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COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

TURNING POINT COMMUNITY CHURCH OF GOD IN CHRIST,

Respondent,

vs.

BERNICE LEE,

Appellant.

On Appeal From King County Superior Court
Cause No. 06-2-24383-8SEA
HON. CRAIGHEAD

RESPONDENT'S BRIEF

Fredric D. Reed, WSBA# 4761
Eric E. Brunstrom, WSBA# 31753
Counsel for Respondent

REED, LONGYEAR, MALNATI, &
AHRENS, PLLC
1415 Norton Building
801 Second Avenue
Seattle, WA 98104-1522
(206) 624-6271

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I. INTRODUCTION

This case involves the enforcement of an oral contract for the purchase of a church and attached school by the parishioners of Turning Point Church of God in Christ, Respondent, (hereafter “Turning Point”) from their former fellow parishioner, the Appellant, Bernice Lee. The parishioners paid Lee on the contract, through their individual donations, tithing and group fundraising for over four years. Then, without notice to her fellow parishioners, Lee reneged on the contract and attempted to evict the parishioners from their church and school. Turning Point sued to enforce the oral contract.

The evidence presented at trial showed and the trial court concluded 1) there was a valid, enforceable oral contract between Turning Point and Lee for purchase of the subject property; 2) that the operation of the statute of frauds was excused based on the doctrine of partial performance; 3) Lee breached the contract by failing to convey title to the property to Turning Point Church; and 4) a constructive trust in favor of Lee existed for remaining funds due under the terms of the contract.

II. ASSIGNMENTS OF ERROR & ISSUES ON APPEAL.

A. Assignments of Error

Respondent defers to Appellant’s Assignments of Error.

B. Issues on Appeal

Respondent defers to Appellant's Issues on Appeal.

III. RESPONSIVE STATEMENT OF FACTS

A. Background Facts

In September, 2000, the Rev. Marion Tucker, Pastor of Turning Point, acting on behalf of Turning Point's congregation, entered into contract for the purchase of properties to be used as a church, a school and a parking lot with Lee. RP 3/25 99-107; 198; 200-202; CP 206-207; RP 4/17 4-5. Prince of Peace Church was the seller and carried the contract for the properties. RP 3/25 101; 105; CP 126-135; 206-207.

Turning Point congregation worshipped at Macedonia Church of God in Christ prior to the contract, but adopted the name when they entered into the contract with Lee and moved to the subject properties. RP 3/25 102-103; 4/17 14-15; CP 206. The Turning Point name was chosen by Rev. Tucker and approved by the congregation during services. *Id.* Turning Point made all payments toward the purchase of the subject properties with checks drawn on accounts held in Turning Point's name. CP 43-72; 207. All transactions and commitments were performed in the name of Turning Point at all times relevant to this action; at no time were any payments or contributions made in the name of Macedonia. *Id.* Turning Point incorporated on September 24, 2001. *Id.* Reverend Tucker

was working as Turning Point's agent prior to incorporation and Turing Point ratified his preincorporation activities after incorporation, including the oral contract with Lee. *Id.* Lee was director of Turning Point's board. RP 3/25 108-110.

Lee's portion of the initial down payment for purchase the properties was \$92,000. Turning Point contributed \$8,053 toward the initial down payment. CP 207. Thereafter, Turning Point made the monthly payments of \$1,500 on the real estate contract directly to Reverend Moore of Prince of Peace. Lee held title to the properties in her name for security and agreed to transfer title to Turning Point payment had been completed. RP 3/27 115-117; CP 43-72; 207.

In total, Turning Point paid \$ 155,020.48 toward the purchase of the church properties and parking lot, as follows:

- \$8,053 for the down payment;
- \$79,500 in \$1,500 monthly payments between December 22, 2000 and May 22, 2006; and
- \$45,000 in balloon payments (\$25,000 in October 2001 and \$20,000 in October 2003).

RP 4/17 13; CP 43-86; 208.

Additionally, Turning Point loaned Lee approximately \$22,240. Lee did not repay these loans. *Id.*

Lee contributed \$92,000 to the initial down payment for the properties and made one balloon payment of \$25,000. CP 208.

The parishioners of Turning Point raised the money for the monthly payments on the properties through their regular monthly tithing and donations. The balloon payments came from the Building Fund, created by Turning Point specifically to raise money for the balloon payments. The parishioners made and sold meals to the community and donated the proceeds, as well as made individual cash contributions, to the Building Fund. RP 3/25 101-118; 4/17 8; CP 208-209.

As a fellow parishioner, Lee consistently acknowledged, publicly and privately, the existence of the contract between herself and Turning Point to the congregation, to regional and national church officials, as well as to Reverend and Mrs. Tucker. Lee acknowledged and enjoyed the many expressions of gratitude and praise she received from the congregation and Turning Point officials during services and from the surrounding community during social gatherings. On several occasions during services, Lee was presented before the congregation and thanked for her generosity. Lee consistently made cash donations and sold meals for contribution to the Building Fund. When the note to Prince of Peace was satisfied, Lee was brought before the congregation for ceremonial “mortgage burning,” and thanked again by her fellow parishioners. RP 3/25 123-125.

During the many years of contract performance, Turning Point used and operated the subject properties as a church, school and parking lot. Turning Point donations paid for all repairs, utilities and insurance for the properties. Turning Point made several repairs to the church and school, including replacement of a water main, placement of several exterior doors, repairs to the roof to prevent leaking, removal and replacement of a hot water tank, and rewiring of electrical work. RP 3/25 137-136; CP 119-124.

On November 18, 2004, against Turning Point's strong objections, Lee sold the parking lot for \$200,000. Despite Turning Point's ownership of the parking lot, Lee personally retained \$77,988 received in net proceeds from the sale and disbursed the remainder as follows: \$65,967 to Prince of Peace for balance of purchase contract of parking lot; \$14,000 to Prince of Peace for balance of purchase contract on church; \$11,587 for real estate taxes on church; and the remainder to closing costs. RP 4/17 12; CP 208.

Lee repudiated the oral agreement for the sale of the church shortly after this, and, for the first time, claimed Turing Point was renting the property from her. RP 3/25 133-136; CP 207-209.

On June 20, 2006, without notice to the congregation, Lee posted a “Notice of Termination” on Turning Point’s front door. On July 28, 2006, Turning Point brought this suit against Lee. CP 1-8.

B. Procedural History and Trial

On July 28, 2006 Turning Point filed a complaint to confirm ownership in real property and for accounting, claiming breach of contract, resulting trust and constructive trust. CP 1-8.

On August 29, 2006, Lee answered, named Reverend Marion Tucker as a third-party Defendant, and claimed and counterclaimed slander of title, infliction of emotional distress, trespass, conversion, fraud, and unlawful detainer. CP 217-225; 9-12

Lee’s February 8, 2008 Motion for Summary Judgment was denied in its entirety. CP 13-27.

Trial was before the Honorable Susan Craighead on March 25, 26, 27, 2006. RP 3/25 1-226; 3/26 1-215; 3/27 1-136.

The court made its oral findings of fact and conclusions of law ruling on April 17, 2008. RP 4/17 1-22. The court entered written findings of fact and conclusions of law on October 3, 2008. CP 205-213. The trial court found Lee not credible generally and specifically on Lee’s claim she “rented” the church to Turning Point. The trial court quieted title to the subject property to Turning Point and found a constructive trust

in Lee's favor, secured by a lien against the property in the amount of \$237,500—one half of the agreed current value of the property. CP 211-212.

Lee timely appealed from the trial court's decision.

IV. ARGUMENT

A. Summary of Argument

The trial court properly found that the parties' oral contract to convey land was not subject to the statute of frauds because there is clear and unequivocal evidence of the terms, character and existence of the contract, and clear, cogent and convincing evidence of partial performance of the contract.

B. Standard of Review

Lee overstates the standard of review in this matter by selectively citing from *In re Sego*, 82 Wash. 2d 736, 513 P.2d 831 (1973). She would have the appellate court act like a trial court, reviewing the findings of fact de novo under a "clear, cogent, and convincing standard."

This is not the standard of review on appeal, as was clearly and thoroughly assessed by the court in *Endicott v. Saul*, 142 Wash. App. 899, 909-910, 176 P.3d 560 (2008):

[T]he appellate court's role is limited to determining whether substantial evidence supports the trial court's findings of fact. *Bland*, 63 Wash.2d at 154, 385 P.2d 727.

Substantial evidence is the quantum of evidence sufficient to persuade a rational fair-minded person the premise is true. *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wash.2d 169, 176, 4 P.3d 123 (2000). **In determining the sufficiency of evidence, an appellate court need only consider evidence favorable to the prevailing party.** *Bland v. Mentor*, 63 Wash.2d 150, 155, 385 P.2d 727 (1963).

(emphasis added.)

Lee erroneously argues that the standard of review in this matter is somehow increased beyond what the *Endicott* court determined. Without a pin-point cite, Lee argues that the *Berg* Court “speaks of ‘unequivocal’ evidence of part performance pointing to the existence of a contract. Appellant’s Brief pg. 76 (citing *Berg v. Ting*, 125 Wash. 2d 544, 886 P.2d 564 (1995)) The unequivocal evidence “spoken of” by the *Berg* court is the standard for the trial court to determine the existence of a contract, not the standard of review for the appellate court. *Berg v. Ting*, 125 Wash. 2d at 556.

C. LEE HAS NO CREDIBILITY; LEE’S TESTIMONY AND CLAIMS MUST BE DISREGARDED BY THIS COURT.

In evaluating the persuasiveness of the evidence, and the credibility of witnesses, [an appellant court] must defer to the trier of fact. *Burnside v. Simpson Paper Co.*, 123 Wash.2d 93, 108, 864 P.2d 937 (1994). “[C]redibility determinations are solely for the trier of fact [and] cannot be reviewed on appeal.” *Morse v. Antonellis*, 149 Wash.2d 572, 574, 70 P.3d 125 (2003).

Endicott v. Saul, 142 Wash. App. 899, 909-910.

Many of Lee's arguments on appeal are based on her discredited claim that Turning Point was a tenant and not a purchaser. Lee's credibility on this specific issue was repeatedly rejected by the trial court: "Defendant Lee's testimony did not appear to the Court to be credible. Moreover, it was apparent to the Court that Ms. Lee's reading comprehension was limited and she was not able to remember or recall significant events or conversations." CP 206. *See also* RP 4/17 2. In dismissing Lee's claim of a landlord-tenant relationship between Lee and Turning Point, the trial court also found:

To believe Ms. Lee's version of the events the court would have to accept that the congregation gave its hard-earned money in the form of down payments and balloon payment, in particular, to Reverend Moore to help Ms. Lee buy a piece of property for herself that she was renting to them and that the congregation was thanking them for letting them rent from. This is simply not believable.

RP 4/17 9-10.

All of Lee's appellate arguments that depend on the possible existence of a landlord-tenant relationship between the parties must be disregarded by this court. Lee cannot rehabilitate credibility on appeal; the trial court found she had none and this court must defer to that finding.

Morse v. Antonellis, 149 Wash. 2d 572, 574, 70 P.3d 125 (2003).

D. THE ORAL CONTRACT WAS PROPERLY TAKEN OUT OF THE STATUTE OF FRAUDS; THE TRIAL COURT'S FINDINGS ARE SUPPORTED BY SUBSTANTIAL EVIDENCE.

The part performance doctrine “is based on the premise that in certain situations it would be fraudulent to permit a party to escape performance of his [or her] duties under an oral contract after ... [permitting] the other party to perform in reliance upon the agreement.” 2 Washington State Bar Ass'n, Real Property Deskbook § 37.40, at 37-27 (2d ed. 1086) (citing *Miller v. McCamish*, supra).

Berg v. Ting, 125 Wash. 2d at 556.

Lee cites to *Berg*, but mischaracterizes the *Berg* court's analysis and holding. The *Berg* court provided clear guidance for the application of the Partial Performance doctrine—and the trial court properly followed this guidance. Lee conflates also two analyses discussed by the *Berg* Court and erroneously concludes that *Berg* “added a fourth element” to the Partial Performance doctrine. Appellant's Brief pg. 20. The court did not add a fourth element; the *Berg* Court articulated the long-held requirement that in a claim for specific performance of an oral contract a “threshold requirement [of determining the existence of an enforceable contract] must be satisfied.” *Williams v. Fulton*, 30 Wash. App. 173, 178, 632 P.2d 920 (1981).

Lee confuses the analyses by addressing specific performance and part performance out of sequence. Turning Point responds in the proper sequence.

1. Specific Performance

While a decree of specific performance rests within the sound discretion of the trial court, this does not permit a court to deny specific performance when otherwise appropriate. *See Egbert*, 15 Wash.App. at 79, 546 P.2d 1246 (reversing the superior court's denial of specific performance); *O.K. Tire & Rubber Co. v. Oswald*, 166 N.W.2d 749, 752 (Iowa 1969) (“In a proper case, however, [specific performance] is not to be denied unless some good reason is shown for so doing.”); 71 AM.JUR.2D Specific Performance § 9 (“[A]lthough the court in a specific performance case has a wide measure of discretion in awarding or denying the remedy, that discretion may not be abused or exercised arbitrarily” (footnotes omitted)).

Crafts v. Pitts, 161 Wash. 2d 16, 162 P.3d 382 (2007).

[W]here specific performance of the agreement is sought, the contract must “be proven by evidence that is clear and unequivocal and which leaves no doubt as to the terms, character, and existence of the contract.” *Miller*, 78 Wash.2d at 829, 479 P.2d 919 (quoting *Granquist v. McKean*, 29 Wash.2d 440, 445, 187 P.2d 623 (1947)).

Berg v. Ting, 125 Wash. 2d at 556

However, absolute certainty is not exacted; reasonable certainty is all that is required. 58 C.J. 930, § 96. If, from all the evidence in the case, the court can ascertain and determine the contract with reasonable certainty, that is sufficient. *Faucett v. Northern Clay Co.*, 84 Wash. 382, 146 P. 857; *Le Marinel v. Bach*, 114 Wash. 651, 196 P. 22; *Herren v. Herren*, 118 Wash. 56, 203 P. 34.

Luther v. National Bank of Commerce, 2 Wash. 2d 470, 478, 98 P.2d 667 (1940).

The court in *Miller v. McCamish*, 78 Wash. 2d 821, 479 P.2d 919 (1971) defined the objective meaning of the evidentiary standard “clear and unequivocal:”

Evidence of the parties' part performance of their oral agreement is, in our judgment, clear and unequivocal, and leaves no doubt as to the terms, character and relationship agreed upon by the parties. Although testimony as to the parties' agreement was disputed, we agree with the Court of Appeals assessment that there is substantial evidence from which the trial court could make its findings concerning the existence and terms of the parties' oral agreement. ... **[T]he term-if it may be ascribed any objective, rather than mere subjective, meaning-must relate to the quality of the evidence presented and the credibility of the parties testifying as to the oral agreement. Questions of credibility are uniquely and exclusively within the province of the trial court, and we will not disturb that determination on appeal.**

Id at 831. (emphasis added.)

On appeal, this court is asked merely whether “substantial evidence” supports the trial court’s decision. *Miller v. McCamish* 78 Wash. 2d at 831. As in *Miller*, the trial court here was faced with conflicting testimony. As in *Miller*, the trial court here weighed the evidence presented by the parties regarding the oral agreement and addressed the credibility of the witnesses. The trial court found Rev. Tucker and the other witnesses on behalf of Turning Point were credible

and Lee was not credible. This un-reviewable credibility determination by the trial court leaves only the evidence presented by Turning Point: that there was an oral agreement between the parties for transfer of the subject properties.

Based on the evidence presented, the trial court made the following oral finding of fact:

Although not uncontroverted, I find the evidence clearly and unequivocally demonstrates that the parties were engaged in purchasing the property together and that Reverend Tucker and his congregation were led to believe that ultimately the church would be theirs, and I'm relying here on *Miller v. McCamish*, 78 Wn.2d 821 (1971). I make this finding on the following bases, first, the congregation contributed money from the building fund towards the down payment in the form of cashier's checks made out to the attorney closing the deal; second, the congregation moved to the new building, where their net costs were higher than at Macedonia, because they thought they were buying a church and would no longer need to fear being put out.

The church made regular payments of \$1,500 a month to Reverend Moore until he deemed that satisfied. Subsequently the church began to make payments to Ms. Lee or others she designated, albeit on a less regular basis. Members of the congregation made regular contributions to the building fund for the purpose of buying the church. The witnesses who testified did not appear to be wealthy people, and it is evident to the court that the amount that they gave represented sacrifices for their church. The congregations held fundraisers, mainly selling barbecue dinners, to raise money for the \$45,000 in balloon payments that the church made.

RP 4/17 7-8.

The trial court properly weighed the quality of the evidence and the credibility of the witnesses and found that Turning Point's evidence clearly and unequivocally left "no doubt as to the terms, character, and existence of the contract." *Miller v. McCamish*, 78 Wash. 2d at 829.

Without citing any supporting legal authority, Lee ignores the abundant evidence supporting the trial court's findings and charges that the parties' agreement is unenforceable because it lacked "the terms of payment." Appellant's Brief pg. 25. Appellant is wrong in fact and law.

Rev. Tucker testified that the parties agreed that Turning Point would continue to pay Lee until she was repaid all financial contributions she made toward the purchase of the property. 3/28 198-201.

The trial court relied on Reverend Tucker's credibility and found "clear and convincing evidence demonstrates that Reverend Tucker knew that the church needed to repay the down payment to Ms. Lee after Reverend Moore had been paid off." RP 4/17 4.

Contrary to Lee's assertions, failure of the parties to calculate the final date of payment on an oral contract does not prevent specific performance. Rather, "[i]f, from all the evidence in the case, the court can ascertain and determine the contract with reasonable certainty, that is

sufficient.” *Luther v. Nat’l Bank of Commerce*, 2 Wash. 2d 470, 478, 98 P.2d 667 (1940).

The trial court relied on clear and unequivocal evidence and “[a]lthough testimony as to the parties' agreement was disputed ... there is substantial evidence from which the trial court could make its findings concerning the existence and terms of the parties' oral agreement.” *Miller v. McCamish*, 78 Wash. 2d at 831.

2. Partial Performance.

The second analysis is whether there was part performance of the oral contract.

This court has identified three factors, or elements, which are examined to determine if there has been part performance of the agreement so as to take it out of the statute of frauds: (1) delivery and assumption of actual and exclusive possession; (2) payment or tender of consideration; and (3) the making of permanent, substantial and valuable improvements, referable to the contract. *Kruse v. Hemp*, 121 Wash.2d 715, 724-25, 853 P.2d 1373 (1993); *Powers v. Hastings*, 93 Wash.2d 709, 717, 612 P.2d 371 (1980).

The court never set forth a rigid requirement that two of the three factors be present. In general, though, the court's dictum accords with the observation that usually where part performance is found, two of the three factors are present; however, there is no absolute rule that two of the three factors must be present for the doctrine of part performance to take a real estate conveyancing agreement out of the statute of frauds.

Berg v. Ting, 125 Wash. 2d at 557-558. (emphasis added.)

Turning Point responds to the factors as prescribed by the Supreme Court and not as argued by Lee; that is (1) delivery and assumption of actual and exclusive possession; (2) payment or tender of consideration; and (3) the making of permanent, substantial and valuable improvements.

a. Possession.

Lee concedes that Turning Point met this factor by taking possession of the subject property. Appellant's Brief pg. 19. Lee's parenthetical claim that Turning Point's possession was not ownership-like was found not credible by the trial court and should be disregarded.

b. Payment of Consideration.

The trial court found Turning Point paid over \$155,000 in consideration toward the purchase price of the property. RP 4/17 13;17.

Lee illogically argues the trial court did not rely on substantial evidence in finding that Turning Point met the consideration factor because the trial court counted the \$76,500 in monthly \$1,500 payments made by Turning Point to Lee or on Lee's behalf "as something other than rent..." Appellant's Brief pg. 23.

But this is just Lee trying to rehabilitate her credibility and argue theories on appeal that were rejected as unsupported or not credible by the trial court. The trial court rejected Lee's credibility on this point and

specifically determined that the \$76,500 paid by Turning Point in \$1,500 installments was not rent, but consideration.

Lee also argues that even if there was an agreement between the parties for the sale of land, the monthly payments should be counted as rental value and not calculated as part of Turning Point's consideration. Lee is essentially asking this court to find that Turning Point was obligated to pay Lee rent in addition to mortgage. This claim has no basis in law or logic and no credible evidence was offered to support this claim.

Finally, Lee argues that Turning Point's payments of \$53,053 toward the down payment and balloon payments were not consideration, but "could also be explained as additional consideration the church paid for the use of the property." *Id.* As above, Lee asks this court to credit testimony the trial court found not credible and then further credit the fantastic theory that Turning Point made balloon payments and down payments for a property in which they had no expectation of having an ownership interest.

The trial court's finding that Turning Point met the second factor is supported substantial evidence.

c. Improvements To The Property.

Lee's longest argument is also her weakest. First, Lee repeatedly and erroneously states that making property improvements is a

“requirement” for finding partial performance. Far from it, the Supreme Court and all pertinent case law has repeatedly and specifically held that no single factor is dispositive. “[T]here is no absolute rule that two of the three factors must be present for the doctrine of part performance to take a real estate conveyancing agreement out of the statute of frauds.” *Berg v. Ting*, 125 Wash. 2d at 557-558.

Second, Lee mischaracterizes the trial court’s findings regarding this factor by only citing a portion of the finding. In total the trial court found: “While element three of *Richardson* specifically refers to whether there were permanent, substantial, and valuable improvements made to the land, **this element is not uniformly required**, and, this court concludes that the third element really goes to reliance on the oral agreement.” CP 210. (emphasis added.)

Despite clear case law not requiring this factor or all three factors, Lee unnecessarily argues, at length, that the trial court’s decision should be overturned because the substitution of reliance for this element was prohibited by the *Berg* court.

In *Berg*, the court rejected the lower court’s dicta that a finding of detrimental reliance could obviate the application of the foregoing three factors. Contrary to the Lee’s claim, the trial court did not substitute detrimental reliance for all three factors; the trial court specifically found

that only two factors were required and met—consideration and possession. While the improvement factor may not have been met as described in case law, the trial court analyzed this factor and determined that it “really goes to reliance on the oral agreement.” CP 210. The trial court’s reasoning is supported by case law. Courts have not required this factor be satisfied for partial performance to be found:

It may be true that the making of such improvements is the strongest way to satisfy this element, as it both is a kind of detrimental reliance and points to the existence of an oral promise to convey. **However, it does not follow that the element may be satisfied only by the making of improvements.** What this element essentially requires are detrimental acts in reliance upon the oral promise; that is what raises an equitable defense to the statute of frauds, just as detrimental reliance raises an estoppel. **Therefore, if other circumstances, including direct evidence of the oral promise to convey, point clearly and convincingly to the oral promise, then it should not be necessary that the acts in reliance consist of improvements to the land.**

17 *Washington Practice Series, Real Estate: Property Law*, William B. Stoebuck John W. Weaver § 7.12 (2007). (Emphasis added.)

Both courts in *Luther v. National Bank of Commerce*, 2 Wash. 2d 470, 98 P.2d 667 (1940) and *Beckendorf v. Beckendorf*, 76 Wash. 2d 457, 457 P.2d 603 (1969) found partial performance applicable and enforced oral conveyances of land when the transferee did not make improvements to the property.

Like *Luther* and *Beckendorf*, there is compelling evidence of an oral promise to convey land here. Further, the nature of the subject property was considered by the trial court in applying and analyzing this element. Turning Point's parishioners purchased the property to use as it existed: as a church. There was no need to make improvements to the land; the properties were purchased precisely because no substantial improvements were required. Requiring substantial improvements where none are needed or indicated would defeat the equitable purpose of partial performance.

E. TURNING POINT PERFORMED.

Lee argues, without citation to legal authority, that the trial court ordered specific performance by Lee, but not by Turning Point. This argument ignores that Lee prevented Turning Point from performing the contract by attempting to rescind the agreement, refusing the tendered payments by Turning Point after her attempted rescission and attempting to evict Turning Point.

F. TRANSFER OF TITLE IS THE ONLY ADEQUATE REMEDY

Lee argues the "Church's loss, if any" was strictly monetary and could have been adequately remedied with an award of damages. Appellant's Brief pg. 27. This is not only wrong legally and factually, it is a transparent attempt to elide over the uniqueness of the property and

the importance of the church to its parishioners and the community at large.

Since real estate is considered unique, damages cannot adequately compensate a purchaser for a seller's breach of a contract to purchase specific land. "No piece of land has its counterpart anywhere else and it is impossible to duplicate by the expenditure of any amount of money." *Carpenter v. Folkerts*, 29 Wash. App. 73, 76, 627 P.2d 559 (1981); *See also Egbert v. Way*, 15 Wash. App. 76, 79, 546 P.2d 1246 (1976).

A damages award rather than title transfer would have resulted in taking the church from the parishioners who had spent years tithing, donating, and laboring at fundraisers to raise money to buy their church. It would have closed the doors of the church to the community and discontinued Turning Point's service and tradition of providing free meals for the hungry and free pre-school for the community children. The intrinsic value of the church is much more than the sum of numbers presented by Lee. Turning Point is a center of support, spiritual and otherwise, to its community. The years spent providing those services and creating goodwill and a place in the community cannot be "adequately compensated by a money judgment."

G. THE IMPOSITION OF A CONSTRUCTIVE TRUST IS SUPPORT BY SUBSTANTIAL EVIDENCE.

Where for any reason the legal title to property is placed in one person under such circumstances as to make it inequitable for him to enjoy the beneficial interest, a trust will be implied in favor of the persons entitled thereto. This arises by construction of equity, independently of the intention of the parties. Equity will raise a constructive trust and compel restoration where one through actual fraud, abuse of confidence reposed and accepted, or through other questionable means gains something for [herself] which in equity and good conscience [she] should not be permitted to hold. 26 R.C.L. 1236, 1237; 35 A.L.R. 307; *Rozell v. Vansyckle*, 11 Wash. 79, 39 P. 270; *Pollard v. McKenney*, 69 Neb. 742, 96 N.W. 679, 101 N.W. 9; *Quinn v. Phipps*, 93 Fla. 805, 113 So. 419, 54 A.L.R. 1173; *Scott v. Thompson*, 21 Iowa 599.

Scymanski v. Dufault, 80 Wash. 2d 77, 491 P.2d 1050 (1971) *See also* *Hesthagen v. Harby*, 78 Wash. 2d 934, 481 P.2d 438 (1971); *Betchard-Clayton, Inc. v. King*, 41 Wash. App. 887, 707 P.2d 1361 (1985); *Mehelich v. Mehelich*, 7 Wash. App. 545, 500 P.2d 779 (1972).

Here the trial court concluded:

It appears to the court that the proper remedy to resolve this dispute is imposition of a constructive trust, quoting *Baker vs. Leonard*, 120 Wn.2d 538 (1993), constructive trusts arising in equity are imposed when there is clear, cogent, and convincing evidence of a basis for impressing a trust. The basis for impressing the constructive trust can be fraud, misrepresentation, bad faith, or over reaching, but a constructive trust can also be imposed under broader circumstances, including where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it. Here, unless Ms. Lee was actively misleading the members of her church for a period of years, the only explanation for her actions is that she

changed her mind. After the congregation worked as hard as it did to raise the funds to pay Reverend Moore, Ms. Lee would be unjustly enriched if she were permitted to retain title to the property. The reason that the congregation worked so hard, was that it didn't want to be put out of its church. I therefore conclude that the basis for impressing a constructive trust has been established by clear, cogent, and convincing evidence.

Despite Lee's claim that the trial court did not find her guilty of wrongdoing, the facts show that Lee committed at least an abuse of confidence. Contrary to Lee's argument, a finding of outright fraud is not required. "We have held that fraud, misrepresentation, bad faith, or overreaching usually forms the base upon which a constructive trust is erected." *Bland v. Mentor*, 63 Wash. 2d 150, 385 P.2d 727 (1963). (internal citations omitted.)

Lee certainly made misrepresentations to her fellow parishioners at Turning Point, which they relied on to their detriment. There is no doubt, given the trial court's findings, that Lee is guilty of overreaching. Each parishioner who donated and tithed money for the purchase of their church and school was being cheated by Lee. Allowing Lee to retain ownership of the properties would be a reward for her deception. "It is apparent that in the event [Lee] obtained the deed in question ... by false and fraudulent promises which she then did not intend to keep, and we so find, then she

held the deed under a constructive trust...” *Kausky v. Kosten*, 27 Wash. 2d 721, 732, 179 P.2d 950 (1947).

Further, the trial court found a constructive trust in Lee’s favor in half the amount of the property’s current value—\$237,500. The trial court also allowed Lee to retain the \$77,988 she gained from her unilateral sale of the parking lot. In combination, these amounts exceed \$310,000. The trial court found that Lee had only contributed \$142,587 to the purchase of the subject properties. CP 208. The trial court’s award to Lee provides her over a 100% return on her initial investment. This is hardly an inequitable result for Lee.

The trial court’s imposition of a constructive trust was proper under law and fact.

**H. TURNING POINT IS THE PARTY IN INTEREST;
LEE AND TURNING POINT RATIFIED THE
PREINCORPORATION CONTRACT.**

Lee erroneously argues that Turning Point is not the real party in interest. Lee’s argument fails.

An appellate court may supplement the trial court’s written findings with its oral findings to the extent the oral decision does not contradict the written finding. *State v. Hinds*, 85 Wash. App. 474, 486, 736 P.2d 1135 (1997) (citation omitted).

Lee mistakenly claims that the Trial Court did not find that Turning Point is the party in interest in this matter and cites only to the Trial Court's written findings to support this claim. Appellant's Brief 31-32.

Contrary to Lee's claim, the Trial Court specifically found in its oral ruling that:

Ms. Lee has argued that any oral agreement she reached was not with the plaintiff, because at the time Turning Point did not exist, and certainly did not exist as a corporate entity. I find it substantially the same members were part of Macedonia as Turning Point, and the vast majority of the congregation's contributions to buying the church were made after it became Turning Point, albeit some of them before it became a 501C3. No formal steps were taken to ratify Reverend Tucker's agreement by the corporation, but certainly the church's actions demonstrate that it considered itself bound by the agreement.

The trial court's ruling is support by fact and law. When a person enters into a contract in the name of a corporation, and the corporation is subsequently formed, both the individual and the corporation are party promisors to the contract unless the other party knew of the nonexistence and agreed to look solely to the corporation. *White v. Dvorak*, 78 Wash. App. 105, 896 P.2d 85 (1995).

Turning Point was created by former members of the congregation at Macedonia Church for the purpose of purchasing the church, school and parking lot properties. Consequently, it existed at least constructively at

the time of the agreement. Contemporaneous with the contract, Turning Point held banking accounts and checks in its name. Lee recognized Turning Point's existence by recording charitable donations to Turning Point on her 2000 tax return. Lee was also the Director of the Board of Turning Point after incorporation and during performance of the oral contract. RP 3/25 108-110.

Civil Rule 23.2 permits an unincorporated association to be treated as a "legal entity" for purposes of bringing suit to protect the interests of its members or for being sued for the common actions of its members. It is also well established, and supported by extensive statutory and case law, that pre-incorporation contracts entered into by agents or promoters of an unformed corporation are binding upon the corporation once the corporation adopts the contract or assumes liability under it. RCW 23B.03.020; RCW 23B.02.040; *Chilcott v. Washington State Colonization Co.*, 45 Wash. 148, 88 P. 113 (1906); *Stilwell v. Spokane Alarm Co.*, 66 Wash. 703, 120 P. 85 (1912); *Kraft v. Spencer Tucker Sales*, 39 Wash. 2d 943, 239 P.2d 563(1952); *Goodman v. Darden, Doman & Stafford Associates*, 100 Wash. 2d 476, 670 P.2d 648 (1983). Furthermore, courts have specifically stated that "when a corporation is formed pursuant to a pre-incorporation subscription agreement and acts pursuant to that agreement after formal incorporation, corporate acceptance is presumed."

Further, formal ratification of a preincorporation contact is not required but can be implied by the parties' actions. *M/V La Conte, Inc. v. Leisure*, 55 Wash. App. 396, 400, 777 P.2d 1061 (1989). See also RCW 19.86.010i (Defining "person" as an unincorporated association).

Lee and Turning Point ratified the preincorporation contract and Turning Point is the party in interest.

V. CONCLUSION

This case is about credibility—a determination only the trial court can make. Lee was not credible; Reverend Tucker and the congregation of Turning Point were. The trial court's decision is supported by substantial evidence and should not be disturbed.

DATED this 15th day of June, 2009.

REED, LONGYEAR, MALNATI, &
AHRENS, PLLC

By 

Fredric D. Reed, WSBA# 4761
Eric E. Brunstrom, WSBA# 31753
Counsel for Respondent

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COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

TURNING POINT COMMUNITY
CHURCH OF GOD IN CHRIST

Respondent,

v.

BERNICE LEE

Appellant.

CERTIFICATE OF SERVICE

I declare under penalty of perjury that I caused copies of the
RESPONDENT'S BRIEF, and this Certificate of Service by causing a true
copy thereof to be served to counsel of record on June 15, 2009, as
follows:

Ronald Meltzer
Sinsheimer and Meltzer, Inc., P.S
1001-4th Avenue Plaza,
Suite 2120
Seattle, WA 98154-1109

U.S. Mail, postage prepaid

Messenger

Fax:

Email:

Other:

DATED this 15th day of JUNE, 2009.



Sheila Sowecke
Legal Assistant