Supreme Court No. _____
Court of Appeals No. 75632-0-I

# Supreme Court of the State of Washington

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Patrick Cuzdey,

Appellant,

v.

Patricia Landes, et al.,

Respondents.

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## Petition for Review

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## Statutes/Rules

## 1. Identity of Petitioner

Patrick Cuzdey, Plaintiff in the trial court and Appellant in the Court of Appeals, asks this Court to accept review of the Court of Appeals decision terminating review, specified below.

## 2. Court of Appeals Decision

*Cuzdey v. Landes*, No. 75632-0-I (April 3, 2017). A copy of the decision is included in the Appendix at pages 1-12.

## 3. Issues Presented for Review

1. Under the "part performance" exception to the statute of frauds, an oral agreement to convey real property is valid where consideration of three factors favors a finding that the oral contract was actually performed, at least in part: 1) delivery and actual, exclusive possession by the buyer; 2) payment of consideration; and 3) the buyer making permanent improvements on the land. Cuzdey presented evidence of all three. Did the trial court err in dismissing Cuzdey's claims despite this genuine issue of material fact?

The Court of Appeals was presented with many other issues to review. Br. of App. at 2. The court affirmed the trial court's dismissal of Cuzdey's claim to the real property solely on the statute of frauds/part performance issue. *See, e.g.,* App 1. Cuzdey asks this Court to reverse that portion of the Court of

Appeals decision and remand to that court for consideration of the remaining issues relating to Cuzdey's claim to the real property.

## 4. Statement of the Case

Patrick Cuzdey entered into an oral agreement with his in-laws (Benny and Patricia Landes) to purchase from them a five-acre parcel of land and a mobile home to live in with his wife (Landes' daughter, Karla Wallen[1]) and their children. Cuzdey immediately moved in and began improving the land. Over the next 12 years, Cuzdey paid off the agreed purchase price through a combination of cash payments and labor on Landes' other property.

The family members agreed that Landes would retain paper title to the property, to use as collateral to finance their own mobile home, which was installed on the property to allow Landes to be closer to the family. These informal arrangements worked fine for many years, until Wallen divorced Cuzdey in 2014. Suddenly, Cuzdey was an outsider. Landes refused to acknowledge any obligations to Cuzdey and tried to evict him. In order to protect his interests, Cuzdey filed this quiet title action.

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[1] Ms. Wallen was born Karla Landes. She was known as Karla Cuzdey while married to Patrick Cuzdey. She has since remarried and is known as Karla Wallen. To avoid confusion, this petition will refer to her throughout by her current name.

### 4.1 Cuzdey entered into an oral contract to purchase real property from Landes, took possession, made payment, and built improvements.

Landes purchased the real property in 1983 for $9,000 or $10,000. CP 162, 429-35. In 1984, Cuzdey and Landes agreed that Landes would sell the real property to Cuzdey for $10,000, which Cuzdey would repay through a combination of cash payments and labor performed on other property owned by Landes. CP 162-64, 190, 192. Cuzdey cleared trees from the property, moved a mobile home onto the property, and installed a well, power, and septic system. CP 163, 189-90.

Over the next 13 years, Cuzdey made other improvements to the property for his own benefit, including clearing and re-grading portions of the property; expanding the mobile home; and building several large outbuildings (a 1,200 square foot barn, a 2,480 square foot shop for Cuzdey's business, and a 950 square foot utility building). CP 164, 192. Cuzdey had exclusive control of the property for those 13 years. CP 201.

By 1997, Cuzdey had paid off the purchase price of the real property, through a combination of cash payments and labor, including extensive work on Landes' home in town; repairing and rebuilding Landes' vehicles, motor homes, and equipment; and performing repairs for Landes' friends. CP 192-93.

Cuzdey never expected to receive paper title to the property right away. CP 197. Landes asked Cuzdey on multiple occasions to allow Landes to stay on title in order to use the land as collateral for loans or purchases. *Id.* For example, in 1997, Landes purchased a Goldenwest mobile home, which Cuzdey agreed could be located on a portion of the property, for Landes to live out the rest of their days. CP 163, 199-200. After Benny Landes' death in 2001, Patricia Landes refinanced. CP 148, 923-46. Cuzdey agreed to these arrangements, relying on Landes' promises that they would transfer title eventually. CP 197.

Since 1997, Landes and Cuzdey have lived on the property in their respective mobile homes. Neither charged rent from the other. *See* CP 195, 200. All parties were, apparently, satisfied with their unwritten arrangements and trusted that they could rely on family to be true to their word.

### 4.2 Immediately after Cuzdey's divorce from Landes' daughter, Landes claimed ownership and sought to evict Cuzdey from the property.

Everything changed in 2014, when Wallen petitioned for divorce from Cuzdey. *See* CP 954-57. The divorce was final in May 2014. CP 152-54. The very next month, Landes served Cuzdey a 20-day notice to terminate tenancy. CP 155.

Prior to the divorce, Patricia Landes had always acknowledged Cuzdey's rights to the land. CP 167, 197. The

initiation of the eviction process immediately after the divorce in 2014 was the first notice to Cuzdey that Landes was claiming full ownership. CP 197. In order to defend his property rights, Cuzdey filed this quiet title action. CP 1-5.

### 4.3 The trial court dismissed Cuzdey's claims on summary judgment.

Landes filed a motion for summary judgment seeking dismissal of Cuzdey's claims and an award of attorney fees under CR 11 or RCW 4.84.185. CP 10, 19-20. Landes argued, among other things, that Cuzdey's claim to the land was barred by the statute of frauds. CP 17-18. Landes later filed an "amended" motion and a "second amended" motion, both of which made the statute of frauds argument, among others. CP 96-97, 410-11. In response, Cuzdey argued, among other things, that he had presented evidence of the elements of an oral contract and the three factors for establishing part performance as an exception to the statute of frauds. CP 225-26.

The trial court held that Cuzdey's evidence failed to raise a defense to the Statute of Frauds. RP 64-65.[2] The trial court excluded much of Cuzdey's evidence under the Deadman's Statute. *Id.* The trial court alternatively reasoned that it could

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[2] Except as otherwise noted, all citations to "RP" refer to the Verbatim Report of Proceedings transcribed by Pamela R. Jones, which combined the hearings of April 24, May 15, and June 19, 2015.

have dismissed Cuzdey's claims on the basis of statute of limitations, laches, or estoppel. RP 65.

In a subsequent hearing, the trial court held that Cuzdey's action was frivolous under RCW 4.84.185. RP, Aug. 7, 2015, at 22. The trial court awarded $36,000 in attorney fees. RP, Aug. 7, 2015, at 25; CP 382-83. Cuzdey appealed.

### 4.4 The Court of Appeals affirmed dismissal on the basis of the statute of frauds.

On appeal, Cuzdey argued, among other things, that under the doctrine of part performance, he had presented sufficient evidence to remove the case from the statute of frauds and create genuine issues of material fact, precluding summary judgment. Br. of App. at 18-19, 21-22.

The Court of Appeals affirmed the trial court's dismissal of Cuzdey's claim to the land on the basis of the statute of frauds. App 1. The court noted that an oral agreement to convey real property can be enforced if there is sufficient performance of the agreement. App 5. The court noted that such a case is strongest when all three factors of part performance are present: 1) delivery and actual, exclusive possession by the buyer; 2) payment of consideration; and 3) the buyer making permanent improvements referable to the contract. App 5, 8.

The court then added a new requirement, holding that a party seeking to benefit from the doctrine of part performance

must also prove thirteen "material terms to a real estate contract." App 6-7. The Court held that Cuzdey had only provided evidence of three. App 7.

As an alternative, the court also held that Cuzdey failed to demonstrate two of the three traditional factors. App 8-9. The court reasoned that Cuzdey's possession was not exclusive because Cuzdey lived his first 13 years on the property with his wife, who happened to be Landes' adult daughter. App 8. The Court also reasoned that Cuzdey did not make improvements "referable to the contract," because the additional buildings Cuzdey constructed were not "a condition of, or referred to, in the contract." App 8-9.

The court reversed the trial court decision in regards to ownership of the mobile home. App 9-10. The court also reversed the trial court's award of attorney's fees, finding that Cuzdey's quiet title action was not frivolous. App 10-11. The court did not address any of the parties' other issues or arguments regarding the land. App 9.

## 5. Argument

A petition for review should be accepted when the decision of the Court of Appeals is in conflict with a decision of this Court. RAP 13.4(b)(1).

The decision of the Court of Appeals in this case is in conflict with prior decisions of this Court relating to the doctrine of part performance as an exception to the statute of frauds and to the material terms of a real estate contract. *See, e.g., Kruse v. Hemp*, 121 Wn.2d 715, 853 P.2d 1373 (1993); *Powers v. Hastings*, 93 Wn.2d 709, 716, 612 P.2d 371 (1980); *Miller v. McCamish*, 78 Wn.2d 821, 479 P.2d 919 (1971); *Hubbell v. Ward*, 40 Wn.2d 779, 246 P.2d 468 (1952).

This petition will first provide some background on the doctrine of part performance. Second, it will show that, contrary to the decision of the Court of Appeals, prior decisions of this Court do not require proof of the thirteen material terms set forth in *Hubbell v. Ward*. Third, it will show that the Court of Appeals' interpretation of the three part performance factors is in conflict with prior cases.

### 5.1 The doctrine of equitable estoppel by reason of part performance as an exception to the statute of frauds.

The statute of frauds, which requires all conveyances of real property to be in writing, exists to prevent the fraud that

could easily result from the uncertainty inherent in oral agreements. *See Miller*, 78 Wn.2d at 828-29. However, because strict application of the statute could sometimes lead to inequitable results, the courts developed the doctrine of part performance as an exception:

> From earliest times the English courts of chancery exhibited a willingness, and have proclaimed and granted, suitable relief in those instances where strict application of the statute of frauds, resulting in total avoidance of the parties' oral agreement, would produce an inequitable result. Thus, courts have long granted equitable relief ... where sufficient showing or proof of part performance by the parties to the oral agreement warrants the granting of such relief.

*Id.* at 825.

Courts have been willing to grant relief from the statute of frauds in appropriate cases in order to prevent the statute from failing in its purpose:

> The purpose and intent of the statute of frauds is to prevent fraud, and not to aid in its perpetration... The courts will endeavor in every proper way to prevent the use of the statute of frauds as an instrument of fraud or as a shield for a dishonest and unscrupulous person... The courts do not tolerate the use of the statute of frauds to enable one to take advantage of his own wrong.

*Id.* at 825-26.

To prevent such inequitable results, the courts of equity developed "the doctrine of equitable estoppel by reason of part performance," to protect "innocent parties who have been induced or permitted to change their position, in reliance upon oral agreements." *Mobley v. Harkins*, 14 Wn.2d 276, 283-84, 128 P.2d 289 (1942). The doctrine "operates to estop one party from denying the validity of an agreement or conveyance which, if not sustained as valid, would put another party in a materially worse position by reason of having acted on the faith of the first party's attitude." *Id.* at 285-86. In other words, the courts will not allow the seller to deny the contract after having allowed the buyer to act in reliance on the contract—taking possession, making payment, and building improvements for the buyer's own benefit.

### 5.2 Contrary to the decision of the Court of Appeals, prior decisions of this Court do not require proof of the thirteen material terms set forth in *Hubbell v. Ward* as a prerequisite to part performance.

The Court of Appeals held that the doctrine of part performance did not apply because Cuzdey did not prove the thirteen material terms of a real estate installment contract set forth in *Hubbell v. Ward*. App 6-7. In doing so, the Court of Appeals has created a new requirement in conflict with prior decisions of this Court.

As a part of the part performance analysis, a court must first determine whether there is sufficient evidence of the terms of the contract to enable the court to grant the requested relief. *Powers v. Hastings*, 93 Wn.2d 709, 716, 612 P.2d 371 (1980). But this Court has never required proof of the thirteen *Hubbell* terms as a prerequisite to applying the doctrine of part performance.

The *Hubbell* decision itself did not involve the doctrine of part performance. *See Hubbell*, 40 Wn.2d 779. In *Hubbell*, the prospective buyers and seller of an apartment building entered into an earnest-money agreement that contemplated a sale for $29,000 with payment terms to be set forth in a future real estate contract. *Id.* at 780. When the seller refused to close, the buyers sued for specific performance, seeking to compel the seller to enter into the contemplated contract. *Id.* This Court held that the seller could not be compelled to enter into a new real estate contract because the parties had not agreed on what the terms of that contract would be, including a list of thirteen terms that would be material to that specific situation. *Id.* at 782-84. However, the Court also held that the sellers had the option under the earnest-money agreement to buy the land outright for cash payment in full. *Id.* at 788. Without requiring any of the thirteen terms, the Court ordered specific performance of the cash purchase. *Id.* at 788-89.

In *Kruse v. Hemp*, 121 Wn.2d 715, 853 P.2d 1373 (1993), this Court recognized the distinction drawn in *Hubbell*. The thirteen terms were required before a court could order parties to enter into a real estate installment contract, but an immediate cash sale could be ordered without those terms. *Kruse*, 121 Wn.2d at 722 n. 1. Addressing the doctrine of part performance, the *Kruse* court held that part performance could not be used to establish terms that were not part of the oral agreement. *Id.* at 725.

This Court's decision in *Sea-Van Invs. Assocs. v. Hamilton*, 125 Wn.2d 120, 881 P.2d 1035 (1994), on which the Court of Appeals relied, does not support its decision. Like *Kruse*, *Sea-Van* involved an incomplete contract. *Sea-Van*, 125 Wn.2d at 123-24. Because there was no meeting of the minds, the court could not order specific performance. *Id.* at 127. *Sea-Van* did not involve the doctrine of part performance.

None of this Court's decisions in part performance cases have ever required proof of the thirteen *Hubbell* terms. Although the *Miller* court noted that the evidence must provide certainty as to the terms of the oral contract, *Miller*, 78 Wn.2d at 829, the court did not require proof of the thirteen material terms required here by the Court of Appeals. *See Id.* at 822-23. In *Miller*, the evidence demonstrated five material terms relating to possession, payment, and dispute resolution. *Id.* None of the

terms match the *Hubbell* list of thirteen. The court found that part performance removed the oral contract from the statute of frauds and granted the requested relief. *Id.* at 830-31.

The *Powers* court also required certainty of terms as part of the part performance analysis. *Powers*, 93 Wn.2d at 713-17. But nowhere in the court's analysis did it require the thirteen *Hubbell* terms to be proven. *See Id.* To the contrary, the *Powers* court was satisfied that the three terms proven—timing of lease and option; payment amounts; and responsibility for taxes and insurance—"leaves no doubt as to the relationship intended by the parties in their oral agreement." *Id.* at 714-15. The court held that part performance applied. *Id.* at 722.

In requiring that Cuzdey prove the thirteen *Hubbell* terms, the Court of Appeals decision conflicts with prior decisions of this Court. This Court has never required proof of the thirteen terms as a prerequisite to applying the doctrine of part performance. The thirteen terms do not even apply to the situation presented in Cuzdey's case.

Cuzdey did not need to prove any of the thirteen material terms because he was not asking the court to order Landes to enter into any new contract. There were no new terms to which the parties had not yet agreed. Cuzdey and Landes had entered into a contract with specific, agreed terms, to which Cuzdey testified. *E.g.,* CP 162-64, 190, 192. Cuzdey and Landes had

already performed nearly all of the terms. *E.g.,* CP 192-93. The only term remaining to be performed was the delivery of title to Cuzdey. *E.g.,* CP 197. Cuzdey provided evidence of all of the terms necessary to the relief he requested. In requiring the *Hubbell* terms, in conflict with decisions of this Court, the Court of Appeals erected an artificial barrier to Cuzdey's claim. This Court should accept review and reverse the erroneous decision.

### 5.3 The Court of Appeals' interpretation of the three part performance factors is in conflict with prior cases.

The Court of Appeals held that Cuzdey had not established two of the three part performance factors, but it only did so by interpreting the factors in a way that conflicts with this Court's prior decisions.

The Court of Appeals correctly concluded that Cuzdey had presented sufficient evidence that he paid full consideration for the real property. App 8. In a bizarre twist, the Court of Appeals held, incorrectly, that Cuzdey's possession of the land from 1984 to 1997—when only Cuzdey and his immediate family lived on the property (CP 201)—was somehow not exclusive for the sole reason that Cuzdey's wife also happened to be Landes' daughter. App 8. There was no evidence that Landes was ever on the property during that time, and Landes only moved onto the property in 1997 with Cuzdey's permission. CP 163, 199-200.

The Court of Appeals' greatest error, though, was in its interpretation of the third factor: making valuable improvements. The Court of Appeals decision requires Cuzdey to prove that the improvements he constructed were "a condition of, or referred to, in the contract." App 9. The prior decisions of this Court do not impose such a requirement.

The touchstone of "the doctrine of equitable estoppel by reason of part performance" is that "it would be intolerable in equity for the owner of a tract of land knowingly to suffer another to invest time, labor, and money in that land, upon the faith of a contract which did not exist." *Miller*, 78 Wn.2d at 827. That is the light in which prior decisions of this Court have interpreted the "improvements" factor. The question is not whether the improvements were a part of the oral contract itself, but whether the buyer made the improvements in reliance on the fact that the contract existed.

The Court of Appeals instead attempts a strict interpretation of the phrase "referable to the contract." But the language of the case law—"permanent, substantial, and valuable improvements, referable to the contract"—does not mean that the improvements must have been referred to in the contract. Rather, it means that the fact that the purchaser built permanent, substantial, and valuable improvements on the land is attributable to the fact that there was an actual contract of

conveyance—that is, the building of improvements for one's own benefit, in the manner of a true owner, is both evidence of the existence of the contract and constitutes justifiable reliance that should estop the other party from denying the contract's existence.

This Court has repeated the language, "referable to the contract" in many cases, using it to mean "attributable to" or "in reliance on," as demonstrated by this Court's decision in *Mobley v. Harkins*, 14 Wn.2d 276, 128 P.2d 289 (1942):

> The courts of equity therefore developed the doctrine of equitable estoppel by reason of part performance, declaring that certain acts referable to an oral agreement would be regarded as taking that agreement out of the statute of frauds. In this way equity guards against the utilization of the statute as a means for defrauding innocent parties who have been induced or permitted to change their position, in reliance upon oral agreements within its operation.

*Id.* at 283-84 (emphasis added). The *Mobley* court equated "referable to" with "in reliance."

The buyers in *Mobley* made valuable improvements to their leasehold, above and beyond the contract requirements, for the benefit of the business they planned to operate on the leased property:

> After taking possession of the property, respondents repaired and repainted the restaurant and installed additional equipment. Respondents

> assumed the obligations devolving upon them under their contract of purchase and went to the added expense necessary to a proper conduct of the business wholly in reliance upon the agreement that the Vaughn lease would be assigned to them.

*Mobley*, 14 Wn.2d at 285. This Court found the added expenses, beyond the requirements of the contract, but in reliance on its validity and performance on the part of the seller, to be strong evidence of part performance. *Id.* at 285-86.

As another example, in *Powers v. Hastings*, 93 Wn.2d 709, 612 P.2d 371 (1980), this Court considered improvements not required by the contract as evidence of part performance:

> Finally, the Powers made substantial improvements, expending more than $ 5,000, excluding their own considerable labor, on improvements worth $ 14,520. Near the milking parlor, a 60-foot by 6-foot strip of concrete was poured and plumbing for a washing area was installed. Manure deposited throughout the milking parlor was removed, the parlor was thoroughly cleaned, and additional wiring, light fixtures, lights and milking fixtures were installed. In the milk house -- where the milk tank is located -- lights, plumbing and a pump were installed. The milk house was repainted and the doors between the milk house and the milking parlor were rehung.
>
> Outside, gates were repaired and reinstalled and fences were replaced. Manure was removed from the 85-foot-long feeder trough, which was then completely rebuilt. Likewise, the holding bin was cleaned and rebuilt. Approximately 2,000 cubic yards of manure, along with other refuse, was

> moved farther away from the milking operation. The floor of the shed was elevated with gravel and fill to provide adequate drainage, and the shed evidently was expanded. Finally, the Powers moved their herd onto the farm and added 20 springing heifers.
>
> One acquaintance of the Powers worked 3 months on the projects and other labor was necessary, as well. Although some of the improvements were required by the milk inspector [not the seller], many were initiated by the Powers.

*Powers*, 93 Wn.2d at 718-19 (emphasis added). The evidence of the terms of the oral contract did not include any mention of the improvements listed above. *Id.* at 714. This Court found the improvements, not called for in the contract, to be strong evidence of part performance. *Id.* at 718-19.

By requiring Cuzdey to have made improvements as a condition of the contract, the Court of Appeals decision conflicts with prior decisions of this Court. This Court has repeatedly accepted valuable improvements made for the buyer's own benefit in reliance on the contract as evidence of part performance.

Cuzdey made substantial improvements for his own benefit in reliance on the contract, acting as a true owner. He cleared trees from the property, moved a mobile home onto the property, and installed a well, power, and septic system. CP 163, 189-90. Over the next 13 years, Cuzdey cleared and re-graded

portions of the property; expanded the mobile home; and built several large outbuildings (a 1,200 square foot barn, a 2,480 square foot shop for Cuzdey's business, and a 950 square foot utility building). CP 164, 192. Cuzdey would not have performed such extensive work, or operated a heavy-equipment and material-intensive business on the property if he did not believe he was the true owner. CP 192, 196.

Cuzdey built precisely the kind of improvements required to demonstrate the third factor of part performance. Having demonstrated the presence of all three factors, Cuzdey was entitled to take the issue to trial. This Court should accept review and reverse the erroneous decision of the Court of Appeals.

## 6. Conclusion

Cuzdey provided sufficient evidence to defeat summary judgment on the issue of the doctrine of part performance. The 13 material terms of a written contract do not apply to part performance cases. Cuzdey presented evidence of all three part performance factors: he paid full consideration; he exclusively possessed the property for 13 years; and he built permanent, substantial, and valuable improvements that only an owner under an actual contract of sale would have made. Cuzdey's

performance is proof of the existence of the contract and of his ownership.

The Court of Appeals decision is in conflict with prior decisions of this Court. The court's erroneous decision erects artificial barriers to the doctrine of part performance that this Court has not required or approved. Under GR 14.1, the erroneous decision becomes persuasive authority that could be harmful in future cases. This Court should accept review, reverse the decision of the Court of Appeals on the statute of frauds/part performance issue, and remand to the Court of Appeals to consider the remaining issues relating to Cuzdey's claim to the real property.

Respectfully submitted this 16th day of June, 2017.

*/s/ Kevin Hochhalter*

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## 7. Appendix

CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that on June 16, 2017, I caused the foregoing document to be filed with the Court and served on counsel by the method indicated below:

| | | |
|---|---|---|
| Supreme Court<br>415 – 12th Street W<br>Olympia, WA 98504 | XX | Electronic Mail |
| Andrew P. Mazzeo<br>Taylor Law Group, P.S.<br>6510 Capitol Blvd. SE<br>Tumwater, WA 98501-5566<br>Drew.taylorlawgroup@outlook.com<br>taylorlawgroup@comcast.net | XX | Electronic Mail |

DATED this 16th day of June, 2017.

*/s/ Rhonda Davidson*
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

| | |
|---|---|
| PATRICK CUZDEY, an unmarried person,<br><br>Appellant,<br><br>v.<br><br>PATRICIA LANDES, a widow; THE ESTATE OF BENNY J. LANDES, deceased; KARLA WALLEN, a married person, and any marital community interest; and all other persons claiming any right, title, or interest, etc.,<br><br>Respondents. | No. 75632-0-I<br><br>DIVISION ONE<br><br>UNPUBLISHED OPINION<br><br>FILED: April 3, 2017 |



MANN, J. — Patrick Cuzdey sued his former mother-in-law, Patricia Landes, seeking to quiet title to real property and a mobile home. Cuzdey's claim to title was based on an alleged 1984 oral conveyance by his in-laws, Benny and Patricia Landes. Cuzdey appeals the trial court's decision dismissing his quiet title action on summary judgment. Cuzdey also claims that the trial court abused its discretion in awarding attorney fees and costs pursuant to RCW 4.84.185. We affirm the dismissal of Cuzdey's claim to the real property because it is barred by the statute of frauds. But



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because there is a genuine issue of fact, we reverse the trial court's dismissal of Cuzdey's quiet title claim to the mobile home. Because Cuzdey's action was not frivolous in its entirety, we vacate the trial court's award of attorney fees and costs under RCW 4.84.185.

## FACTS

In 1983, Benny and Patricia Landes purchased a five-acre parcel of undeveloped property southwest of Olympia, Washington (property). The Landeses then permitted and paid for the installation of a well, septic system, and electrical services to serve an older mobile home on the property. The Landeses' daughter, Karla, and her then husband, Patrick Cuzdey, moved into the mobile home in 1994. Cuzdey claims that pursuant to an oral agreement, the Landeses purchased the property for him and he agreed that he would repay the $10,000 debt through "physical labor, mechanical work, and construction work on their equipment."

In 1985, the Landeses obtained a loan and purchased a newer Nova Commodore mobile home (Nova) for the Cuzdeys to live in. The Nova was registered as a vehicle and taxed as personal property. Cuzdey claims the Landeses "agreed to sell it to [the Cuzdeys] for the same price [the Landeses] paid, which was $14,660.80 on the same installment terms." The Cuzdeys repaid the Landeses for the cost of the Nova by making monthly payments on the loan directly to the bank. The last payment on the loan was made in 2005 and the loan closed. The Cuzdeys also paid the personal property taxes for the Nova.

From 1984 to 1997, the Cuzdeys lived on the property alone. In 1996, however, the Landeses purchased, installed, and moved into a new Goldenwest double wide

manufactured home on the property. The Landeses purchased the Goldenwest home by mortgaging the property. In 1997, the Landeses eliminated the Department of Licensing title to the Goldenwest home, thereby converting it from personal property to real property. The value of the home was added to their real property tax parcel. Since their purchase of the property in 1983, the Landeses paid the real property taxes for the full property. From 1997 to the present, the property tax has included the value of the Goldenwest home.

Benny Landes died in 2001. Patricia Landes inherited her husband's interest in the property pursuant to a recorded community property agreement. Landes continued to live in the Goldenwest home and continued to pay property taxes for the entire property. Landes refinanced the property in 2001 and granted a deed of trust to Washington Mutual.

In May 2014, Karla and Patrick Cuzdey dissolved their marriage. The petition for dissolution and decree of dissolution identified and awarded only personal property. Neither the petition nor decree identified any real property. Karla (now Karla Wallen) moved off of the property. Patrick Cuzdey continued to reside in the Nova. In June 2014, Landes served Cuzdey with a notice to terminate tenancy on the real property.

In July 2014, Cuzdey filed an action to quiet title to the property pursuant to the claimed 1984 oral contract. Cuzdey claimed that the purchase price had been paid off with cash payment and work performed on the property and other real and personal property of the Landeses. Cuzdey's original complaint did not seek to quiet title to the Nova. In her answer, Landes admitted that Cuzdey and Wallen purchased and paid off

the Nova, but denied the existence of an oral contract for the real property. Cuzdey's second amended complaint added a claim to quiet title to the Nova.

The trial court dismissed Cuzdey's claims in their entirety on summary judgment. The court subsequently found Cuzdey's action "frivolous and advanced without reasonable cause it its entirety." The court awarded Landes $36,000 as reasonable attorney fees under RCW 4.84.185.

Cuzdey appeals the summary judgment order and the fee award.

## ANALYSIS

### I

Cuzdey argues first that the trial court erred in dismissing his quiet title action on summary judgment.[1] We disagree.

We review an order of summary judgment dismissal de novo and engage in the same inquiry as the trial court. Kut Suen Lui v. Essex Ins. Co., 185 Wn.2d 703, 709-10, 375 P.3d 596 (2016). Summary judgment is appropriate when the pleadings, declarations, depositions, and admissions on file demonstrate that there are no genuine issues of material fact that the moving party is entitled to judgment as a matter of law. CR 56(c); Bostain v. Food Exp., Inc., 159 Wn.2d 700, 708, 153 P.3d 846 (2007). Facts and reasonable inferences therefrom are viewed most favorably to the nonmoving party.

[1] Cuzdey's opening brief argued that (1) the statute of frauds did not bar his quiet title action because he presented evidence of part performance, (2) Landes waived the protections of the dead man's statute (which allowed Cuzdey to introduce declarations supporting his theory of an alleged oral contract), and (3) his quiet title action was not barred by a statute of limitations.

Cuzdey's reply brief raised arguments based on adverse possession, quantum meruit, constructive trust, and conversion, arguments that were not included in his opening brief. An appellate court will not consider a claim of error that a party fails to support with legal argument in his opening brief. Jackson v. Quality Loan Serv. Corp., 186 Wn. App. 838, 845, 347 P.3d 487 (2015). Cuzdey waived these arguments.

Bostain, 159 Wn.2d at 708. Where reasonable minds could reach but one conclusion from the admissible fact in evidence, summary judgment should be granted. Allen v. State, 118 Wn.2d 753, 760, 826 P.2d 200 (1992).

A

An oral agreement for the sale or transfer of real property violates the statute of frauds. The statue of frauds for real property states: "[e]very conveyance of real estate or any interest therein . . . shall be by deed." RCW 64.04.010. And "[e]very deed shall be in writing, signed by the party bound thereby, and acknowledged." RCW 64.04.020. Because Cuzdey's claim to the property is based on an alleged oral and unwritten agreement with the Landeses, it violates the statute of frauds.

Under the partial performance doctrine, however, an agreement to convey an estate in real property that violates the statute of frauds may be specifically enforced if there is sufficient part performance of the agreement. Berg v. Ting, 125 Wn.2d 544, 556, 886 P.2d 564 (1995). Partial performance removes a contract from the statute of frauds if a party can prove: "(1) delivery and assumption of actual and exclusive possession; (2) payment or tender of consideration; and (3) the making of permanent, substantial and valuable improvements, referable to the contract." Berg, 125 Wn.2d at 556 (citing Kruse v. Hemp, 121 Wn.2d 715, 724-25, 853 P.2d 1373 (1993)). The actions constituting part performance must "point unmistakably and exclusively to the existence of the claimed agreement." Miller v. McCamish, 78 Wn.2d 821, 826, 479 P.2d 919 (1971).

B

As a threshold matter, because Cuzdey seeks specific performance of a contract, he had the burden to prove "'by evidence that is clear and unequivocal and which leaves no doubt as to the terms, character, and existence of the contract.'" Berg, 125 Wn.2d at 556 (quoting Miller, 78 Wn.2d at 829.) If the acts point to some other relationship or can be accounted for by some other hypothesis, then they are not sufficient to prove the existence of the underlying contract. Miller, 78 Wn.2d at 829.

Our Supreme Court has outlined 13 material terms to a real estate contract. These terms are:

> (a) time and manner for transferring title, (b) procedure for declaring forfeiture, (c) allocation of risk with respect to damage or destruction, (d) insurance provisions, (e) responsibility for: (i) taxes, (ii) repairs, and (iii) water and utilities, (f) restrictions, if any, on: (i) capital improvements, (ii) liens, (iii) removal or replacement of personal property, and (iv) types of use, (g) time and place for monthly payments, and (h) indemnification provisions.

Sea-Van Investments Associates v. Hamilton, 125 Wn.2d 120, 128, 881 P.2d 1035 (1994); Kruse, 121 Wn.2d at 722; Hubbell v. Ward, 40 Wn.2d 779, 785, 246, P.2d 468 (1952).

The parties in Sea-Van, for example, exchanged correspondence concerning the sale of a parcel of property. While the correspondence agreed on the particular parcel and price, the writing did not agree on interest payments. The opening offer was for a 2-year note at 10 percent interest per year. The response offered a 2-year note at 10 percent per quarter. After one of the parties sued for specific performance, the trial court determined that there was no contract because there was no meeting of the minds on the terms of the promissory note, the terms of the deed of trust, the type of deed, the

time of closing, or the payment of taxes. Sea-Van, 125 Wn.2d at 123-125. The Court of Appeals reversed concluding that the difference in interest rates was de minimus and that other silences in the contract were nonessential terms. Sea-Van, 125 Wn.2d at 125. The Supreme Court agreed with the trial court that the exchange of correspondence did not demonstrate a meeting of the minds. The court also reiterated that its prior holdings in Kruse and Hubbell outlining the 13 material terms of a real estate contract remained valid law.

Here, unlike Sea-Van, there is no written evidence documenting any terms of a real estate contract. Instead, viewed in the light most favorable to Cuzdey, the Landeses and Cuzdey had an oral agreement on only three material terms: the price ($10,000), the parties, and the subject property. The material terms and conditions supporting the claimed contract are far from clear and unequivocal. For example, the first material term of a real estate contract is the time and manner for transferring title. Cuzdey testified that he "did not expect to receive title to the property right away." And further, that he understood that the Landeses "would transfer title at some point, and I was confident that I would get it eventually." This admission fails to satisfy the requirement that the contract identify the time and manner for transferring title. Sea-Van, 125 Wn.2d at 128. Nor did Cuzdey prove the timing or amount of payments, how his physical labor accrued toward the purchase price, the type of deed to be delivered, the closing date, or a procedure for declaring forfeiture.

Because Cuzdey failed to prove by clear and unequivocal evidence the material terms of the alleged real estate contract, his claim to quiet title under the alleged contract fails. Berg, 125 Wn.2d at 556.

C

But even if Cuzdey could prove the essential terms of a real estate contract, he still failed to demonstrate partial performance. There is a diversity of opinion of the relative importance of the three factors necessary to show partial performance. Berg, 125 Wn.2d at 557. The strongest case presents when all three factors are demonstrated. Berg, 125 Wn.2d at 557. Here, viewed in the light most favorable to Cuzdey, at best he can demonstrate that he did sufficient labor for the Landeses to justify consideration. But our Supreme Court has confirmed that "payment of the purchase price, in whole or in part, is not of itself a sufficient part performance to remove an oral agreement for the sale of land from the operation of the statute of frauds." Berg, 125 Wn.2d at 557 (citing Richardson v. Taylor Land & Livestock Co., 25 Wn.2d 518, 530, 171 P.2d 703 (1946). Cuzdey's labor alone is insufficient to demonstrate partial performance.

Cuzdey failed to demonstrate either of the other two elements necessary to prove part performance. First, Cuzdey failed to show "exclusive possession of the land." Berg, 125 Wn.2d at 566. Between 1984 and 1997, Cuzdey did not have exclusive possession: he lived on the property with his wife Karla–the Landeses' daughter. Then, in 1997, it is undisputed that the Landeses installed their Goldenwest home on the property. The Landeses then resided on the property until Benny's death in 2001. Patricia Landes continued to reside on the property until the present. Cuzdey never had exclusive possession of the real property.

Nor did Cuzdey demonstrate that he made "permanent, substantial and valuable improvements, referable to the contract." Berg, 125 Wn.2d at 556 (emphasis added).

Viewed in the light most favorable to Cuzdey, it appears that he performed clearing work, and at least helped build the outbuildings on the property. But the buildings were permitted and paid for by the Landeses. Other than his labor, Cuzdey offered no evidence that the Landeses were repaid for any of the outbuildings. More importantly, there is no evidence that the improvements were "referable to the contract." According to Cuzdey: "I purchased the property with the Landes' help, who loaned me the money for the initial purchase, and the agreement that I would repay the loan through physical labor, mechanical work, and construction work on their equipment." Cuzdey does not claim that the addition of outbuildings was a condition of, or referred to, in the contract.

Viewed in the light most favorable to Cuzdey, the evidence does not support Cuzdey's claim to the real property. The doctrine of partial performance neither removes Cuzdey's alleged oral contract for real property from the statute of frauds nor creates a contract for conveying real property. The trial court did not err when it granted summary judgment for Landes dismissing Cuzdey's action seeking to quiet title to the real property.

Because we affirm the trial court's dismissal on this ground, it is unnecessary to address Landes's other defenses including the Deadman's statute, statute of limitations, and laches.

II

Cuzdey argues second that the trial court erred in dismissing his claim to quiet title to the Nova. We agree.

In her answer to Cuzdey's amended complaint, Landes admitted that Cuzdey and Wallen paid off the loan for the Nova:

> [D]efendant admits that the purchase of the 1982 Commodore [Nova] mobile home by their daughter and the plaintiff has been paid off. This defendant admits that there were cash payments and work performed by the plaintiff toward the purchase of the [Nova] mobile home, but denies that there were any cash payments toward purchase of the real property.

In response, Cuzdey sought leave to file a second amended complaint. Cuzdey's second amended complaint sought to quiet title to both the real property and the Nova.

Summary judgment is appropriate only where the pleading and other evidence on file demonstrate that there are no genuine issues of material fact. Based on the pleadings on file, because there is at least a material question of fact over title to the Nova, the trial court erred in dismissing Cuzdey's second amended complaint in its entirety. Title to the Nova remains unresolved.

III

Cuzdey next assigns error to the trial court's award of attorney fees to Landes under RCW 4.84.185, arguing that his action was not frivolous in its entirety because there was merit to his claim to title to the Nova. We agree.

We review a trial court's decision under RCW 4.84.185 for an abuse of discretion. Alexander v. Sanford, 181 Wn. App. 135, 184, 325 P.3d 341 (2014). RCW 4.84.185 permits a trial court to award attorney fees to the prevailing party if the nonprevailing party's action was frivolous. RCW 4.84.185 reads, in pertinent part, "In any civil action, the court . . . may, upon written findings by the judge that the action . . . was frivolous and advanced without reasonable cause, require the nonprevailing party to pay the prevailing party the reasonable expenses, including fees of attorneys, incurred in opposing such action." "A frivolous action is one that cannot be supported by any rational argument on the law or facts." Alexander, 181 Wn. App. at 184. The

lawsuit must be frivolous in its entirety and "advanced without reasonable cause." Alexander, 181 Wn. App. at 184 (citing N. Coast Elec. Co. v Selig, 136 Wn. App. 636, 650, 151 P.3d 211 (2007)).

Here, Cuzdey's quiet title action included a claim to both the Nova and the real property. The quiet title claim to the Nova was advanced with reasonable cause: Landes admitted in her amended answer that Cuzdey and Wallen paid off the loan for the Nova. Because Cuzdey's quiet title action was not frivolous in its entirety, the court erred when it awarded attorney fees to Landes under RCW 4.84.185.

IV

Landes requests fees on appeal under RAP 18.1, RAP 18.9, and RCW 4.84.185. RAP 18.1(b) requires a party seeking fees on appeal to devote a section of its brief to its request for appellate fees. RAP 18.1(b) requires more than a bald assertion. Because Landes failed to present argument in support of her fee request, we deny the request. Gardner v. First Heritage Bank, 175 Wn. App. 650, 677, 303 P.3d 1065 (2013); Thweatt v. Hommel, 67 Wn. App. 135, 148, 834 P.2d 1058 (1992). Further, because we reverse the trial court's fee award under RCW 4.84.185, we also deny fees under RCW 4.84.185 on appeal.

## CONCLUSION

We affirm the trial court's grant of summary judgment as to Cuzdey's claim to the real property. We reverse the court's decision dismissing Cuzdey's claim to the Nova and remand for a determination of Cuzdey's action to quiet title to the Nova. We vacate the trial court's order assessing attorney fees against Cuzdey.

WE CONCUR:

COX, J.

**CUSHMAN LAW OFFICES, P.S.**

**June 16, 2017 - 4:53 PM**

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