof, the *Payn* court rejected the caretakers’ oral contract claim. *Id.* at 45.

Like the Schocks, the caretaker tenants in *Payn* asserted that they had a statutory right to recover the value of their improvements under the predecessor to RCW 7.28.160, Rem. Rev. § 797 (P.C. § 7523), a statute that is materially identical to the current statute.<sup>3</sup> The *Payn* court rejected the caretakers’ argument because the caretakers possession of the property was merely permissive and not adverse to the owners of the property:

The appellants did not establish the alleged oral contract; on the contrary, the trial court held that appellants' occupancy and use of the property were merely permissive and at the sufferance of the respondent. Hence they were not holding the property ‘in good faith under color or claim of title *adversely to the claim of plaintiff.*’ (Italics ours.)

*Payn*, 21 Wn.2d at 46.

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<sup>3</sup> The *Payn* court quoted the relevant portions of Rem. Rev. § 797:

‘In an action for the recovery of real property upon which permanent improvements have been made \* \* \* by a defendant \* \* \* holding in good faith under color or claim of title adversely to the claim of plaintiff, the value of such improvements \* \* \* must be allowed as a counterclaim to the defendant.’

*Payn*, 21 Wn.2d at 46. This quoted portion is identical to RCW 7.28.160.

Like the court in *Payn*, this Court should decline to apply RCW 7.28.160 because the Schocks have failed to satisfy the requirements of the statute.

**4. The unjust enrichment and quantum meruit claims are barred by statute of limitations.**

Setting aside Schocks' failure to plead unjust enrichment and quantum meruit, both claims are barred by the statute of limitations. Unjust enrichment and quantum meruit are claims based upon implied contracts. The statute of limitations for an implied oral contract is three years. RCW 4.16.080(3). The statute of limitations began to run when the Schocks had the right to seek relief in court following the District's 1990 denials of Schocks' claims. *See, U.S. Oil & Ref. Co.*, 96 Wn.2d at 91 ("A cause of action accrues when a party has a right to apply to a court for relief.") The statute of limitations began running at that time, and expired at the latest in 1993. Because the claims for unjust enrichment and quantum meruit are time barred, the trial court properly declined to apply them.

**5. Promissory estoppel does not apply because there is no admissible evidence that the District ever made a promise to compensate the Schocks based on the appraisal method, or grant the Schocks an ownership interest or possessory right in CJT.**

Schocks last new claim is based upon promissory estoppel. App. Br. at 39. Promissory estoppel has five elements:

(1) a promise, (2) that promisor should reasonably expect to cause the promisee to change his position, and (3) actually causes the promisee to change position, (4) justifiably

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

*McCormick v. Lake Wash. Sch. Dist.*, 99 Wn. App. 107, 117, 992 P.2d 511 (1999) (citation omitted).

“The sine qua non of promissory estoppel is the existence of a promise.” *Jones v. Best*, 134 Wn.2d 232, 240, 950 P.2d 1 (1998). A “promise” under Washington law on promissory estoppel is “a ‘manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made.’” *Havens v. C & D Plastics, Inc.*, 124 Wn.2d 158, 172, 876 P.2d 435 (1994). Here, the promissory estoppel argument fails because there is no admissible evidence that the District ever made a promise to compensate the Schocks based on the appraisal method, grant the Schocks an ownership interest in Camp Taylor, or a possessory right until compensated. The only evidence of such a promise is the uncorroborated and inadmissible hearsay testimony of Mr. Schock. Without that hearsay evidence, there is no proof that the District made the requisite promise necessary for a promissory estoppel claim.

Washington courts also hold that “[t]his promise element is not satisfied if the promise is made by an unauthorized agent. *McCormick*, 99 Wn. App. at 118 (citing *King v. Riveland*, 125 Wn.2d 500, 506, 886 P.2d 160 (1994)). In *McCormick*, the school official who allegedly “promised” plaintiff a permanent job with the school district lacked the proper authority to bind the district because that function is statutorily reserved for the

district's board. *McCormick*, 99 Wn. App. at 118. Thus, the court held promissory estoppel inapplicable. *Id.*

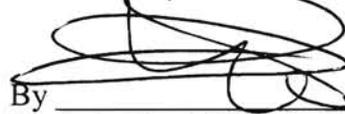
Here, it is undisputed that Toney Shelton lacked the statutory authority to make the contractual commitments or promises that he allegedly made to Mr. Schock. Only the District's Board of Directors could enter into such an agreement or make such a commitment to the Schocks. Given the lack of admissible evidence of a promise and the lack of statutory authority in Toney Shelton, there is no basis for the Schocks' promissory estoppel claim.

#### V. CONCLUSION

For the above reasons, the District requests that the Court affirm the summary judgment order of the trial court.

RESPECTFULLY SUBMITTED this 4<sup>th</sup> day of September, 2014.

VANDEBERG JOHNSON &  
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By \_\_\_\_\_  
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## CERTIFICATE OF SERVICE

The undersigned makes the following declaration under penalty of perjury as permitted by RCW 9A.72.085.

I am a legal assistant for the firm of Vandenberg Johnson & Gandara, LLP. On the 4<sup>th</sup> day of September, 2014, in the manner indicated below, I caused a copy of:

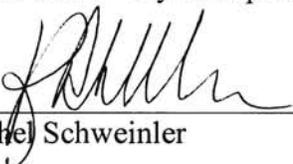
### BRIEF OF RESPONDENT

to be served, via Legal Messenger, on Counsel for the Appellants:

L. Paul Alvestad  
GORDON & ALVESTAD, PLLC  
7525 Pioneer Way, Ste. 101  
Gig Harbor, WA 98335

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

Dated this 4<sup>th</sup> day of September, 2014.

  
\_\_\_\_\_  
Rachel Schweinler