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Washington State
Court of Appeals
Division Two

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

PATRICIA LANDES, Respondent, v. PATRICK CUZDEY, and ANY OTHER RESIDENTS, Appellant.	No. 51841-4-II UNPUBLISHED OPINION

MAXA, C.J. – Patrick Cuzdey appeals the trial court's order in Patricia Landes's unlawful detainer action directing issuance of a writ of restitution, granting judgment to Landes for past due rent, and awarding attorney fees to Landes. An unlawful detainer action is available against a "tenant of real property for a term less than life." RCW 59.12.030. The issue here is whether Cuzdey was Landes's "tenant," thereby making the unlawful detainer statute applicable.

We hold that the trial court erred in granting the writ of restitution and final judgment in this unlawful detainer action because Cuzdey presented issues of fact requiring trial regarding (1) whether an enforceable rental agreement was formed between the parties that created a tenancy under the unlawful detainer statute, and (2) whether Landes's waiver and equitable estoppel theories applied. We also hold that the trial court did not abuse its discretion in declining to apply Landes's judicial estoppel theory. Accordingly, we reverse the writ of restitution and the

final judgment in favor of Landes for unpaid rent and attorney fees, and we remand to the trial court for further proceedings.

FACTS

Background

In 1983, Landes and her husband (now deceased) purchased a five-acre parcel of undeveloped property southwest of Olympia. Their daughter Karla[1] and her then husband Cuzdey moved into a mobile home on the property in 1984.

In 1985, the Landeses purchased a newer mobile home for the Cuzdeys to live in. The Cuzdeys repaid the Landeses for the cost of the mobile home by making monthly payments until the amount was paid off in 2005. The Cuzdeys apparently never made rent payments to the Landeses for either the mobile home or the property on which it was located.

In May 2014, Karla and Cuzdey dissolved their marriage. Karla moved off the property, but Cuzdey continued to reside in the mobile home.

Cuzdey's Quiet Title Action

In June 2014, Landes served Cuzdey with a 20-day notice to terminate tenancy of the mobile home and the real property. In response, Cuzdey filed an action to quiet title to the property. Cuzdey alleged that pursuant to a 1984 oral agreement, the Landeses had agreed to sell the property to him and Karla, and that the purchase price had been paid off with cash and work Cuzdey had performed on the property. Cuzdey later added a claim to quiet title to the mobile home, which he claimed was included in the sale of the property.

[1] To distinguish her from Cuzdey, this opinion will refer to Karla by her first name. No offense is intended.

In August 2015, the trial court dismissed Cuzdey's claims on summary judgment. The court also found that Cuzdey's claim was frivolous and awarded Landes $36,000 in attorney fees under RCW 4.84.185. In addition, the court issued an order staying the dismissal of Cuzdey's quiet title claims for 60 days if Cuzdey filed an appeal and also paid into the court's registry a $36,000 bond and rent for two months at $1,500 per month.

Cuzdey filed a notice of appeal. He did not post bond at that time or make a rental payment into the court's registry for either August or September. The stay expired on October 6.

On October 14, Landes filed a complaint for unlawful detainer. On November 13, the trial court entered an agreed order dismissing the unlawful detainer action if Cuzdey scheduled a hearing to determine the amount of security or bond required to stay the judgment in the quiet title action pending appeal. The hearing was to take place no later than December 11, or else Landes was free to obtain a new show cause hearing date on the unlawful detainer action.

Notice to Begin Rental

On November 16, Landes served Cuzdey with a "Notice to Begin Rental Pursuant to Chapter 59.18 RCW." Clerk's Papers (CP) at 23-24. The notice read

> YOU ARE HEREBY NOTIFIED that the terms of your non-exclusive possession and occupancy of [the property's address] are hereby changed as of and after January 1, 2016, as follows:
>
> 1. On or after January 1, 2016, your non-exclusive possession and occupancy of the subject premises will be considered a month-to-month tenancy subject to the provisions of the Residential Landlord-Tenant Act, RCW 59.18.
>
> 2. Rent will be charged for your possession and occupancy of the subject premises, at the rate of $1,500.00 per month, payable in advance on or before the first day of each month, beginning January 1, 2016.

CP at 23. Cuzdey did not respond to this notice at that time.

Supersedeas Bond Hearing on Quiet Title Action

The next day, Cuzdey set a hearing for his motion for stay or alternative security in the quiet title matter while it was pending on appeal. A hearing on Cuzdey's motion occurred on December 11. Cuzdey argued that the quiet title judgment should be stayed without bond because his only assets were personal property and that selling the personal property to raise money for the bond would take too long to effect a stay of the judgment.

The trial court asked the parties whether the unlawful detainer action Landes had filed would move forward if Cuzdey was unable to post a bond in the amount the court set. Landes's attorney replied that it would. The court then asked how long Cuzdey would have to remove his personal property if Landes prevailed in the unlawful detainer action. Landes's attorney responded that "because we served upon him a notice to [begin] rental, you've got to put this under the Landlord Tenant Act and . . . it's 45 days." CP at 410.

The court asked Cuzdey's attorney to answer the same questions. Cuzdey's attorney responded, "I would agree that this would fall under the Landlord Tenant Act," and he stated that Cuzdey would have roughly 45 days to remove his personal property if Landes prevailed in the unlawful detainer action. CP at 411. The court ended the discussion by stating, "Well, okay, I'm not ruling on the landlord tenant matter but I thank you for that clarification." CP at 411.

The trial court ordered that the judgment against Cuzdey would be stayed on the condition that he posted a supersedeas bond or cash in the amount of $75,000 on or before January 11, 2016.

Cuzdey's Response to Notice to Begin Rental

By January 11, Cuzdey had not posted the bond. Landes apparently sent Cuzdey a "3 day pay or vacate notice." CP at 42.

On January 19, Cuzdey wrote to Landes, attaching "a money order satisfying your demand for rent in the amount of $1,500.00 payable to Patricia Landes." CP at 42. Cuzdey further informed Landes that he had "appealed the judgment quieting title and [did] not admit to being a tenant of Landes." CP at 42. Cuzdey stated that he was "paying under protest and under order of the superior court," and that he "reserve[d] all of [his] rights, claims and arguments for purposes of the appeal and remand of the case." CP at 42. Finally, Cuzdey reserved the right to seek reimbursement of the payment if he prevailed on appeal.

In February, Cuzdey sent Landes a second money order for $1,500. The memo line of the money order read " 'RENT' FOR FEB 2016." CP at 27.

In March, the trial court granted Cuzdey a stay of enforcement of the quiet title action after he posted a supersedeas bond. Cuzdey stopped making $1,500 monthly payments to Landes, but he continued living in the mobile home on the property.

In April 2017, Division One of this court affirmed the dismissal of Cuzdey's claim to the real property, but reversed the trial court's dismissal of his quiet title claim to the mobile home because there was a genuine issue of fact regarding title.[2] *Cuzdey v. Landes*, No. 75632-0-I, slip op. at 1-2, 12 (Wash. Ct. App. Apr. 3, 2017) (unpublished), http://www.courts.wa.gov/opinions/pdf/756320.pdf. The court also reversed the trial court's attorney fee award.

Unlawful Detainer Action

In October 2017, Landes sent Cuzdey another 3-day notice to pay or vacate, asserting that rent from January 2016 through October 2017 at $1,500 per month still was owing. Cuzdey remained on the property in the mobile home.

[2] Nothing in the record indicates whether there has been at the time of this opinion a final adjudication on remand of the quiet title action determining which of the parties has title to the mobile home.

In November 2017, Landes filed a new unlawful detainer action against Cuzdey based on his failure to pay rent. Landes also filed a motion for an order to show cause why a writ of restitution and final judgment should not be entered in her favor. The trial court granted the motion and scheduled a show cause hearing.

At the hearing, Landes argued that the parties had an enforceable rental agreement under the terms of her November 2015 Notice to Begin Rental. Cuzdey argued that the trial court lacked subject matter jurisdiction to remove him from the property through an unlawful detainer action because he was a tenant at will, and that no enforceable rental agreement had been formed between the parties.

The trial court orally ruled that Cuzdey's remaining on the property and payment of rent for two months formed a rental agreement between the parties. The court entered the following findings of fact:

> 2.9 Mr. Cuzdey was represented by counsel when his attorney stated Mr. Cuzdey's circumstance was governed by Landlord Tenant Act. Based on transcripts and filings submitted in this action, Mr. Cuzdey's attorney and Mr. Cuzdey understood paying rent in January of 2016 would cause Mr. Cuzdey to enter into a contract governed by the Landlord Tenant Act.
>
> 2.10 The court has proper subject matter jurisdiction over this action based on Mr. Cuzdey entering into an enforceable contract in January of 2016.

CP at 163.

The court entered judgment for Landes in the amount of $43,331, representing $34,500 in back rent, attorney fees of $8,324, and $597 in costs. The court also issued a writ of restitution restoring the property to Landes.

Cuzdey filed a motion for reconsideration. Cuzdey argued that the amount of past due rent awarded to Landes was still a disputed issue and that if the trial court determined he had title

to the mobile home, the total judgment should be reduced to reflect the rental value of only the land where the mobile home was situated. The trial court denied the motion for reconsideration.

The sheriff eventually served the writ of restitution on Cuzdey on March 19. By that date Cuzdey had vacated the property.

Cuzdey appeals the writ of restitution and the judgment for unpaid rent and attorney fees.

ANALYSIS

A. APPLICABILITY OF UNLAWFUL DETAINER STATUTE

Cuzdey argues that the trial court should have dismissed Landes's unlawful detainer action because the unlawful detainer statute did not apply to his occupancy of Landes's property. He claims that the unlawful detainer statute is inapplicable because he was not a "tenant" as required under that statute. Landes argues that a month-to-month tenancy was created when she sent the November 2015 notice that such a tenancy would start on January 1, 2016 and Cuzdey accepted her offer by paying rent and remaining on the property. We hold that Cuzdey presented issues of fact regarding whether he was a "tenant" under the unlawful detainer statute that must be tried by a jury.

1. Unlawful Detainer Action

Chapter 59.12 RCW governs unlawful detainer actions and allows for a summary proceeding that provides an expedited means for landlords and tenants to resolve competing claims to possession of leased property. *Angelo Prop. Co. v. Hafiz*, 167 Wn. App. 789, 808, 274 P.3d 1075 (2012). An unlawful detainer action is an alternative to the common law action of ejectment. *River Stone Holdings NW, LLC v. Lopez*, 199 Wn. App. 87, 92, 395 P.3d 1071 (2017).

RCW 59.12.030 states that a "tenant of real property for a term less than life" can be "guilty of unlawful detainer" under one of seven different circumstances. The circumstance potentially applicable here is found in RCW 59.12.030(3):

> When [the tenant] *continues in possession* in person or by subtenant *after a default in the payment of rent,* and after notice in writing requiring in the alternative the payment of the rent or the surrender of the detained premises, served (in manner in RCW 59.12.040 provided) [on] behalf of the person entitled to the rent upon the person owing it, has remained uncomplied with for the period of three days after service thereof. The notice may be served at any time after the rent becomes due.

(Emphasis added.) As noted in this statute, a person is guilty of unlawful detainer if noncompliance continues more than three days after service of a notice to pay rent or surrender the premises. RCW 59.12.030(3).

To regain possession of the property, the landlord may file an unlawful detainer complaint against the tenant, and the complaint can include a claim for damages or compensation for occupation of the property. RCW 59.12.070. After filing the unlawful detainer complaint, the landlord may request the court to issue a writ of restitution restoring the property to the landlord. RCW 59.12.090.

A trial court may address a landlord's unlawful detainer claims in a show cause hearing. *Hous. Auth. of the City of Pasco and Franklin County v. Pleasant*, 126 Wn. App. 382, 390-92, 109 P.3d 422 (2005). However, a show cause hearing is not necessarily the time for a final determination of the parties' rights. *4105 1st Ave. S. Invs., LLC v. Green Depot WA Pac. Coast, LLC*, 179 Wn. App. 777, 786, 321 P.3d 254 (2014). RCW 59.12.130 provides that "[w]henever an issue of fact is presented by the pleadings it must be tried by a jury."

Unlawful detainer actions are "limited to resolving questions related to possession of property and related issues like restitution of the premises and rent." *River Stone Holdings*, 199 Wn. App. at 92. Issues unrelated to possession cannot be resolved in an unlawful detainer

action; those issues must be addressed in a general civil action. *Angelo Prop.*, 167 Wn. App. at 809.

2. Subject Matter Jurisdiction

Cuzdey argues that the trial court erred in failing to dismiss Landes's unlawful detainer action for lack of subject matter jurisdiction. But framing the issue in this case as one of subject matter jurisdiction is incorrect. The trial court clearly had subject matter jurisdiction over Landes's lawsuit. The real issue is whether the trial court had authority under RCW 59.12.030 to *exercise* that jurisdiction.

The Washington Constitution generally provides subject matter jurisdiction in cases involving title or possession of real property to the superior courts. WASH. CONST. art. IV, § 6; *see MHM&F, LLC v. Pryor*, 168 Wn. App. 451, 460, 277 P.3d 62 (2012). In addition, RCW 59.12.050 states, "The superior court of the county in which the property or some part of it is situated shall have jurisdiction of proceedings under this chapter."

Because of the constitutional grant of jurisdiction, "it is incorrect to say that the court 'acquires' subject matter jurisdiction" only if a lawsuit satisfies the requirements of the unlawful detainer statute. *Hous. Auth. of the City of Seattle v. Bin*, 163 Wn. App. 367, 376, 260 P.3d 900 (2011); *see also MHM&F*, 168 Wn. App. at 460. The proper terminology for when statutory requirements are not met is that a party "may not maintain such action or *avail itself* of the superior court's jurisdiction." *Tacoma Rescue Mission v. Stewart*, 155 Wn. App. 250, 254 n.9, 228 P.3d 1289 (2010) (emphasis added). Another formulation of this principle is that noncompliance with the statute "precludes the superior court from *exercising* subject matter jurisdiction over the unlawful detainer proceeding." *Christensen v. Ellsworth*, 162 Wn.2d 365, 372, 173 P.3d 228 (2007) (emphasis added).

The issue here is whether the unlawful detainer statute applies or does not apply based on whether a month-to-month tenancy was created. " '[A] superior court has jurisdiction to determine whether an unlawful detainer action may go forward.' " *Bin*, 163 Wn. App. at 374 (quoting *Tacoma Rescue Mission*, 155 Wn. App. at 254 n.9).

Accordingly, we reject Cuzdey's argument that the trial court did not have subject matter jurisdiction to hear Landes's unlawful detainer action.

3. Scope of Unlawful Detainer Statute

As noted above, RCW 59.12.030 states that a "tenant of real property for a term less than life" can be "guilty of unlawful detainer." The plain language of this statute establishes that an unlawful detainer action is available against only a "tenant of real property for a term less than life." RCW 59.12.030. If the person in possession of real property is not such a tenant, the property owner must seek some other remedy.

At least before 2016, there is no question that Cuzdey's occupancy of Landes's property did not involve a tenancy that was subject to the unlawful detainer statute. Cuzdey's original occupation was with Landes's permission, there was no fixed term of occupancy, and he did not pay any rent. This type of occupancy is referred to as a "tenancy at will." *Turner v. White*, 20 Wn. App. 290, 292, 579 P.2d 410 (1978); *see also* 17 WILLIAM B. STOEBUCK & JOHN W. WEAVER, WASHINGTON PRACTICE: REAL ESTATE: PROPERTY LAW § 6.15 (2d ed. 2004) (stating that a tenancy at will is a tenancy "of indefinite duration, terminable at the will of either landlord or tenant, without advance notice").

A tenancy at will is "terminable only upon demand for possession, allowing the tenant a reasonable time to vacate." *Turner*, 20 Wn. App. at 292. But a tenancy at will does not fall within the scope of RCW 59.12.030. *Id.*

On the other hand, a periodic tenancy is "a leasehold for an indefinite time that is terminable by either landlord or tenant upon some period of advance notice that is governed by a statute." STOEBUCK & WEAVER at § 6.13. When premises are rented for an indefinite time, with monthly rent reserved, the tenancy is construed as a tenancy from month to month. RCW 59.04.020. A person subject to a month-to-month tenancy clearly is a "tenant of real property for a term less than life" as required under RCW 59.12.030. A month-to-month tenant who fails to pay the monthly rent is guilty of unlawful detainer under RCW 59.12.030(3).

4. Alleged Formation of Rental Agreement

The relevant inquiry here is whether RCW 59.12.030 applies to Cuzdey's occupancy of Landes's property. Therefore, the issue is whether Landes's November 2015 Notice to Provide Rental and Cuzdey's actions following that notice converted the initial tenancy at will that was not subject to the unlawful detainer statute to a month-to-month tenancy that was subject to the unlawful detainer statute. We hold that questions of fact regarding the formation of a rental agreement precluded entry of an unlawful detainer judgment and required a trial by jury under RCW 59.12.130.

a. Legal Principles

A unilateral contract is a form of contract that is distinct from a bilateral contract, which is the typical form. *See Storti v. Univ. of Wash.*, 181 Wn.2d 28, 35-36, 330 P.3d 159 (2014). A bilateral contract is formed when one party makes an offer and the other party accepts by promising to perform. *See Multicare Med. Ctr. v. Dept. of Soc. and Health Servs.*, 114 Wn.2d 572, 584, 790 P.2d 124 (1990). In a unilateral contract, one party makes an offer and the other party can accept only through performance of his or her end of the bargain. *Storti*, 181 Wn.2d at 36.

A unilateral contract becomes executed once the offeree performs. *Multicare*, 114 Wn.2d at 584. In other words, performance renders a unilateral contract binding and enforceable. *Higgins v. Egbert*, 28 Wn.2d 313, 317-18, 182 P.2d 58 (1947). And substantial performance is enough to render a unilateral contract enforceable. *Storti*, 181 Wn.2d at 37. However, the offeree cannot create a new contract with the offeror by changing the terms of the offer and then performing those new terms. *See Higgins*, 28 Wn.2d at 318.

As with bilateral contracts, unilateral contracts are defined by traditional contract concepts of offer, acceptance, and consideration. *Storti*, 181 Wn.2d at 36. To be enforceable, unilateral contracts must satisfy these contract requisites. *Id.* at 35. In addition, as with bilateral contracts, unilateral contracts require mutual assent, also known as a meeting of the minds. *Multicare*, 114 Wn.2d at 586-88, 586 n.24.

Regarding mutual assent, we follow the objective manifestation theory of contracts. *Id.* at 586. "[T]he unexpressed subjective intention of the parties is irrelevant; the mutual assent of the parties must be gleaned from their outward manifestations. To determine whether a party has manifested an intent to enter into a contract, we impute an intention corresponding to the reasonable meaning of a person's words and acts." *Id.* at 587 (citations omitted).

In the context of a unilateral contract offer, the court in *Multicare* emphasized that performance of the offered terms shows a manifestation of an intent to agree to those terms. *Id.* at 587.

> The Hospitals were under no obligation to accept the terms of the contract. Upon voluntary performance of those terms, however, the only reasonable intent which can be imputed to their acts is that they assented to the terms of the contract. . . . The Hospitals are not entitled to perform the contract and then argue that there was no mutual intention.

Id. The court refused to accept an argument that the offeree could accept the terms of the contract through performance and then argue for a better contract. *Id.*

The party claiming that a unilateral contract has been created has the burden of proving each essential element of the contract. *Id.* at 584 n.19. The existence of mutual assent generally is a question of fact. *Id.* at 586 n.24.

b. Parties' Arguments

Landes argues that her Notice to Begin Rental constituted a unilateral contract offer to Cuzdey to enter into a month-to-month rental agreement – she offered that he could occupy the property as a tenant and pay monthly rent of $1,500.[3] She claims that Cuzdey accepted by performance when he remained on the property after January 1, 2016, and when he paid the $1,500 rent in January and February 2016.

Cuzdey argues that simply remaining on the property that he already occupied as a tenant at will could not constitute acceptance by performance of Landes's offer of tenancy. In addition, he argues that payment of $1,500 in January and February did not constitute performance because the letter he included with the January 2016 payment expressly stated that the payment was not rent. Instead, the letter constituted a counteroffer that he would pay $1,500 per month for a stay of Landes's attempt to evict him. Cuzdey argues that Landes accepted his counteroffer by depositing his checks.

The parties both rely on *Higgins*, 28 Wn.2d 313, to support their positions. In *Higgins*, a real estate broker sent a client a listing agreement dated February 18, 1946, for her to sign in

[3] The language of the Notice to Begin Rental suggests that Landes claimed the ability to simply impose a tenancy on Cuzdey without his consent. Cuzdey argues that Landes could not convert his tenancy at will to a periodic tenancy simply by sending him the Notice to Begin Rental. On appeal, Landes appears to agree that Cuzdey's acceptance of the offer by performance was required to create a tenancy.

which she promised to pay a commission if he found a buyer for her property within 60 days. *Id.* at 314. On February 27, the client sent back a signed listing agreement in which she changed the listing period to 30 days, but kept the February 18 start date. *Id.* at 315. When the broker received the signed listing agreement he changed with a pencil the start date of the listing period from the original February 18 to February 27, the date the client sent back the signed agreement, but he did not notify the client of this change. *Id.* The broker procured a buyer 32 days after February 18, but the client declined to sell the property to the proposed buyer and refused to pay the broker a commission. *Id.* at 316.

The court in *Higgins* stated that the client's signed listing agreement, including the change to the listing period, constituted a unilateral contract offer to the broker that he could accept by finding a buyer within 30 days of February 18, the date the client left unaltered in the agreement. *Id.* at 317-19. The court stated that when the broker received the instrument he could have (1) made an effort to perform within the time limit the client established in her offer, (2) attempted to persuade her to extend the time allowed, or (3) declined to do anything further regarding the sale of the property. *Id.* at 318. However, "he could not, by changing the date of the instrument, create what would amount to a new offer from the appellant to himself, nor alter the only one she had ever made to him." *Id.* Accordingly, the court held that the broker was not entitled to a commission. *Id.* at 319.

Landes compares Cuzdey's attempt to change the terms of her offer to the broker's attempt to change the terms of the client's offer. She claims that *Higgins* stands for the proposition that the offeree of a unilateral contract offer cannot make a counteroffer; the offeree must either accept by performance, decline to perform, or attempt to negotiate different terms.

Id. at 318. But an offeree cannot change the terms to create what would amount to a new offer from the offeror. *Id.*

Cuzdey compares himself to the client in *Higgins*. Like the client, he received an offer but changed the terms and communicated that change to the offeror. He claims that this constituted a counteroffer, not an acceptance of the original offer. In other words, he tendered performance but under different terms. Cuzdey disagrees that *Higgins* supports the argument that the offeree of a unilateral contract offer cannot make a counteroffer. Instead, he points out that *Higgins* recognized that the broker could have made a counteroffer – the court stated that he could have endeavored to persuade the client to change the terms. *Id.* And Landes could have rejected the tender, but instead she accepted the tender and the revised terms that came with it by depositing Cuzdey's checks.

c. Analysis – Rental Agreement Formation

Landes argues that Cuzdey accepted her unilateral contract offer in two ways. First, he remained on the property past January 1, 2016, after receiving the notice that a month-to-month tenancy would start on that date. Landes's argument would be stronger if Cuzdey had actually moved onto the property after receiving the Notice to Begin Rental. But Cuzdey already had been living on the property for decades and he simply remained there. Merely remaining on the property does not *necessarily* reflect an intent to perform on the offer.

On the other hand, on January 1, 2016, Cuzdey was in a precarious position. The trial court in the quiet title action had ruled that Landes owned the property and the mobile home, and Cuzdey had not posted a bond to stay execution of the court's ruling. Therefore, Landes had the legal right to evict Cuzdey if he did not accept the offer of a tenancy. It could be inferred from

these circumstances that Cuzdey intended to perform on the unilateral contract offer by remaining on the property.

We conclude that the evidence creates a genuine issue of fact regarding mutual assent – whether Cuzdey performed on Landes's unilateral contract offer by remaining on the property where he had lived for years. Therefore, a jury trial is required on this issue under RCW 59.12.130.

Second, Landes claims that Cuzdey performed on her unilateral contract offer by paying $1,500 rent in both January and February 2016. This payment arguably constituted at least part performance of Landes's offer to create a tenancy with monthly rent payments of $1,500. The letter accompanying the January payment stated, "Attached is a money order satisfying your demand for rent." CP at 42. The money order for the February 2016 payment stated " 'RENT' FOR FEB 2016" on the memo line. CP at 27.

Cuzdey emphasizes that he did not accept Landes's terms. He expressly stated in his letter that he did not admit to being Landes's tenant, he was paying under protest, and he was paying under court order.[4] He claims that under *Higgins*, he was entitled to make this counteroffer without being deemed to have performed on Landes's offer because the terms of his offer were different.

The facts of this case are challenging because Cuzdey did not simply perform on Landes's offer without any limitations. And he did not communicate a counteroffer to Landes

[4] Landes is correct that, despite the statements in Cuzdey's letter to the contrary, Cuzdey was under no court order to pay rent to Landes. At the time Landes sent Cuzdey the Notice to Begin Rental, he was a tenant at will on her property who had not attained any stay of the enforcement of the judgment in the quiet title action. In December 2015, the trial court ordered that the judgment against Cuzdey would be stayed on the condition that he posted a $75,000 supersedeas bond on or before January 11, 2016.

before performing on her offer. He did both – he performed by paying rent *and* he communicated a counteroffer. Arguably, this constituted the type of conduct – Cuzdey attempting to make "what would amount to a new offer" to himself from Landes – that the court in *Higgins* stated was not allowed. 28 Wn.2d at 318.

We conclude that the evidence creates a genuine issue of fact regarding mutual assent – whether Cuzdey performed on Landes's unilateral contract offer by paying the offered rent amounts while stating that he did not admit to being a tenant and was paying under protest. Therefore, a jury trial is required on this issue under RCW 59.12.130.

In summary, questions of fact exist regarding whether a rental agreement was formed and therefore whether the unlawful detainer statute applies in this case. Accordingly, we hold that the trial court erred in entering judgment in favor of Landes in the unlawful detainer action.

5. Landes's Equitable Theories Regarding Tenancy

Landes argues that even if questions of fact exist regarding the creation of a rental agreement, Cuzdey is precluded under the doctrines of judicial estoppel, equitable estoppel, and waiver from arguing that he did not enter into a unilateral contract to rent the property month-to-month. We hold that the trial court did not err in rejecting Landes's judicial estoppel theory and that questions of fact exist regarding equitable estoppel and waiver.

a. Judicial Estoppel

Landes argues that judicial estoppel bars Cuzdey from arguing he was not a tenant under the rental agreement because he stipulated in the December 2015 bond hearing on the quiet title matter that the Residential Landlord-Tenant Act (RLTA) would apply. The trial court declined to apply judicial estoppel.

" 'Judicial estoppel is an equitable doctrine that precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position.' " *Chonah v. Coastal Vills. Pollock, LLC*, 5 Wn. App. 2d 139, 147, 425 P.3d 895 (2018), *review denied* 192 Wn.2d 1012, 432 P.3d 784 (2019) (quoting *Bartley-Williams v. Kendall*, 134 Wn. App. 95, 98, 138 P.3d 1103 (2006)). In determining whether judicial estoppel applies, a trial court primarily must consider three nonexhaustive "core" factors:

> (1) whether the party's later position is clearly inconsistent with its earlier position, (2) whether acceptance of the later inconsistent position would create the perception that either the first or the second court was misled, and (3) whether the assertion of the inconsistent position would create an unfair advantage for the asserting party or an unfair detriment to the opposing party.

Taylor v. Bell, 185 Wn. App. 270, 282, 340 P.3d 951 (2014). One additional factor that courts usually consider is whether the party's prior inconsistent position was accepted by the first court. *Id.*

We review a trial court's ruling on judicial estoppel for an abuse of discretion. *Chonah*, 5 Wn. App. 2d at 147. A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds. *Id.*

Landes relies on the following exchange at the bond hearing:

> THE COURT: And if an unlawful detainer is granted, a person has the right for a reasonable time period to remove personal property, do they not?
>
> [LANDES'S ATTORNEY]: In this case, because we have put in a notice to begin rental, they've got – I think it's 45 days – they've got to ask – once the writ is issued, they can give the landlord a notice that says I want you to store the property. That's – they can do it for 45 days. If not, after that time period it can be sold at auction. Now, the reasonable time period [applies] if there's no rental agreement in effect, and then you resort back to the common law and it's a reasonable time period. However, because we served upon him a notice to [begin] rental, you've got to put this under the Landlord Tenant Act and that's pretty clear. . . .
>
> THE COURT: That matter is not before me but I wanted to ask you that question . . . and I'll allow Mr. Cuzdey's counsel to give m[e] any other details he thinks

> appropriate in that regard. Do you have rebuttal argument or do you want to answer that question?
>
> [CUZDEY'S ATTORNEY]: I would. I would agree that this would fall under the Landlord Tenant Act. I also don't remember if it's 45 days but it sounds right.
>
> The additional detail I would add, though, is that when the landlord gets that right to sell the property it is for the benefit of the tenant. . . . So if the property stays there for the 45 days or whatever the period is and then Landes goes to sell it under the Landlord Tenant Act, the money belongs to Cuzdey.
>
> THE COURT: Well, okay, I'm not ruling on the landlord tenant matter but I thank you for that clarification.

CP at 409-11.

Landes argues that Cuzdey's position at the December 2015 hearing that his tenancy would fall under the RLTA as of January 2016 and his later claim that there was no enforceable rental agreement between the parties were inconsistent and resulted in an unfair advantage for him. She claims that the court accepted Cuzdey's representation at the December 2015 hearing because the court gave him more time than customary to obtain the $75,000 bond in the quiet title matter and store his personal belongings on the property during that time.

But even if Cuzdey's position in December 2015 is inconsistent with his current position, there is no indication that the trial court accepted or relied on Cuzdey's statement about the RLTA or that Cuzdey obtained an unfair advantage. The court expressly stated that it was not ruling on the landlord tenant matter. And the court did not indicate that the 45 days Cuzdey would have to store his belongings on Landes's property under the RLTA after a hypothetical unlawful detainer ruling caused the court to give Cuzdey any more time than it otherwise would have to post the supersedeas bond. In fact, it appears that the approaching holidays might have been more of a factor in the court's ultimate decision regarding setting the deadline for Cuzdey to post bond.

We hold that the trial court did not abuse its discretion in declining to apply judicial estoppel.

b. Equitable Estoppel

Landes argues that Cuzdey is equitably estopped from asserting he did not make rent payments or enter into an enforceable unilateral contract because he remained on the property in January 2016.

Equitable estoppel rests on the principle that a party cannot deny what he or she has already acknowledged. *Nickell v. Southview Homeowners Ass'n*, 167 Wn. App. 42, 53, 271 P.3d 973 (2012). Proving equitable estoppel requires the asserting party to show that (1) another party "made an admission, statement, or act inconsistent with a claim it later asserted"; (2) the asserting party "reasonably relied on [that] admission, statement, or act"; and (3) the asserting party "was injured as a result." *Shelcon Constr. Group, LLC v. Haymond*, 187 Wn. App. 878, 902, 351 P.3d 895 (2015).

Courts disfavor equitable estoppel, and the party asserting estoppel "must prove its elements by clear, cogent, and convincing evidence." *Id.* Clear, cogent, and convincing evidence of estoppel exists when occurrence of all three elements has been shown to be highly probable. *Colonial Imps., Inc. v. Carlton Nw., Inc.*, 121 Wn.2d 726, 735, 853 P.2d 913 (1993). Equitable estoppel is a question for the trier of fact unless the evidence leads to only one reasonable inference. *Id.* at 737.

Here, Landes again relies on Cuzdey's statement to the trial court at the December 2015 bond hearing in the quiet title matter that his tenancy going forward would be under the RLTA. She also argues Cuzdey demonstrated his intent to become a month-to-month tenant by remaining on the property after January 2016 and paying $1,500 rent for two months. Finally,

she argues that she reasonably relied on these representations and was injured as a result because she refrained from bringing an unlawful detainer action in January or February of 2016 because at that point Cuzdey was current on his rent payments.

However, Cuzdey presented evidence that created a genuine issue of fact as to whether Landes could prove each element of equitable estoppel with clear, cogent, and convincing evidence. At the December 2015 hearing, Cuzdey had not yet responded in any way to Landes's Notice to Begin Rental. The trial court asked Cuzdey's counsel at that hearing how long Cuzdey would have to remove his personal property if Landes prevailed in her initial unlawful detainer action. Cuzdey's counsel responded "this would fall under the Landlord Tenant Act," and that Cuzdey would have roughly 45 days to remove his personal property. CP at 411. The court did not rule on the landlord tenant matter at that hearing.

Cuzdey also presented evidence that his continued residence on the property after January 2016 and two payments of $1,500 were not inconsistent with his claim that the parties did not have a rental agreement. Cuzdey's letter expressly stated that he was not Landes's tenant, that he was appealing the judgment in the quiet title action, and that he reserved the right to seek reimbursement of the payments if he won his appeal. Although this proposal essentially amounted to an unorthodox arrangement where Cuzdey paid Landes directly to stay her enforcement of the quiet title judgment, it did arguably convey his refusal to enter a landlord-tenant relationship with her under the Notice to Begin Rental. Moreover, once Cuzdey was able to post bond in March 2016, he stopped making monthly payments to Landes.

Finally, Landes cannot conclusively establish that she reasonably relied on Cuzdey's alleged admissions that he was her tenant under the RLTA because he presented evidence that his letter expressly told her that he did not admit to being her tenant. Nor can she conclusively

establish that she was injured as a result of her reliance. Because Cuzdey was a tenant at will, she could have demanded possession at any point before Cuzdey secured a supersedeas bond to stay enforcement of the quiet title action in March 2016. Instead, she took a calculated risk by sending him the Notice to Begin Rental in an attempt to transform their situation to a landlord-tenant relationship under the RLTA in which Cuzdey paid her rent. This calculated risk did not ultimately pay off, but Cuzdey's actions cannot definitively be said to have injured Landes based on her reasonable reliance.

We hold that equitable estoppel does not support final judgment in favor of Landes's unlawful detainer claim because material issues of fact exist regarding all three of its elements.

c. Waiver of Tenancy at Will Claim

Landes argues that Cuzdey waived any claim that he remained a tenant at will by (1) stating to the trial court in December 2015 that as of January 2016 his presence on the property would be governed by the RLTA, (2) remaining on the property after January 2016, and (3) making rent payments in January and February 2016.

Waiver is the intentional and voluntary relinquishment of a known right. *Schroeder v. Excelsior Mgmt. Group, LLC*, 177 Wn.2d 94, 106, 297 P.3d 677 (2013). Waiver may be express, but it also may be implied through a party's conduct. *224 Westlake, LLC v. Engstrom Props., LLC*, 169 Wn. App. 700, 714, 281 P.3d 693 (2012). Implied waiver occurs when a party's unequivocal acts or conduct demonstrate an intent to waive. *Id.* Waiver cannot be implied from a party's ambiguous conduct. *Id.* And the party's conduct must be inconsistent with any intention other than waiver. *Edmonson v. Popchoi*, 155 Wn. App. 376, 390, 228 P.3d 780 (2010).

The burden of proving intent to waive is on the party claiming waiver and, because waiver is disfavored, the claimant has a "heavy burden of proof." *Saili v. Parkland Auto Ctr., Inc.*, 181 Wn. App. 221, 225, 329 P.3d 915 (2014). Waiver is a mixed question of law and fact. *Brundridge v. Fluor Fed. Servs., Inc.*, 164 Wn.2d 432, 440-41, 191 P.3d 879 (2008). When an issue involves a mixed question of law and fact but the facts are not disputed, the issue is a question of law for this court to resolve. *Id.* at 441.

Here, Cuzdey presented evidence that the actions on which Landes bases her waiver claim did not constitute unequivocal acts or conduct demonstrating his intent to waive his claim to be a tenant at will. As discussed above, Cuzdey's representation to the trial court on December 15 occurred in the context of the court's question about storage of Cuzdey's personal property and occurred before he had made any definitive response to Landes's Notice to Begin Rental.

Likewise, his remaining on the property after January 2016 and payments in January and February 2016 were accompanied by a letter expressly informing Landes that he "[did] not admit to being [her] tenant," that he was "paying under protest," and that he "reserve[d] all of [his] rights, claims and arguments for purposes of the appeal and remand of the case," as well as his right to seek reimbursement of the payment if he prevailed on appeal. CP at 42. Far from unequivocally signaling Cuzdey's intent to waive his status as Landes's tenant at will, his letter expressly reserved his rights.

We hold that waiver does not support final judgment in favor of Landes's unlawful detainer claim because material issues of fact exist regarding whether Cuzdey waived his claim to be a tenant at will.

6. Remedy

Because questions of fact exist regarding application of the unlawful detainer statute, we reverse the trial court's judgment granting unlawful detainer relief. In addition, we vacate the trial court's judgment in favor of Landes for $34,500 in unpaid rent. Finally, we vacate the trial court's award of attorney fees to Landes under the RLTA[5].

Cuzdey no longer lives on Landes's property. The general rule is that if possession no longer is at issue after an unlawful detainer action has been started, "the proceeding may be converted into an ordinary civil suit for damages, and the parties may then properly assert any cross claims, counterclaims, and affirmative defenses." *Munden v. Hazelrigg*, 105 Wn.2d 39, 45-46, 711 P.2d 295 (1985). However, Cuzdey still is asserting his right to possession even after he was forced to vacate the premises. Therefore, he is entitled to have his right to possession determined in the unlawful detainer action. *See Hous. Auth. of the City of Pasco*, 126 Wn. App. at 388-89.[6]

[5] Cuzdey argues on appeal that even if the unlawful detainer statute applies, Landes cannot recover attorney fees under the RLTA. But Cuzdey did not challenge the trial court's authority to award attorney fees in the trial court, so the trial court has not addressed this issue. We decline to address this argument raised for the first time on appeal. Cuzdey can raise this issue on remand.

[6] Cuzdey also contends that because ownership of the mobile home was still in dispute after the appeal in the quiet title action, a trial was necessary in the unlawful detainer action to determine whether the alleged rental agreement pertained to both the mobile home and the property or to only the property. But this issue is not the proper subject of the unlawful detainer action. An unlawful detainer action is a proceeding that provides an expedited method of resolving the right to *possession* of property. *Faciszewski v. Brown*, 187 Wn.2d 308, 314, 386 P.3d 711 (2016) (emphasis added). As noted above, issues unrelated to possession must be addressed in a general civil action. *Angelo Prop.*, 167 Wn. App. at 809. The resolution of this issue is more properly determined by the trial court in the quiet title action.

B. ATTORNEY FEES ON APPEAL

Both parties request attorney fees on appeal under the RLTA. Two RLTA provisions, RCW 59.18.290(2) and RCW 59.18.410, allow for the recovery of attorney fees to the prevailing party in certain situations.

However, we decline to address whether the RLTA applies here. In addition, a prevailing party is the party that receives judgment in its favor at the conclusion of the entire case. *Harmony at Madrona Park Owners Ass'n v. Madison Harmony Dev., Inc.*, 160 Wn. App. 728, 739-40, 253 P.3d 101 (2011). Therefore, any determination of the prevailing party when the unlawful detainer action is being remanded for trial would be premature. *See Leda v. Whisnand*, 150 Wn. App. 69, 87, 207 P.3d 468 (2009).

CONCLUSION

We reverse the writ of restitution and the final judgment in favor of Landes for unpaid rent and attorney fees, and we remand to the trial court for further proceedings.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

MAXA, C.J.

We concur:

LEE, J.

CRUSER, J.