

**FILED**

NO. 348253

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COURT OF APPEALS  
THE STATE OF WASHINGTON  
DIVISION III

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DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

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JESUS GALVAN, et al,

Respondents.

v.

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MIGUEL GALVAN, et al,

Appellants,

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APPEAL FROM THE SUPERIOR COURT  
FOR CHELAN COUNTY

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**BRIEF OF RESPONDENTS**

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Jeffers, Danielson, Sonn & Aylward, P.S.  
BRIAN C. HUBER, WSBA #23659  
P.O. Box 1688  
Wenatchee, WA 98807-1688  
(509) 662-3685  
Attorneys for Respondents Jesus and  
Josefina Galvan

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## **I. INTRODUCTION**

Respondents Jesus and Josefina Galvan, through counsel, submit this brief in response to the Appellants' Opening Brief submitted by Appellants Miguel and Maria Galvan.

## **II. RESTATEMENT OF THE ISSUES**

1. Have the Appellants met their burden to show that the trial court's findings and conclusions are not adequately supported?
2. Have the Appellants waived affirmative defenses that were not pled in their Answer, not argued to the trial court in a Motion to Dismiss nor at trial, and are being raised for the first time on appeal?

## **III. ASSIGNMENTS OF ERROR**

Respondents make no assignments of error in this appeal.

## **IV. STATEMENT OF THE CASE**

### **A. Summary of the Facts.<sup>1</sup>**

This case involves two brothers and their wives who agreed to

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<sup>1</sup> Respondents acknowledge that their statement of the case and argument as set forth in this response brief include few references to relevant parts of the trial court record. See RAP 10.3(a)(5) and -(6). This is equally true with respect to the Appellants' Opening Brief. The lack of references to the record can fairly be attributed to the fact that the Appellants – who have the burden in this appeal – did not order a verbatim report of proceedings from trial. Respondents cannot afford the cost of such a transcript and feel it was Appellants' responsibility to order a trial transcript if Appellants desired to challenge the trial court's rulings.

purchase as partners a 22-acre parcel of land and mobile home located near Chelan, Washington. The brothers and their wives were neither sophisticated nor experienced with respect to real estate purchases, in fact quite the opposite.

The brothers orally agreed that each of the two couples would contribute 50% of any required mortgage payments, property taxes and other expenses relating to the subject property. They also agreed that the property would be owned and titled in the names of both brothers and their wives.

The property was purchased in the name of Appellants Miguel and Maria Galvan (collectively "Miguel") and not in the name of Respondents Jesus and Josefina Galvan (collectively "Jesus"). After the purchase, Miguel began residing in the mobile home.

At some point in the future, the brothers hoped the 22-acre parcel could be subdivided so that each of the brothers could own a portion of the property in his own name.

The fact that Miguel (and not Jesus) was listed in the property records as the owner of the property was not known to Jesus or his wife. Miguel had been the only brother who was involved in the closing of the purchase.

For years Jesus paid 50% of all mortgage payments, property taxes and other expenses. Most of these payments were made in the form of cash. Most of the time other family members couriered the cash payments from Jesus to Miguel each month.

After learning that Miguel had failed to put Jesus's name onto the legal title and would not acknowledge Jesus's 50% interest in the property, Jesus filed suit against Miguel. The First Amended Complaint alleged claims for quiet title, specific performance and partition, breach of contract, unjust enrichment/quantum meruit, constructive trust and conversion. CP 14-20.

At the one-day bench trial, multiple individuals – including three disinterested family members who had observed that the two brothers treated the property as co-owners - testified in support of Jesus. Some testified that they had personally couriered cash payments from Jesus to Miguel. Various witnesses testified that they had witnessed Miguel acknowledge that Jesus owned a 50% interest in the property.

Respondents Miguel and Maria Galvan represented themselves *pro se* at the trial. Both denied at trial that there was any agreement that Jesus would be a co-owner of the property. Miguel called no witnesses other than himself and his wife Maria Galvan.

The trial court found Jesus and his witnesses to be more credible. In the trial court's remarks to the parties after the trial, the trial court specifically cited the lack of credibility of certain key witnesses, including Miguel and his wife Maria Galvan, that determined the outcome of the trial.

**B. Procedural Defects of Appeal.**

**1. No Report of Proceedings.**

RAP 9.1(b) states: "The report of any oral proceeding must be transcribed in the form of a typewritten report of proceedings." Although Miguel argues there were numerous errors by the trial court in the proceedings below, Miguel voluntarily chose not order a verbatim report of proceedings from the one-day bench trial. Miguel made this tactical decision despite the obvious difficulties the lack of a trial transcript would create in terms of meeting an appellants' burden to show the trial court's findings of fact were not supported by substantial evidence.<sup>2</sup>

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<sup>2</sup> With all due respect to Appellants' attorney, who did not represent the Appellants at trial and does not have the benefit of a trial transcript, it appears counsel was forced in Appellants' brief to recite "facts" and "evidence" from the trial based solely upon what was reported to counsel by the Appellants themselves. The Respondents dispute many if not most of the factual assertions set forth in Appellants' brief, very few of which are supported by references to the trial court record.

It stands to reason that appellants must know their ability to challenge the trial court's findings of fact and conclusions of law that were entered after a full blown trial will be compromised where, as here, the appellate court cannot review the witness testimony that the trial court considered.

Like most cases, the outcome from the trial in this case required the trial court to make determinations as to the credibility (or lack of credibility) of witnesses who testified at trial. Miguel's decision to forego ordering a report of proceedings from the one-day trial severely limits if not outright eliminates Miguel's ability to challenge the evidentiary basis of the trial court's determinations.

Appellants' opening brief clearly demonstrates the difficulties inherent in failing to order a report of proceedings from the trial below. Appellants' brief makes bold statements about the content of the witnesses' testimony, but no citation to the record is possible or even attempted. Miguel basically asks this appellate court to take his word for it and accept his version of the evidence that was submitted at trial because he is unable to include "references to relevant parts of the record" in his arguments as required by RAP 10.3(a)(6). See also RAP 10.3(a)(5) (stating with respect to the statement of the case portion of appellants'

brief, “Reference to the record must be included for each factual statement”).

Jesus respectfully submits that for these reasons alone, Miguel’s arguments on appeal should be rejected in their entirety, and the trial court’s judgment should be affirmed in all respects.

## **V. LEGAL ARGUMENT**

### **A. Standard of Review.**

Where the trial court has weighed the evidence, appellate review is limited to determining whether substantial evidence supports the findings and, if so, whether the findings in turn support the trial court's conclusions of law. Ridgeview Properties v. Starbuck, 96 Wn.2d 716, 719, 638 P.2d 1231 (1982). The trial court's findings are presumed to be correct; the party claiming error bears the burden of proving that the findings were not supported by substantial evidence. Fisher Properties, Inc. v. Arden-Mayfair, Inc., 115 Wn.2d 364, 369, 798 P.2d 799 (1990).

### **B. Appellants Fail to Meet Their Burden on Appeal.**

In the instant case, substantial evidence supports the trial court's findings of fact, and those findings of fact amply support the trial court’s conclusions of law. Miguel has failed to meet his burden to show otherwise. Jesus hereby incorporates and restates his arguments set forth above with respect to Miguel’s failure to order a report of proceedings

from trial and his failure to support his factual statements and arguments with citations to the relevant parts of the trial court record.

**C. Appellants Waived Any Affirmative Defenses.**

Conspicuously absent from the Appellants' Opening Brief is any mention – let alone argument – about the fact that they clearly waived any affirmative defenses. This includes, but is not limited to, the statute of limitations defense which Miguel did not plead in his Answer, did not assert in a Motion to Dismiss, did not argue at trial, and is attempting to raise for the first time on appeal.

Generally, affirmative defenses are waived unless they are: (1) affirmatively pleaded; (2) asserted in a motion to dismiss; or (3) tried by the express or implied consent of the parties. See, e.g., Harting v. Barton, 101 Wn.2d 954, 6 P.3d 91, *rev. denied*, 142 Wn.2d 1019, 16 P.3d 1266 (2000). See also CR 8(c) (requiring that a party pleading to a preceding pleading “shall set forth affirmatively. . . [*inter alia*] statutes of limitation... and any other matter constituting an avoidance or affirmative defense”).

In the instant case, the statute of limitations was not pled as an affirmative defense. While Miguel did file an Answer to Jesus's First Amended Complaint, it did not set forth a single affirmative defense. CP 87-91.

Likewise, Miguel did not assert the statute of limitations in a Motion to Dismiss brought before the trial court.

Even at the trial itself, Miguel did not make any arguments or other reference to the statute of limitations. Miguel does not deny that he failed to raise the issue at trial, nor does he argue that the statute of limitations was tried by the express or implied consent of the parties per Harting.

If there is one core principle behind the rule from Harting and similar caselaw, it is that litigants should not be ambushed with new arguments that were not raised in the pleadings, in a Motion to Dismiss, or at least at the trial itself. Therefore, the principle from Harting could perhaps never be more egregiously breached than if an appellant were to raise a new affirmative defense for the first time on appeal.

In the instant case, Miguel is improperly attempting to raise a new affirmative defense before this appellate court that was never asserted in the trial court. This court should reject Miguel's arguments, and the trial court should be affirmed.

**D. The Statute of Limitations Is Not a Valid Defense In Any Event.**

Another independent basis for rejecting Miguel's statute of limitations argument is the fact that Jesus both pled and proved that he and his wife own a 50% ownership interest under the constructive trust

doctrine.<sup>3</sup> As mentioned earlier, Jesus's First Amended Complaint included claims for quiet title, specific performance and partition, breach of contract, unjust enrichment/quantum meruit, constructive trust and conversion. CP 14-20.

The claims for quiet title, unjust enrichment and constructive trust are particularly material here. In a non-binding, unpublished opinion issued on September 17, 2013, see GR 14.1(a), Division II stated:

In arguing that the statute of limitations deprived [the mother] of standing, [the son] incorrectly presumes that [the mother] sought title through the deed of trust and note. But as both the original and amended complaints show, [the mother] sought to quiet title through a constructive trust theory, an equitable remedy. "A constructive trust is an equitable remedy which arises when the person holding title to property has an equitable duty to convey it to another on the grounds that they would be unjustly enriched if permitted to retain it." City of Lakewood, 144 Wn.2d at 126. A court may impose constructive trusts not only in cases of fraud, misrepresentation, or bad faith, but also in circumstances not amounting to fraud or undue influence. Baker v. Leonard, 120 Wn.2d 538, 547, 843 P.2d 1050 (1993). As recognized by our Supreme Court:

If one party obtains the legal title to property, not only by fraud or by violation of confidence or of fiduciary relations, but in any other unconscientious manner, so that he cannot equitably retain the property which really belongs to another, equity

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<sup>3</sup> The trial court's Findings of Fact and Conclusions of Law may not expressly make reference to the words "constructive trust," but the trial court's judgment was that Jesus held a 50% ownership interest in the property even while Miguel was listed as the owner of record. Therefore, it seems apparent that the trial court's judgment was rooted in the constructive trust doctrine.

carries out its theory of a double ownership, equitable and legal, by impressing a constructive trust upon the property in favor of the one who is in good conscience entitled to it, and who is considered in equity as the beneficial owner.

Kausky v. Kosten, 27 Wn.2d 721, 728, 179 P.2d 950 (1947) (quoting 1 JOHN NEWTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 155, at 210 (Spencer W. Symons ed., 5th ed. 1941). Constructive trusts may arise even if property is not acquired wrongfully because the concern is whether the enrichment is unjust. See Brooke v. Robinson, 125 Wn. App. 253, 257, 104 P.3d 674 (2004).

Fix v. Fix, 176 Wn.App. 1030 (2013) (unpublished opinion) (reversing trial court's summary judgment dismissal of mother's claims for constructive trust to quiet title to real property titled in son's name, rejecting son's statute of limitations arguments, remanding for trial).

The logic employed by the Fix court applies equally in the instant case: A court may impose a constructive trust upon property "when the person holding title to property has an equitable duty to convey it to another on the grounds that they would be unjustly enriched if permitted to retain it." See Fix, at 8 (quoting City of Lakewood v. Pierce County, 144 Wn.2d 118, 30 P.3d 446 (2001)). Here, the trial court concluded that Miguel, the owner of record of the property, had an equitable duty to convey 50% ownership interest to his brother Jesus.

The Fix case is also instructive with respect to how it rejected the son's arguments regarding affirmative defenses, specifically including the

statute of limitations:

The statute of limitations is an affirmative defense that the defendant must assert or else it is waived. Alexander v. Food Services of America, Inc., 76 Wn.App. 425, 428-29, 886 P.2d 231 (1994). It is not self-executing. Alexander, 76 Wn.App. at 428-29. Thus, assuming that the statute of limitations applies to [the mother's] claims, any interest [the mother] had in the property did not automatically become invalid once the statute of limitations ran.

Fix, at 8.

In the instant case, this appellate court should reject Miguel's arguments with respect to the statute of limitations. His failure to plead or argue the statute of limitations in the trial court -- and his attempt to raise those arguments for the first time on appeal -- means the affirmative defense has been waived. But in any event, the statute of limitations did not invalidate Jesus's interest in the property, and the trial court's judgment made clear that the trial court determined that the property had been held by Miguel subject to a constructive trust.

## VI. CONCLUSION

This Court should affirm the trial court in all respects. Appellants fail to show that the trial court committed error in any way.

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Respectfully submitted this 7<sup>th</sup> day of September, 2017.

JEFFERS, DANIELSON, SONN  
& AYLWARD, P.S.

By  \_\_\_\_\_

BRIAN C. HUBER, WSBA #23559  
Attorneys for Respondents Jesus and Josefina  
Galvan  
P.O. Box 1688  
Wenatchee, WA 98807  
(509) 662-3685  
[BrianH@jdsalaw.com](mailto:BrianH@jdsalaw.com)

**CERTIFICATE OF SERVICE**

I, Michaela C. Reeder , hereby certify that:

1. On September 7, 2017, and prior to 4:00 p.m., I delivered a copy of the **BRIEF OF RESPONDENTS** to the Court of Appeals Division III Clerk via UPS Next Day Air.

2. I sent a copy of this document via U.S. Mail First Class to counsel addressed as follows:

Myles Julian Johnson  
Benjamin & Healy  
1201 Pacific Avenue, Suite C7  
Tacoma, WA 98402-4393

DATED at Wenatchee, Washington this 7<sup>th</sup> day of September, 2017.

  
\_\_\_\_\_  
MICHAELA C. REEDER