



<u>TABLE OF CONTENTS</u>	<u>PAGE</u>
TABLE OF AUTHORITIES	iii
Assignments of Error	1
Issues Pertaining to Assignments of Error	3
Statement of the Case	6
Argument	11
I.    An Enforceable Contract Must Meet all Required Elements and Must be Fulfilled Pursuant to Its Unambiguous Terms	11
A.    The Statute of Frauds as a Matter of Law Defeats the Enforceability of the Contract	11
B.    Even if the Statute of Frauds is Not an Issue, a Contract that is Unambiguous on its Face is Enforceable Only if the Terms of that Contract Have in Fact Been Met	13
1.    A Contract that is Unambiguous on its Face Must be Interpreted Within the Confines of the Contract Itself	13
2.    The Court Erred in Finding that Plaintiff Exercised his Option to Purchase the Property in Writing Contemporaneously with the Re-Issuance of the \$1,000.00 Check	16

II.	The Defendant is Entitled to Reasonable Rent for the Period of Time the Plaintiff Occupied the Premises After January 18, 2005	18
III.	Attorney's Fees Should be Awarded to the Defendant	19
IV.	The Trial Court Erred in Denying the Motion for Reconsideration and/or New Trial	20
	Conclusion	24
	Appendix	27

## TABLE OF AUTHORITIES

### **CASES**

<u>Bigelow v. Mood</u> , 56 Wn.2d 340, 341, 353 P.2d 429 (1960) .....	11, 12
<u>Brown v. Mead</u> , 22 Wn.2d 60, 154 P.2d 283 (1944) .....	22
<u>Davis v. Jones</u> , 15 Wn.2d 572, 131 P.2d 430 (1942) .....	18, 19
<u>Duprey v. Donahoe</u> , 52 Wn.2d 129, 133-34, 323 P.2d 903 (1958) .....	14
<u>Hubble v. Ward</u> , 40 Wn.2d 770, 246 P.2d 468 (1952) .....	13
<u>In re Estate of Boston</u> , 80 Wn.2d 70, 491 P.2d 1033 (1971) .....	22
<u>Key Design, Inc. v. Moser</u> , 138 Wn.2d 875, 880-83, 993 P.2d 900 (1999) .....	11, 12
<u>Kruse v. Hemp</u> , 121 Wn.2d 715, 722, 853 P.2d 1373 (1993) .....	13
<u>Martin v. Seigel</u> , 35 Wn.2d 223, 229, 212 P.2d 107 (1949) .....	11
<u>McCourtie v. Bayton</u> , 159 Wash.418, 422, 294 P.238 (1930) .....	18
<u>McLennan v. Grant</u> , 8 Wash.603, 36 P.682 (1894) .....	19
<u>Sarvis v. Land Resources, Inc.</u> , 62 Wn.App. 888, 815 P.2d 840 (1991) .....	19
<u>Smith v. Hamilton</u> , 26 Wn.App. 663, 613 P.2d 567 (1980) .....	13
<u>Spake v. Elder</u> , 1 Wn.App. 116, 459 P.2d 820 (1969) .....	14
<u>Turner v. White</u> , 20 Wn.App. 290, 579 P.2d 410 (1978) .....	18

**A. ASSIGNMENTS OF ERROR**

**Assignments of Error**

1. The trial court erred in denying Defendant's Motion for Summary Judgment or Partial Summary Judgment. CP at 87-88.
2. That the trial court erred in finding from the testimony the following Findings of Fact:

Findings of Fact 1.13:

Although Mr. Jolly's testimony was vague in terms of the exact date, at most his testimony was a couple of weeks after the \$10,000.00 check was reissued. He requested Mr. Pardee assist him with cashing a \$1,000.00 he had received and failed to negotiate in a timely manner. CP at 101-105.

and

Findings of Fact 1.14:

The writing admitted as Exhibit 5 without objection was a letter sent certified mail by Mr. Pardee to Mr. Jolly dated January 13, 2005 and post marked January 14, 2005 in which Mr. Pardee expressed an intent to exercise his option to purchase the property. Mr. Jolly acknowledged receiving this either on January 15 or 16th, 2005. The written notice was sent to Mr. Jolly contemporaneous with the re-issuance of the \$1,000.00 check had occurred. *Id.*

Specifically, the court erred in finding as follows: “The written notice was sent to Mr. Jolly contemporaneous with the re-issuance of the \$1,000.00 had [sic] occurred.”

3. That the court erred in finding from the testimony the following Findings of Fact:

Findings of Fact 1.16:

As to the Defendant’s claim for reasonable rent, the court finds that there was no testimony regarding the reasonable rental value of the residence located on the property either at the time that the option agreement was signed or as it currently exists. CP at 101-105.

4. The court erred in concluding that the Plaintiff, Gary Pardee, exercised his option to purchase the property consistent with the requirements of the written contract as stated in Paragraph 2.1 of the

Conclusions of Law:

Conclusions of Law 2.1:

Mr. Pardee exercised his option to purchase the property in writing consistent with the requirements of the contract. CP at 101-105.

5. That the court erred in concluding that there was no evidence of reasonable rental value and, therefore, rent should be denied

as concluded in Paragraph 2.3 of Conclusions of Law:

Conclusions of Law 2.3:

That there was no evidence of the reasonable rental value of the house located on the real property and therefore Defendant's claim for reasonable rent should be denied. CP at 101-105.

6. That the court erred in ordering that the house be sold to Plaintiff pursuant to terms of the written contract (see Judgment, Paragraph 1a.-1h.). CP at 106-108. (see full text in Appendix)

7. That the court erred in ordering in the Judgment at Paragraph 2 that no lease agreement had been established such that Mr. Jolly's counter-claims for Writ of Restitution and/or rents on the property is denied. CP at 106-108.

8. The court erred in denying Defendant's Motion for Reconsideration. CP at 138.

**Issues Pertaining to Assignments of Error**

1. At the Summary Judgment Hearing, the court ruled that there were material questions of fact even though the written contract was clear and unambiguous. The facts were undisputed that the last payment made by the Plaintiff was in November, 2004, and at that time he did not submit a written notice to the Defendant exercising his option to purchase

the property. RP at 28, 38 and 69. The facts were also undisputed that there was an incomplete legal description on the contract. (See Appendix 1) Did the court err in denying Defendant's Motion for Summary Judgment given the Statute of Frauds requires that all material terms must exist in writing to enforce a contract for the sale of real property and given the method of exercising the option was clearly stated, but not followed? *The standard of review is de novo.* (Assignment of Error No. 1)

2. The admitted testimony by the Plaintiff himself was that the re-issued check of \$1,000.00 occurred in late December. Mr. Pardee's testimony clearly separates that event from the event of his writing a letter on January 13, 2005, wherein he expressed his desire to purchase the property. Those two events did not happen at the same time according to Mr. Pardee's own testimony and confirmed by Mr. Jolly's testimony. RP at 41-44. Did the court have any evidence to "find" that the written notice to exercise Mr. Pardee's option was contemporaneous with the re-issuance of the \$1,000.00 check? *The standard of review is abuse of discretion.* (Assignment of Error No. 2)

3. Based on the Findings of Fact, it appears the court concluded that the "contemporaneous" payment of the re-issuance of the

\$1,000.00 satisfied the contractual requirement of timely exercising the option to purchase the property. The last payment that the Plaintiff made, however, was in November. RP at 70. Did the court err in concluding that the later re-issuance of a \$1,000.00 check that had originally been paid in May the previous year met the contractual requirements of the last payment made (even if it was made contemporaneously with the written notice) such that the court could accurately conclude that the contract option was timely exercised? *The standard of review is de novo.*

(Assignments of Error Nos. 4 and 6)

4. The Plaintiff remained on the premises and was the sole possessor of it from November 10, 2004, to the present. During the entire time, the Plaintiff paid none of the property taxes and paid no rent to the Defendant. Did the court err in concluding that there was no evidence of reasonable rent even though the Defendant had presented un rebutted testimony that reasonable rent for the barn located on the property was \$750.00 per month? *The standard of review is de novo.* (Assignments of Error Nos. 3, 5 and 7)

5. The contract provided for the prevailing party to be awarded attorney's fees. Assuming that a reversal of the trial court's decision is appropriate in this case, did the court err in awarding attorney's

fees to the Plaintiff? *The standard of review is de novo.* (Assignment of Error No. 6)

6. The testimony of Mr. Pardee was that the re-issuance of the \$1,000.00 check occurred in late December. Mr. Jolly testified that it occurred a couple of weeks after December 21, 2004. Based on both parties' testimony, it is clear that the re-issuance did not occur contemporaneously with the Plaintiff's submission of a written notice of exercising his option dated January 13, 2005. Given the existing ambiguity, did the court err in denying Defendant's request to reopen the case to take additional testimony to determine exactly when the re-issuance of that May payment occurred? *The standard of review is de novo.* (Assignment of Error No. 7)

## **B. STATEMENT OF THE CASE**

The parties to this case entered into an option-to-purchase agreement on January 18, 2004. RP at 21. The Plaintiff (hereafter "PARDEE") was the optionee/purchaser and the Defendant (hereafter "JOLLY") was the optioner/seller. See Exhibit 1 attached hereto at Appendix 1. CP at attachment. PARDEE was required by the terms of the contract to pay an initial \$10,000.00 plus \$500.00 per month for a total of \$16,000.00. RP at 21. The option agreement expressly provided that

PARDEE had the right to exercise the option to purchase by signifying his desire to do so in writing at the same time as the last payment.

Once the purchaser has paid the full amount of option money, the option shall terminate unless the Purchaser notifies the Seller in writing at the time the Purchaser makes the last option payment that the Purchaser is exercising its option to purchase.

See Exhibit 1, Paragraph 3.

Even though the purchaser was only required to make \$500.00 per month payments (after the initial \$10,000 payment), PARDEE paid \$1,000.00 every two (2) months. RP at 26-29. As such, PARDEE paid the final payment under the contract on or about November 6, 2004. RP at 28 and 38.

[Pardee]

So it was November 6<sup>th</sup> when I [sic] making that last payment at the post office, . . .

RP at ll. 3-4, p 28.

See also Mr. Pardee's testimony when he said:

Q [by Hammermaster] So all payments as of November, at least as you understand it to be, were made as of November 11<sup>th</sup>, I think, or November 10<sup>th</sup>, something like that?

A [Pardee] Yes

Q 2004?

A Yes

RP at 69.

PARDEE did not exercise his option to purchase the property at the time that he made his final payment in November.

Q [Geiersbach] With that last payment did you advise him [JOLLY] of your plans regarding the property?

A [Pardee] No

RP at ll. 17-19, p 38.

The testimony of PARDEE was that he discussed several times purchasing the property on a contract basis from JOLLY, and his first mention of that method of purchase was in September, 2004. RP at ll. 18-25, p 36 and l. 16, p 37. After communicating in September and paying the last payment in November, the next time the parties met was December 21, 2004. RP at 39. Nothing in writing came of those discussions, and PARDEE admitted in his testimony that such method of purchase would have been a modification or change in the original agreement. RP ll. 25, p 74 - ll. 3, p 75. According to PARDEE's testimony, JOLLY did not state that he would agree to sell on a seller-financed basis, nor did he expressly refuse to sell on such terms. However, JOLLY testified that he absolutely would not agree to sell on a contract with PARDEE'S proposed interest rate. Cf. RP 73-74 and ll. 1-9, p 121. According to JOLLY, he flatly rejected any proposals by PARDEE at the interest rate he was proposing and never offered a counter proposal.

*Id.*, at 121.

At one point in late December, 2004, PARDEE presented a written extension agreement. RP at 140. JOLLY refused to sign such extension. RP at 140-142. He saw no advantage to extending the contract. *Id.* On or about December 21, 2004, the parties met because JOLLY had not cashed the initial \$10,000.00 check and needed PARDEE'S assistance in clearing the same because it was too old for his bank. RP at 40 and 68. A new check was drawn at Plaintiff's (PARDEE'S) bank and cashed by JOLLY. Later, another old check was similarly cashed. It was a \$1,000.00 payment originally paid in May, 2004, by PARDEE. RP at 43. According to the Plaintiff, that check was cashed with his help at his bank by Mr. Jolly "right after the holidays" in late December, 2004. RP at 11. 24-25, p 41 – 11. 25, p 43 (see the full text in Appendix 2). The trial court found that the Defendant said the \$1,000.00 check was re-issued "a couple of weeks" after December 21, 2004. However, no testimony from the Report of Proceedings was found to support the trial court's finding. On January 13, 2005, PARDEE mailed by registered or certified mail a letter to JOLLY stating that he desired to exercise his option to purchase the property. RP at 44. JOLLY advised PARDEE that the option had expired. *Id.* PARDEE acknowledged that the contract required him to

exercise his option in writing on or before he made his final payment in November. RP at ll. 5-14, p 70. There is no testimony that any of the checks were re-issued or cashed on the same day (January 13, 2005) that PARDEE wrote to JOLLY attempting to exercise his option to purchase the property. See Appendix 2 for PARDEE'S testimony, RP at 43-45.

The Plaintiff made some improvements or repairs to the property. The parties interlineated on the contract a right conferred to Plaintiff to make improvements during the term of the contract. See Exhibit 1, Paragraph 18. In other words, making improvements was a contemplated aspect of the agreement and was expressly addressed therein. The contract expressly stated that any improvements he chose to make would remain on the property. The Plaintiff paid no rent from November 10, 2004, to the present. The Defendant presented un rebutted testimony that rent for the barn would reasonably be not less than \$750.00 per month. RP at 129.

PARDEE brought this lawsuit against the Defendant, JOLLY, and JOLLY brought counterclaims for unpaid rent and writ of restitution. The court later denied Defendant's Motion for Summary Judgment and ruled in favor of the Plaintiff at trial. The request for a new trial, new evidence or reconsideration was denied, and this appeal was filed by the Defendant.

**C. ARGUMENT**

**I. AN ENFORCEABLE CONTRACT MUST MEET ALL REQUIRED ELEMENTS AND MUST BE FULFILLED PURSUANT TO ITS UNAMBIGUOUS TERMS.**

**A. The Statute of Frauds as a Matter of Law Defeats the Enforceability of the Contract.**

*Response to Issue 1*

The Statute of Frauds governs the enforceability of contracts for the sale of real estate. Simply put, all material terms must be in writing in order to be enforceable. A classic example of an unenforceable contract for the sale of real estate (one that applies in this case) is the absence of a complete or adequate legal description of the property.

A contract or deed for the conveyance of land must contain a description of the land sufficiently definite to locate it without recourse to oral testimony, or else it must contain a reference to another instrument which does contain a sufficient description. Bigelow v. Mood, 56 Wn.2d 340, 341, 353 P.2d 429 (1960).

In Martin v. Seigel, 35 Wn.2d 223, 229, 212 P.2d 107 (1949), the Washington Supreme Court set forth the standard for a correct legal description when it stated:

Every contract or agreement involving a sale

or conveyance of platted real property must contain, in addition to the other requirements of the Statute of Frauds, the description of such property by the correct lot numbers, block number, addition, city, county, and state.

This decision was recently affirmed by the Supreme Court of Washington in Key Design, Inc. v. Moser, 138 Wn.2d 875, 880-83, 993 P.2d 900 (1999).

In the case at bar, the only evidence or testimony presented at trial regarding the legal description of the property is Exhibit I, the Option to Purchase Real Estate agreement. Within that document, the only paragraph that remotely attempts to describe the property for sale is Paragraph 1. That paragraph does not contain an address, nor does it contain a city, county or state. Furthermore, it does not provide a complete legal description as required by the Bigelow case identifying the block number or addition number. Furthermore, the agreement states “See attached for full legal description.” No testimony or document was admitted into evidence confirming that any document was attached with the full legal description. It is plain from the record that a more complete legal description exists, but was never furnished.

Furthermore, the Statute of Frauds requires that all material

terms for the sale of property be contained within the document executed by the parties. If this is, in fact, a sale to occur on a contract financed by the seller, then there are thirteen (13) material terms that must be provided pursuant to Hubble v. Ward, 40 Wn.2d 770, 246 P.2d 468 (1952). Furthermore, in order to enforce specific performance, a higher standard of proof must be met. The evidence must be “clear and unequivocal. . . Evidence that “leaves no doubt as to the terms, character, and existence of the contract.” Kruse v. Hemp, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993). As already discussed, the legal description is one of those material terms that must be provided and was lacking in this case.

**B. Even if the Statute of Frauds is Not an Issue, a Contract that is Unambiguous on its Face is Enforceable Only if the Terms of that Contract Have in Fact Been Met.**

**1. A contract that is unambiguous on its face must be interpreted within the confines of the contract itself.**

*Response to Issues 1, 2 & 3*

In the case of an option to purchase real estate, the method of exercising the option to purchase is dictated by the terms of the contract unless the contract does not mandate how notice is to be given. In the case of Smith v. Hamilton, 26 Wn.App. 663, 613 P.2d 567 (1980), the court was asked to determine if the tenants had properly exercised their

option to purchase the real estate pursuant to a lease with option to purchase agreement. The lease agreement required that notice be given during the lease period, but it did not describe the manner of notice. The court held that the lessee, having delivered a proposed real estate contract naming both the husband and wife (lessees) as prospective purchasers, was sufficient notice to the lessors. It quoted from Duprey v. Donahoe, 52 Wn.2d 129, 133-34, 323 P.2d 903 (1958), when it stated:

**In the absence of any provision in the option contract with reference to the manner by which an option can be exercised**, it is the general rule that any manifestation, either oral or written, indicating an acceptance on the part of the optionee is sufficient. (Emphasis added)

See also, Spake v. Elder, 1 Wn.App. 116, 459 P.2d 820 (1969).

In this case, unlike Duprey, *supra*, the contract does specifically set forth how and when the option is to be exercised. It is to be done on or before the last payment is made and in writing. The contract even addresses the situation of when to exercise the option if full payment is made early. The contract states:

At any time during the term of the option, the purchaser may pay the full amount of the option money due and must, at the same time, exercise its option to purchase the property by giving written notice to the

seller at the address to which the monthly option payments are made. However, if the purchaser does not exercise its option to purchase the property prior to termination of the option term, this agreement shall terminate without further notice to purchaser and the purchaser shall lose all interest and rights in the property.

Exhibit 1, Paragraph 3, Lines 4-8 (See Appendix 1).

The Plaintiff admits he never exercised the option to purchase the property in November when he made his final payment. The court errantly found that the \$1,000.00 payment re-issued in late December or early January qualified as the last payment under the terms of the contract, thereby making his January 13, 2005, written notice to exercise the option as being timely. However, there is no reasonable interpretation or construction of the contract to support the court's findings. At Paragraph 3, the contract in part states:

Once the purchaser has paid the full amount of option money, the option shall terminate unless the purchaser notifies the seller in writing at the time the purchaser makes the last option payment that the purchaser is exercising its option to purchase.

Exhibit 1, Paragraph 3.

If the Plaintiff is not considered to have paid the full and final amount of the option money when he made the last payment in

November (including the \$10,000.00 check cashed on December 21, 2004), then the Plaintiff is actually in breach of the contract due solely because the Defendant failed to cash the checks once he received them. Such an interpretation would be counter to the basic contract rules that a payment received (in whatever lawful form) is deemed paid upon receipt. In other words, the Plaintiff in this case was not in default for failing to make the \$10,000.00 payment at the beginning of the contract simply because Mr. Jolly failed to cash that \$10,000.00 check until eleven (11) months later. Such interpretation stands on the head of common sense and general principles of contract interpretation. Therefore, as a matter of law, Plaintiff's right to exercise the option terminated when he made the final payment in November, 2004.

**2. The court erred in finding that Plaintiff exercised his option to purchase the property in writing contemporaneously with the re-issuance of the \$1,000.00 check.**

*Response to Issues 2 & 3*

Even if this court agrees with the trial court that the re-issuance of the \$1,000.00 check constitutes the final payment as defined by the contract in Exhibit 1, the trial court abused its discretion in determining or finding that such payment was made contemporaneously with Plaintiff's exercise of the option.

The Plaintiff, Mr. Pardee, clearly testified that the \$1,000.00 check was taken to the bank to be cashed with his assistance in late December, 2004. This \$1,000.00 check was the May payment held by the Defendant until late December. RP at 43. The Plaintiff admits in his testimony that it was in late December immediately following the holidays that he and Mr. Jolly went to the Plaintiff's bank to cash the check. See RP at 41-45, Appendix 2. No testimony of Mr. Jolly could be found to confirm the trial court's finding that the check was re-issued "a couple of weeks" after December 21, 2004. Even if Defendant had said that, however, it still does not reach the date of January 14 or 15, 2005, which was the date the Plaintiff gave written notice to exercise his option. In the stream of testimony by the Plaintiff, it was clear that he was referring to two (2) different days and two (2) different events when describing his assisting the Defendant in cashing the check and him writing the letter to the Defendant. Thus, it was an abuse of discretion when the court found that those events occurred contemporaneously with one another.

As a matter of law and, in keeping with the terms of the contract, the Plaintiff was required to exercise the option (if at all) when he made the final payment in November. He did not do so and, therefore, lost his option rights.

**II. THE DEFENDANT IS ENTITLED TO REASONABLE RENT FOR THE PERIOD OF TIME THE PLAINTIFF OCCUPIED THE PREMISES AFTER JANUARY 18, 2005.**

*Response to Issue 4*

A person occupying the premises, where no agreement exists and no objection from the owner, is a tenant-at-sufferance or tenant-at-will. In the case of Turner v. White, 20 Wn.App. 290, 579 P.2d 410 (1978), the court held that a former employee given permission to occupy real property owned by the employer became a tenant-at-will terminable at any time. The court also held that a tenant-at-will, after being given reasonable notice to vacate the premises, is subject to unlawful detainer if he fails to do so. Turner, 20 Wn.App. at 291-92. See also Davis v. Jones, 15 Wn.2d 572, 131 P.2d 430 (1942).

A tenant who takes possession with the permission of the land owner (but no agreement as to terms), then that tenant is considered a tenant-at-will. A person who takes possession of the real property without the landlord's permission, but is allowed to stay on the property, is considered a tenant-at-sufferance. In both cases, the rules regarding reasonable rent apply. The rule for rent was enunciated in McCourtie v. Bayton, 159 Wash.418, 422, 294 P.238 (1930) when it stated:

Whenever any person obtains possession of premises without the consent of the owner or other person having the right to give said possession, he shall be deemed a tenant-by-sufferance merely, and shall be liable to pay reasonable rent for the actual time he occupied the premises, . . . (Quoting McLennan v. Grant, 8 Wash.603, 36 P.682. See also Davis v. Jones, 15 Wn.2d 572, 131 P.2d 430 (1932) and Sarvis v. Land Resources, Inc., 62 Wn.App. 888, 815 P.2d 840 (1991)).

In the case at bar, the only testimony before the court regarding reasonable rent was presented by the Defendant. He testified that reasonable rent at \$750.00 per month was appropriate for the rental of the property which included a full-sized barn. RP at 129. There is no dispute that the Plaintiff has solely possessed the real property at the exclusion of the Defendant. The agreement terminated in November when Plaintiff made the final payment and failed to exercise the option. The Defendant is entitled to reasonable rent at \$750.00 per month from November, 2005, to the present.

**III. ATTORNEY'S FEES SHOULD BE AWARDED TO THE DEFENDANT.**

*Response to Issue 5*

The court determined pursuant to the contract that attorney's fees were awarded to the Plaintiff as prevailing party. If the

court reverses the decision on one or more grounds, then attorney's fees should be awarded to the Defendant including fees in this appeal.

Therefore, as a matter of law, the trial court's award of attorney's fees should be reversed consistent with the anticipated reversal of the trial court's decision.

**IV. THE TRIAL COURT ERRED IN DENYING THE MOTION FOR RECONSIDERATION AND/OR NEW TRIAL.**

*Response to Issue 6*

The court should have granted Defendant's motion to open the trial for new evidence or reconsider the court's decision. The reasons why the court should have granted the Motion for Reconsideration are the same reasons in the argument set forth hereinabove. The reason why a new trial should have been granted to allow additional testimony and/or evidence relates to the court's finding that the \$1,000.00 re-issuance of a check occurred simultaneously with the September 13 written notice by Plaintiff to exercise his option to purchase the property. There is not any competent evidence to support those findings, but there is evidence available if the court were to allow the additional testimony or evidence, such as a cancelled check, to establish the exact date of that cashing of that check.

Civil Rule 59 provides several grounds for a new trial or reconsideration. Without limiting the court in its analysis, there are several bases upon which this case should be reconsidered. Civil Rule 59 in relevant part states as follows:

Grounds for a new trial or reconsideration. The verdict or other decision may be vacated and a new trial granted to all or any of the parties and on all or part of the issues when such issues are clearly and fairly separable and distinct, on the motion of the party aggrieved for any one of the following causes materially affecting the substantial rights of such parties:

(4) Newly discovered evidence, material for the party making the application, which he could not with reasonable diligence had discovered and produced at the trial;

(6) Error in the assessment of the amount of recovery whether too large or too small, when the action is upon a contract, or for the injury or detention of property;

(7) That there is no evidence or reasonable inference from the evidence to justify the verdict or the decision, or that it is contrary to law;

(9) That substantial justice has not been done.

#### Newly Discovered Evidence

On the issue of newly discovered evidence, it was believed

prior to trial that this evidence either did not exist or was not available to the Defendant because it was originally believed that the payment was made on a personal check which would have been in the possession of the Plaintiff or the Plaintiff's bank. Furthermore, the issues as presented by the Plaintiff and defended by the Defendant had little or nothing to do with the timing of those payments as a basis for extending the term of the contract. The ultimate theory of relief came from the court for which neither party had argued or prepared. Given the ruling of the court and the critical nature of knowing when the final money order was cashed, as a matter of justice, it is appropriate to reopen the trial for additional testimony.

Error in the Assessment of the Amount of Recovery

The court, in the opinion of the Defendant, erred in its assessment of the amount of recovery due the Plaintiff and/or not due the Defendant. Specifically, a party who occupies real estate owned by another is required by law (once sued on said issue) to pay reasonable rent. See, In re Estate of Boston, 80 Wn.2d 70, 491 P.2d 1033 (1971); Brown v. Mead, 22 Wn.2d 60, 154 P.2d 283 (1944). In this case, there is evidence that the reasonable rental value of the property, at a minimum, was \$750.00 per month. No theory of law permits a person to occupy real

property at the expense of another without due consideration. Since the Plaintiff has been occupying Defendant's real property from November, 2004, to the present outside the terms of any contract, a reasonable rent should be owed to the Defendant.

The court in its oral ruling held that all payments had been made by November 11, 2004, but that two of those payments had not been perfected because Mr. Jolly failed to cash the same, to wit, the initial \$10,000.00 payment and one of the \$1,000.00 payments. The court also found that the \$1,000.00 payment was re-issued contemporaneously with the written notice given by the Plaintiff to the Defendant on or about January 14, 2005.

The evidence is contrary to the court's findings that the \$1,000.00 payment was re-issued contemporaneously with the written notice. Neither party testified to that fact and in fact both parties testified that all payments had been made prior to Plaintiff giving the written notice. If the case was reopened, it would clarify with certainty the dates in which these events occurred.

Substantial justice has not been had in this case based on the present ruling. The court should reverse the trial court's original decision but, if the court is not inclined to do so, then it should at least

reverse the trial court's denial of Defendant's motion for reconsideration with a directive to take testimony on the timing of the receipt of the re-issued check for \$1,000.00.

**D. CONCLUSION**

The court erred on matters of law and on Findings of Fact. The standards of review differ in that matters of law are reviewed by this court de novo, and Findings of Fact are based on an abuse of discretion.

The case should never have gone to trial, but should have been resolved at summary judgment. There are no material questions of fact as to when the last payment was made (November) and there is no dispute that the Plaintiff **did not** submit a written notice of intent to exercise the option at that time. Furthermore, the Statute of Frauds requires all material terms to be in writing. There is no legal description that adequately describes the property being sold. Most notably, the city, county and state are missing, as well as other portions of the legal description. There is no address or any other indicator identifying the location of the property to the level required to satisfy the Statute of Frauds.

The court erred as a matter of law in denying the Defendant reasonable rent for the time the property was occupied by the Plaintiff from November 11, 2004, to the present. The Plaintiff has been a tenant-at-will ever since the last payment was made, and the case law clearly provides that reasonable rent must be paid to the land owner. That reasonable rent would be \$750.00 per month.

There should be an award of attorney's fees to the Defendant if any one or more of these issues is ruled in Defendant's favor.

The court also erred in denying the Defendant's Motion for Reconsideration for the reasons stated hereinabove and erred in denying a new trial for additional testimony to clarify a critical issue that the trial court unilaterally determined was key to the case. That is, the court determined (outside the argument or complaint presented by either party) that the date of the re-issuance of the \$1,000.00 check was relevant for purposes of enforcing the contract. Even if that was the correct interpretation of the contract, from the testimony and facts presented at trial, that \$1,000.00 re-issuance check occurred in late December, 2004, not January 15, 2005, and, therefore, not contemporaneously with

Plaintiff's attempted exercise of the option to purchase. Therefore, the trial court's decision should be reversed in favor of the Defendant.

DATED this 11<sup>th</sup> day of April, 2006.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "David C. Hammermaster", written over a horizontal line.

DAVID C. HAMMERMASTER  
Attorney for Defendant/Appellant

APPENDIX

OPTION TO PURCHASE REAL ESTATE (A)

Sally Pardee, Washington, Jan. 18, 2004

This Option to Purchase Real Estate (the "Option Agreement") is made between, Mary Pardee (husband and wife), a single person(s) X, or Willis G. Sally (husband and wife), a single person(s) X, or as "Purchaser," and as "Seller," for real property located in Itasca County, State of Washington. Purchaser and Seller hereby agree to this Agreement based upon the following terms and conditions:

1. The Property. The real property (the "Property") which is the subject of this Option Agreement is commonly known as and is legally described as follows:

Parcel # 3 of Subst Plat - 811130015 (7.37 Acres) Section 24 Twp 19N Range 3E. See attached for full legal description.

(If the legal description is not written above or attached as an exhibit at the time of mutual acceptance, Purchaser shall have three (3) business days from mutual acceptance in which to verify and approve of the legal description.)

2. Option Money. The purchaser hereby agrees to pay a total of \$16,000.00 as option money, payable as follows: The Purchaser hereby deposits and receipt is hereby acknowledged of Ten Thousand DOLLARS (\$10,000), evidenced by a personal check for \$10,000 cash, or an assignment of funds for \$ . An additional option payment is is not X due on in the amount of \$ . The balance shall be paid in monthly installments which shall be due on the 10th day of each month following mutual acceptance of the Agreement, for a maximum of twelve (12) months. The amount of each payment shall be \$500.00 per month, or more at Purchaser's option. The first payment shall be due on February 10, 2004. This option money is delivered as consideration for Seller granting Purchaser an option for the purchase of the property. If Purchaser exercises Purchaser's option and purchases the property, the option money shall be deemed as part payment of the down payment and purchase price of the Property. The option money shall be paid directly to Seller and retained by Seller, as shall any monthly option payments.

3. Option Term. Once the purchaser has paid the full amount of option money, the option shall terminate unless the Purchaser notifies the Seller in writing at the time the Purchaser makes the last option payment that the Purchaser is exercising its option to purchase. If the Purchaser exercises the option, then the sale shall close pursuant to the terms of this Agreement. If the Purchaser does not exercise the option, then this Agreement shall terminate. At any time during the term of the option, the Purchaser may pay the full amount of the option money due and must, at the same time, exercise its option to purchase the Property by giving written notice to the Seller at the address to which the monthly option payments are made. However, if the Purchaser does not exercise its option to purchase the Property prior to termination of the option term, this Agreement shall terminate without further notice to Purchaser, and the Purchaser shall lose all interest and rights in the property.

4. Purchase Price and Terms. If Purchaser exercises its option to purchase, the total purchase price shall be Three Hundred Thousand DOLLARS (\$300,000), payable as follows:

- ( ) All Cash at the Closing of the Sale.
[X] Real Estate Contract. See Addendum attached and incorporated herein by reference.

5. Exercise of Option. Purchaser may exercise Purchaser's option to purchase the Property at any time prior to termination of this Agreement. In order to exercise Purchaser's option, Purchaser must give written notice to Seller at the address to which the monthly option payments are made.

6. Failure to Exercise Option. If Purchaser does not exercise its option in the manner above prior to termination of the Agreement, Seller shall retain all payments made by Purchaser under the terms of this Agreement.

7. Condition of Property. Purchaser acknowledges that the property is unimproved and that Seller is making no representation regarding the condition of the Property or improvements, if any, on the Property. If during the option period Purchaser has any tests or inspections done on the property, the costs and fees of such shall be the sole responsibility of the Purchaser. Purchaser further agrees to indemnify Seller against any claims or liens relating to any such inspections or test. Purchaser understands that the Seller is making no representations or warranties regarding the Property, other than those set forth in the Agreement. Purchaser acknowledges that neither Seller nor Seller's agents have made any representations regarding the ability to develop the Property or construct improvements on it.

8. Access. Until the Option Agreement terminates for any reason, Purchaser shall have reasonable access to the Property for the purpose of conducting, at Purchaser's sole expense, such building and property inspections as Purchaser deems desirable. However, no logging shall be conducted on the Property, no wood or brush shall be removed, and no improvements shall be made on the property during the term of this Option Agreement without Seller's prior written consent, which Seller may in its sole discretion withhold.

9. Assignment. This Option Agreement may not be assigned without the written approval of the Seller, which Seller at its sole discretion may withhold.

10. Default. Any default under the terms of this Option Agreement shall immediately terminate the Agreement. If the Purchaser is the defaulting party, Seller shall retain any funds paid under the terms of this Agreement as consideration for this Option Agreement. Furthermore, either party may seek specific performance pursuant to the terms of this Agreement, damages or rescission in the event of default. If the non-defaulting party is the Purchaser, all option money shall be refunded to the Purchaser unless the Purchaser elects to specifically enforce this Agreement. If the Purchaser, the Seller, or a real estate agent to this transaction shall institute suit to enforce any rights hereunder, the prevailing party shall be entitled to costs and reasonable attorney's fees, including those for appeals.

Page 1 of 2 Seller: Bill Sally, Jan 18, 2004 Purchaser: Mary Pardee

APPENDIX 1-1

11. **Condition of Title.** The title to the property is to be free of all encumbrances or defects except the Seller's underlying loan (mortgage, deed of trust, or real estate contract), if any. Purchaser is hereby given notice that most of the properties sold through Tacoma Land Company are subject to underlying loans which included deed release clauses so that a Purchaser's title will be free of such loans on payment of the Purchaser's purchase price in full. The title shall also not be free at closing of the following: (i.e. U.I.D, etc.): CC&R's - if any
12. **Title Insurance.**  
 (a) **Type of Insurance.** On exercise of the option by Purchaser, Seller authorizes Tacoma Land Company, at Seller's expense, to apply for a preliminary commitment for a standard form Purchaser's policy of title insurance to be issued by Chicago Title in the amount of the purchase price. Seller authorizes the title company to apply as soon as practicable for such title insurance on exercise of the option. As soon as it is reasonably possible, Purchaser shall be furnished a preliminary commitment issued by the above title company. Because a standard form of title insurance does not insure the location of the boundary lines, Seller shall furnish an extended form of title insurance if Purchaser so desires, except that the Purchaser shall pay the difference between a standard and extended form of title insurance, as well as any other costs specifically related to the extended form of title insurance (i.e. a survey).  
 (b) **Approval/Condition.** On receipt of a preliminary commitment, the Purchaser shall have ten (10) days in which to accept the condition of the title as provided in the preliminary commitment, subject to the standard exception for a standard form of title insurance and those set forth in Paragraph 11 above. If the Purchaser does not accept the condition of title within those ten days, Purchaser must give written notice to Seller of Purchaser's disapproval of the condition of title. If the Purchaser's reasons for disapproval are not satisfied to Purchaser's satisfaction prior to closing, Purchaser may terminate the Agreement and the option money shall be refunded. Failure to notify Seller in writing shall be deemed to be approval. Seller shall assume any cancellation fee for such commitment or policy; however, the option money may be used for payment of the policy, regardless of whether or not this sale closes. Title shall be free of all defects except those in the standard form of title insurance and those set forth in Paragraph 11 above. If title is not so insurable as above provided and cannot be made so insurable by the termination date set forth in the terms of this Agreement, the option money shall be refunded and this Agreement shall terminate; provided, however, that the Purchaser may waive defects in writing and elect to purchase.
13. **Closing.** With the understanding that time is of the essence, the sale should be closed by the escrow company of Seller's choice within ten (10) days after a preliminary commitment for title insurance is made available to the parties after Purchaser's exercise of Purchaser's option. This date shall also be the termination date of the Agreement, unless extended in writing. Purchaser and Seller shall deposit, when notified, without delay, in escrow with to be determined as closing agent, all instruments and monies required to complete the transaction in accordance with this Agreement. Closing, for the purpose of this Agreement, is defined as the date that all documents are recorded and all sale proceeds are available for disbursement by the closing agent; closing agent shall be a person authorized to perform escrow services pursuant to the provisions of chapter 18.44 of the Revised Code of Washington. Funds held in reserve accounts pursuant to escrow instructions shall be deemed, for purposes of this definition, as available for disbursement to the Seller.
14. **Forest Land/Open Space.** If the Property consists of twenty (20) acres or more, Purchaser's real estate excise tax affidavit shall provide for continuation of the Property in its then current designation as forest land or open space if the Property qualifies for continuance.
15. **Closing Costs and Pro-Rations.** Purchaser and Seller shall share equally the cost of escrow, except those which are expressly limited by Federal Regulation. Seller shall pay the excise tax at closing. Taxes for the current year, rents, interest, association and/or homeowner's fees, water and other utility charges, if any, shall be pro-rated as of the date of closing unless otherwise agreed. Purchaser & Seller will each pay 50% of closing fees excluding excise tax.
16. **Homeowners' Fees/Light and Water Shares.** The Property is is not subject to homeowners' or association fees. If so, the amount of such fees are \$ 0 per year. Light and water shares, if any, shall not be included in the sale.
17. **Conveyance.**  
 (a) If this Agreement is for conveyance of fee title, title shall be conveyed by warranty deed, free of encumbrances except those noted above.  
 (b) If this Agreement provides for a sale by real estate contract, the real estate contract shall provide that title be conveyed by a statutory fulfillment deed.  
 (c) If the Property is subject to an existing contract, mortgage, deed of trust or other encumbrance which Seller is to continue to pay, Seller agrees to pay the contract, mortgage, deed of trust or other encumbrance in accordance with its terms, and on default, Purchaser shall have the right to make any payments next falling due on the contract between Seller and Purchaser therein.  
 (d) If this Agreement is for sale and transfer of vendee's (Purchaser's) interest under an existing real estate contract, the transfer shall be by Purchaser's assignment of contract and deed sufficient in form to convey after title is acquired.
18. **Possession.** Purchaser shall be entitled to possession on closing. However have the right to occupy of improve property during option period.
19. **Agency Disclosure.** By the signing of this Agreement the selling agent N/A represented N/A represented the Seller and the listing agent N/A represented N/A. Each party signing this Agreement certifies that prior oral and/or written disclosure was provided him/her in this transaction.
20. **Professional Advice.** The terms of this Agreement affect both parties' legal rights and have tax implications. Thus, Purchaser and Seller are both hereby advised to obtain legal, tax, or other professional advice in connection with this transaction as they deem necessary.
21. **Attorney's Fees.** If a dispute should arise regarding the terms and conditions of this Agreement, the prevailing party shall be entitled to reasonable attorney's fees and costs (including those for appeals) regardless of whether the matter proceeds to judgment or is resolved by a defaulting party during default. This paragraph shall apply to Purchaser, Seller, and any real estate agent involved in the transaction.
22. **No Other Agreements.** There are no other verbal or other agreements which modify or affect this Agreement. Time is of the essence of this Agreement. All subsequent modifications or waivers of any condition of this Agreement shall be in writing and signed by the appropriate parties.
23. Both purchaser and seller will cooperate and division of property on short plat on lot 3 with required signatures of applications in accordance with the County to give water. Also the lot line adjustments on lot 1 & 2 was not to be applied to short plat on lot 3. Purchaser will pay all expenses for short plat requirements on lot 3. Seller was previously a Real Estate Agent.

Seller: Bob Dale Purchaser: Gay Pader

Jan 13 2004

APPENDIX 1-2

1 the bank teller, if she would be able to cash this for  
2 him now. And, actually, for her, she said --

3 MR. HAMMERMASTER: Objection to what the bank  
4 teller said.

5 THE COURT: I'll sustain the objection.

6 Q Okay. What happened relative to that \$10,000?

7 A Well, they wouldn't refuse -- they refused to honor it,  
8 because it was, again, because it was too old. So I  
9 took another \$10,000 out of the bank and got a bank  
10 check with that -- you know, that bank gave me a bank  
11 check out of my account, and then I put that -- I put  
12 the other check that he gave me back, back into the  
13 bank, and they sent it back to New York, and, you know,  
14 it all got cleared. But I basically gave him a new  
15 cashier's check for the \$10,000 that I had given him  
16 back in January.

17 Q Now, at the December 21st meeting did Mr. Jolly say  
18 anything to you like: you've made your last payment but  
19 you haven't exercised the option in writing?

20 A No.

21 Q Did he indicate in any way that you no longer had the  
22 option to purchase the property?

23 A No, sir.

24 Q Now, again, a few weeks later you met again right after  
25 the holidays?

1 A Yes, sir.

2 Q And what was the nature of that meeting? What did you  
3 talk about and what was discussed?

4 A Well, again, the nature was to try to iron out an  
5 agreement, and, you know, I was trying to just sell him  
6 on -- selling him, to get him to hold the mortgage for  
7 me. So I'm not exactly sure. I actually remember at  
8 one point I was trying to tell him that it might be a  
9 tax advantage to him, told him that when I had purchased  
10 some land back in New York a long time ago the woman  
11 wanted to hold the mortgage instead of taking the cash  
12 all at once, and I assumed it was for tax purposes. And  
13 I thought, you know, that that might be an incentive for  
14 Bill as well.

15 And what happened was he said, he expressed  
16 interest in that, and he said, is there a library around  
17 here? And I said yes there is, right down the block.  
18 He said he wanted to go down and get this Master Tax  
19 Guide or some sort and look into that. So we went over  
20 to the library. He went to the librarian and asked her  
21 for it. She didn't have have one there. He thought it  
22 might be on microfilm. She still didn't have it. So  
23 pretty much that was the end of that because he said he  
24 wanted to look into that, and he was going to go and try  
25 to find the tax guide on his own and --

1 Q Okay.

2 A -- that was--

3 Q Was there anything else that was in your discussion  
4 regarding a one-thousand-dollar check that hadn't been  
5 cashed?

6 A Yes. He had another one of the thousand-dollar checks  
7 that I had given him along the way, I think it was May,  
8 that he hadn't cashed in and it was too late at his  
9 bank, and he asked me if I would help him with that.

10 Q What did you do?

11 A We went across the street to my bank again and I got the  
12 bank teller there to -- because it was, I think it was  
13 their check, I don't know -- but they cashed it for him;  
14 through my account, I guess, but they cashed in for him.

15 Q So at this meeting in December after the holidays did  
16 Mr. Jolly ever indicate to you that the option had  
17 expired and you can't purchase the property?

18 A No, sir.

19 Q Did you meet again after that meeting?

20 A Yes, sir.

21 Q When was that?

22 A I believe it was just after the 18th of January.

23 Q All right. Tell me about that meeting. Where was it  
24 at?

25 A It was at the house for the first time.

It  
ba

after  
1

1 Q All right. And what was the nature of what was  
2 discussed?

3 A Well, Bill kind of threw me a curve there. He came on  
4 telling me that it was too late now to go through with  
5 this. Basically, he said that it was -- because I  
6 hadn't cashed, come up with the cash by then -- I mean,  
7 the end of the year had come now, he told me that the  
8 contact was null and void and that we'd have to start  
9 all over.

10 Q And that was the first time that he'd ever said that to  
11 you?

12 A Yes.

13 Q Now, let me go back here.

14 (WHEREUPON, Plaintiff's Exhibit  
15 No. 5 was marked for  
identification.)

16 Q I'm going to show you what's been marked as Plaintiff's  
17 Exhibit No. 5. Would you look at that, please?

18 A (Complies with request.)

19 Q What is that?

20 A This was the letter exercising my option to buy that I  
21 had sent him on January 13th, written notice or -- you  
22 know.

23 Q Was that by registered mail?

24 A Certified mail, yes.

25 Q And attached to this exhibit is there a certified mail

1 receipt?

2 A Yes.

3 Q Okay. You filled those out and mailed those to Mr.

4 Jolly?

5 A Yes.

6 MR. GEIERSBACH: I move to admit Exhibit 5.

7 THE COURT: Any objections?

8 MR. HAMMASTER: No objections.

9 THE COURT: 5 will be admitted.

10 (WHEREUPON, Plaintiff's Exhibit  
11 No. 5 was admitted into  
evidence.)

12 Q Now, back to this meeting after January 18th. You were  
13 saying that for the first time he told you that the  
14 option had expired?

15 A Yes. I knew that the twelve-month option period was  
16 over now. But he said that it was -- that the contract  
17 was null and void now because that period had run and I  
18 hadn't come up with the cash.

19 Q What did you say?

20 A Well, I found it kind of incredulous. I was like, what  
21 are you talking about. We've been talking about the  
22 mortgage for the last month or so now. And, anyway, I  
23 said besides that you said just a month earlier -- my  
24 dad, or maybe a little bit more, was getting concerned  
25 that the end of the year was coming and he was asking

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STATE OF WASHINGTON

BY *dn*

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

GARY PARDEE, )  
 )  
 Respondent, )  
 )  
 -vs- )  
 )  
 WILLIS JOLLY, )  
 )  
 Appellant. )

NO. 34006-2-II

CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury of the laws of the State of Washington that on this date the undersigned has personally served a copy of the **BRIEF OF APPELLANT** upon **HAL J.**

**GEIERSBACH**, the counsel of record for Respondent, at his office located at 8910 - 184<sup>th</sup> Avenue East, Suite F, Bonney Lake, Washington, 98391.

**DATED** this 11th day of April, 2006.



**DAVID C. HAMMERMASTER**  
Attorney for Appellant