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NO. 657411

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I**

Housing Authority of the City of Seattle,

Plaintiff/Respondent,

v.

Shaunta Powell,

Defendant/Petitioner.

BRIEF OF APPELLANT

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~~FILED~~

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 **ORIGINAL**

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I. Introduction

This appeal is from a final judgment for the landlord, a public housing agency, in an unlawful detainer action pertaining to a federally-subsidized public housing tenancy. The tenant contends that the superior court lacked jurisdiction over the case due to a defective lease termination notice and an improper summons.

II. Assignments of Error

1) The Superior Court lacked jurisdiction for this unlawful detainer action due to a defective lease termination notice.

2) The Superior Court lacked jurisdiction for this unlawful detainer action because the summons did not explicitly state that the defendant could respond by mail.

3) The Superior Court lacked jurisdiction for this unlawful detainer action because the summons was served prematurely (i.e., before the tenancy had terminated).

III. Statement of the Case

This appeal arises from a residential unlawful detainer action concerning a federally-subsidized public housing tenancy. See 42 USC 1437 (creating public housing program). Defendant/Appellant Shaunta Powell is the tenant, and the disputed premises are her public housing apartment in Seattle. CP at 3-5. The landlord, Plaintiff/ Respondent Seattle Housing Authority (hereafter “SHA”), is a government body¹ that receives federal funds to develop and operate public housing facilities for low-income people in Seattle, Wash. CP at 3; see also RCW 35.82; see also 42 USC 1437 et seq.

On or about January 6, 2009, SHA presented Ms. Powell with a notice alleging she had violated the terms of her tenancy and demanding she vacate her apartment “not later than midnight on January 9, 2009.” CP at 6-7. However, the notice also advised Ms. Powell that she could contest the proposed termination of her tenancy by requesting a grievance hearing within three days. CP at 7. Ms. Powell made a timely request for a grievance hearing and continued to occupy the premises beyond January 9, 2009. CP at 32-35.

¹ In federal regulations, entities such as SHA are called “public housing agencies” or “PHAs.” See 24 CFR 5.100. In Washington, “public housing agencies” are called “Housing Authorities.” See RCW 35.82 (Housing Authorities Law). The terms are functionally equivalent and there is no relevant distinction for purposes of this case.

An administrative hearing officer conducted the grievance hearing and issued a decision on February 4, 2009. CP at 32-35. The grievance decision upheld the termination of Ms. Powell's tenancy. CP at 35. SHA then filed this action in King County Superior Court on February 12, 2009, seeking a writ of restitution to remove her from the premises. CP at 3-5, 35. SHA had already served Ms. Powell the summons and complaint in the action on January 26, 2009, while she was still awaiting the outcome of her grievance proceeding. CP at 1-2, 14.

SHA applied for a writ of restitution, and an unlawful detainer show cause hearing was held October 27, 2009. RP at 3-17; CP at 75-77. In that hearing, Ms. Powell argued that the January 26, 2009, summons had been prematurely served, and thus did not confer unlawful detainer jurisdiction upon the superior court. RP at 4; CP at 64-66. Her argument was based on a federal public housing regulation stating:

When the PHA is required to afford the tenant the opportunity for a hearing under the PHA grievance procedure for a grievance concerning the lease termination (see [24 CFR] 966.51(a)(1)), the tenancy shall not terminate (even if any notice to vacate under State or local law has expired) until the time for the tenant to request a grievance hearing has expired, and (if a hearing was timely requested by the tenant) the grievance process has been completed.

24 CFR 966.4(l)(3)(iv). CP at 64-66, 137. This provision was also a mandatory term of Ms. Powell's rental agreement with SHA. See 24 CFR

966.4 (“A lease shall be entered into between the PHA and each tenant of a dwelling unit which shall contain the provisions described hereinafter:”).

A superior court commissioner ruled that SHA had indeed served the summons prematurely. RP at 15-17; CP at 75-76. That commissioner reasoned that a summons cannot be served until a tenancy has terminated, and that Ms. Powell’s tenancy could not have terminated until the written decision from her grievance hearing was issued on February 4, 2009. RP at 15-16; CP at 75-76. The commissioner entered an order of dismissal, based on a rule that a premature summons does not confer unlawful detainer jurisdiction,. RP at 16-17; CP at 76-77.

On December 14, 2009, a superior court judge reversed the order of dismissal on SHA’s motion for revision. CP at 153. The order on revision reinstated the action and set the case for trial. CP at 153. Ms. Powell filed a motion for reconsideration of the order on revision, but her motion was denied. CP at 154-160, 165-166. She then filed a petition for discretionary review of the ruling, but a commissioner of this Court denied review (Cause No. 64779-2).

The superior court entered a final judgment for SHA on July 2, 2010, followed by an order granting SHA \$14,539.49 in attorney fees and costs. CP at 167-73. Ms. Powell now appeals.

V. Summary of Argument

A tenant in federally-subsidized public housing is entitled to contest a proposed termination of her tenancy through an administrative grievance procedure. See 24 CFR 966.51(a). A public housing tenancy cannot be terminated before the deadline to request a hearing elapses, and if the tenant invokes her right to the grievance procedure, until after the grievance process is complete. See 24 CFR 966.4(1)(3)(iv).

Washington law is clear that a valid eviction summons cannot be served to a tenant until after the tenancy has terminated. See *IBF, LLC, v. Hueft*, 141 Wn. App. 624, 632; 174 P.3d 95 (2007). A tenancy does not terminate until a tenant has been served with notice to vacate, and the time specified in that notice has run out. See *Community Investments, Ltd. v. Safeway Stores, Inc.*, 36 Wn. App. 34, 37; 671 P.2d 289 (1983). A prematurely-served unlawful detainer summons does not establish jurisdiction. See *IBF* at 632.

Ms. Powell's tenancy had not been terminated at the time she was served the summons, because her administrative grievance proceeding was still pending. CP at 14, 32; see 24 CFR 966.4(1)(3)(iv). The superior court should have recognized its lack of jurisdiction and dismissed this action accordingly. See *IBF* at 632. Alternatively, the superior court should have dismissed this action because the summons did not contain

mandatory language indicating that Ms. Powell could respond by mail. CP at 1-2; see RCW 59.18.365. The lease termination notice SHA served Ms. Powell was also deficient, because it was misleading as to the deadlines for her to request a grievance hearing or vacate the premises. CP at 6-7, 127; see *IBF* at 632; see also 24 CFR 966.4(l)(3)(iv).

VI. Argument & Authorities

A. Standard of Review

This appeal concerns the interpretation of the Unlawful Detainer Act (RCW 59.12), the Residential Landlord-Tenant Act (RCW 59.18), and a federal public housing regulation codified at 24 CFR 966.4(l)(3)(iv). Interpreting the procedural requirements of unlawful detainer statutes and regulations are questions of law subject to de novo review. See *Truly v. Hueft*, 138 Wn. App. 913, 916; 158 P.3d 1276 (2007); see also *Lawson v. City of Pasco*, 168 Wn.2d 675, 678 (2010).

B. The public housing program

Congress created public housing in the U.S. Housing Act of 1937 with the primary goal of helping state and local governments “to remedy the unsafe housing conditions and the acute shortage of decent and safe dwellings for low-income families[.]” 42 USC 1437. In summary, the program provides federal funding to state and local government agencies,

called “public housing authorities” or “PHAs,” for the “development, acquisition, or operation of low-income housing projects.” 42 USC 1437b(a).

To enable Washington communities to receive federal public housing funds, in 1939 the Legislature passed the Housing Authorities Law. See RCW 35.82.010. The Housing Authorities Law created PHAs, called “housing authorities,” in every Washington city and county. RCW 35.82.030. Plaintiff/Respondent Seattle Housing Authority (SHA) is one of the PHAs that came into being under this act. See RCW 35.82.030. SHA received its first federal public housing grant later that year, and has continuously operated public housing in Seattle ever since.²

Defendant/Appellant Shaunta Powell became an SHA public housing tenant on or about January 29, 2008. CP at 4. Her apartment, in an SHA public housing project at 6339 – 34th Ave SW in Seattle, Wash., are the disputed premises in this action. CP at 3-5.

1. Public housing tenancies

Public housing is open only to low-income families who meet certain eligibility criteria established by the U.S. Housing Act and amendments thereto. See 24 CFR 960.201. To ensure that public housing units are rented to eligible tenants, and because tenant rents are limited to

² See <http://www.seattlehousing.org/about/history/>, last visited Sept. 8, 2010.

about 30% of a household's income, public housing residents must regularly report information concerning their income and assets to the PHA and must certify their eligibility at least once per year. See 42 USC 1437a(a); see 24 CFR 960.257, 259. Public housing tenancies run for twelve-month terms and automatically renew at the end of each lease period. See 24 CFR 966.4(a). A PHA may terminate a public housing tenancy only for cause. See 24 CFR 966.4(1)(2). In most other respects, public housing tenancies resemble ordinary (private) residential tenancies; tenants must pay rent and follow basic rules largely set forth in their lease agreements. See 24 CFR 966.4. Tenants who violate these rules and duties can face eviction. See 24 CFR 966.4(1).

Housing authorities, like ordinary residential landlords, must provide safe and habitable premises and avoid interfering with their tenants' quiet enjoyment. See RCW 59.18.060; see also 24 CFR 966.4. But, in addition to usual obligations of landlords, as federal contractors PHAs must manage public housing in accordance with various federal requirements, including the U.S. Housing Act and policies and regulations established by the U.S. Department of Housing & Urban Development (HUD). See *Housing Authority of King County v. Saylor*, 19 Wn. App. 871, 874; 578 P.2d 76 (1978). As state actors, PHAs must also abide by

relevant constitutional provisions and refrain from arbitrary, capricious, or illegitimate action. See *Saylor* at 873-74.

2. Public housing grievance procedures

Among the most significant legal protections that public housing tenants enjoy is the right to an administrative grievance procedure. See 42 USC 1437d(k); see 24 CFR 966.52(b) (“PHA grievance procedure shall be included in, or incorporated by reference in, all tenant dwelling leases”). The grievance procedure enables a public housing tenant to dispute “any PHA action or failure to act ... which adversely affect[s] the individual tenant’s rights, duties, welfare or status” before a PHA administrative tribunal. 24 CFR 966.50. Except in very limited circumstances,³ a grievance decision is binding on the PHA. See 24 CFR 966.57(b) (“The decision of the hearing officer or hearing panel shall be binding on the PHA which shall take all actions, or refrain from any actions, necessary to carry out the decision[.]”).

While local PHAs are free to develop their own grievance policies and procedures, any grievance hearing must afford the tenant significant procedural safeguards, including the right to examine and copy relevant evidence and documents ahead of time, to have representation (at the

³ A PHA’s Board of Commissioners may administratively overturn a decision that is contrary to law or outside the hearing officer’s authority. See 24 CFR 966.57(b).

tenant's expense) at the hearing, to present evidence and arguments, to confront and cross-examine adverse witnesses, and to have an impartial hearing officer (or panel of hearing officers) render a written decision based solely on the information presented at the hearing. See 42 USC 1437d(k); see 24 CFR 966.56(b);⁴ see also *Saylor* at 873-74. SHA's grievance hearing policy is contained in its Manual of Operations, Code L 12.9-1. CP at 123-131.

3. Applicability of grievance procedures to public housing lease terminations

The termination of a public housing tenancy clearly threatens an adverse effect on the tenant's "rights, duties, welfare or status." See 24 CFR 966.50. But in some jurisdictions, some lease terminations are not subject to the PHA grievance procedure; this is because Congress has authorized PHAs to substitute state court eviction trials in place of grievance hearings for cases involving "criminal activity that threatens the health, safety or right to peaceful enjoyment of the premises of other residents or employees of the PHA [or] violent or drug-related criminal activity [or] criminal activity that resulted in felony conviction of a

⁴ For the most part, HUD's grievance hearing requirements are derived from the 1970 U.S. Supreme Court opinion in *Goldberg v. Kelly*, which established the minimal procedural safeguards that the 14th Amendment Due Process Clause requires whenever "welfare provid[ing] the means to obtain essential food, clothing, housing, and medical care" is at stake. See *Goldberg v. Kelly*, 397 U.S. 254, 264; 90 S.Ct. 1011 (1970).

household member.” See 42 USC 1437d(k); see 24 CFR 966.51(a)(2)(i); see also *Housing Authority of Everett v. Terry*, 114 Wn.2d 558, 567; 789 P.2d 745 (1990). The nature of the allegations against Ms. Powell could potentially have placed the matter within these categories. CP at 6-7. Nonetheless, the termination of her tenancy was not exempt from SHA’s grievance procedure. See CP at 127.

A PHA may substitute a state court eviction trial (in place of the grievance hearing) “only if HUD has determined that state court eviction procedures satisfy the elements of due process as defined in 24 CFR 966.53(c).” *Yesler Terrace Community Council v. Cisneros*, 37 F.3d 442, 445 (9th Cir. 1994); see 42 USC 1437d(k); see 24 CFR 966.51(a)(2)(i). HUD issued such a “due process determination” for Washington on December 20, 1991.⁵ See *Yesler Terrace CC* at 445. However, this due process determination was declared invalid in 1994. See *Yesler Terrace CC* at 449. Since HUD has not replaced the Washington due process determination, housing authorities in this state probably cannot exempt any lease terminations from the PHA grievance procedure. See 42 USC 1437(d)(k); see 24 CFR 966.51(a)(2)(i); but see *Terry* at 567. In any

⁵ The due process determination, HUD Legal Opinion GCH-0032, is available at: <http://www.hud.gov/offices/adm/hudclips/lops/GCH-0032L OPS.pdf>.

event, SHA's grievance policy does not attempt to exempt any cases from the grievance procedure. CP at 127.

4. Public housing lease terminations.

When a PHA attempts to terminate a public housing tenancy, the PHA must provide the tenant a written notice that states the "specific grounds for termination," and also includes other information such as "the right to make such reply as the tenant may wish" and "the right ... to examine PHA documents directly relevant to the termination or eviction." 24 CFR 966.4(l)(3)(ii). The notice must give the tenant a minimum period of time (thirty days or less, depending on the reason for the eviction) in which to vacate the premises. See 24 CFR 966.4(l)(3)(i). And "[w]hen the PHA is required to afford the tenant the opportunity for a grievance hearing," such as at SHA, then "the notice shall also inform the tenant of the tenant's right to request a hearing in accordance with the PHA's grievance procedure" and the tenancy cannot terminate until the deadline for requesting the hearing expires. 24 CFR 966.4(l)(3). If the tenant requests a grievance hearing, then the tenancy continues to the end of the grievance process. 24 CFR 966.4(l)(3)(iv).

SHA served Ms. Powell a written notice to terminate tenancy on January 6, 2009. CP at 6-7. The notice stated specific grounds for the termination, and advised Ms. Powell of her rights to reply to the notice, to

examine relevant SHA documents, and to request a grievance hearing. CP at 7. The notice was defective, however, because it instructed Ms. Powell to vacate the premises within three days—i.e., by January 9, 2010—and because it stated that Ms. Powell had only three days in which to request a grievance hearing. CP at 7.

Three days may have been a reasonable time for Ms. Powell to vacate considering the seriousness of the case. See RCW 59.12.030(5) (allowing landlord to terminate tenancy on three days' notice to vacate for waste or nuisance in the premises); see *Terry* at 566 (lease termination notice periods “may be regarded as the Legislature’s expression of what it considers ‘reasonable’ under the federal statute”). But SHA’s grievance policy assured Ms. Powell at least five days to request a grievance hearing. CP at 7, 127. Her tenancy could not have terminated any earlier than the end of that fifth day. See 24 CFR 966.4(1)(3)(iv) (“tenancy shall not terminate (even if any notice to vacate under State or local law has expired) until the time for the tenant to request a grievance hearing has expired”).

A notice to terminate a tenancy must be “sufficiently particular and certain so as not to deceive or mislead.” *IBF, LLC, v. Hueft*, 141 Wn. App. 624, 632; 174 P.3d 95 (2007). SHA’s notice was misleading as to the amount of time Ms. Powell had both to request a grievance hearing

and to vacate the premises. See CP at 7, 127. Also, “[a] termination notice that fails to follow a lease's terms is ineffective to maintain an unlawful detainer action.” *Tacoma Rescue Mission v. Stewart*, 155 Wn. App. 250, 255; 228 P.3d 1289 (2010). SHA’s notice did not follow the lease terms because it stated shorter deadlines to request a grievance hearing, and to vacate the premises, than were permitted by 24 CFR 966.4(l)(3)(iv) or by SHA’s grievance procedure—both of which are incorporated into the lease. See 24 CFR 966.4.

The defective notice was alone sufficient reason for the superior court to have dismissed the case. See *Leda v. Whisnand*, 150 Wn. App. 69, 85; 207 P.3d 468 (2009) (“A court has no power to give a landlord relief from a holdover tenancy unless the tenant was accorded proper notice.”); see also *Terry* at 564-65 (dismissing public housing eviction lawsuit due to defective lease termination notice). Serving a proper lease termination notice is both a “jurisdictional condition precedent” to an unlawful detainer action, as well as a mandatory element of the claim. See *Terry* at 564-65 (“Because it gave deficient notice, the Housing Authority could not prove a cause of action for unlawful detainer.”).

5. Physical eviction from public housing

Despite the misleading notice, Ms. Powell requested a grievance hearing, which SHA conducted on January 15, 2009. CP at 4, 32-35. The

decision from the grievance hearing was issued on February 4, 2009. CP at 32. Thus, even assuming the lease termination notice SHA gave her was valid, the date Ms. Powell's tenancy terminated would have been February 4, 2009. See 24 CFR 966.4(1)(3)(iv) (if a grievance hearing is requested, public housing tenancy does not terminate until "the grievance process has been completed."). Of course, Ms. Powell did not vacate the premises on or after February 4, 2009.

A tenant who remains in rental premises after the tenancy has terminated (i.e., "holds over") is guilty of unlawful detainer. See RCW 59.12.030; see *Christiansen v. Ellsworth*, 162 Wn.2d 365, 371; 173 P.3d 228 (2007); see also *Marsh-McLennan Bldg., Inc. v. Clapp*, 96 Wn. App. 636, 644; 980 P.2d 311 (1999). When a public housing tenant holds over after lease termination, HUD permits a PHA to remove the tenant either "[b]y bringing a court action [or] bringing an administrative action if law of the jurisdiction permits eviction by administrative action[.]" 24 CFR 966.4(1)(4). Washington does not permit non-judicial eviction. See *Gray v. Pierce County Housing Authority*, 123 Wn. App. 744, 757-59; 97 P.3d 26 (2004). Thus, SHA could remove Ms. Powell from her apartment only by obtaining a writ of restitution through a state civil action. See 24 CFR 966.4(1)(4); see *Gray* at 757; see also *Terry* at 567.

C. Residential Unlawful Detainer Actions in Washington

“Washington law provides two alternate methods of removing a tenant from the landlord’s premises: an action in *ejectment* under RCW 7.28; or an action for *unlawful detainer* under RCW 59.12.” *Terry*, 114 Wn.2d at 566 (italics in original). Ejectment, first recognized at common law, invokes the superior court’s full equitable jurisdiction; “[a]ny person having a valid subsisting interest in real property” can bring an ejectment claim, which can result in an order quieting title to the disputed real property. See RCW 7.28.010, 260; see also *Durrah v. Wright*, 115 Wn. App. 634, 638; 63 P.3d 184 (2003) (discussing common law ejectment actions in Washington). Unlawful detainer actions, by contrast, are specifically designed to facilitate a landlord’s recovery of (possession of) rental premises. See *Motada v. Donohoe*, 1 Wn. App. 174, 175; 459 P.2d 654 (1969). SHA opted to bring an unlawful detainer action against Ms. Powell. CP at 3-5, 9-10.

Unlawful detainer actions are characterized by their summary nature. As soon as a (residential) unlawful detainer action is filed, the landlord may secure an order commanding the tenant to appear and show cause why such a writ of restitution (i.e., an order directing the sheriff to physically remove the tenant) should not be issued. See RCW 59.18.370. This “show cause hearing” may take place in as little as seven days. RCW

59.18.370. A sheriff can execute a writ of restitution as soon as three days after issuance, meaning a prevailing landlord can recover possession as quickly as ten total days after filing suit. See RCW 59.18.370, 390. A case not resolved at the initial show cause hearing must still proceed to a trial within thirty days. See RCW 59.18.380; see also RCW 59.12.130 (Unlawful detainer cases “take precedence of all other civil actions.”).

The unlawful detainer timelines afford little, if any, opportunity for discovery or other pre-trial procedures. See, e.g., CR 33-36 (discovery responses ordinarily due at least thirty days from receipt of request). And, to prevent evictions from being delayed or bogged-down by ancillary matters, parties to unlawful detainer cases are precluded from raising most counter-claims or arguments unrelated to the present right to possession of the disputed premises. See *Munden v. Hazelrigg*, 105 Wn.2d 39, 45; 711 P.2d 295 (1985). Rather, unlawful detainer actions are “limited to the question of possession and related issues such as restitution of the premises and rent.” *Munden* at 45.

1. Unlawful detainer plaintiff must comply with statutory notice and service requirements

Given its advantages in speed and efficiency, it is not surprising that landlords commonly prefer unlawful detainer to ejectment. See *Terry* at 563 (“By reason of provisions designed to hasten the recovery of

possession, the statutes creating [unlawful detainer] remove the necessity to which the landlord was subjected at common law, of bringing an action of ejectment ... with its attendant delays and expenses[.]”), quoting *Wilson v. Daniels*, 31 Wn.2d 633, 643-44 (1948). But to maintain an unlawful detainer action, a landlord—including a PHA—must comply with all applicable statutory procedures. See *Terry* at 564-65.

The provisions governing residential unlawful detainer actions arise principally from two statutes. One is the Unlawful Detainer Act of 1890, which governs unlawful detainer procedures generally (i.e., for any kind of tenancy, whether residential, commercial, or other). See RCW 59.12 et seq. The other is the Residential Landlord-Tenant Act of 1973 (or “RLTA”), which pertains only to residential tenancies. See RCW 59.18.430. The Unlawful Detainer Act applies to residential tenancies except where supplanted by the more recent and more specific RLTA. *Leda*, 150 Wn. App. at 77. Both the Unlawful Detainer Act and (unlawful detainer provisions of) the RLTA are strictly construed in favor of the tenant. See *Terry* at 563; see *Truly v. Hueft*, 138 Wn. App. at 918; see also *Hartson v. Goodwin*, 99 Wn. App. 227, 231-32; 991 P.2d 1211 (2000) (“Unlawful detainer statutes are in derogation of the common law, and we strictly construe them in favor of the tenant.”).

2. Unlawful detainer action requires proper summons

Both the Unlawful Detainer Act and RLTA provide for the tenant to receive a summons at the outset of an unlawful detainer action. See RCW 59.12.040; see RCW 59.18.365. For a residential case, the RLTA prescribes the form for the summons, and the Unlawful Detainer Act provides the manner in which the summons must be served. See RCW 59.18.365; see RCW 59.12.040. Failure to serve the tenant a proper summons in the correct manner is fatal to the action. See *Truly* at 918 (“In the context of a residential unlawful detainer action, the summons must comply with the RCW 59.18.365 to confer both personal and subject matter jurisdiction.”); see *Christiansen v. Ellsworth*, 162 Wn.2d at 372 (“Any noncompliance with the statutory method of process precludes the superior court from exercising subject matter jurisdiction over the unlawful detainer proceeding.”).

Prior cases have classified defective unlawful detainer summonses into two basic categories: “form & content” defects, and “time & manner” defects. See *Truly* at 920-21. A summons that omits statutorily-required information or presents the information in a materially-different way is defective as to “form & content.” See *Id.* at 921-22. A summons that is served at an improper time, or that contains inaccurate or misleading information about procedures for responding is defective as to “time &

manner.” See *Id.* at 921. Strict compliance with “time & manner” is required for an unlawful detainer summons; substantial compliance with “form & content” requirements has sometimes been sufficient, but in one recent case this Court suggested that strict compliance with form & content provisions may also be required in residential unlawful detainer actions. See *Id.* at 921 (“We have never adopted the strictest rule of construction as to the form or contents of such notices under our unlawful detainer statutes, chiefly for the reason, doubtless, that the statutes prescribe no form. But the current residential unlawful detainer statute does provide a form for a summons.”), citing *Foisy v. Wyman*, 83 Wn. App. 22, 32; 515 P.2d 160 (1973).

D. The unlawful detainer summons SHA served to Ms. Powell was ineffective to confer jurisdiction.

SHA served Ms. Powell an unlawful detainer summons on January 26, 2009. CP at 1-2, 14. The summons was deficient. The summons did not indicate that Ms. Powell could respond by mail, as required by RCW 59.18.365, and the summons was served at an inappropriate time, contrary to RCW 59.12.040. Because the summons was defective, the superior court did not have jurisdiction, and should have dismissed this case. See *Truly* 138 Wn. App. at 915; see *IBF* 141 Wn. App. at 633.

1. The summons SHA served Ms. Powell was defective because it did not state that she could respond by mail

The RLTA requires that a residential unlawful detainer summons explicitly inform the defendant that he or she may respond by mail. See RCW 59.18.365(3) (“The summons for unlawful detainer actions for tenancies covered by this chapter shall be substantially in the following form: ... ‘You can respond to the complaint in writing ... by personal delivery, *mailing*, or facsimile...’”) (italics added). The summons SHA served to Ms. Powell stated only that she “can respond to the summons in writing by delivering a copy of a notice of appearance or answer to [her] landlord’s attorney,” and elsewhere that “the notice of appearance or answer must be delivered or faxed to: [SHA’s address.]” CP at 1-2. Nowhere did the summons explicitly inform Ms. Powell of her right to respond by mail. CP at 1-2.

Since the summons was not in the form required by the RLTA, it was defective and did not establish jurisdiction. See RCW 59.18.365; see *Truly* at 922 (“the current residential unlawful detainer statute does provide a form for a summons, and that form includes language giving the tenant the option to answer by mail or facsimile.”). The defect was also of the time & manner variety, because the omitted information pertained to the manner in which Ms. Powell could have responded:

“the tenant's method of answering, although susceptible of falling into both categories, appears more appropriately to be considered a “manner” requirement. Our previous holdings support the conclusion that ‘manner’ refers not only to how a landlord serves the tenant, but also to how the tenant responds.

Truly at 921.

Indeed, the defect in the summons SHA served Ms. Powell can scarcely be distinguished from the summons in *Truly v. Hueft*, a residential unlawful detainer action in which the summons failed to inform the tenant of her right to respond by fax. See *Truly* at 919. In both *Truly* and this case, the body of the summons contained a sentence stating, verbatim:

“You can respond to the complaint in writing by delivering a copy of a notice of appearance or answer to your landlord's attorney to be received no later than the deadline stated above.”

CP at 1; *Truly* at 919. This language reflected a sentence in the RLTA's form summons (at RCW 59.18.365) prior to 2005. See *Truly* at 915-16. In 2005, this text was amended to include the specific methods by which a tenant could respond to a summons:

You can respond to the complaint in writing by delivering a copy of a notice of appearance or answer to your landlord's attorney (or your landlord if there is no attorney) *by personal delivery, mailing, or facsimile to the address or facsimile number stated below* to be received no later than the deadline stated above.

RCW 59.18.365 (italics added); see also *Truly* at 916. The *Truly* court held that the omission of the new language advising the tenant of her other response options (besides personal delivery) rendered the summons defective and inadequate to confer jurisdiction. See *Truly* at 922.

Unlike the *Truly* summons, SHA's summons includes a line near the bottom stating that "the notice of appearance or answer must be delivered or faxed to: [SHA's address.]" CP at 2. This line may have fulfilled SHA's duty to inform Ms. Powell of her right to respond by fax, even though the location of this information is not in the place prescribed by the RLTA form summons. See RCW 59.18.365; but see, c.f., *Truly* at 921-22 (strict compliance with "form & content" requirements of RCW 59.18.365 may be necessary). But this line still did not inform Ms. Powell of her right to respond by mail; therefore, the summons did not comply with RCW 59.18.365, and the superior court was without jurisdiction. See *Truly* at 921-22 (RCW 59.18.365 "require[s] landlords to make tenants fully aware not only of the time in which they must answer, but also of their statutory options for the manner in which they may do so."); see also RCW 59.18.365.

2. The summons was is ineffective because it was served before Ms. Powell’s tenancy has terminated

An unlawful detainer summons confers jurisdiction only if served at the proper time. See *IBF v. Hueft*, 141 Wn. App. at 633 (unlawful detainer summons served before tenant’s deadline to pay rent or vacate expired did not confer jurisdiction); see also *Canterwood Place, LP v. Thande*, 106 Wn. App. 844, 848-50; 25 P.3d 495 (2001) (summons served earlier than permitted by RCW 59.18.070 did not confer jurisdiction), *superseded on other grounds by statute*.⁶ (RCW 59.12.070). The summons SHA served Ms. Powell was also defective because it was served at an inappropriate time—that is, before the tenancy terminated.

To terminate a tenancy, a landlord must ordinarily give the tenant a written notice to quit the premises.⁷ See RCW 59.12.030. Depending on

⁶ In *Canterwood Place*, a landlord had served an unlawful detainer summons less than six court days before the return date. See *Canterwood* at 846. At the time, RCW 59.18.070 required the return date to be between six and twelve days after service. See *Canterwood* at 847. The *Canterwood* court ruled that, because the deadline specified in RCW 59.18.070 was less than seven days, the time computation rules under CR 6(a) were applicable and the summons needed to be served at least six court days before the return date. See *Canterwood* at 849. For this reason, the *Canterwood* court ruled that the summons was served at an inappropriate time, and affirmed a commissioner’s order denying the landlord’s claim. See *Canterwood* at 850. Several years later, the Legislature amended RCW 59.18.070 to require the return date to fall between seven and thirty days after service. See RCW 59.18.070. Thus, the CR 6(a) time computation rules probably no longer apply to RCW 59.18.070.

⁷ Such notice is not required at the expiration of a lease for a specified time, or if the tenant “commits or permits any gang-related activity at the premises as prohibited by RCW 59.18.130.” RCW 59.12.030(1), (7). Neither of these scenarios are implicated here.

the reason for termination, the notice must provide the tenant a minimum of three to more than twenty days' notice of the deadline to vacate, and may need also to offer the tenant an opportunity to preserve the tenancy by curing the alleged default or lease violation. See RCW 59.12.030(2-5). In a public housing tenancy, this notice may be combined with the lease termination notice required by federal law (i.e., 24 CFR 966.4(1)(3)), and the time periods may run concurrently. 24 CFR 966.4(1)(3)(iii). SHA served Ms. Powell such a combined notice in this action. See CP at 6-7.

A tenancy terminates when the time specified in the notice to vacate (or pay-or-vacate or comply-or-vacate) expires. See *Christiansen*, 162 Wn.2d at 371; see *Wooding v. Sawyer*, 38 Wn.2d 381, 387; 229 P.2d 535 (1951). If a tenant holds over past the expiration of the notice to vacate, then she is guilty of unlawful detainer. RCW 59.12.030; see *Wooding* at 387 (“Until the notice has been served and has remained uncomplied with for a period of three days after its service, the tenant, though in [violation of the lease], is rightfully in possession, but thereafter he is guilty of unlawful detainer.”).

“Once a tenant is guilty of unlawful detainer ... a landlord may commence an unlawful detainer action by service and filing of the statutory summons and complaint.” *Christiansen* at 371. However, multiple Washington cases make clear that a summons served before the

tenancy has terminated—that is, before the tenant’s deadline to vacate has run—is premature, and does not establish unlawful detainer jurisdiction. See *IBF*, 141 Wn. App. at 633; see *Community Investments, Ltd. v. Safeway Stores, Inc.*, 36 Wn. App. 34-35, 38; 671 P.2d 289 (1983).

a. *Community Investments v. Safeway Stores*

The first relevant case is *Community Investments v. Safeway Stores* (hereafter “*Safeway Stores*”), which held that a prematurely-filed unlawful detainer case is without jurisdiction and must be dismissed. See *Safeway Stores* at 38. The *Safeway Stores* case also established that an unlawful detainer action is premature if commenced prior to the time a rental agreement provides for the tenant to vacate. See *Id.* at 38. While *Safeway Stores* did not directly concern the timing of the summons, both of these holdings are significant to this appeal.

The tenant in *Safeway Stores* was a supermarket chain (Safeway) that had closed a store located in leased space at a commercial shopping center. See *Id.* at 34. The shopping center—which viewed the Safeway as an “anchor tenant” that drew customers to the surrounding businesses—served Safeway a comply-or-vacate notice demanding it either re-open (as required by the lease) or surrender the premises within ten days. See *Id.* at 34-36; see RCW 59.12.030(4). But Safeway neither re-opened the store

nor vacated the premises within ten days, so the shopping center filed an unlawful detainer action. See *Safeway Stores* at 36.

Safeway moved to dismiss on several grounds, including that the action was filed prematurely. See *Id.* at 36. The trial court granted the motion for dismissal, but on unspecified grounds. See *Id.* at 36. The shopping center appealed, and the dismissal was affirmed on the basis that the suit had indeed been prematurely filed. See *Id.* at 38 (“Because [the shopping center’s] suit was premature, the superior court never obtained jurisdiction over Safeway or the cause.”).

Significantly, the shopping center had filed the unlawful detainer action on the nineteenth day after serving the comply-or-vacate notice. See *Safeway Stores* at 37. As the Unlawful Detainer Act authorizes a landlord to terminate a tenancy on just ten days’ notice (to comply-or-vacate) for breach of a lease covenant, the action was timely under the minimum notice periods set forth in the statute. See RCW 59.12.030(4). But Safeway had negotiated a right to twenty days’ notice in its rental agreement, and “[t]he parties validly having contracted in their lease for a longer time period than the statute provides, are bound by that provision.” *Safeway Stores* at 37. Thus, it was the shopping center’s commencement of the unlawful detainer action before the expiration of the notice period

provided in the lease, rather than the statute, which made the action premature. See *Id.* at 37.

Like the shopping center in *Safeway Stores*, SHA served Ms. Powell a lease termination notice demanding that she vacate after the minimum period allowed by statute. CP at 1-2; see RCW 59.12.030(5) (authorizing termination of tenancy on three days' notice to quit in cases of waste or nuisance). This deadline had expired on January 9, 2009—and thus SHA's January 26, 2009, summons was timely under the statute. CP at 1-2; see RCW 59.12.030(5). However, Ms. Powell's lease provided that her tenancy would continue until completion of her grievance hearing process, irrespective of the minimum statutory notice period. See 24 CFR 966.4(l)(3)(iv) ("the tenancy shall not terminate (even if any notice to vacate under State or local law has expired) until the time for the tenant to request a grievance hearing has expired, and (if a hearing was timely requested by the tenant) the grievance process has been completed.").

As the grievance process was not completed until February 4, 2009, SHA could not properly have commenced an unlawful detainer suit until then. See *Safeway Stores* at 38 ("When a tenant contracts with his landlord for a notice period longer than the statutory period, he is entitled to the full time stated just as he is under the statute."); see also 24 CFR 966.4(l)(3)(iv). In other words, since the rental agreement still gave Ms.

Powell the right to occupy the premises, she was not holding over on January 26, 2009, when SHA's commenced this action. CP at 1-2, 14; see CR 3(a). The action having been prematurely commenced, the superior court was without jurisdiction and should have dismissed the case. See *Safeway Stores* at 37.

b. *IBF, LLC v. Hueft*

Whereas the landlord in *Safeway Stores* had filed its unlawful detainer action before the tenant's deadline for vacating the premises had expired, SHA did not file this action until February 12, 2009—that is, approximately eight days after the grievance process was completed. CP at 3; see *Safeway Stores* at 36. However, the case of *IBF, LLC v. Hueft* makes clear this difference is immaterial. See *IBF*, 141 Wn. App at 633.

In *IBF*, a tenant failed to pay rent for three months, and the landlord served her with a notice to pay rent or vacate. See *IBF* at 628. Consistent with state law, the notice gave the tenant three days to either cure the default or vacate the premises. See *IBF* at 628; see RCW 59.12.030(3). When the tenant neither paid the delinquent rent nor vacated the premises, the landlord served her an unlawful detainer summons and complaint on the ninth day after the notice. See *IBF* at 633. But, like in *Safeway Stores*, the tenant's lease had provided more time than the statutory minimum time to cure a default in rent (ten days after written

notice). *IBF* at 630. Following *Safeway Stores*, the *IBF* court found the summons was premature and thus did not confer jurisdiction. See *IBF* at 633.

Significantly, in *IBF* the landlord had not filed the unlawful detainer action until after the tenth day (following the notice to comply-or-vacate) had passed. See *IBF* at 629. This did not affect the outcome, however, because the prematurely-served summons remained inadequate to establish the court's jurisdiction:

“Although *IBF* did not *file* its complaint with the court until twenty calendar days after giving Hueft notice, it misled her by serving the summons before the ten-day notice period expired. Because compliance with service procedures is jurisdictional, we conclude that the trial court lacked jurisdiction.”

IBF at 633 (italics in original). Thus, after *IBF* there can be no doubt that neither the filing nor service of an unlawful detainer action can precede the termination of the tenancy. See *IBF* at 633.

c. Whether the tenant has a right to cure is immaterial in determining time when tenancy terminates

IBF and *Safeway Stores* control the outcome in this case, even though SHA's unlawful detainer action was predicated on a (3-day) notice to quit alleging “nuisance,” rather than a cure-or-vacate type of notice (as in *Safeway Stores* and *IBF*). CP at 6-7; see RCW 59.12.030(5); see also

Safeway Stores at 35-36; see also *IBF* at 629. The case that best demonstrates this rule is *Leda v. Whisnand*, 150 Wn. App. at 73.

In *Leda*, landlords (the Ledas) served a notice to terminate tenancy upon their month-to-month residential tenant (Whisnand). See *Leda* at 73; see RCW 59.12.030(2). There is nothing a tenant who receives such a notice can do to preserve the tenancy; rather, such a tenant must simply move out:

If the tenant has been given proper notice, however, the Residential Landlord Tenant Act does not require the landlord to further justify ending the landlord-tenant relationship . . . No reason need be given for such termination; there is no ‘breach’ at issue, and thus nothing that the [tenant] can ‘cure.’

Leda at 77-78.

To be effective, such a notice must be served at least twenty days before the next rental period would begin; the tenancy terminates at the end of the preceding rental period. RCW 59.12.030(2). The Ledas’ notice was served January 30, 2008, and instructed Whisnand to vacate no later than February 29, 2008. *Leda* at 73. When Whisnand did not move out, the Ledas served him an unlawful detainer summons on March 1, and filed the action on March 5, 2008. *Leda* at 74.

Since the rental period in a month-to-month tenancy commonly runs from the first day of a month to the last day, the Ledas’ notice—being

more than twenty days before March 1, the beginning of the March rental period—would ordinarily have been effective to terminate Whisnand’s tenancy as of February 29. See *Leda* at 80; see RCW 59.12.030(2). But Whisnand claimed the period of his tenancy ran from the 15th day of one month to the 14th day of the next. *Leda* at 80. If true, this would mean the start date for Whisnand’s next rental period would be February 14, not March 1. *Id* at 80. “If Whisnand’s tenancy period did not end until February 14, the earliest date that the Ledas could have initiated [and unlawful detainer] suit would have been March 14—the first end of a tenancy period more than 20 days after the service of notice.” *Leda* at 80; see also RCW 59.12.030(2).

The superior court entered judgment for the Ledas, but only after improperly denying Whisnand an opportunity to present evidence proving that the rental periods began on the 14th and ended on the 15th of each month. See *Leda* at 74-77. This Court reversed, since the improperly-excluded evidence could have established that the Ledas prematurely served (and filed) the unlawful detainer action—a fact that would have meant the case was without jurisdiction. *Id.* at 80.

The *Leda*’s court’s determination (that an unlawful detainer action cannot be commenced until the termination date specified in a notice to vacate has expired) is consistent with *Christiansen v. Ellsworth*, which

also concerned a residential tenancy. See *Christiansen*, 162 Wn.2d at 369. In *Christiansen*, the landlord served an unlawful detainer summons and complaint to a tenant on July 8, after receiving no response from a pay-or-vacate notice mailed July 3. See *Christiansen* at 369-70. More than four⁸ calendar days had elapsed from the time of the pay-or-vacate notice to the service of the summons, but three of those days were over a weekend and a holiday. *Id.* at 369. The tenant argued that the time computation rules of CR 6(a) applied to the pay-or-vacate notice period, which would exclude weekends and holidays. *Id.* at 372.

The Supreme Court recognized that, if CR 6(a) applied to the notice period, then the action would be without jurisdiction for having been commenced (by service of the summons and complaint) before the time to pay-or-vacate expired. See *Christiansen* at 371-72. However, the court ruled that CR 6(a) does not apply to lease termination notice periods. See *Christiansen* at 374. One reason for this conclusion was that the civil rules apply to “proceedings,” and an unlawful detainer notice period is not a proceeding. See *Christiansen* at 373-74. But a second reason was that a lease termination notice period constitutes a “waiting period for the

⁸ In *Christiansen*, an extra day was added to the time for the tenant to cure because the pay-or-vacate notice was served by mail. *Christiansen* at 371; see also RCW 59.12.040 (“[W]hen service is made by mail one additional day shall be allowed before the commencement of an action based upon such notice.”).

landlord before an unlawful detainer action can be commenced rather than a deadline for the tenant to act.” *Christiansen* at 377.

E. Continuation of the tenancy precludes the commencement of an unlawful detainer action, not just the entry of a judgment for possession (or writ of restitution), prior to completion of the grievance process

Consistent with *IBF*, the superior court commissioner found that SHA’s summons was prematurely served and did not establish jurisdiction for the case. RP at 16-17; CP at 75-77; see *IBF* at 633. The revision judge overturned the commissioner on the premise that “[t]he completion of the grievance process is not a jurisdictional prerequisite to the filing of this action and service upon defendant.” CP at 153. This conclusion was untenable. Per *IBF* and *Safeway Stores*, termination of the tenancy is a jurisdictional prerequisite to (both filing and) service of an unlawful detainer action, and per HUD’s mandatory lease regulation, completion of the grievance process is a condition precedent to termination of a public housing tenancy. See *IBF* at 633; see *Safeway Stores* at 37-38; see 24 CFR 966.4(1)(3)(iv). Therefore, completion of the grievance process is a jurisdictional prerequisite to serving an effective summons.

1. “Tenancy” means a right to possession of premises, not just possession

Critically, the superior court appears to have overlooked the difference between a “tenancy” and mere possession of premises. CP at

153. SHA argued that “tenancy” essentially means “possession” and thus only the judicial removal of the tenant terminates a tenancy:

“The plain meaning of the tenancy is that she is in possession. . . . Under the unlawful detainer, she’s entitled to retain possession until the Court signs the document ordering the writ and the sheriff coming, even after the Court issues the writ. So the tenancy continues until the sheriff comes and physically removes them.”

RP at 11-12.

Neither the superior court commissioner nor the revision judge appears to have agreed that a tenancy continues all the way until physical removal of the tenant. RP at 15-17; CP at 153. But the revision judge did accept SHA’s core assertion that possession and tenancy are equivalent, and thus that the restoration of a landlord’s possession is what terminates a tenancy. CP at 153. This was the error that led to the superior court’s incorrect conclusion (that 24 CFR 966.4(1)(3)(iv) precludes only the issuance of a judgment for possession prior to completion of the grievance process, not the commencement of suit). CP at 153. The flaw in this analysis lies within its premise; i.e., the terms “tenancy” and “possession” do not mean the same thing.

To be in “possession” of land means simply to occupy the property with intent to control it. See *Pruitt v. Savage*, 128 Wn. App. 327, 331; 115 P.3d 1000 (2005). To have a “tenancy” means having the *right to*

possession, usually pursuant to a lease with the landowner. See RCW 59.18.030(19) (“A ‘tenant’ is any person who is entitled to occupy a dwelling unit primarily for living or dwelling purposes under a rental agreement.”). “Tenancy” can also mean possession pursuant to such a right. See Black’s Law Dict., 8th Ed. (2004) (defining “tenancy” as either “possession or occupancy of land under a lease [or] a leasehold interest in real estate.”). However, it is certainly possible to be in “possession” of premises without having a “tenancy.” A holdover tenant, i.e., a person who unlawfully remains in possession of premises after her tenancy has terminated, is in such a status. See RCW 59.12.030; see *Carlstrom v. Hanline*, 98 Wn. App. 780, 786; 990 P.2d 986 (2000).

2. The continued possession of rental premises by a holdover tenant is unlawful even though the landlord must obtain judicial intervention to recover possession

As discussed above, a “tenancy,” or a tenant’s *right* to possession, terminates at the expiration of a notice to vacate (or term tenancy). See RCW 59.12.030; see also *Carlstrom* at 786. If the tenant holds over, the landlord cannot remove her except through judicial process—but this does not make her continued possession “lawful” until the judgment or writ of restitution is issued. See *Gray*, 123 Wn. App. at 757 (“no landlord ... may ever use non-judicial, self-help methods to remove a tenant”). On the contrary—holding over past the termination of a tenancy is illegal, and

expressly prohibited by statute. See RCW 59.18.290(2) (“It shall be unlawful for the tenant to hold over in the premises or exclude the landlord therefrom after the termination of the rental agreement except under a valid court order so authorizing.”); see *Carlstrom* at 786-87; see also RCW 59.12.170 (authorizing double-damages against hold-over tenants in non-residential tenancies).

The entry of a judgment for possession in an unlawful detainer suit reflects a judicial determination that the tenancy was in fact terminated, and thus the tenant was unlawfully holding over—it is not the judgment itself that terminates the tenancy. See *Carlstrom* at 786. Conversely, a tenant may prevail in an unlawful detainer action by proving that her lease was not terminated. See *Terry* at 570-71; see also *Housing Authority of Everett v. Kirby*, 154 Wn. App. 842,853-54; 226 P.3d 222 (2010).

The regulation at issue in this case provides that a public housing “tenancy” does not terminate until the grievance process is completed. 24 CFR 966.4(1)(3)(iv). That regulation, and associated lease provision, thus extends Ms. Powell’s *right* to possession of her apartment, not just her physical occupancy, to the conclusion of the grievance process. See *Id.*; see also *Tesoro Refining & Marketing Co. v. Dept. of Revenue*, 164 Wn.2d 310, 322; 190 P.3d 28 (2008) (unambiguous regulations interpreted

according to plain and ordinary meaning); see also *Stevens v. Brink's Home Security, Inc.*, 162 Wn.2d 42, 47; 169 P.3d (2007) (same).

Indeed, this is the only logical interpretation, for a public housing tenant must have the right to remain in the premises pending the outcome of an administrative grievance hearing. See *Goldberg v. Kelly*, 397 U.S. 254, 264; 90 S.Ct. 1011 (1970) (“when welfare is discontinued, only a pre-termination evidentiary hearing provides the recipient with procedural due process.”); see *Housing Authority of King County v. Saylor*, 19 Wn. App. at 873-75 (extending *Goldberg* to public housing in Washington and holding that a “Housing Authority must also comply with HUD regulations and its own grievance procedure. Until it does so, [tenant] is entitled to continue her tenancy.”) (underline added).

Since Ms. Powell still had the right to possession of her apartment when the summons was served on January 26, 2009, she was not holding over or unlawfully detaining the premises at that time, and therefore the summons was premature. See *IBF* at 633; see *Safeway Stores* at 37-38. The “waiting period” before SHA could commence an unlawful detainer action against Ms. Powell coincided with the completion of her grievance process, which did not end until February 24, 2009. CP at 32-35; see *Christiansen* at 377; see also 24 CFR 966.4(1)(3)(iv). The superior court should have concluded that SHA’s premature summons failed to confer

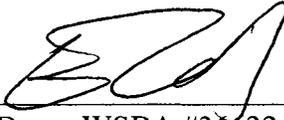
unlawful detainer jurisdiction, and dismissed the case accordingly. See *IBF* at 633. Its judgments should therefore be reversed and this action dismissed for lack of jurisdiction.

VI. Conclusion

For all of the foregoing reasons, the Court should REVERSE the judgment of the superior court.

RESPECTFULLY SUBMITTED this 15 day of September, 2010.

NORTHWEST JUSTICE PROJECT

By: 

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