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No. 51841-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

PATRICIA LANDES,
Respondent,

v.

PATRICK CUZDEY,
Appellant.

BRIEF OF RESPONDENT

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1. INTRODUCTION

1.1. Appellant, Patrick Cuzdey (“Mr. Cuzdey”) was always a tenant of Respondent, Patricia Landes (“Mrs. Landes”), on her real property. Mr. Cuzdey lost a prior appeal where he sued to quiet title and ownership of her real property to him. During the initial pendency of that appeal, Mr. Cuzdey was a holdover tenant at will with no rights or interest in the real property. He chose not to initially stay the trial court’s summary judgment ruling against him. Therefore, the order was completely enforceable. Mrs. Landes could have filed a new ejectment action to remove Mr. Cuzdey from her real property or offered him a new tenancy to reside there, such as a month-to-month tenancy.

Mrs. Landes chose the latter option and served a “Notice to Begin Rental” on him that, in substance, was a unilateral contract offer to rent non-exclusive use and occupancy of her real property on a month-to-month basis. Mrs. Landes promised Mr. Cuzdey could reside on her real property for \$1,500.00 per month if he decided to reside there on January 1, 2016. She promised that other applicable terms of his month-to-month tenancy would be supplied by Chapter 59.18, RCW, as it was expressly incorporated by reference into the offer of a rental agreement.

Mr. Cuzdey accepted the terms of the unilateral contract offer, and rental agreement, by performance. He did so by residing on the real property

on and past January 1, 2016. The terms contained in the Notice to Begin Rental, i.e., unilateral contract offer, became an enforceable rental agreement. Mr. Cuzdey further performed by paying \$1,500.00 per month in rent in January and February of 2016. He did so before finally obtaining a stay of the trial court's summary judgment ruling in the quiet title action pending appeal.

After Mr. Cuzdey lost the appeal regarding ownership of the real property, and the Supreme Court denied review, he refused to vacate Mrs. Landes' real property. Mrs. Landes served him proper notice and brought an unlawful detainer action based on the unilateral contract entered into by performance in January of 2016. The trial court correctly issued a writ of restitution against him. It also ordered him to pay Mrs. Landes back rent, attorney fees, and costs.

1.2. On appeal, Mr. Cuzdey erroneously argues that the trial court lacked jurisdiction to enter a writ and judgment against him. Mr. Cuzdey's claim is that he never entered into a month-to-month rental agreement with Mrs. Landes and that his tenancy was of the type not governed by either Chapter 59.12, RCW or Chapter 59.18, RCW. These arguments lack merit.

First, Mr. Cuzdey plainly performed on the unilateral contract and entered into a month-to-month rental agreement in January of 2016. The

parties provided all material evidence and testimony, and this was correctly decided as a matter of law.

Second, Mr. Cuzdey misstates the law regarding unilateral versus bilateral contracts. He cites inapplicable caselaw. He erroneously attempts to argue, and carve out, a distinction between whether the trial court had subject matter jurisdiction to issue a writ of restitution but not order attorney fees and costs. He incredulously, and irrelevantly, states that he believed he was not a month to month tenant, despite paying rent monthly. These arguments fail. The tenancy and attorney fee and cost award were governed by contract. His subjective belief was irrelevant and could not contradict the terms of the contract. The unilateral contract was accepted upon performance, and he had no ability to make counteroffers, let alone after he performed.

Last, Mr. Cuzdey was judicially estopped from asserting, and/or waived, the factual defense of not understanding that the Notice to Begin Rental would create a contract if he resided on the property after January 1, 2016. This was because, via counsel, Mr. Cuzdey stipulated to this factual matter and understanding on the record. Moreover, he was equitably estopped from asserting, and/or waived, the factual defenses of denying he made rental payments and denying that he accepted a month-to-month tenancy by the performance of residing on the real property on, and after,

January 1, 2016.

2. RESTATEMENT OF THE ISSUES

- 2.1. Whether material issues of law or fact existed in the unlawful detainer proceeding in regard to the trial court ruling that Mr. Cuzdey entered into a unilateral contract and rental agreement with Mrs. Landes?
 - 2.1.1. Whether Mr. Cuzdey entered into an enforceable unilateral contract and rental agreement with Mrs. Landes?
 - 2.1.2. Whether Mr. Cuzdey could and/or did make a counteroffer to Mrs. Landes unilateral contract offer?
 - 2.1.3. Whether Mr. Cuzdey was equitably estopped from asserting he did not perform on and accept the unilateral contract and rental agreement?
 - 2.1.4. Whether the doctrine of waiver precludes Mr. Cuzdey from asserting he did not perform on and accept the unilateral contract and rental agreement?
 - 2.1.5. Whether Mr. Cuzdey was judicially estopped from asserting that he was not a tenant under the rental agreement and thus the landlord tenant act?
- 2.2. Whether Mr. Cuzdey's jurisdictional arguments have merit?
 - 2.2.1. Whether the trial court had jurisdiction under Chapter 59.12, RCW and/or Chapter 59.18, RCW?
 - 2.2.2. Whether Parsons v. Mierz has any impact on this appeal?
- 2.3. Whether the quiet title action and previous quiet title appeal, definitely deciding all issues regarding the real property, and remanding to the trial court on the sole issue of title to the Nova mobile home has any relevance to this unlawful detainer action?

- 2.4. Whether Mr. Cuzdey did not preserve and waived any claim in regard to the amount of back rent, attorney fees, and costs on appeal?
- 2.5. Whether any material issue of law or fact existed as to the amount of back rent and/or attorney fees and costs ordered by the trial court?

3. RESTATEMENT OF THE CASE

3.1. In summer of 2014, Mr. Cuzdey brought a quiet title action against Mrs. Landes in response to Mrs. Landes serving a twenty-day notice to vacate on him. (CP at 295-96, 298-302; 430-441). Mr. Cuzdey made various claims, including that he owned Mrs. Landes' real property and the Nova mobile home. (CP at 430-441). Mrs. Landes has never filed, nor countersued with, an ejectment action. Mrs. Landes purchased the Nova mobile home for about \$15,000, decades ago. (CP at 430-441, 489). It is and has been separate from the real property and is titled under the law as a "vehicle." (CP at 287, 430-441, 489).

3.2. In June of 2015, the trial court, in the quiet title action, granted summary judgment in favor of Mrs. Landes, finding all of Mr. Cuzdey's claims frivolous. (CP at 430-441). Mr. Cuzdey filed an appeal, but initially did not stay the summary judgment ruling, nor did he initially obtain a supersedeas bond. (CP at 40-41, 150-51, 266, 396-97, 401-16).

3.3. During the time period that the quiet title's summary

judgment order was completely enforceable, Mrs. Landes personally served a “Notice to Begin Rental” (“Notice to Begin Rental” or “Rental Agreement”) on Mr. Cuzdey in November of 2015. (CP at 23-24). Per the notice, Mrs. Landes offered and promised that Mr. Cuzdey’s “non-exclusive use and occupancy” of the real property at “5145 124th Way SW, Olympia, WA 98512” would cost him \$1,500.00 per month, payable on the first day of each month, beginning January 1, 2016. (CP at 23). Acceptance of these terms was to be performed by residing on the property on, and after, January 1, 2016. Id. Other terms of the rental agreement would be supplied by and “subject to the provisions of Residential Landlord-Tenant Act, RCW 59.18.” Id. The rental agreement did not mention the Nova mobile home at all. Id. In pertinent part, the notice stated the following:

TO: Patrick Cuzdey
5145 124th Way SW
Olympia, WA 98512

YOU ARE HEREBY NOTIFIED that the terms of your non-exclusive possession and occupancy of 5145 124th Way SW, Olympia, WA 98512 are hereby changed as of and after January 1, 2016, as follows:

1. On or after January 1, 2016, [Mr. Cuzdey’s] non-exclusive possession and occupancy of the subject premise will be considered a month-to-month tenancy subject to the provisions of the Residential Landlord-Tenant Act, RCW 59.18.
2. Rent will be charged for your possession and occupancy of the subject premises, at the rate of \$1,500.00 per month, payable in advance on or before the first day of each month, beginning

January 1, 2016.

3.4. In December of 2015, Mr. Cuzdey's counsel, in discussing whether a stay and supersedeas bond requirement should be issued in the quiet title action pending appeal of that action, represented to the trial court that he understood and agreed with the terms of the rental agreement and that his tenancy would be governed by the Landlord Tenant Act come January of 2016:

MR. HOCHHALTER: Your Honor, it's our view that this a unique situation on appeal. The plaintiff, Mr. Cuzdey, has a quite a bit of personal property located on the real property which this court quieted to the [Mrs. Landes], and so [Mrs. Landes] is seeking to evict Mr. Cuzdey unless a supersedeas bond is posted.

[the court discusses supersedeas bond and procedural history and then turns to Mrs. Landes' counsel. Mrs. Landes' counsel discusses supersedeas bond and procedural history of quiet title action]

THE COURT: Let me ask you a couple questions.

MR. MAZZEO: Sure.

THE COURT: And **if an unlawful detainer is granted**, a person has the right for a reasonable time period to remove personal property, do they not?

MR. MAZZEO: In this case, **because we have put in a notice to begin rental**, they've got -- I think it's 45 days -- they've got to ask -- once the writ is issued, they can give the landlord a notice that says I want you to store the property. . . . If not, after that time period it can be sold at auction. Now, the reasonable time period comes under if there's no rental agreement in effect, and then you resort back to the common law and it's a reasonable time period. However, because we served upon him a notice to [begin] rental,

you've got to put this under the Landlord Tenant Act and that's pretty clear.

THE COURT: That matter is not before me but I wanted to ask that question --

MR. MAZZEO: Sure.

THE COURT: -- and I'll allow Mr. Cuzdey's counsel to give m[e] any other details he thinks appropriate in that regard. Do you have rebuttal argument or do you want to answer that question?

MR. HOCHHALTER: **I would. I would agree that this would fall under the Landlord Tenant Act.** I also don't remember if it's 45 days but it sounds right.

THE COURT: Folks, at the time that I ordered the judgment in this case I was aware there might very well be an appeal. . . . I gave some time to stay enforcement until the appeal could be filed and even further if an appeal were filed, some additional time.... If an unlawful detainer is issued against Mr. Cuzdey and his property is not available to him, that's the risk to him. . . . I'm going to set a bond and that bond is going to be \$75,000. . . . So I've made a ruling as to the amount of bond if this going to be stayed. I guess I need to set some kind of time period. So what's a reasonable time period.

MR. MAZZEO: Can you flush that out? Reasonable time period for what, Your Honor?

THE COURT: To post bond.

MR. MAZZEO: Understood.

THE COURT: Normally, it would be a fairly quick time period, like ten days.

MR. MAZZEO: May I interject a little bit? It's Christmastime. I couldn't evict him right now. No sheriff in the world would do it until after the new year. So I would offer up maybe the first week in January.

THE COURT: Well, okay. Today's the 11th. And so if we're looking 30 days, that would be Monday, the 11th, I believe of January. So that will be what I'll do is say 30 days. . . .

(CP at 401-16 (emphasis added); see also 396-97).

3.5. Mr. Cuzdey performed on and accepted the promises and offer contained within the Notice to Begin Rental by residing on the property on and past January 1, 2016. (CP at 23). His "non-exclusive" use, possession, and occupancy of Mrs. Landes' real property became a month-to-month tenancy. (CP at 23).

3.6. Come January 11, 2016, Mr. Cuzdey still had not posted a supersedeas bond in the quiet title action nor obtained a stay. Later in January, he paid \$1,500.00 in rent. (CP at 26-27, 45). He provided a letter to Mrs. Landes with his rental check that stated:

I have appealed the judgment quieting title and do not admit to being a tenant of Landes. I am paying under protest and under order of the superior court and reserve all of my rights, claims and arguments for the purpose of the appeal and remand of the case. I further reserve the right to seek reimbursement of the payment/if when I prevail on appeal. **Attached is a money order satisfying your demand for rent in the amount of \$1,500.00 payable to Patricia Landes.**

(CP at 42) (emphasis added). Mr. Cuzdey paid rent again in February 2016.

(CP at 26-27, 45). The check expressly stated "rent" on it. (CP at 26-27, 45).

No letter accompanied this check.

3.7. In March of 2016, Mrs. Landes brought another unlawful

detainer action. (CP at 422-23). Shortly thereafter, Mr. Cuzdey posted supersedeas, as cash, and stayed enforcement of the final order in the quiet title action. (CP at 425).

3.8. In the spring of 2017, Division 1 affirmed the trial court's final order in the quiet title action. (CP at 430-441). Division 1 ruled that the real property at 5145 124th Way, SW, Olympia WA, 98512, was owned by Mrs. Landes as a matter of law. Id. Division 1 also vacated Mrs. Landes' attorney fee award, finding Mr. Cuzdey's complaint was not entirely frivolous. Id. Finally, it affirmed dismissal of every other claim by Mr. Cuzdey, except that of title to the Nova mobile home. (CP at 131-146, 430-441). On that sole claim, it remanded back to the trial court. Id.

3.9. Both parties moved for reconsideration. (CP at 443-44). Mrs. Landes argued that Division 1 erred as to the Nova mobile home because its opinion relied on the First Amended Answer to Mr. Cuzdey's complaint. Under the law, when Mrs. Landes filed a Second Amended Answer, it completely replaced the First Amended Answer, and the First was no longer a part of the record and could not be a basis for a decision on appeal. Herr v. Herr, 35 Wash. 2d 164, 166-67, 211 P.2d 710, 712 (1949).¹ Mr. Cuzdey

¹ (holding "An amendment which is complete in itself and does not refer to, or adopt, the prior pleading, supersedes it and the original pleading ceases to be a part of the record, being in effect abandoned, or withdrawn, and becoming functus officio, with the result that the subsequent proceedings in the case are to be regarded as based upon the amended

argued Division 1 erred as to affirming Mrs. Landes' ownership of the real property. Division 1 denied both parties' motions for reconsideration.

3.10. Mr. Cuzdey filed a petition for review with the Supreme Court of Washington. (CP at 443-44). Since Mrs. Landes prevailed in the appeal as to the real property, and all claims except as to the Nova mobile home were dismissed, she requested the Supreme Court of Washington deny Mr. Cuzdey's petition for review. There was no sense in arguing over ownership of a Nova mobile home that was purchased for less than \$15,000.00 decades ago, when it has no monetary value today. (CP at 430-441). The Supreme Court of Washington denied Mr. Cuzdey's petition for review on October 4, 2017. (CP at 443-44).

3.11. After Division 1's opinion was issued, as well as after the Supreme Court's denial of review, Mr. Cuzdey did not do anything to vacate Mrs. Landes' property. (See 31-33). Mrs. Landes describes what Mr. Cuzdey has done to her property as creating a "junkyard." (Dec. of Terry Landes, filed in Div. 2 on or about January 29, 2018; Dec. of Patricia Landes, filed in Div. 2 on or about February 16, 2018). Contradicting Division 1's decision, Mr. Cuzdey added—instead of removing—personal possessions to Mrs. Landes' real property. Id. This included both before and

pleading, which will not be aided by anything in the prior pleading, and any ruling of the court with relation to the sufficiency of the original pleading is not properly in the record.")

during the unlawful detainer action that Mr. Cuzdey appeals now. Id.

3.12. In late October of 2017, Mrs. Landes served a three-day and twenty-day notice to vacate on Mr. Cuzdey. (CP at 30-33). On November 2, 2017, Mrs. Landes filed the unlawful detainer complaint against Mr. Cuzdey that is now on appeal. (CP at 3-33). She stated jurisdiction was under RCW 2.08.010 and RCW 59.12.050, based on Mr. Cuzdey failing to pay rent. (CP at 3). Mrs. Landes purposely set the show cause hearing for December 1, 2017, attempting to give Mr. Cuzdey another month to voluntarily vacate her real property. (CP 34-36). The December 1, 2017, show cause hearing was continued until January 12, 2018, as the parties agreed to a summary judgment briefing schedule. (RP (January 12, 2018) at 3-4).

3.13. At the show cause/summary judgment hearing, Mrs. Landes argued in pertinent part:

(1) Mr. Cuzdey was judicially estopped from asserting the rental agreement and Landlord Tenant Act did not apply to his tenancy;

(2) Mr. Cuzdey was equitably estopped from asserting he did not pay rent to Mrs. Landes in January and February of 2016, or that he did not accept and perform on the rental agreement by residing on the property on January 1, 2016; thus, he was barred from arguing he did not enter into a month-to-month tenancy (governed by the Landlord Tenant Act);

(3) Mr. Cuzdey had waived any right to claim that he did not pay rent in in January and February of 2016, or that he did not accept and perform on the rental agreement by residing on the property on January 1, 2016; thus, he was barred from arguing he did not enter into a month-to-month tenancy (governed by the Landlord Tenant Act);

(4) Mr. Cuzdey entered into a fully enforceable unilateral contract/rental agreement for a month-to-month tenancy by residing on Mrs. Landes' real property on January 1, 2016, and paying \$1,500.00 in rent in January and February of 2016. Basic rental agreement terms were provided in the Notice to Begin Rental. Other applicable terms were supplied by Chapter 59.18, RCW, as it was incorporated by reference;

(5) Title to the Nova mobile home was not at issue in the unlawful detainer action, which was for possession of the real property, and

(6) Mr. Cuzdey's Personal property should be removed from the real property before eviction. Anything left on the real property would be stored under RCW 59.18.312, per the rental agreement. Mrs. Landes would store the Nova mobile home until the quiet case was decided on remand. (CP at 263-83, 58-68; RP (January 12, 2018)).

3.14. In Mr. Cuzdey's declaration submitted to the trial court before the show cause hearing, he acknowledged that "I understand that I will have to move eventually and have been looking for a small parcel of

land. . . .” (CP at 39). Nonetheless, Mr. Cuzdey argued:

- (1) That the checks he gave Mrs. Landes in January and February of 2016, for \$1,500.00, and saying “rent” on at least one of them, were not for rent;
- (2) That no rental agreement was created for a month-to-month tenancy;
- (3) That the rental agreement did not require Mr. Cuzdey to pay rent starting in January of 2016; and
- (4) That subject matter jurisdiction was lacking because no month-to-month tenancy existed and because title to the Nova mobile home was being litigated in quiet title action on remand. (CP at 46-55).

3.15. On January 12, 2018, Mr. Cuzdey’s counsel at the show cause hearing admitted that under “a land tenancy, [Chapter] 59.12[, RCW] would be applicable, and [the trial court] could issue a writ.” (RP (January 12, 2018) at 26). The commissioner entered a writ of restitution to restore Mrs. Landes’ possession of the real property. (CP at 167-68). She made no ruling regarding the Nova mobile home. (CP at 160-66). The basis of her decision was that Mr. Cuzdey entered into an enforceable contract, i.e., month-to-month rental agreement, in January of 2016 by accepting Mrs. Landes’ offer, staying on Mrs. Landes’ real property, and paying rent. (CP at 160-66). The trial court specifically found:

Mr. Cuzdey was represented by counsel when his attorney stated Mr. Cuzdey’s circumstance was governed by the Landlord Tenant Act. Based on the transcripts and filings submitted in this action,

Mr. Cuzdey's attorney and Mr. Cuzdey understood paying rent in January of 2016 would cause Mr. Cuzdey to enter into a contract under the Land[lord] Tenant Act.

(CP at 163). Without any argument or objection from Mr. Cuzdey, the trial court entered a judgment including back rent, attorney fees, and costs. (Compare RP (January 12, 2018) with CP at 160-66). Back rent was properly calculated as owing from March of 2016 to January of 2018, in the amount of \$1,500.00 per month, totaling \$34,500.00. (CP at 160-66). Reasonable attorney fees for \$8,234.00 and costs of \$597.00 were also ordered. Id.

3.16. The commissioner's ruling for attorney fees, under RCW 59.18, was based on the rental agreement and the fact that the real property at issue was residential in nature, not governed by RCW 59.20. (CP at 160-66).

3.17. Almost every day the next week, Mr. Cuzdey hailed Mrs. Landes' counsel into court before the commissioner, for "emergency" contested hearings, attempting to reconsider the decision and/or secure a bond and stay. Mrs. Landes agreed to allow Mr. Cuzdey to set a reconsideration on shortened notice. (See RP (January 26, 2018) at 4). The agreed reconsideration hearing date was set to January 26, 2018. (See RP (January 26, 2018) at 4).

3.18. On reconsideration, Mr. Cuzdey for the first time objected to

and argued against the dollar amount of back rent, attorney fees, and costs ordered at summary judgment. (CP at 185, 190-92). He argued for the first time that Division 1's decision remanding the issue of title to the Nova mobile home somehow "voided" the January 2016 contract. (CP at 188-189). Finally, he made the same arguments made at the January 12, 2018, show cause/summary judgment hearing. The commissioner denied Mr. Cuzdey's motion for reconsideration in totality, without the need for written reasons. (RP (January 26, 2018) at 19-20).

3.19. Mr. Cuzdey moved this Court to modify the supersedeas bond and was denied. A supersedeas bond has never been entered in this action and the trial court's decision has not been stayed. Mrs. Landes provided the Sheriff with the writ of restitution as well as a "REQUEST FOR STORAGE OF PERSONAL PROPERTY" under RCW 59.18.312. (CP at 519-523).

3.20. Mr. Cuzdey has vacated the property and Mrs. Landes has voluntarily stored Mr. Cuzdey's "junkyard" of personal property pending this appeal. (Second Dec. of Terry Landes, filed in Div. 2 on or about February 16, 2018). She has voluntarily left the (monetarily valueless) Nova mobile home in place pending this appeal and the outcome of quiet title action. Id.

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4. ARGUMENT

4.1. Mr. Cuzdey Entered into an Enforceable Unilateral Contract and Rental Agreement in January of 2016.

Washington follows an objective manifestation theory of contracts. Everett v. Estate of Sumstad, 95 Wn.2d 853, 855, 631 P.2d 366, 367 (1981). Under this theory, the court objectively looks at the plain language of the contract, disregarding subjective intentions of the parties expressed outside of it. Id. (holding “subjective intention of the parties is irrelevant” and “A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties”). “Contracts come in two forms: bilateral and unilateral.” Storti v. University of Washington, 181 Wn.2d 28, 330, 335, P.3d 159, 163 (2014); Higgins v. Egbert, 28 Wn.2d 313, 182 P.2d 58 (1947); Browning v. Johnson, 70 Wn.2d 145, 422 P.2d 314 (1967). “The vast majority of contracts are bilateral, where two parties exchange reciprocal promises and one party’s promise provides consideration for that of the other party.” Storti, 181 Wn.2d 28 at 336; Higgins, 28 Wn.2d 313; Browning, 70 Wn.2d 145.

In a unilateral contract, however, only one party makes a promise or an offer. Storti, 181 Wn.2d 28 at 336; Higgins, 28 Wn.2d 313; Browning, 70 Wn.2d 145. The party making the promise can only revoke the offer before other party performs, not after. Mowbray Pearson Co. v. E. H.

Stanton Co., 109 Wash. 601, 603-604, 187 P. 370, 371 (1920). The second party accepts that promise or offer and establishes an enforceable unilateral contract through performance. Storti, 181 Wn.2d 28 at 336; Higgins, 28 Wn.2d 313; Browning, 70 Wn.2d 145. A binding unilateral contract exists where there is performance by a party after the extension of an offer or promise by another party. Higgins, 28 Wn.2d at 318. The party offered to perform, i.e., the offeree, cannot change the terms of offeror's offer or promise nor make a counteroffer. Id. Rather, the offeree can perform, not perform, or try to get the offeror to change the terms of the offer or promise. Id. at 318-19. Once performance occurs an enforceable contract has been executed. Id.

In Higgins, the plaintiff/respondent, a real estate broker named Mr. Higgins ("respondent") sued to recover a real estate commission from a defendant/appellant named Ms. Egbert ("appellant") who utilized the services of the respondent to list her land for sale. Higgins, 28 Wn.2d at 314. The appellant claimed that she did not owe the respondent a commission because the land was sold after the listing expired. Id. The respondent claimed that he was entitled to a commission because the land sold before the listing expired. Id. (stating respondent argued that the listing was for sixty days and the appellant argued the listing was for thirty days).

In holding there was a fully enforceable unilateral contract for only

thirty days, the court of appeals relied on a letter from the appellant to the respondent offering to list the property for sale for thirty days. Id. at 315. The letter amounted to an offer for a unilateral contract even though the respondent attempted to make a counteroffer² by changing the appellant's offer to sixty days, as well as the date the period of time began to run, "by means of a pencil notation." Id. at 315-317. Stated another way, when the respondent received the letter from appellant he could have (1) performed as the appellant offered, (2) endeavored to persuade the appellant to change the terms of the offer, or (3) declined to perform on the offer. But he could not make what amounted to a counteroffer. Id. at 319.

In Mowbray Pearson Co., the Supreme Court of Washington, en banc, discussed a classic unilateral contract offer extended to one party to another in writing:

In consideration of Mowbray Pearson Company soliciting and delivering ice in Spokane north of the Spokane river to Olive street bridge and north of N.P.R.R. east of Olive street bridge and south of Cora avenue west of Division street, and Dalton avenue, east of Division street, E. H. Stanton Co. agrees to sell pure merchantable ice to Mowbray Pearson Company for \$ 1.50 per ton at their plant for their requirements during 1916, and further agrees not to sell any other dealer for distribution in that district.

² (See also Annotated Higgins Opinion) (Lexis editor for Higgins, stating in the "Overview" that "The [respondent] could not, by changing the date of the instrument, create what would amount to a new offer from the [appellant] to himself, nor alter [appellant's] only offer.").

Mowbray Pearson Co., 109 Wash. at 602. The offeree wrote “accepted” on the writing and argued on appeal that created a binding enforceable *bilateral* contract. Id. at 604. The offeror argued on appeal that because there was no performance on the unilateral contract offer, only the “accepted” language lacking mutual promises, there was no enforceable contract. Id. at 603. The Supreme Court sided with offeror and rejected the argument that the writing could be classified as a bilateral contract offer with acceptance because “a promise by one party to another to do a certain thing in case that other does some other thing, leaving it optional with the other whether he does the thing or not, is not an obligatory [bilateral] contract. . . . because [of a] lack[] of mutuality.” Id. In such case, “There is no promise for a promise.” Id. The Supreme Court specifically held, “the writing itself . . . was wholly unilateral”:

Turning to the writing under consideration. . . . the respondent promised nothing. . . . The writing itself . . . [wa]s wholly unilateral. The promise is entirely upon the one side without any corresponding promise on the other.

Id. at 603-04.

In sum, Mowbray Pearson Co. buttresses Higgin’s holding that when a party receives a unilateral contract offer, that party, the offeree, can either (1) perform, (2) endeavor to persuade the offeror to change the terms of the unilateral contract offer, or (3) decline to perform. The material point

is that an offeree to a unilateral contract cannot make a counteroffer, and if performance occurs then an enforceable unilateral contract is created. Mowbray Pearson Co., 109 Wash. at 603-604; Higgins, 28 Wn.2d at 318-19.

Here, the gravamen of Mr. Cuzdey's main argument is that residing on Mrs. Landes' real property in January of 2016, and/or payment of rent in January and February of 2016, did not create a rental agreement between the parties. However, Mrs. Landes' Notice to Begin Rental constituted a unilateral contract offer and promise to Mr. Cuzdey. By the plain language, Mrs. Landes clearly intended to be bound by the terms and promises of her offer stated within it. The terms of the offer and promise were unambiguous. (CP at 23). Mr. Cuzdey, for his part, chose to perform by residing on the real property on January 1, of 2018. Thus, the unilateral contract was completed and enforceable upon that performance. See Higgins, 28 Wn.2d at 318-19. He further performed by paying rent in January and February of 2016.

It is noteworthy that Mrs. Landes' unilateral contract offer to Mr. Cuzdey is very similar to the unilateral contract offer at issue in Mowbray Pearson Co. In Mowbray Pearson Co., the offeror promised to sell the offeree ice for \$1.50 per ton, and not to sell others, if the offeree delivered ice to the offeror at a specific place. Mowbray Pearson Co., 109 Wash. at

602. No performance occurred so no contract. In the instant case, Mrs. Landes promised to rent her real property in a non-exclusive fashion for \$1,500.00, on a month-to-month basis, subject to additional terms provided by Chapter 59.18, RCW. Acceptance occurred by Mr. Cuzdey residing on her real property on and beyond January 1, 2016.

He performed not only to give him property to live on, and to prevent his removal, but also it gave him time to raise supersedeas funds for the then pending quiet title action appeal. Mr. Cuzdey had no ability to make a counteroffer to Mrs. Landes' unilateral contract offer and promise. See Higgins, 28 Wn.2d 313; Mowbray Pearson Co., 109 Wash. at 603-604. He was not under any "order of the superior court," whatsoever, to pay rent, and he understood staying on the property and/or paying rent would create a month-to-month rental agreement with Mrs. Landes. (CP at 40-41, 163, 396-97).

4.2. Mr. Cuzdey Erroneously Asserts He Did in Fact Make, or Could have Made, a Counteroffer to Mrs. Landes' Unilateral Contract Offer; Mr. Cuzdey Performed on Mrs. Landes' Unilateral Contract Offer and an Enforceable Rental Agreement was Executed.

Mr. Cuzdey argues that he made a bilateral counteroffer instead of performing on Mrs. Landes' unilateral contract offer. (Opening Brief at 20-22). He also argues, via a more than strained reading of Higgins, that Mr. Cuzdey could have made a counteroffer to Mrs. Landes' unilateral contract

offer. Neither of these arguments have merit.

First, Mrs. Landes' unilateral offer and promise was accepted and performed on January 1, 2016, when Mr. Cuzdey resided on Mrs. Landes' real property. (CP at 23). Therefore, when Mr. Cuzdey sent his rent payment on January 19, 2016, he was *already late in making payment that was already due and enforceable*. On this basis alone, the letter accompanying the January 19, 2016, rental payment could not be deemed a counteroffer. Mrs. Landes' unilateral contract offer had already been accepted and performed on by Mr. Cuzdey.

Furthermore, the substance of Mr. Cuzdey's letter was nonsense, except for part where stated he was paying rent. (See CP at 42) (stating **“attached is a money order satisfying your demand for rent in the amount of \$1,500.00. . . .”**) (emphasis added). This is clear because Mr. Cuzdey was not under any order of the trial court to pay Mrs. Landes rent. The only order Mr. Cuzdey was under gave him the option of paying a large amount of money *into the trial court's registry—not to Mrs. Landes*—as an alternative to a supersedeas bond pending appeal. (CP at 396-97). Consequently, his argument that “he made these payments [to Mrs. Landes] under the superior court's order for a stay pending appeal” (Opening Brief at 6, 20-21) lacks merit. His stated subjective belief was irrelevant, see Everett, 95 Wn.2d at 855, legal spin provided by his attorney and made after

the rental agreement had been executed by performance. The statement was not accurate; he was a tenant. Furthermore, he blatantly admitted so by stating, “attached is a money order satisfying your demand for rent in the amount of \$1,500.00.” (CP at 42).

Additionally, Mr. Cuzdey claims his January 19, 2016, letter “added terms of his own” to Mrs. Landes’ proposed unilateral rental agreement offer. (Opening Brief at 22). As a practical matter, rental agreements contain all kinds of material terms, namely the amount of rent, when its due, how often, and a description of the rental property. No counteroffer or different *rental terms*, from what Mrs. Landes offered, are proposed in Mr. Cuzdey’s January 19, 2016, letter. (See CP at 42)

Regardless, the only caselaw Mr. Cuzdey cites, other than his beyond strained reading of Higgins, is Kysar v. Lambert, 76 Wn. App. 470, 477-78, 887 P.2d 431 (1995). In Kysar, one party, Lambert, sold Christmas trees in Boston that the other party, the Kysars, grew and shipped from Washington state. Id. at 473. The parties initiated the order by negotiating promises for promises over the phone, on July 6, 1989. Id. More negotiation regarding promises for promises occurred later by the purchasing party filling out and signing a printed order form created by the seller. Id. This bilateral contract form was mailed to Lambert. Id. More modifications to the bilateral contract form were made before the trees shipped. Id. at 473-

74. Ultimately, on August 21, 1989, Lambert mailed the Kysars a letter putting money down for the shipment. Id. at 474. The trees shipped in late November of 1989. Id. Lambert rejected the trees when they arrived in Boston because they were not of the quality—*allegedly promised* by the Kysars—and because the trees were shipped in contradiction of the method *allegedly promised*. Id. Therefore, Lambert also refused to complete payment *as promised*. Id.

Unsurprisingly, this Court held that the parties entered into a classic bilateral contract, with offers and counteroffers and *reciprocal promises made by both parties*. Kysar v. Lambert, 76 Wn. App. at 478. The term “unilateral contract” is not even mentioned in the opinion because the contract was not unilateral in any sense. Instead, it contained promises made to each other, in exchange for other promises, as well as consideration, regarding the terms offered and ultimately accepted. The issue in the case was missing material terms, i.e., shipping provisions, and whether the Uniform Commercial Code could supply the missing terms. Id. Accordingly, Kysar is irrelevant to the case at hand and provides no authority or guidance for this Court regarding this appeal.

Second, Mr. Cuzdey argues that Higgins is in accord with the proposition that an offeree to a unilateral contract can make a counteroffer after, or when simultaneously, performing on unilateral contract offer.

(Opening Brief at 19-20). This argument has no merit as it was rejected in

Higgins expressly:

[The offeree to the unilateral contract] could not, by changing the [terms of the unilateral contract offer], create what would amount to a new offer from the [offeror] to himself, nor alter the only one [the offeror] had ever made to him.

Higgins, 28 Wn.2d 313 at 318.

In sum, Mr. Cuzdey did not make a counteroffer to Mrs. Landes. He had already performed and entered into the rental agreement by residing on the property on January 1, 2016. He further performed on the rental agreement as a month-to-month tenant by paying the rental amount due, and stating, “Attached is a money order satisfying your demand for rent in the amount of \$1,500.00 payable to Patricia Landes.” Furthermore, Mr. Cuzdey had no ability to make a counteroffer because the offer extended to him was for a unilateral contract.

4.3. Mr. Cuzdey is Equitably Estopped from Asserting that He Did Not Pay Rent, or Enter into an Enforceable Unilateral Contract, in January of 2016 by Residing on the Real Property

The elements of equitable estoppel are (1) a statement or act inconsistent with a claim afterward asserted, (2) reasonable reliance, and (3) injury to the party who relied on the statement or act. State Dept. of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 20, 43 P.3d 4 (2002);

Schoonover v. State, 116 Wn.App. 171, 179–80, 64 P.3d 677 (2003).

Here, on appeal, Mr. Cuzdey argues that equitable estoppel does not apply because (1) “Cuzdey did not make any inconsistent statement or act,” as to the rental agreement, (2) “Landes did not reasonably rely on anything Cuzdey said or did,” and (3) “Landes did not suffer any injury from her alleged reliance.” Opening Brief at 39-40. These arguments have no merit and border on the absurd.

As to the first claim, in December of 2015, Mr. Cuzdey stipulated to the trial court that he understood he would be in a contract and a tenancy governed by the “Landlord Tenant Act” come January of 2016. (CP at 163). Mr. Cuzdey then performed on the rental agreement by residing on Mrs. Landes’ real property on January 1, 2016. Mr. Cuzdey paid rent in the amount of \$1,500.00 per month according to the terms rental agreement, in both January and February of 2016. (CP at 26-27, 45). The February rent check stated “rent” on it (CP at 27), and his January 19, 2016, letter stated, “Attached is a money order satisfying your demand for rent in the amount of \$1,500.00 payable to Patricia Landes.” (CP at 42).

As to the second claim that Mrs. Landes did not reasonably rely on these inconsistent acts and statements, Mrs. Landes plainly did. She did not bring an unlawful detainer action in January nor February of 2016 because he performed on the unilateral contract offer by residing on the property and

because Mr. Cuzdey was current on rent due.

As to third claim that Mrs. Landes did not suffer any harm, she plainly did. Mr. Cuzdey owes her \$1,500.00 in past rent due since March of 2016. If he is allowed to repudiate these claims, Mrs. Landes, an elderly widow on a fixed income, may have to bring a new action against him that she cannot afford. Worse, Mr. Cuzdey, the spiteful and unwanted ex-son-in-law that she fears (Dec. of Patricia Landes, filed in Div. 2 on or about February 16, 2018), may actually be able to come back onto her real property. All of which results in substantial financial and emotional harm.

4.4. Mr. Cuzdey Waived Any Right to Claim a Tenancy at Will by Residing on Mrs. Landes' Property On January 1, 2016, and By Paying Rent in January and February of 2016.

“An implied waiver may arise where one party has pursued such a course of conduct as to evidence an intention to waive a right, or where his conduct is inconsistent with any other intention than to waive it.” Bowman v. Webster, 44 Wn.2d 667, 670, 269 P.2d 960, 962 (1954); Kessinger v. Anderson, 31 Wn.2d 157, 172, 196 P.2d 289, 297 (1948). “It may result from an express agreement or be inferred from circumstances indicating an intent to waive.” Bowman, 44 Wn.2d at 669. “It is a voluntary act which implies a choice, by the party, to dispense with something of value or to forego some advantage.” Id. Importantly, “Once a party has relinquished a known right or advantage, he cannot reclaim it without the consent of his

adversary.” Id. at 670.

In Bowman, the appellants were purchasers of residential property. Id. at 677-78. Respondents were sellers of the residential property. Id. The appellants sought a court order deeding them a parcel of land they believed they purchased in a real estate transaction. Id. at 668. However, appellants “knew . . . that their contract of purchase did *not* include the [disputed parcel of land].” Id. (emphasis in original). The appellants then took possession of the land and made payments on the contract. Id. (emphasis in original). The trial court dismissed appellant’s case, and the Supreme Court affirmed, because “appellants, by their action and conduct, after acquiring full knowledge that they were not getting the [disputed parcel of land], had waived any rights. . . .” Id. at 669.

In Kessinger, Plaintiff purchaser brought suit against defendant sellers of land to recover damages for alleged breach of warranty against encumbrances. 31 Wn.2d 157. The action was founded upon the covenants of a statutory warranty deed in which the sellers had conveyed certain real property to the purchasers. The trial court entered judgment in favor of the purchasers and the sellers appealed. The sellers, as appellants, argued the doctrines of waiver and estoppel because purchasers were fully aware of the encumbrance and closed the transaction. The Supreme Court reversed and ordered that the purchaser (respondents on appeal) take nothing in

judgment. Summarizing the facts of the case, the Supreme Court's reasoning included that respondents took possession of the land and paid money under contract for such land; thus, they were precluded from suit under the doctrine of waiver. Id. at 171-72.

Here, Mr. Cuzdey made the affirmative and intentional acts of (1) stipulating on the record in the quiet title action that he understood he would be under contract come January 2016, and thus governed Landlord Tenant Act; (2) residing on Mrs. Landes' real property on January 1, 2016, per the terms of the rental agreement; (3) paying rent in January and February of 2016; (4) writing "rent" on his February 2016 rent check and payment; and (5) providing in writing that:

Attached is a money order satisfying your demand for rent in the amount of \$1,500.00 payable to Patricia Landes.

(CP at 42). Any one of these acts constituted an intentional and voluntarily relinquishment of any right he may have had to claim a tenancy at will or that he had not accepted the terms of rental agreement. See Bowman, 44 Wn.2d 667; Kessinger, 31 Wn.2d 157.

Why Mr. Cuzdey waived his rights is understandable. He waived his rights for good reason and valuable consideration. Becoming a month-to-month tenant under the protections of Chapter 59.18, RCW, allowed him the benefit of time to store his personal property, the benefit of a continued

place of land to live on, and the benefit of time to raise \$75,000.00 needed to post cash bond alternative and stay the trial court's order on summary judgment. Moreover, he erroneously thought he could prevail in the quiet title action appeal; he thought his waiver would not have binding effect.

Mr. Cuzdey will surely argue in his Reply Brief that the waiver doctrine cannot apply because he stated in mid-January of 2016 that he was paying rent "under protest." But this statement came after waiver had already occurred. He had already asserted, in open court in the quiet title action, that the rental agreement and thus the Landlord Tenant Act applied to him come January 2016. He had already performed on and accepted the rental agreement by residing on Mrs. Landes' real property past January 1, 2016. Thus, Mr. Cuzdey "could not reclaim" his alleged rights to claim otherwise because he had relinquished them already. See Bowman, 44 Wn.2d at 670. Furthermore, after his "protest" he affirmed and/or ratified his intention to be a month-to-month tenant under the rental agreement by writing "rent" in the memo line of the February rent check.

4.5. Mr. Cuzdey is Judicially Estopped from Asserting that He was Not a Tenant Under the Rental Agreement and Thus the Landlord Tenant Act.

The Supreme Court of Washington, en banc, holds that misleading a court in an earlier proceeding to gain advantage in a later proceeding is the basis of a judicial estoppel claim. Anfinson v. FedEx Ground Package

Sys., Inc., 174 Wash. 2d 851, 861–62, 281 P.3d 289, 294–95 (2012).
Judicial estoppel applies to questions of law as well as questions of fact. Id.
at 296–97.

Here, on December 11, 2015, there was a hearing to set bond pending appeal in the quiet title action. Mr. Cuzdey, via counsel, stipulated and agreed—as a factual matter—that come January 1, 2016, he would be a tenant under the rental agreement, and thus, under the Landlord Tenant Act:

THE COURT: And **if an unlawful detainer is granted**, a person has the right for a reasonable time period to remove personal property, do they not?

MR. MAZZEO: In this case, **because we have put in a notice to begin rental**, they've got -- I think it's 45 days -- they've got to ask -- once the writ is issued, they can give the landlord a notice that says I want you to store the property. . . . **because we served upon him a notice to [begin] rental, you've got to put this under the Landlord Tenant Act** and that's pretty clear.

MR. HOCHHALTER: I would. **I would agree that this would fall under the Landlord Tenant Act.** I also don't remember if it's 45 days but it sounds right.

(CP at 401-16). The trial court then relied on Mr. Cuzdey's stipulation (1) because it was important to the Court that Mr. Cuzdey be given some time to get \$75,000.00 together for a bond, (2) because the Court wanted assurances that Mr. Cuzdey's personal property would be stored and protected for some time after he was evicted in an unlawful detainer action,

and (3) because the Court normally would have only given Mr. Cuzdey ten days:

THE COURT: Folks, at the time that I ordered the judgment in this case I was aware there might very well be an appeal. . . . I gave some time to stay enforcement until the appeal could be filed and even further if an appeal were filed, some additional time. . . . **If an unlawful detainer is issued against Mr. Cuzdey and his property is not available to him, that's the risk to him. . . . I'm going to set a bond and that bond is going to be \$75,000. . . . So I've made a ruling as to the amount of bond if this going to be stayed. I guess I need to set some kind of time period. So what's a reasonable time period.**

MR. MAZZEO: Can you flush that out? Reasonable time period for what, Your Honor?

THE COURT: To post bond.

MR. MAZZEO: Understood.

THE COURT: Normally, it would be a fairly quick time period, like ten days.

MR. MAZZEO: May I interject a little bit? It's Christmastime. I couldn't evict him right now. No sheriff in the world would do it until after the new year. So I would offer up maybe the first week in January.

THE COURT: Well, okay. Today's the 11th. And so if we're looking 30 days, that would be Monday, the 11th, I believe of January. So that will be what I'll do is say 30 days. . . .

(CP at 401-16 (emphasis added); CP at 163).

In other words, first as to the element of change of position, it is incontrovertible that Mr. Cuzdey's position has completely changed and reversed. On December 11, 2015, Mr. Cuzdey stipulated that he agreed with

the terms of the Notice to Begin Rental and understood that he was going to be a tenant under the rental agreement and thus the “Landlord Tenant Act” come January 1, 2016. The Commissioner at the show cause hearing, in this case, made this specific factual finding. (CP at 163).

On November 30, 2017, Mr. Cuzdey changed his position to say, as a factual matter, he did not agree with the terms of the Notice to Begin Rental or that he previously stipulated that he would be a tenant under the rental agreement come January 1, 2016. But instead of framing the issue as the factual matter it was, and as he did previously in December of 2015, Mr. Cuzdey later in this case, inconsistently, claimed the issue turned on a subject matter jurisdiction analysis. Stated simply, from his erroneous perspective, it did not matter if he changed his position as to his factual stipulation that he agreed he would be under contract come January 2016; judicial estoppel could not be the basis of subject matter jurisdiction. The glaring problem for Mr. Cuzdey is that he isn’t being estopped as to anything jurisdictional—he’s being judicially estopped as to his factual stipulation, relied upon by the trial court, that he would be under contract and in a tenancy governed by the rental agreement come January 2016.

Second, as to the element of whether the trial court was misled, on December 11, 2015, the trial court specifically asked Mr. Cuzdey’s counsel if the Landlord Tenant Act applied to his tenancy come January 1, 2016.

Mr. Cuzdey's counsel plainly asserted that it would. Thus, it is beyond clear Mr. Cuzdey was attempting to mislead the trial court by later changing his position.

Third, as to the element of unfair advantage or detriment, Mr. Cuzdey's change and reversal in position clearly is intended to unfairly advantage him over Mrs. Landes. He wished to have this action and appeal dismissed, stated Mrs. Landes' action to evict him was frivolous, and he would have had Mrs. Landes go to the detriment of amending her answer in the quiet title action to bring a counter suit for ejectment. A nefarious part about all of this is that had Mrs. Landes sued for ejectment after Division 1's unpublished decision came down, Mr. Cuzdey would have certainly claimed his possession and tenancy on the real property was governed by the Landlord Tenant Act, as he did on December 11, 2015. Consequently, Mr. Cuzdey cannot have his cake and eat it too; the doctrine of judicial estoppel applies here. See Anfinson, 174 Wash. 2d at 865–66.

In response on appeal, Mr. Cuzdey argues that “judicial estoppel cannot create subject matter jurisdiction where none exists.” (Opening Brief at 36). He cites a Division 1 case, Rust v. W. Wash. State College, 523 P.2d 204, 209, 11 Wn. App. 410, 418-19 (1974) (holding as a “general rule” that “Jurisdiction should not be sustained upon the doctrine of estoppel”). However, judicially estopping Mr. Cuzdey from going back on his previous

factual assertion that his tenancy was going to be governed by the rental agreement and thus the “Landlord Tenant Act” come January 2016, relied upon by the trial court in December of 2015, is not “creating” subject matter jurisdiction. Furthermore, even if this Court accepted Mr. Cuzdey’s framing of the judicial estoppel issue as jurisdictional, Mrs. Landes pointed the trial court to a Supreme Court of Washington case, Svatonsky, that carved out an exception to “general rule” espoused in Rust, regarding judicial estoppel not being able to create subject matter jurisdiction.

In Svatonsky v. Svatonsky, 63 Wn.2d 902, 389 P.2d 663 (1964), the parties were divorced, and by stipulation title to their farm was transferred to the husband's mother in exchange for their release from debts owed to her. Id. at 903. The husband was ordered to pay the wife monthly installments totaling the remainder of the value of the farm less the paid debt. Id. The wife filed an action seeking an adjudication of her rights to the farm and argued the trial court was without jurisdiction to award the farm to the husband’s mother. Id. at 903-04.

The Supreme Court of Washington acknowledged that the decree could be void for the lack of jurisdiction, but it rejected that argument holding, “even though a [final order] is void as beyond the power of the court to pronounce, a party who procures . . . it is estopped to question its validity where he has obtained a benefit therefrom.” Id. at 904. The Supreme

Court reasoned that a party cannot gain unfair advantage and secure important rights from an adversary through a court order and then repudiate that court order on jurisdictional grounds. See id. at 905. Thus, the court ruled:

The question whether the court had jurisdiction, either of the subject-matter of the action or of the parties, is not important in such cases. Parties are barred from such conduct, not because the judgment obtained is conclusive as an adjudication, but for the reason that such a practice cannot be tolerated.

Id. In the case at hand, Mr. Cuzdey secured important rights in the quiet title action by stipulating that his tenancy on Mrs. Landes' real property was governed by the rental agreement come January 2016 and thus the Landlord Tenant Act. He was able to extend his time to pay a supersedeas bond or cash alternative, able to prevent an eviction, and able to substantially extend his time on Mrs. Landes real property. Therefore, Mr. Cuzdey's lack of subject matter jurisdiction argument is "intolerable" and fails. See Svatonsky, 63 Wn.2d at 905.

It was "intolerable" for Mr. Cuzdey to be allowed to make the completely opposite argument than he did before the trial court on December 11, 2015. See id. Our justice system would simply break down if attorneys, parties, and courts could not rely on stipulations made in open court. Reliance on such stipulations by judges and parties keep cases on

track for just, equitable, and economical resolution. See id. Such tactics and “practice cannot be tolerated” legally or ethically. See id.

Accordingly, even though Mr. Cuzdey correctly cites the general rule as to judicial estoppel, he improperly frames Mrs. Landes’ argument and the issue at hand as jurisdictional. The reality is that Mr. Cuzdey is judicially estopped from changing his factual stipulation from December of 2015 that he would be in a contract governed by the rental agreement come January 2016, and thus in a tenancy governed by the Landlord Tenant Act. Even if this Court agreed with Mr. Cuzdey’s framing of the issue as to do with subject matter jurisdiction, this Court has the authority to follow an exception to the general rule. Svatonsky provides that authority, and this Court can affirm on this basis because Mr. Cuzdey’s tactics were misleading to the trial court to gain advantage over an adversary, and thus, “intolerable.”

4.6. Mr. Cuzdey’s Jurisdictional Arguments are a Red Herring.

As stated above, the issue in this matter is whether Mr. Cuzdey performed on a unilateral contract and month-to-month rental agreement with Mrs. Landes. He plainly did. Additional issues include whether, under the doctrines of estoppel and waiver, Mr. Cuzdey is barred from making certain factual assertions, including attacking the formation, execution, and enforceability of the rental agreement. Again, Mr. Cuzdey plainly is barred

from doing. Accordingly, Mr. Cuzdey’s attempt to frame the issues in this case as jurisdictional are a red herring.

4.6.1. The Trial Court Had Jurisdiction Under Chapter 59.12, RCW and Chapter 59.18, RCW.

Title 59 RCW sets out Washington's landlord-tenant law.” Brown, 187 Wn.2d at 314. Chapter 59.12, RCW, governs all unlawful detainer actions as that chapter defines what constitutes unlawfully detaining a landlord’s property. See RCW 59.12.030; Brown, 187 Wn.2d at 314; Indigo Real Estate Servs., Inc. v. Wadsworth, 169 Wn. App. 412, 280 P.3d 506 (2012) (holding “the procedures set forth in the generalized unlawful detainer statutes, chapter 59.12 RCW, apply to the extent they are not supplanted by those found in the [RCW 59.18, the Residential Landlord Tenant Act].”).

Chapter 59.18 RCW, “known as the Residential Landlord-Tenant Act of 1973 . . . governs the rights and remedies of residential landlords and tenants.” Brown, 187 Wn.2d at 314 (emphasis added); Wadsworth, 169 Wn. App. 412, 280 P.3d 506 (2012) (holding “Because this case involves a residential tenancy, it is governed by the Residential Landlord-Tenant Act of 1973 (RLTA), chapter 59.18 RCW”) (citing Leda v. Whisnand, 150 Wn. App. 69, 77, 207 P.3d 468 (2009)).

Here, Mr. Cuzdey’s attempt to draw a distinction between whether

he was properly evicted under Chapter 59.12, RCW, or Chapter 59.18, RCW is a red herring. Mrs. Landes pled jurisdiction under Chapter 59.12, RCW, as was appropriate as all unlawful detainer actions rely on such chapter to secure a writ of restitution on the basis of not paying rent on a month-to-month tenancy. See RCW 59.12.030. Mr. Cuzdey’s counsel at the show cause hearing admitted that under “a land tenancy, [Chapter] 59.12[, RCW] would be applicable, and [the trial court] could issue a writ.”³ (RP (January 12, 2018) at 26).

Mrs. Landes additionally argued that Chapter 59.18, RCW applied. The only practical distinction as to whether Chapter 59.18, RCW, applied in addition to Chapter 59.12, RCW would be whether Mrs. Landes was entitled to attorney fees. This is because Chapter 59.12, RCW does not include an attorney fee provision and Chapter 59.18, RCW does. What Mr. Cuzdey is missing, and ignoring in his Opening Brief, is that attorney fees are appropriate where the parties enter into a contract allowing them. Gander v. Yeager, 167 Wn. App. 638, 645, 282 P.3d 1100, 1103 (2012).

In this case, the terms of the rental agreement expressly incorporated by reference Chapter 59.18, RCW:

On or after January 1, 2016, [Mr. Cuzdey’s] non-exclusive

³ Thus, the invited error doctrine bars also Mr. Cuzdey’s argument that Chapter 59.12, RCW does not apply. See In re Estate of Muller, 197 Wn. App. 477, 484-85, 389 P.3d 604, 609 (2016) (holding parties cannot set up an alleged error on appeal).

possession and occupancy of the subject premise will be considered a month-to-month tenancy subject to the provisions of the Residential Landlord-Tenant Act, RCW 59.18.

(CP at 23). Mrs. Landes did so to simplify the length and terms of the offer and promises made to Mr. Cuzdey in becoming a month-to-month tenant. She also did so, so that Mr. Cuzdey was assured tenant-favorable terms within Chapter 59.18, RCW—including mandated storage of a tenant’s personal property if an unlawful detainer was initiated. The attorney fee provision of Chapter 59.18, RCW was incorporated by reference so as to discourage any more litigation. Accordingly, Mr. Cuzdey’s jurisdictional arguments are red herrings and the trial court was well justified in ordering both a writ of restitution and an attorney fee award.

4.6.2. Parsons v. Mierz is Distinguishable and, Respectfully, was Wrongly Decided Because It Interpreted Statutory Provisions in Isolation, Leading to Strained or Absurd Results, Rather than Harmonizing Washington State’s Unlawful Detainer Statutory Scheme.

Responding to Mr. Cuzdey’s argument that Parsons v. Mierz, 2018 Wash. App. LEXIS 776, *8, 2018 WL 1733519 (Slip Op. No. 49324-1-II, filed April 10, 2018), somehow stands for the proposition that the trial court lacked jurisdiction in this case, Mrs. Landes argues the following.

First, Mrs. Landes was entitled to a writ of restitution, under Chapter 59.12, RCW, to remove Mr. Cuzdey from her real property because he

entered into a month-to-month tenancy for the use of Mrs. Landes real property per terms of the rental agreement. The trial court's writ of restitution was to remove Mr. Cuzdey from Mrs. Landes' real property. He could have and should have taken his personal property off the property at the same time. Mrs. Landes has been kind enough to store such personal property pending resolution of this appeal, even though she could dispose of all such property per the RCW 59.18.310, which was expressly incorporated into the rental agreement.

As to the Nova mobile home, a vehicle and personal property under Washington law, ownership of this asset is the sole remaining issue in the quiet title action. Resolution of Mr. Cuzdey's claim on that personal asset had nothing do with whether Mr. Cuzdey could lawfully remain in possession of Mrs. Landes' real property. Mr. Cuzdey was not entitled to remove that personal asset when he was evicted from Mrs. Landes' real property because Mrs. Landes owns it and has title to it. As a practical matter, Mrs. Landes has elected not to do anything with this personal asset because of Mr. Cuzdey's claim on its title.

Consequently, Mr. Cuzdey's argument under Parsons is irrelevant and distinguishable. Following the rationale of Parsons, Mrs. Landes is Mr. Cuzdey's landlord, under Chapter 59.12, RCW, because she rented her real property to him on a month-to-month basis. She did not rent him use of the

Nova mobile home and no contract says otherwise. The Nova mobile home is just a personal asset that she owns and that he wishes to have title quieted to him. If he wins the quiet title action, he can have it. If he loses he may not have it. This does not change the reality that Mr. Cuzdey failed to pay rent for use of the real property, and does not change the reality that Mrs. Landes properly evicted him off of her real property. Without paying rent, Mr. Cuzdey was trespassing and unlawfully on Mrs. Landes real property, regardless of any claim he had made on such personal property.

Mr. Cuzdey argues to the contrary and that the terms of the unilateral contract covered both the Nova mobile home and the real property. He argues that Chapter 59.12, RCW, cannot provide jurisdictional basis for evicting him. But these arguments fail under the plain language of the rental agreement. Per the rental agreement, his rental was for his “*non-exclusive possession and occupancy of 5145 124th Way SW, Olympia, WA 98512*, i.e., his non-exclusive possession and non-exclusive occupancy of the real property. Obviously, Mr. Cuzdey *exclusively possessed and occupied* the Nova mobile home, and no one has ever argued otherwise. The Nova mobile home is not mentioned in the rental agreement. Without question, and also under the rationale of Parsons, Chapter 59.12, RCW governs his tenancy on the real property and he was properly evicted.

Second, Parsons, is only persuasive authority and it, respectfully,

was wrongly decided. The decision reads statutory provisions and words located in Chapter 59.18, RCW, in isolation rather than interpreting and harmonizing Washington State’s unlawful detainer statutory scheme, i.e., Chapter 59.12, RCW, Chapter 59.18, RCW, and Chapter 59.20, RCW as a whole. In doing so, the decision judicially creates gaps and absurd or strained results in application that are detrimental to both landlords and tenants alike.

Parsons stands for the rule of law that in cases involving single mobile homes for residential purposes on real property, with a rental agreement for use of the real property—but not concerning the mobile home—are governed solely by Chapter 59.12, RCW, and not by Chapter 59.18, RCW, nor by Chapter 59.20, RCW. One of the strained results is that a tenant in such circumstance is subject to “twice the amount of damages thus assessed and of the rent.” See RCW 59.12.170. Other strained results being basic protections and remedies for tenants and landlords, espoused in RCW 59.18 and RCW 59.20, are unavailable because RCW 59.12 does not contain them. The legislature did not intend to subject residential tenants to double damages and double rent judgments nor did it intend to take away residential tenant’s basic protections.

Specifically, the error in Parsons stems from its holding improperly interpreting the word “property.” The word was not defined in 1973 when

the Act was created. Chapter 59.18, RCW, currently uses the word “property” over 200 times. Just like in 1973 when the Chapter was created, the word “property” as used today still clearly refers to real property, personal property, public property, or rental property depending on context. However, central to the Parsons’ rationale, is the holding that the word “property” can never mean “real property.” Rather, Parsons holds that—all 200 plus times—the word “property” is used in Chapter 59.18, RCW, it *only* means the definition not added to the chapter until 2010: “all dwelling units on a contiguous quantity of land managed by the same landlord as a single, rental complex.” This restrictive definition, many times, literally makes zero sense at all in context. See Chapter 59.18, RCW. In other words, the definition *added in 2010* did not supplant the various definitions of “property” used for decades and cannot be the sole definition based on a plain reading of the Chapter as a whole. In turn, this overly restrictive interpretation of the word “property” caused the Court, to improperly define the terms “landlord”, “tenant”, “dwelling unit,” “owner,” and “rental agreement.”

The better interpretation that (1) coincides with a plain reading, (2) fulfills the purpose of Chapter 59.18, RCW, and (3) harmonizes Washington’s unlawful detainer statutory scheme is that the word “property” means “real property”, “personal property”, “rental property”,

or “public property” in the appropriate context. Regardless, it is not necessary to take a second look at Parsons or for Mrs. Landes to go into more detail than above. Parsons is distinguishable on the grounds that attorney fees are appropriate in this case per contract. Attorney fees were properly ordered because the attorney fee provision in Chapter 59.18, RCW, was incorporated by reference in the rental agreement.

4.7. The Quiet Title Action on Remand, Regarding the Sole Issue of Ownership of the (Financially Valueless) Nova Mobile Home, is Not Relevant to this Appeal or Action.

Mr. Cuzdey argues that the rental agreement became void after Division 1 filed its unpublished opinion in the quiet title action. (Opening Brief at 9). Similarly, he further claims that ownership of the Nova mobile home is in dispute, that Mrs. Landes admitted he owned it, and therefore the trial court lacked jurisdiction to evict him off of Mrs. Landes’ real property. (Opening Brief at 32-34).

Here, the Nova mobile home is personal property that was purchased decades ago. Today it is monetarily valueless. Division 1 remanded back to the trial court, in the quiet title action, on the sole issue to determine the Nova’s ownership. While the rationale, from the unpublished decision, for determining that there were material issues of law or fact is technically in error (See Herr, 35 Wash. 2d at 166-67 (holding amending pleadings completely replace prior pleadings), title to the personal property,

e.g., Nova mobile home, has nothing to do with unlawful detainer action regarding possession of Mrs. Landes' real property. See e.g., River Stone Holdings NW, LLC v. Lopez, 199 Wn. App. 87, 96, 395 P.3d 1071, 1076 (2017) (holding "unlawful detainer actions are not the proper forum to litigate questions of title.").

In sum, the rental agreement was solely for the "non-exclusive" use and occupancy of Mrs. Landes' real property. (CP at 23). The agreement was not impacted, or "voided," by the quiet title action's unpublished decision. See Stabbert v. Atlas Imperial Diesel Engine Co., 39 Wn.2d 789, 792, 238 P.2d 1212, 1214 (1951). Mr. Cuzdey was properly evicted from Mrs. Landes' land and title to the Nova mobile home is separately, and properly, being litigated in the quiet title action.

4.8. Mr. Cuzdey Failed to Object and Waived Any Claim in Regard to the Amount of Back Rent, Attorney Fees, and Costs on Appeal, and the Trial Court Did Not Abuse Its Discretion in Not Considering the Argument on Reconsideration.

Under RAP 2.5(a), this Court generally does not review any claim of error not raised in the trial court. In re Adoption of T.A.W., 188 Wn. App. 799, 807, 354 P.3d 46 (2015); State v. Clark, 124 Wn.2d 90,105, 875 P.2d 613 (1994) (Raising the issue below helps ensure the "benefit of developed argument on both sides and lower court opinions squarely addressing the questions."). If a party files a motion for reconsideration under CR 59, "a party

may preserve an issue for appeal that is closely related to a position previously asserted and does not depend upon new facts.” River House Dev., Inc. v. Integrus Architecture, PS, 167 Wn. App. 221, 231, 272 P.3d 289, 294 (2012). However, the trial court has discretion to refuse to consider an issue raised for the first time on reconsideration if no good cause is shown. Id. at 231. On review, the trial court’s refusal to consider a new argument on reconsideration is reviewed for abuse of discretion. Id.

Here, Mr. Cuzdey, at the show cause/summary judgment hearing, failed to timely object to or argue against the dollar amount of back rent ordered, failed to timely object to or argue against the dollar amount of attorney fees ordered, and failed to timely object to argue against the amount of costs ordered. (RP (January 12, 2018)). Consequently, the amount of attorney fees, costs, and back rent was not preserved.

Only on reconsideration did Mr. Cuzdey raise—as a separate, additional, issue from his jurisdictional arguments—the issue of dollar amounts ordered as to rent, attorney fees, and costs. But Mr. Cuzdey did not make a showing of good cause as to why these additional, non-jurisdictional, arguments and objections (contesting dollar amounts ordered) were not timely raised or timely preserved during the show cause/summary judgment hearing. Thus, the trial court did not abuse its discretion in not considering the new arguments. Accordingly, Mr. Cuzdey

has did not timely preserve, therefore waived this issue at hearing on the merits. On reconsideration, no good cause was shown as to the tardiness of the argument. This Court has no reason to hear this issue on appeal.

4.9. There is No Material Issue of Law or Fact as to the Amount of Back Rent and/or Attorney Fees, Costs, Ordered by the Trial Court.

Here, this eviction was correctly decided as a matter of law because all the facts and possible material testimony was before the trial court. (See RP (January 12, 2018) at 23-27). The rental agreement incorporated Chapter 59.18, RCW including RCW 59.18.410's attorney fee provision. The agreement clearly stated the amount of rent due each month. Thus, the amount of back rent ordered was a simple matter of arithmetic, multiplying \$1,500.00 per month in rent by how many months Mr. Cuzdey was delinquent. No issue existed for trial because a sum certain was easily calculated. Cost were equally easy to calculate and determine. The reasonable attorney fee award was calculated under the law per a lodestar analysis. No error occurred. See Mahler v. Szucs, 135 Wn.2d 398, 433-434, 957 P.2d 632, 651 (1998).

5. ATTORNEY FEES ON APPEAL

Pursuant to RAP 18.1, Mrs. Landes requests attorney fees on appeal. Mrs. Landes has two bases for this request. First, she is entitled to attorney fees and costs based on her rental agreement that specifically incorporated

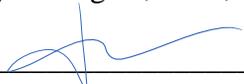
by reference Chapter 59.18, RCW, including RCW 59.18.410.⁴

Second, Mr. Landes is entitled to fees under RCW 59.18.410—even without incorporating such statute by reference in her rental agreement—because she rented, on a month-to-month basis, residential real property to a tenant for residential purposes. Parsons, again, was respectfully wrongfully decided on this issue. The better test, which harmonizes Washington’s unlawful detainer statutory scheme, is whether there is a rental agreement entitling the tenant to reside on, or at, the landlord’s real, or other, property. The proper test is not the strained and narrow test of whether the landlord explicitly rented a “dwelling unit.” Chapter 59.18, RCW applies where (a) a tenant is entitled to use the landlord’s residential real property to place a single mobile home, or other dwelling unit, on, and (b) when Chapter 59.20, RCW does not apply.

6. CONCLUSION

For reasons stated herein Mrs. Landes requests the trial court be affirmed and attorney fees on appeal be awarded to her.

Respectfully submitted this 9th day of August, 2018,



Drew Mazzeo WSBA No. 46506
Attorney for Mrs. Landes

⁴ (stating “if . . . unlawful detainer be after default in the payment of rent, . . . the judgment shall be rendered against the defendant guilty of . . . unlawful detainer for the amount of . . . the rent, if any, found due, and the court may award statutory costs and reasonable attorney's fees.”)

CERTIFICATE OF SERVICE

I declare under penalty of perjury under the laws of the state of Washington that on August 9, 2018, I caused to served:

1. Brief of Respondent

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