

**FILED**

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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By: \_\_\_\_\_

NO. 322297

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

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STRUNK FAMILY TRUST,

Respondent,

v.

BRIGIT STRUNK,

Appellant.

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BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

**Assignments of Error**

- 1. The trial court erred in considering inadmissible evidence in determining a motion for summary judgment**
- 2. The trial court erred in granting summary judgment to the Plaintiff.**

**Issues Pertaining to Assignments of Error**

- 1. Did the trial court err or abuse its discretion in failing to exclude hearsay contained in the declarations of the trustee?**
- 2. Did the trial court err or abuse its discretion in failing to exclude the declaration of attorney Shea Meehan?**
- 3. In this action for eviction under the Residential Landlord Tenant act, was there any material issue of fact which precluded summary judgment, where the Defendant alleged an equitable estate in the**

**property, supported by declarations of several witnesses?**

- 4. Was the Plaintiff entitled to summary judgment as a matter of law, in this eviction action, where the Defendant alleged facts constituting an equitable estate in the property, that entitled her to possession of the property?**

## II. STATEMENT OF THE CASE

Appellant Brigit Strunk, began living in a home on 22 acres in Benton City, Benton County, Washington with her children in September of 2005. Her mother and father purchased the property so that she and her children would always have a place to live, after Brigit Strunk had been displaced from her last residence and was looking for a new place to rent. The property was titled to the parents of Brigit Strunk. CP 108-17.

Various witnesses described statements by Oscar Strunk in which he stated he had purchased the Whan Road property so that Brigit Strunk and her children would always have a place to live. A former trustee stated in a

declaration that Oscar Strunk and his attorney had said that he had “given” the 22 acres and home to Brigit Strunk.

At first Brigit Strunk paid rent to her parents. In 2011 her mother grew ill, and Brigit Strunk provided care to her mother in her mother’s home. After that point, her parents no longer requested that she pay rent.

Ms. Strunk made substantial improvements to the property in the way of fencing for horses, and removal of many dead trees, for example.

In 2008, Appellant’s parents had placed their property in a trust. Apparently the Whan Road property was placed in the trust. No trustee ever questioned the use of the Whan Road property by Brigit Strunk and her children until the present eviction action.

In November of 2013, the trustee filed an eviction complaint against Brigit Strunk. CP 1-3. The complaint caption indicates it was filed pursuant to RCW Chap. 59.18 (the Residential Landlord-Tenant Act.) CP 1. The caption referred to “all others occupying the residence” as Defendants. *Id.* Only Brigit Strunk was ever served with the Summons and Complaint.

The Complaint represents to the Superior Court that it is unknown if or when any agreement was made for the Defendant to reside at the premises but that it is believed no such agreement exists. CP 2.

After service of the Summons and Complaint, Brigit Strunk timely filed an Answer to the Complaint, and a declaration setting forth the facts in her defense. Her declaration disclosed that one of her daughters was age eighteen and lived at the Whan Road property. CP 19.

The Answer to the Complaint alleges in part: “The beneficial owner of at least the right to occupy the property is Brigit Strunk, per agreement with the title owner.” CP 20.

Ms. Strunk’s declaration alleged that she lived at the Whan road property by agreement with her parents. Her father was still living, and her mother was deceased. Ms. Strunk had once been renting a home in Webber Canyon, and when the landlord decided to let the landlord’s daughter live at that property, Ms. Strunk began to look for another place for her and her daughters to live. Her father was helping her look for another place to live. Encountering a scarcity of places for rent, “my father told me he was going to buy a home so that myself and my children would always have a place to live.” CP 17.

Brigit Strunk owned horses, and discovered the Whan Road property, consisting of 22 acres and a home, was for sale. Her father bought the property, and she and her children moved in. Her father bought the property in part so he could store some items on the property and pursue some of his own agricultural hobbies, and so that his daughter could keep the horses for the use of his granddaughters, who were active in 4H and rodeo. There were still eight horses at the Whan Road property at the time of the eviction action. CP 17.

In the beginning of her residence at Whan Road, Ms. Strunk had paid rent to her parents for about a year. In December of 2008, she was employed full time. "But at the request of my parents, I quit my job to take care of them." CP 17-18.

Her father told Brigit Strunk that in exchange for taking care of him and her mother, that she and her children would always be able to live at Whan Road. She took her parents to doctor appointments, did their cooking, cleaning, laundry, and provided personal care such as giving them showers and having them take their medications. Her mother needed her at the home as she used a walker to get around, and could no longer drive. She was at their home about 12 hours a day during the week,

stayed some nights, and was there for some of the time on the weekends.

CP 18.

Ms. Strunk asserted in her declaration that she and her children had the right to live at the Whan Road property, based on statements by her father that in exchange for the care she provided to him and her mother, that they would always have a place to live. CP 18.

Ms. Strunk denied any violation of municipal codes as alleged in the complaint, she had not seen any notices of alleged violations from the county. She had not been asked by her father, the trustee, or anyone else to correct any alleged code violations. CP 18-19.

Paragraph IV of the Complaint alleged in part: “Additionally, the defendant is in violation of the municipal codes. (See attached Exhibit “C”).” CP 2. Exhibit C is a warning letter from the Benton County Building Department, addressed to Oscar Strunk, Jr. at 526 Douglass Road in Richland. CP 14. There is no documentation in the record that Brigit Strunk was ever made aware of the warning, or provided any opportunity to be heard by County officials on that issue.

Ms. Strunk alleged that she currently lived at the Whan Road property with her two 15 year old daughters and her 18 year old daughter. CP 19.

Ms. Strunk alleged that she paid the electric bills for the property, and that the trustee, Mr. May had arranged for the bill to be sent to her, under her name, instead of to her father's residence. CP 19.

Prior to the show cause hearing, Ms. Strunk's counsel filed a "Motion to Strike Hearsay," asking that the Court strike the "Declaration of C. Wayne May," or portions thereof, on the basis that is contained hearsay and matters not within his personal knowledge. CP 29-30.

At the time of the show cause hearing, Ms. Strunk also filed a counterclaim alleging a beneficial interest in the property via a constructive trust and served the trustee with a copy in open court.

Ms. Strunk and her counsel appeared for the show cause hearing on December 6<sup>th</sup>, 2013, with witnesses to call on her behalf. CP 109. The Superior Court judge indicated the matter would be set as a special setting, and a hearing date of January 21<sup>st</sup>, 2014 was eventually set.

Plaintiff filed a "Motion for Summary Judgment and CR 11 Sanctions" noted the matter for January 17<sup>th</sup>, 2014. CP 31-32.

Counsel for Ms. Strunk filed another motion to strike inadmissible materials offered by Plaintiff, "Defendant Brigit Strunk's 2<sup>nd</sup> Motion to Strike Hearsay or Other Inadmissible Material." CP 126-128.

Counsel for Defendant noted both of the motions to strike inadmissible materials for the same date and time as the motion for summary judgment. CP 90-91, 129-30.

In response to the motion for summary judgment, Ms. Strunk filed declarations of people who had been present to testify on her behalf at the time of the December 6<sup>th</sup>, 2014 show cause hearing. These declaration generally alleged that Oscar Strunk had intended that Brigit Strunk be able to live at the Whan Road property to raise her children.

Darroll Reithamyr had been present for the show cause hearing on December 6<sup>th</sup>, 2013, but was then told it would be held on a later date. CP 120. He had known Oscar Strunk for 21 years. Oscar Strunk had attended birthday parties for the children of Ms. Strunk and of Mr. Reithamyr, and was like family. Mr. Reithamyr was installing carpet at the residence of Mr. Strunk about seven or eight years ago. Mr. Strunk told Mr. Reithamyr that “he bought a farm on Whan Road for his daughter for his daughter Brigit Strunk and her children. ... so they would have a permanent place to stay.” CP 121.

Joyce Roberts had also been present to testify at the show cause hearing when she was informed it would be held on a later date. CP 122. She was familiar with both Oscar Strunk and Brigit Strunk. When she lived next to

Brigit Strunk, she would see Oscar and Mary Strunk at Brigit's house for dinner every Sunday. She was aware they were " 'there' for each other" and were a close-knit family. CP 123.

In the late summer of 2005, Roberts helped Brigit Strunk and her family move into the Whan Road property. Oscar Strunk was there, and said he was relieved that he had a place where his daughter could live the rest of her life, where her children could remain in the same school system instead of being bounced from school to school and home to home. He said that Brigit would never have to move again. CP 123. Roberts had witnessed improvements made by Brigit Strunk to the property such as an electric fence. CP 123-24.

In the last two years, William Lakey had helped Brigit Strunk maintain and improve the property by removing dead trees, moving boulders, installing fencing and carpet. The only one who compensated him to do was Brigit Strunk. CP 118-19.

Defendant presented a declaration from the vulnerable adult petition file in which a former trustee indicated he had been told by Oscar Strunk and his attorney that he had "given" the 22 acres and home on Whan Road to Brigit Strunk. "I further understood from earlier conversations with Mr. Strunk and his attorney that Mr. Strunk had given substantial assets to

Brigit, including without limitation cars and a mobile home which is situated on 22 acres in Benton City.” CP 139. The former trustee also referred to visiting Brigit Strunk “at her Benton City home.” CP 140.

Plaintiff referred in various filings to a vulnerable adult petition that had been filed by a prior trustee. Plaintiff did not ever file any documents from that file or specifically move that the Superior Court take judicial notice of the other file. The Vulnerable Adult petition had been dismissed. CP 88, line 1.

Ms. Strunk, as part of her opposition to summary judgment, filed excerpts from the vulnerable adult petition, which had been dismissed. These revealed that Oscar Strunk, with representation by an attorney, had stated in a declaration that he was not being exploited by his daughter and that he wanted to help her as much as possible. And the prior trustee had been told by Oscar Strunk and his attorney that he had “given” the 22 acres and home on Whan Road to Brigit Strunk.

Prior to the hearing on the motion for summary judgment, counsel for Ms. Strunk timely noted two different motions to strike hearsay or other inadmissible material offered by Plaintiff.

At the hearing on the motion for summary judgment, when counsel for Ms. Strunk began to argue in favor of the first motion to strike portions of

Plaintiff's evidence, the Superior Court judge asked counsel to move on to his substantive argument in opposition to the summary judgment motion.

As set forth in the trial court briefing, counsel for Ms. Strunk argued that the allegations set forth in the various declarations indicated a material issue of fact existed as to whether Ms. Strunk was entitled to a life estate or other equitable interest in the Whan Road property that operated as an equitable defense to the eviction complaint. CP 92-107.

In making his ruling on the summary judgment motion, the Superior Court judge made no mention of the two motions filed by Ms. Strunk to exclude inadmissible evidence.

The Superior Court judge granted the motion for summary judgment, stating there had been a tenancy at will, which had been properly terminated by the trustee.

At the conclusion of the hearing, counsel for Plaintiff handed up documents to the Superior Court judge for signature without first providing them to Appellant's counsel. After the judge signed them, Appellant's counsel was shown Findings of Fact and Conclusions of Law, and an order for a writ of restitution. Appellant's counsel noted on the documents that they were presented without notice to him. CP 153-57.

An Order Granting Summary judgment was entered weeks after the summary judgment hearing. CP 158-60.

Appellant filed a Notice of Appeal from the Order for Writ of Restitution, and following the entry of the Order Granting Summary Judgment, filed an Amended Notice of Appeal.

### III. ARGUMENT

#### **Standard of Review**

"We engage in a de novo review of a ruling granting summary judgment. *Anderson v. Weslo, Inc.*, 79 Wn.App. 829, 833, 906 P.2d 336 (1995). Thus, we engage in the same inquiry as the trial court." *Green v. Normandy Park Riviera Section Cmty. Club, Inc.*, 137 Wn.App. 665, 681, 151 P.3d 1038, (2007), rev. denied 163 Wn.2d 1003. "Summary judgment is properly granted when the pleadings, affidavits, depositions, and admissions on file demonstrate that there is no genuine issue of material fact and that the moving party is entitled to summary judgment as a matter of law. CR 56(c); *Hutchins v. 1001 Fourth Ave. Assocs.*, 116 Wn.2d 217, 220, 802 P.2d 1360 (1991)." *Green*, 137 Wn.App. at 681. "All reasonable inferences from the evidence must be construed in favor of the nonmoving party. *Lamon v. McDonnell Douglas Corp.*, 91 Wn.2d 345, 349, 588 P.2d 1346 (1979)." *Green*, 137 Wn.App. at 681.

1. The trial court erred in failing to exclude inadmissible evidence

Prior to the show cause hearing, Ms. Strunk's counsel filed a "Motion to Strike Hearsay," asking that the Court strike the "Declaration of C. Wayne May," or portions thereof, on the basis that it contained hearsay and matters not within his personal knowledge. CP 29-30. Plaintiff's response to this concern was to file another Declaration of Mr. May in support of Plaintiff's Motion for Summary Judgment with additional material which was hearsay and not of personal knowledge. Defendant filed a second motion to strike such material, and noted both motions for the same date and time as the summary judgment hearing. CP 126-28, CP 90-91, 120-30.

The first declaration of Mr. May indicated he was appointed successor trustee on July 12<sup>th</sup>, 2012. Paragraph 3 of the declaration refers to his review of a State Farm letter allegedly discussing an improperly installed roof and resultant alleged damage, without the letter being part of the record and without any basis for personal knowledge on behalf of Mr. May about the damage. Mr. May then recounts a conversation with Oscar Strunk on the issue. CP 24.

Mr. May recounts in Paragraph 4 that Mr. Strunk was concerned about the safety of the home and additional repairs needed. CP 24. In paragraph

12 A., Mr. May lists a “[d]etermination that residence is not habitable.” There is no source or basis of personal knowledge provided for this “determination.” Mr. May continues on to refer to conversations with a number of other persons. CP 24-25.

Mr. May then avers that Douglass Kerr has 27 pages of client notes of Mr. and Mrs. Strunk’s decision making process while drafting the trust. There is no basis of knowledge for this statement. CP 27.

Evidence Rule 602. LACK OF PERSONAL  
KNOWLEDGE

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of rule 703, relating to opinion testimony by expert witnesses.

The Superior Court should have excluded evidence under this rule that was not shown to be based on May’s own perception. It is completely unknown how anyone determined the home was uninhabitable. (Although a residence could become uninhabitable if the trustee refuses to maintain the property as alleged by Ms. Strunk.)

Evidence Rule 801. DEFINITIONS.

The following definitions apply under this article:

(a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) Declarant. A "declarant" is a person who makes a statement.

(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) Statements Which Are Not Hearsay. A statement is not hearsay if—

...

(2) Admission by Party-Opponent. The statement is offered against a party and is (i) the party's own statement, in either an individual or a representative capacity or (ii) a statement of which the party has manifested an adoption or belief in its truth, or (iii) a statement by a person authorized by the party to make a statement concerning the subject, or (iv) a statement by the party's agent or servant acting within the scope of the authority to make the statement for the party, or (v) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

#### Evidence Rule 802. HEARSAY RULE

Hearsay is not admissible except as provided by these rules, by other court rules, or by statute.

The State Farm letter is hearsay, to the extent May implies the contents enter into his own testimony. The statements of Oscar Strunk to Mr. May are hearsay, he is not a party opponent. The 27 pages of notes of

Douglass Kerr, from years before May's appointment, showing a slow and deliberative process by the Strunks in creating their trust (with no concomitant actions to remove their daughter from Whan Road) are hearsay.

The Defendant's second motion to strike hearsay or other inadmissible material objected to various documents offered by Plaintiff, including a declaration by attorney Shea Meehan, on the basis that it contained hearsay statements of Oscar Strunk, and offered statements heard in an attorney-client relationship. And the second motion addressed Mr. May's second declaration, made in support of the summary judgment motion in that is offered hearsay from Oscar Strunk, and referred to financial records not before the Court. CP 126-28.

According to the Declaration of C. Wayne May in Support of Summary Judgment, "... Mr. Oscar Strunk hired Shea C. Meehan, in part to defend his daughter Brigit Strunk concerning the allegations in the raised in the Vulnerable Adult Protection action." CP 87.

The Declaration of Shea Meehan in Support of Summary Judgment, CP 80-86, sets forth alleged statements by Oscar Strunk and Brigit Strunk to Mr. Sheehan, and the lack of certain statements, such that Mr. Strunk did

not ever say Brigit Strunk had a life estate in the Whan Road property.

Mr. Sheehan also expresses his opinion about the purpose of the trust.

RCW 5.60.060. Who is disqualified - Privileged communications.

(2)(a) An attorney or counselor shall not, without the consent of his or her client, be examined as to any communication made by the client to him or her, or his or her advice given thereon in the course of professional employment.

The statements of Mr. Meehan about what Oscar Strunk said, or did not say, should have been excluded on the basis of hearsay and that they were privileged. The statements about what Brigit Strunk told Mr. Meehan should have been excluded on the basis they were privileged.

The " best evidence" rule, more accurately described as the original writing rule, refers to ER 1001-08. 5C KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE LAW AND PRACTICE § 1000.1, at 353 (5th ed.2007). The rule applies when a party is attempting to prove the contents of a writing. ER 1001-04. The rule typically requires the use of the original writing, or a duplicate, to prove the contents of the writing. ER 1002-03.

*In re Adolph*, 243 P.3d 540, 567, 170 Wn.2d 556 ( 2010).

The declarations of Mr. Meehan and Mr. May make abundant reference to documents such as the trust, financial documents and items such as the notes of Mr. Kerr without apparent need to share the actual contents with

the Court or parties. Those portions of their declarations should have been stricken under the “best evidence” rule.

That would include references to a guardianship, for which the Plaintiff never asked the Superior Court in the eviction to take judicial notice of, instead simply made false allegations about findings that didn't not exist. The Declaration of Wayne May in Support of Summary Judgment, CP 88, paragraph 6, makes representations about supposed findings in a guardianship proceedings. No such findings were presented to the Superior Court in the eviction action, nor would it have been possible to do so, as none exist.

Not only did the Superior Court apparently consider all of the material Defendant made express objections to, but the Superior Court judge did not make any rulings on the objections.

Defendant also objected to a portion of the trust document being offered, since it was incomplete. CP 126, CP 72-77. ER 106 requires the entire document. And to a building inspection report, since it was unsworn. CP 46-71.

2. The trial court erred in granting summary judgment to Plaintiff

**A. Summary Judgment is not the proper procedure on an  
eviction complaint**

RCW 59.18.380 provides that in an eviction proceeding, the Defendant is entitled to respond orally at the time of the show cause hearing. The only Summons served in this matter was under the Landlord Tenant Act, the statutory form of summons under that statutory scheme having been served. It was served November 22nd, 2013, and required a written response to be filed by December 5th, 2013, which is 13 days, far less than the 20 days allowed for a common law suit by CR 12(a)(1). That does not hail Defendant into Court on any other basis.

RCW 59.18.380 provides, in relevant part:

At the time and place fixed for the hearing of plaintiff's motion for a writ of restitution, the defendant, or any person in possession or claiming possession of the property, may answer, orally or in writing, and assert any legal or equitable defense or set-off arising out of the tenancy.... The court shall examine the parties and witnesses orally to ascertain the merits of the complaint and answer, and if it shall appear that the plaintiff has the right to be restored to possession of the property, the court shall enter an order directing the issuance of a writ of restitution.

Phrased in a less verbose fashion, the statute allows the defendant to appear for the first time at an unlawful detainer show cause hearing and assert, either " orally or in writing," " any legal or equitable defense" to the plaintiff's request for a writ of restitution. The statute then imposes on the trial court an

affirmative duty to examine the parties and witnesses, ascertain whether such defenses have merit and, thus, determine whether a writ of restitution should issue.

*Leda v. Whisnand*, 150 Wn.App. 69, 79, 207 P.3d 468, (2009).

The procedure required under RCW 59.18.380 includes the right of the tenant to have the plaintiff examined, *Leda*, 150 Wn. App. at 82, which cannot occur as part of a summary judgment motion. Plaintiff would have wanted the Plaintiff examined on a number of topics, such as whether he was involved in having a dog infraction issued against Oscar Strunk to make Brigit Strunk look bad in this proceeding, without defending Oscar in that infraction, why he put the electric bill in Brigit Strunk's name if he knew of no agreement for her to reside at the property, and as to whether he failed to carry out his duties as trustee to maintain the property, thus creating his own argument that the property was not habitable. *Leda* cites the US and Washington Constitutions in discussing the right of the tenant to a meaningful opportunity to be heard. 150 Wn. App. at 83.

We also hold, however, that the superior court commissioner abused her discretion by refusing to allow Whisnand to present evidence supporting his other claimed defenses during the unlawful detainer show cause hearing. Accordingly, we reverse and remand for further proceedings.

*Leda v. Whisnand*, 150 Wn. App. 69, 73, 207 P.3d 468 (2009).

Whisnand sought to present evidence that, if true, would have established that he had been given insufficient notice by the Ledas of their intent to terminate his tenancy. This evidence, if true, would have mandated a conclusion that the trial court had no authority to issue a writ of restitution. *Christensen v. Ellsworth*, 162 Wn.2d 365, 372, 173 P.3d 228 (2007).

A tenant who raises a viable legal defense, either in written submissions or during the show cause hearing, is entitled to testify in support of that defense. The rules of evidence apply to unlawful detainer show cause hearings, and inadmissible evidence may not be therein considered. ... Under ER 603, unsworn testimony is inadmissible. Whisnand was therefore entitled to be sworn. Whisnand was also entitled to have the Ledas sworn and examined as to the merits of the asserted defense because RCW 59.18.380 expressly directs the court to "examine the parties." RCW 59.18.380 also expressly contemplates testimony by witnesses other than the parties. Examination of such witnesses is also required, if necessary to ascertain the merits of a defense.

*Leda v. Whisnand*, 150 Wn. App. at 82.

It would violate the statute, and potentially the Due Process clause, to grant summary judgment on a residential eviction complaint without allowing the Defendant to respond orally at a show cause hearing, as the Defendant was prepared to do, with two independent witnesses, as well as her own testimony, on December 6th, 2013. And Defendant should have been allowed to ask the trial court to examine the Plaintiff.

**B. Failure to hold the show cause hearing within 30 days of the service of the Summons and Complaint invalidates the process**

RCW 59.18.370 provides:

Forcible entry or detainer or unlawful detainer actions - Writ of restitution - Application - Order – Hearing

The plaintiff, at the time of commencing an action of forcible entry or detainer or unlawful detainer, or at any time afterwards, upon filing the complaint, may apply to the superior court in which the action is pending for an order directing the defendant to appear and show cause, if any he or she has, why a writ of restitution should not issue restoring to the plaintiff possession of the property in the complaint described, and the judge shall by order fix a time and place **for a hearing of the motion, which shall not be less than seven nor more than thirty days** from the date of service of the order upon defendant. A copy of the order, together with a copy of the summons and complaint if not previously served upon the defendant, shall be served upon the defendant. The order shall notify the defendant that if he or she fails to appear and show cause at the time and place specified by the order the court may order the sheriff to restore possession of the property to the plaintiff and may grant such other relief as may be prayed for in the complaint and provided by this chapter. (Emphasis added.)

The statute requires that the Summons for an eviction set a hearing not sooner than seven days, nor later than 30 days, after service of the summons. Because the 30 days expired before a hearing was held, the

Summons and Complaint should be dismissed and the Plaintiff was not entitled to summary judgment.

Holding the show cause hearing within 30 days would have meant allowing the Defendant to present oral testimony. Defendant appeared on December 6th, 2013 with two witnesses. CP 109, 120, 122

We also hold, however, that the superior court commissioner abused her discretion by refusing to allow Whisnand to present evidence supporting his other claimed defenses during the unlawful detainer show cause hearing. Accordingly, we reverse and remand for further proceedings.

*Leda v. Whisnand*, 150 Wn. App. 69, 73, 207 P.3d 468 (2009).

Here, more than 30 days has passed from service of the Summons under RCW Chap. 59.18, without the Defendant's right to have presented oral testimony at the show cause hearing having been afforded to her.

Whisnand contends that he had a right under RCW 59.18.380 to present legal defenses to his eviction during the show cause hearing, that RCW 59.18.380 required the trial court to attempt to ascertain the merits of those defenses by examining the parties, and that he was wrongfully denied both of these things. Whisnand points out that, to the extent there was an absence of evidence in the record that the period of his tenancy ran from the 15th day of one month to the 14th day of the next month, such evidentiary deficiency is the result of the commissioner's refusal to allow him to present such evidence. According to Whisnand, the Ledas' own submissions to the court supported this defense, but he was nevertheless prevented from arguing it by the trial

court's refusal to either engage in or allow examination of the parties. ... We agree with Whisnand.

*Leda v. Whisnand*, 150 Wn. App. at 79-80.

**C. Genuine issues of material fact precluded summary**

**Judgment**

As argued below, Defendant's allegation of an equitable estate in the property means Plaintiff was not entitled to judgment as a matter of law. There were material issues of disputed fact, or, if anything, certain relevant factual allegations by Defendant were not challenged. Further complicating the matter is that the Superior Court judge did not rule on the Defendant's evidentiary motions.

Plaintiff alleged that he knew of no agreement at all for Defendant to reside at the property. Plaintiff alleged otherwise, and presented the declarations of witnesses to back up her claim that her father said the Whan Road property was purchased with the intent that she always have a place to reside.

Defendant raised for the first time in an untimely reply brief in the Superior Court, faxed to Defendant's counsel, the issue of whether there had been only a tenancy at will. Assuming an issue of tenancy at will could even properly be before the Superior Court, there is certainly a

factual issue there. Defendant alleged that after she provided care for her mother, rent was no longer required and she was told she could live at the Whan Road property forever. Intent is an issue of fact.

Defendant presented a declaration from the vulnerable adult petition file in which a former trustee indicated he had been told by Oscar Strunk and his attorney that he had “given” the 22 acres and home on Whan Road to Brigit Strunk. “I further understood from earlier conversations with Mr. Strunk and his attorney that Mr. Strunk had given substantial assets to Brigit, including without limitation cars and a mobile home which is situated on 22 acres in Benton City.” CP 139. This was apparently unquestioned by that trustee, who focused his concern on his objection to the provision of additional monetary assistance by Oscar Strunk to Brigit Strunk. The former trustee also referred to visiting Brigit Strunk “at her Benton City home.” CP 140. The facts alleged by that trustee as to the Benton City acreage clearly supports Ms. Strunk’s contention that she at a minimum had at least a beneficial interest in the property, if not an equitable claim for a fee estate to her, in light of the use of the word “given” to describe Oscar Strunk’s action. This creates at least a factual issue as to a beneficial estate, and whether there was a “tenancy at will” for the current trustee to terminate.

And there are factual disputes that may or not be material. Plaintiff alleged financial abuse, Defendant denied the same. In a vulnerable adult proceeding, Oscar Strunk had stated in a declaration that he had taken care of Brigit Strunk and his grandchildren, that he had said “yes” when she needed assistance, and that he wanted to help her as he saw fit. CP 135-36. (And in fact the vulnerable adult petition was dismissed in accordance with the desires of Oscar Strunk and his attorney. CP 88, line 1.) If Plaintiff had grounds to evict pursuant to RCW 59.18 based on financial abuse of the settlor of the trust, Plaintiff did not demonstrate how such an allegation fell into the framework of the Residential Landlord-Tenant Act. And if there was a tenancy at will, the trustee needed no grounds to terminate the tenancy. But if the Superior Court was considering the alleged financial abuse in determining whether Defendant could prevail on an equitable defense, then clearly there was a material factual dispute.

Plaintiff alleged waste of the property and municipal code violations. While Plaintiff did not demonstrate any steps under the Residential Landlord-Tenant Act to notify Defendant of any violations of a tenant’s duties so as to then result in an eviction, if somehow this was an issue, then clearly Defendant denied waste of the property. In fact, Defendant demonstrated having made substantial improvements to the property. The trustee had refused to make needed repairs, using his own dereliction

of duty against Defendant. Defendant denied knowledge of any notice of municipal code violations. Plaintiff had knowledge of an infraction notice, issued to his ward, Oscar Strunk, which Plaintiff apparently deliberately failed to defendant against, in the hopes of smearing the Defendant. In any event, no finding of a court was presented to show any infraction had been found to have been committed.

**D. Defendant's equitable defense of constructive trust defeats**

**Plaintiff's right to possession**

Defendant specifically alleged that she occupied the premises by agreement. That her father and mother bought the property so that she and her children would always have a place to live, not dependent upon male companions or other landlords. At first, the Defendant paid rent. Then she provided care for her parents. She understood she was always able to stay there, at least as a tenant. The owner had not demanded continued rent payments. A former trustee heard Oscar Strunk and his attorney say he had "given" the property to Brigit Strunk.

Defendant has also made substantial improvements to the property.

Even before the law of this State allowed counterclaims to be filed in unlawful detainer actions, constructive trust was a recognized defense to

an unlawful detainer action. In *Snuffin v. Mayo*, 6 Wn.App. 525, 528, 494 P.2d 497 ( 1972), the Court stated: “A constructive trust is clearly an equitable defense and ..., the resolution of that issue was necessary to a determination of right to possession.”

*Mehelich v. Mehelich*, 7 Wn. App. 545, 548, 500 P.2d 779 (1972) supports Defendant’s position that a life estate or other similar interest should be imposed upon the property, regardless of legal title.

In that case the trial court imposed a constructive trust for a life estate in favor of the defendants, which was affirmed on appeal. The plaintiff in that case was the younger Joseph Mehelich, the defendant was the elder Joseph Mehelich. The trial court had made the following finding of fact:

(12) That when plaintiff and his now deceased wife joined together with defendants, **the purpose to be accomplished was the acquisition of a house for the elderly parents to reside in**, and the parties were not concerned with title, and made no specific agreement regarding ownership; that plaintiff, his deceased wife, and defendants, together, acquired a piece of property, and in 1949 these parties were venturing into some kind of joint venture, the details of either parties' interest in which were never articulated; that the purpose of this acquisition was to provide the parents with a place to live the rest of their lives, after which the property would belong to defendant son, Joseph P. Mehelich, and his wife;

(Emphasis added.)

7 Wn. App. at 548.

The Court of Appeals upheld that finding of fact, noting that the use of the phrase “joint venture” was being used for descriptive purposes, not as a term of art. 7 Wn. App. at 549. “Appellants' remaining assignments of error are directed to the trial court's conclusion that a constructive trust should be imposed to give the respondent an interest in the proceeds of the sale of the real estate to the extent of a life estate.” Id.

In resolving that question, we consider the following language in *Seventh Elect Church in Israel v. First Seattle Dexter Horton Nat'l Bank*, 162 Wash. 437, 440, 299 P. 359 (1931), which was quoted with approval in *Scymanski v. Dufault*, 80 Wn.2d 77, 491 P.2d 1050 (1971), to be significant: 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 himself which in equity and good conscience he should not be permitted to hold.

Id.

The Court of Appeals next rejected that argument that a constructive trust required facts showing wrongdoing or fraud on the part of the younger Mehelich.

Appellants argue that in absence of a specific finding of fraud or wrongdoing on their part, the court erred in concluding that a

constructive trust should be found. We do not believe such a narrow interpretation ought to be placed upon the guidelines recognized in this state for the creation of a constructive trust. *Scymanski v. Dufault*, supra.

Id.

The Court of Appeals quoted with approval from the trial court's opinion, as to the reasoning justifying imposition of a constructive trust:

We have several people joining together in some form or fashion to accomplish a particular task--acquiring a house and property for some elderly parents to reside in. I am sure that as of that moment in 1949 when the four people were together discussing this, deciding to go ahead with the venture, that no one really thought about whether this was a transaction in which one or the other was going to have this form of title or that form of title or what exactly the holding of the respective parties were.

7 Wn. App. at 550.

Key to the reasoning of the Court of Appeals was that after a period of time, the son no longer demanded rent from his parents, and assisted them in improving the property. 7 Wn. App. at 551. Those same facts are also shown in the case before this Court.

And the fact that a familial "confidential relationship," also present in this case, was also of utmost importance to the Court in *Mehelich*:

The confidential relationship that existed between the parties makes it unconscionable to deprive the respondent of a life estate in the property. We hold that under the facts of this case, the

situation of trust and confidence manifested in the family relationship of these parties is sufficient to support the trial court's conclusion that a constructive trust ought to be imposed to the extent of a life estate in favor of the respondent father. See 1 A. Scott, *The Law of Trusts*, § 44.2, at 337 (3d ed. 1967). Indeed, we believe that to hold otherwise would be to allow the unjust enrichment of the appellants at the expense of the respondent. The trial court properly avoided such a result by imposing a constructive trust. See 5 A. Scott, *The Law of Trusts*, § 462.2 at 3417 (3d ed. 1967). As our state Supreme Court observed in *Scymanski v. Dufault*, supra, 80 Wn.2d at 89, 491 P.2d at 1057:

A constructive trust may arise even though acquisition of the property was not wrongful. It arises where the retention of the property would result in the unjust enrichment of the person retaining it.

7 Wn. App. at 551.

Other case law supports that imposition of a constructive trust does not require proof of a wrongful taking or fraud. In *In re Marriage of Lutz*, 74 Wn. App. 356, 368, 873 P.2d 566 (1994), the Court stated:

However, as the Supreme Court has recently stated, "constructive trusts are also imposed in broader circumstances not arising to fraud or undue influence". *Baker[v. Leonard]*, 120 Wn.2d [538, 843 P.2d 1050 (1993)] at 547, 843 P.2d 1050. A constructive trust arises 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. Our court has noted that constructive trusts are those which arise purely by construction of equity and are entirely independent of any actual or presumed intention of the parties and are often directly contrary to such intention. They are entirely in invitum and are forced upon the conscience of the trustee for the purpose of working out right and justice or frustrating fraud. ... *Proctor v. Forsythe*, 4 Wn. App. 238, 242, 480 P.2d 511

(1971). Thus, "[a] constructive trust may arise even though acquisition of the property was not wrongful. It arises where the retention of the property would result in the unjust enrichment of the person retaining it." *Scymanski v. Dufault*, 80 Wn.2d 77, 89, 491 P.2d 1050 (1971). Here, Siler clearly would be unjustly enriched if she were permitted to keep the title to the property. A constructive trust is the proper means to prevent that inequitable result.

The principles enunciated in *Mehelich* and *Lutz* as applied to the facts here show that Plaintiff is not entitled to summary judgment. Largely undisputed facts demonstrate Defendant and her children were always to have a place to live, according to the express intent of Oscar Strunk, defeating Plaintiff's claims. It was not the intent of Oscar Strunk that his daughter and granddaughters be rendered homeless. Any dispute as to exactly what interest the Defendant was intended to receive or should receive is a genuine issue of disputed material fact preventing summary judgment.

#### IV. CONCLUSION

This Court should exclude the inadmissible material offered by Plaintiff in support of Plaintiff's Motion for Summary Judgment, or remand to the Superior Court for that Court to rule on the Defendant's two motions to exclude evidence.

This Court should hold that genuine issues of material fact are presented, and that Plaintiff is not entitled to summary judgment as a matter of law, and reverse the Superior Court's order granting summary judgment and the findings of fact and conclusions of law and order granting a writ of eviction.

Respectfully submitted,

June 6<sup>th</sup>, 2014



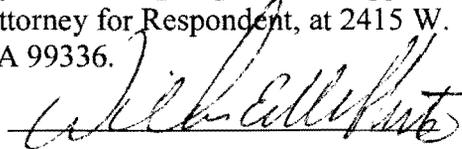
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WSBA 13808

Certificate of Mailing

I hereby certify that on the 6<sup>th</sup> day of June, 2014, I mailed a true and accurate copy of the foregoing Brief of Appellant to Andrea J. Clare, Attorney for Respondent, at 2415 W. Falls, Kennewick, WA 99336.



William Edelblute