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

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| **TRIUNE FAMILY CHARITABLE REMAINDER UNITRUST, also known as TRIUNE FAMILY CRUT,** | ) | **No. 28635-5-III** |
| **Respondent,** | ) | **Division Three** |
| **v.** | ) | **UNPUBLISHED OPINION** |
| **DORIS LEANN PFEIFER,** | ) | |
| **Appellant.** | ) | |

Kulik, C.J. — Triune Family Charitable Remainder Unitrust (Triune) owns the Joseph Cove Apartment Complex in Bridgeport, and participates in the Department of Housing and Urban Development's (HUD) housing assistance program. Triune terminated the rental subsidy of its tenant Doris Pfeifer for alleged noncompliance with HUD regulations and then filed an unlawful detainer action when she failed to pay full market rate rent. A Douglas County court commissioner denied Ms. Pfeifer's motion to dismiss for lack of jurisdiction due to deficient service of process. She was evicted upon execution of a writ of restitution. The superior court denied revision but ordered a trial

on the right to possession of the premises. Prior to trial, the court granted Triune's CR 41(a)(1)(B) motion to voluntarily dismiss the unlawful detainer action without prejudice. The court awarded Ms. Pfeifer damages and costs sustained from execution of the writ, but denied her requests for damages for lost rental subsidy and an award of attorney fees against Triune.

Ms. Pfeifer appeals, contending the court erred by (1) not dismissing the unlawful detainer action for lack of jurisdiction, (2) granting Triune's CR 41(a)(1)(B) motion for dismissal without restoring her to her tenancy, (3) denying her damages for the value of her lost federal housing subsidy, and (4) denying her request for attorney fees. We conclude the trial court did not err, and we affirm.

## FACTS

On January 24, 2005, Ms. Pfeifer rented an apartment from Triune on a one-year written lease with successive one-year renewal terms. At the times pertinent to this case, she paid $143 per month rent for a three-bedroom apartment with a full market rate of $562. The $419 difference was her HUD rental assistance subsidy. Pursuant to the lease and HUD regulations, her monthly rent and assistance payment was adjusted to reflect changes in her income and the number of persons in her household. HUD regulations required Triune to assign units according to the size of household and age and sex of the

household members. If a more appropriate unit became available for a tenant, the tenant could either move into the new unit or stay in the original unit and rent at the HUD approved market rate. These terms were reflected in Ms. Pfeifer's lease agreement.

When Ms. Pfeifer's children moved out, she was a single person living in a three-bedroom apartment and, as such, became "'overhoused.'" Clerk's Papers (CP) at 373. On May 8, 2008, Triune's manager, Andrew Taber, talked with her about moving into a two-bedroom unit that would be available later in the month. Ms. Pfeifer said she would consider moving, but might instead have other family members move into her current apartment. Mr. Taber requested that she make a decision. She expressed concern about cockroach and mold problems in the other apartment and that her medical conditions would prevent her from living there. Mr. Taber assured her the problems would be resolved before she moved in. On May 21, a professional exterminator sprayed for cockroaches and advised Mr. Taber that the apartment was habitable as of May 23.

Meanwhile, on May 20, Triune sent Ms. Pfeifer a letter reiterating the May 8 discussions and informing her that if she did not move to the two-bedroom apartment, her rent in the three-bedroom unit would increase to market rate. Triune requested that she move by May 26 because other people were waiting for apartments. She did not move.

On May 29, Triune sent Ms. Pfeifer a 30-day notice to terminate her housing assistance. The notice stated that the vacant two-bedroom apartment would be held for her until June 8, and that another family would be moved in on June 9 unless she changed her mind. Further, in accordance with HUD rules, if she did not move into the two-bedroom apartment and vacate her current apartment by June 8, her rent would increase to the $562 market rate effective July 1.

Ms. Pfeifer did not comply. Triune terminated her rental assistance on July 1 and charged her $562 rent for her three-bedroom apartment. She submitted payment of $143 in early July. Triune rejected the payment. On July 11, Triune gave her a three-day notice to pay the full $562 rent or vacate. She did neither.

Triune initiated an unlawful detainer action against Ms. Pfeifer on July 18, 2008. Triune attempted to personally serve her with the lawsuit documents on July 22, but was unsuccessful. The process server instead posted the documents at her apartment. Triune also mailed her copies the next day. The documents included an eviction summons with a response deadline of August 11, 2008, and an order to appear and show cause on August 12.

On August 7, the Northwest Justice Project appeared as counsel and answered on Ms. Pfeifer's behalf. She asserted several affirmative defenses against Triune, including

lack of unlawful detainer jurisdiction due to improper alternative service of process under the Residential Landlord-Tenant Act of 1973, chapter 59.18 RCW, lack of authority to terminate her housing assistance, lack of proper notice before terminating her housing assistance, and discrimination for failure to reasonably accommodate her respiratory disability.

At the August 12 show cause hearing, the court commissioner recognized that service of process was deficient, but ordered a two-week continuance for Triune to personally serve Ms. Pfeifer. She was personally served later in the day on August 12, but the summons stated a return date of August 11, 2008.

Triune then special set the show cause hearing for August 20. At that hearing, Ms. Pfeifer again asserted the court lacked unlawful detainer jurisdiction due to improper service of process, this time also adding the defense of improper return date on the summons. The commissioner ruled service had been completed and granted Triune a writ of restitution. Also on August 20, the commissioner entered the following documents presented ex parte by Triune: an order terminating the tenancy and judgment awarding Triune $2,153 for rent, costs, and attorney fees, an order for break and enter, an order for writ of restitution, and a writ of restitution.

Ms. Pfeifer moved for revision in superior court on August 26, again contending

the court lacked jurisdiction because service was defective. She moved for a stay but did not post a $500 bond. The writ of restitution was executed on August 29, and Ms. Pfeifer was evicted. The superior court issued its decision on the motion for revision on September 12. The court agreed Ms. Pfeifer had not been properly served for the August 12 hearing, but ruled that because she was personally served later on August 12, and her counsel was aware of the August 20 hearing date, the court had jurisdiction to issue the writ of restitution. The court ordered a trial on the right of possession. Triune did not post bond pending trial. RCW 59.18.380 requires a landlord to post security for damages sustained by a tenant in the event of a wrongful writ of restitution.

Trial was ultimately set for May 20, 2009. Ms. Pfeifer filed an amended answer on April 2. She maintained the affirmative defense of lack of jurisdiction due to improper summons. She also pleaded affirmative defenses that Triune failed to comply with HUD regulations for termination of rental assistance/change in rental agreement and termination of tenancy, and that Triune violated federal and state discrimination laws by failing to accommodate her disability. She sought dismissal of Triune's unlawful detainer complaint with prejudice, an award of costs and attorney fees, a judgment based on her affirmative defenses awarding reinstatement of her subsidized tenancy, and an order requiring Triune to expunge the eviction from her housing and credit records.

On April 14, 2009, Triune moved to voluntarily dismiss the unlawful detainer action pursuant to CR 41(a)(1)(B). Triune claimed it was entitled to dismissal as a matter of right because there were no counterclaims filed. Ms. Pfeifer challenged the motion on the theory that the right to trial on the issue of possession superseded Triune's right to take a voluntary dismissal. In the alternative, she sought reinstatement of her tenancy and an award of out-of-pocket costs.

On May 15, 2009, the court granted Triune's motion to dismiss and ruled Ms. Pfeifer was entitled to damages, costs, and attorney fees sustained due to execution of the writ of restitution. The court declined to reinstate her tenancy. No vacancies existed at the Joseph Cove apartment complex. On July 13, the court entered an order dismissing Triune's unlawful detainer action pursuant to CR 41(a)(1)(B), without prejudice. The parties later stipulated that Ms. Pfeifer should receive $1,311 in damages for moving-related expenses attributable to the writ of restitution being executed.

On July 30, 2009, the matter proceeded to a bench trial limited to the issues of costs, attorney fees, and additional damages. The court rejected Ms. Pfeifer's damages claim for lost housing subsidy, reasoning that termination of her tenancy (whether lawful or unlawful) did not cause the termination of her housing subsidy. The court found $7,500 in attorney fees was a reasonable amount for Northwest Justice Project's defense

of Ms. Pfeifer. The court nevertheless declined to award any fees because the publicly-funded Northwest Justice Project, under federal law, could not accept attorney fees. The court also determined that Northwest Justice Project would continue to perform its function if no fees were awarded. Further, Ms. Pfeifer was not entitled to fees personally, and an award of fees would be punitive to Triune whose conduct was presumably discouraged by having to pay its own costs and fees.

The court ultimately entered findings of fact and conclusions of law and awarded Ms. Pfeifer $1,311 in stipulated damages for moving-related expenses, $522.19 in costs, and $120.12 in prejudgment interest, for a total of $1,953.31. The court also ruled Ms. Pfeifer was entitled to vacation of the August 20, 2008 judgment and order, the order for writ of restitution, the writ of restitution, and the break and enter order.

Ms. Pfeifer appeals.

ANALYSIS

*Unlawful Detainer Jurisdiction.* Under the Residential Landlord-Tenant Act of 1973, chapter 59.18 RCW, a landlord may commence an unlawful detainer action against a tenant who fails to make timely rental payments. RCW 59.18.130, .180(1). The unlawful detainer statute, chapter 59.12 RCW, is in derogation of the common law and must therefore be strictly construed in favor of the tenant. *Hous. Auth. v. Terry*, 114

Wn.2d 558, 563, 789 P.2d 745 (1990); *Truly v. Heuft*, 138 Wn. App. 913, 918, 158 P.3d 1276 (2007). To obtain unlawful detainer jurisdiction, the landlord must prove the tenant was properly served with a statutory unlawful detainer summons; compliance with the statutory method of process is mandatory. *Christensen v. Ellsworth*, 162 Wn.2d 365, 372, 173 P.3d 228 (2007); *Truly*, 138 Wn. App. at 918; *Canterwood Place LP v. Thande*, 106 Wn. App. 844, 847, 25 P.3d 495 (2001); *see Terry*, 114 Wn.2d at 564.

Ms. Pfeifer contends the superior court erred on revision by not dismissing the unlawful detainer action for lack of jurisdiction because Triune first failed to comply with the service of process requirements in RCW 59.18.055, and subsequently failed to serve a proper summons under RCW 59.12.070. We agree with Ms. Pfeifer's first contention.

a. Service under RCW 59.18.055. In landlord tenant matters, if the plaintiff is unable to personally serve the summons on the defendant, an alternative means of service is provided in RCW 59.18.055. The statute provides in pertinent part:

> (1) When the plaintiff, after the exercise of due diligence, is unable to personally serve the summons on the defendant, *the court may authorize the alternative means of service described herein*. Upon filing of an affidavit from the person or persons attempting service describing those attempts, and the filing of an affidavit from the plaintiff, plaintiff's agent, or plaintiff's attorney stating the belief that the defendant cannot be found, *the court may enter an order authorizing service of the summons as follows*:
>
> (a) The summons and complaint shall be posted in a conspicuous place on the premises unlawfully held, not less than nine days from the return date stated in the summons; and
>
> (b) Copies of the summons and complaint shall be deposited in the

> mail, postage prepaid, by both regular mail and certified mail directed to the defendant's or defendants' last known address not less than nine days from the return date stated in the summons.

RCW 59.18.055 (emphasis added).

It is undisputed that after Triune was unable to serve Ms. Pfeifer on July 22, 2008, Triune failed to obtain the court approval required by RCW 59.18.055(1) before posting and mailing the documents. Ms. Pfeifer thus correctly asserted lack of jurisdiction at the August 12 show cause hearing. Any noncompliance with the statutory method of process prevents the superior court from acquiring subject matter jurisdiction over the unlawful detainer proceeding. *Christensen*, 162 Wn.2d at 372. Lack of jurisdiction "renders the superior court powerless to pass on the merits" of the case. *Skagit Surveyors & Eng'rs, LLC v. Friends of Skagit County*, 135 Wn.2d 542, 556, 958 P.2d 962 (1998). Dismissal without prejudice is the limit of what a court may do. *Hous. Auth. v. Kirby*, 154 Wn. App. 842, 850, 226 P.3d 222 (2010).

Triune is correct that a party may waive the defense of lack of jurisdiction by seeking affirmative relief, thereby invoking the jurisdiction of the court. *See In re Marriage of Parks*, 48 Wn. App. 166, 170, 737 P.2d 1316 (1987). Affirmative relief is defined as "'[r]elief for which defendant might maintain an action independently of plaintiff's claim and on which he might proceed to recovery, although plaintiff abandoned his cause of action or failed to establish it.'" *Negash v. Sawyer*, 131 Wn. App. 822, 827,

129 P.3d 824 (2006) (quoting *Grange Ins. Ass'n v. State*, 110 Wn.2d 752, 765-66, 757 P.2d 933 (1988)). Ms. Pfeifer did request judgment for her costs and attorney fees, but presenting defenses and requesting judgment for costs and attorney fees against the landlord is not a request for affirmative relief. *See id.* at 826-27. Ms. Pfeifer did not waive her lack of jurisdiction defense. Dismissal without prejudice was the proper remedy at the August 12 hearing.

b. Requirements for unlawful detainer summons. A summons served by a landlord in an unlawful detainer action must comply with RCW 59.12.070 and .080. RCW 59.12.070 provides in pertinent part:

> A summons must be issued as in other cases, returnable at a day designated therein, which *shall not be less than seven nor more than thirty days from the date of service*.

(Emphasis added.) Former RCW 59.12.080 (1927) provides in pertinent part:

> The summons must state the names of the parties to the proceeding, the court in which the same is brought, the nature of the action, in concise terms, and the relief sought, *and also the return day*; and must notify the defendant to appear and answer within the time designated or that the relief sought will be taken against him.

(Emphasis added.)

On August 12, after the show cause hearing, Triune personally served Ms. Pfeifer with all of the original service documents with no date changes. The eviction summons

still stated "THE DEADLINE FOR YOUR WRITTEN RESPONSE IS: AUGUST 11, 2008, AT 5:00 P.M." CP at 126. At the August 20 show cause hearing, Ms. Pfeifer again asserted deficient service of process and lack of jurisdiction. The court commissioner ruled that service had been completed and granted Triune a writ of restitution. On revision, the superior court upheld jurisdiction because Ms. Pfeifer was personally served and her counsel was aware of the August 20 hearing date.

Ms. Pfeifer contends this was error because Triune's second attempt at service failed the plain requirement of RCW 59.12.070 that a summons state a return date of not less than 7 nor more than 30 days from the date of service. We agree.

Again, noncompliance with the statutory method of process prevents the superior court from acquiring subject matter jurisdiction over the unlawful detainer proceeding. *Christensen*, 162 Wn.2d at 372; *Terry*, 114 Wn.2d at 563-64; *Truly*, 138 Wn. App. at 918; *Canterwood Place*, 106 Wn. App. at 847. When interpreting a statute, we must consider it as a whole and avoid rendering any section meaningless or superfluous. *Truly*, 138 Wn. App. at 922. Time and manner requirements in the unlawful detainer service of summons statute are to be strictly enforced. *Id.* at 921-22. Thus, it is a strict jurisdictional requirement that landlords correctly inform tenants how much time they have to answer a summons. *Id.*; *Canterwood Place*, 106 Wn. App. at 849.

Here, Triune's failure to change the dates in the documents personally served on Ms. Pfeifer on August 12 is an obvious oversight that may not appear prejudicial when she previously answered the complaint and appeared on August 12 and August 20. But the superior court's ruling and Triune's arguments ignore that jurisdiction was lacking in the first instance (on August 12) due to improper service. Subsequent service of the same documents without changing the August 11 summons return date reflected impossibility. Strictly construing the service statute as we must, Triune's failure to change the summons response date is tantamount to having no return date at all—a clear violation of RCW 59.12.070. Compliance with a time requirement is mandatory and jurisdictional. *Canterwood Place*, 106 Wn. App. at 849. The court therefore never acquired jurisdiction. Ms. Pfeifer was entitled to answer and appear and still assert lack of jurisdiction due to improper service. *See Negash*, 131 Wn. App. at 827; *Truly*, 138 Wn. App. at 918.

Triune's cited case *Hill v. Hill*, 3 Wn. App. 783, 477 P.2d 931 (1970) is not controlling. There, the dispute was over interpretation of a dissolution decree. The court construed the plaintiff's ambiguous pleadings as a complaint for unlawful detainer. The plaintiff acquiesced but later argued the action should not be construed as an unlawful detainer because the return date in her summons exceeded the time period allowed in

RCW 59.12.070. The trial court ruled her new claim untimely. On appeal, the court held that the return date beyond the permitted maximum did not render the case a void unlawful detainer proceeding. *Hill*, 3 Wn. App. at 789.

*Hill* predates the Residential Landlord-Tenant Act of 1973, chapter 59.18 RCW, and does not address now well-settled principles that strict compliance with time requirements in an unlawful detainer summons are jurisdictional. *Hill* is further distinguishable on its unusual facts where the plaintiff attempted to change her claim after acquiescing to the court's construction of her pleadings. Moreover, unlike in *Hill*, the return date prior to the date of summons in this case was essentially no date at all.[1]

We conclude that the superior court erred on revision by upholding jurisdiction over the unlawful detainer proceeding and ordering a trial on the right of possession, instead of dismissing the action without prejudice and quashing the writ of restitution. We still discuss the subsequent proceedings in which the superior court determined Ms. Pfeifer's remedy.

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[1] Triune's other cited cases are inapposite because they were not unlawful detainer actions. *Sammamish Pointe Homeowners Ass'n v. Sammamish Pointe LLC*, 116 Wn. App. 117, 64 P.3d 656 (2003), *review granted*, 150 Wn.2d 1025 (2004) (no prejudice from 20-day summons instead of 60-day summons when nonresident product manufacturer defendants appeared and answered); *United Food & Comm'l Workers Union v. Alpha Beta Co.*, 736 F.2d 1371 (9th Cir. 1984) (summons requiring answer in 10 days rather than 20 not prejudicial when defendant appeared in arbitration of pension of dispute).

*Voluntary Dismissal of Unlawful Detainer Action Under CR 41(a)(1)(B).* A tenant dispossessed by writ of restitution has a right to a trial on the issue of possession under both the unlawful detainer statute (RCW 59.12.130) and the Residential Landlord-Tenant Act (RCW 59.18.380 and .410). *Munden v. Hazelrigg*, 105 Wn.2d 39, 45, 711 P.2d 295 (1985); *Housing Auth. v. Pleasant*, 126 Wn. App. 382, 389, 109 P.3d 422 (2005). The issue is not moot merely because the tenant no longer has possession; a displaced tenant who does not concede the right of possession is entitled to have that right determined. *Pleasant*, 126 Wn. App. at 389.

On the other hand, CR 41(a)(1)(B) allows a plaintiff to voluntarily dismiss a suit at any time before resting its case, without good cause shown. The dismissal is without prejudice unless otherwise stated in the order of dismissal. CR 41(a)(4). The effect of a CR 41(a)(1)(B) dismissal is to leave the parties as if the action had never been brought. *Wachovia SBA Lending, Inc. v. Kraft*, 165 Wn.2d 481, 492, 200 P.3d 683 (2009). "No substantive issues are resolved, and the plaintiff may refile the suit." *Id.*

Ms. Pfeifer contends the court erred by granting Triune's motion for voluntary dismissal without restoring her to possession of the premises. She argues that her right to trial on the possession issue was superior to Triune's claim of right to voluntary

dismissal. She asserts that the special proceedings provided in unlawful detainer statutes supersede general court rules to the extent they are inconsistent. CR 1; CR 81; *Christensen*, 162 Wn.2d at 374. Under *Wachovia*, she concludes the court erred by granting Triune's motion without reinstating her tenancy because the dismissal should have left the parties as if no unlawful detainer action was brought. *Wachovia*, 165 Wn.2d at 492.[2]

Two cases cited by Triune illustrate that, in general, voluntary dismissal without prejudice under CR 41(a)(1)(B) is available in unlawful detainer actions even though they are special proceedings. *Council House, Inc. v. Hawk*, 136 Wn. App. 153, 147 P.3d 1305 (2006) (tenant awarded attorney fees and costs following landlord's CR 41(a)(1)(B) voluntary dismissal); *Keron v. Namer Inv. Corp.*, 4 Wn. App. 809, 484 P.2d 1152 (1971) (unlawful detainer action dismissed without prejudice under CR 41(a)(1)(B) is not res judicata in subsequent wrongful eviction action). But neither case resembles the facts

[2] We reject Triune's threshold contention that the issue is not properly before this court because Ms. Pfeifer did not appeal the July 13, 2009 dismissal order within 30 days. If a dismissal without prejudice has the effect of determining the action or preventing a final judgment or discontinuing the action, it is appealable. *Munden*, 105 Wn.2d at 44; *see* RAP 2.2(a)(3). Those criteria are not met here. The July 13 order of dismissal without prejudice did not determine or discontinue the action or prevent a final judgment. The order specifically grants Ms. Pfeifer a trial to obtain judgment on the issue of damages and costs. After the trial, the court ultimately entered findings of fact and conclusions of law on November 6, 2009. Ms. Pfeifer timely appealed within 30 days thereafter. RAP 5.2(a).

here.

In *Council House*, unlike Ms. Pfeifer, the tenant subject to the unlawful detainer action had not been dispossessed of the premises. *Council House*, 136 Wn. App. at 156. The voluntary nonsuit would thus not have been inconsistent with the right to a trial on the issue of possession. *Keron* is also distinguishable because no possessory rights under the unlawful detainer statute were at issue in the action seeking damages for the tort of wrongful eviction. *Keron*, 4 Wn. App. at 809. The court held that a prior action for unlawful detainer dismissed without prejudice under CR 41(a)(1)(B) was not res judicata for purposes of the subsequent eviction action. *Keron*, 4 Wn. App. at 811.[3]

Ms. Pfeifer would not have been dispossessed but for Triune's filing of the unlawful detainer action and execution of the writ of restitution. Even assuming the court acquired jurisdiction, Triune's voluntary dismissal should have left the parties as though no unlawful detainer action was brought, thus returning Ms. Pfeifer to possession. Her arguments are well taken, but only in theory because the status quo was not earlier preserved, and Joseph Cove had no vacancies when the court granted Triune's motion for dismissal in May 2009. Nevertheless, Triune perpetuated what amounts to a wrongful

[3] Triune's other cited case *Commonwealth Real Estate Services v. Padilla*, 149 Wn. App. 757, 205 P.3d 937 (2009) is distinguishable because it involved a tenant's *involuntary dismissal* claim under CR 41(b)(3) after the plaintiff landlord rested its case in chief.

dispossession by executing a writ of restitution without complying with jurisdiction requirements for the unlawful detainer action, and then failing to post bond as required by RCW 59.18.380 pending a trial on the issue of possession. Practically, by the time Triune moved to dismiss, the court could only vindicate Ms. Pfeifer's right of possession by awarding her damages to compensate for Triune's wrongful dispossession and by expunging the August 20, 2008 judgment, orders, and writ of restitution.

We, therefore, reject Ms. Pfeifer's further argument that the interests of justice should require this court to now restore her to her tenancy. *See* RAP 12.2. Again, Ms. Pfeifer did not post bond or seek further relief to preserve the status quo prior to her eviction. *See* RAP 2.3(b)(1)-(3); RAP 17.4(b). She explains that she chose not to do so because the court ordered a trial on the issue of possession in its September 12 ruling, and she expected to vindicate her rights at trial. But she makes no showing that restoring her to possession is now a practical alternative. We conclude in these circumstances that there was no prejudicial error by the court in granting voluntary dismissal without returning possession of the premises to Ms. Pfeifer.

*Relevance of Termination of Ms. Pfeifer's Federal Housing Subsidy and Claim for Damages.* Ms. Pfeifer contends the trial court erred by concluding that Triune lawfully terminated her federal housing subsidy. She argues that Triune failed to provide her with

legally sufficient notice required by both federal and state law, as well as the lease agreement itself, before increasing her rent without her consent and terminating her housing subsidy. She contends she has been wrongfully deprived of her home since July 1, 2008, and deprived of the value of her federal housing subsidy ($419 per month) since July 1, 2008, and that she is entitled to recover all damages that reasonably flow from Triune's wrongful eviction.

Triune responds that the termination of the federal housing subsidy is not relevant because dismissal of the unlawful detainer case discontinued the action. The court then correctly calculated Ms. Pfeifer's damages which were incurred as a direct consequence of the issuance of the writ of restitution. We agree with Triune and the trial court.

As discussed, unlawful detainer actions brought under RCW 59.12.030 are a summary proceeding to determine the right of possession as between landlord and tenant. *Munden*, 105 Wn.2d at 45. "The action is a narrow one, limited to the question of possession and related issues such as restitution of the premises and rent." *Id.* In order to protect the summary nature of the proceedings, other claims, including counterclaims, are generally not allowed, except when the counterclaim, affirmative equitable defense, or setoff is based on facts which excuse a tenant's breach. *Id.*; *see Heaverlo v. Keico Indus., Inc.*, 80 Wn. App. 724, 728, 911 P.2d 406 (1996). "In an unlawful detainer action, the

court sits as a special statutory tribunal to summarily decide the issues authorized by statute and *not* as a court of general jurisdiction with the power to hear and determine other issues." *Granat v. Keasler*, 99 Wn.2d 564, 571, 663 P.2d 830 (1983).

Here, Triune's unlawful detainer complaint alleged Ms. Pfeifer's breach of the lease provisions due to her noncompliance with HUD regulations as justification for the increase in her rent. Her failure to pay the increased rent is what resulted in the unlawful detainer action. Ms. Pfeifer's amended answer filed in April 2009 still included as affirmative defenses: (1) lack of jurisdiction due to improper service of summons, (2) Triune's failure to comply with notice and procedural requirements for termination of rental assistance and/or change in rental agreement under HUD regulations, Washington law, and the terms of the lease agreement, and (3) Triune's failure to comply with notice and procedural requirements for termination of tenancy under HUD regulations.

Under RCW 59.18.080, a tenant may raise as a defense in an unlawful detainer proceeding that there is no rent due and owing. The upshot of Ms. Pfeifer's defenses was that she was entitled to possession of the premises at her $143 rental rate tendered in July 2008 because Triune misapplied HUD regulations, state law, and the terms of the lease agreement to raise her rent when she refused to move to the alleged uninhabitable apartment. Ms. Pfeifer's lack of notice/breach of lease arguments raised in support of

these defenses for trial were certainly relevant in the unlawful detainer action. *See Heaverlo*, 80 Wn. App. at 728 (affirmative defense that would excuse payment of rent is properly before the court). But Triune's argument that the termination of Ms. Pfeifer's housing subsidy was not "in any way related" to the unlawful detainer action is without merit. Br. of Resp't at 11.

Nevertheless, on the unique facts of this case, Ms. Pfeifer's defenses (save for lack of jurisdiction) are no longer relevant. As discussed, lack of jurisdiction renders the superior court powerless to pass on the merits of the case. Dismissal without prejudice is the limit of what the court may do. *Kirby*, 154 Wn. App. at 850; *see Christensen*, 162 Wn.2d at 372; *Skagit Surveyors*, 135 Wn.2d at 556. Even if there was jurisdiction, the unlawful detainer action was not converted into a general action because possession never ceased to be an issue. *Munden*, 105 Wn.2d at 45-46.

It is clear from the record that Ms. Pfeifer did not file any counterclaims, only affirmative defenses. Once the case was dismissed without prejudice under CR 41(a)(1)(B), the effect was to leave the parties as if the action had never been brought. *Wachovia*, 165 Wn.2d at 492. No substantive issues are resolved. *Id.*

It then follows that because Ms. Pfeifer's lack of notice/right to possession arguments were before the court solely as affirmative defenses in the unlawful detainer

action, the court lacked jurisdiction/authority to resolve the merits of those issues once the case was dismissed. The court's conclusion of law after the damages trial that "[Ms.] Pfeifer's federal housing assistance was lawfully terminated by Triune"[4] pertains to the merits and is therefore extraneous. The trial court appropriately did not enter findings to resolve the notice/breach of lease issues raised in Ms. Pfeifer's affirmative defenses.[5]

We conclude that Ms. Pfeifer's lack of notice/breach of lease defenses are not relevant in the first instance due to lack of jurisdiction. Even if the court had acquired unlawful detainer jurisdiction, it lacked authority to address the merits of the defenses after granting the CR 41 dismissal without prejudice. Neither party is entitled to any substantive ruling on the merits of their claims and defenses.[6] Termination of the federal housing subsidy is not relevant and neither is a claim of damages flowing therefrom.

*Propriety of Court's Damages Award.* A wrongfully evicted tenant is entitled to

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[4] CP at 378.

[5] In this situation where the case was dismissed, *Housing Resource Group* and other state and federal cases cited by Ms. Pfeifer as authority that a federally subsidized landlord must give advance written notice that conforms with federal mandates and all procedures set out in the lease before increasing rent are inapposite. *Hous. Resource Group v. Price*, 92 Wn. App. 394, 958 P.2d 327 (1998). Ms. Pfeifer's cited cases involving lease construction are likewise inapplicable.

[6] We thus do not reach Ms. Pfeifer's contentions regarding lack of proper notice before terminating her housing assistance under state and federal law and the lease provisions. The trial court appropriately did not pass on those arguments.

recover all damages that reasonably flowed from the landlord's wrongful act, including the expenses of moving. *Iverson v. Marine Bancorporation*, 86 Wn.2d 562, 565, 546 P.2d 454 (1976). The party seeking damages must prove loss as a result of the other party's conduct by competent evidence in the record. *Id.*; *ESCA Corp. v. KPMG Peat Marwick*, 86 Wn. App. 628, 639, 939 P.2d 1228 (1997), *aff'd*, 135 Wn.2d 820, 959 P.2d 651 (1998).

Here, the trial court cited RCW 59.18.380 as a basis for awarding damages to Ms. Pfeifer. The statute requires the landlord to post bond to secure payment of the tenant's costs and damages sustained by reason of a wrongful writ of restitution:

> [B]efore any writ shall issue prior to final judgment the plaintiff shall execute to the defendant and file in the court a bond in such sum as the court may order, with sufficient surety to be approved by the clerk, conditioned that the plaintiff will prosecute his action without delay, *and will pay all costs that may be adjudged to the defendant, and all damages which he may sustain by reason of the writ of restitution having been issued, should the same be wrongfully sued out.*

Former RCW 59.18.380 (1973) (emphasis added).

The parties stipulated to Ms. Pfeifer's damages in the amount of $1,311 for her security deposit and moving and storage expenses—after a $286 offset to Triune for the unsubsidized portion of her rent for July and August 2008. The court also awarded Ms. Pfeifer costs of $522.19, and $120.12 in prejudgment interest. None of these amounts are

challenged on appeal.

The issue at trial was whether Ms. Pfeifer's loss of her housing subsidy was a recoverable damage. Based upon its extraneous conclusion that Ms. Pfeifer's federal housing assistance was lawfully terminated, the court further concluded that Ms. Pfeifer was not entitled to compensation for the value of her lost housing subsidy. This conclusion is correct, but for the reason that when the case was dismissed, Ms. Pfeifer's defenses pertaining to unlawful housing assistance termination were not subject to determination on the merits.

We find no error in the court's damages award. Ms. Pfeifer's remedy was appropriately limited to the damage and cost award, and vacation of the court's orders of August 20, 2008, including the judgment and order, the order for writ of restitution, the order for break and enter, and the writ of restitution.

*Attorney Fees.* Ms. Pfeifer contends the trial court erred by denying an award of attorney fees against Triune. We decline to address this claim. Ms. Pfeifer failed to assign error to the trial court's attorney fee decision. She gave only passing treatment to the issue in her opening brief and did not cite to any pertinent authority. She did not develop her argument until her reply brief. *See Palmer v. Jensen*, 81 Wn. App. 148, 153, 913 P.2d 413 (1996), *remanded on other grounds*, 132 Wn.2d 193, 937 P.2d 597 (1997)

("Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration."); *Fosbre v. State*, 70 Wn.2d 578, 583, 424 P.2d 901 (1967) (points not argued and discussed in opening brief are considered abandoned); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (arguments raised for the first time in a reply brief generally will not be addressed).

We also deny Ms. Pfeifer's request for attorney fees on appeal because she has not prevailed in this court.

We affirm the trial court's dismissal of the unlawful detainer action, its award of damages and costs, and its denial of lost rental subsidy and attorney fees.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Kulik, C.J.

WE CONCUR:

_____ _____
Brown, J. Siddoway, J.