

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**June 7, 2005**

Cornelia G. Clark  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2004AP3044**

**Cir. Ct. No. 2004SC3772**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**JOSEPH VANDER WIELEN AND CHRISTINE VANDER WIELEN,**

**PLAINTIFFS-RESPONDENTS,**

**v.**

**JOHN B. SIMONSON,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Outagamie County: HAROLD V. FROEHLICH, Judge. *Affirmed.*

¶1 HOOVER, P.J.<sup>1</sup> John Simonson appeals a judgment evicting him from premises he rented from Joseph and Christine Vander Wielen. Simonson had failed to pay rent for several months. He argues he was legally entitled to an

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(1). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

abatement of rent because he paid for repairs and utilities that he argues the Vander Wielens were responsible for paying. We conclude Simonson has not established that he was entitled to rent abatement and therefore affirm the judgment.

## BACKGROUND

¶2 Simonson began renting his apartment from a prior landlord in 1999. The Vander Wielens acquired the property on June 1, 2002. On August 6, 2003, the parties entered into a new lease that took effect on September 1, 2003. The lease states that the landlord is not responsible for payment of heat, water and sewer. However, the parties also signed a document entitled “Non-Standard Rental Provisions.” This document amended the lease to state that all utilities are to be paid by the tenant. When Simonson paid for the utilities, he requested reimbursement from the Vander Wielens under the lease. The Vander Wielens did not reply to Simonson’s request.

¶3 Simonson alleged he complained to the Vander Wielens about problems that needed to be fixed. However, when the repairs were not made, he states he paid for them himself and billed the Vander Wielens for reimbursement. Again, the Vander Wielens did not reply to his requests.

¶4 When Simonson failed to pay rent on time in August 2004, the Vander Wielens issued Simonson a five-day notice to pay rent or vacate the premises. Simonson then paid the rent. He was late again in September, and the Vander Wielens issued another five-day notice. Simonson paid the rent but his bank account did not have sufficient funds to cover the check. Also in September, Simonson gave the Vander Wielens notice that he was going to withhold rent because he had not been reimbursed for utility and repair payments he made.

When Simonson again failed to pay rent in October, the Vander Wielens issued a final notice of non-payment and a fourteen-day notice terminating Simonson's tenancy. Also in October, Simonson gave notice of partial untenability and that he was withholding rent until the Vander Wielens made repairs.

¶5 When Simonson did not vacate the premises, the Vander Wielens began this eviction action. Simonson admitted not paying rent, but argued he was entitled to rent abatement under WIS. STAT. § 704.07(4). He contended there were "health issues and hazards in the building" and that he was entitled to rent credit for the next ten months. He further argued he was not obligated to pay on time because the Vander Wielens had accepted late rent before. Finally, he argued he was not responsible for heat, water and sewer payments but had paid for them in order to prevent discontinuation of services. The circuit court found Simonson's arguments incredible and ordered his eviction from the premises. Simonson appeals.

## DISCUSSION

¶6 The basis of Simonson's argument is that he is entitled to withhold rent due to the Vander Wielens' failure to maintain the premises and pay utilities. However, his brief is deficient in several respects. It is devoid of citations to the record, as required by WIS. STAT. RULE 809.19(1)(e). He merely refers us to the record generally, stating "the relevant facts are contained in the formal court record." He directs us to sources, such as the State of Michigan Truth in Renting Act, without specific reference to these authorities he globally cites.

¶7 Simonson raises matters irrelevant to an eviction action and others he fails to demonstrate were raised in the trial court. We do not consider issues raised for the first time on appeal. See *First Bank (N.A.) v. H.K.A. Enters., Inc.*,

183 Wis. 2d 418, 426 n.10, 515 N.W.2d 343 (Ct. App. 1994). Simonson also raises new arguments in his reply brief. We do not address arguments raised for the first time in a reply brief. See *A.O. Smith Corp. v. Allstate Ins. Cos.*, 222 Wis. 2d 475, 492-93, 588 N.W.2d 285 (Ct. App. 1998). However, even absent these deficiencies, Simonson's argument that he is entitled to rent abatement is unpersuasive.

¶8 The circuit court's decision was based primarily on its determination that Simonson's arguments regarding rent abatement were incredible. Determinations as to the credibility of a witness and the weight to be accorded a witness's testimony are left to the circuit court. *Lessor v. Wangelin*, 221 Wis. 2d 659, 665, 586 N.W.2d 1 (Ct. App. 1998). Simonson does not argue that the court's credibility determinations were inadequate.

¶9 Furthermore, Simonson does not show that he has met the requirements for rent abatement. Simonson argues the apartment was untenantable due to the Vander Wielens' failure to keep the premises safe and therefore he is entitled to full rent abatement for up to ten months. WISCONSIN STAT. § 704.07(4) provides, in part, as follows:

If the premises become untenantable because of damage by fire, water or other casualty or because of any condition hazardous to health, or if there is a substantial violation of sub. (2) [landlord's duty to repair] materially affecting the health or safety of the tenant, the tenant may remove from the premises unless the landlord proceeds promptly to repair or rebuild or eliminate the health hazard or the substantial violation of sub. (2) materially affecting the health or safety of the tenant; or the tenant may remove if the inconvenience to the tenant by reason of the nature and period of repair, rebuilding or elimination would impose undue hardship on the tenant. If the tenant remains in possession, rent abates to the extent the tenant is deprived of the full normal use of the premises.

Additionally, this section “does not authorize rent to be withheld in full, if the tenant remains in possession.” *Id.* Rather, “[i]f the tenant remains in possession, rent abates to the extent the tenant is deprived of the full normal use of the premises.” *Id.*

¶10 Simonson does not specifically state what conditions made the property untenable, or how he was deprived of the full normal use of the premises. He merely contends that “certain deficiencies existed and other deficiencies manifested themselves over time,” and that he “was forced to take corrective action to protect his own security, safety, and health.” Furthermore, Simonson states several times in his brief that the property was “partially untenable,” yet he is asking for full rent abatement. Up until the time of the eviction action, Simonson was in possession of the apartment and therefore not entitled to full rent abatement, pursuant to WIS. STAT. § 704.07(4).<sup>2</sup>

¶11 Simonson also does not show that he is entitled to abate rent as reimbursement for utility payments. The Non-Standard Rental Provisions document, which he admits signing, provides that the tenant is responsible for utilities. He does not argue that the document is invalid or otherwise unenforceable.

*By the Court.*—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

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<sup>2</sup> The court ordered that Simonson could stay in the apartment pending appeal as long as he paid \$2,160 as a cash bond in order to stay the writ of restitution. However, Simonson was unable to pay and has vacated the premises.

