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FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON

2009 JUL -9 PM 2:58

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No. 62697-3-I

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COURT OF APPEALS DIVISION I  
STATE OF WASHINGTON

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BERNICE LEE,

Appellant,

v.

TURNING POINT COMMUNITY CHURCH OF  
GOD IN CHRIST,

Respondent.

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APPELLANT'S REPLY BRIEF

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## I. LEGAL ARGUMENT

### A. TURNING POINT'S STATEMENT OF FACTS IS INACCURATE AND UNSUPPORTED BY THE RECORD.

Certain of the statements in the responsive Statement of Facts are unsupported by the record:

- References to Turning Point entering into an agreement with Lee.

Turning Point refers to an agreement made between the Turning Point congregation and Lee; however at the time the alleged agreement was made, Turning Point did not exist. There was no Turning Point Church of God in Christ prior to September, 2001.

- Respondent states that "Lee consistently acknowledged publicly and privately the existence of the contract between herself and Turning Point to the congregation, to the regional and national church as well as to Reverend and Mrs. Tucker."

There is no citation to the record to support this assertion. This is not surprising, since there was no such evidence. No one other than Reverend Tucker himself testified to having heard Lee state that she was selling the church to Turning Point or was ever planning to convey title. No one testified to her being thanked publicly for buying the building for the congregation.

- Turning Point also claims that Lee was thanked during the so-called mortgage burning. Lee could hardly have been thanked by the congregation during the mortgage burning since at that point she had already publicly and repeatedly disavowed any intention to ever transfer title to the church.

B. WHAT CONSTITUTES SUBSTANTIAL EVIDENCE IS DIFFERENT WHEN THE FINDING MUST BE SUPPORTED BY CLEAR, COGENT AND CONVINCING EVIDENCE.

There was no substantial evidence to support the trial court's findings based on a "clear cogent and convincing evidence" standard.

The Respondent argues that the trial court's findings will not be disturbed if there was substantial evidence in support of the findings. This is an accurate statement of the standard on review. However, as the court said in In re Sego, 82 Wn.2d 736, 513 P.2d 831 (1973), "evidence which may be sufficiently substantial to support an ultimate fact in issue based upon a preponderance of the evidence may not be sufficient to support an ultimate fact in issue proof of which must be established by clear, cogent & convincing evidence."

This case has not been overruled, and the principle it expresses is still good law. There was not even substantial evidence by a

preponderance of the evidence standard, much less by a clear, cogent and convincing standard.

C. LEE'S SUPPOSED LACK OF CREDIBILITY IS NOT, BY ITSELF, SUFFICIENT TO SUSTAIN THE FINDINGS.

Turning Point appears to argue that, once the trial court had made a finding that Lee was not credible, that was the end of the discussion; that Turning Point had, by default, proven the existence of the contract by clear, cogent and convincing evidence. However, the burden was not on Lee to prove that her arrangement with Turning Point was something other than a sale; rather the burden was on the plaintiff Turning Point to prove by clear, cogent and convincing evidence that the contract had been taken outside the Statute of Frauds by part performance, and to demonstrate unequivocally the terms of the contract. Berg v. Ting, 125 Wn.2d 544, 886 P.2d 564 (1995), Williams v. Fulton, 30 Wash.App. 173, 632 P.2d 920 (1981).

Turning Point did not present sufficient evidence to sustain its claim, even assuming Lee's testimony was not credible. Reverend Tucker was the only witness to testify as to the supposed oral contract to convey title. Several of the \$1,500 payments were marked "rent." Two witnesses in addition to Lee testified that it was their understanding that the arrangement was a rental. And, as previously

argued, Turning Point failed to establish the elements necessary to take the contract out of the Statute of Frauds, or to establish its terms with sufficient specificity.

The court's finding on Lee's credibility should be viewed with some skepticism. It was premised, at least in part, on a finding that: "Ms. Lee's reading comprehension was limited, and she was not able to remember or recall significant events and conversations accurately." (CP 206)

This was to be expected, in that Ms. Lee has limited education and was over 80 at the time of trial (a time of life in which forgetfulness is sometimes the rule more than the exception). To the extent that Lee was penalized for her age and limited education, the finding was unfair and does not support the court's conclusions.

D. THE COURT REWROTE THE ALLEGED CONTRACT AS IT WAS TOO INDEFINITE TO BE SPECIFICALLY ENFORCED.

Turning Point cites Miller v. McCamish, 79 Wn.2d 821, 479 P.2d 919 (1973) in support of its argument that specific performance can be granted even though the contract is not entirely certain.

The Miller case was not about specific performance. The issue in Miller was whether, when there was not sufficient part performance

to take a contract to convey land out of the Statute of Frauds, there still could be an action for damages, in quantum meruit.

In Luther v. National Bank of Commerce, 2 Wn.2d 470, 98 P.2d 667 (1940), the Court described the degree of certainty necessary to warrant a decree of specific performance:

"to warrant a decree of specific performance the terms of the contract must be so clear, definite, certain, precise and free from obscurity or self contradiction that neither party can reasonably misunderstand them and the can discern the intention of the parties and interpret the contract court without supplanting any of its provisions or supplying anything additional ..."

In Berg v. Ting, 125 Wn.2d 544, 886 P.2d 564 (1995), the court stated, "[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."

The alleged contract lacked an essential term, payment. Tucker's understanding of the repayment terms shifted. At one point he claimed to understand that the Church would be making \$1,500 payments every month; later this changed to every other month.

This indefiniteness would create a host of problems enforcing the supposed contract. Assume, for instance, that Turning Point missed a payment. Given Tucker's testimony that the payments were

to be made either every month or every other month, it wouldn't be easy to determine when a payment had been missed. And what were Lee's rights in the event of nonpayment? These are fundamental components of any contract to purchase land over a period of time.

However, rather than finding, as the court should have, that the contract was too uncertain to be enforced, the court did exactly what Luther said it should not do; it effectively rewrote the contract to give the Church rights and benefits it never claimed to have had. The court quieted title in the Church although the Church had not paid the consideration it understood to be due before it was entitled to a transfer of title.

The court, in short, enforced an agreement which never existed

E. THE COURT APPLIED AN INCORRECT STANDARD IN DETERMINING WHETHER PART PERFORMANCE HAD TAKEN THE CONTRACT OUT OF THE STATUTE OF FRAUDS.

Turning Point argues that the courts do not invariably require a showing of the making of improvements in deciding whether a contract is taken out of the Statute of Frauds.

However, the making of improvements is uniformly regarded as the most important of the three requirements Williams v. Fulton, 30 Wash.App. 173, 632 P.2d 920 (1981). And respondent cites no

Washington case which has found sufficient part performance without the making of improvements.

Turning Point references two cases which it contends found part performance even though there were no improvements. Neither of these cases involved an oral agreement to convey land, nor was the issue the lack of a showing of substantial improvements. Luther, supra, involved an alleged contract to devise certain real property in a will. The plaintiff had given up her nursing career to move in with the decedent with the understanding that if she took care of him for the rest of his life he would build and deed to her a house. The case had to do with the Statute of Frauds regarding agreements to bequeath property, not the real estate statute of frauds.

Beckendorf v. Beckendorf, 75 Wn.2d 457, 457 P.2d 603 (1969) similarly did not involve the issue of whether there had been improvements. In that case, parents had deeded their property to their son and his wife with the agreement that the parents could live on the property for the rest of their lives, and the son would promise to operate the ranch and pay half of the expenses.

After the son and the wife divorced, the son announced he had been committing fraud when he promised to operate the ranch, and sought to have the deed reconveyed to his parents, for the obvious

purpose of cutting out his ex-wife's interest. The case was decided, not by weighing the three factors, but on equitable estoppel grounds. (The case was decided prior to Berg v. Ting, *supra*.)

The more basic problem is that the Court here substituted detrimental reliance not only for the "substantial improvement" factor but for the other factors as well.

There is no way the court could have reached the conclusion it did had it followed long established case law in weighing the relevant factors: taking possession, paying consideration, and making improvements.

The fact that the Church took possession cannot be grounds for finding part performance, since the possession was not referable to the alleged contract of sale, rather than to some other relationship, as is required by Granquist v McKean, 29 Wn.2d 440, 445, 187 P.2d 623 (1947).

No improvements were made, so this factor obviously was not weighed. That leaves the payment of consideration.

In Berg v. Ting, *supra*, the court stated that:

[the] payment of consideration is the least convincing of the three" and that "this court has uniformly held 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.

The court had nothing to weigh here then but the payment of consideration, a factor the Washington Supreme Court has declared is not sufficient in itself to take a contract out of the Statute of Frauds. And even there, the trial court was more persuaded by what it deemed it to be detrimental reliance than by the payments themselves (which in any case amounted to far less than the supposed agreed purchase price).

"The congregation as a whole,"(the court found) "believed it would ultimately own the properties. This is supported by the fact that the entire congregation made donations, performed tithing, and volunteered their time and skills for fundraising in order to pay off the mortgage and abide by the understood terms of the oral agreement. Further, the congregation celebrated a mortgage burning together when this goal had been accomplished. If this had not been the arrangement between Ms. Lee and Reverend Tucker, surely Ms. Lee would not allow her fellow congregants to sacrifice as they did under a misapprehension."(CP 210)

\* \* \*

" . . . after the congregation worked as hard as it did to raise the funds to pay Reverend Moore, Ms. Lee would be unjustly enriched if she were permitted to retain title to the property"(CP 211)

In essence, the court substituted a "holding bake sales" standard for the principles the courts of this state have established in case after case over the last 75 years for determining when a contract

for the sale of land may be taken out of the Statute of Frauds by part performance.

The court plainly sympathized with the Church, but that did not justify ignoring the law to reach what it deemed to be a fair result.

F. THERE ARE NO THEORIES UNDER WHICH TURNING POINT IS A PROPER PARTY TO THIS ACTION.

Turning Point advances two theories for its being a proper party, despite the fact that it did not exist at the time the alleged contract was made. The authorities it cites do not support its position.

First it argues that Tucker should be treated as something analogous to the promoter of a corporation who enters into contracts prior to the corporation's existence, citing White v. Dvorak, 78 Wash.App. 105, 896 P.2d 85 (1995).

That case had to do not with whether a promoter can bind a corporation, but rather with whether a person who purports to act as an agent for a corporation not yet formed is liable on a pre-incorporation contract.

A promoter is one who alone or with others forms a corporation and procures for it the rights, instrumentalities and capital to enable it to conduct its business. Goodman v. Darden, Doman and Stafford, 100 Wn.2d 476, 670 P.2d 648 (1983).

Tucker cannot be considered a "promoter" of what would eventually become the Turning Point Corporation. There is no evidence in the record that, at the time of making the alleged contract, he was holding himself out as an agent for a Corporation to be formed, or which was in the process of formation.

Second, Turning Point contends that the corporation ratified the agreements by implication, citing M/V La Conte, Inc. v. Leisure, 55 Wash.App. 396, 772 P.2d 1061 (1989). That case, however, dealt with the narrow issue of whether persons signing a pre-incorporation subscription agreement were bound by the terms of that agreement after the corporation was formed. The court cited the rule that "when a corporation is formed pursuant to a pre-incorporation subscription agreement and acts pursuant to that agreement after formal incorporation, corporate acceptance is presumed."

Obviously, there was no pre-incorporation subscription agreement here. The M/V LaConte case does not stand for the general proposition that a corporation which acts in partial performance of an alleged contract made by an unincorporated association has thereby adopted and ratified that contract.

Turning Point cites Goodman, supra, in support of its contention that Turning Point had ratified the agreement by

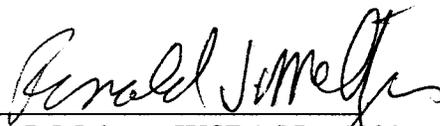
implication. However Goodman, like the other cases Turning Point cites, had to do not with corporate ratification, but with the individual liability of the promoter.

Respondent also cited Kraft v. Spencer Tucker Sales, 39 Wn.2d 943, 239 P.2d 563 (1952), which similarly had nothing to do with pre-incorporation contracts. Rather, it involved the issue of whether a corporation was bound by the unauthorized acts of its president, when it had accepted the benefits of the agreement.

There is no legal authority which would make Turning Point a proper party to this action, at least as to any claim for breach of contract.

RESPECTFULLY SUBMITTED this 8th day of July, 2009.

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