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

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

Petitioner/Appellee,

and

OSCAR SCHOCK, "JANE DOE" SCHOCK  
husband and wife,

Respondent/Appellants,



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APPEAL FROM THE SUPERIOR COURT FOR PEIRCE COUNTY  
STATE OF WASHINGTON  
THE HONORABLE JERRY T. COSTELLO

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APPELLANTS' OPENING BRIEF

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## I. INTRODUCTION

Like a contractor, Oskar Schock [Schock] improved property of another—here the Tacoma School District [TSD]—and wants to be paid. The case is unusual because the improvements were made to TSD’s Camp Joshua Taylor (in Gig Harbor Key Peninsula) in the late 1960’s and early 1970’s under an arrangement where Schock would improve buildings (primarily living quarters) and live on the property as a caretaker and watchman and on his departure, be paid for the improvements. He continues to reside there as caretaker.

TSD asked Schock to move in 2012 and Schock demanded payment for the time and money spent on the improvements. In Schock’s mind the question with the TSD was not “if” but “when” and “how much.” To TSD, the issue now is “if.”

TSD’s pleadings ask for ejectment. Schock makes defenses and counterclaims related to contract and equity and counterclaim under the ejectment statute. Schock initially claimed an interest in the property and alternatively a compensable interest in it. In his counterclaim he claimed a right to “sweat equity” in the improvements.

TSD moved for summary judgment on all issues. It focused on (and the lower court accepted) its statute of frauds argument, to the effect that because Schock had no written interest in the property, he is not entitled to payment. Schock argued (and this court should agree) that if

the statute of frauds applies, he is excepted by the doctrine of part performance. But this court need not rule on the applicability of the statute of frauds or the part performance exception because Schock alternatively plead and argued: 1) the existence of a contract that requires payment under “appraisal method” and when he leaves; 2) payment under equity principles; and 3) that payment for tenant improvements is authorized as a counterclaim under the ejectment statute.

Because of a timeline that extended from the 1960’s, statute of limitation questions predictably arose. But Schock *continues* to reside on the property as a “caretaker,” and the District continued to leave the door open for discussions on the method of compensation. Thus the statute remained open when the lawsuit commenced.

Finally, hearsay issues arose concerning the admissibility of discussions with the District. But the admissibility by a party opponent exception applies, and even if not applicable, the equitable principles of promissory estoppel and quasi contract still would apply to entitle Schock to compensation for tenant improvements.

## **II. ASSIGNMENTS OF ERROR**

### **A. Assignments of Error.**

1. The trial court erred in entering the order of March 28, 2014 granting the plaintiff Tacoma School District’s Motion for Summary Judgment granting a writ of ejectment.

2. The trial court erred in entering the order of March 28, 2014 granting the plaintiff Tacoma School District's Motion for Summary Judgment dismissing defendants' counterclaims.

B. Issues Pertaining to Assignments of Error.

1. Whether Washington's Statute of Frauds RCW 64.04.010, precludes recovery for the fair market value of improvements made by a party who does so with the express or implied direction and permission of the property owner [Assignment of Error 1].

2. Whether promises made by TSD's Business Manager to Schock that he would be compensated when he moves from the premises through the "appraisal method" for his permanent improvements are admissible under ER 801(d)(2)(iv) to prove the existence of an oral contract where he had both actual and apparent authority to make the agreement [Assignment of Error 1].

3. Whether an oral agreement between Schock and TSD to a) recover the value of improvements Schock made to the premises upon; b) Schock's departure from the premises is barred by any statute of limitations when w) TSD left open discussions on to Schock's ability to recover; x) Schock continued to reside on the property; y) Schock continued to serve as caretaker on the property; and z) the ejectment statute [RCW 7.28.170] explicitly allows a counterclaim for the

value of permanent improvements made by the person being ejected [Assignment of Error 2].

4. Whether, Schock is entitled to compensation under promissory estoppel or quasi-contract or quantum meruit under the facts set forth [Assignment of Error 1].

### **III. STATEMENT OF THE CASE**

#### **A. The Original Agreement.**

In 1968, Schock and his family agreed to perform live-in caretaker services for the TSD at the Camp. CP 81:19-21. The Camp is located at a relatively remote location on the Key Peninsula where a live-in caretaker is needed to prevent vandalism. CP 83. “In exchange for providing caretaker services, Mr. Schock resides in one of the residential houses located at [the Camp] and has done so since 1968.” CP 27 (Declaration of TSD Chief Operations Officer Sam Bell dated February 27, 2014). Schock receives free rent and utilities “in lieu of wages” for his caretaker services. CP 120 (Report of TSD Internal Auditor Charles Cuzzetto dated May 17, 1989). These caretaker services continue to this day. CP 81.

Schock and his family initially lived in a tent because the buildings were uninhabitable. CP 82:1-3. The TSD’s original plan was to remove the original house and build a new one at considerable cost to it. CP 76, 109. With TSD approval, Schock decided to move into the house with his family and to make improvements to it. CP 76:8-10. Schock made the

improvements so that he and his family could live in the house and then continued to make other improvements to Camp buildings. At first, the TSD reimbursed him for the expenses he incurred in making the improvements. CP 15, 74, 76, 122, 125.

In 1971 or 1972, TSD Business Manager Tony Shelton told Schock that the TSD did not want to be “nickeled and dimed” and that Schock “should continue to make the repairs and improvements.” He told Schock that from that point forward he would be compensated using the “appraisal method” rather than the previously used cost reimbursement method. CP 76:12-16; 82:3-6. Schock understood the “appraisal method” to mean that he would be “compensated for the value [he] added to the property from [his] efforts and monetary contributions.” CP 69:22-25; 82:7-8. He also interpreted Shelton’s statement to mean that he would be compensated “prior to vacating the premises.” CP 82:8-9.

B. The Repairs and Improvements.

Over the next 17 years, Schock made major improvements to the main residential house at the Camp, to a smaller “homestead” cabin, and to a large barn. CP 66; 82-83. He also made minor repairs to a smaller barn, a garage and two well houses. CP 66; 82:3-8. Most of the major improvements were completed by 1982 and all were completed by the end of 1987. CP 80.

C. Schock's Professional Appraisal of the Improvements and Negotiations with the TSD.

On December 3, 1987, TSD Personnel Manager Gerry Tanagi asked Schock by letter for more details concerning these improvements. CP 89. In response, Schock hired a professional appraiser, Jim Latteri, to appraise their value. Latteri issued a report on December 14, 1987 using a "cost approach" method of appraisal. CP 129-140. Latteri estimated the total value of the improvements at that time at \$197,815. Id. Schock presented the Latteri report to the TSD. On December 18, 1987, Ms. Tanagi responded by requesting a copy of the "agreement with Tony Shelton regarding the cost of improvements" as well as the dates when the improvements were made. CP 90.

On January 15, 1988, Schock responded by letter with the dates of the improvements and with the contents of the agreement regarding the improvements. CP 91. Schock emphasized that the "real estate appraisal method" would be used to reimburse him for the improvements and that he would have first option to buy the property if it were offered for sale. Id. On February 1, 1988, Ms. Tanagi explicitly acknowledged "the terms of the agreement with Mr. Shelton." CP 92.

On April 5, 1988, TSD Business Manager Nick Schaefer wrote to Schock stating that the District did not accept his "appraisal method" of reimbursement. CP 93. He indicated however that the TSD was

interested in seeing additional information and that he would review that information “with the goal of reaching a mutually agreeable solution on the issue.” CP 93.

A meeting between Schock and TSD representatives was held on February 14, 1989. CP 94. In a subsequent letter to Schock, TSD Business Manager Benjamin Soria stated that those present who represented TSD (including himself, his assistant and the TSD Facilities Manager) “indicated to you that the school district recognizes that there may be some claims by you as it pertains to improvements that have been made to the property over the years.” CP 94.

Soria told Schock that “you ... have our commitment to resolving the issue of the improvements as quickly as possible.” Id. He stated that the TSD would have an appraiser determine the monthly value of the property as well as the values for the caretaker services Schock was providing. After that was accomplished, a proposed agreement would be presented to Schock. The TSD said it would “work to attempt to resolve the issue of the value of the improvements completed by you.” CP 94.

D. The TSD’s Appraisal of the Improvements and Caretaker Services.

On May 17, 1989, the TSD’s internal auditor Charles Cuzzetto submitted a detailed report to Soria concerning his assessment of the caretaker services provided by Schock as well as Schock’s request to be

reimbursed for the improvements. CP 120-128. Although Cuzzetto disagreed with Schock's appraisal method, he concluded that Schock "*most certainly improved the value of the site with his remodeling efforts*" and that he had not been adequately reimbursed by the TSD. CP 124 (emphasis supplied). Cuzzetto put a value on "Schock's labor, purchases and use of existing materials" at \$163,599. CP 125. Cuzzetto concluded that "*there is no doubt that Mr. Schock has substantially enhanced the value of the Camp Taylor site through his remodeling efforts at the homestead and barn sites.*" Id. (emphasis supplied).

Cuzzetto placed the initial assessed value of the Camp in 1968 at \$4,350 with the 1988 assessed value at \$266,000. CP 128. He placed the total value of Schock's security and remodeling services between 1968 and 1988 at \$342,914. Id. Cuzzetto advised the TSD that it may owe Schock payments for his improvements if it had not sufficiently paid him for his caretaker and security services. Id.

In February 1990, Soria issued a report to the TSD Board in anticipation of its discussion regarding reimbursing Schock for the improvements. CP 117. 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.*” Id. (emphasis supplied). He assessed the “potential liability ... in excess of \$300,000.” Id.

E. The TSD Board’s Negotiations with Schock Regarding His Claim for Payment for the Improvements.

On March 8, 1990, TSD Superintendent Lillian Barna sent Schock a letter in which she addressed Schock’s position that Shelton “had agreed to allow you to receive the increased valuation of the property as a result of your efforts to improve it.” CP 54. Superintendent Barna stated that the “records indicate that you have been amply compensated for your labor as well as materials which may have been used with District approval for improvements to the property.” Id. Superintendent Barna told Schock that she was “denying your claim for reimbursement based on the increased value of the property.” Id. Schock was informed that he had 30 days in which to appeal this decision to the Board.

On April 6, 1990, Schock wrote an appeal letter to the Board. CP 56-58. He explicitly appealed the Board’s denial of his claim for payment for the improvements, stating that “the improvements on the buildings that I made are mine, because I bought the material, I performed or paid for the labor, and I maintained the buildings.” CP 57. On May 8, 1990, Superintendent Barna responded with a letter to Schock simply restating the Board’s denial of his “claim for reimbursement based on the increased value of the property.” CP 59-60.

On July 31, 1990, Superintendent Barna sent a follow-up letter to Schock telling him that unless he could provide additional information supporting the existence of “the original agreement,” the District viewed his “claim for compensation for improvements to the property as closed.” CP 61-62. Schock’s responsive letter on September 10, 1990 described the efforts he was exerting to obtain the necessary documentation to substantiate his original agreement with the TSD concerning improvements. CP 63.

F. The TSD’s Continuing of Discussions with Schock Regarding His Claim for Payment for the Improvements.

In March 1991, Schock received a letter from the Director of TSD’s Department of Buildings and Grounds John Helmlinger. CP 108. This letter scheduled a meeting with Schock to “map out” an understanding and to come to closure concerning all of the “outstanding issues” with regard to Schock and Camp Taylor. Id. Schock would be given an opportunity to “present information relating to” his claims for reimbursement. Id.

The meeting occurred on March 27, 1991. CP 109-112. Present were: Schock, his attorney Knight, TSD’s General Counsel Susan Schreurs, Helmlinger, TSD Deputy Superintendent Soria, and TSD Administrator Dan Moran. CP 109. Schock emphasized that he continued to perform caretaker duties at the Camp. Id. Knight explained that

Schock's original agreement with Shelton involved his staying at the Camp to perform these services: "The arrangement was that he would improve the house, barns, etc. at his own labor and expense with the school district not involved and that eventually he would be reimbursed based on the appraisal method and he would be given first option to buy the property." Id. After Shelton died, there was a breakdown in communications and problems began regarding payment for the reimbursement. CP 110. Schock estimated that he did receive \$9,000 as reimbursement for materials he used to make the house livable. Id.

Extensive discussion took place concerning Schock's remodeling the old house at the Camp rather than having the District come in and build a new one. CP 110-111. Schock stated that after many discussions with Shelton, it was decided that Schock would continue with the remodel and that the "district would reimburse [him] after it has been appraised." CP 111. He also stated that there was no written agreement, that he never signed anything. Id.

Some additional meetings took place in April 1991 concerning payment for Schock's remodel. CP 112-113. A meeting was scheduled on April 8, 1991 with Cuzzetto, the TSD auditor who wrote the 1989 report addressing Schock's remodel reimbursement claim. CP 112. It included other high level TSD officials (General Counsel, TSD Administrator, Personnel Manager). The meeting's purpose was to

“discuss Camp Taylor and Oscar Schock” and to review whatever information existed. Id. There is no further documentation of this meeting and apparently no other meetings took place.

*Thus the District left the issue hanging in midair. Following the discussions and input from Schock, there was no affirmation or denial, questions or final decision on letter advising Schock that a final decision was reached from which an appeal could be taken.*

G. Schock Continues to Perform Caretaker Services at the Camp for TSD in Exchange for Rent to the Present Time.

During the next 21-1/2 years (between April 1991 and November 2012), Schock believed that the TSD acknowledged that he had made valuable improvements to the Camp, that eventually the arrangement would be formalized in writing and that he would be paid no later than when he vacated the premises. CP 87. Schock continues to perform onsite caretaker services for the TSD in exchange for which he resides at the Camp and pays no rent. CP 27 (Declaration of TSD Chief Operations Officer Sam Bell). Since Schock believed he would be compensated on his departure, there was never a triggering event that required him to take action.

H. Procedural History.

On November 5, 2012, the TSD notified Schock’s attorney by letter that his caretaker services were no longer required and that he was to

vacate the Camp no later than February 15, 2013. CP 40-41. There was no mention of any reimbursement for the improvements.

On April 26, 2013, the TSD filed its Complaint for Ejectment and to Quiet Title in Pierce County Superior Court. CP 1-4. Schock's Answer filed June 13, 2013 included a counterclaim that he be compensated for the improvements and his "sweat equity" in the property prior to the termination of his occupancy in the amount of \$300,000. CP 5-11.

On February 28, 2014, TSD filed its Motion for Summary Judgment Granting Writ of Ejectment and Dismissing All Claims of Defendants ["Motion"]. CP 12-25. It asserted that no oral agreement existed between the TSD and Schock to pay him for the improvements and even if such an agreement existed, it is unenforceable under the Statute of Frauds, RCW 64.04.010. It also argued that even if a valid oral agreement existed, any breach occurred no later than May 8, 1990 when Superintendent Barna last informed Schock that his claim for reimbursement was denied. CP 23. Thus, the TSD argued that such an agreement is unenforceable under either RCW 4.16.080 (three year statute of limitations for action on a contract not in writing) or RCW 28A.645.010 (30 day statute of limitations for appeals from a school board decision). CP 23-24. The TSD also argued that Shelton's statements were inadmissible hearsay because he was not an "agent or servant acting with

authority” to make such statements on behalf of the District. CP 170 at n.1.

In response, Schock argued that the Statute of Frauds did not apply to defeat his counterclaim for reimbursement as a condition for his vacating the property in part because the ejectment statute, RCW 7.28.170, clearly contemplates that he be reimbursed for permanent improvements made to the property. CP 141-165. He also argued that the doctrine of part performance applies, that his claim for “sweat equity” did not imply an “interest in real estate transferable by deed” requiring a writing under the Statute of Frauds and that fact disputes exist regarding the existence of the oral contract that Schock be paid for the improvements prior to vacating the property. CP 162. Finally, he argued that the Statute of Limitations did not bar his claims because the TSD continued to discuss his claim for reimbursement in 1991 and did not breach the oral agreement until November 5, 2012 when it ordered him off the property without payment. CP 164.

On March 26, 2014, the trial court granted the TSD’s motion for summary judgment for ejectment and dismissed Schock’s counterclaim for reimbursement. CP 204-206. In so ruling, it held that (1) Schock’s assertion for reimbursement “is tied to an interest in this real estate” and is thus barred by the Statute of Frauds for lack of a written agreement; (2) Shelton’s statements are hearsay as a matter of law; (3) the doctrine of part

performance “would not rescue this alleged agreement from the Statute of Frauds;” (4) Schock’s counterclaim is barred by either the three year or 30 day Statute of Limitations. RP 30-31.

Schock timely filed a Notice of Appeal on April 24, 2014 and an amended Notice of Appeal on April 25, 2014. CP 201-206; 207-212.

#### IV. ARGUMENT

##### A. Standard of Review for Summary Judgment.

An appellate court reviews an order of summary judgment de novo, performing the same inquiry as the trial court. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002). It considers “the facts and the inferences from the facts in a light most favorable to the non moving party.” *Jones*, 146 Wn.2d at 300.

Summary judgment is appropriate where “the pleadings, affidavits, and depositions establish that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.” *Jones*, 146 Wn.2d at 300-01; CR 56(c). It is only appropriate where reasonable minds could reach but one conclusion. *Ruff v. King County*, 125 Wn.2d 697, 887 P.2d 886 (1995). “A material fact is one upon which the outcome of the litigation depends.” *Balise v. Underwood*, 62 Wn.2d 195, 199, 381 P.2d 966 (1963). The initial burden is on the moving party to show there is no issue of material fact. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). If the moving party meets this

initial burden, then “[t]he non-moving party must set forth specific facts showing a genuine issue of material fact and cannot rest on mere allegations.” *Baldwin v. Sisters of Providence in Wash., Inc.*, 112 Wn.2d 127, 132, 769 P.2d 298 (1989); CR 56(e). Only where the non-moving party fails to present such evidence is summary judgment proper. *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005).

B. Fact Disputes Exist Regarding Whether the Oral Agreement Entered into Between TSD and Schock is Enforceable.

As the non-moving party in a Summary Judgment motion, all evidence in support of Schock’s claim for an enforceable oral agreement equitable recovery or counterclaim under the ejectment statute must be construed in Schock’s favor.

The elements of an oral contract include “the subject matter of the contract, the parties, the promise, the terms and conditions, and ... consideration.” *DePhillips v. Zolt Constr. Co., Inc.*, 136 Wn.2d 26, 31, 959 P.2d 1104 (1998). Sufficient evidence on all of those elements are present to deny summary judgment and to present those facts to the court. 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. CP 172.

In addition to proof of the essential elements, the parties' words and conduct must manifest mutual assent for a contract to be enforceable. *City of Everett v. Sumstad's Estate*, 95 Wn.2d 853, 855, 631 P.2d 366 (1981). Mutual assent is essential to the formation of a contract and must be gathered from the parties' outward expressions and acts, and not from an unexpressed intention. Id. An enforceable oral contract clearly exists here based in part on Shelton's statements and the subsequent actions of Schock in making the improvements in his capacity as business manager.

C. Shelton's Statements are Admissions of an Agent with Apparent Authority Under ER 801(d)(2)(iv) and Not Hearsay.

Schock's partial defense to the ejectment action and the basis of his counterclaim is that he entered into an enforceable oral agreement with TSD through statements of Business Manager Shelton. The trial court below erred when it held that Shelton's statements are inadmissible hearsay.

The applicable hearsay exception<sup>1</sup> reads in pertinent part

“A statement is not hearsay if—.... The statement is offered against a party [TSD] and is ... (i) his own statement, in his ... representative [business manager] capacity or .... (iii) a statement by a person [Shelton] authorized by him [TSD] to make a statement concerning the subject, or a statement by his agent [business manager] acting within the scope of authority

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<sup>1</sup> This actually is not a hearsay exception and instead excludes the statement from the definition of hearsay. During the many instances that Schock reminded the District of Shelton's promises, not once did anyone from TSD assert that Shelton lacked authority. The issue only arises in the context of litigation.

to make the statement for the party [TSD]. ER 801(d)(2).

In a footnote, TSD dismisses the hearsay exception that because only the School Board can cede property interests, that the business manager lacked authority to agree with Schock. CP 171 But TSD's reliance on that concept ignores the facts, Schock's alternative defenses and counterclaims in contract, equity and the counterclaim for ejectment, none which rely upon there being an interest in the property.

Construing the facts in Schock's favor, the terms of the oral agreement between Schock and the TSD through Shelton are that TSD would reimburse Schock for the improvements he made to the property prior to vacating it. CP 142. Shelton told Schock that he should "continue to make the repairs and improvements and that [he] would be compensated using the 'appraisal method'." CP 82:4-5. Schock interpreted this statement to mean that he "would be compensated prior to vacating the premises." CP 82:8-9. Shelton also told Schock that this arrangement was kept in a file and Schock assumed this was a personnel file. CP 83.

Relying upon Shelton's promises, Schock continued to repair and improve Camp buildings until the late 1980's. CP 80, 82-83. Shelton died in 1986. CP 43, 80. Schock's relationship with TSD officials then "became less cordial as [TSD] memories faded." CP 83.

TSD asserts that Shelton's statements "are inadmissible because the statements are hearsay." CP 169. It argues that they are out of court statements made to prove the truth of the matter asserted, "namely a meeting of the minds on the terms of an oral agreement between Schocks and the District regarding Schocks' rights in Camp Taylor." *Id.*, citing ER 801(c). If TSD's theory is accepted, then no testimony, between two participants, ever would be allowed to support or rebut the existence of an oral agreement.

TSD further argues that only the "District's Board of Directors could make the statements attributed to Mr. Shelton *contracting to grant ownership and possessory rights in District real property* (emphasis supplied)." *Id.*, citing former RCW 28.57.135 ("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").

TSD emphasizes that "there is no evidence that the Board delegated any kind of authority to Tony Shelton to enter into an agreement that would create ownership interests ... or a right of possession in the Schocks." RP 8:11-15; 28-29. Accordingly, there is no enforceable oral agreement because without Shelton's statement, "there's no evidence of a meeting of the minds." RP 11:14-15; 30:8-9 ("the meeting of the minds is all based on hearsay"). While TSD asserts that the Business Manager lacked authority to unilaterally convey a property interest, it never argued

that he lacked authority with Schock—and most importantly it never has denied the existence of the agreement.

Schock agrees he has no titled “ownership” in the property. He only says that he is entitled to compensation once he departs. In other words, the departure is simply a triggering date for payment, not a grant of a property interest.

If we ignore the fact that TSD presented no evidence that the contract does not exist and that it never stated that Shelton had no authority to contract (other than convey property), and that Schock repeated the existence of the contract with no denial from TSD, Shelton’s statements are admissible under ER 801(d)(2)(iv) for two additional reasons; Schock claims no property interest and Shelton had apparent, if not actual, authority to make agreements with Schock in other areas.

Assuming Shelton’s authority still is in question he had *apparent authority* to make the statements on behalf of TSD. RP 21:4-5. The general rule in Washington is that a party “may be bound by the contracts or agreements or its agent if within the apparent scope of the agent’s authority although the contract may be beyond the scope of his actual authority.” *Schoonover v. Carpet World, Inc.*, 91 Wn.2d 173, 177, 588 P.2d 729 (1978), citing *Lumber Mart Co. v. Buchanan*, 69 Wn.2d 658, 662, 419 P.2d 1002 (1966). Apparent authority is sufficient to establish “speaking agency” for purposes of ER 801(d)(2)(iv). 5B Karl B. Tegland,

*Washington Practice, Evidence Law and Practice*, §801.48, at 360 (4<sup>th</sup> ed. 1999).

Apparent authority is defined as follows:

[T]he principal is bound by the act of his agent when he has placed the agent in such position that persons of ordinary prudence, reasonably conversant with business usages and customs, are *thereby led to believe and assume that the agent is possessed of certain authority, and to deal with him in reliance upon such assumption* [emphasis supplied].

*Schoonover*, 91 Wn.2d at 176-177, quoting *Mohr v. Sun Life Assur. Co.*, 69 Wn.2d 658, 662, 419 P.2d 1002 (1966).

Put another way, an agent has apparent authority when the principal (1) knowingly permits the agent to perform certain acts, (2) holds him out as possessing certain authority, or (3) *places the agent in such a position that a reasonable person would believe and assume that the agent has certain authority and would deal with him on reliance of that assumption or belief*. *Larson v. Bear*, 38 Wn.2d 485, 490, 230 P.2d 610 (1951) (emphasis supplied), citing *Galbraith v. Weber*, 58 Wash. 132, 107 P. 1050 (1910).

Apparent authority can only be established from the conduct of the principal, and not by the conduct of the agent. *Equico Lessors v. Tow*, 34 Wn.App. 333, 338, 661 P.2d 597 (1983). Establishing the requisite authority rests upon the one who asserts it. *Lamb v. General Associates, Inc.*, 60 Wn.2d 623, 374 P.2d 677 (1962). The out-of-court statements

themselves are inadmissible to prove agency or the authority to speak. *Passovoy v. Nordstrom Inc.*, 52 Wn.App. 166, 171, 758 P.2d 524 (1988).

Shelton's statements are admissible as a matter of law. For example, the *Schoonover* court found that a salesman at a carpet retail outlet in Lynnwood had "apparent authority" to enter into a binding employment agreement with the plaintiff. *Schoonover*, 91 Wn.2d at 174. Ms. Schoonover had worked at a carpet store for a significant number of hours and was not paid. The carpet company's managers were aware of her work and had supervised her on occasion. The salesman who hired her disappeared with the funds that were meant to pay her. The carpet store claimed that it had no binding contract with her and that only the salesman was responsible. The trial court agreed that no binding contract existed. *Id.* at 175-176.

In reversing the trial court's finding and applying the law as stated above, the Supreme Court stated that the carpet store had placed the salesman in "a position where it could be logically inferred by a job seeker of ordinary prudence, reasonably conversant with business custom, that he was in a position to hire sales personnel for the store." *Schoonover*, 91 Wn.2d at 179. Furthermore, "it would follow that he had concomitant authority to state the terms of employment, absent any reasonable and timely notice to an individual employed by him." *Id.*

In reaching this conclusion, the *Schoonover* court relied on *Walker v. Pacific Mobile Homes, Inc.*, 68 Wn.2d 347, 413 P.2d 3 (1966), which upheld a finding of apparent authority where a mobile home salesman had no actual authority to accept a consignment or complete a sale. The salesman sold a mobile home that had been taken on consignment and absconded with the funds. The consignor sued the corporation which the salesman represented and the corporation denied “having authorized the salesmen’s acts or having knowledge thereof.” Id.

The *Walker* court held that the evidence warranted finding that the corporation had “clothed the salesmen with apparent authority to take the trailer on consignment and to consummate a sale.” The court considered “each salesman’s solitary presence in the company office on several occasions as well as the salesmen’s seeming control of the office” in determining that apparent authority had been established. Id.

Like the agents in *Schoonover* and *Walker*, Shelton was placed in such a position and had previously 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.

Shelton’s previous actions would have led a reasonable person to believe and assume that he possessed the authority to act on the TSD’s behalf and would enter into agreements with him in reliance on that belief. Such earlier actions include Shelton’s discontinuance of the previous “cost

reimbursement” method of reimbursing Schock for the materials and equipment he purchased to make the improvements, stating that the TSD didn’t want to be “nickel and dimed.” No fact disputes exist that Schock was partially reimbursed for the improvements by the TSD directly.

In addition, Shelton was the only representative that Schock dealt with for many years concerning such matters as the initial offer to have Schock stay on the property as a caretaker. CP 109 (TSD notes from 3/27/91 summarizing Shelton’s initial discussions with Schock). It was Shelton with whom initially Schock discussed remodeling the property versus the TSD’s constructing entirely new buildings. It also was Shelton who arranged for Schock’s initial reimbursements on the TSD’s behalf.

A reasonable person in Schock’s position would have assumed that Shelton (like the mobile home salesman in *Walker*) had “seeming control” over any decisions made concerning payments for the improvements made to the property. This was especially so concerning any decisions relating to the method by which Schock would be reimbursed for the improvements.

Furthermore, TSD’s argument that only the Board could enter into agreements that “contract[ed] to grant ownership and possessory rights in District real property” is a non-starter. Nothing in the oral agreement suggests that Schock was granted an “ownership” or “possessory” right in

the property. Schock has clearly abandoned any claim to “any fee simple interest in the property” even if such an interest was mentioned in his Answer. RP 22:8-10. The oral agreement on which he relied was simply “a contractual arrangement to pay him before he leaves.” Id.

Finally, TSD officials later ratified Shelton’s agreement with Schock that he would be reimbursed by some method for his repair and remodel costs by actually doing so between 1968 to 1973. CP 15 (the TSD reimbursed Schock “for materials used in remodeling from 1968 to 1973”); CP 122 (TSD “has reimbursed Mr. Schock for some of the improvements”); CP 125 (estimating at \$34,216 the 1988 value of the “materials purchased by Mr. Schock and reimbursed by” TSD).

Thus, it was entirely reasonable for Schock to believe that Shelton had the authority to simply change the reimbursement method by which he completed the remaining improvements (from direct reimbursement to the appraisal method) and it was totally reasonable for him to rely on that belief. Like the courts in *Schoonover* and *Walker*, the court here can find that Shelton’s statements are not hearsay as a matter of law since he had apparent authority to make them.

D. Schock’s Contract Counterclaim is Not Barred by the Statute of Frauds.

TSD argues that any oral agreement concerning Schock being reimbursed for expenses using the “appraisal method” is unenforceable

since it was not in writing and thus violates the Statute of Frauds. The trial court agreed with the argument, stating:

This is sort of frustrating because on the one hand we have Mr. Schock's very long-term residency on this property and his adamancy – *his continuing assertions that he is entitled to compensation*. On the other hand, it appears to the Court, I am satisfied, that *his assertion is tied to an interest in this real estate* and that it does call into question the Statute of Frauds. And there is no writing. I agree with the Plaintiff's position in this matter. There is no writing here. I think it violates the Statute of Frauds. RP 30:13-20 [emphasis supplied].

It is true that in his Answer Schock may have asserted that he may have some form of compensable ownership interest in the improvements he made. CP 6 at ¶¶3.1, 3.5. But Schock made it clear that he is not claiming a “fee simple” or “fee” interest in the property that would trigger the Statute of Frauds. RP 22:8-9. The interest that he asserts is not an effort to own the property or to possess it indefinitely. It is not tied to the real estate.<sup>2</sup>

Rather, Schock is simply “saying there's a contractual arrangement to pay him before he leaves.” RP 22:9-10. In his Answer, Schock pled an

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<sup>2</sup> In fairness the issue perhaps was not understood. While Schock asserts he is entitled to payment upon departure, the nuance of the argument could be misconstrued as a claimed ownership interest in the improvements. From Schock's standpoint, his departure is the triggering event for payment but does not give him a fee interest that would, for instance allow him to lease, destroy, convey or move the premises. The Answer claims that Schock owned a title interest *or* a “compensable property interest.” While different terms could have been used, the pleadings clearly distinguished from a title interest and if the point was not clear, the counterclaim made it clear that Schock was entitled to compensation for his improvement efforts. As a compensable property interest, Schock is entitled to compensation for the improvements.

“alternative claim” by which he asserts a right to be reimbursed for “sweat equity” under a straight contract or equity theory even if he has no title interest in the property at issue. CP 10-11 at ¶¶6.4-6.6. Under the counterclaim, the oral agreement is not contingent on an interest in the property and thus does not violate the Statute of Frauds. It is bolstered by Schock’s statutory right to assert such a counterclaim in an ejectment action such as this one. RCW 7.28.160 (Defendant’s counterclaim for the value of permanent improvements “must be allowed”).

1. Schock Claims No Conveyance of or Interest in the Property That Would Trigger a Written Agreement under the Statute of Frauds.

The Statute of Frauds cited by TSD reads in pertinent part:

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 [Conveyances and encumbrances to be by deed]. Clearly, Schock’s counterclaim to be reimbursed for the value of the improvements is not tied to a “conveyance of,” interest in or “encumbrance upon” the property at issue. The enforcement of the oral agreement on which it is based is not barred by the Statute of Frauds. TSD created a “straw man” that misses the point of Schock’s assertion.

2. TSD is Estopped from Requiring a Written Agreement Under the Statute of Frauds Where it Promised to Put it Into Writing and Did Not.

But if the Statute of Frauds somehow applies on its face, exceptions still allow enforcement of Schock's agreement with the TSD for reimbursement. First, Schock understood and assumed for many years that his agreement with TSD was put into written form and placed into his personnel file. CP 70. This was because Shelton told him "It's going to go – you know, I'm going to put it – it's all going to be in your file." CP 70:14-16. In these circumstances, the District is estopped from asserting the Statute of Frauds to avoid Schock's efforts to enforce the contract for reimbursement. *In re Estate of Nelson*, 85 Wn.2d 602, 610-611, 537 P.2d 765 (1975). As the court stated in *Nelson*, "a party who promises, implicitly or explicitly, to make a memorandum of a contract in order to satisfy the Statute of Frauds, and then breaks that promise, is estopped to interpose the Statute as a defense to the enforcement of the contract by another who relied on it to his detriment." *Nelson*, 85 Wn.2d at 610-611.

3. No Writing is Required Where Schock Continuously and Exclusively Occupied the Camp and Made Substantial and Valuable Improvements to it Under the Terms of the Oral Agreement.

Again, *if* the Statute of Frauds applies, the doctrine of part performance applies to except these facts. Part performance of an oral agreement takes it outside the Statute if there is proof of the existence, character and terms of the contract. *Powers v. Hastings*, 93 Wn.2d 709,

612 P.2d 371 (1980). Here the trial court ruled: “I don’t think the Part Performance Doctrine would rescue this alleged agreement from the Statute of Frauds. There’s not unmistakable evidence before the Court.” CP 30:24-25; 31:1-2. The trial court must be reversed on this issue.

Part performance is an equitable doctrine that has

evolved in mitigation of the harsh results of a too-strict application of the statute of frauds. This doctrine prevents a party from asserting the invalidity of a contract where the other party has acted in conformity with the contract and thus placed himself in a position where it would be intolerable in equity to deny its enforcement.

*Stevenson v. Parker*, 25 Wn.App. 639, 643-644, 608 P.2d 1263 (1980), citing *Miller v. McCamish*, 78 Wn.2d 821, 827, 479 P.2d 919 (1971) and *Gabrick v. Franz*, 13 Wn.2d 427, 430, 125 P.2d 295 (1942). The principle elements or circumstances involved in determining whether there has been sufficient part performance are:

- (1) delivery and assumption of actual and exclusive possession of the land;
- (2) payment or tender of consideration, whether in money or property or services;
- (3) the making of permanent, substantial and valuable improvements, referable to the contract.

*Powers*, 93 Wn.2d at 717, citing *Richardson v. Taylor Land and Livestock Co.*, 25 Wn.2d 518, 528-29, 171 P.2d 703 (1946).

*Powers* emphasized that when deciding whether there is sufficient evidence to “remove” an oral agreement from the Statute of Frauds, only two of the three elements outlined above must be present. *Powers*, 93

Wn.2d at 721 (citing numerous Washington cases in which only possession and improvements were sufficient to find part performance). *Powers* further emphasized that “substantial and valuable improvements” have been characterized as the “strongest and most unequivocal act” and the “highest evidence” of part performance. *Powers*, 93 Wn.2d at 722, citing *Henrikson v. Henrikson*, 143 Wis. 314, 321, 127 N.W. 962, 965 (1910) and 73 Am.Jur.2d *Statute of Frauds*, §424 at 55 (1974).

In *Powers*, the court upheld the enforceability of an oral agreement under the doctrine of part performance. *Powers* involved the breach of an oral lease-option agreement. The Hastings had owned a dairy farm they wanted to sell. When Powers was unable to secure financing, the Hastings orally agreed to lease the farm for three years with an option to purchase. *Powers*, 93 Wn.2d at 711. The Powers substantially repaired and improved the property in order to make it operable as a dairy farm again. Their business subsequently deteriorated and they had difficulty making payments. They then attempted to obtain financing but the Hastings denied the existence of the oral agreement and refused to give the Powers a written lease. Hastings served an eviction notice. Powers sold their cows at a substantial loss and left the farm. Powers subsequently for damages and obtained a jury verdict for \$40,000. *Id.*

Hastings’ key defense at trial was that if the oral lease-option agreement existed, it was unenforceable under the Statute of Frauds. The

trial court granted a judgment n.o.v. It held that the doctrine of part performance did not take the agreement outside the statute in part because “the improvements do not unequivocally or unmistakably point to the option.” *Powers*, 93 Wn.2d at 712.

The court of appeals reversed, holding that substantial evidence of part performance had been presented to the jury, including the Powers’ possession of the property and evidence of substantial improvements and payments. The Supreme Court agreed, reversed and remanded to reinstate the jury’s verdict. *Id.* at 713.

In so doing, it applied a “preponderance of the evidence” rather than a “clear and unequivocal” burden of proof to weigh whether there was sufficient evidence to take the agreement outside the Statute of Frauds. *Id.* at 717. It held that because all three elements of part performance (as outlined above) appeared to be present, “a fair-minded person would conclude there is sufficient evidence of part performance of the lease-option agreement.” *Id.* This evidence included: (1) “actual, exclusive possession of the farm pursuant to the agreement;” (2) the making of payments in consideration of the option; and (3) the Powers making of substantial improvements to the property. *Id.* at 718.

These “substantial improvements” included:

- Expending more than \$5,000 and considerable labor on improvements worth \$14,250;
- Pouring concrete and installing plumbing for a washing area;

- Installing wiring, light fixtures, lights and milking fixtures as well as plumbing and a pump;
- Repainting, re-hanging doors, repairing gates and replacing fences;
- Rebuilding a holding bin and feeder trough;
- Elevating the floor of a milking shed with gravel, expanding and filling it to provide drainage.

*Powers*, 93 Wn.2d at 718. The court concluded that there “was sufficient evidence to show these improvements were permanent, substantial and valuable.” *Id.* at 719.

Like the improvements present in *Powers*, Schock presents facts that support a finding of part performance. The improvements that Schock made to the property in reliance on the oral agreement with Shelton include:

- Completely renovating and expanding the main residential house, originally a one-bedroom dwelling;
- Completely renovating and expanding the homestead cabin which was originally a single room structure;
- Renovating and rebuilding the main barn;
- Additional renovations and repairs to other buildings on the property.

CP 82-83. Like the improvements in *Powers*, these improvements were “permanent, substantial and valuable.” There is not even a fact dispute on this issue: TSD’s own auditor stated unequivocally that “Mr. Schock most certainly improved the value of the site with his remodeling efforts.” CP 124 (Cuzzetto 1989 “Report of Past Transactions”). Schock’s auditor set the value of the improvements in 1987 dollars at \$197,815 and TSD’s appraiser agreed to this figure. CP 128; 133-135.

*Powers* court found part performance where only two of the elements outlined above were present at the time of trial since the Powers were no longer in possession of the property and had ceased making payments. *Powers*, 93 Wn.2d at 721-722 (granting enforcement of the oral agreement where only the elements of substantial improvements and some payments were present). This court should find part performance. Here, no fact disputes exist that two of the elements exist: substantial and valuable improvements, actual and exclusive possession of the improved premises.

Reversing the trial court here is especially appropriate since unlike *Powers*, this case was dismissed on summary judgment and did not go to a trier of fact for determination. Clearly, here as in *Powers*, there is sufficient evidence of the existence, character and terms of the oral contract as well as actual and exclusive possession combined with clear evidence of substantial improvements to the property, the substantial value of which is not even in dispute. As in *Powers*, Schock should be able to present his case to a trier of fact.

E. Schock's Counterclaim to Enforce the Oral Agreement Between Himself and TSD is Not Time-Barred.

Schock raised sufficient factual disputes to present his claim for enforcement of the oral agreement to a trier of fact. One final question is whether his claim is barred by any Statute of Limitations. The trial court

ruled: “I also agree that even assuming an agreement existed, that it is barred by the Statute of Limitations as well, whether that be a 30-day statute or a three-year statute.” CP 31:2-5. Considering all of the relevant facts as summarized below, the trial court must too be reversed on this issue.

1. Facts Relevant to the Statute of Limitations.

Schock completed the improvements by the end of 1987 and filed a claim with TSD shortly thereafter. CP 83 at ¶5; CP 101. His appraiser calculated the value of the improvements using a “cost approach appraisal” method at \$197,815. CP 129-139 (Latteri Report). The TSD’s appraiser calculated the value at \$163,599. CP 125 (Cuzzetto Report).

In March 1990, TSD Superintendent Lillian Barna denied Schock’s claim for reimbursement. CP 98-99. She notified him that he had 30 days in which to appeal to the School Board and he did so. CP 100-102. Thereafter in May 1990, Superintendent Barna again denied his claim. CP 103-104.

However, on July 31, 1990, Superintendent Barna continued discussions with Schock concerning his claim by writing to him as follows:

Do you have any other information which would be substantial 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. CP 105-106.

Obviously Superintendent Barna did not believe the statute closed. A meeting was scheduled with Schock and TSD officials on August 20, 1990. CP 106. Schock responded that he needed more time in which to compile the needed information concerning the original agreement with Shelton. CP 107.

The proposed meeting with TSD officials finally took place on March 27, 1991. CP 108. In the scheduling letter, Schock was instructed to be “prepared to present your position as to your ... understanding of any agreements you believe you have with the Tacoma School District with respect to the District’s property, Camp Joshua Taylor.” Id. Obviously the statute was still open.

At the meeting with TSD officials, Schock and his *attorney* summarized the oral agreement between Schock and Shelton on behalf of TSD concerning being reimbursed using the appraisal method for the permanent improvements he made to the property. CP 109-111 (unsigned notes from meeting). (Obviously the attorney believed the statute was still open.) Schock and his attorney described in detail the improvements that were made, the numerous discussions that Schock had with Shelton in the early years to discuss the remodeling and how it would be paid for and the agreement with Shelton that the “district would reimburse Mr. Schock after it has been appraised.” CP 111. The meeting concluded with no agreement regarding what the TSD would do, if anything, regarding

Schock's claim for reimbursement. Unlike the 1990, no 30 day appeal deadline was directed to Schock and the statute remained open.

No further records document any further discussions between Schock and TSD officials concerning his claim. Schock and his family continued to reside at the property and to provide caretaker services to the TSD in exchange for rent as in the past for 21 years.

On November 5, 2012, TSD issued its notice to vacate the property. CP 40-41. Schock filed his counterclaim seeking enforcement of the oral agreement with Shelton in his Answer filed with the trial court on June 13, 2013. CP 5-10.

2. Schock's Counterclaim is Not Barred Under the 30 Day Statute of Limitations for School District Claims Since TSD Reopened the Claim in 1990 and Never Closed It.

On these facts, neither the 30 day statute of limitations found in RCW 28A.645.010 nor the three year statute of limitations found in RCW 4.16.080 bar Schock's counterclaim for reimbursement. RCW 28A.645.010(1) states in pertinent part as follows:

Any person ... 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.

No fact disputes exist here that Superintendent Barna continued discussion of Schock's claim for reimbursement in her letter to him of July 31, 1990 by offering to receive additional information from him before deciding whether to close the claim. CP 105-106. Schock responded that he needed additional time in which to gather such information. CP 107. The TSD agreed to an extension until March 27, 1991. CP 108-111. No resolution of the claim either way occurred at that meeting.

The TSD argues that Ms. Barna's July 31, 1990 letter did not continue discussions or reopen the claim and merely scheduled a meeting. CP 173. But a careful reading of her letter reveals that is not true: She clearly and unequivocally informed him that she was willing to receive additional information from him regarding his claim and that she *and the Board* would only consider the claim closed if he did not provide such information at the scheduled meeting. *Id.* The TSD agreed to delay the meeting so that Schock could obtain this information, which he did do by the March 27, 1991 meeting.

By the terms of her letter, the District would only consider his claim closed if he did not provide the information. Because he did so the claim remained open. Under these facts, a new promise was made in writing by the TSD Superintendent which was sufficient to satisfy the writing requirements of RCW 4.16.280 (new promise must be in writing).

Under these circumstances, Schock did not have a decision or order from which to appeal in March, 1991.

3. Schock's Counterclaim is Not Barred by the Three Year Statute of Limitations.

The same facts apply to the three year statute of limitations found in RCW 4.16.080(3). That statute states:

The following actions shall be commenced within three years: ... (3) ... an action upon a contract or liability, express or implied, which is not in writing, and does not arise out of any written instrument ...

For statute of limitations purposes, a contract claim accrues when there has been a breach of contract. *Schwindt v. Commonwealth Ins. Co.*, 140 Wn.2d 348, 353, 997 P.2d 353 (2000). That did not occur here until November 5, 2012 when TSD ordered Schock off the property without paying him for the improvements.<sup>3</sup>

Schock has remained at and still occupies the Camp in his role as caretaker in exchange for rent. By its very terms, the oral agreement did not require that he do anything until it was time for him to vacate the property or when the TSD decided to sell it. The oral agreement was in a sense "merged" with his onsite employment as caretaker and was continuously renewed every day that Schock has remained at the property in his capacity as caretaker. There was thus no breach of contract until

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<sup>3</sup> Since Bell continues to assert that Schock is the caretaker, CP 27, he continues to reside on the premises with TSD's permission.

November 2012. Schock's counterclaim based on the oral agreement was not time barred.

4. Schock Could Not File a Counterclaim Under the Ejectment Statute for the Value of the Permanent Improvements Until TSD Filed its Complaint in April 2013.

While not addressed by the court, Schock has a statutory right to assert a counterclaim in this ejectment action to be reimbursed for all "permanent improvements" made in good faith by him to the property. RCW 7.28.150, 7.28.160 ("In an action for the recovery of real property upon which permanent improvements have been made ... the value of such improvements ... must be allowed as a counterclaim to the defendant"). To the extent that his counterclaim is based on this statutory right, Schock could not have brought it until after TSD filed its Complaint for Ejectment and Quiet Title in April 2013. Schock's counterclaim is not time-barred.

F. The TSD's Promise to Pay at the Time Schock Leaves the Property is Enforceable as a Quasi-Contract or Under the Doctrines of Promissory Estoppel or Quantum Meruit.

Even if there is no enforceable oral agreement between Schock and TSD to reimburse him for the permanent improvements at the time he leaves the property, the promise to pay him can be enforced as a "quasi-contract" or under the related doctrine of promissory estoppel. A quasi-contract is "an obligation implied by law to avoid unjust enrichment." *Heaton v. Imus*, 93 Wn.2d 249, 252, 608 P.2d 651 (1980). The doctrine

will be applied when “money or property has been placed in one person’s possession under circumstances that in equity and good conscience he ought not to retain it.” Id. See also *Young v. Young*, 164 Wn.2d 477, 484, 191 P.3d 1258 (2008) (unjust enrichment is the modern designation for quasi-contract).

Promissory estoppel is a “promise which one should reasonably expect to cause reliance, and which does cause justifiable reliance.” *Corbit v. J.J. Case Company*, 70 Wn.2d 522, 538-539, 424 P.2d 290 (1967) (detailing the five requisites for recovery in promissory estoppel). Washington courts have expressly adopted *Restatement (Second) of Contracts §91* which states that if the promise is one which is “performable at a future time,” the promisor is bound but performance becomes due only upon “the arrival of the specified time.” Id.

Quantum meruit is the “measure of recovering the reasonable value of services provided under a contract implied in fact” *Young*, 164 Wn.2d at 485. A contract “implied in fact” is:

an agreement depending for its existence on some act or conduct of the party sought to be charged and arising by implication from circumstances which, according to common understanding, show a mutual intention on the part of the parties to contract with each other. *The services must be rendered under such circumstances as to indicate that the person rendering them expected to be paid therefore, and that the recipient expected or should have expected to pay for them [emphasis supplied].*

Id. “Unjust enrichment” (or quasi contract) is founded on notions of justice and equity while “quantum meruit” is founded in the law of contracts.” Id. at 486.

Placing the property in TSD’s possession through a Writ of Restitution without compensating Schock for the value of his permanent improvements will clearly result in an “unjust enrichment” to the TSD. Thus, the court can find an enforceable quasi-contract under these facts.

Alternatively, this court can rule in favor of Schock under the doctrine of promissory estoppel, especially when the facts are viewed most favorably to him as the non-moving party. The TSD through its apparent or actual agent Shelton promised Schock that he would be reimbursed using the appraisal method at the time he vacated the property for the permanent improvements he made. That TSD actually did partially reimburse him for these improvements should have caused it to reasonably expect that Schock would follow through with the agreement and continue to make significant improvements to the Camp buildings at his own expense. Schock did in fact expend much, time, energy and materials to make substantial improvements to the Camp buildings. In so doing, Schock justifiably relied on the original promise that he would be reimbursed at the time that the TSD no longer needed his caretaker services and he left the property. An injustice can only be avoided if the TSD’s promise to pay is enforced. Since the promise to pay was

conditioned on his vacating the property, its performance becomes due at the present time since he will now have to do so. Application of the doctrine of promissory estoppel to these facts requires that this court reverse the trial court's ruling in favor of the TSD, remanding the case back to the trial court for a trial to be conducted on all of these issues.

Here, the TSD agreed to have Schock perform significant improvements to the property in lieu of building the caretaker's residence itself. Under these circumstances, based on either a quasi-contract or quantum meruit theory, TSD is required to pay full restitution to Schock. *Young* at 490. Therefore, the measure of Schock's recovery is the "entire value of the benefit [TSD] received as determined by either the fair market value of the services rendered or the amount the improvements enhanced the value of the property." *Young* at 490-491 (remanding to trial court for recalculation of an unjust enrichment award in a quasi-contract action for improvements to real property).

## **VI. CONCLUSION**

The trial court's granting of summary judgment on the TSD's ejectment claim and its denial of Schock's counterclaim should both be reversed and remanded for trial on the merits. Genuine issues of material fact exist regarding the enforceability of the oral agreement entered into between Schock and Shelton. Shelton's statements made to Schock at that time are non-hearsay admissions of a party-opponent since a reasonable

person in Schock's position would have believed that Shelton had apparent authority to make promises to pay using the appraisal method and would have reasonably relied on them. Shelton did in fact have such authority and the TSD ratified his actions.

The Statute of Frauds does not require a written agreement in this case. TSD's reliance on the Statute is a red herring in any event since Schock is not claiming an ownership or possessory interest in the property. The doctrines of estoppel and part performance also apply to eliminate the need for a written deed. Part performance especially applies here since there are no factual disputes that Schock made substantial and permanent improvements to the property and that he has had exclusive and actual possession of the buildings he improved for 46 years.

Schock's counterclaim for payment is not time-barred since the TSD clearly and unequivocally re-opened his claim for reimbursement on July 31, 1990, never closed it, the breach of contract did not occur until November 2012 and Schock has a statutory right to assert a counterclaim for the value of the permanent improvements in this ejectment action.

Finally, construing the facts in Schock's favor as this court must, the doctrines of quasi-contract, quantum meruit and promissory estoppel require that the TSD pay him for the permanent improvements prior to his vacating the property. Schock is entitled under these theories to full restitution determined as either the fair market value of the services

rendered or the amount the improvements enhanced the value of the property. At the least, this case should be reversed and remanded back to the trial court for a full trial on the merits.

To the contrary, Schock initially was paid to build but went to an appraisal method when the Business Manger complained of being “nickel and dimed.” Later his building efforts were throttled when he made too many improvements CP 51. Never did anyone tell Schock that Shelton did something he was not supposed to do. The lack of authority argument was developed preparatory to litigation and nothing else.

Respectfully submitted this 5th day of August, 2014.

A handwritten signature in black ink that reads "David D. Gordon, for". The signature is written in a cursive style and is positioned above the typed name and address.

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

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

Plaintiff/Appellee

v.

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

Defendants/Appellants.

**Court of Appeals No. 46198-6-II**

**Pierce County Cause No. 13-2-08661-7**

**CERTIFICATE OF SERVICE OF  
APPELLANTS' OPENING BRIEF**

I, DAVID D. GORDON on behalf of L. PAUL ALVESTAD, hereby certify that on the  
5<sup>th</sup> day of August, 2014, I placed with ABC Legal Messenger, a true and correct copy of the  
Appellants' Opening Brief to:

Counsel for Plaintiff/Appellee:  
Mark A. Hood  
Attorney at Law  
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1201 Pacific Ave., Ste. 1900  
Tacoma, WA 98402-4315

Certificate of Service of  
Appellants' Opening Brief - 1

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

DATED this 5<sup>th</sup> day of August, 2014.

GORDON & ALVESTAD, PLLC

By   
DAVID D. GORDON for  
L. Paul Alvestad, WSBA #10892