

Appeal No. 63712-6-1

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE AT SEATTLE

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CEDAR PROFESSIONAL CENTER, LLC,  
A Washington limited liability company

Respondent

v.

CRAIG BERNHART, DDS, P.S.,

Appellant

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FILED  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
2012 APR -6 PM 12:55

CEDAR PROFESSIONAL CENTER, LLC  
RESPONDENT'S BRIEF

Certificate of Service attached

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## I. INTRODUCTION

The Appellant basically rests its case either on judicial misconduct, because he did not have counsel; or a misreading of the commercial Landlord Tenant Act. RCW 59.12 *et seq.*

The record includes several lawyers appearing or ghost-writing pleadings for the Appellant, including Mr. Weigelt, who is counsel of record in this case. A transcript with ample opportunity to be heard and declarations – omitted in the Appellant’s Clerk’s Papers – which clearly demonstrate default, notice and an opportunity to be heard.

The record confirms that the Appellant was served properly, had an opportunity to appear in court, in fact did appear before the Commissioner, on revision before the Presiding Judge of the Superior Court and in a motion for reconsideration; and that all legal procedures were properly followed and that the Appellant was properly evicted.

## II. ASSIGNMENTS OF ERROR

The Appellant assigns a number of errors to findings of fact. This Court on appeal does not review facts except in the most extraordinary situations, *Thorndike v. Hesperian Orchards*, 54 Wn.2d 570, 343 P.2d 183 (1959). In this case we have pleadings and a transcript promising, but no evidence from the Appellant that in fact it had paid the rent. On the other hand we have ample evidence that the rent was neither offered nor paid.

The first error is the entry of the Judgment and Order. Since this “error” pervades the others, we only comment here, that the Judgment and Order were proper and supported by actual evidence.

The second error refers to the recitals in the Judgment. The record reflects that the Commissioner did have, among other pleadings, the Appellant’s answer [CP 34] and a declaration of Craig Bernhart [CP 31 – 33]. The recital in the Judgment, which is the record in this case, states that the Commissioner considered “any opposition submitted by defendant”, which presumptively would include the Answer and the Declaration. [CP 6] This Court on appeal does not review facts except in the most extraordinary situations, *Thorndike v. Hesperian Orchards*, 54 Wn.2d 570, 343 P.2d 183 (1959).

The motion for revision was filed by Mr. Weigelt. The record clearly demonstrates that the Court did consider both this motion and related pleadings [CP 22- 24] as well as the Motion for Reconsideration, which was obviously drafted by a lawyer. [CP 13-18].

Moreover, the statements or allegations in these pleadings all fall outside the summary jurisdiction of a superior court in an eviction case.

The third error, is that the findings of fact and conclusions of law are “mixed” and not stated separately. While that may be, the result

would be the same if the findings and conclusions were separate; and there is no harm done.

The fourth error, relating to finding/conclusion No. 3, is not couched in terms of an error, but from the record, it appears that the Appellant had not paid his common area charges, that this was a part of the lease and that the default was not cured within the three days, as required by RCW 59.12.030(3).

The final error, relating to findings/conclusions No. 6, 7 and 8, is that they may more properly be conclusions.

### **III. STATEMENT OF RELEVANT FACTS**

The Respondent, Cedar Professional Center, LLC, is a Washington limited liability company (“Cedar” or “Respondent”) which owned the building in which Dr. Bernhart practiced dentistry at 22725 44<sup>th</sup> Avenue West, Mountlake Terrace, Washington. [CP 7, Findings No. 1] The Appellant, Craig Bernhart, DDS, P.S., a Washington Professional Services Corporation (“Bernhart DDS” or “Appellant” herein) was the named tenant in the building.<sup>1</sup> [CP 7, Findings 2.] The principal of the Appellant, Craig Bernhart, (“Bernhart”) was a minority member of Cedar. [CP 9, Declaration at Paragraph 3; and CP 13, Statement of Facts] The Appellant defaulted in rent which under the terms of the Lease included common

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<sup>1</sup> Neither party is in business any longer.

area charges in the total amount of \$72,001.39 as of the date of the notice to vacate [CP 43] and \$43,377.68 as of the date of judgment. [CP 25].

The Landlord served the Appellant with a notice to pay rent or vacate on March 13, 2009 [CP 43]; and when Appellant did not pay the rent, it filed an eviction action under RCW 59.12.*et seq.* on March 18, 2008 in Snohomish County Superior Court. [CP 40 through 44] An order to Show Cause was issued on March 18<sup>th</sup>, directing the Appellant to appear on March 31, 2009 at 10:30 a.m. before the Ex Parte Department/Court Commissioner. [CP 36 – 37]

In the case below, Cedar was represented by Dana A. Ferestien and Elizabeth Hebener of Williams Kastner & Gibbs, PLLC. [CP 40 through 44]. The Appellant has been represented at various times by Edward Weigelt [CP 11, 22 – 24, e.g. and the Appellant’s Opening Brief in this case]; Michael Jacobs [CP 11] and Dallas W. Jolley, Jr. who appears as counsel for the Appellant on the second Cover Page of the Defendant’s Clerk’s Papers.

Prior to the Show Cause hearing on March 31, the Appellant filed a Notice of Appearance [CP 7], an Answer [CP 8], and a declaration [CP 31 - 33]. It filed a Notice of Appearance *Pro Se* at the conclusion of the hearing [CP 11].

At the Show Cause Hearing Dr. Bernhart, when asked about making payment, denied payment had been made in the three day notice period.

Commissioner: Well, was the payment made or offered within the three-day period after service of the Three Day Notice?

Bernhart: Um, your Honor, the situation was that the person that receives the rents had moved out, I didn't have a place to send the rents, I talked to my attorney, he said to deposit the rents with him in trust. The monies have been in trust and have been current all along. Uh, once we received the Notice from them, uh, we had my attorney transfer the funds to him.

Transcript 4, lines 2-8.

Although the Appellant implies the Court did not have any testimony from the Respondent for the show cause hearing (Appellant Brief page 5), that would be true if the Court was to rely only upon the Appellant's Designation of Clerk's Papers. The Appellant omitted from its *Designation of Clerk's Papers* the testimony of K. Anderson, which was submitted to the Court via a sworn declaration of March 31, 2009. [CP 72 *et seq.*] Ms. Anderson was the Comptroller of Cedar Professional Center, LLC. She provided a declaration of 29 pages, including attachments. Ms. Anderson attested that the Appellant had not fully paid the Lease obligations as of the date of the hearing; she provided a copy of the Lease; and, a complete accounting from February 12, 2003 through March 30,

2009. The K. Anderson declaration has been added to the record as Plaintiff's Supplemental Clerk's Papers as CP 72-101. (This declaration was also part of the record reviewed by Judge Appel on the Appellant's Motion for Revision.

At the conclusion of the Show Cause Hearing, the Commissioner entered the Findings of Fact, Conclusions of Law and an Order and Judgment. [CP 5 *et seq.*].

The Appellant, through Mr. Weigelt, the attorney of record in this case, filed a Motion for Revision of the Commissioner's Ruling, etc. [CP 20 *et seq.*] This motion was denied by an order entered on June 5, 2012. [CP 19] At the June 5<sup>th</sup> hearing, the minute entry reflects that Mr. Weigelt had resigned and that attorney Michael Jacobs filed a limited notice of appearance. [CP 11] Mr. Weigelt had represented both the Respondent and Ms. Danard at various times. He is counsel of record in this case.

On June 15, 2012, the Appellant filed a motion for reconsideration [CP 13 18] which was denied. [CP 10] This appeal ensued.

#### **IV. ARGUMENT**

##### **1. Unlawful Detainer is a Summary Proceeding.**

An Unlawful Detainer Action is a summary form of legal action, controlled by Statute, RCW 59.12 *et seq.* The summons is a special form

of Summons, requiring the Defendant to appear and answer in a short period of time, between seven and thirty days. RCW 59.12.070-080.

Unlawful detainer actions are a summary statutory proceeding designed primarily for the purpose of hastening recovery of possession of real property. (citations omitted)

*Tuschoff v Westover*, 65 Wn. 2d 69, 72395 P.2d 630 (1964) overruled on other grounds *Munden v. Hazelrigg*, 105 Wn. 39, 711 P.2d 295 (1985).

In an unlawful detainer action, the allegation of payment, with nothing more, is not proof of the payment. As noted below, there is nothing in the record to prove payment, in fact, the record, from Mr. Bernhart in Court to the Commissioner, is that he did not make any payment within the three day time frame nor was there any later provided proof of any payments and/or transfers referenced.

Further, the testimony of Respondent's Comptroller, K. Anderson, evidences that payments were still due and owing under the Lease obligations at the time of hearing and a complete accounting was provided as Exhibit B to her declaration. [CP 99-101]

## **2. An Unlawful Detainer Show Cause Proceeding is Proper.**

The Appellant bases a significant portion of its argument on the assertion that the scheduling and conducting of a show cause hearing in a commercial landlord-tenant matter is inappropriate. In reality it is a recognized proceeding in commercial contexts.

First, RCW 59.12.090 provides in part:

The plaintiff at the time of commencing an action of forcible entry or detainer or unlawful detainer, or at any time afterwards, *may apply to the judge of the court in which the action is pending for a writ of restitution* restoring to the plaintiff the property in the complaint described, and the judge shall order a writ of restitution to issue.

This Court ruled that the use of a show cause hearing is not precluded in a commercial landlord-tenant dispute under the general unlawful detainer statute. *IBF, LLC v. Carmen Heuft*, 141 Wn. App. 624; 174 P.3d 95 (2007).

While it is understandable that a party may be surprised by the use of a show cause hearing in a [\*635] commercial landlord-tenant dispute, nothing in the statute indicates the court may *not* allow a show cause proceeding. Arguably a show cause hearing affords procedural protection to a commercial tenant, by allowing him or her the opportunity to object before eviction rather than be merely relegated to suing on the bond for damages. Here, Heuft did not seek these protections, but because IBF sought a show cause hearing, she was given the opportunity to take advantage of this additional due process. Her argument that she should have received even more due process by being allowed to question witnesses is not an issue for this court to decide. The question of whether to take live testimony or to decide the matter on the basis of declarations is at the discretion

of the trial court--even [\*\*101] an opportunity to object via filing declarations provides more procedural [\*\*\*13] protections for the tenant than an eviction without a show cause hearing. The procedural requirements of these hearings are best decided by local court rules.

*IBF, supra*, at 634-35.

While reversed on other ground, the *IBF* case clearly approves the process and proceedings before the Snohomish County Superior Court in the present case. In fact, the *IBF* case was also a Snohomish County Superior Court case.<sup>2</sup>

**3. The Issuance of the Order to Show Cause and the Order and Judgment Were Proper.**

The Appellant is in error when it asserts that the order to show cause and the order and judgment were entered without supporting affidavits or competent evidence. (Appellant's Brief Page 19-20)

First, the order to show cause was supported by the certified statement of Elizabeth R. Hebener, Esq. [CP 39] More importantly, and *omitted* from the *Appellant's Designation of Clerk's Papers* is the Declaration of K. Anderson, the Comptroller of Cedar Professional Center, LLC, which was presented and filed at the show cause hearing. (Pursuant to RAP 9.2 the Respondent

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<sup>2</sup> While King and Pierce Counties set out procedures for show cause hearings in Unlawful Detainers (KCLR 77; PLR 77) Snohomish County has no such rule.

has supplemented the record with the Declaration of Anderson)  
The sworn testimony of K. Anderson is that she is the comptroller;  
she reviewed the Respondent's business records maintained in the  
ordinary course. She attached a copy of the Lease, recited that the  
Lease required monthly payments, and that the Appellant  
subsequently breached its Lease by failing to pay its obligations  
under the Lease. She provided a complete accounting of payments  
and she further recited that the Appellant still had not paid the  
Lease obligations at the time of the declaration. (The Declaration  
was docketed as number 12 in Snohomish County Superior Court  
file.) [CP 72-101]

Further, to the extent Appellant has implied that the Court  
Commissioner did not listen to him because he was not an  
attorney, the Appellant has omitted from his quotes from the  
transcript the following, which affirms from the mouth of the  
Appellant that they did not make a rental payment as required  
under the Notice to Pay or Vacate. Mr. Bernard stated:

Commissioner: Well, was the payment made or  
offered within the three-day period after service of the  
Three Day Notice?

Bernhart: Um, your Honor, the situation was that  
the person that receives the rents had moved out, I didn't  
have a place to send the rents, I talked to my attorney, he

said to deposit the rents with him in trust. The monies have been in trust and have been current all along. Uh, once we received the Notice from them, uh, we had my attorney transfer the funds to him.

Transcript page 4, lines 2-8.

The Court should note that from the Three Day Notice, to the Order to Show Cause, to the Show Cause Hearing, to the Motion for Revisions and finally to the Appellant's Motion for Reconsideration, there is a complete failure of proof or any evidence showing any transfers of payments from Appellant to its attorney or from its attorney to the Respondent to satisfy the Three Day Notice.

**4. The Hearing in Front of Judge Appel Mooted many Procedural Issues Alleged by Appellant and Confirmed the Commissioner's Ruling.**

Although Respondent disagrees with any procedural errors asserted by Appellant regarding the show cause hearing, those alleged errors were mooted by the full hearing of the Appellant's Motion for Revision heard by Judge Appel.

In *Hartson Partnership v. Goodwin*, 99 Wn. App. 227, 991 P.2d

1211 (2000) the Court stated:

The hearing on the motion for revision was the functional equivalent of the hearing on the order to show cause for the issuance of a writ of restitution in this unlawful detainer proceeding.

*Hartson, supra*, at 230.

Appellant asserts as an assignment of error that he was not given the opportunity to be heard because he did not have counsel at the show cause hearing. (Appellant's Brief, page 3) Again, even if we ignore what Mr. Bernhart admitted in open Court that he did not make the payment within the notice period, in Appellant's Motion for Revision he was represented by counsel, Mr. Weigelt and Appellant's opposition was submitted to Judge Appel by his counsel. As noted in *Hartson, supra*, the motion for revision was the functional equivalent of the hearing on the order to show cause.

In fact, the Appellant in its subsequent Motion for Reconsideration of the order denying the motion for revision, states:

In any event, any issue regarding Mr. Bernhart's representation became moot when counsel appeared for the corporation. The Defendant was represented by counsel at the Motion For Revision. [CP 16, lines 8-12]

The Court should note that absent from this records is any evidence that the Appellant, Mr. Bernhart personally, nor counsel have ever provided proof of making payments necessary to cure

fully the rent due under the Three-Day Notice<sup>3</sup>. Appellant notes that Mr. Bernhart told the Commissioner that he had documents to show the rents were paid, even though he noted earlier he did not have a place to send the rents. (RP 4) Absent from his counsel's filings in the *Motion for Revision*, which referenced the Bernhart declaration, were any of these alleged documents. In fact, the alleged documents were not attached to the declaration or any later pleadings in this case. A complete failure of proof.

Nor did Appellant post a bond to stay enforcement of the writ or to supersede the judgment. Nor did Appellant avail itself of the two statutory provisions in the unlawful detainer statute. The first in RCW 59.12.170 allows the Appellant to satisfy the judgment within five days after its entry and reinstate the lease. The second in RCW 59.12.190 which allows the tenant to petition the court to avoid forfeiture and reinstate the lease.

The Appellant has failed in all three *bites it had at the apple* to provide any evidence that it had made the Lease obligation payments due within the Three Day Notice period. It failed to provide said evidence at show cause, then at the motion for revision when represented by counsel, and finally in the motion

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<sup>3</sup> There apparently was a partial payment reducing the rent from \$72,001.39 [CP 43] set forth in the complaint [CP 43] to the \$43,377.68 principal judgment balance [CP 5].

for reconsideration. There is no question of fact that this Appellant never had the money and never provided it to the Respondent or to his attorney.

The Appellant stresses that his pleadings were not considered by the Court Commissioner. (Appellant's Brief, page 3) However, assuming that is correct, they were considered by Judge Appel on the Motion for Revision. Appellant had counsel for the Motion for Revision and the Court had the Appellant's position fully in front of it when it denied the motion for revision. [CP 22-24]

a. A Partnership Dispute is not a Proper Defense to an Unlawful Detainer.

The essence of Mr. Bernhart's declaration is an admitted partnership dispute. He says it is a dispute between members and not a dispute over payment of rent.

In an unlawful detainer action, a tenant may assert only counterclaims that would excuse his failure to pay rent. *Granat v. Keasler*, 99 Wn.2d 564, 570, 663 P.2d 830 (1983); *see, Sprincin King Street Partners v. Sound Conditioning Club, Inc.*, 84 Wn. App. 56, 68, 925 P.2d 217 (1996). And the trial court does not have subject matter jurisdiction over counterclaims that do not

excuse failure to pay rent. *See, Sprincin, supra, at 68.* "[T]he court sits as a special statutory tribunal to summarily decide the issues authorized by statute [i.e., whether the landlord is entitled to possession] and *not* as a court of general jurisdiction with the power to hear and determine other issues." *Granat, 99 Wn.2d at 571.*

Not only has Mr. Berhhart failed to provide evidence to support paying his Lease obligations, but his defense is based upon an admitted partnership dispute and monies related to the LLC, not possession.

**5. The Proper Appeal is From the Order Denying the Motion for Revision.**

In an opinion filed last month by this Court, the Court reiterated that an appeal in this circumstance is from the denial of the motion for revision:

Where the superior court has made a decision on a motion for revision, the appeal is from the superior court's decision, not from the commissioner's decision.

*BECU v. Burns*, 66420-4-I (Wash.App. 3-19-2012) citing *State v. Ramer*, 151 Wn.2d 106, 113, 86 P.3d 132 (2004).<sup>4</sup>

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<sup>4</sup> Appellant consistently refers to this as a default judgment when the order was not designated a default and the action appealed from is a denial of a revision. The only reference in the order to default is that the payments are in default. (Appellant's Brief Page 1 and CP 7)

Appellant has not provided any transcript of the hearing on the motion for revision; a hearing that it was represented by counsel. However, the Appellant, through counsel, supplied Judge Appel a detailed synopsis of Mr. Bernhart's declaration and the Respondent supplied a declaration and response in opposition to the motion for revision. The Court further had the previously filed Declaration of K. Anderson with the Lease and the accounting showing a default in the amounts paid at the time of the original hearing. Therefore, the Court had the information in front of it that Mr. Bernhart wanted to present to the Commissioner as well as the Respondent's proof. The Court, even not being aware that Mr. Bernhart had previously stated in open Court to the Commissioner, that he failed to make the payment within the three day notice period, but having the K. Anderson declaration on file, still denied the motion. Again, given what Mr. Bernhart had said to the Commissioner about transferring funds, he failed to take the opportunity to clearly show that the proper amount of funds, if any, were transferred. The conclusion could only be that proper payments were not made and possession should be returned to the Respondent.<sup>5</sup>

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<sup>5</sup> The case cited by Appellant, *Leda v. Whisnand*, 150 Wn. App. 69, 207 P.3d

## V. ATTORNEYS FEES AND COSTS

Respondent is entitled to attorneys' fees and costs in responding to this appeal pursuant to the Lease agreement. The Lease [CP 75-97] provides in section 25.14 that in any action or proceeding is brought by either party in connection with the Lease, the prevailing shall be entitled to recover its costs and reasonable attorney's fees which included appeals. [CP 91].

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468 (2009), differs from the present case. In *Leda, supra*, there was no *Motion for Revision* hearing and it was a straight appeal from the Commissioner's ruling. At the *Motion for Revision* the Appellant's declaration and his counsel full memorandum were before the Court. The oral hearing and the memorandum and the declaration were in line with the dicta in *Leda, supra*, "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. In addition, a partnership dispute is not a viable legal defense to an unlawful detainer.

## VI. CONCLUSION

The Court should rule in favor of the Respondent, Cedar Professional Center, LLC, and deny the appeal of Appellant Craig Bernhart, DDS, P.S. There were no errors on the part of the court and any alleged defect was remedied in the motion for revision heard by Judge Appel. The Respondent further requests an award of attorneys fees and costs in defending this appeal.

Dated this 6th day of April, 2012.

STERNBERG THOMSON OKRENT & SCHER, PLLC



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Craig S. Sternberg, WSBA 00521  
Attorneys for Cedar Professional Center, LLC

CERTIFICATE OF SERVICE

I, Craig S. Sternberg, do hereby declare under penalty of perjury that I have served

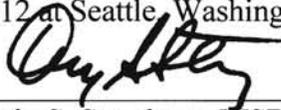
CEDAR PROFESSIONAL CENTER, LLC RESPONDENT'S BRIEF  
and  
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on the parties in interest by e-mail and by depositing them into first class mail, postage prepaid on April 6, 2012 as follows:

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Dated April 6, 2012 at Seattle, Washington.



Craig S. Sternberg, WSBA#521

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