

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

<p>City of Glen Ullin and Park District of the City of Glen Ullin,</p> <p>Plaintiffs/Appellee,</p> <p>v.</p> <p>Karen Schirado and Jerome Schirado, Defendants/Appellants.</p>	<p>Case No.: 30-2019-CV-01009</p> <p>Supreme Court Case No: 20200345</p> <p><b>PETITION FOR REHEARING</b></p>
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PETITION FOR REHEARING  
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Petition for Re-hearing on the Judgment entered on the 21<sup>st</sup> day of April, 2021 by the  
North Dakota Supreme Court

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## PETITION FOR REHEARING

[¶1] COMES NOW the Defendant/Appellant, Karen and Jerome Schirado (Schirados), and petitions the court for a rehearing.

## JURISDICTION

[¶2] Defendants/Appellant Schirados timely petitions for rehearing in accordance with N.D. R. App. P. 40.

## STATEMENT OF THE ISSUES

[¶3] **ISSUE I.** Were the facts in this case established by the Schirados sufficient to get the contract out of the Statute of Frauds?

**ISSUE II.** Did the attorney fees ordered by the Court for the City of Glen Ullin include fees for contempt?

## LAW AND ARGUMENT

**ISSUE I.** Were the facts in this case established by the Schirados sufficient to get the contract out of the Statute of Frauds?

[¶4] In this case the City of Glen Ullin doesn't dispute the fact that the Schirados have spent time cleaning garbage off the platted City's alleys and streets. Also, the City of Glen Ullin doesn't dispute the Schirados' testimony they were doing it because of an agreement with the City of Glen Ullin. The City of Glen Ullin only disputes amount of work the Schirados claim they did removing the garbage.

[¶5] The facts in this case show that for a number of years the City of Glen Ullin was aware the Schirados had their horses on the platted streets and alleys and were aware the Schirados were removing garbage from the streets and alleys.

[¶6] Removal of garbage by the Schirados from the City of Glen Ullin's platted alleys and streets is a partial performance by the Schirados that explains the contract that they had with the City of Glen Ullin. The City of Glen Ullin watching and accepting the

Schirados cleaning up of the garbage explains how the City of Glen Ullin understood the contract with the Schirados.

[¶7] According to City of Glen Ullin, et al. v. Schirado, et al., 2020 ND 185, in North Dakota partial performance can remove an agreement from the Statute of Frauds.

According to Trosen v. Trosen, 2014 ND 7, ¶21, 841 N.W.2d 687:

“A party asserting part performance removed an unwritten agreement from the statute of frauds must prove that a contract existed. *Id.* at ¶ 22. This Court has said:

“The general rule is that contracts for the sale of real property and transfers of real property interests must be made by an instrument in writing. Section 9-06-04, N.D.C.C.; Section 47- 10-01, N.D.C.C. However, part performance of an oral contract which is consistent only with the existence of the alleged contract removes it from the statute of frauds. *Poyzer v. Amenia Seed & Grain Co.*, 409 N.W.2d 107 (N.D. 1987). While partial payment of the purchase price alone is not justification for enforcing an oral contract to convey land, partial payment together with other acts such as possession or the making of valuable improvements may be sufficient to take a contract out of the statute of frauds. See *Parceluk v. Knudtson*, 139 N.W.2d 864 (N.D. 1966). When improvements to the property are relied upon as part performance of an oral contract for purposes of removing it from the statute of frauds, the improvements made on the land must be valuable, substantial, and permanent. *Vasichek v. Thorsen*, 271 N.W.2d 555 (N.D. 1978). Thus, part payment of the purchase price and substantial improvements to the property may remove an oral contract from the statute of frauds and create an enforceable contract constituting an enforceable equitable property interest.””

[¶8] In this case there are the Glen Ullin City Council May 12, 2003 meeting minutes. There is also testimony of Defendant/Appellant Karen Schirado and Glen Ullin City Council woman Betty Delabarre about the oral agreement between the City of Glen Ullin and the Schirados.

[¶9] The Schirados between the City Council May 12, 2003 meeting minutes and the oral agreement testified to by Defendant/Appellant Karen Schirado and Betty Delabarre who was a member of City Council when the oral contract was made created a contract.

[¶10] The Schirados believe is that they have done a partial performance that removes their agreement from the Statute of Frauds.

[¶11] In addition to the above the facts show that the Defendant/Appellant Schirados had taken possession of the City of Glen Ullin's platted streets and alleys and made valuable improvements.

[¶12] Because of the above facts the Schirados' petition for rehearing should be granted.

**ISSUE II.** Did the attorney fees ordered by the Court for the City of Glen Ullin include fees for contempt?

[¶ 13] When this case began there were two Plaintiffs, the City of Glen Ullin (City) and The Park District of the City of Glen Ullin (Park District). Park District had a judgment against Defendant/Appellant Schirados prior to this lawsuit. The City had none.

[¶14] In Schirado I. the North Dakota Supreme Court vacated the district court's original award of attorney's fees to both the City and the Park District, stating: "[T]he court did not specify which portion of the award is a sanction for the contempt, nor did it articulate which portion of the award was attributable to each plaintiff. We therefore vacate the award of attorney's fees and costs with instructions for the district court to explain its rationale for the award, including which amount is a sanction for the contempt, and which portion is allocated to each plaintiff." Schirado I, 2020 ND 185, ¶ 8 (citations omitted).

[¶15] Page 123 of the Appellant Appendix in paragraph 3 states, "Plaintiffs shall be awarded statutory costs of \$10.00, disbursements of \$176.85, and one half of their attorney fees ( $\$10,920.00 \times \frac{1}{2} = \$5,460.00$ ) for a total sum of \$5,646.85."

[¶16] In the original judgment at Appellant Appendix page 95 paragraph 3 states, "Plaintiffs shall be awarded statutory costs and disbursements, together with attorney fees in the total sum of \$11,106.85."

[¶17] \$11,106.85 was the original judgment and it contained contempt fees. In the second judgment was for \$10,920.00. The different between those two judgments is \$186.85. The total new judgment is so similar to what was in the original judgment it has to include contempt fees. Therefore, it is apparent the current judgment awarded to the Park District and City included contempt fees and the City is not entitled to contempt fees.

[¶18] For the above reason Schirados' petition for rehearing should be granted on this issue.

### CONCLUSION

[¶19] Defendants/Appellants Schirados' petition for rehearing should be granted.

Dated this 30<sup>th</sup> day of April, 2021.

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<p>City of Glen Ullin and Park District of the City of Glen Ullin,</p> <p>Plaintiffs/Appellee,</p> <p>v.</p> <p>Karen Schirado and Jerome Schirado, Defendants/Appellants.</p>	<p>Case No.: 30-2019-CV-01009</p> <p>Supreme Court Case No: 20200345</p> <p><b>CERTIFICATE OF COMPLIANCE</b></p>
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[¶1] This Petition complies with the pages limit set forth in Rule 40 of the North Dakota Rules of Appellate Procedure, as the petition does not exceed 10 pages.

Dated this 30<sup>th</sup> day of April, 2021.

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[¶1] The undersigned, being of legal age, being first duly sworn deposes and says that she served true copies of the following documents:

1. Petition for Rehearing
2. Certificate of Compliance
3. Certificate of Service

by electronically serving the same through the North Dakota Supreme Court e-filing system and that e-filing will provide service to the following:

John Mahoney  
Attorney for the Plaintiffs  
[service@mahoney-legal.com](mailto:service@mahoney-legal.com)

North Dakota Supreme Court  
[supclerkofcourt@ndcourts.gov](mailto:supclerkofcourt@ndcourts.gov)

and by placing a true and correct copy of said items in a sealed envelope with USPS mail to:

Karen and Jerome Schirado  
411 S. 2<sup>nd</sup> Street  
Glen Ullin, ND 58631

Dated this 30<sup>th</sup> day of April, 2021.

/S/ Benjamin C. Pulkrabek  
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¶1 The undersigned, being of legal age, being first duly sworn deposes and says that she served true copies of the following documents:

1. Title Page 1 of Petition for Rehearing
2. Certificate of Service

by electronically serving the same through the North Dakota Supreme Court e-filing system and that e-filing will provide service to the following:

John Mahoney  
Attorney for the Plaintiffs  
[service@mahoney-legal.com](mailto:service@mahoney-legal.com)

North Dakota Supreme Court  
supclerkofcourt@ndcourts.gov

and by placing a true and correct copy of said items in a sealed envelope with USPS mail to:

Karen and Jerome Schirado  
411 S. 2<sup>nd</sup> Street  
Glen Ullin, ND 58631

Dated this 3<sup>rd</sup> day of May, 2021.

/S/ Benjamin C. Pulkrabek  
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