Advising and Representing Low-Income Tenants Facing Eviction

EVICTIONS: THE TENANT'S PERSPECTIVE

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This outline is a brief review of the topics it covers. It is not a substitute for legal advice. Persons with a particular legal problem should consult an attorney. Attorneys should supplement this outline with their own legal research.

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A. GENERAL

The unlawful detainer action is a special statutory procedure for the recovery of rental property. RCW 59.12. It is summary in nature, in derogation of the common law, and is strictly construed in favor of the tenant. *Housing Authority v. Terry*, 114 Wn.2d 558 (1990); *Wilson v. Daniels*, 31 Wn.2d 633 (1948); *Sullivan v. Purvis,* 90 Wn. App. 456 (1998). *See* Stoebuck, Vol. 17 WASHINGTON PRACTICE, Chap. 6 *Landlord and Tenant* (1995); Fredrickson, Vol. IC WASHINGTON PRACTICE, Chap. 88 *Termination of Tenancies and Unlawful Detainer* (1997).

Because the unlawful detainer action is a special statutory proceeding, limited primarily to the issue of possession, dismissal in favor of the tenant does not preclude the landlord from bringing a separate civil action against the tenant for damages arising out of the eviction process. *Phillips v. Hardwick*, 29 Wn. App. 382 (1981); *Mead v. Park Place Properties*, 37 Wn. App. 403 (1984).

For most residential tenancies, RCW 59.12, RCW 59.18, and RCW 59.20 will be the most applicable statutes. RCW 59.18 is the Residential Landlord Tenant Act (RLTA). RCW 59.18 governs residential tenancies involving the rental of a "dwelling", such as an apartment, room, or house. RCW 59.20 is the Mobile and Manufactured Home Residential Landlord Tenant Act (MHLTA). RCW 59.20 governs rentals of lots in mobile home parks for people who own their mobile home.

RCW 59.12 regulates all unlawful detainer actions. It is modified by RCW 59.18 and 59.20 which use specific procedures in RCW 59.18.365 through RCW 59.18.410 for residential tenancies.

Beyond just defending and identifying a client's defenses, unlawful detainers involve a dynamic set of circumstances that require knowledge of the availability of public resources to pay off a judgment or debt, the impact of an eviction on future tenancy opportunities, and same-day settlements that leave room for interpretation or error. Advocates should consult additional training resources on these points.

B. GROUNDS FOR TERMINATION OF TENANCY

Service of a proper unlawful detainer notice is a jurisdictional prerequisite to commencement of an unlawful detainer action. *Sowers v. Lewis*, 49 Wn.2d 891 (1957). The notice must be one of the notices specified in RCW 59.12.030. *Turner v. White*, 20 Wn. App. 290 (1978). An improper notice prevents the court from exercising unlawful detainer jurisdiction. *Sullivan v. Purvis,* 90 Wn. App. 456 (1998).

1. General Unlawful Detainer Notices (not for RLTA or MHLTA)

RLTA and MHTLA tenancies have their own notice requirements, separate from the UDA statute. **The seven grounds for unlawful detainer below are not for use in RLTA or MHLTA cases.** For all other tenancies, such as for farmworker housing or tenants who are employed to work at the premises, the following are grounds for unlawful detainer pursuant to RCW 59.12.030:

1. Failure to vacate after expiration of a lease or rental agreement for a specified term (requires no written notice unless the contract itself requires notice) The holdover tenant provision of the unlawful detainer statute did not apply to a tenant who breached the lease and the landlord was not excused from serving an unlawful detainer notice with a cure opportunity prior to commencing an unlawful detainer action. *FPA Crescent Assoc. LLC v. Jamie's LLC,* 190 Wn. App. 666,(2015);;

2. Failure to vacate after service of a notice of termination of tenancy on a month-to-month tenant twenty days or more before the end of any monthly rental period;

3. Default in the payment of rent and failure to comply with a fourteen-day notice to pay rent or, alternatively, vacate the premises;

4. Breach of a covenant or term of the rental agreement and failure to comply or vacate after a ten day notice;

5. Failure to vacate after service of a three day notice for waste, nuisance, or unlawful business;

6. Failure of a trespasser to vacate after service of a three day notice.

7. Committing or permitting gang-related activity at the premises in violation of RCW 59.18.130 (no notice specified, but legislative history presumes three-day notice to vacate).

2. <u>RLTA Notices for Unlawful Detainer</u>

RLTA tenancies are governed by a just cause law that creates 16 different causes for termination of tenancy. They can be separated into three types, ones where the tenant is in breach or has failed to act; ones where the landlord has a reason to terminate the rental agreement; and rental agreements for a specified period that have expired. The law is not yet codified, so citations can be as the following: 2021 Laws, Ch. 212, Sec. 2, sub. (2).

a. Tenant breaches the lease or other violation

The tenant fails to pay rent or vacate within 14 days
Lease violation: a "substantial breach of a material term"
"Waste or nuisance" which is unlawful or substantially or repeatedly interferes with neighbors

The tenant harasses the landlord or another tenant
The tenant gives false information on the application
The landlord offers a new lease, but the tenant doesn't accept
A resident fails to fill out a rental application

b. Landlord wants possession for their own reason

The landlord wants to move into the rental unit
The landlord wants to sell a single-family rental house
The landlord wants to substantially remodel or tear down (demolish) the unit
The landlord wants to convert the unit into a condominium
The landlord has a legitimate economic or business reason
The rental unit has been condemned
The landlord shares a dwelling unit, kitchen or bathroom with the tenant
The landlord is a transitional housing program

c. *Rental agreement is for a specified period*

The rental agreement is for a specified period and the landlord has given 60 days notice to terminate the tenancy prior to the expiration of that term.

The RLTA contains several other less-common reasons for termination. Expedited unlawful detainer notice procedures may also be available for termination of rental agreements in alcohol and drug-free housing covered by RCW 59.18.550. Finally, after a tenant vacates for reasons other than the ending of the tenancy by the landlord, the landlord must serve certain remaining occupants a notice providing the option to vacate or apply to become party to the rental agreement.

3. Notices for MHLTA Tenancies

Notices for tenancies governed by RCW 59.20 are found at RCW 59.20.080.

C. DEFENDING THE UNLAWFUL DETAINER ACTION

1. Governing Principles Favor Preservation of the Tenancy

Four general principles governing unlawful detainer actions favor the tenant:

a) Courts strictly construe unlawful detainer laws in the tenant's favor:

The unlawful detainer statute is in derogation of the common law, and must therefore be

strictly construed in favor of the tenant. *Housing Authority v. Terry*, 114 Wn.2d 558 (1990), (citing *Wilson v. Daniels*, 31 Wn.2d at 643). *See also Housing Authority v. Silva*, 94 Wn. App. 731 (1999); *Kessler v. Nielson,* 3 Wn. App. 120, 123 (1970).

b) The court should avoid the forfeiture of leases if possible.

The Court in Stevenson v. Parker, 25 Wn. App. 639 (1980), made this point when reversing an unlawful detainer judgment in the landlord's favor. Quoting from *Spedden v. Sykes*, 51 Wash. 267, 272 (1908), the court stated the law's strong revulsion to forfeitures of leases:

> This court has held the general doctrine that forfeitures are not favored in the law, and that courts should promptly seize upon any circumstance arising out of the contract or relations of the parties that would indicate an election or an agreement to waive the harsh and at times unjust remedy of forfeiture, a remedy which is oftentimes too freely granted by those who have taken no account of the misfortunes and disappointments which conditions, unforeseen and beyond a party's control, have raised as a bar to performance, however honest may be his intent. Equity will enforce forfeitures when it is the contract of the parties that it shall be so. But before making its decrees it will consider every agreement, every declaration, and every relation of the parties arising out of the contract; and if there be anything that warrants a finding that the parties have resolved anew, it will so decree.

25 Wn. App. at 647. *See also Olympic Manganese Mining Co. v. Downing,* 156 Wash. 686, 689 (1930)("Forfeitures are odious and should be avoided when possible."), *Markland v. Wheeldon,* 29 Wn. App. 517, 520 (1981).

c) Any ambiguity in the lease must be construed against the landlord that supplied it.

This principle acknowledges the unequal bargaining power between the parties to a residential lease. *McGary v. Westlake Investors,* 99 Wn.2d 280, 287 (1983).

d) The landlord is the plaintiff and bears the burden to prove the elements of their case and their entitlement to a writ of restitution.

This includes proving the existence of a rental agreement, service of predicate notice, and the existence of a tenancy. *See, e.g., Housing Authority v. Pleasant*, 126 Wn. App 382 (2005). Further, the evidence at show cause should be construed in the light most favorable to the tenant. *Webster v. Litz,* __ Wn. App. 2d. __, 2021 WL 2801729, *4 (2021).

2. Procedural defenses

The procedural requirements for unlawful detainer actions must be carefully followed. The unlawful detainer action is a special statutory proceeding that is strictly construed. *Kessler v. Nielsen*, 3 Wn. App. 120 (1970). Minor irregularities which would typically be either ignored

or easily corrected in an ordinary civil action may result in dismissal of an unlawful detainer action. Time and manner requirements—such as the time for compliance by a tenant—require strict compliance. *Christiansen v. Ellsworth*, 162 Wn.2d 365 (2007). Form and content requirements—such as the contents of a notice where the statute prescribes no form—require substantial compliance. *See Truly v. Heuft*, 138 Wash. App. 913, 921, (2007), abrogated by *MHM & F, LLC v. Pryor*, 168 Wash. App. 451, (2012) (abrograting *Truly* on unrelated grounds).

a) Improper Court

The superior court has original jurisdiction to hear unlawful detainer actions. Art. 4, § 6 Washington Constitution; RCW 2.08.010.

b) Failure to Serve Proper Unlawful Detainer Notice

i. Form and Content of notices

Service of a RCW 59.12.030 notice is a prerequisite to bringing an unlawful detainer action. *Sowers v. Lewis*, 49 Wn.2d 891 (1957); 33 WASH. L. REV. 165 (1958); *Community Investments v. Safeway*, 36 Wn. App. 34 (1983). *See also*, Peck, *Landlord and Tenant Notices*, 31 WASH. L. REV. 51 (1956). The form and content of the statutory notice must substantially comply with the requirements of RCW 59.12.030. *Sowers v. Lewis*, *supra; Provident Mutual Life Ins. Co. v. Thrower*, 155 Wash. 613, 617 (1930); *Foisy v. Wyman*, 83 Wn.2d 22 (1973). Numerous informal notices of lease violations are not sufficient. *Sullivan v. Purvis*, 90 Wn. App. 456 (1998). The court did make a limited exception to the requirement of strict compliance for notice given by the tenant in *Kennedy v. McGuire*, 38 Wn. App. 237 (1984).

ii. RLTA specificity

New in 2021, notices under the RLTA must identify "facts and circumstances known and available to the landlord at the time of the issuance of the notice that support the cause or causes with enough specificity so as to enable the tenant to respond and prepare a defense to any incidents alleged." Laws 2021, Ch. 212, Sec. 2. A notice may also be insufficient if it doesn't comply with the lease and fails to state the reasons for termination with reasonable specificity. *Tacoma Rescue Mission v. Stewart,* 155 Wn. App. 250 (2010) (subsidized housing).

iii. CARES Act 30-day Notice Provision

In response to the COVID-19 pandemic, Congress passed the CARES Act which created a temporary moratorium on evictions in some federally subsidized housing. CARES Act, P.L. 116-36, sec. 4024 (b). The covered properties include HUD, USDA, and LIHTC-supported properites, as well as persons with Section 8 vouchers, and homes with federally backed mortgages. One database to confirm the subsidy of these properties is here:

https://nlihc.org/federal-moratoriums

However, the CARES Act also imposed a 30-day notice requirement on evictions in many types of federally assisted housing, cross-referencing housing covered by the Violence Against Women Act, which did not sunset with the moratorium's expiration. The text of the statute does not limit the 30-day notice to nonpayment evictions, though the structure and purpose of the Act arguably do. Thus, for advocates who have tenants living in federally assisted housing, they should argue that these landlords are required to serve 30-day notices in all instances but be prepared for the court to decide that they only apply to nonpayment cases. *See, e.g., W. Haven Hous. Auth. v. Eugenia Armstrong*, 2021 WL 2775095, at *2 (Conn. Super. Ct. Mar. 16, 2021) (holding that CARES Act 30-day notice provision only applies to nonpayment cases) *and Nwagwu v. Dawkins*, 2021 WL 2775065, at *2 (Conn. Super. Ct. Mar. 2, 2021).

c) Improper Service or Time of Unlawful Detainer Notice

A tenant is entitled to service of notice exactly as required by RCW 59.12.040. *Lowman v. West*, 8 Wash. 355 (1894); *Hinkhouse v. Wacker*, 112 Wash. 253 (1920). An extra day must be added to the notice period when the notice is mailed. RCW 59.12.040. When the period of time prescribed or allowed by the unlawful detainer notice is less than seven days, Saturdays, Sundays and holidays are not excluded in the computation. *Christensen v. Ellsworth,* 162 Wn.2d 365 (2007), *overruling Christensen v. Ellsworth*, 134 Wn. App. 295 (2006). If the last day falls on a Saturday, Sunday, or holiday, *Christensen* also says in dictum that the tenant may not have until the following business day to perform. CR 6(a); RCW 1.12.040. The landlord must plead service of notice. *Little v. Catania*, 48 Wn.2d 890 (1956). Although the superior court's constitutional jurisdiction over unlawful detainer actions remains constant regardless of procedural missteps by the parties, a party filing an action after improper notice may not maintain such action or avail itself of the superior court's jurisdiction. *Hall v. Feigenbaum*, 178 Wn. App. 811 (2014). In an unpublished opinion, the court held that each cotenant must be served with the unlawful detainer notice pursuant to RCW 59.12.040. *Culpeper v. Jordan,* 151 Wn. App. 1026, 2009 WL 2220652 [UNPUBLISHED OPINION; DO NOT CITE. GR 14.1(a); RCW 2.06.040].

d) Improper Summons

If the summons does not comply with the strict requirements of RCW 59.12.070 and .080 the court does not have authority to proceed under the unlawful detainer act. Kelly v. Schorzman, 3 Wn. App. 908 (1970); *Big Bend Land Co. v. Huston*, 98 Wash. 640 (1917); *Morris v. Healy Lumber Co.*, 33 Wash. 451 (1903); *Draper Machine Works v. Hagberg*, 34 Wn. App. 483 (1983); *Markland v. Wheeldon*, 29 Wn. App. 517 (1981). The summons must be returnable on a designated date which shall not be less than seven nor more than thirty days from the date of service. RCW 59.12.070. A summons that afforded a tenant fewer than seven days to respond was void under CR 6 prior to the codification of the seven day minimum period in 2005. *Canterwood Place, L.P. v. Thande,* 106 Wn. App. 844 (2001). The RLTA form "Eviction

Summons" must contain certain information required by statute including a street address for delivery of a response and, if available, a facsimile number for the plaintiff or the plaintiff's attorney, if represented. RCW 59.18.365. The summons must also contain information relating to appointment of counsel for indigent tenants in MHLTA and RLTA evictions. A summons that fails to inform the tenant of the right to respond by mail or facsimile does not strictly comply with the statute and does not confer subject matter unlawful detainer jurisdiction. *Truly v. Heuft,* 138 Wn. App. 913 (2007) [abrogated by *MHM & F, LLC v. Pryor*, 168 Wn. App. 451 (2012)]. See also *Housing Authority of City of Everett v. Kirby,* 154 Wn. App. 842 (2010). For tenancies governed by the MHLTA, notice may only be effective if personally served on the tenant or by posting and mailing. Substitute service is not permitted. RCW 59.20.150.

e) Improper Service of Summons.

The summons must be served as in other civil cases. CR 4; RCW 4.28.080-090. The summons must either be personally served on the defendant or a copy must be left at the defendant's usual abode with a resident therein of suitable age and discretion. There must be a delivery of the summons for effective service. *United Pacific Ins. Co. v. Discount Co.*, 15 Wn. App. 559 (1976). Failure to come to the door to receive service of process is not evasion of service. *Weiss v. Glemp*, 127 Wn.2d 726 (1995). "Usual place of abode" means the center of the defendant's domestic activity and the place where he or she is most likely to receive notice. *Sheldon v. Fettig*, 129 Wn.2d 601, 610-611 (1996); Note and Comment, *Sheldon v. Fettig, Interpreting the Substitute Service of Process Statute in Washington,* 72 WASH. L. REV. 655 (1997). "Resident" means someone who is actually living in the home, not someone who is merely "present" there. *Salts v. Estes,* 133 Wn.2d 160, 170 (1997). The defense of insufficient service of process is not waived by filing a notice of appearance (CR 4(d)(5); *Adkinson v. Digby, Inc.,* 99 Wn.2d 206, 210 (1983)) and if it is asserted in either a responsive pleading or a CR 12(b)(5) motion (CR 12(h)(1)(B); *French v. Gabriel,* 116 Wn.2d 584, 588 (1991). A tenant may answer orally or in writing at a show cause hearing. RCW 59.18.380. An answer may ordinarily be amended within 20 days after it is served without leave of court or consent of the adverse party as long as the action has not been set for trial yet. CR 15(a).

f) Improper Alternative Service of Summons.

The landlord may effect service of the summons by posting and mailing if certain requirements are met. RCW 59.18.055. Prior to amendment of the statute, courts construed the due diligence requirement to require an honest and "reasonable effort" to find the defendant before alternative service was authorized. *Dobbins v. Mendoza,* 88 Wn. App. 862 (1997); *See also Bruff v. Main,* 87 Wn. App. 609 (1997). Now, a landlord may post and mail by certified and standard mail. Prior to this, the landlord must file an affidavit demonstrating attempts at personal service at least three times, over a period of two different days and two different times. RCW 59.18.055. Posting and mailing by regular and certified mail must occur not less than nine days from the return date in the summons. Alternative service limits the court's jurisdiction to restoring possession of the property. No money judgment may be entered against the defendant until personal jurisdiction is acquired. However, a defendant waives the defense of lack of

personal jurisdiction if they seek affirmative relief. *See Negash v. Sawyer*, 131 Wn. App. 822 (2006).

g) Failure to Comply with Other Civil Rules.

The Superior Court Civil Rules apply, except when they are inconsistent with statutory requirements in "special proceedings." CR 81(a). RCW 59.12 (and by inference, the eviction-related sections of RCW 59.18) have been considered "special proceedings." *Kelly v. Powell*, 55 Wn. App. 143 (1989). Violations of the civil rules that would be defenses to the unlawful detainer action include, improper venue, improper service, noncompliance with CR 6, etc. A summons or show cause order that afforded a tenant fewer than seven to respond was void under CR 6. *Canterwood Place, L.P. v. Thande,* 106 Wn. App. 844 (2001); now codified at RCW 59.12.070, RCW 59.18.370. CR 6(a) does not apply to computation of time for a three-day notice to pay rent or vacate. *Christensen v. Ellsworth,* 162 Wn.2d 365 (2007).

3. Substantive Defenses

Substantive defenses may be a legal defense (e.g. rent was tendered but refused); an equitable defense (e.g. landlord waived written rule tenant is being evicted for breaching); or a set-off (e.g. unpaid rent is less than rent reduction due because of breach of implied warranty of habitability). RCW 59.18.080, .380 and .400.

a) Possession Not at Issue.

The principal purpose of the unlawful detainer action is to determine the right to possession. *Phillips v. Hardwick*, *supra*. If the tenant has moved out prior to commencement of the action, the complaint should be dismissed. *Kessler v. Nielsen, supra; MacRae v. Way*, 64 Wn.2d 544 (1964); *Tuschoff v. Westover*, 65 Wn.2d 69 (1964); *Pine Corp. v. Richardson*, 12 Wn. App. 459 (1975). *See also, Lees v. Wardall*, 16 Wn. App. 233 (1976).

If the issue of the right to possession is resolved after service or filing of the complaint but before trial, then the parties can convert the action to an ordinary civil suit in which all of the parties' claims and defenses may be raised. *Munden v. Hazelrigg*, 105 Wn.2d 39 (1985). A tenant who counterclaimed for retaliatory eviction and sought damages in an unlawful detainer action could petition for mandatory arbitration after voluntarily vacating the premises. *Barr v. Young,* 187 Wn. App. 105 (2015). However, the trial court exceeded its unlawful detainer jurisdiction when it considered a constructive eviction counterclaim without first converting the unlawful detainer action into an ordinary civil action for damages. *Angelo Property Co., LP v. Hafiz*, 167 Wn. App. 789 (2012) [commercial case].

b) Claim of Ownership or No Landlord-Tenant Relationship.

Chapter 59.12 RCW applies by its terms only to landlord-tenant relationships. RCW 59.12.030; *Turner v. White*, 20 Wn. App. 290 (1978). In cases where there is no landlord tenant

relationship but there is a dispute as to possession, the party out of possession must ordinarily bring an ejectment action under RCW 7.28 rather than an unlawful detainer action (e.g. buyer/seller disputes, former employees who resided on premises as term of employment, family members who never paid rent). *See Puget Sound Inv. Group, Inc. v. Bridges,* 92 Wn. App. 523 (1998). Unlawful detainer is, however, authorized to recover possession after a nonjudicial deed of trust foreclosure or real estate contract forfeiture. RCW 61.24.060; RCW 61.30.100(2)(c). *See Savings Bank v. Mink*, 49 Wn. App. 204 (1987).

Although title cannot be quieted in an unlawful detainer proceeding, the defendant can assert an ownership claim as an affirmative defense in an unlawful detainer action. *Proctor v. Forsythe*, 4 Wn. App. 238 (1971); *Snuffin v. Mayo*, 6 Wn. App. 525 (1972); *Sundholm v. Patch*, 62 Wn.2d 244 (1963). *See also Kelly v. Powell*, 55 Wn. App. 143 (1989) (requesting specific performance of an exercised option to purchase). If issues of ownership remain unresolved in a quiet title action, determining the right to possession in an unlawful detainer action may be premature. *Pearson v. Gray,* 90 Wn. App. 911 (1998).

c) Retaliation.

RCW 59.18.240 was amended in 1983 to prohibit landlords from evicting tenants in retaliation for good faith assertion or exercise of their rights and remedies under the Landlord-Tenant Act or for making complaints to a government authority regarding code or repair violations. *See Stephanus v. Anderson*, 26 Wn. App. 326 (1980) for a review of the law on retaliation prior to the 1983 amendment. *Lee v. Sauvage*, 38 Wn. App. 699 (1984) discusses the defense of retaliation based upon prohibitions in a local ordinance regarding floating home moorage rentals.

Retaliation usually arises as a defense in an unlawful detainer action based upon a notice to terminate tenancy, or upon failure to pay a rent increase alleged to be retaliatory.

If the defense is based upon code violation complaints, RCW 59.18.240(1), the complaints must have been made in good faith and involve the landlord's failure to substantially comply with code or statutory violations that affect the tenant's health or safety. RCW 59.18.250 creates certain rebuttable presumptions, some of which apply to the unlawful detainer proceeding:

i. A rebuttable presumption that the eviction notice is retaliatory if given within 90 days after tenant makes a code violation complaint or asserts other rights under act;

ii. A rebuttable presumption that the eviction notice is not retaliatory if tenant is behind in rent, in violation of other terms of the rental agreement, or complained to a governmental authority within 90 days after a good faith action by landlord including an action to increase the rent.

Regardless of any presumptions, the defense of retaliation may depend upon establishing

the landlord's motive for bringing the unlawful detainer action. Proof often depends upon circumstantial evidence.

d) Discrimination.

A tenant who is being evicted for discriminatory reasons or for failure to comply with a rule or rent increase that is discriminatory is permitted to raise the defense in an unlawful detainer action. *Josephinium Assoc. v. Kahli*, 111 Wn. App. 617 (2002). Discrimination includes a failure to reasonably accommodate a disabled tenant. At least one court has concluded that a reasonable accommodation can be requested any time before a physical eviction occurs. *Radecki v. Joura,* 114 F.3d 115 (8th Cir. 1997).

Most landlords are prohibited from discriminating against tenants on the basis of sex, marital status, sexual orientation, race, creed, color, national origin, familial status, honorably discharged veteran or military status, or the existence of a sensory, mental or physical disability. 42 U.S.C. § 3604 or RCW 49.60.030 and .222. The Washington Law Against Discrimination does not protect cohabitation or dating under "marital status." *Waggoner v. Ace Hardware Corp,* 134 Wn.2d 748 (1998). Local ordinances may prohibit other forms of discrimination. For example, Seattle and King County also prohibit discrimination based on age or Section 8 participation. Chapter 14.08 of the Seattle Municipal Code; Chapter 12.20 of the King County Code (Seattle also prohibits discrimination based on political ideology). Bellevue also prohibits discrimination against Section 8 participants. Chapter 9.20 of the Bellevue City Code. *See generally,* Schwemm, *Housing Discrimination Law and Litigation,* Thomson West, 2003.

A landlord may not terminate a tenancy or fail to renew a tenancy because of a tenant's or household member's status as a victim of domestic violence, sexual assault, unlawful harassment, or stalking. RCW 59.18.570-.585.

A landlord is prohibited from taking adverse action against a tenant or prospective tenant because of their source of income. RCW 59.18.255. Source of income includes receipt of government benefits such as SSI or Section 8 and other nonprofit programs but does not include income derived in an illegal manner. Adverse action can be eviction, refusal to accept payment of rent or other charges because of the source of income, or any other action that "otherwise" has the effect of denying housing based on source of income. RCW 59.18.255.

e) Breach of the Warranty of Habitability

A tenant who is being evicted for nonpayment of rent may claim that rent is not owing because the landlord failed to make needed repairs. This defense is referred to as the warranty of habitability defense and is based upon case law, not the Residential Landlord-Tenant Act. *Foisy v. Wyman*, 83 Wn.2d 22 (1973); *Knight v. Hallsthammer*, 29 Cal.3d 46, 623 P.2d 268 (1981). It can be characterized as either an equitable defense or a set-off and is permitted under RCW 59.18.400. (*See Skarperud v. Long*, 40 Wn. App. 548 (1985) for a discussion of the habitability defense in a nonresidential context.)

The Residential Landlord-Tenant Act did not supersede common law remedies, including the implied warranty of habitability recognized in *Foisy v. Wyman.* RCW 59.18.070. *Landis & Landis Const., LLC v. Nation*, 171 Wn. App. 157, 286 P.3d 979 (2012).

The warranty of habitability defense is based upon the premise that the landlord has a duty to provide a livable dwelling which the tenant is not permitted to bargain away, even in exchange for a lower rent. Therefore, it does not matter whether the tenant knew about the repair problems at the beginning of the tenancy. *Foisy v. Wyman*, *supra* at 28.

In *Foisy v. Wyman*, *supra* at 34, the court describes a two-step process the court is to follow if breach of the implied warranty of habitability is alleged as an affirmative defense to an unlawful detainer. First, the court must decide whether the unit was totally or partially uninhabitable during the tenancy. Second, the court must determine what the reduction in the rental value for the unit should be during the term of the tenancy. If the tenant's obligation to pay rent is totally off-set by the landlord's breach, then the unlawful detainer action should be dismissed. If the court finds the repair problems only justify a partial reduction in the rent, and the tenant withheld more than this amount, judgment for the rent found owed and for possession will be granted in favor of the landlord.

The defense does not depend on an official inspection or official finding of violations of a municipal housing code. Reports and testimony from housing code inspectors can, however, be a very useful and an inexpensive means to prove the tenant's claim of breach at trial. Minor violations of a housing code that do not affect habitability would not ordinarily entitle a tenant to a rent reduction. *Foisy v. Wyman*, *supra* at 31, fn. 1.

Although the tenant must give written notice of defective conditions to the landlord as a prerequisite to exercising the repair remedies in the Residential Landlord-Tenant Act, the Act recognizes that those remedies are "…in addition to pursuit of remedies otherwise provided him by law..." that don't necessarily require written notice. RCW 59.18.070. Since the implied warranty of habitability was judicially created after the adoption of the Residential Landlord-Tenant Act, it could not have been superseded or preempted by the Act and constitutes a remedy "otherwise provided…by law" that does not require written notice. Nor does the tenant have to be current in rent to assert the defense of breach of the warranty of habitability. RCW 59.18.080 and *Foisy v. Wyman, supra*.

A tenant who withholds all of the rent for one month should be able to defend an unlawful detainer on the basis that the unit has been partially uninhabitable for a number of months as long as the cumulative reduction in rent exceeds the amount of rent withheld.

EXAMPLE: The monthly rent is $900. Tenant has no heat for the months of January, February and March. Court reduces the rent by $300 for each month. Tenant withholds $900 for April rent. No rent should be found owing for April.

See Pham v. Corbett, 187 Wn.App. 816 (2015).

The major difficulty in asserting the defense of breach of the implied warranty of habitability is in accurately determining the amount of rent which the tenant is entitled to withhold. *See generally, Measure of Damages for Landlord's Breach of Implied Warranty of Habitability,* 1 ALR 4th 1182; Note, *The Great Green Hope: The Implied Warranty of Habitability in Practice*, 28 STAN L. REV. 729 (1976).

There are no uniform, objective standards for determining the value of any rent reduction. A defect that the tenant regards as serious may, to a judge, justify only a minimal rent abatement. Due to the uncertainties of rent withholding and the serious risks of eviction and liability for court costs and reasonable attorney's fees, it may be preferable for the tenant to liquidate the claim for a rent reduction in small claims court or district court before setting it off against the rent. RCW 59.18.110(1)(b).

While expert testimony regarding reduced rental value and the dollar amount of any rent abatement might be preferable, opinion testimony of a lay witness may be admissible under ER 701. A tenant should be allowed to testify to the value of a dwelling unit as personal property as long as there is some reasonable basis for that testimony. *See* Tegland, Vol. 5B WASHINGTON PRACTICE, Chap. 7, *Evidence Law and Practice* § 701.18 (1999).

f) Local Ordinances.

Some local governments have adopted regulations that provide additional protections for tenants and may be the basis for an affirmative defense to an unlawful detainer action. *Kennedy v. City of Seattle*, 94 Wn.2d 367 (1980); *Margola Associates v. City of Seattle*, 121 Wn.2d 625 (1993). For example, Seattle has adopted a local ordinance that requires that a landlord have "good cause" to terminate a residential tenancy. Seattle Municipal Code, § 22.206.160.C. Failure to comply with the ordinance justifies dismissal of an unlawful detainer action. *Housing Authority v. Silva*, 94 Wn. App. 731 (1999). A tenant may contest a landlord's basis for eviction under the good cause requirement at the show cause hearing. *See Faciszewski v. Brown*, 187 Wn.2d 308 (2016).

g) Equitable Defenses:

Most of the equitable defenses that can be asserted in an ordinary civil action may also be asserted in an unlawful detainer action. Defenses such as estoppel, laches, and waiver are not uncommon. *See* CR 8(c); CR 12(b).

Equitable defenses are expressly authorized in unlawful detainer actions. RCW 59.18.400. The court, on a number of occasions, had recognized the right to raise equitable defenses prior to the passage of the Residential Landlord-Tenant Act. *See Andersonian Inv. Co. v. Wade*, 108 Wash. 373 (1919); *Income Properties Inv. Corp. v. Trefethen*, 155 Wn. 493 (1930); *Thisius v. Sealander*, 26 Wn.2d 810 (1946); *Motoda v. Donohoe*, 1 Wn. App. 174 (1969);

Shoemaker v. Shaug, 5 Wn. App. 700 (1971). *See also First Union Management v. Slack*, 36 Wn. App. 849 (1984); *Port of Longview v. IRM, Ltd.,* 96 Wn. App. 431 (1999)(Commercial).

(1) Estoppel or Part Performance:

A landlord may be estopped from asserting that an oral lease is a month-to-month tenancy. *Armstrong v. Burkett*, 104 Wash. 476 (1918). The elements of equitable estoppel are discussed in *Crown Plaza v. Synapse Software,* 87 Wn. App. 495, 502 (1997) and *Kennewick v. Board of Firefighters,* 85 Wn. App. 366, 370 (1997). Part performance may enable enforcement of a lease that does not comply with the statute of frauds. *Tiegs v. Watts,* 135 Wn.2d 1 (1998). It is unclear whether estoppel is available in an action based on nonpayment of rent where the landlord has frequently accepted the rent late. *See Neitsch v. Tyrrell*, 25 Wn.2d 303 (1946); *Glover v. Hanks*, 396 S.2d 949 (La. App. 1980); 22 WASH. L. REV. 144 (1947).

(2) Acceptance of Rent as Waiver:

a. What constitutes acceptance? Inexcusable delay in returning a rent check has been held to constitute acceptance. *Tipton v. Roberts et ux.,* 48 Wash. 391 (1908) (where, in an unlawful detainer action, tenant timely remitted rent to landlord for two months, landlord's retention of checks until after commencing action constituted acceptance by the landlord). Failure to cash a rent check does not negate acceptance. *C & A Land Co. v. Rudolf Investment Corp*., 163 Ga. App. 832, 296 S.E. 2d 149 (1982). *See also Aspen Enterprises, Ltd. V. Bray,* 148 Mich. App. 9, 384 N.W. 2d 65 (1985); *EDC Associates, Ltd. v. Gutierrez,* 153 Cal. App. 3d 167, 200 Cal. Rptr. 333 (1984); *Roxborough Apartment Corporation v. Becker*, 177 Misc. 2d 408, 676 N.Y.S. 2d 821 (1998); *Office Enterprises, Inc. v. Pappas*, 19 N.C. App. 725, 200 S.E. 2d 205 (1973).

b. Acceptance of current rent. If a tenant fails to pay rent and the landlord accepts later rental payments, the landlord has waived a right under the unlawful detainer act to declare forfeiture for nonpayment. A landlord may declare a forfeiture for an older, continuing breach or any new breach. Under *Munden v. Hazelrigg,* 105 Wn.2d 39 (1985) the court could enter a judgment for the older rents due after ruling for the tenant on the issue of possession. *MH 2 Company v. Hwang,* 104 Wn. App. 680 (2001)[Commercial case].

c. Application to earliest defaults. A landlord does not waive defaults in rent by accepting rent after a three-day notice if he applies the receipts to the earliest rent first and there is still some rent owing for the period before the notice. *Housing Resources Group v. Price,* 92 Wn. App. 394 (1998). Payment for rent must be applied to rent first before being applied to any other charges. RCW 59.18.283.

d. Acceptance of partial payment. A landlord does not waive her right to proceed with an unlawful detainer action by accepting partial payment from a third party that is late and is applied to unpaid utilities. *Hwang v. McMahill,* 103 Wn. App. 945 (2000). Under certain circumstances, however, acceptance of a partial payment may waive the right to proceed

on a previously served unlawful detainer notice. *Cf.* RCW 59.18.390. A rental agreement may contain a provision that states that such acceptance does not constitute waiver.

e. Acceptance after commencement of action. A landlord waives its right to proceed with an unlawful detainer action when it accepts the full amount of rent after the action is commenced. *Housing Authority of Grant County v. Newbigging,* 105 Wn. App. 178 (2001).

f. Acceptance as waiver of prior breaches. Acceptance of rent with knowledge of breaches of a lease or rental agreement may constitute a waiver. *Wilson v. Daniels*, 31 Wn.2d 633 (1948); *First Union Management v. Slack*, *supra*; *Stevenson v. Parker*, 25 Wn. App. 639 (1980); 24 WASH. L. REV. 165 (1949); *See also Alaska Pac. v. Eagon Forest Prods.,* 85 Wn. App. 354, 361 (1997). Acceptance of rent after termination of the tenancy for a reason other than breach, however, is not a waiver of the termination of the tenancy. *See Leda v. Whisnand*, 150 Wash. App. 69, 78, 207 P.3d 468, 473 (2009).

(3) Service of Unlawful Detainer Notice as Waiver: Service of an unlawful detainer notice may constitute a waiver of a previous unlawful detainer notice because it is inconsistent with the claim that a previous notice extinguished the landlord-tenant relationship. *Hinkhouse v. Wacker,* 112 Wash. 253 (1920)(dictum).

(4) Tender: A landlord's refusal of a proper tender of performance may be a defense to an unlawful detainer action based on the nonperformance. *Fletcher v. Bryan*, 76 N.M. 221, 413 P.2d 885 (1966). 5A CORBIN, CONTRACTS § 1233 (1964). Tender of rent into the court is not a defense to an action based upon nonpayment of rent. *Young v. Riley*, 59 Wn.2d 50 (1961).

h) Set-offs and counterclaims: The Act permits tenants to assert any set-off arising out of the tenancy. RCW 59.18.400. A set-off is any demand of a like nature that can be asserted against a party in a civil action upon an express or implied contract. The ability to raise a set-off as a defense is purely statutory, *Fischer Flouring Mills Co. v. U.S.*, 17 F.2d 232, 235 (9th Cir. 1927), and must be pleaded. RCW 4.32.150. Judgment may be entered on a set-off that exceeds the plaintiff's demand. RCW 4.56.075.

Although there are few decisions describing the types of claims that can be asserted as set-offs in unlawful detainer actions, tenants should be able to claim any damages resulting from the landlord's failure to perform any of its contractual or statutory obligations (e.g. payment of utility bills which are the landlord's obligation). *Foisy v. Wyman*, *supra*; *Tipton v. Roberts*, 48 Wash. 391 (1908)(tenant repair costs as set-off); *Gentry v. Krause*, 106 Wash. 474 (1919); *Parks v. Lepley*, 160 Wash. 287 (1931); *Reichlin v. First National Bank*, 184 Wash. 304 (1935).

Although set-offs that arise out of the tenancy may be asserted in a residential unlawful detainer proceeding, general counterclaims are still not permitted unless they would prove facts that excuse the tenant's breach. *See, however, Munden v. Hazelrigg*, *supra*, which permits

general counterclaims, cross-claims, etc., when right to possession ceases to be an issue and the matter is converted to a general civil action.

Ordinarily, a tenant may not assert a counterclaim in an unlawful detainer action. *Young v. Riley*, 59 Wn.2d 50 (1961). The court may, however, have jurisdiction to decide the merits of a counterclaim that is essential to determining right to possession. "If the counterclaim, affirmative defense, or setoff excuses the tenant's failure to pay rent (or other breach), then it is properly asserted in an unlawful detainer action." *Heaverlo v. Keico Indus.*, 80 Wn. App. 724, 728 (1996) *citing Munden v. Hazelrigg, supra. See also, Kelly v. Powell*, 55 Wn. App. 143 (1989); *Sprincin v. Sound Conditioning,* 84 Wn. App. 56, 65 (1996). A counterclaim that was not based on facts which excused a tenant's breach did not fall within the narrow range of counterclaims allowed in unlawful detainer proceedings. *Angelo Property Co., LP v. Hafiz*, 167 Wn. App. 789 (2012) [commercial case].

Tenants in an unlawful detainer action may be awarded damages for breach of the implied warranty of habitability, set-off of prepaid rent against unpaid rent, and statutory relocation assistance pursuant to RCW 59.18.085. *Pham v. Corbett,* 187 Wn. App. 816 (2015). RCW 59.18.085 does not allow for recovery of emotional distress damages. *Segura v. Cabrera,* 184 Wn.2d 587,(2015).

But see Housing Authority v. Terry, 114 Wn.2d 558 (1990) where the court stated generally that counterclaims are not permitted in unlawful detainer actions. This language, however, does not appear to change the general rule. First, it is dicta in a decision that dismissed the action against the tenant on other grounds. Second, the tenant asserted an "affirmative defense" seeking "reasonable accommodation" for his handicap in the form of a Section 8 certificate that would have allowed him to vacate the premises and move to another subsidized unit. In this way, the affirmative defense would not have excused the breach or even contested possession.

i) Consumer Protection Act claims: Tenancies that are covered by the Residential Landlord-Tenant Act, RCW 59.18, are generally not covered by the Consumer Protection Act, RCW 19.86. *State v. Schwab*, 103 Wn.2d 542 (1985). But see, *Handlin v. On-Site Manager, Inc.*, 187 Wn. App. 841 (2015), where allegation that consumer reporting agency unlawfully withheld information when applicants applied for tenancy at an apartment complex sufficiently pled element of injury in consumer protection action.

4. Limitations on Unlawful Detainer Judgments

a) General.

In defending an unlawful detainer action, it is important to keep in mind that the damages that can be awarded to the landlord are restricted because of the limited nature of the proceeding. Judgments are restricted to: (i) Rent found to be owing; (ii) Damages arising out of the tenancy caused by the tenant's unlawful detention of the premises. (Typically this is the per diem

rental for each day the tenant remains until evicted). RCW 59.18.410.

The damages incurred by the plaintiff because of the unlawful detention are based on the reasonable rental value of the premises. This may be more or less than the agreed rent. *Lenci v. Owner*, 30 Wn. App. 800 (1981); *Finch v. King Solomon Lodge No. 60*, 40 Wn.2d 440 (1952); *Reichlin v. First National Bank*, *supra*; *Owens v. Layton*, 133 Wash. 346 (1925). *See* Peck, *A Comment on Damages in Unlawful Detainer Actions in Washington*, 37 WASH. L. REV. 451 (1962).

b) Claims That Cannot Be Asserted By Landlord:

In order to avoid filing multiple actions, landlords may try to assert claims against tenants in unlawful detainer proceedings that exceed the court's limited jurisdiction. Ordinarily, if right to possession is still an issue these other claims cannot be litigated in an unlawful detainer action. *Little v. Catania*, *supra*. Nor can judgment be recovered on a lease provision authorizing damages, when the damages are not a necessary factor in determining the right of possession. *Pine Corp. v. Richardson*, 12 Wn. App. 459 (1975); *See also* Peck, *A Comment on Damages…, supra* at 452; *Honan v. Ristorante Italia*, 66 Wn. App. 262 *rev. den*. 120 Wn.2d 1009 (1992). *See however, Munden v. Hazelrigg*, *supra*, which permits conversion of the action to an ordinary civil action if right to possession is no longer an issue. The action may not be converted, however, if the tenant disputes the right to possession and has not relinquished possession prior to issuance of the writ of restitution. *Sprincin v. Sound Conditioning,* 84 Wn. App. 56, 68 (1996).

c) Double Damages:

The double damages authorized by RCW 59.12.170 are **not** available in unlawful detainer actions subject to the Residential Landlord-Tenant Act of 1973. RCW 59.18.420. However, double damages are still available in actions involving parties not covered by the Act. Where applicable, the double damage provision of RCW 59.12.170 raises an issue of what amount of rent is to be doubled. The court in *Sprincin v. Sound Conditioning*, 84 Wn. App. 56, 63 (1996) ruled that the statute permits only a doubling of the rent that would have accrued after the termination of the tenancy when the tenant was in unlawful detainer. It does not permit a doubling of the unpaid rent that accrued during the tenancy. In reaching this conclusion, the court rejected the contrary conclusion reached in *Queen v. McClung*, 12 Wn. App. 245, 247-48 (1974).

5. Answering the Unlawful Detainer Complaint

The unlawful detainer summons for residential evictions must be in a specific statutory form. RCW 59.18.365. A summons that fails to inform the tenant of the right to respond by mail or facsimile does not strictly comply with the statute and does not confer unlawful detainer jurisdiction. *Truly v. Heuft,* 138 Wn. App. 913 (2007) [abrogated by *MHM & F, LLC v. Pryor*, 168 Wn. App. 451 (2012)].

The tenant must appear or answer by the return date on the summons in writing. RCW 59.12.120; a faxed appearance or answer may be permissible. It is only at a show cause hearing that the tenant is given the option of answering orally. RCW 59.18.380. Thus, there may be two different deadlines in an unlawful detainer.

a) Applicability of Civil Rules.

The Civil Rules for Superior Court govern all suits of a civil nature unless they are inconsistent with rules or statutes applicable to special proceedings. CR 1; CR 81. At least one court has concluded that unlawful detainer actions are "special proceedings" within the meaning of CR 81. *Kelly v. Powell*, 55 Wn. App. 143 (1989). *See also Canterwood Place, L.P. v. Thande,* 106 Wn. App. 844 (2001). The rules of practice in civil actions are expressly applicable to unlawful detainer actions, except in some cases where there is an inconsistency with RCW 59.12. RCW 59.12.180.

b) Pleading Affirmative Defenses

Defenses such as lack of jurisdiction over the person or subject matter, insufficiency of process or service of process, or failure to state a claim upon which relief may be granted should be set forth in the answer if not made in a motion. CR 12(b) and (h).

An unlawful detainer action must be prosecuted in the name of the real party in interest. CR 17. If the real party in interest is a corporation or LLC it must be represented by a licensed attorney. *Dutch Village Mall v. Pelletti*, 162 Wn. App. 531 (2011); *Lloyd Enters. v. Longview Plumbing*, 91 Wn. App. 697 (1998). Objections to the capacity of the party initiating the suit should be raised in the answer. CR 9(a), CR 17. Those objections may include failure of person or entity conducting business under an assumed name to allege filing of a proper certificate. RCW 19.80.040. See *Reese Sales Co., Inc. v. Gier*, 16 Wn. App. 664 (1977). *But see Griffiths & Sprague Stevedoring Co. v. Bayly, Martin & Fay, Inc*., 71 Wn.2d 679 (1967).

c) Pleading Special Matters:

If an affirmative defense or set-off is based on a local ordinance, it should be specifically pleaded by ordinance number, title, and date of enactment. CR 9(i); *Foisy v. Wyman*, 83 Wn.2d 22 (1973).

6. Payment into Court Registry

RCW 59.18.375 was rescinded in 2021. Laws 2021, ch. 115, sec. 19. Landlords may not use a .375 notice to require payment of rent into the registry or a sworn statement after April 22, 2021.

7. Show Cause Hearing

a) The Order to Show Cause.

RCW 59.18.370, *et seq*. provides for an optional procedure to have a pretrial hearing to determine if the landlord should be restored to possession immediately (i.e. have a writ of restitution issued). This procedure is referred to as a show cause hearing and generally is conducted by a court commissioner, the civil motion judge or the presiding judge. Only the court can order the tenant to appear at a show cause hearing. RCW 59.18.370. The show cause hearings "routinely constitute the only opportunity to present any evidence" in an unlawful detainer and are therefore often the only process a tenant receives. *Leda v. Whisnand*, 150 Wn. App. 169 (2009).

The order to show cause must specify a hearing date that shall not be less than seven nor more than thirty days from the date of service on the tenant. RCW 59.18.370. The tenant may answer the show cause orally or in writing. RCW 59.18.380. A show cause hearing scheduled fewer than seven days from the date of service should be stricken. *Canterwood Place v. Thande,* 106 Wn. App. 844 (2001). If the court authorizes service of the order to show cause by mail, then service is deemed complete on the third day following the date of mailing, unless the third day fall on a Saturday, Sunday, or Holiday. CR 5(b)(2)(A).

b) Issuing the Writ.

The court is required to examine the parties and witnesses orally at the show cause hearing and ascertain whether the plaintiff has the right to be restored to possession of the property. The standard which the court must use in making this determination is not clear. RCW 59.18.380 provides as follows:

> ". . . and if it shall appear that the plaintiff has the right to be restored to possession of the property, the court shall enter an order directing the issuance of a writ of restitution . . ."

A recent case refused to decide that the standard is the same as summary judgment, noting that a landlord who proves a right to be restored on a preponderence of the evidence should be issued a writ. *Webster v. Litz*, __ Wn. App. 2d. __, 2021 WL 2801729, *4 (2021). Regardless, the Court should view the evidence in the light most favorable to the tenant at a show cause hearing. *Webster v. Litz*, __ Wn. App. 2d. __, 2021 WL 2801729, *4 (2021).

Issuing a writ at a show cause hearing is premature when the tenant has placed in issue whether he has engaged in criminal activity in violation of RCW 59.20.080(1)(f). *Hartson Partnership v. Goodwin,* 99 Wn. App. 227 (2000). The issue of whether a tenant has engaged in serious or repeated violation of the terms or conditions of the lease should not be summarily resolved at a show cause hearing. *Housing Authority v. Pleasant*, 126 Wn. App. 382 (2005); *Indigo Real Estate Services, Inc. v. Wadsworth*, 169 Wn. App. 412 (2012). The court should not make rulings at a preliminary hearing which impair the defendant's right to a jury trial or to adequately present defenses. *See Tuschoff v. Westover,* 60 Wn.2d 722 (1962).

c) Granting Other Relief at Hearing.

The court may also grant or deny other relief requested by the plaintiff if it determines that the plaintiff is or is not entitled to the relief as a matter of law. RCW 59.18.380. If a substantial issue of disputed fact is presented the court must set it over for a trial.

The court may also grant or deny the relief requested by the defendant at the show cause hearing including dismissal of the plaintiff's complaint. RCW 59.18.380.

d) Review of Court Commissioner's Decision.

Many counties conduct the unlawful detainer show cause hearing before a court commissioner. Either party may request a revision of a commissioner's ruling by filing a motion within ten days. RCW 2.24.050. Superior Court Local Rules may prescribe the procedure for seeking revision. The review is *de novo* on the record where the record before the commissioner does not include live testimony. *See Marriage of Moody,* 137 Wn.2d 979, 991-993 (1999) regarding the review standard. There may not be a record of a hearing before a court commissioner so it is important to decide what kind of record you would need for appeal or revision of an adverse decision. You may want to request a reporter or submit sworn declarations. Filing a motion for revision may operate as an automatic stay of a court commissioner's order for issuance of a writ of restitution. *Cf., State v. Lawley*, 32 Wn. App. 337 (1982); *but see* King County Superior Court Local Rule LR 7(b)(7)(B)(iv) directing that the commissioner's ruling remains in effect pending review, unless stayed.

e) Bonds.

The landlord must post a bond to indemnify the tenant if a writ of restitution is issued in any unlawful detainer prior to final judgment. *See Meadow Park v. Canley*, 54 Wn. App. 371 (1989).

8. Pretrial Motions

CR 12(b) permits a party to optionally raise certain defenses by means of a motion rather than an answer. Filing a motion in lieu of an answer for the purpose of pointing out jurisdictional defects in an unlawful detainer proceeding has been implicitly approved without discussion. *Sowers v. Lewis*, 49 Wn.2d 891 (1957). One early case, however, refused to approve or disapprove such a procedure. *Lee v. Weerda*, 124 Wash. 168 (1923). This procedure is now clearly permissible with the adoption in 1989 of a statutory summons that expressly authorizes service of a notice of appearance. RCW 59.18.365.

9. Trial

If the court does not issue a pretrial writ of restitution, the case should be set for trial within 30 days. If the writ of restitution is issued but there is still a dispute regarding possession

or there are still other claims to be reduced to judgment, the case should be set for trial in the same manner as other civil actions. RCW 59.18.380. The tenant in these circumstances who wishes a speedy trial would still be able to rely on the statutory priority given to unlawful detainer actions. RCW 59.12.130. A tenant who is deprived of possession at a show cause hearing but prevails on a claim of possession at trial can be restored to possession. *Meadow Park v. Canley*, 54 Wn. App. 371 (1989).

Factual issues in unlawful detainer actions must be tried by a jury unless a jury is waived. RCW 59.12.130. A jury is waived if the jury demand is not filed before the case is set for trial. The process of demanding a jury and the conduct of a jury trial are governed by Rules 38 and 39 of the Civil Rules for Superior Court. *Thompson v. Butler*, 4 Wn. App. 452 (1971). The court may direct a verdict as in other civil cases. *Peterson v. Crockett*, 158 Wash. 631 (1930).

A question may arise as to whether the client is entitled to a jury if the issues are primarily equitable, such as avoidance of the application of the statute of frauds. *Thompson v. Butler*, *supra*; *See Himpel v. Lindgren* 159 Wash. 20 (1930). In this instance, the tenant should argue that the statutory right to a jury in the RLTA and unlawful detainer statute supersede the court's authority to strike the jury and/or that the matter is suitable for a decision by a jury. See briefing posted in Sharepoint on juries for more on this argument.

It is arguably error for the court to decide material factual issues at either a show cause hearing or an expedited trial if it deprives the defendant of the opportunity to have the case heard by a jury. *See Tuschoff v. Westover*, 60 Wn.2d 722 (1962); *Housing Authority v. Pleasant*, 126 Wn. App. 382 (2005). *See, however, Meadow Park v. Canley*, 54 Wn. App. 371 (1989).

10. Late Fees & Other Charges

The Manufactured/Mobile Home Landlord-Tenant Act specifically authorizes service of a fourteen-day notice to pay or vacate for rent and "other charges," RCW 59.20.080(1)(b). In the RLTA, rent is defined as recurring charges such as monthly rent and utilities, and late fees or other nonrecurring charges may not be demanded in a notice to pay or vacate or comply or vacate or be the basis for any eviction in the RLTA. RCW 59.18.030; RCW 59.18.283.

Although *Foisy v. Wyman*, 83 Wn.2d 22, 32 (1973) found that a three-day notice to pay rent or vacate substantially complied with the Unlawful Detainer Act even though it overstated the amount of rent due, no fees or charges were demanded in the notice other than rent. Similarly, in *Sowers v. Lewis*, 49 Wn.2d 891 (1957) the landlord claimed in the three-day notice to pay rent or vacate that insurance premiums were delinquent, but only made a demand for payment of the delinquent rent within the three-day period.

A landlord may not recover more than $75 in late fees in an unlawful detainer hearing, but may seek other late fees authorized by the rental agreement in another civil action. RCW 59.18.410(1).

SB 5160, not yet codified, prohibits a landlord for charging late fees for rent owed between March 1, 2020 and July 31, 2021.

11. Attorney Fees

A landlord who prevails in an unlawful detainer action may be awarded costs and reasonable attorney fees. RCW 59.18.410. A tenant who prevails may be awarded costs and reasonable attorney fees also. RCW 59.18.290(2); *Housing Authority of City of Seattle v. Bin*, 163 Wn. App. 367 (2011); *Council House v. Hawk,* 136 Wn. App. 153 (2006); *Soper v. Clibborn,* 31 Wn. App. 767 (1982); *see, however, Housing Authority of City of Everett v. Kirby,* 154 Wn. App. 842 (2010). The defendant may be deemed the prevailing party when the plaintiff takes a voluntary nonsuit. *Council House, supra*; *Walji v. Candyco, Inc.,* 57 Wn. App. 284 (1990); *Andersen v. Gold Seal Vineyards,* 81 Wn.2d 863 (1973) (long-arm statute); *Western Stud Welding v. Omark Industries,* 43 Wn. App. 293 (1986). A party may recover reasonable attorney fees even if legal services are provided at no cost, except when a tenant prevails on a retaliation defense. RCW 59.18.250). *Council House, supra*; *Holland v. Boeing Company,* 90 Wn.2d 384 (1978); *Harold Meyer Drug v. Hurd,* 23 Wn. App. 683 (1979). RCW 4.84.330 may also authorize reasonable attorney fees to the prevailing party if provided in the rental agreement, notwithstanding the limitations on attorney fees specified in RCW 59.18.230(2)(c). *Wright v. Miller,* 93 Wn. App. 189 (1998).

A landlord may not receive fees in two specific instances. First, if the judgment is issued after a tenant fails to respond to a pleading or other notice under RCW 59.18. Second, if the judgment for rent is equal to or less than two months' rent or $1,200, whichever is greater. RCW 59.18.290.

In an unlawful detainer based on a 60 day notice for other good cause constituting a legitimate an economic of business reason, the court may stay the writ of restitution upon good cause shown by the tenant. But upon granting the stay, the court must award court costs and attorney fees as allow by RCW 59.18. Laws 2021, ch. 115, sec. 2(m).

Finally, if a tenant files a motion to reinstate their tenancy pursuant to RCW 59.18.410(3), a landlord may only recover attorney fees if the tenant is reinstated. RCW 59.18.290.

12. Settlement

Unlawful detainers are often settled in the hallway immediately prior to the show cause hearing. The settlement agreement that is reached may be a "rental agreement" under the RLTA, as it governs the relationship between the landlord and tenant. RCW 59.18.030 (definition of "rental agreement"). Landlords will often ask for stipulations that go beyond the immediate basis for the eviction, such as requiring payment of rent as a condition of dismissal, when the eviction is about a rule violation, or vice versa. A tenant may not be forced to agree to unenforceable provisions under the RLTA, such as confessing judgment if they fail to comply with behavioral

restrictions, waiving notice of the entry of a writ of restitution, waiver of the right to seek additional reasonable accommodations under fair housing laws, or other objectionable provisions that landlords often impose as a condition of settlement. *See* RCW 59.18.230. Nevertheless, the practice persists with landlord attorneys. While the defendant may not have much leverage in such a negotiation the threat to either proceed to trial or to force a stay and seeking a repayment agreement under RCW 59.18.410 give the tenant leverage to push back on onerous settlement provisions. Advocates should consult additional resources on UDA settlements.

13. Default

A tenant who does not answer may be defaulted and a writ issued ex parte. The court has inherent authority and authority under CR 62 to stay the writ on terms that are just to allow a tenant to vacate the default order or judgment. *See Reynolds v. Harmon*, 193 Wn.2d 143 (2019).

14. Bankruptcy

The filing of a bankruptcy petition operates as an automatic stay of the commencement or continuation of an eviction action. 11 U.S.C. § 362(a)(1), 11 U.S.C. § 362(a)(3). The stay remains in effect unless the court grants a request for relief from stay or the property is no longer property of the bankruptcy estate. 11 U.S.C. § 362. In order to get the full benefit of the automatic stay during the pendency of the bankruptcy, however, the tenant/debtor must file the bankruptcy petition before a "judgment for possession" is entered.

A residential landlord may continue an eviction action without seeking relief from stay if a "judgment for possession" was obtained prior to the filing of the petition. 11 U.S.C. § 362(b)(22). Notwithstanding the entry of a judgment for possession before the filing of the petition and § 362(b)(22), the automatic stay will continue for 30 days after filing the petition if the debtor files a certification that state law permits a cure after a judgment for possession (as does Washington in a nonpayment of rent case; RCW 59.18.410) and deposits rent that will become due within 30 days after the filing of the petition with the clerk (must be a cashier's check or money order payable to the order of the landlord. Local Bankruptcy Rules, Western District of Washington, RULE 4001-1(b)). The automatic stay will continue beyond the 30-day period if the debtor completely cures and certifies the complete cure of the monetary default within the 30-day period. 11 U.S.C. § 362(l).

An action to evict the debtor from residential rental property is not stayed if the eviction action is based upon the tenant's endangerment of the property or the illegal use of controlled substances on the property and the landlord files a sworn certification regarding such endangerment or illegal use. 11 U.S.C. § 362(b)(23). If the landlord files and serves a sworn certification, then the eviction is stayed for 15 days to give the tenant an opportunity to file an objection and obtain a hearing on the objection. The stay will remain in effect if the tenant prevails at a hearing on the objection. 11 U.S.C. § 362(m).

15. Reinstatement

There are several ways for a tenant who is behind on rent to reinstate their tenancy. The first, under RCW 59.18.410(2), permits the tenant to reinstate at any time prior to judgment by paying the full amount of rent owed, a total late fee of up to $75 if allowed by the lease, and court costs incurred, if any. After judgment, a tenant may reinstate within five days by payment of the full amount ordered.

The second method, allows a tenant to reinstate their tenancy under RCW 59.18.410(3) if they lose based on nonpayment at the show cause hearing and judgment is entered. The court may stay the writ at the show cause hearing, or by a motion after the show cause hearing, and permit the tenant to propose a payment plan or seek payment by the Department of Commerce. Consult the statute and NJP's forms for specifics about this option.

A tenant who has been evicted for nonpayment of rent may be restored to possession after judgment if his lease or agreement has not yet expired by paying the amount of the judgment and costs into court within five days of the judgment's entry. This relief is also available when judgment is entered at a show cause hearing. RCW 59.18.410; RCW 59.12.170. The five-day period presumably excludes Saturday, Sunday, and Holidays pursuant to CR 6 and *Canterwood Place, L.P. v. Thande,* 106 Wn. App. 844 (2001). A court may also relieve a tenant from forfeiture of a lease, after a judgment of forfeiture, if the tenant submits a verified application and petition for such relief within thirty days after entry of the judgment. RCW 59.12.190. The wife was not entitled to relief from forfeiture pursuant to RCW 59.12.190 when husband committed nuisance. *Burgess v. Crossan,* 189 Wn. App. 97 (2015) [commercial case].

A tenant can appeal from a final judgment in an unlawful detainer action and file a motion to supersede the judgment and stay execution of the writ of restitution if the tenant is still in possession. RAP 8.1(b)(2). The Washington Supreme Court Commissioner has ruled in an unpublished decision that an appropriate bond to supersede an unlawful detainer judgment is the amount of the judgment entered, plus payment of the monthly rent when due, but not an amount for additional unspecified losses exceeding those in the judgment. *Mirador v. Bernardo*, Supreme Court of Washington, No. 48844-4, September 13, 1982.

A tenant who appeals from a judgment in favor of the landlord and who does not supersede the judgment may be restored to possession if he is successful on appeal. RAP 12.8; *see also Housing Authority v. Pleasant*, 126 Wn. App. 382 (2005) holding that when the right to possession is at issue in an unlawful detainer action, the issue is not moot on appeal simply because the tenant has vacated the premises.

16. Orders of Limited Dissemination

A defendant in an unlawful detainer may ask during the case, or make a motion after conclusion of the case, for entry of an order of limited dissemination. Complete sealing and redaction of unlawful detainer files is limited in Washington. *See Hundtofte v. Encarnacion*, 169 Wn.2d 498 (2012). The order of limited dissemination may help a defendant limit the extent to

which the eviction history is shared with tenant screening companies. The practical effect is that an eviction history should not be reported by a screening company to a landlord. It does not prevent a landlord from searching the court record on their own, and it does not permit the tenant to state that they have never been a defendant in an unlawful detainer.

An order may be granted on one of three grounds: that the tenancy was reinstated, that the eviction was not well grounded in law or fact, or that "other good cause" exists. RCW 59.18.367. Many courts will find that payment of any underlying judgment and difficulty finding housing constitute "other good cause". There is no enforcement mechanism within the statute itself.

17. Post-Foreclosure & Real Estate Contract Forfeiture Evictions

a) Nonjudicial Deed of Trust Foreclosure. The Deed of Trust Act authorizes a purchaser at a trustee's sale to use RCW 59.12 to recover possession of the property after a nonjudicial foreclosure. It does not authorize recovery of damages, court costs, or attorney fees. RCW 61.24.060. A trustee's deed containing proper recitals is prima facie evidence of deed of trust foreclosure compliance and conclusive evidence thereof in favor of bona fide purchasers and encumbrancers for value. The recitals do not affect the lien or interest of any person who was not sent required notices. RCW 61.24.040(7).

In 2018, Congress permanently authorized the Protecting Tenants in Foreclosure Act, which provides a *bona fide* tenant residing in a foreclosed property an additional 90 days before they may be evicted. Pub. L. 115–174, title III, §304(a), (c), May 24, 2018, 132 Stat. 1339. To qualify as *bona fide* tenant, the tenant cannot be the borrower or the child, spouse, or parent of the borrower, the lease or tenancy at issue must have been created by an arms-length transaction, and the rent cannot be substantially less than the fair market rent. Section 8 tenants may remain until the expiration of the HAP contract. Jurisdictions with good cause ordinances may provide more protection.

There are a number of cases that limit the ability of borrowers to challenge nonjudicial deed of trust foreclosures in post-foreclosure sale unlawful detainer actions. *See, e.g., FNMA v. Ndiaye,* 188 Wn. App. 376 (2015) (mortgagor could not litigate questions of title in unlawful detainer action after nonjudicial foreclosure); *Steward v. Good*, 51 Wn. App. 509 (1988); *Koegel v. Prudential Mut. Savings Bank*, 51 Wn. App. 108 (1988); *Peoples Nat'l Bank of Washington v. Ostrander*, 6 Wn. App. 28 (1971). A borrower or tenant should be able to raise defenses to the eviction, however, where the trustee's sale is void or there are equitable grounds for setting the sale aside. *Albice v. Premier Mortgage Services,*174 Wn.2d 560 (2012).

The tenant of property that is purchased at a nonjudicial foreclosure sale is an essential party to an unlawful detainer action brought by the purchaser of the property and the failure to join the tenant as a party deprives the trial court of subject matter jurisdiction. An unlawful detainer action is not moot just because the tenant no longer has possession of the contested premises. *Laffranchi v. Lim*, 146 Wn. App. 376 (2008).

No pre-lawsuit unlawful detainer notice is required where the plaintiff purchased the property at a nonjudicial deed of trust foreclosure sale, the occupant is the former property owner, and the purchaser has not subsequently entered into a landlord-tenant agreement with the former owner. (See, however, tenant notice requirements under the Deed of Trust Act, RCW 61.24.146 (60-day written notice to vacate unless waste or nuisance).

Neither Deed of Trust Act nor unlawful detainer statute (RCW 59.12) authorized award of reasonable attorney fees in unlawful detainer action to recover possession after nonjudicial foreclosure of deed of trust. Residential Landlord-Tenant Act did not apply. *Fannie Mae v. Steinmann,* 181 Wn.2d 753 (2014).

b) Real Estate Contract Forfeiture. The Real Estate Contract Forfeiture Act authorizes the seller to use RCW 59.12 to recover possession of the property after forfeiture plus actual damages caused by failure to surrender possession after forfeiture and for reasonable attorney fees and costs. RCW 61.30.100(3).

18. Distressed Property Conveyances

As a result of the increase in foreclosure rescue scams and related abuses, the RLTA was amended in 2008 to impose special requirements for evictions that involve distressed homes and conveyances of properties that were in danger of foreclosure. RCW 61.34. RCW 59.18.363 requires that in an unlawful detainer action involving property that was a distressed home: (1) the plaintiff shall disclose to the court whether the defendant previously held title to the property that was a distressed home, and explain how the plaintiff came to acquire title; (2) a defendant who previously held title to the property that was a distressed home shall not be required to escrow any money pending trial when a material question of fact exists as to whether the plaintiff acquired title from the defendant directly or indirectly through a distressed home conveyance; (3) there must be both an automatic stay of the action and a consolidation of the action with a pending or subsequent quiet title action when a defendant claims that the plaintiff acquired title to the property through a distressed home conveyance.

19. Ejectment

Although the unlawful detainer action is the procedure most frequently used for evicting tenants, it is not the only procedure available. A landlord may also proceed by way of ejectment. *Petsch v. Willman*, 29 Wn.2d 136 (1947); *Verline v. Hyssop*, 2 Wn.2d 141 (1940); *Honan v. Ristorante Italia*, 66 Wn. App. 262 *rev. den*. 120 Wn.2d 1009 (1992).

The procedure for ejectment is contained in RCW 7.28.010 *et seq*. Prior to the passage of HB 1236 in 2021, a landlord did not need to serve any particular notice for ejectment of a tenant. However, HB 1236 changed that and required cause to be demonstrated for a landlord to evict a tenant under the RLTA. Regardless, the procedure is seldom used. It is commenced with a regular statutory twenty-day summons; there is no provision for pretrial writs of restitution; there is no statutory priority over other civil actions, and there is no statutory right to either reasonable

attorney's fees or double damages if the landlord prevails.

Ejectment could conceivably be used where the landlord has substantial monetary claims against a tenant that could not be recovered in an unlawful detainer action due to the court's limited jurisdiction. If the landlord could recover possession relatively quickly through the use of summary judgment or preliminary injunctive relief, then it may be able to avoid the necessity of bringing successive actions by combining its damage claims with an ejectment action.

Ejectment may be the only procedure available for evicting a tenant at will due to the fact that a tenancy at will does not fit into any of the notice categories described in RCW 59.12.030 and therefore a landlord may not utilize an unlawful detainer action. *Turner v. White*, 20 Wn. App. 290 (1978). *See also Najewitz v. Seattle*, 21 Wn.2d 656 (1944); 1C Wash. Prac., Methods of Practice, § 88.8 (4th ed.); 17 Wash. Prac. Real Estate: Property Law, § 6.16 (2d ed.); 20 WASH. L. REV. 169 (1945).

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