

FILED

AUG 12 2014

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 322297

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STRUNK FAMILY TRUST,

Respondent,

v.

BRIGIT STRUNK,

Appellant.

REPLY BRIEF

William Edelblute
Attorney for Appellant
WSBA 13808
1030 N Center Parkway
Kennewick WA 99336
Ph. 509-737-0073

TABLE OF CONTENTS

I. Reply to Introduction	1
II. Reply to Factual Statement	2
III. Reply to Argument	
A. Findings of Fact have not become	
verities on appeal	6
B. The trial court erred in granting summary	
Judgment	
1. The statute of frauds does not defeat	
The claim of equitable interest	7
2. RCW 5.60.030 does not apply to	
Brigit Strunk's conversations with	
her father	8
3. There is a material issue of fact as	
to imposition of a constructive trust	11
4. Tenancy at will depends upon a	

	material issue of disputed fact	14
5.	Respondent has conceded a	
	number of issues	16
IV.	Conclusion	17

TABLE OF AUTHORITIES

Case Law

<i>Dowgialla v. Knevage</i> , 48 Wn.2d 326, 294 P.2d 393 (1956)	7
<i>Green v. Normandy Park Riviera Section Cmty. Club, Inc.</i> , 137 Wn. App. 665, 151 P.3d 1038, (2007), rev. denied 163 Wn.2d 1003	6
<i>Lappin v. Lucurell</i> , 13 Wn. App. 277, 292, 534 P.2d 1038 (1975)	8
<i>In re Marriage of Lutz</i> , 74 Wn. App. 356, 873 P.2d 566 (1994)	7
<i>Moe v. Brumfield</i> , 27 Wn.2d 714, 179 P.2d 968 (1947)	7
<i>Najewitz v. City of Seattle</i> , 21 Wn.2d 656, 152 P.2d 722 (1944)	15
<i>In re Estate of Tate</i> , 32 Wn.2d 252, 201 P.2d 182 (1948)	8
<i>Turner v. White</i> , 20 Wn. App. 290, 292, 579 P.2d 410 (1978)	14, 15

Statutes

RCW 5.60.030	8
RCW 11.88.010	9, 10
RCW 59.12	15

RCW Chap. 59.18

5

RCW 59.18.380

16

I. REPLY TO INTRODUCTION

The Strunk Family Trust notes in its introduction that Wayne May is also the legal guardian of Oscar Strunk's person and estate. The record does not reflect that the eviction involves guardianship estate property. The Trust acknowledges at p. 3 of its brief that the subject property is in the trust. There is no known role that Mr. May's status as guardian plays in this case.

The Trust also notes that on December 6th, 2013, the day the eviction came before the Court for a show cause hearing, that Ms. Strunk's attorney informed the Court that she was filing a counter-claim "the day of the hearing." As argued in the Brief of Appellant, RCW 59.18.380 does not call for any pre-hearing notice from the defendant of the defenses that will be raised, but Ms. Strunk's filings prior to the December 6th, 2014 hearing did put the parties and Court on notice of the equitable defense. Her answer, filed two days before the show cause hearing, said she was the "beneficial owner," CP 20, and her first declaration filed November 27th, 2013, though not required, explained the basis for that allegation. CP 15-19. The counter-claim would be handled with a separate trial.

II. REPLY TO FACTUAL STATEMENT

As a statement of fact, the Trust asserts: "Brigit Strunk was unlawfully occupying the property as no written agreement exists permitting her possession." P. 2, Amended Brief of Respondent. "Unlawfully" is a legal conclusion, and merely begs the whole question presented by the appeal, or what should have been presented at a show cause hearing, not disposed of by summary judgment.

It is not accurate that "Brigit Strunk counters and/or justifies her occupancy solely upon an alleged verbal conversation with her father." Amended Brief of Respondent, p. 2. In fact, multiple witnesses state Oscar Strunk told them his daughter would always have a place to stay at the Whan Road property. CP 118-25. Including a former trustee who said Oscar and his attorney told them he had "given" the property to Ms. Strunk. CP 139, lines 21-25.

The Trust then devotes much of its factual discussion to the circumstances of a vulnerable adult petition which was dismissed. If the underlying facts of that are relevant, then the Trust only discusses highly disputed facts. Oscar Strunk denied at the time his

daughter was exploiting him, and said he wanted to help her and wanted the petition dismissed. CP 135-37. Ms. Strunk denies the allegation of financial exploitation. CP 113-15. If not relevant, the Trust only reveals an improper motive to assassinate the character of Ms. Strunk in litigation, as well as revealing why Mr. May believes he can act in a roughshod manner towards Ms. Strunk, dispensing with a proper proceeding. He apparently was acting as a vigilante, avenging an unjustly dismissed AIP petition.

The factual issue should have been, did Brigit Strunk have an equitable interest in the Whan Road property that was a defense to an eviction? Without offering law on the subject of why alleged financial exploitation, a claim once dismissed, would enter into the lawfulness of the eviction then the Trust spends a lot of time and effort on immaterial matters.

At best the Trust implies that because of Ms. Strunk's purported "irresponsibility with finances and decision-making" that the eviction was justified. Overall the facts show that Ms. Strunk openly occupied the property at the time the trust was created. The original trustee did not perceive that Ms. Strunk should be evicted. It is a non sequitur to assert that because Mr. Strunk believed his

property should be placed in at trust because of Ms. Strunk being able to handle the property on her own, then she should be thrown off the property. The creation of the trust is consistent with his intent that she always have a place to live. The Trust offered only an excerpt of the trust into the record below, CP 72-77, so cannot fully establish to this Court the overall intent of the trust.

The Trust, in its brief at p. 6, refers to Mr. May as “[s]tepping into Oscar Strunk’s shoes” If so, then he stepped into the shoes of someone who wanted to help his daughter as much as possible, and obviously knew she was living in the Whan Road property. In fact, May stepped into the shoes of a trustee who understood the property was “given” to Ms. Strunk and who made no effort to expel her from the home of herself and her children. CP 139-40.

The Trust states the trustee “alleged no *written* agreement existed which entitled Brigit Strunk to possession of the property.” P. 6, Amended Brief of Respondent. (Emphasis added.) That is an innocent description of what he alleged to the Court. In fact the trustee alleged more than that, stating in fact he had no knowledge of *any* sort of agreement for Ms. Strunk to be there, when in fact he had dealt with her for some time at the property, and put the electric

bill in her name. CP 19, para. 10, CP 113, lines 9-13, CP 116. The Complaint, signed under oath by his attorney states: "It is believed there is no agreement." CP 2. His assertion that he knew of no basis at all for her to be there was false, tending to show there are material issues of fact for the Superior Court. Had he thought she was a mere trespasser, he would have acted within a matter of days, not after many months on board as trustee, as the original trustee would have done if that was the case.

The Trust notes that a "20 day notice to terminate tenancy" was served upon Ms. Strunk. P. 6, Amended Brief of Respondent. The Trust does not include the fact that it stated it was pursuant to RCW 59.18, the Residential Landlord Tenant Act. CP 5. If there is no knowledge of an agreement to be on the land, why a notice to "terminate tenancy"? If there was a tenancy, there is an issue of whether it fell under the strict procedures of the Residential Landlord Tenant Act, RCW Chap. 59.18, what was its length, and whether there were grounds to terminate that tenancy.

III. REPLY TO ARGUMENT

A. Findings of fact have not become verities on appeal

Respondent acknowledges in its conclusion that they are asking the Court to affirm the trial court's order granting summary judgment. Amended Brief of Respondent, p. 17. Review of summary judgment is de novo. *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.

At the hearing on the Respondent's motion for summary judgment, counsel for Ms. Strunk questioned why the Superior Court judge was entering Findings of Fact on a summary judgment motion and objected to the entry thereof. RP 20, lines 2-8. And noted that he had not been provided a copy of, or shown, said findings prior to them being handed up to the Court and entered by the Court. RP 19, lines 3-14. CP 155. Weeks after the improper entry of those documents, an order denying summary judgment was entered. CP 158-60.

The rule that unchallenged findings of fact are verities on appeal should not apply where the findings were obviously entered with no proper procedure, i.e., something called a trial.

This argument by Respondent only showcases the impropriety of the procedure below, and that the entry of an order of eviction was a foregone conclusion.

B. The trial court erred in granting summary judgment

1. The statute of frauds does not defeat the claim of an equitable interest

The statute of frauds does not preclude the use of parol evidence to establish a constructive trust. *Dowgialla v. Knevage*, 48 Wn.2d 326, 333, 294 P.2d 393 (1956) (citing *Moe v. Brumfield*, 27 Wn.2d 714, 717, 179 P.2d 968 (1947)). Clearly Appellant claimed constructive trust in the trial court and in her briefing to this Court. It seems that most, if not all, claims of constructive trust would not exist to begin with if the statute of frauds prevented imposition of a constructive trust.

In *In re Marriage of Lutz*, 74 Wn. App. 356, 873 P.2d 566 (1994), discussed in Brief of Appellant at pp. 31-32, the Court discussed whether the statute of frauds defeated imposition of a trust upon real property. It did not, since the trial court's finding of a constructive trust in that case was upheld. *Lutz*, at 366-67.

2. RCW 5.60.030 does not apply to Brigit Strunk's conversations with her father

Even if Respondent prevailed on this issue, there is plenty other evidence that Oscar Strunk bought the property so that his daughter and granddaughters would always have a place to live. The declarations of Reithamyr, Roberts, and the prior trustee provide an issue of fact on that. CP 120-125, 139-40. Those people did not have anything to gain financially in the litigation.

A "party in interest" prohibited from testifying is one who would gain or lose by the action in question. *In re Estate of Tate*, 32 Wn.2d 252, 201 P.2d 182 (1948); *Lappin v. Lucurell*, 13 Wn. App. 277, 292, 534 P.2d 1038 (1975). Roberts, Reithamyr, and the prior trustee had nothing to gain or lose in this action, and nothing prevents their accounts of Mr. Strunk's wishes from being admissible.

The Trust's briefing on this issue is baseless, stating: "Since Brigit relied solely on her own declaration concerning statements from her father who is now legally declared incompetent, the court correctly dismissed her claim." Amended Brief of Respondent, p.

11. Overwhelming evidence demonstrates she did not rely “solely” upon her own declaration concerning statements from her father.

And, Appellant does not concede that Mr. Strunk was, at the time of the litigation, an “incompetent” person. Respondent alleges that Mr. Strunk was subject to a guardianship, without offering documentation.

Regardless, being incapacitated so as to justify a guardianship does not establish the ward is incompetent to testify in court, and thus not available to refute allegations of an interested party. RCW 11.88.010 generally defines who can be subject to imposition of a guardianship, and it includes far more than those who are “incompetent.”

RCW 11.88.010. Authority to appoint guardians -
Definitions - Venue - Nomination by principal

(1) The superior court of each county shall have power to appoint guardians for the persons and/or estates of **incapacitated persons**, and guardians for the estates of nonresidents of the state who have property in the county needing care and attention.

(a) For purposes of this chapter, a person may be deemed **incapacitated** as to person when the superior court determines the individual has a significant risk of personal harm based upon a demonstrated inability to adequately provide for nutrition, health, housing, or physical safety.

(b) For purposes of this chapter, a person may be deemed **incapacitated** as to the person's estate when the superior court determines the individual is at significant risk of financial harm based upon a demonstrated inability to adequately manage property or financial affairs.

(c) A determination of **incapacity** is a legal not a medical decision, based upon a demonstration of management insufficiencies over time in the area of person or estate. Age, eccentricity, poverty, or medical diagnosis alone shall not be sufficient to justify a finding of incapacity.

(Emphasis added.)

Apparently Shea Meehan, the Trust's star witness, thought Mr. Strunk was very competent in June of 2012, when he signed a detailed declaration prepared on Mr. Shea's pleading paper, which was filed to support dismissal of the vulnerable adult petition. CP 135-37.

Because Respondent has failed to establish that Mr. Stunk was incompetent, the Trust may not hide behind the prohibitions of RCW 5.60.030.

And, the issue is moot for the purposes of the issue of whether there are issues of material fact, due to the number of other declarations that support imposition of a constructive trust.

3. There is a material issue of fact as to imposition of a constructive trust

The Trust relies upon a gross misrepresentation to this Court, in arguing that equitable relief should be denied as "... Ms. Strunk has been found by the court previously to have engaged in gross financial exploitation of her father such that equity has no basis to intervene." Amended Brief of Respondent, p. 11.

No such finding has ever been made. The vulnerable adult petition was dismissed. No findings by the Superior Court in the guardianship were offered by Respondent. Counsel for Ms. Strunk at the argument on summary judgment indicated he had reviewed the guardianship file, and found no such findings. RP 14, lines 19-23. There are none. But the Trust didn't put the guardianship file documents before the Court, regardless. To render a woman and her children homeless, a trustee should rely on more than blatant misrepresentations.

The Trust then goes on to argue that Ms. Strunk has not shown she would be "wronged," as "... the undisputed facts showed: she made no improvements to the property" Amended Brief of Respondent, p. 12.

William Lakey stated in his declaration that he had performed tasks for Ms. Strunk at Whan Road, including; moved boulders, taken out bushes and trees, laid carpet, put in fencing, including electric fencing. (As well as tasks that could be considered maintenance.) These tasks are improvements, not merely routine maintenance. The only one to compensate him for this was Brigit Strunk. CP 118-19.

Ms. Strunk, in her declaration in response to the motion for summary judgment, began early on in that document to describe the improvements she had made, "in reliance upon the understanding that I would always be able to stay there." CP 2, para. 5. These improvements included: double-strand electric fencing, around twenty acres, to keep eight head of horses, removal of bushes and 100 dead trees, installation of carpet and pad, installation of ten new smoke detectors, installation of all new light fixtures throughout the home, including two ceiling fans with fixtures, two new showerheads, two new frost-free faucets outside, removal of a deteriorating chicken coop, and repairing bad plumbing. CP 109-11.

Moreover, at the summary judgment hearing, counsel for the Trust acknowledge to the Court that Ms. Strunk could bring a claim for improvements to the property. RP 18, lines 1-4.

The Trust also claims as an “undisputed” fact that “the home is in a completely unsafe condition” Amended Brief of Respondent, at p. 12. That is not true, Ms. Strunk objected to consideration of an unsworn inspection report, which in any event does not establish the property as a whole is “unsafe.” Ms. Strunk averred that the trustee would generally not make repairs to the property when she reported damages, such as from a fire or the wind. In the summer of 2012, there was a fire in the pump house that supplies water to the outside. Mr. May refused to repair it. The condition of the property was disputed, as well as whether Ms. Strunk was the cause of any deficiencies, as opposed to the failure of the trustee to carry out his duties, thus setting Ms. Strunk up for a claim of uninhabitability. CP 110-12.

Respondent also goes on about the property being a liability and uninsurable. Appellant objected to implied conversations by the trustee with an insurance agent as hearsay, with the trial court never ruling upon the objection. It is a disputed issue whether the

property is insurable, or could be if the trustee would carry out his duties.

4. Tenancy at will depends upon a material issue of disputed fact

The Trust asserts, “[t]he relationship between Brigit Strunk and the landowner can only be that of a landlord and a tenant.” Amended Brief of Respondent, p. 14. Given the declarations showing that a constructive trust had evolved, there is no explanation of why the relationship could only be landlord and tenant, i.e., why there is no material issue of fact.

After previously representing to the Superior Court that there was never any agreement for Ms. Strunk to occupy the land, the Trust now argues that there was a tenancy at will. The Trust first made that argument in Superior Court in an untimely reply brief faxed to Ms. Strunk’s counsel. As described by the Trust, that occurs when the occupancy begins with permission of the owner, in contradiction with the claim there was no agreement. Amended Brief of Respondent, p. 15, citing *Turner v. White*, 20 Wn. App. 290, 292, 579 P.2d 410 (1978).

It is curious that Respondent would cite *Turner v White*, given that it dismissed an unlawful detainer action, under RCW Chap. 59.12, on the basis that tenancies at will did not fall under that procedure. *Turner*, 20 Wn. App. at 292. Here, the Trust served Ms. Strunk only with an unlawful detainer action, requiring her to answer and appear within a short time of being served on November 22nd, 2013, with a hearing date of December 6th, 2013, and not allowing her 20 days to answer as she would have in a common law action of ejectment, pursuant to CR 12(a).

So there has been no action here to terminate a tenancy at will. The Trust also cites, *Najewitz v. City of Seattle*, 21 Wn.2d 656, 659, 152 P.2d 722 (1944), where the Court held an agreement for occupancy for an indefinite term, with no monthly or other periodic rent was reserved, and there was no time basis from which a thirty-day notice of termination could start, was a tenancy at will. *Najewitz* was not an eviction action, rather it was a complaint for an injunction brought by the occupier to stop the City from removing him from the land.

This still does not answer the question of why there is no material issue of fact as to whether Ms. Strunk was entitled to more

of an interest in the land that occupancy for an indefinite term. Being able to stay there so she and her children would always have a place to live is definite, not indefinite.

And unless a tenancy at will falls under the procedure of RCW 59.18, the only procedure employed her, then there has been no proper action to eject Ms. Strunk from the land.

5. Respondent has conceded a number of issues

The Respondent has made no argument on Issues 1 and 2 raised by Appellant on the trial court's failure to exclude inadmissible evidence, or even to rule upon the motions made by Appellant. Sec. 1 of part III Argument, in Appellant's Brief, pp. 13-18.

The Respondent did not address the contention by Appellant that summary judgment cannot be appropriate on eviction where RCW 59.18.380 provides for the court to examine the witnesses and parties orally. Sec. 2, part A, of part III Argument, Appellant's Brief, pp. 19-21.

The Respondent did not discuss the argument that failure to hold a show cause hearing within 30 days of service of the

summons and complaint invalidates the eviction process. Sec. 2, part A, of part III Argument, I Appellant's brief, pp. 22-24.

IV. CONCLUSION

Due to a myriad of disputed issues of material fact and Respondent's inability to show it is entitled to judgment as a matter of law, the Superior Court's grant of summary judgment should be reversed.

Respectfully submitted,

August 11th, 2014

A handwritten signature in black ink, appearing to read "William Edelblute", is written over a horizontal line.

William Edelblute

Attorney for Appellant

WSBA 13808