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Case #: 1035543

SUPREME COURT OF THE STATE OF WASHINGTON

RAMIRO CORTES,

PETITIONER,

v.

MARIJKE DEUTSCHER and ALLEN DEUTSCHER,

RESPONDENTS.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Petitioner Ramiro Cortes asks this Court to accept review of the Court of Appeals' decision terminating review designated in Part II of this petition.

II. CITATION TO COURT OF APPEALS DECISION

The Court of Appeals issued an unpublished decision in this matter on April 15, 2024. Mr. Cortes moved for reconsideration. On June 17, the Court of Appeals denied the motion for reconsideration, but withdrew its prior decision and issued a new unpublished decision. Mr. Cortes moved for reconsideration of the substituted decision, and on September 16, the Court denied the motion for reconsideration. A copy of the June 17, 2024, opinion is in the Appendix at pages A-1 through A-15. A copy of the order denying the Petitioner's motion for reconsideration is in the Appendix at pages A-16. A copy of the April 15, 2024, decision is at pages A-17 through A-31.

III. ISSUES PRESENTED FOR REVIEW

- A. The Court of Appeals' decision that Mr. Cortes cannot show the existence of an oral contract without alleging the essential elements of a real estate contract is in conflict with Supreme Court decisions and published Court of Appeals decisions**
- B. The Court of Appeals' decision conflicts with Supreme Court decisions and published Court of Appeals decisions holding that the determination and interpretation of an oral contract is not appropriate for summary judgment**
- C. There is substantial public interest in this Court ensuring that courts are not used to further perpetuate fraud nor create additional barriers to low-income, LEP litigants**

IV. STATEMENT OF THE CASE

Factual History

Ramiro Cortes was a long-time employee of Marijke Deutscher, working for her since approximately 2002. Mrs. Deutscher owns numerous businesses, holding companies, and real estate properties. CP 66-67. Mr. Cortes provided maintenance and landscaping on her various properties. CP 2, 152. Mr. Cortes is a native Spanish speaker, with limited

English proficiency (LEP), and less than a high school education. CP 12.

In 2008, Mr. Cortes told Mrs. Deutscher he wanted to buy a home for himself and his family (his two minor children, his disabled brother, and his elderly mother), and he asked her for help. Mrs. Deutscher steered Mr. Cortes towards 9234 Mountain View Road SE, Yelm, WA 98597 (the “Property”). The Property consists of two homes, the larger home that Mr. Cortes and his family reside in, and a smaller home addressed 9040 Mountain View Road (“9040”). CP 139, 151-152.

Mr. Cortes and Mrs. Deutscher orally agreed he would buy the Property from her for \$270,000, with Mr. Cortes making monthly payments of \$2250 until the entire purchase price was paid.¹ Under the agreement, Mr. Cortes was responsible for paying \$1250 each month, and he could have

¹ In 2011, they agreed to lower the total monthly amount to \$1800. CP 95-96, 153.

people live in the 9040 home to assist in making monthly payments of \$1000. CP 95-97, 120-121, 147-148, 152-153.

While the agreement was not in writing, Mrs. Deutscher made it known Mr. Cortes was buying the home. She told Iliana Garcia (her employee, Mr. Cortes's niece, and a 9040 resident), "eventually the Property would be Ramiro's," and he "isn't getting the house for willy-nilly, but that he is working for it." CP 131. Mrs. Deutscher told Chris Garcia (her employee and a 9040 resident), all payments for the Property were to compensate her for the purchase, and the Property would formally be Mr. Cortes's after he reimbursed her. CP 120. Others either heard discussion of the agreement, *see* CP 127 ("I recall a conversation between Ramiro and Marijke about purchasing the Property.") or brought up the agreement to Mrs. Deutscher and she did not deny its existence, *see* CP 117 ("I commented on the property Romero was renting to own and how I was excited for him. She said something along the line of

that she was happy with Romero's improvements to it and that he was a good person.").

The contract was oral, primarily at the insistence of Mrs. Deutscher. She testified the agreement for Mr. Cortes to move into the Property was "[m]ainly oral, because Ramiro did not understand contracts much or, you know, even if I explained things to him, I sometimes had to do it two or three times before he really got it." CP 148. Mr. Cortes accepted the agreement being oral because he "totally trusted her word." CP 139, 153. Chris Garcia testified that throughout his relationship with Mrs. Deutscher, all agreements, both for housing and employment, were done orally and Mrs. Deutscher's stated position was "written agreements were wholly unnecessary." CP 121. Chris Garcia further testified:

Myself, my Wife, Ramiro's Sister & Brother-in-law (who also resided on the property for a time,) often adamantly communicated concern that Ramiro desperately needed something in writing from Mrs. Deutscher. Ramiro was never susceptible to his family's pleas for him to request a contract, as he remained adamant that Marijke

would never go back on her word, and he couldn't make such a request of her. Ramiro is the type of individual that avoids any type of conflict and his soft-spoken and trusting nature made him agree with Mrs. Deutscher's statements that written agreements were unnecessary. He believed requesting a contract would be rude given his long-time relationship with Marijke.

CP 121.

While Mr. Cortes initially made his monthly payments of \$1250 in cash, eventually, Mrs. Deutscher began withholding wages and told him she would apply them directly to the purchase. CP 96, 152. Despite his paycheck only reflecting 40 hours of work, Mr. Cortes often worked 50-60 hours a week. CP 118, 121-122, 124-125, 127, 131, 152-153, 156-185.

Numerous people testified about Mr. Cortes's long hours and commitment to Mrs. Deutscher and honoring the contract:

- Garijo Wynn testified: "For 8 years, while I am out on my route, I have often seen Romero returning from work at all hours of the evening. I also work on Saturdays and I

have often seen Romero working Saturdays as well.” CP 118;

- Chris Garcia testified as to Mrs. Deutscher’s suspect employment practices and referred to Mr. Cortes as a “workaholic to a fault” and that it is “a significant weakness of his to his friends and family as he is constantly consumed by his employment and loyalty to his employer.” CP 122;
- Isabel Cortes testified: “Ramiro worked very late hours, not getting home until dark in the summer. He would work nearly every Saturday ... Ramiro would work blindly for her, any time. He would work holidays. She would call him and he would go work/fix things for her when they broke. He was incredibly dedicated and loyal to her.” CP 124-125;
- Jacqueline Herrera-Blanco testified: “He worked early mornings, days, nights, weekends, and even on his days off.” CP 127;

- Iliana Garcia testified: “In the summer, they would work from sunup to sundown, typically 6 days a week, and sometimes 7. There were 12-hour workdays...” CP 131.

Beyond the long hours worked by Mr. Cortes, Mrs. Deutscher had a practice of never paying her employees overtime no matter how many hours they worked. CP 149. Mr. Cortes never raised concerns because he always trusted his unpaid wages were going toward the purchase of the home. CP 122-123, 125, 152-153.

Throughout the years, Mr. Cortes made substantial improvements to the Property. He did interior work, had the driveway redone, and did extensive landscaping, planting numerous trees and other plants, and installed rocks and boulders throughout the Property. CP 153-154, 187-203. In January 2021, he paid \$1600 to repair the communal well. CP 154, 205. In November 2020, he paid \$4400 to install insulation and a vapor barrier at the 9040 home. CP 154, 207. He was responsible for all maintenance and repairs for both his home

and the 9040 home. CP 120, 125, 131, 153-154. He made these improvements because he believed he was buying the Property. Otherwise, he would not have spent his very limited income on these costly improvements. CP 154.

In May 2021, Mrs. Deutscher fired Mr. Cortes and told him she wanted to sell the Property. As of May 2021, based on his years of payments made through cash, labor, and withheld wages, Mr. Cortes has paid over \$280,000 on the contract.

Procedural History

The Deutschers filed an ejectment action against Mr. Cortes on November 16, 2021. Mr. Cortes filed counterclaims for breach of contract, and in the alternative, claims for fraud, unjust enrichment, and wage claims. CP 1-4, 20-30.

On June 3, 2022, the court heard the Deutschers' motion for partial summary judgment where they sought an ejectment order and dismissal of Mr. Cortes's counterclaims. Mr. Cortes opposed the motion with the support of seven declarations: his own, those of former employees of Mrs. Deutscher, former

residents of 9040, and friends and family who were familiar with his situation. CP 116-207. Mr. Cortes also produced over a year's worth of timecards evidencing he worked over 50 hours a week (despite only being paid for 40 hours), and documentation and photographs evidencing thousands of dollars he spent improving the Property. CP 156-203. In reply, the Deutschers simply asserted Mr. Cortes's claims were unbelievable. CP 224-250.

After hearing argument, the court granted the Deutschers' motion, dismissed Mr. Cortes's counterclaims and granted the writ of ejectment. CP 251-253. The court incorrectly noted there was no documentation he worked overtime or made any payments on the contract. RP 22. The court inferred from the fact he never reported any of the claimed unpaid income on his taxes as proof he did not work overtime or make any payments toward the purchase of the Property. RP 22, 24. Acknowledging it was undisputed he made payments of \$1250 for at least a year, the court still questioned

whether that rose “to the level of a material fact when we look at the value of the home that he was residing in, as those amounts appear to be less than what would be rent?” RP 22-23.

The court characterized Mr. Cortes’s statements as self-serving, and implied the declarations he provided were not credible because they were from his family and friends. RP 23. The court further implied it was unbelievable his payments/services could be seen as purchase payments. RP 23.

The court stated Mr. Cortes’s improvements to the Property were insufficient to constitute partial performance, comparing them to *Granquist v. McKean*, 29 Wn.2d 440, 444, 187 P.2d 623 (1947), where tenant improvements of “a few fruit trees” were not enough to remove an oral contract from the statute of frauds. RP 23. This was even though Mr. Cortes provided evidence of thousands of dollars of improvements to the Property. CP 153-154, 187-207. The court found no genuine issue of material fact existed and dismissed Mr. Cortes’s breach of contract claim. RP 23.

As to the fraud claim, the court dismissed it because he “resided in [the] home for thirteen years, either for free or at a low cost in return for his services.” RP 23-24. The court acknowledged there was “some evidence” from both Mr. Cortes and other individuals, but found it was not enough to meet the clear, cogent, and convincing standard. RP 24.

With respect to Mr. Cortes’s unjust enrichment claim, the court stated if his unpaid hours went for payments on the Property, then he should have included them in his taxes. RP 24. The court stated there was no evidence the Deutschers received a benefit at Mr. Cortes’s expense and dismissed the unjust enrichment claim. RP 24-25. The court dismissed Mr. Cortes’s claims and granted the Deutschers’ motion for ejectment. RP 25; CP 251-253.

Mr. Cortes sought discretionary review, which was accepted by the Court of Appeals. The Court of Appeals issued an unpublished decision upholding the dismissal of Mr. Cortes’s claims for breach of contract and fraud based on

reasons that were not briefed nor argued by either party. Mr. Cortes moved for reconsideration and the Court denied the motion, but nonetheless withdrew its prior decision and issued a new unpublished decision. On July 5, Mr. Cortes moved for reconsideration of the substituted decision, which on September 16, 2024, the Court denied the motion.

V. ARGUMENT

A. **The Court of Appeals’ decision that Mr. Cortes cannot show the existence of an oral contract without alleging the essential elements of a real estate contract is in conflict with Supreme Court decisions and published Court of Appeals decisions**

1. **The essential terms of a real estate contract only apply to future contracts, not contracts entered 16 years ago, and there is no requirement that contracts contain terms regarding taxes or interest**

In the Court of Appeals first opinion, they found Mr. Cortes could not prove the existence of an oral contract because he failed to provide terms of the “13 material terms of a real estate contract” as set forth in *Hubbell v. Ward*, 40 Wn.2d 779, 246 P.2d 468 (1952) and subsequently *Kruse v. Hemp*, 121

Wn.2d 715, 853 P.2d 1373 (1993) (hereinafter “*Hubbell* factors”). A-23 – A-24. After Mr. Cortes moved for reconsideration challenging this reasoning, the Court denied the motion but modified the opinion to remove all citations to *Kruse*. However, the Decision retained its reasoning and still references how Mr. Cortes cannot prove the essential terms of a contract without satisfying factors, “such as timing of the payments, payment of taxes, or even interest” and how “even viewing [Mr. Cortes’s evidence] in the light most favorable to Cortes....none of these statements introduce *any* evidence as to the essential terms of a real estate contract.” A-7 – A-8.

The Decision is in conflict with Supreme Court holdings in both *Hubbell* and *Kruse*, which held the “material and essential terms” apply to only *future* contracts (i.e., an option contract). *See Kruse*, 121 Wn.2d at 722; *Hubbell*, 40 Wn.2d at 785. The Decision is also in direct conflict with a published Court of Appeals decision, *Dankievitch v. Lawrence*, 22 Wn. App. 2d 749, 513 P.3d 804 (2022), *review denied*, 520 P.3d 965

(2022). The *Dankievitch* court came to the opposite conclusion when presented with nearly an identical argument. *Dankievitch* held *Hubbell*'s material terms only apply to *future* real estate contracts, not contracts already agreed to. *Id.* at 758 (“*Dankievitch* contends that *Hubbell* enumerates terms necessary to specifically enforce a *future* real state contract and that those terms are not necessary for her and Marti’s agreement. We agree.”).

The Decision further cited *Dankievitch* for the proposition that “[t]he failure to agree on an interest rate alone can preclude specific performance.” A-8. However, *Dankievitch* does not support the proposition that interest is an essential term of a contract.

What occurred in *Dankievitch* was that when referring to the terms of the contract, *Dankievitch* testified that “[n]othing was discussed about liability for interest.” 22 Wn. App. 2d at 752. Based on this statement in the record, the Court found it was unclear why the parties did not discuss interest: “[t]his may

be because the parties believed no interest would accrue, or it may be because the parties had not agreed on a rate. If the former, specific performance might be appropriate, if the latter, it would not.” *Id.* at 761.

The *Dankievitch* Court, reviewing a summary judgment ruling, was not in the position to make factual determinations, but in viewing the facts in the light most favorable to *Dankievitch*, stated: “For the purpose of this appeal, we construe this uncertainty as meaning that no interest would accrue.” *Id.* at 752, fn 3. The Court overturned the dismissal of *Dankievitch*’s breach of contract claim and remanded for a fact-finding hearing. *Dankievitch* does not stand for the proposition that a contract must contain a term regarding interest. The Decision provides no other authority that interest is an essential term in a contract. The Decision is therefore in conflict with a published Court of Appeals decision.

The Decision is in further conflict with what the Washington Supreme Court has held are the essential elements

of a contract: “The essential elements of a contract are subject matter, parties, promise, terms and conditions, and price or consideration.” *DePhillips v. Zolt Constr. Co.*, 136 Wn.2d 26, 31, 959 P.2d 1104 (1998). These five elements are the only essential elements necessary terms of a contract, not the terms the Decision indicates that Mr. Cortes must meet.

Mr. Cortes has set forth facts meeting these material elements of a contract: (1) subject matter—the Property; (2) parties—Mr. Cortes and the Deutschers; (3) promise—the Deutschers selling the Property to Mr. Cortes; (4) terms and conditions—monthly payments of \$2,250 until the purchase price was reached; and (5) price or consideration—\$270,000. Mr. Cortes alleged sufficient facts supporting the existence of a contract.

This was the contract, and the agreement did not call for the entry of an additional contract in the future. This oral contract is not a future real estate contract or an option contract subject to the *Hubbell* factors. By finding Mr. Cortes cannot

prevail as a matter of law on a breach of contract action because he did not allege the *Hubbell* factors, the Decision is in direct conflict with Supreme Court cases and a published decision of the Court of Appeals.

2. **The *Hubbell* factors are only applicable to specific performance, not requests for damages**

In addition to the Decision wrongly concluding Mr. Cortes needed to allege the *Hubbell* factors in order to obtain specific performance, the Decision went further and found Mr. Cortes needed to also do so in order to proceed on his claim for damages. A-8 – A-9, fn. 9.

However, the *Hubbell* factors only apply when a party is seeking specific performance because “to decree specific performance of a contract, the court must be able to determine what must be done to constitute performance.” 40 Wn. 2d at 785. *See also Kruse*, 121 Wn. 2d at 722-25; *Dankievitch*, 22 Wn. App. 2d at 758-760. The rationale for applying the *Hubbell* factors is not applicable when a party seeks damages. To Mr.

Cortes's knowledge, no published decision has ever denied damages on a breach of an oral contract based on the contract not containing the *Hubbell* factors. *See, e.g., Powers v. Hastings*, 93 Wn.2d 709, 612 P.2d 371 (1980); *Miller v. McCamish*, 78 Wn.2d 821, 479 P.2d 919 (1971) (neither case addressing *Hubbell* or analyzing whether the oral agreements contained the material terms of a real estate contract).

The Court erred by refusing to vacate the dismissal of Mr. Cortes's breach of contract claim as it pertained to damages. The Decision is thus in conflict with decisions of the Supreme Court and published Court of Appeals decisions.

3. **Even if Mr. Cortes was required to plead the *Hubbell* factors, the Decision overlooked the rule that a trial court has equitable authority to order the sale of real property under an oral agreement that lacks otherwise material terms**

Even if the Decision is correct that Mr. Cortes was required to plead the *Hubbell* factors on his breach of contract claim, the Court overlooked the equitable doctrine that the trial court could still award specific performance if the contract can

be completed by paying the full balance within a reasonable time. In *Hubbell*, even though it was concluded the parties' agreement lacked necessary terms, the Court nevertheless provided relief based on its equitable authority if the purchase could be completed within a reasonable time. 40 Wn. 2d at 787-788. This equitable rule has been repeatedly recognized by our Courts. *See, e.g., Kruse*, 121 Wn.2d at 722, fn 1; *Dankievitch*, 22 Wn. App. 2d at 758-760; *Valley Garage, Inc., v. Nyseth*, 4 Wn. App. 316, 481 P.2d 17 (1971).

If Mr. Cortes's evidence is taken as true as is required at summary judgment, then Mr. Cortes has in fact completed the oral contract and there would be no further amounts to pay. As of May 2021, Mr. Cortes has paid over \$280,000 on the contract, fulfilling his obligation. There is no reason why the trial court could not order specific performance on a contract that has been completed. If the trial court were to find any amounts remain on the contract, then Mr. Cortes should be given a reasonable amount of time to complete the contract. For

example, Mr. Cortes has been paying \$1500 into the registry every month since July 2022 and will continue to do so during the pendency of review, providing ample funds to apply to the contract.

If Mr. Cortes prevails at trial, the trial court retains its equitable authority to order specific performance on a contract if it can be completed within a reasonable time. The Court of Appeals denied Mr. Cortes this right, and in doing so, the Decision conflicts with Supreme Court decisions and published Court of Appeals decisions.

B. The Court of Appeals' decision conflicts with Supreme Court decisions and published Court of Appeals decisions holding that the determination and interpretation of an oral contract is not appropriate for summary judgment

The Court of Appeals found it was appropriate to dismiss Mr. Cortes's claim of breach of an oral contract at summary judgment despite published cases indicating this is not appropriate. Courts have repeatedly held that determinations regarding the existence and interpretation of oral contracts is

the role of fact-finder, not the role of the court at summary judgment. *See, e.g., Donatelli v. D.R. Strong Consulting Eng'rs, Inc.*, 179 Wn.2d 84, 93, fn. 1, 312 P.3d 620, 624 (2013) (internal citations omitted) (“The interpretation of an oral contract is generally not appropriate for summary judgment because the existence of an oral contract and its terms usually depends on the credibility of witnesses testifying to specific fact-based dealings which, if believed, would establish a contract and the contract's terms.”); *see also, Duckworth v. Langland*, 95 Wn. App. 1, 7, 988 P.2d 967 (1998); *Crown Plaza Corp. v. Synapse Software Sys., Inc.*, 87 Wn. App. 495, 500–01, 962 P.2d 824 (1997).

Mr. Cortes’s case illustrates why such determinations must be made at a trial. It is undisputed that Mr. Cortes and Mrs. Deutscher entered into an oral agreement related to the Property. Mr. Cortes and multiple witness attested Mrs. Deutscher stated she agreed to sell Mr. Cortes the Property. Mrs. Deutscher disputes this. A fact-finding hearing is needed

to decide who is more credible, not a court reviewing affidavits at summary judgment. The Court of Appeals erred when it upheld the dismissal of Mr. Cortes's breach of contract claim on summary judgment. The Decision is thus in conflict with decisions of the Supreme Court and published Court of Appeals decisions.

C. There is substantial public interest in this Court ensuring that courts are not used to further perpetuate fraud nor create additional barriers to low-income, LEP litigants

From the onset, this case has been about the statute of frauds. It was the primary issue before the court at summary judgment and the issue primarily briefed by the parties on appeal. The Decision ignores the statute of frauds and instead erects additional barriers for a party seeking to enforce an oral contract. The Decision runs contrary to established law as discussed above, and further is contrary to the purpose of the statute of frauds.

The "indiscriminate application" of the statute of frauds has often furthered the perpetration of fraud. *Mobley v. Harkins*,

14 Wn.2d 276, 283, 128 P.2d 289 (1942). In response, courts “developed the doctrine of equitable estoppel by reason of part performance, declaring that certain acts referable to an oral agreement would be regarded as taking that agreement out of the statute of frauds.” *Id.* The doctrine of part performance “guards against the utilization of the statute as a means for defrauding innocent parties who have been induced or permitted to change their position, in reliance upon oral agreements within its operation.” *Id.* at 284. Because “the purpose of the statute of frauds is to prevent a fraud, not to perpetuate one... courts of this state are empowered to disregard the statute when necessary to prevent a gross fraud from being practiced.” *Powers v. Hastings*, 20 Wn. App. 837, 842, 582 P.2d 897 (1978) *affirmed by Powers*, 93 Wn.2d 709.

What happened in the superior court and the Court of Appeals enabled fraud to go unchallenged. The superior court discounted Mr. Cortes’s testimony and the unrebutted testimony of others as self-serving and not enough because it

came from those who knew him and were supportive of his position. Mr. Cortes was faulted for not having written proof of the agreement, despite the evidence showing it was Mrs. Deutscher who insisted on oral contracts. The superior court further disregarded evidence of thousands of dollars of improvements and years of unpaid labor made by Mr. Cortes, instead faulting him for how he did his taxes.

Mr. Cortes appealed on the issue of whether he satisfied the statute of frauds, the issue at summary judgment. This was the issue argued and briefed by the parties. However, the Court of Appeals decided the case on a completely different basis that has no support in the law. The Court determined it was appropriate to dismiss Mr. Cortes's claims at summary judgment because he did not plead the *Hubbell* factors, a holding in conflict with published decisions as set forth above. More troubling, the Court of Appeals created an additional requirement that every contract must contain a term discussing

interest, even though “interest” is not an essential element of a contract.

Further, the Decision upholds the dismissal of Mr. Cortes’s fraud claim based on another untenable determination that he was “unable to demonstrate a genuine issue of material fact regarding the fourth element of a fraud claim: the speaker’s knowledge of the falsity of their representation.” A-11. As acknowledged in the Decision, even the Deutschers did not dispute this element had been met by Mr. Cortes. A-10. This holding was in error as the evidence provided by Mr. Cortes as well as the inferences taken in the light most favorable to him sufficiently showed that Mrs. Deutscher knew the statement she made that she was selling him the property was false.

Stated another way, the Decision found Mr. Cortes demonstrated a prima facie case that: (1) Mrs. Deutscher represented she was selling the Property to Mr. Cortes; (2) this representation was material and (3) false; (5) Mrs. Deutscher intended Mr. Cortes would act on the representation; (6) Mr.

Cortes was ignorant of the falsity of the representation; (7) Mr. Cortes relied on the truth of the representation; (8) Mr. Cortes had a right to rely on the representation; and (9) Mr. Cortes suffered damages. Given the Court found Mr. Cortes satisfied these eight elements, it is difficult to ascertain the Court's reasoning for finding the fourth element was not met. Either she intended to sell Mr. Cortes the Property and thus her change of position amounted to breach of contract, or she knew from the beginning they were not going to sell the Property to Mr. Cortes, and thus committed fraud.

The Court further bases its reasoning on the fact that no one has testified "that Marijke acted with knowledge of the falsity of her representation." A-12. But this ignores the fact that the Deutschers are now attempting to eject Mr. Cortes and his family from their home and are further disclaiming the existence of the agreement. These actions are her acting on the falsity of her representation. The Court was required to reasonably infer from these facts—as it must under the

summary judgment standard—that she knew the representation was false and is now trying to avoid the legal implication of that statement. The Court’s reasoning would essentially mean no one could ever prevail on a fraud claim unless they had a confession from the perpetrator of the fraud. Apart from such situations being extremely rare, this is not the appropriate standard for assessing a fraud claim at summary judgment.

The Decision has left Mr. Cortes without a remedy for over thirteen years of harm. The Decision says he cannot proceed with a breach of contract claim, either for specific performance or for damages because the oral contract entered in 2008 did not discuss things such as interest and taxes.

Conversely, the Decision states that even if Mrs. Deutscher promised to sell him the Property, Mr. Cortes could not recover under a theory of fraud because he cannot prove she intended to defraud him, irrespective of her subsequent conduct. Such a conclusion leads to absurd results and further insulates those who take advantage of low wage workers.

VI. CONCLUSION

The Court of Appeals' Decision deprives Mr. Cortes of his right to have his case heard by a fact-finder. The Decision upholds dismissals of his claims on grounds that were not argued by the parties and for reasons that have no support in the law. The Decision went so far as to say Mr. Cortes cannot recover under any contract theory because the contract he entered in 2008 did not address interest. Low-wage, LEP litigants are already systemically disadvantaged. The Decision further perpetuates fraud and leaves Mr. Cortes without any available remedy for damages he sustained over the course of thirteen years.

This Court should grant review and 1) reverse the superior court's dismissal of Mr. Cortes's claims of breach of contract and fraud, 2) find he has plead a prima facie case for each of his claims, 3) find that his evidence as produced would show partial or complete performance of the contract, thus

satisfying the statute of frauds, and 4) remand the case for further proceedings, including a trial.

CERTIFICATE OF COMPLIANCE WITH RAP 18.17

I certify that this document contains 4926 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 15th day of October 2024.

NORTHWEST JUSTICE PROJECT



Tyler Graber, WSBA #46780

Carrie Graf, WSBA #51999

Attorneys for Ramiro Cortes

CERTIFICATE OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that on this 15th day of October 2024, I caused to be delivered by E-service via the Washington State

Appellate Courts’ Portal, a true a correct copy of this Petition
for Review, addressed to the following:

John A Kesler III
BEAN, GENTRY, WHEELER & PETERNELL, PLLC
910 Lakeridge Way SW
Olympia, Washington 98502
jkesler@bgwp.net

DATED this 15th day of October 2024, at Olympia, WA.

NORTHWEST JUSTICE PROJECT

By: 
Tyler Graber, WSBA #46780

VII. APPENDIX

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

MARIJKE DEUTSCHER and ALLEN
DEUTSCHER, husband and wife, and
their marital community,

Respondents,

v.

RAMIRO CORTES[†], a single person,
and ALL OTHER OCCUPANTS OF
9234 MOUNTAIN VIEW ROAD SE,
YELM, WASHINGTON,

Appellant,

YOUR LANDSCAPE COMPANY, LLC,
a Washington limited liability company,

Third-Party Defendant.

No. 85898-0-I

DIVISION ONE

UNPUBLISHED OPINION

HAZELRIGG, A.C.J. — Ramiro Cortes lived in a residence jointly owned by his longtime employer Marijke Deutscher and her husband as their tenant. In May 2021, the Deutschers notified Cortes that they intended to sell the property and, when he refused to vacate, brought an action for ejectment. Cortes answered the suit and filed counterclaims against the Deutschers, asserting an equitable interest in the property and alleging, among other causes of action, breach of an oral contract to purchase the property, fraud, and unjust enrichment. The trial court

[†] Though the Deutschers set out their former employee's name as "Romero Cortez" in their pleadings, he spelled his own name "Ramiro Cortes" in all of his pleadings filed in the trial court and on appeal. We adopt the spelling used by the appellant.

granted the Deutschers' motion for summary judgment dismissal of Cortes' counterclaims against them and ordered the writ of ejectment. Because Cortes demonstrated a genuine issue of material fact as to his counterclaim for unjust enrichment, the court erred in ordering its dismissal. We reverse and remand on the unjust enrichment cause of action, but otherwise affirm.

FACTS

Ramiro Cortes was a longtime employee of Your Landscape Company LLC, a business owned by Marijke Deutscher.¹ On or about October 18, 2008, Marijke² and her husband, Allen Deutscher, purchased the property of 9234 Mountain View Road SE, Yelm, Washington (the property) for a purchase price of \$295,000. The property consisted of two residences: a 2,499-square-foot home at 9234 Mountain View Road and a 1,176-square-foot home at 9040 Mountain View Road. It was insured under a policy issued to Allen and Marijke Deutscher. While the parties fundamentally disagree about their arrangement regarding Cortes' access to and residence at the property, they agree that Cortes and his family moved onto the property at some point in 2008.³ There was no written lease agreement between

¹ Although Marijke did not provide specifics as to when Cortes began working for her business, there was evidence presented in her pleadings and supporting documents that she had previously stated in a text message to Cortes that she was sad his employment had to end "like this after nearly 20 years." Cortes asserts his employment with the Deutschers started in approximately 2002.

² The complaint for ejectment and damages was filed by Marijke and Allen Deutscher as a marital community and references to the litigation are ascribed to "the Deutschers." However, in the interest of clarity, in descriptions of the interactions between Cortes and Mrs. Deutscher we will use her first name, Marijke. No disrespect is intended.

³ Cortes contends that he approached Marijke asking for assistance to buy a home, he moved into the property thereafter, and then he and Marijke entered into an oral contract for Cortes to buy it from the Deutschers. In his answer to the complaint for ejectment, Cortes alleges that

the parties governing Cortes' use of the property.⁴ At various times, Cortes' extended family also lived on the property in the 9040 residence and paid rent to Marijke.⁵ Despite language in the complaint for ejectment wherein the Deutschers asserted Cortes "has never paid rent for the [p]remises and never been asked to pay rent for the [p]remises," the parties now agree on appeal that, at least for the first year of his tenancy, Cortes was to pay \$1,250 to Marijke monthly.⁶ Cortes initially paid Marijke cash for his monthly rent.⁷ He alleges that Marijke eventually started withholding earnings from his paycheck in order to meet the monthly payment obligations. The Deutschers deny that any money was withheld from Cortes' checks and aver that, instead, he simply stopped paying rent altogether when he encountered personal hardships.

Cortes' employment with Your Landscape Company was terminated in May 2021. Shortly thereafter, the Deutschers decided to sell the property and notified Cortes that he would need to vacate it. Cortes refused and, on November 15, the Deutschers filed a complaint for ejectment in Thurston County Superior Court. On

Marijke "let [him] know that she found a potential home for him" after Cortes approached her for help but prior to the Deutschers purchasing the property.

In contrast, the Deutschers assert in briefing that they allowed Cortes and his family to move into the 9234 residence on the property in order to help him and his family. At the time of the complaint for ejectment, Cortes asserted that he, his two children, his disabled brother, and his elderly mother lived in the 9234 residence.

⁴ Marijke asserted that the agreement was "mainly oral, because Ramiro did not understand contracts much or, you know, even if I explained things to him, I sometimes had to do it two or three times before he really got it." Cortes' answer to the Deutschers' complaint asserts his primary language is Spanish and he characterizes his English-language proficiency as "limited."

⁵ Marijke asserts that her realtor, Margo Street, has communicated with the 9040 tenants through her business, Networks Real Estate LLC, screened some of them, and deposited their rent checks at Marijke's direction.

⁶ Cortes further asserts that another \$1,000 "payment" was credited to his monthly payments by recruiting tenants to live in the 9040 residence on the property.

⁷ Again, directly contradicting the language in the original complaint, Marijke admitted in deposition testimony that cash rental payments were made for between eight months and one year. Cortes does not provide a time frame for his cash payments for rent.

December 29, Cortes responded with his answers, affirmative defenses, counterclaims against the Deutschers, and third-party claims against Your Landscape Company.⁸ His counterclaims included allegations that the Deutschers violated an oral contract for Cortes to purchase the property, Marijke committed fraud, and the Deutschers were unjustly enriched by Cortes' uncompensated improvements to the property. On February 18, 2022, the Deutschers moved for partial summary judgment on the ejectment action and Cortes' three counterclaims against them. Cortes filed a response on May 20, arguing that there were material issues of fact as to his three counterclaims that necessarily prevented their dismissal and precluded an order of ejectment.

On June 3, the trial court conducted a hearing on the Deutschers' motion. After considering the argument and briefs of the parties, including multiple declarations in support of each party's position, the court granted the Deutschers' motion for partial summary judgment dismissing Cortes' counterclaims and ordered a writ of ejectment. On June 8, Cortes filed a notice for discretionary review in Division Two of this court. A commissioner denied review and Cortes moved to modify that ruling. Cortes' motion to modify the commissioner's ruling was granted, as was review of the case, which was subsequently transferred to this division.

⁸ The claims against Your Landscape Company are not before this court, as they survived the Deutschers' motion for summary judgment and are proceeding to trial.

ANALYSIS

Cortes argues that the summary judgment dismissal of his counterclaims was improper because he established that there were genuine issues of material fact as to each of his three causes of action and that the court similarly erred as to the order for writ of ejectment.

This court reviews a summary judgment order de novo. *Berry v. King County*, 19 Wn. App. 2d 583, 587, 501 P.3d 150 (2021). “A party seeking summary judgment bears the initial burden to show the absence of a genuine issue of material fact.” *Hung Dang v. Floyd, Pflueger & Ringer, PS*, 24 Wn. App. 2d 145, 158, 518 P.3d 671 (2022), *review denied*, 200 Wn.2d 1032 (2023). Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact.” *Berry*, 19 Wn. App. 2d at 587 (quoting CR 56(c)). All facts and reasonable inferences are viewed in the light most favorable to the nonmoving party. *Id.* “The moving party is held to a strict standard” and any doubts regarding the existence of a genuine issue of material fact are resolved against the moving party. *Atherton Condo. Apt.-Owners Ass’n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990).

If the moving party meets their initial burden, then the burden shifts to the nonmoving party to show the existence of a genuine issue of material fact. *Hung Dang*, 24 Wn. App. 2d at 158. The nonmoving party must provide “more than conclusory allegations, speculative statements, or argumentative assertions of the existence of unresolved factual issues” to survive summary judgment. *Walker v.*

King County Metro, 126 Wn. App. 904, 912, 109 P.3d 836 (2005). Absent specific circumstances, at the summary judgment stage, the court must only determine whether the nonmoving party has met a burden of production, “not whether the evidence produced is persuasive,” as that role belongs to the jury. *Renz v. Spokane Eye Clinic, PS*, 144 Wn. App. 611, 623, 60 P.3d 106 (2002). Accordingly, when ruling on a motion for summary judgment, the “trial court may not weigh the evidence, assess credibility, consider the likelihood that the evidence will prove true, or otherwise resolve issues of material fact.” *Haley v. Amazon.com Servs., LLC*, 25 Wn. App. 2d 207, 217, 522 P.3d 80 (2022). Although summary judgment exists to avoid pointless trials where no material fact is in dispute, a trial is “absolutely necessary where there is a genuine issue as to any material fact.” *Id.* (quoting *Balise v. Underwood*, 62 Wn.2d 195, 199, 381 P.2d 966 (1963)). Finally, and separately from the summary judgment framework, we may affirm on any basis supported by the record on appeal. *Performance Constr., LLC v. Glenn*, 195 Wn. App. 406, 415, 380 P.3d 618 (2016).

I. Counterclaim for Breach of Contract

Cortes alleges that the Deuschers breached an oral contract between them to purchase the property. To prevail on a breach of contract claim, a plaintiff must show that a valid agreement existed between the parties, the agreement was breached, and the plaintiff suffered damages. *Univ. of Wash. v. Gov’t Emp. Ins. Co.*, 200 Wn. App. 455, 467, 404 P.3d 559 (2017). Generally, to survive summary judgment, a party must make a prima facie showing of each of these three elements. See *Boguch v. Landover Corp.*, 153 Wn. App. 595, 609, 224 P.3d 795

(2009) (explaining if plaintiff fails to make prima facie showing on element essential to case, summary judgment should be granted). However, because Cortes expressly requested specific performance of the alleged contract in his counterclaim, he must meet a heightened standard of proof, even at the summary judgment stage.

“[W]here specific performance of the agreement is sought, the contract must ‘be prove[d] by evidence that is clear and unequivocal and which leaves no doubt as to the terms, character, and existence of the contract.’” *Berg v. Ting*, 125 Wn.2d 544, 556, 886 P.2d 564 (1995) (internal quotation marks omitted) (quoting *Miller v. McCamish*, 78 Wn.2d 821, 829, 479 P.2d 919). In the context of summary judgment, this standard requires us to determine “whether, viewing the evidence in the light most favorable to the nonmoving party, a rational trier of fact could find that the nonmoving party supported [their] claim with clear, cogent, and convincing evidence.” *In re Est. of Kolesar*, 27 Wn. App. 2d 166, 176, 532 P.3d 170 (2023) (internal quotation marks omitted) (quoting *Woody v. Stapp*, 146 Wn. App. 16, 22, 189 P.3d 807 (2008)).

Cortes asserts that he had an oral contract with Marijke to purchase the property for \$270,000 and that he made monthly payments toward the sale amount. He alleges that he was to make monthly payments of \$2,250 to Marijke, which were later lowered to \$1,800 by agreement, until the purchase price of \$270,000 was reached. The monthly payment would consist of \$1,250 in cash and a \$1,000 “credit” for Cortes’ assistance in obtaining renters for the 9040 residence. However, Cortes fails to present facts as to the general terms of the

alleged contract, such as timing of the payments, payment of taxes, or even interest. The failure to agree on an interest rate alone can preclude specific performance. *Dankievitch v. Lawrence*, 22 Wn. App. 2d 749, 761, 513 P.3d 804, review denied, 200 Wn.2d 1017 (2022).

Cortes submitted declarations from several witnesses who heard statements made by Marijke affirming the alleged contract, including his friend, sister, nephew, and two nieces. These declarations include general statements from each of the witnesses about what they heard concerning the existence of a contract to buy the property, such as Cortes' niece, who explained that Marijke told her "eventually the property would be Ramiro's." However, even viewing these declarations in the light most favorable to Cortes as the nonmoving party at summary judgment, none of these statements introduce *any* evidence as to the essential terms of a real estate contract, much less evidence sufficient to satisfy the clear, cogent and convincing standard that applies in the specific procedural posture before us. Therefore, Cortes is unable to meet the heightened burden required by his request for specific performance of the purported oral contract to purchase the property. Because he fails to satisfy this initial burden, we need not reach his remaining arguments on this issue. The trial court did not err in dismissing the counterclaim for breach of contract.⁹

⁹ In the alternative to his request for specific performance, Cortes also sought money damages in his claim for breach of contract. While the heightened evidentiary standard for specific performance is inapplicable to Cortes' request for damages, the outcome here is the same. See *Powers v. Hastings*, 93 Wn.2d 709, 716, 612 P.2d 371 (1980). To prevail on a breach of contract claim for damages, Cortes must still "prove that a valid agreement existed between the parties." *Univ. of Wash*, 200 Wn. App. at 467.

Cortes not only fails to present facts as to the general terms of the alleged contract but he also fails to present evidence that shows the existence of any real estate contract between the

II. Writ of Ejectment

In a related assignment of error, Cortes also challenges the court's order for a writ of ejectment. An ejectment is a legal remedy used to evict tenants who have not paid rent. *Bar K Land Co. v. Webb*, 72 Wn. App. 380, 383, 864 P.2d 435 (1993). The entirety of Cortes' argument on this issue is premised on his claim of equitable title based on the alleged oral contract to purchase the property. In his counterclaims, Cortes expressly sought specific performance of the contract. Had he prevailed at the summary judgment stage, the issuance of the order on the writ would have been premature. However, as Cortes' breach of contract claim was properly dismissed by the trial court, it did not err when it issued the order on writ of ejectment.

III. Counterclaim for Fraud

As an alternative cause of action, Cortes also brought a counterclaim against the Deutschers for fraud, alleging that Marijke made a material and false misrepresentation to him that he was purchasing the property from her for \$270,000. To prove fraud in a civil context, the plaintiff must establish each of the following elements:

(1) A representation of an existing fact, (2) its materiality, (3) its falsity, (4) the speaker's knowledge of its falsity or ignorance of its truth, (5) [their] intent that it should be acted on by the person to whom it is made, (6) ignorance of its falsity on the part of the person to whom it is made, (7) the latter's reliance on the truth of the representation, (8) [their] right to rely upon it, (9) [their] consequent damage.

parties. Viewed in the light most favorable to Cortes, the evidence shows no issue of material fact, and thus, summary judgment dismissal was proper.

Kirkham v. Smith, 106 Wn. App. 177, 183, 23 P.3d 10 (2001). If Cortes is unable to demonstrate a genuine issue of material fact on *any* of the nine factors of fraud, dismissal of this claim was proper. The Deuschers specifically challenge elements (1), (2), and (9), however, we evaluate each element in our de novo review of this summary judgment action and conclude that Cortes did not produce a prima facie showing of element (4).

The trial court acknowledged that Cortes had presented evidence in support of his fraud claim, but dismissed it nonetheless, ruling that

[t]he nine elements of fraud *have not been prove[d] by clear, cogent and convincing evidence*. There is some evidence—I'll acknowledge that there are declarations from other individuals, not just Mr. Corte[s], but the *standard required has not been met*.

(Emphasis added.) In briefing, the Deuschers also state that Cortes must establish the elements of fraud under the same evidentiary standard as they aver applied to the breach of contract counterclaim. Both the trial court and the Deuschers are mistaken. The heightened standard applied only to the breach of contract claim and only because he expressly sought specific performance of the purported contract. See *Berg*, 125 Wn.2d at 556; *Kolesar*, 27 Wn. App. 2d at 176. His prayer for relief specifically limits that remedy to that one cause of action: “Cortes respectfully request[s] the following relief: . . . [a]n order requiring *specific performance of the contract* entered into for the sale of the [p]roperty; . . . [i]n the alternative, an award of damages in [an] amount to be prove[d] at trial.” (Emphasis added.) Cortes did not, and more critically *could not*, seek specific performance in either a claim for fraud or unjust enrichment. In the procedural posture of this case, Cortes need only make a prima facie showing that there is a genuine issue of

material fact for each element of his fraud claim to survive summary judgment. *Hung Dang*, 24 Wn. App. at 158.

For this cause of action, Cortes relied on his own declaration, as well as those of his friends and family that he offered to support his assertion of the existence of an oral contract. Despite the Deutschers' focus in briefing on their erroneous argument about the evidentiary standard, the evidence Cortes produced was sufficient to raise a genuine issue of material fact as to whether Marijke made the requisite representation to him. The evidence was also sufficient to establish a genuine issue of material fact as to whether the purported representation was material, as Cortes' witnesses stated that he made improvements to the property and that monthly payments were made to Marijke toward the purchase of the property based on that representation. Cortes produced an invoice marked "Paid cash," photographs, and testimony that he made uncompensated improvements to the property, which also establish a genuine issue of material fact that he incurred damages. Therefore, the only three elements of this cause of action that the Deutschers contest have been met for purposes of summary judgment.

Nevertheless, as we engage in de novo review of orders on summary judgment, we conclude that Cortes is unable to demonstrate a genuine issue of material fact regarding the fourth element of a fraud claim: the speaker's knowledge of the falsity of their representation. Taking Cortes' evidence and associated inferences in the light most favorable to him, there is nothing to demonstrate that Marijke made a promise to him about the purchase of the

property *that she knew to be false*. Although Cortes and his witnesses all claim awareness of the existence of the agreement, none asserted that Marijke acted with knowledge of the falsity of her representation. Again, we may affirm on any basis supported by the record. *See Performance Constr.*, 195 Wn. App. at 415. Because Cortes cannot show a genuine issue of material fact on an essential element of the cause of action, summary judgment dismissal of the claim for fraud was proper.

IV. Counterclaim for Unjust Enrichment

Cortes' final cause of action, also pleaded in the alternative to breach of contract, alleged that the Deutschers were unjustly enriched by the repairs and improvements he made on the property without compensation. Unjust enrichment is an equitable claim. *Columbia Cmty. Bank v. Newman Park, LLC*, 177 Wn.2d 566, 574, 304 P.3d 472 (2013). "Unjust enrichment allows a party to recover the value of a benefit it has conferred on another party, absent any contractual relationship, if fairness and justice require it." *Samra v. Singh*, 15 Wn. App. 2d 823, 837, 479 P.3d 713 (2020). "To prevail on a claim for unjust enrichment, the plaintiff must show that (1) the defendant received a benefit, (2) the received benefit is at the plaintiff's expense, and (3) the circumstances make it unjust for the defendant to retain the benefit without payment." *Id.* Again, in the context of summary judgment, Cortes need only make a prima facie showing that there is a genuine issue of material fact as to each of these elements. *See Crabtree v. Jefferson County Pub. Hosp. Dist. No. 2*, 20 Wn. App. 2d 493, 507, 500 P.3d 203

(2021) (“A motion for summary judgment must be denied if the nonmoving party . . . shows specific facts that show a genuine issue of material fact.”).

Cortes argues that the trial court improperly dismissed this claim by looking at the work he performed for Marijke as an employee and the withholdings on his tax return, rather than at the thousands of dollars of improvements he asserts that he made to the property, including those for the 9040 residence despite the fact that he never occupied that home. This assertion is supported by the record; in analyzing the evidence offered in support of this cause of action, the court stated,

With respect to unjust enrichment, I look at the record. Mr. Corte[s] was paid for the work that he did for Ms. Deutscher. At times, he was paid even when he was not working, and the parties agreed to that. There’s no evidence that [Cortes] made the mortgage payments on this home. There’s no evidence that he paid the property taxes on this home, and there’s no evidence that he collected the rent from the residence that is on the property. If he did have \$270,000 withheld from his tax returns over those 13 years as a housing allowance, a significant benefit, that is not evidenced.

It is clear that the court focused on the evidence highlighted by the Deutschers to the exclusion of the evidence presented by Cortes that pertained to the crux of his claim: the tangible improvements to the property for which he was not compensated. Further, the ruling indicates that rather than taking all inferences in favor of Cortes as the nonmoving party, the court weighed the evidence presented by each side. This is a misapplication of the summary judgment standard.¹⁰ See, e.g., *Haley*, 25 Wn. App. 2d at 217 (“On summary judgment, the trial court may not

¹⁰ The Deutschers similarly do not address property improvements in their argument regarding unjust enrichment. Instead, they assert that the trial court properly found that the evidence potentially shows that the labor Cortes claimed he performed on the property was the equivalent of a reasonable amount of rent. This argument fails to account for the expenses Cortes said he incurred for repairs and maintenance completed by others or for the replacement of appliances or fixtures.

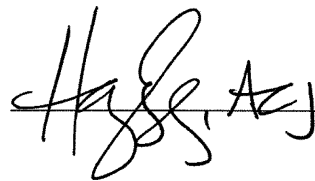
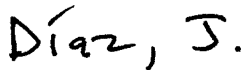

weigh the evidence, assess credibility, consider the likelihood that the evidence will prove true, or otherwise resolve issues of material fact.”); *Am. Exp. Centurion Bank v. Stratman*, 172 Wn. App. 667, 676, 292 P.3d 128 (2012) (“The trial court does not weigh the evidence or assess witness credibility on a motion for summary judgment.”); *Silves v. King*, 93 Wn. App. 873, 880, 970 P.2d 790 (1999) (“A genuine issue of credibility should not be resolved at summary judgment.”).

Again, as with each of the other causes of action, we review the dismissal of this claim de novo and do not weigh the evidence or make credibility determinations. *Bale v. Allison*, 173 Wn. App. 435, 458, 294 P.3d 789 (2013) (“The function of the appellate court is to review the action of the trial courts. Appellate courts do not hear or weigh evidence, find facts, or substitute their opinions for those of the trier-of-fact.” (quoting *Quinn v. Cherry Lane Auto Plaza, Inc.*, 153 Wn. App. 710, 717, 225 P.3d 266 (2009))). The evidence Cortes presented in support of his counterclaim for unjust enrichment consisted of photographs of landscaping improvements on the property, an invoice for a new vapor barrier and removal and replacement of insulation in the 9040 residence, and an invoice marked “Paid cash” for a pressure check of the well that provided water to both residences on the property. He also provided a declaration asserting that he performed substantial landscaping work and repairs on the property, including replacement of fixtures and appliances. He declared that he had not been compensated for this work, so, if there was no enforceable contract to buy the property, the improvements would benefit only the Deutschers. In response, the Deutschers claimed that they received no benefit at Cortes’ expense; he

worked for Marijke and she paid him for his labor.¹¹ This discrepancy in testimony is precisely the sort that precludes summary judgment because only a fact-finder may weigh credibility to resolve this type of competing evidence. Similarly, the determination of the persuasiveness of the invoices and photographs that Cortes has produced is reserved for the fact-finder. Again, the burden at the summary judgment stage is one of production, not persuasion. *Renz*, 114 Wn. App. at 623. The trial court erred in dismissing Cortes' counterclaim for unjust enrichment.

We affirm in part, reverse in part, and remand for further proceedings.

WE CONCUR:

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¹¹ The Deutschers' response to this cause of action also included an argument that Cortes may not claim unjust enrichment because he has "unclean hands" for purportedly not reporting to the Internal Revenue Service the \$270,000 he alleges was withheld from his paycheck. Aside from the fact that this framing rests on a misapplication of the unclean hands doctrine, we decline to address this argument as Cortes' unjust enrichment claim pertained only to improvements to the property.

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No. 85898-0-I

DIVISION ONE

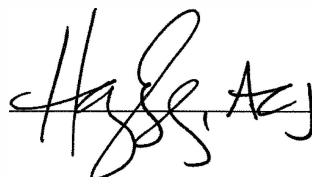
ORDER DENYING MOTION
FOR RECONSIDERATION
OR PUBLICATION

Appellant filed a motion for reconsideration or, in the alternative, publication on July 5, 2024. A panel of the court called for an answer to that motion which was filed by respondents on August 7, 2024. After consideration of the motion and response, the panel has determined that the motion should be denied.

Now, therefore, it is hereby

ORDERED that the motion for reconsideration or, in the alternative, publication is denied.

FOR THE COURT:

A handwritten signature in black ink, appearing to be "H. S. A. J.", is written over a horizontal line.

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DIVISION ONE

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granted the Deutschers' motion for summary judgment dismissal of Cortes' counterclaims against them and ordered the writ of ejectment. Because Cortes demonstrated a genuine issue of material fact as to his counterclaim for unjust enrichment, the court erred in ordering its dismissal. We reverse and remand on the unjust enrichment cause of action, but otherwise affirm.

FACTS

Ramiro Cortes was a longtime employee of Your Landscape Company LLC, a business owned by Marijke Deutscher.¹ On or about October 18, 2008, Marijke² and her husband, Allen Deutscher, purchased the property of 9234 Mountain View Road SE, Yelm, Washington (the property) for a purchase price of \$295,000. The property consisted of two residences: a 2,499-square-foot home at 9234 Mountain View Road and a 1,176-square-foot home at 9040 Mountain View Road. It was insured under a policy issued to Allen and Marijke Deutscher. While the parties fundamentally disagree about their arrangement regarding Cortes' access to and residence at the property, they agree that Cortes and his family moved onto the property at some point in 2008.³ There was no written lease agreement between

¹ Although Marijke did not provide specifics as to when Cortes began working for her business, there was evidence presented in her pleadings and supporting documents that she had previously stated in a text message to Cortes that she was sad his employment had to end "like this after nearly 20 years." Cortes asserts his employment with the Deutschers started in approximately 2002.

² The complaint for ejectment and damages was filed by Marijke and Allen Deutscher as a marital community and references to the litigation are ascribed to "the Deutschers." However, in the interest of clarity, in descriptions of the interactions between Cortes and Mrs. Deutscher we will use her first name, Marijke. No disrespect is intended.

³ Cortes contends that he approached Marijke asking for assistance to buy a home, he moved into the property thereafter, and then he and Marijke entered into an oral contract for Cortes to buy it from the Deutschers. In his answer to the complaint for ejectment, Cortes alleges that

the parties governing Cortes' use of the property.⁴ At various times, Cortes' extended family also lived on the property in the 9040 residence and paid rent to Marijke.⁵ Despite language in the complaint for ejectment wherein the Deutschers asserted Cortes "has never paid rent for the [p]remises and never been asked to pay rent for the [p]remises," the parties now agree on appeal that, at least for the first year of his tenancy, Cortes was to pay \$1,250 to Marijke monthly.⁶ Cortes initially paid Marijke cash for his monthly rent.⁷ He alleges that Marijke eventually started withholding earnings from his paycheck in order to meet the monthly payment obligations. The Deutschers deny that any money was withheld from Cortes' checks and aver that, instead, he simply stopped paying rent altogether when he encountered personal hardships.

Cortes' employment with Your Landscape Company was terminated in May 2021. Shortly thereafter, the Deutschers decided to sell the property and notified Cortes that he would need to vacate it. Cortes refused and, on November 15, the Deutschers filed a complaint for ejectment in Thurston County Superior Court. On

Marijke "let [him] know that she found a potential home for him" after Cortes approached her for help but prior to the Deutschers purchasing the property.

In contrast, the Deutschers assert in briefing that they allowed Cortes and his family to move into the 9234 residence on the property in order to help him and his family. At the time of the complaint for ejectment, Cortes asserted that he, his two children, his disabled brother, and his elderly mother lived in the 9234 residence.

⁴ Marijke asserted that the agreement was "mainly oral, because Ramiro did not understand contracts much or, you know, even if I explained things to him, I sometimes had to do it two or three times before he really got it." Cortes' answer to the Deutschers' complaint asserts his primary language is Spanish and he characterizes his English-language proficiency as "limited."

⁵ Marijke asserts that her realtor, Margo Street, has communicated with the 9040 tenants through her business, Networks Real Estate LLC, screened some of them, and deposited their rent checks at Marijke's direction.

⁶ Cortes further asserts that another \$1,000 "payment" was credited to his monthly payments by recruiting tenants to live in the 9040 residence on the property.

⁷ Again, directly contradicting the language in the original complaint, Marijke admitted in deposition testimony that cash rental payments were made for between eight months and one year. Cortes does not provide a time frame for his cash payments for rent.

December 29, Cortes responded with his answers, affirmative defenses, counterclaims against the Deutschers, and third-party claims against Your Landscape Company.⁸ His counterclaims included allegations that the Deutschers violated an oral contract for Cortes to purchase the property, Marijke committed fraud, and the Deutschers were unjustly enriched by Cortes' uncompensated improvements to the property. On February 18, 2022, the Deutschers moved for partial summary judgment on the ejectment action and Cortes' three counterclaims against them. Cortes filed a response on May 20, arguing that there were material issues of fact as to his three counterclaims that necessarily prevented their dismissal and precluded an order of ejectment.

On June 3, the trial court conducted a hearing on the Deutschers' motion. After considering the argument and briefs of the parties, including multiple declarations in support of each party's position, the court granted the Deutschers' motion for partial summary judgment dismissing Cortes' counterclaims and ordered a writ of ejectment. On June 8, Cortes filed a notice for discretionary review in Division Two of this court. A commissioner denied review and Cortes moved to modify that ruling. Cortes' motion to modify the commissioner's ruling was granted, as was review of the case, which was subsequently transferred to this division.

⁸ The claims against Your Landscape Company are not before this court, as they survived the Deutschers' motion for summary judgment and are proceeding to trial.

ANALYSIS

Cortes argues that the summary judgment dismissal of his counterclaims was improper because he established that there were genuine issues of material fact as to each of his three causes of action and that the court similarly erred as to the order for writ of ejectment.

This court reviews a summary judgment order de novo. *Berry v. King County*, 19 Wn. App. 2d 583, 587, 501 P.3d 150 (2021). “A party seeking summary judgment bears the initial burden to show the absence of a genuine issue of material fact.” *Hung Dang v. Floyd, Pflueger & Ringer, PS*, 24 Wn. App. 2d 145, 158, 518 P.3d 671 (2022), *review denied*, 200 Wn.2d 1032 (2023). Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact.” *Berry*, 19 Wn. App. 2d at 587 (quoting CR 56(c)). All facts and reasonable inferences are viewed in the light most favorable to the nonmoving party. *Id.* “The moving party is held to a strict standard” and any doubts regarding the existence of a genuine issue of material fact are resolved against the moving party. *Atherton Condo. Apt.-Owners Ass’n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990).

If the moving party meets their initial burden, then the burden shifts to the nonmoving party to show the existence of a genuine issue of material fact. *Hung Dang*, 24 Wn. App. 2d at 158. The nonmoving party must provide “more than conclusory allegations, speculative statements, or argumentative assertions of the existence of unresolved factual issues” to survive summary judgment. *Walker v.*

King County Metro, 126 Wn. App. 904, 912, 109 P.3d 836 (2005). Absent specific circumstances, at the summary judgment stage, the court must only determine whether the nonmoving party has met a burden of production, “not whether the evidence produced is persuasive,” as that role belongs to the jury. *Renz v. Spokane Eye Clinic, PS*, 144 Wn. App. 611, 623, 60 P.3d 106 (2002). Accordingly, when ruling on a motion for summary judgment, the “trial court may not weigh the evidence, assess credibility, consider the likelihood that the evidence will prove true, or otherwise resolve issues of material fact.” *Haley v. Amazon.com Servs., LLC*, 25 Wn. App. 2d 207, 217, 522 P.3d 80 (2022). Although summary judgment exists to avoid pointless trials where no material fact is in dispute, a trial is “absolutely necessary where there is a genuine issue as to any material fact.” *Id.* (quoting *Balise v. Underwood*, 62 Wn.2d 195, 199, 381 P.2d 966 (1963)). Finally, and separately from the summary judgment framework, we may affirm on any basis supported by the record on appeal. *Performance Constr., LLC v. Glenn*, 195 Wn. App. 406, 415, 380 P.3d 618 (2016).

I. Counterclaim for Breach of Contract

Cortes alleges that the Deuschers breached an oral contract between them to purchase the property. To prevail on a breach of contract claim, a plaintiff must show that a valid agreement existed between the parties, the agreement was breached, and the plaintiff suffered damages. *Univ. of Wash. v. Gov’t Emp. Ins. Co.*, 200 Wn. App. 455, 467, 404 P.3d 559 (2017). Generally, to survive summary judgment, a party must make a prima facie showing of each of these three elements. See *Boguch v. Landover Corp.*, 153 Wn. App. 595, 609, 224 P.3d 795

(2009) (explaining if plaintiff fails to make prima facie showing on element essential to case, summary judgment should be granted). However, because Cortes expressly requested specific performance of the alleged contract in his counterclaim, he must meet a heightened standard of proof, even at the summary judgment stage.

“[W]here specific performance of the agreement is sought, the contract must ‘be prove[d] by evidence that is clear and unequivocal and which leaves no doubt as to the terms, character, and existence of the contract.’” *Berg v. Ting*, 125 Wn.2d 544, 556, 886 P.2d 564 (1995) (internal quotation marks omitted) (quoting *Miller v. McCamish*, 78 Wn.2d 821, 829, 479 P.2d 919). In the context of summary judgment, this standard requires us to determine “whether, viewing the evidence in the light most favorable to the nonmoving party, a rational trier of fact could find that the nonmoving party supported [their] claim with clear, cogent, and convincing evidence.” *In re Est. of Kolesar*, 27 Wn. App. 2d 166, 176, 532 P.3d 170 (2023) (internal quotation marks omitted) (quoting *Woody v. Stapp*, 146 Wn. App. 16, 22, 189 P.3d 807 (2008)).

Our state Supreme Court has provided 13 material terms of a real estate contract as follows:

(a) time and manner for transferring title; (b) procedure for declaring forfeiture; (c) allocation of risk with respect to damage or destruction; (d) insurance provisions; (e) responsibility for: (i) taxes, (ii) repairs, and (iii) water and utilities; (f) restrictions, if any, on: (i) capital improvements, (ii) liens, (iii) removal or replacement

of personal property, and (iv) types of use; (g) time and place for monthly payments; and (h) indemnification provisions.

Kruse v. Hemp, 121 Wn.2d 715, 853 P.2d 1373 (1993). Cortes asserts that he had an oral contract with Marijke to purchase the property for \$270,000 and that he made monthly payments toward the sale amount. He alleges that he was to make monthly payments of \$2,250 to Marijke, which were later lowered to \$1,800 by agreement, until the purchase price of \$270,000 was reached. The monthly payment would consist of \$1,250 in cash and a \$1,000 “credit” for Cortes’ assistance in obtaining renters for the 9040 residence. While this evidence arguably supports one term of a real estate contract, time and place for monthly payments, Cortes does not offer any facts as to the other terms outlined in *Kruse*. Neither does he present facts as to the general terms of a contract, such as timing of the payments, payment of taxes, or interest.

Cortes also submitted declarations from several witnesses who heard statements made by Marijke affirming the alleged contract, including his friend, sister, nephew, and two nieces. These declarations include general statements from each of the witnesses about what they heard concerning the existence of a contract to buy the property, such as Cortes’ niece, who explained that Marijke told her “eventually the property would be Ramiro’s.” However, even viewing these declarations in the light most favorable to Cortes as the nonmoving party at summary judgment, none of these statements introduce *any* evidence as to the essential terms of a real estate contract, much less evidence sufficient to satisfy the clear, cogent and convincing standard that applies in the specific procedural posture before us. Therefore, Cortes is unable to meet the heightened burden

required by his request for specific performance of the purported oral contract to purchase the property. Because he fails to satisfy this initial burden, we need not reach his remaining arguments on this issue. The trial court did not err in dismissing the counterclaim for breach of contract.

II. Writ of Ejectment

In a related assignment of error, Cortes also challenges the court's order for a writ of ejectment. An ejectment is a legal remedy used to evict tenants who have not paid rent. *Bar K Land Co. v. Webb*, 72 Wn. App. 380, 383, 864 P.2d 435 (1993). The entirety of Cortes' argument on this issue is premised on his claim of equitable title based on the alleged oral contract to purchase the property. In his counterclaims, Cortes expressly sought specific performance of the contract. Had he prevailed at the summary judgment stage, the issuance of the order on the writ would have been premature. However, as Cortes' breach of contract claim was properly dismissed by the trial court, it did not err when it issued the order on writ of ejectment.

III. Counterclaim for Fraud

As an alternative cause of action, Cortes also brought a counterclaim against the Deutschers for fraud, alleging that Marijke made a material and false misrepresentation to him that he was purchasing the property from her for \$270,000. To prove fraud in a civil context, the plaintiff must establish each of the following elements:

- (1) A representation of an existing fact, (2) its materiality, (3) its falsity, (4) the speaker's knowledge of its falsity or ignorance of its

truth, (5) [their] intent that it should be acted on by the person to whom it is made, (6) ignorance of its falsity on the part of the person to whom it is made, (7) the latter's reliance on the truth of the representation, (8) [their] right to rely upon it, (9) [their] consequent damage.

Kirkham v. Smith, 106 Wn. App. 177, 183, 23 P.3d 10 (2001). If Cortes is unable to demonstrate a genuine issue of material fact on *any* of the nine factors of fraud, dismissal of this claim was proper. The Deutschers specifically challenge elements (1), (2), and (9), however, we evaluate each element in our de novo review of this summary judgment action and conclude that Cortes did not produce a prima facie showing of element (4).

The trial court acknowledged that Cortes had presented evidence in support of his fraud claim, but dismissed it nonetheless, ruling that

[t]he nine elements of fraud *have not been prove[d] by clear, cogent and convincing evidence*. There is some evidence—I'll acknowledge that there are declarations from other individuals, not just Mr. Corte[s], but the *standard required has not been met*.

(Emphasis added.) In briefing, the Deutschers also state that Cortes must establish the elements of fraud under the same evidentiary standard as they aver applied to the breach of contract counterclaim. Both the trial court and the Deutschers are mistaken. The heightened standard applied only to the breach of contract claim and only because he expressly sought specific performance of the purported contract. See *Berg*, 125 Wn.2d at 556; *Kolesar*, 27 Wn. App. 2d at 176. His prayer for relief specifically limits that remedy to that one cause of action: "Cortes respectfully request[s] the following relief: . . . [a]n order requiring *specific performance of the contract* entered into for the sale of the [p]roperty; . . . [i]n the alternative, an award of damages in [an] amount to be prove[d] at trial." (Emphasis

added.) Cortes did not, and more critically *could not*, seek specific performance in either a claim for fraud or unjust enrichment. In the procedural posture of this case, Cortes need only make a prima facie showing that there is a genuine issue of material fact for each element of his fraud claim to survive summary judgment. *Hung Dang*, 24 Wn. App. at 158.

For this cause of action, Cortes relied on his own declaration, as well as those of his friends and family that he offered to support his assertion of the existence of an oral contract. Despite the Deutschers' focus in briefing on their erroneous argument about the evidentiary standard, the evidence Cortes produced was sufficient to raise a genuine issue of material fact as to whether Marijke made the requisite representation to him. The evidence was also sufficient to establish a genuine issue of material fact as to whether the purported representation was material, as Cortes' witnesses stated that he made improvements to the property and that monthly payments were made to Marijke toward the purchase of the property based on that representation. Cortes produced an invoice marked "Paid cash," photographs, and testimony that he made uncompensated improvements to the property, which also establish a genuine issue of material fact that he incurred damages. Therefore, the only three elements of this cause of action that the Deutschers contest have been met for purposes of summary judgment.

Nevertheless, as we engage in de novo review of orders on summary judgment, we conclude that Cortes is unable to demonstrate a genuine issue of material fact regarding the fourth element of a fraud claim: the speaker's

knowledge of the falsity of their representation. Taking Cortes' evidence and associated inferences in the light most favorable to him, there is nothing to demonstrate that Marijke made a promise to him about the purchase of the property *that she knew to be false*. Although Cortes and his witnesses all claim awareness of the existence of the agreement, none asserted that Marijke acted with knowledge of the falsity of her representation. Again, we may affirm on any basis supported by the record. See *Performance Constr.*, 195 Wn. App. at 415. Because Cortes cannot show a genuine issue of material fact on an essential element of the cause of action, summary judgment dismissal of the claim for fraud was proper.

IV. Counterclaim for Unjust Enrichment

Cortes' final cause of action, also pleaded in the alternative to breach of contract, alleged that the Deuschers were unjustly enriched by the repairs and improvements he made on the property without compensation. Unjust enrichment is an equitable claim. *Columbia Cmty. Bank v. Newman Park, LLC*, 177 Wn.2d 566, 574, 304 P.3d 472 (2013). "Unjust enrichment allows a party to recover the value of a benefit it has conferred on another party, absent any contractual relationship, if fairness and justice require it." *Samra v. Singh*, 15 Wn. App. 2d 823, 837, 479 P.3d 713 (2020). "To prevail on a claim for unjust enrichment, the plaintiff must show that (1) the defendant received a benefit, (2) the received benefit is at the plaintiff's expense, and (3) the circumstances make it unjust for the defendant to retain the benefit without payment." *Id.* Again, in the context of summary judgment, Cortes need only make a prima facie showing that there is a

genuine issue of material fact as to each of these elements. See *Crabtree v. Jefferson County Pub. Hosp. Dist. No. 2*, 20 Wn. App. 2d 493, 507, 500 P.3d 203 (2021) (“A motion for summary judgment must be denied if the nonmoving party . . . shows specific facts that show a genuine issue of material fact.”).

Cortes argues that the trial court improperly dismissed this claim by looking at the work he performed for Marijke as an employee and the withholdings on his tax return, rather than at the thousands of dollars of improvements he asserts that he made to the property, including those for the 9040 residence despite the fact that he never occupied that home. This assertion is supported by the record; in analyzing the evidence offered in support of this cause of action, the court stated,

With respect to unjust enrichment, I look at the record. Mr. Corte[s] was paid for the work that he did for Ms. Deutscher. At times, he was paid even when he was not working, and the parties agreed to that. There’s no evidence that [Cortes] made the mortgage payments on this home. There’s no evidence that he paid the property taxes on this home, and there’s no evidence that he collected the rent from the residence that is on the property. If he did have \$270,000 withheld from his tax returns over those 13 years as a housing allowance, a significant benefit, that is not evidenced.

It is clear that the court focused on the evidence highlighted by the Deutschers to the exclusion of the evidence presented by Cortes that pertained to the crux of his claim: the tangible improvements to the property for which he was not compensated. Further, the ruling indicates that rather than taking all inferences in favor of Cortes as the nonmoving party, the court weighed the evidence presented by each side. This is a misapplication of the summary judgment standard.⁹ See,

⁹ The Deutschers similarly do not address property improvements in their argument regarding unjust enrichment. Instead, they assert that the trial court properly found that the evidence potentially shows that the labor Cortes claimed he performed on the property was the equivalent of a reasonable amount of rent. This argument fails to account for the expenses Cortes

e.g., *Haley*, 25 Wn. App. 2d at 217 (“On summary judgment, the trial court may not weigh the evidence, assess credibility, consider the likelihood that the evidence will prove true, or otherwise resolve issues of material fact.”); *Am. Exp. Centurion Bank v. Stratman*, 172 Wn. App. 667, 676, 292 P.3d 128 (2012) (“The trial court does not weigh the evidence or assess witness credibility on a motion for summary judgment.”); *Silves v. King*, 93 Wn. App. 873, 880, 970 P.2d 790 (1999) (“A genuine issue of credibility should not be resolved at summary judgment.”).

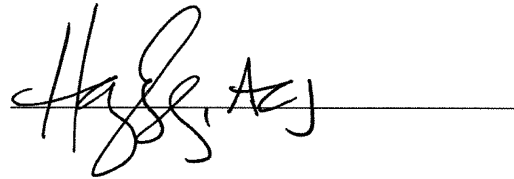
Again, as with each of the other causes of action, we review the dismissal of this claim de novo and do not weigh the evidence or make credibility determinations. *Bale v. Allison*, 173 Wn. App. 435, 458, 294 P.3d 789 (2013) (“The function of the appellate court is to review the action of the trial courts. Appellate courts do not hear or weigh evidence, find facts, or substitute their opinions for those of the trier-of-fact.” (quoting *Quinn v. Cherry Lane Auto Plaza, Inc.*, 153 Wn. App. 710, 717, 225 P.3d 266 (2009))). The evidence Cortes presented in support of his counterclaim for unjust enrichment consisted of photographs of landscaping improvements on the property, an invoice for a new vapor barrier and removal and replacement of insulation in the 9040 residence, and an invoice marked “Paid cash” for a pressure check of the well that provided water to both residences on the property. He also provided a declaration asserting that he performed substantial landscaping work and repairs on the property, including replacement of fixtures and appliances. He declared that he had not been compensated for this work, so, if there was no enforceable contract to buy

said he incurred for repairs and maintenance completed by others or for the replacement of appliances or fixtures.

the property, the improvements would benefit only the Deutschers. In response, the Deutschers claimed that they received no benefit at Cortes' expense; he worked for Marijke and she paid him for his labor.¹⁰ This discrepancy in testimony is precisely the sort that precludes summary judgment because only a fact-finder may weigh credibility to resolve this type of competing evidence. Similarly, the determination of the persuasiveness of the invoices and photographs that Cortes has produced is reserved for the fact-finder. Again, the burden at the summary judgment stage is one of production, not persuasion. *Renz*, 114 Wn. App. at 623. The trial court erred in dismissing Cortes' counterclaim for unjust enrichment.

We affirm in part, reverse in part, and remand for further proceedings.

WE CONCUR:

A handwritten signature in black ink, appearing to read "H. G. Arj", written over a horizontal line.

Díaz, J.

Mann, J.

¹⁰ The Deutschers' response to this cause of action also included an argument that Cortes may not claim unjust enrichment because he has "unclean hands" for purportedly not reporting to the Internal Revenue Service the \$270,000 he alleges was withheld from his paycheck. Aside from the fact that this framing rests on a misapplication of the unclean hands doctrine, we decline to address this argument as Cortes' unjust enrichment claim pertained only to improvements to the property.

NORTHWEST JUSTICE PROJECT

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