

No. 30070-6

**COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III**

FILED

FEB 15 2012

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

FDIC as Receiver for the BANK OF WHITMAN,

Respondent,

v.

URIBE, INC., a Washington Corporation;
MICHAEL C. URIBE and HELEN R.
URIBE, husband and wife and the
Marital Community composed thereof,

Appellants.

APPELLANTS' OPENING BRIEF

ROBERT M. SEINES
Attorney at Law
P.O. Box 313
Liberty Lake, WA 99019
p 509-844-3723
f 509-255-6003
rseines@msn.com

Attorney for Appellants

No. 30070-6

**COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III**

FILED
FEB 15 2012
COURT OF APPEALS
DIVISION III
SEATTLE, WASHINGTON

FDIC as Receiver for the BANK OF WHITMAN,

Respondent,

v.

URIBE, INC., a Washington Corporation;
MICHAEL C. URIBE and HELEN R.
URIBE, husband and wife and the
Marital Community composed thereof,

Appellants.

APPELLANTS' OPENING BRIEF

ROBERT M. SEINES
Attorney at Law
P.O. Box 313
Liberty Lake, WA 99019
p 509-844-3723
f 509-255-6003
rseines@msn.com

Attorney for Appellants

TABLE OF CONTENTS

I. INTRODUCTION 1

II. ASSIGNMENTS OF ERROR 1

 1. Does the record and the declarations submitted by the parties raise issues of fact about the existence of an oral agreement between The Bank of Whitman and the Uribes for the Bank to provide an Irrevocable Letter of Credit (ILOC) or other adequate security to enable Uribe, Inc. to obtain a performance bond. 1

 2. Did the trial court err by determining there were no genuine issues of fact as to whether the Bank of Whitman and Uribes had an oral agreement for the Bank to provide an ILOC or other adequate security to enable Uribe, Inc. to obtain a performance bond. 1

 3. Did the trial court err in determining as a matter of law that an oral agreement did not exist..... 1

 4. Did the trial court err by granting summary judgment and dismissing the Uribe’s counterclaim against the Bank of Whitman..... 1

III. STATEMENT OF THE CASE 2

IV. ARGUMENT 5

 A. Standard of Review 5

 B. A Court may not weigh credibility Issues on summary judgment 6

 C. The determination of the existence of an oral contract is generally not appropriate for summary judgment 7

 D. Summary judgment is also not appropriate for the determination of the terms of the oral contract 9

E.	Appellant should be awarded reasonable attorney’s fees if the trial court’s decision is reversed per RAP 18.1(b)	11
V.	CONCLUSION	11

TABLE OF AUTHORITIES

Cases

<u>Crown Plaza Corp. v. Synapse Software Sys., Inc.</u> , 87 Wn.App. 495, 962 P.2d 824 (1997)	8, 10
<u>Duckworth v. Bonney Lake</u> , 91 Wn.2d 19, 586 P.2d 860 (1978)	6
<u>Duckworth v. Langland</u> , 95 Wn.App. 1, 988 P.2d 967 (1998), review denied, 138 Wn.2d 1002, 984 P.2d 1033 (1999)	8
<u>Estep v. Hamilton</u> , 148 Wn.App. 246, 256, 201 P.3d 331 (2008) review denied, 166 Wn.2d 1027 (2009)	6
<u>Garbell v. Tall’s Travel</u> , 17 Wn.App. 352, 563 P.2d 211 (1977) ...	9
<u>Keystone Land Dev. Co. v. Xerox</u> , 152 Wn.2d 171, 94 P.3d 945 (2004)	8
<u>McNabb v. Department of Corrections</u> , 163 Wn.2d 393, 180 P.3d 1257, 1260 (2008)	6
<u>Meadows v. Grant Auto Brokers</u> , 71 Wn.2d 874, 431 P.2d 216 (1967)	7
<u>Neuson v. Macy’s Dept. Stores, Inc.</u> , 160 Wn.App. 786, 249 P.3d 1054, 1056 (Div. 3, 2011)	6
<u>Plese-Graham, LLC. V. Loshbaugh</u> , 164 Wn.App. 530, ___ P.3d ___ (Div. 3, 2011)	7
<u>Riley v. Andres</u> , 107 Wn. App. 391, 27 P.3d 618 (Div. 2 2001) ...	7
<u>Ruff v. King County</u> , 125 Wn.2d 697, 887 P.2d 886. (1995)	9

<u><i>Spradlin Rock Products, Inc. v. Public Utility Dist. No. 1 of Greys Harbor County</i></u> , 164 Wn.App. 641, ___ P.3d ___ (Div 2, 2011)	7
<u><i>Wilson Court Ltd. Partnership v. Tony Maroni's, Inc.</i></u> , 134 Wn.2d 692, 952 P.2d 590 (1998), <i>cert denied</i> 125 S.Ct 1596 (2005)	8
 Court Rule	
CR 56	5
 Treatise	
Tegland and Ende, 15A <u><i>Washington Practice</i></u> : Washington Handbook on Civil Procedure § 69.16 (2009-2010 ed.)	7

I. INTRODUCTION

This Court should reverse the Superior Court's summary judgment dismissing Uribes' counterclaim. There are clearly genuine issues of material fact as to whether the Bank of Whitman and Uribe had an oral contract for the Bank to timely provide adequate security to enable Uribe to procure a performance bond.

II. ASSIGNMENTS OF ERROR

1. Does the record and the declarations submitted by the parties raise issues of fact about the existence of an oral agreement between The Bank of Whitman and the Uribes for the Bank to provide an Irrevocable Letter of Credit (ILOC) or other adequate security to enable Uribe, Inc. to obtain a performance bond.

2. Did the trial court err by determining there were no genuine issues of fact as to whether the Bank of Whitman and Uribes had an oral agreement for the Bank to provide an ILOC or other adequate security to enable Uribe, Inc. to obtain a performance bond.

3. Did the trial court err in determining as a matter of law that an oral agreement did not exist.

4. Did the trial court err in dismissing the Uribe's counterclaim against the Bank of Whitman.

III. STATEMENT OF THE CASE

Uribe, Inc. (Uribe) was a pipeline construction company headquartered in Pasco. (CP 272, CP 263)). The Bank of Whitman and Uribe, Inc. worked together in the spring of 2007 to enable Uribe to bid on a pipeline construction project. (CP 76) It is undisputed that the Bank of Whitman provided the financing for the project. (CP 220).

The issue here is whether the Uribes and the Bank also had an oral contract – that was part and parcel of the agreement for project financing, for the Bank to provide a line of credit or other adequate security to enable Uribe to secure the performance bond that was required for the construction project.

The Bank of Whitman disagrees there was an oral agreement. (CP 221, CP 216) However, the record shows that the Bank attempted to post the line of credit, but was declined by the surety because of the Bank's poor financial condition. And, the Bank continued its efforts and finally procured another bank, whose letter of credit was accepted by the surety. (CP 60-66).

The delay in procuring the bond prevented Uribe, Inc. from starting the project on time and delayed the completion of the project until the next spring – resulting in substantial financial loss to the Uribes. (CP 266).

Uribe, Inc. ceased to operate after the Bank of Whitman replevied their equipment in the underlying lawsuit. (CP 232-245). The replevin proceedings were commenced on July 21, 2010. The Bank alleged the Uribes were in default on the construction loan that is the subject of this appeal and an earlier loan. (CP 271-273).

On August 23, 2010, the Uribes and Uribe, Inc. filed an answer and counterclaim against the Bank of Whitman. (CP 263). The counterclaim contends that the Bank and Uribes had an oral agreement - that was part and parcel with the construction loan - for the bank to provide an Irrevocable Line of Credit (ILOC) to secure a performance bond. (CP 263-267).

The Uribes allege in Section 8.2 of the Counterclaim, that in 2006, the Bank of Whitman obtained an appraisal for real property owned by the Uribes, and after concluding that there was an abundance of equity, agreed to finance a pipeline construction project by Uribe, Inc. with Intermountain Gas. After reviewing bid specifications, the Bank allowed Uribe to bid and agreed verbally to provide an Irrevocable Line of Credit (ILOC) so that Uribe could obtain a performance bond as required by bid specifications. (CP 265)

The Bank of Whitman, in Section 8.2 of its answer and reply (CP 227-231), admits it obtained an appraisal in 2006 for real property owned

by the Uribes. (CP 228). In Section 8.3, the Bank admits that Uribe bid a job with Intermountain Gas, and admits that it offered a line of credit to the Uribe's bonding company to procure a bond, but the bonding company refused to accept the Bank of Whitman's line of credit. (CP 228)

In Section 8.4 the Bank admits it made extra efforts to assist Uribe, Inc. obtain the performance bond. The Bank offered to pledge a certificate of deposit in the amount of \$1,000,000 to Intermountain Gas in place of a bond, but Intermountain refused to accept the offer. (CP 228).

In contradiction with its answer and reply to the Counterclaim, the Bank of Whitman's affidavits from Craig Conklin (CP 215- 217) and Jim Hui (CP 219-222) state that the Bank never agreed to obtain an ILOC for the project. Their Affidavits also state that Mike Uribe "repeatedly affirmed" that Uribe would have no problem procuring a bond on his own. (Conklin CP 216 ¶ 7; Hui CP 220 ¶ 9).

The Declaration of Mike Uribe contradicts the Conklin and Hui Affidavits. He states in his Declaration that he had a verbal agreement with the Bank of Whitman for them to help him procure a bond by issuing an ILOC – as the Bank had done for another project in 2002. (CP 76 ¶ 3 and CP 77 ¶ 7). Mr. Uribe also states that Mr. Conklin's and Mr. Hui's statements that Mr. Uribe told them he could obtain the performance bond on his own were false. (CP 78-79 ¶10).

Uribe contend that the Bank of Whitman breached the contract when the Surety determined that the Bank of Whitman was not credit worthy or sufficiently solvent to secure the bond. This caused a delay in the construction project, which resulted in a loss of profits and other damages to the Uribe. (CP 263-267).

The sworn statements from Hui, Conklin and Uribe are factually irreconcilable with the declarations of Mike Uribe and John Mostoller. The declarations of Hui and Conklin are also contradictory with the Banks own pleadings.

The hearing on the Bank of Whitman's motion for summary judgment was held on May 23, 2011 before the Honorable Vic L. Vanderschoor. After hearing argument the Judge simply stated, "I will grant the motion." (RP at 9). No additional findings were made.

IV. ARGUMENT

A. Standard of Review. An order for summary judgment is proper only if there is no genuine issue of a material fact and the moving party is entitled to a judgment as a matter of law. CR 56(c). On review of an order granting summary judgment, facts and reasonable inferences are considered in the light most favorable to the nonmoving

party and questions of law are reviewed de novo. McNabb v. Department of Corrections, 163 Wn.2d 393, 180 P.3d 1257, 1260 (2008)

Summary judgment is appropriate **only if** reasonable persons could reach a single conclusion from all the evidence. *Id.* The appellate court may affirm summary judgment on any ground supported by the record. Estep v. Hamilton, 148 Wn.App 246, 256, 201 P.3d 331 (2008), review denied, 166 Wn.2d 1027 (2009).

Findings of fact and conclusions of law are not necessary on summary judgment, CR 52(a)(5)(B), and, if made, are superfluous and will be ignored by the appellate court. Duckworth v. Bonney Lake, 91 Wn.2d 19, 21-22, 586 P.2d 860(1978; Neuson v. Macy's Dept. Stores, Inc., 160 Wn.App. 786, 249 P.3d 1054, 1056 (Div. 3, 2011).

B. A trial court may not weigh credibility issues on summary judgment. It is axiomatic that credibility issues are issues of fact, which cannot be decided by a summary judgment motion. If the facts as presented by the parties require the court to weigh credibility on any material issue, a genuine issue of fact exists and summary judgment should be denied.

Conflicting affidavits raise credibility issues. If the affidavits and counter-affidavits submitted by the parties conflict on material facts, the court is essentially presented with an issue of credibility, and summary

judgment will be denied. Tegland and Ende, 15A *Washington Practice: Washington Handbook on Civil Procedure* § 69.16 (2009-2010 ed.), citing, *Riley v. Andres*, 107 Wn. App. 391, 27 P.3d 618 (Div. 2 2001), *Meadows v. Grant Auto Brokers*, 71 Wn. 2d 874, 431 P.2d 216 (1967).

There are conflicting affidavits in this case. The defendant's claim there **was no** oral agreement to provide financing for Uribe, Inc. to obtain the required performance bond. (Hui Declaration, CP 215-218; Conklin Declaration, CP 215- 218). Mike Uribe claims that there **was** an oral agreement for the Bank of Whitman to provide adequate security in the form of an Irrevocable Line of Credit in order to obtain the bond. (CP 75-79). There is no way to resolve the conflicting sworn statements on paper and as a matter of law.

C. The determination of the existence of an oral contract is not appropriate for summary judgment. The Washington appellate courts have long held that oral contracts are generally not appropriate for summary judgment. *See, e.g.; Plese-Graham, LLC. V. Loshbaugh*, 164 Wn.App. 530, ___ P.3d ___ (Div. 3, 2011); *Spradlin Rock Products, Inc. v. Public Utility Dist. No. 1 of Greys Harbor County*, 164 Wn.App. 641, ___ P.3d ___ (Div 2, 2011); *Duckworth v. Langland*, 95 Wn.App. 1,7, 988 P.2d 967 (1998), review denied, 138 Wn.2d 1002, 984 P.2d 1033 (1999); *Crown Plaza Corp. v. Synapse Software Sys., Inc.* 87 Wn.App. 495, 501, 962 P.2d

824 (1997). As stated by the Division 3 Court of Appeals in Plese-Graham,

164 Wn.App at 541:

Disputes over the existence of oral contracts are generally not appropriate for summary judgment because they depend on an understanding of surrounding circumstances, the intent of the parties, and the credibility of witnesses. Duckworth v. Langland, 95 Wn.App. 1, 6–7, 988 P.2d 967 (1998), *review denied*, 138 Wn.2d 1002 (1999). If a dispute exists with respect to the terms of an alleged oral contract, summary judgment is not appropriate. *Id.* Generally, whether there has been mutual assent to the terms of a contract is a question of fact. Ford v. Trendwest Resorts, Inc., 146 Wn.2d 146, 162, 43 P.3d 1223 (2002); Sea-Van Invs. Assocs. v. Hamilton, 125 Wn.2d 120, 126, 881 P.2d 1035 (1994).

The parties' declarations directly conflict as to whether the Uribes and the Bank had an oral agreement for the Bank to provide an ILOC to secure the Uribes' performance bond. Moreover, the Bank's efforts to provide the ILOC even contradict their own declarations.

Washington follows the objective manifestation test for contracts. Keystone Land Dev. Co. v. Xerox, 152 Wn.2d 171, 177-78, 94 P.3d 945 (2004) (citing, Wilson Court Ltd. Partnership v. Tony Maroni's, Inc., 134 Wn.2d 692, 699, 952 P.2d 590 (1998), *cert denied* 125 S.Ct 1596 (2005). As such, the parties must objectively manifest their mutual assent to form a contract. Keystone, 152 Wn.2d at 177.

Whether the parties have mutually assented is generally a fact question for the jury. Keystone, 152 Wn.2d at 178, note 10. The court may

determine the issue as a matter of law only if reasonable minds could reach only one conclusion. Id. (citing *Ruff v. King County*, 125 Wn.2d 697, 703-04, 887 P.2d 886. (1995)).

It is noteworthy that in our case, the Bank of Whitman actively tried to provide an adequate ILOC to secure a bond and even tendered a \$1,000,000 certificate of deposit as a substitute for a bond. (CP 228).

These objective manifestations by Bank of Whitman and the reliance by the Uribes clearly evidence the existence of the oral agreement for the Bank to provide the necessary security for Uribe, Inc's performance bond.

D. Summary judgment is also not appropriate to determine the terms of an oral contract. In *Garbell v. Tall's Travel*, 17

Wn.App. 352, 354, 563 P.2d 211 (1977), the court stated 'Oral contracts are often, by their very nature, dependent upon an understanding of the surrounding circumstances, the intent of the parties, and the credibility of witnesses.' The court also stated that 'if a dispute exists with respect to the terms of the oral contract, then summary judgment is not appropriate.' And finally, 'the trier of fact in a trial setting should make the final determination with respect to the existence of the contractual agreement.'

Garbell, 17 Wn.App. at 354.

In *Crown Plaza Corp.*, *supra*, the parties disagreed about whether

they consummated an oral contract, 87 Wn.App. at 501. The moving party contended that the nonmoving party ‘presented no evidence beyond mere allegations or assertions supporting the formation of an oral contract.’ *id.*

The court also disagreed, stating:

The moving party appears to confuse the concept of making a bare assertion (e.g., there was an oral contract’) with making a statement that, if believed by a fact finder, would support the legal contention. Here, the nonmoving party stated that he and the moving party entered into an agreement and the moving party denies it. Only a fact finder can determine which of these statements is more credible, considering all the evidence, including the unsigned written agreement and the reasonableness of the agreement.

Crown Plaza, 87 Wn.App. at 501.

Like the parties in the Crown Plaza case, we need a fact finder to determine the terms of the oral agreement between Uribe, Inc. and the Bank of Whitman. We submit that the fact finder will decide that the Bank of Whitman breached its agreement with Uribe, Inc. to provide an adequate line of credit to secure a performance bond because the Bank’s was unable to do so because of its poor financial condition.

E. Appellant should be awarded reasonable attorney’s fees if the trial court’s decision is reversed. RAP 18.1(b). Appellants submit their request herein for an award of reasonable attorney’s fees if they are the prevailing party on appeal pursuant to RAP 18.1(b).

The statutory basis for an award of fees and costs is the Replevin Statute, RCW 7.64.035(1)(b) which provides, "...that if the order is wrongfully sued out, the plaintiff will pay all costs that may be adjudged to the defendant and all damages, court costs, reasonable attorneys' fees, and costs of recovery that the defendant may incur by reason of the order having been issued."

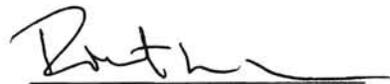
Appellants will also be entitled to attorney fees and costs on remand pursuant to RCW 4.84.330 because all of the loan and security agreements that were part and parcel with the oral contract contain attorney fee provisions. (See e.g.; CP 36).

V. CONCLUSION

Based on the foregoing, Defendant – Counter Plaintiffs Uribe, Inc. and Michael and Helen Uribe respectfully submit there are genuine issues of material fact, particularly as to the existence of an oral contract with Bank of Whitman, and therefore, the Summary Judgment Order should be reversed and the case remanded for further proceedings.

RESPECTFULLY SUBMITTED this 15th day of February, 2012.

ROBERT M. SEINES


Attorney for Uribe, Inc. and
Michael and Helen Uribe
WSBA 16046