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No. 51841-4-II

Court of Appeals, Div. II, of the State of Washington

Patricia Landes,

Respondent,

v.

Patrick Cuzdey,

Appellant.

Reply Brief of Appellant

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1. Introduction

This was not a proper unlawful detainer action. The trial lacked jurisdiction under the applicable statutes. The only proper form for this action was a claim for ejectment, which Landes chose not to make. The trial court erred in failing to dismiss this improper unlawful detainer action.

Even if the trial court had jurisdiction, the unlawful detainer statutes require a trial when there are material facts in dispute. The trial court erred in proceeding to final judgment without a trial.

This Court should reverse the trial court's decisions, dismiss the unlawful detainer action, vacate the writ of restitution, and order that Cuzdey may return to the property.

2. Reply to Landes' Statement of the Case

In an attempt to reformulate her argument regarding the "Notice to Begin Rental," Landes asserts for the first time that the Notice offered a rental agreement that was to be accepted by Cuzdey residing on the property on and after January 1, 2016. Br. of Resp. 6. This assertion is untrue.

An examination of the Notice reveals two key facts. First, the Notice does not expressly make any offer at all. Rather, it speaks in terms of a unilateral action being taken by Landes, which action would allegedly have a certain, described legal

effect. CP 23. For example, the Notice states, "YOU ARE HEREBY NOTIFIED that the terms … are hereby changed." It declares that continued possession "will be considered a month-to-month tenancy" under the RLTA. It insists that "rent will be charged." This is not the language of an offer to contract.

Second, there is absolutely no language in the Notice that specifies how the offer was to be accepted or rejected. It stated that as of January 1, 2016, Landes would unilaterally treat Cuzdey as a month-to-month tenant under the RLTA. Period. The Notice does not invite Cuzdey to accept the terms. It does not specify any performance that would be considered acceptance of the terms.

Landes hopes that by repeating her new mantra, "Cuzdey accepted by residing on the property," she can somehow make it true. It is not. As a matter of law, it cannot be true, as will be argued further in Part 3.1.2, below. To the extent the Notice constituted an offer, Cuzdey did not accept because his performance did not match the terms of the offer.

Landes goes so far as to claim that her original arguments in the trial court included the notion that Cuzdey accepted by remaining on the property. Br. of Resp. at 13. This is also false. Landes' arguments in the trial court all focused on her incorrect

theory that Cuzdey accepted by paying rent.[1] Not once did she argue that Cuzdey accepted by remaining on the property. Surely if she had considered the act of remaining on the property to be acceptance of the offer, she would have made that argument to the trial court. She did not. Her new assertion that she did (Br. of Resp. 12-13) is absolutely false.

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[1] Landes' Memorandum in Support of Complaint, found at CP 263, asserts repeatedly the theory that Cuzdey accepted by paying rent. CP 264:10-12 ("Cuzdey entered into a binding and enforceable unilateral contract when he paid rent in January of 2016"); CP 273:30 ("Landes relied upon the act of paying rent"); CP 274:22-23 ("Cuzdey … relinquished any right he may have had to claim a tenancy at will by paying rent"); CP 276:13 ("Cuzdey accepted these promises by paying rent"); CP 280:22-23 ("Cuzdey affirmed this by paying rent").

Landes' reply, found at CP 58, doubled down on the theory of acceptance by payment alone. CP 59:11-12 ("Cuzdey Fully Performed on a Unilateral Contract by Paying Rent"); CP 59:13-17 ("he fully performed … when he paid monthly rent"); CP 60:30 ("Cuzdey chose to perform by paying rent"); CP 61:23-25 ("By paying rent … he accepted"); CP 62:27-29 ("enter into a month-to-month rental agreement with Mrs. Landes by paying rent"); CP 63:19-21 ("Mrs. Landes' reasonable reliance and estoppel argument is based on Mr. Cuzdey's act of paying rent"); CP 64:3-5 ("Cuzdey did factually pay rent … and in doing so he fully performed").

Landes continued to focus solely on payment at the summary judgment hearing. RP, Jan. 12, 2018, at 7:9-11 ("The unilateral contract was formed by performance once he paid rent, the act of paying rent."), at 9:2-3 ("He relinquished that right by paying rent"), at 10:10-11 ("did he pay rent and enter into a unilateral contract"), at 12:2-3 ("She's promising that if you pay rent … you will become a month-to-month tenant").

Landes' assertion that the trial court decision was based in part on Cuzdey staying on the property (Br. of Resp. 14) is also objectively false, as the trial court's findings, conclusions, and judgment plainly refer only to payment of rent. CP 161:17-18 ("Plaintiff paid rent"); ("Cuzdey understood paying rent in January of 2016 would cause Mr. Cuzdey to enter into a contract").

3. Reply Argument

Cuzdey's opening brief focused on three issues: 1) whether the trial court should have dismissed the case for lack of jurisdiction, Br. of App. 13-28; 2) whether the trial court erred in awarding attorney's fees to Landes when the RLTA does not apply to this case, Br. of App. 28-30; and 3) whether the trial court erred in entering final, summary judgment and order for writ of restitution without holding a trial to resolve disputed, material facts, Br. of App. 30-35. Cuzdey also anticipated Landes' alternative arguments and showed that none of them applies to create jurisdiction for Landes' improper action. Br. of App. 35-42. This reply will address each of these issues in turn.

3.1 The trial court erred in not dismissing this case for lack of jurisdiction.

Cuzdey's chief argument is that this case was outside the scope of the unlawful detainer statutes and should have been

dismissed. Br. of App. at 13. The trial court's lack of authority to decide this case as an unlawful detainer case becomes apparent upon examination of the various factual situations that can trigger the court's unlawful detainer authority. The facts in this case do not fit any of the statutes.

First, the trial court did not have jurisdiction under the Residential Landlord-Tenant Act, Chapter 59.18 RCW, because the RLTA does not apply to the rental of land for the placement of a mobile home. Second, the trial court did not have unlawful detainer jurisdiction because the parties never had a rental agreement. Third, the trial court did not have jurisdiction under Chapter 59.12 RCW because none of the situations defined in that statute apply here. Fourth, even if the trial court had jurisdiction to hear the unlawful detainer case, it had no statutory authority to award attorney's fees to Landes because the RLTA did not apply.

3.1.1 The trial court lacked jurisdiction to hear this unlawful detainer case under Chapter 59.18 RCW because the alleged rental agreement did not include the mobile home.

Cuzdey's opening brief argued that this case is analogous to *Parsons v. Mierz*, No. 49324-1-II (Wn. Ct. App., Apr. 10, 2018), in which this Court held that the RLTA did not apply to rental of land for placement of a mobile home. Br. of App. 14. Because

Landes admits that the mobile home was not part of the alleged rental agreement, there was no "dwelling unit," "landlord," "tenant," or "rental agreement" to which the RLTA could apply. Br. of App. 14-17.[2] The trial court had no authority to hear or decide Landes' unlawful detainer action under the RLTA. Br. of App. 18. This Court should reverse the trial court decisions and dismiss the unlawful detainer action.

This result does not change even if Cuzdey accepted the alleged rental agreement. Landes herself insists that the alleged rental agreement **did not include the mobile home.** *E.g.,* Br. of Resp. 42-43 ("She did not rent him use of the Nova mobile home and no contract says otherwise").[3] Without the mobile home, the alleged agreement did not relate to a "dwelling unit" and therefore could not be governed by the RLTA.

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[2] Cuzdey made this argument in his response to Landes' memorandum and at the summary judgment hearing. CP 51 ("For the RLTA to apply, [Landes] … would have to own the mobile home wherein [Cuzdey] resides. … If Cuzdey owns the mobile home, the RLTA does not apply."); RP, Jan 12, 2018, at 16-17 ("For 59.18 to apply, the landlord … would also have to own the mobile home, and that is exactly what was remanded."). Landes' assertion that this argument was made for the first time on reconsideration (Br. of Resp. 16) is simply untrue.

[3] Landes made the same assertion in the trial court. CP 202:30 ("Objectively speaking, the Nova is not a part of this contract."); CP 203:21-22 ("The unilateral contract was for Mr. Cuzdey's use of the real property."); CP 206:8-9 ("The contract Mr. Cuzdey entered into is not for renting the Nova mobile home.").

Landes' chief response to this argument is that the trial court had jurisdiction under Chapter 59.12 RCW. But this does not answer Cuzdey's argument. Cuzdey's argument is that the **RLTA** does not apply. Landes' response only proves Cuzdey's argument by doubling down on the assertion that the mobile home was not a part of the alleged rental agreement.

Landes argues that Cuzdey's interpretation, supported by *Parsons*, creates an absurd result in that a case involving a single mobile home placed on rented real property would be governed solely by Chapter 59.12 RCW and not by the RLTA or the Manufactured/Mobile Home Landlord-Tenant Act. Far from absurd, this is the only result the statutes can tolerate. Both the RLTA and the MMHLTA provide rights and duties that simply cannot apply to a rental of a parcel of real property (not a mobile home park) where the tenant places his own mobile home.

Landes also takes issue with the *Parsons* court's interpretation of the term "property." But Cuzdey's argument does not depend on the definition of "property." It depends on the definition of "dwelling unit." Under that definition, Landes was not renting Cuzdey a "dwelling unit" and therefore there was no "rental agreement" subject to the RLTA, Cuzdey was not a "tenant," and Landes was not a "landlord." The trial court did not have authority to decide this case under the RLTA. This Court should reverse.

3.1.2 The trial court lacked jurisdiction to hear this unlawful detainer case because the parties never had a rental agreement.

Cuzdey's opening brief argued that the trial court's findings and conclusions regarding the effect of the "Notice to Begin Rental" were not supported by evidence and were based on an erroneous interpretation of contract law. Br of App. 19. The "Notice to Begin Rental" did not create a rental agreement under the RLTA because Cuzdey's tender of payment, with terms different from those of Landes' offer, operated as a counter-offer, which Landes accepted when she accepted Cuzdey's tender. Br. of App. 19-22. Cuzdey's additional terms provided that he was not paying rent as a tenant under a rental agreement but was, instead, paying Landes for a temporary stay of the quiet title judgment until he could post a full supersedeas bond. Br. of App. 22-23.

Without a rental agreement, Cuzdey was a tenant at will, subject only to an action for ejectment, not to the accelerated procedures of unlawful detainer. Br. of App. 23-24. The trial court lacked authority to hear Landes' unlawful detainer action. This Court should reverse the trial court decisions and dismiss the unlawful detainer action.

Landes misreads *Higgins v. Egbert*, 28 Wn.2d 313, 182 P.2d 58 (1947). The *Higgins* court did not prohibit an offeree

from making a counter-offer. Indeed, the court's statement that Higgins could have attempted to negotiate new terms means that he had the power to make a counter-offer to try to change the terms of the deal. *See Higgins*, 28 Wn.2d at 318.

What Higgins could not do was make a noncompliant performance and then ask the court to enforce Egbert's promises. The court held that Egbert was within her rights to reject Higgins' noncompliant performance. *Id.* at 318-19.

The principle that we must take from *Higgins* is that in order for an enforceable unilateral contract to be formed, the **performance must match the terms of the offer.** Egbert was not bound to perform her offer because Higgins' performance was noncompliant. He did the thing that she asked, but he did it too late. The result is the same here. Cuzdey did the thing that Landes asked—pay $1,500—but he did it with attached terms and conditions that did not comply with the offer. Landes was not bound to accept Cuzdey's noncompliant performance. There was no contract.

In *Higgins*, Egbert could have chosen to accept Higgins' noncompliant performance. If she had, the analysis would have been different. By accepting the noncompliant performance, Egbert would have been changing the terms of her offer to match Higgins' performance. In this way, the noncompliant performance acts as a counter-offer, which the offeror is free to

accept or reject. If the original offeror accepts the noncompliant performance, she must also accept the additional terms that came with it. Such is the result here, where Landes accepted Cuzdey's noncompliant tender of payment. Cuzdey's additional terms were that he was paying for a temporary stay; he was not paying rent as a tenant. There was no rental agreement.

There is no factual support for Landes' new argument that Cuzdey could accept her offer by remaining on the property after January 1. Nothing in the "Notice to Begin Rental" indicates that remaining on the property would constitute acceptance. There is no other contemporaneous objective evidence of Landes' intent. There is no factual support for this newly contrived argument.

There is also no legal support for the argument. Landes purports to have created a binding contract by virtue of Cuzdey **doing nothing at all.** Cuzdey's presence on the land was the status quo under his decades-old tenancy at will. It cannot serve as consideration for a new contract. *Cf. Labriola v. Pollard Group, Inc.*, 152 Wn.2d 828, 834, 100 P.3d 791 (2004) ("There is no consideration when one party is to perform some additional obligation while the other party is simply to perform that which he promised in the original contract").

If Landes can succeed in unilaterally creating a contract without any action or change of position on the part of Cuzdey,

then there is nothing to stop any landowner from unilaterally changing the terms of any tenancy at any time without the consent of the tenant. Such a contract cannot be valid.

Landes' complaint that Cuzdey's letter "was nonsense" is an invitation for this Court to weigh the evidence, which this Court cannot do. The trial court's decision was a summary judgment. RP, Jan. 12, 2018, at 3:9-10. Under either summary judgment or show cause standards, the trial court could not resolve this material factual dispute without a trial.

Cuzdey presented evidence of his objective manifestation of intent in making his tender of payment: the letter. CP 42. He also presented evidence of the context in which the letter was written. The order of the superior court provided a mechanism for Cuzdey to stay enforcement by paying $1,500 per month. Even though the order was no longer effective, Cuzdey's reference to that order, together with his objection to being a tenant and his reservation of rights, creates at least a reasonable inference that he was paying for a temporary stay, not for a rental agreement. Landes did not present any evidence of a contrary interpretation of Cuzdey's letter. Cuzdey's evidence was relevant and material. It either established that there was no contract or it created a genuine issue of fact that could not be resolved without a trial. Either way, the trial court erred and this Court should reverse.

3.1.3 The trial court lacked jurisdiction to hear this unlawful detainer case under Chapter 59.12 RCW because none of the factual situations in that statute applies.

Cuzdey's opening brief argued that none of the factual situations listed in the general unlawful detainer statute, Chapter 59.12 RCW, is present in this case. Cuzdey does not meet the threshold requirement under RCW 59.12.030 that he be a tenant "for a term less than life," because there was never any term to his tenancy. Br. of App. 24-25. He also does not meet any of the more specific requirements: 1) he was not a holdover tenant because there was no term; 2) he did not holdover without paying rent due because there was no rent due; 3) he did not default in payment of rent because there was no rent due; 4) he did not neglect any condition of rental because there were no conditions; 5) he did not commit waste and Landes did not serve notice of waste; 6) he did not enter the land without permission; 7) he did not permit gang-related activity on the property. Br. of App. 25-27. He did not commit forcible entry or hold the property in forcible detainer as those terms are defined in the statute. Br. of App. 27-28.

Because none of the statutory definitions apply, the trial court lacked authority to hear or decide Landes' unlawful detainer action. Her proper remedy was an action for ejectment.

This Court should reverse the trial court decisions and dismiss the unlawful detainer action.

Landes is wrong when she argues that Cuzdey conceded that the general unlawful detainer statute would apply. Landes cherry-picks a statement from the summary judgment hearing and takes it out of context. The complete context shows that Cuzdey was making a distinction between a tenancy at will—which is what he had—and a tenancy under Chapter 59.12 RCW: "Had this ever been a real tenancy, versus tenancy at will—**had it been** a land tenancy, 59.12 would be applicable." RP, Jan. 12, 2018, at 26 (emphasis added). Cuzdey did not concede anything. He did not invite the trial court's error.

Landes fails to demonstrate that Chapter 59.12 RCW applies to this case absent her alleged rental agreement. Because there was no contract, the statute did not apply. The trial court did not have authority to hear or decide Landes' unlawful detainer action. This Court should reverse and dismiss the action.

3.1.4 Even if the trial court had jurisdiction, there was no authority to support an award of attorney's fees.

Cuzdey's opening brief argued in the alternative that, even if the trial court had authority to hear the unlawful detainer action under Chapter 59.12 RCW, the trial court **lacked**

authority to award attorney's fees to Landes under the RLTA because the RLTA did not apply. Br. of App. 28-30. The analysis here mirrors that set forth in Part 3.1.1 of Cuzdey's opening brief, in Part 3.1.1 of this brief, and in *Parsons v. Mierz*, No. 49324-1-II, (Wn. Ct. App., Apr. 10, 2018), in which this Court reversed an award of attorney's fees where the tenant rented only the land, not the mobile home in which he had lived. Even if this Court finds that the trial court had authority to hear this unlawful detainer case, this Court should, at the very least, reverse the trial court's award of attorney's fees to Landes.

Landes attempts to save her fee award by arguing for the first time that the "Notice to Begin Rental" included a **contractual** attorney fee provision by stating that the tenancy would be "subject to the provisions of the Residential Landlord-Tenant Act, RCW 59.18." But this reference does nothing more than show Landes' belief that the RLTA could apply to the agreement by its own terms.[4] It does not clearly evidence any intent to formally incorporate those provisions into the contract. A contract being "subject to" the RLTA is very different from a contract "incorporating by reference" the provisions of the RLTA. This alleged contract states only that it is "subject to." But even if this vague reference could be effective to incorporate an

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[4] This belief was reasonable under the status of the case at the time, because Landes had been held to own the mobile home.

attorney fee provision into the alleged contract, the provision would still be interpreted and applied according to the terms and definitions of the RLTA. By these terms and definitions, the provisions of the RLTA do not apply to an agreement that does not relate to a "dwelling unit."

For example, RCW 59.18.290(2) awards fees to the prevailing party in an action brought by a "landlord" deprived of possession of "premises" by a "tenant" who holds over in the "premises" after the termination of the "rental agreement." RCW 59.18.290(2). None of these defined terms applies here. Because Landes was not renting a "dwelling unit" to Cuzdey, she was not a "landlord," he was not a "tenant," and there was no "rental agreement" to which the attorney fee provision could apply. By the same token, Cuzdey did not hold over in any "premises," and Landes was not deprived of possession of any "premises" because "'premises' means a dwelling unit." RCW 59.18.030(18). Whether by statute or by contract, the attorney fee provision of the RLTA does not authorize an award of attorney's fees to Landes. This Court should reverse.

3.2 Because material facts were in dispute, the trial court erred in granting summary judgment and entering final judgment and order for writ of restitution without a trial.

Cuzdey's opening brief argued, again in the alternative, that even if the trial court had authority to hear this unlawful

detainer action, the trial court erred in deciding the case without a trial when material facts were in dispute. Br. of App. 30-31 (citing CR 56(c); RCW 59.12.130; RCW 59.18.380). Cuzdey's brief highlighted three material facts that were in dispute: 1) the facts surrounding the formation and terms of the alleged rental agreement, Br. of App. 31-32; 2) the ownership of the mobile home, Br. of App. 33-34; and 3) the amount of past due rent, if any, Br. of App. 34-35. Because these material facts were in dispute, the trial court erred in deciding the case without a trial. This Court should reverse the trial court decisions and remand for a trial.

3.2.1 The facts surrounding the formation and terms of the alleged rental agreement were in dispute.

Cuzdey argued that the facts surrounding the formation and terms of the alleged rental agreement were in dispute. Br. of App. 31-32. Whether an agreement was actually made controls the outcome of the case: If there was no rental agreement, the RLTA does not apply and neither does the general unlawful detainer statute. If the statutes don't apply, the action should have been dismissed.

The material dispute is this: On the one hand, Landes asserts that Cuzdey's response to the "Notice to Begin Rental" created a rental agreement. On the other hand, Cuzdey

presented admissible evidence supporting his position that his response was a counter-offer that **did not** create a rental agreement. In the context of a summary judgment or show cause hearing, the trial court could not weigh the conflicting evidence. The trial court should have ordered a trial. This Court should reverse the trial court's decisions and remand for a trial.

Landes concedes by not responding to this argument.

3.2.2 Ownership of the mobile home was in dispute, to the extent Landes may still have been attempting to claim to own it.

Cuzdey argued that ownership of the mobile home was a material fact in dispute. Br. of App. 33-34. Whether Landes owns the mobile home affects the outcome of the case: If Landes does not own the mobile home, the RLTA cannot apply in this case. If the RLTA does not apply, the case should have been dismissed (or at least attorney's fees should not have been awarded).

Landes argues that this dispute is irrelevant because the alleged rental agreement did not include the mobile home. This merely proves Cuzdey's point that the RLTA does not apply.

3.2.3 The amount of past due rent, if any, was in dispute.

Cuzdey argued that the amount of past due rent was a material fact in dispute. Br. of App. 34-35. The material dispute was this: On the one hand, Landes' complaint alleged past due

rent of $34,500. On the other hand, Cuzdey denied that any rent was owed. *E.g.,* CP 38-39. On reconsideration, Cuzdey presented, in the alternative, evidence of a lower rental value than that used by Landes in her complaint. CP 461-65. In the context of a summary judgment or show cause hearing, the trial court could not weigh the conflicting evidence to arrive at a value for damages.[5]

Landes argues that this Court should disregard the dispute over the amount of rent on the erroneous theory that Cuzdey failed to object prior to his motion for reconsideration. Cuzdey did object. Prior to the summary judgment hearing, Cuzdey testified that he had never historically paid rent for the property, CP 38, and that he had no ongoing obligation to pay rent, CP 39. No additional objection is necessary to preserve the argument that the trial court improperly weighed the evidence and decided a material dispute of fact without a trial. Cuzdey's motion for reconsideration merely enhanced the evidence and argument. The trial court should have ordered a trial. This Court should reverse the trial court's decisions and remand for a trial.

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[5] Under RCW 59.12.130, a trial is required if the pleadings reveal a disputed issue of fact. Under RCW 59.18.380, the trial court in a show cause hearing can only enter judgment for damages if "there is no substantial issue of material fact."

3.3 Landes' alternative arguments for jurisdiction under Chapter 59.18 RCW all fail on their merits.

Cuzdey's opening brief addressed alternative arguments that Landes had made to the trial court, which the trial court either expressly or silently denied. Br. of App. 35. Cuzdey argued that each of these alternative arguments fails on its merits. First, judicial estoppel does not apply. Br. of App. 36-39. Second, equitable estoppel does not apply. Br. of App. 39-40. Third, waiver does not apply. Br. of App. 40. Fourth, a landlord cannot convert a tenancy at will into a tenancy under the RLTA simply by posting notice. Br. of App. 41-42.

3.3.1 Judicial estoppel does not apply.

Cuzdey argued that the trial court's authority to hear this case is set by the applicable statutes, not the conduct of the parties. Br. of App. 36 (citing *Rust v. Western Washington State College*, 11 Wn. App. 410, 419, 523 P.2d 204 (1974)). Judicial estoppel could not apply. Alleged reliance on an attorney's answer to a hypothetical question cannot create jurisdiction where it does not already exist.

Additionally, the facts do not support application of judicial estoppel. Cuzdey's positions in the different hearings were not inconsistent. Br. of App. 37-38. The first court was not deceived because it did not make any decision based on counsel's

answer to the hypothetical question. Br. of App. 38-39. Cuzdey did not obtain any unfair advantage. Br. of App. 39.

Landes' argument relies on an alleged "stipulation" by Cuzdey's counsel that the RLTA would apply. But the statement of Cuzdey's counsel did not "stipulate" that the "Notice to Begin Rental" created a rental agreement governed by the RLTA. The Notice had not even been accepted yet, if indeed it ever was. Cuzdey had not tendered his payment or sent Landes his letter. The facts at issue in this case are different from the hypothetical facts that were posed to Cuzdey's counsel.

Counsel's statement was made in response to a hypothetical question from the court about what rule would govern storage of Cuzdey's personal property if he were to be evicted from the premises at some future date under an already existing unlawful detainer action (prior to the "Notice to Begin Rental"). CP 409-411, especially CP 409:18-19 ("Assume for purposes of argument, this is a hypothetical."); CP 410:18-19 ("That matter is not before me but I wanted to ask you that question."); CP 411:15-16 ("I'm not ruling on the landlord tenant matter"). Counsel's statement was not a stipulation. It was an answer to a judge's curiosity about an issue that was not even before the court. Counsel's agreement that the storage question should be governed by the storage provisions of the RLTA is not inconsistent with an argument that the RLTA does not apply.

See Excelsior Mortg. Equity Fund II, LLC v. Schroeder, 171 Wn. App. 333, 341-42, 287 P.3d 21 (2012) (holding that the storage provisions of the RLTA can be applied by a court even when the RLTA did not govern the eviction).

Cuzdey's present arguments, under the present facts, are not inconsistent with his counsel's prior statements in response to a hypothetical question with different facts. Landes' reliance on the trial court's finding of fact is misplaced. Cuzdey assigned error to that finding. It is not supported by evidence. The statement of Cuzdey's counsel was not related to the facts of this case as they later played out. Cuzdey's letter was a new fact that materially changed the analysis.

The court was not misled by counsel's statement. Landes' assertion that the trial court in December 11, 2015, "specifically asked Mr. Cuzdey's counsel if the Landlord Tenant Act applied to his tenancy come January 1, 2016," is false. The record reflects that is not the question the court asked. CP 409-11. The record also reflects that counsel did not "plainly assert[] that it would." CP 409-11. The court could not have been misled by counsel's statement because the court's hypothetical question was not even before the court for a decision. There is no evidence that counsel's statement had any effect on the court's decision on the amount or timing of the supersedeas bond.

Counsel's statement did not procure any benefit for Cuzdey. As the court stated, the hypothetical storage issue was not before the court. What was before the court was Cuzdey's motion for a stay or alternate security. The court treated it as a motion to set the amount of a supersedeas bond, to which Cuzdey was entitled under RAP 8.1. CP 414-15. When the court asked what a reasonable period of time would be to allow Cuzdey to post the bond, **Landes'** counsel responded that, due to the upcoming holidays, "I would offer up maybe the first week in January." CP 416. The court took Landes up on the offer and set a deadline of January 11. CP 416. The court's decision had nothing to do with the statement of Cuzdey's counsel. The court was not misled, and Cuzdey did not obtain any benefit from the prior statement. Judicial estoppel does not apply.

3.3.2 Equitable estoppel does not apply.

Cuzdey argued that equitable estoppel could not apply to his tender of payment in response to the "Notice to Begin Rental." Br. of App. 39. Cuzdey did not make any inconsistent statement or act. His position now is entirely consistent with his tender and the accompanying letter that explained he was not paying rent as a tenant. Br. of App. 39-40. Landes alleged reliance unreasonably ignored the terms in Cuzdey's letter. Br. of App. 40. Landes did not suffer any injury. Br. of App. 40.

Landes' argument again ignores the language of Cuzdey's letter. She unreasonably interprets Cuzdey's tender as an unconditional payment of rent, which the letter specifically stated it was not. Her alleged reliance cannot be reasonable because it ignores what Cuzdey actually did and said.

Her alleged reliance did not cause her any harm. She accepted Cuzdey's tender of $1,500 in January and February. After that, Cuzdey posted supersedeas and obtained a stay. Any damages Landes suffered due to delay in obtaining exclusive possession of the property were secured by the supersedeas. Equitable estoppel does not apply.

3.3.3 Waiver does not apply.

Cuzdey argued that waiver does not apply for the same reasons that equitable estoppel does not apply: he expressly stated in the letter that he was not paying rent. Br. of App. 40. He expressly reserved his rights and did not waive them. CP 42.

Landes' argument relies on the alleged "stipulation" of counsel described in Part 3.3.1, above. The waiver argument fails for the same reasons as the judicial estoppel argument. The statement of Cuzdey's counsel in response to a hypothetical question with different facts and a different subject (storage) was not a waiver of any right or argument. Cuzdey's remaining on the land as a tenant at will without paying rent was also not

a waiver. There was no waiver prior to Cuzdey's tender of payment for a temporary stay. The tender could not be a waiver because Cuzdey expressly reserved his rights. If Landes did not agree with Cuzdey's reservation of rights, she could have rejected the tender. She did not. Waiver does not apply.

3.3.4 A landlord cannot unilaterally convert a tenancy at will into a tenancy under Chapter 59.18 RCW simply by posting notice.

Cuzdey argued that a landlord cannot unilaterally convert a tenancy at will into a tenancy under the RLTA. Br. of App. 41-42. The statute upon which Landes' alternative argument relied, RCW 59.18.140, is part of the RLTA and therefore only applies to a rental agreement that is already subject to the RLTA. The statute cannot be applied to a tenancy at will.

Landes does not respond to this argument and appears to have abandoned this faulty theory.

3.4 Cuzdey requests an award of attorney's fees on appeal.

Cuzdey argued that if he prevails he should be entitled to an award of attorney's fees for defeating Landes' RLTA action. Br. of App. 42-43 (citing by analogy *Herzog Aluminum, Inc. v. General American Window Corp.*, 39 Wn. App. 188, 692 P.2d 867 (1984)). The RLTA provides for an award of attorney's fees to the prevailing party in an action brought by a landlord against an

alleged holdover tenant. RCW 59.18.290(2). That is the action Landes tried to bring. If Cuzdey prevails, he is entitled to an award of his attorney's fees in the trial court and on appeal.

Landes did not respond to this argument and therefore concedes that Cuzdey is correct.

3.5 Landes is not entitled to an award of attorney's fees on appeal.

As noted above, the RLTA does not apply to this case because the alleged rental agreement did not include a "dwelling unit." Without a dwelling unit, the provisions of the RLTA cannot apply, even if those provisions have been successfully incorporated into an actual rental agreement. The RLTA's attorney fee provisions cannot apply because the RLTA as a whole does not apply. This Court should deny Landes' request for attorney's fees on appeal.

4. Conclusion

The trial court lacked authority to hear and decide this action under the unlawful detainer statutes. This Court should reverse the trial court's decisions and dismiss the case.

Even if this Court finds that the trial court had authority to hear the case, a trial was required to resolve disputed issues of material fact. This Court should reverse the trial court's decisions and remand for a trial.

Respectfully submitted this 10th day of October, 2018.

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Certificate of Service

I certify, under penalty of perjury under the laws of the State of Washington, that on October 10, 2018, I caused the foregoing document to be filed with the Court and served on counsel listed below by way of the Washington State Appellate Courts' Portal.

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