

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

August 27, 1998

Marilyn L. Graves  
Clerk, Court of Appeals  
of Wisconsin

**NOTICE**

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

**No. 97-3608**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**TARA KESTEL-RAULS AND DUANE RAULS,**

**PLAINTIFFS-APPELLANTS,**

**V.**

**DALE T. MOORE D/B/A J&L COMPANY RENTALS, AND  
GREG SCHMIDT D/B/A J&L COMPANY RENTALS,**

**DEFENDANTS-RESPONDENTS.**

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APPEAL from a judgment of the circuit court for Sauk County: PATRICK TAGGART, Judge. *Affirmed.*

DEININGER, J.<sup>1</sup> Tara Kestel-Rauls and Duane Rauls (the tenants) appeal a judgment in the amount of \$594.36 they were awarded against Dale Moore and Greg Schmidt (the landlords) for the wrongful withholding of a portion of their security deposit, in violation of WIS. ADM. CODE § ATCP 134.06(3). The

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<sup>1</sup> This appeal is decided by one judge pursuant to § 752.31(2)(a), STATS.

tenants contend that the trial court erred in denying additional claims against the landlords, and in failing to apply the proper factors in determining the reasonable attorney's fees to which they were entitled. We conclude that the trial court properly denied the other claims against the landlords, and that it properly determined the attorney's fees for the claim on which the tenants prevailed. Accordingly, we affirm.

### **BACKGROUND**

The rent provision of the tenants' form lease, as filled in, provides that "[r]ent of \$430.00 for Premises ... is due on the 1 day of each month .... If payment is received or postmarked by the 3 day of the month when due, rent is \$2.00 per day for premises ...." The lease also requires the tenants to pay a security deposit of \$430. Additional rent and security deposit are required in the event that the tenants keep pets. During the lease, the landlords learned that the tenants had acquired pets. The landlords increased the rent by \$15 and required the tenants to pay \$180 in additional security deposit. The tenants were often late in paying their rent. The trial court found that, during the course of the tenancy, their payments were at least 50 days late.

After the tenants moved out, the landlords timely refunded only \$88.35 of the \$610 the tenants had paid as a security deposit.<sup>2</sup> The landlords explained in a letter accompanying the refund that they had withheld a portion of the security deposit to cover: "a cumulative late fee" of \$101; \$50 for damage to a

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<sup>2</sup> WIS. ADM. CODE § ATCP 134.06(2) and (4) require landlords to return security deposits within twenty-one days after the surrender of the premises and to provide a written accounting for any amounts withheld. The tenants do not claim that the landlords violated these requirements.

closet door and trim; \$20 for cleaning a storage area; \$80 for carpet cleaning; \$128.97 for rent due at the time the tenants vacated; and \$141.68 for an unpaid utility bill.

The tenants brought an action alleging three separate causes of action: (1) the lease was usurious because of the late rent charges; (2) the landlords had wrongfully withheld portions of the security deposit; and (3) the landlords had failed to provide a receipt for the security deposit. The tenants sought double their pecuniary loss, together with the costs of the action, including reasonable attorney fees as authorized by § 100.20(5), STATS. At trial, the landlords prevailed on all claims but one. The trial court determined, in a written decision, that the utility bill was wrongfully withheld from the security deposit, and awarded the plaintiffs \$283.36 as double damages, plus attorney's fees of \$250, and \$61 in filing fees. The tenants appeal, claiming they were entitled to recover double their entire security deposit and additional attorney's fees.

### **ANALYSIS**

The basis of the tenants' claims on appeal, as at trial, is that the landlords wrongfully withheld a portion of their security deposit. WISCONSIN ADM. CODE § ATCP 134.06(3) sets forth the circumstances under which a landlord may retain a tenant's security deposit:

#### **LIMITATIONS ON SECURITY DEPOSIT WITHHOLDING.**

(a) Except for other reasons clearly agreed upon in writing at the time the rental agreement is entered into, other than in a form provision, security deposits may be withheld only for tenant damage, waste or neglect of the premises, or the nonpayment of:

1. Rent for which the tenant is legally responsible, subject to s. 704.29, Stats.

2. Actual amounts owed for utility service provided by the landlord under terms of the rental agreement and not included in the rent.

3. Actual amounts owed by the tenant for direct utility service provided by a government-owned utility, to the extent that the landlord becomes liable for the tenant's nonpayment.

4. Mobile home parking fees assessed against the tenant by a local unit of government under s. 66.058(3), Stats., to the extent that the landlord becomes liable for the tenant's nonpayment.

(b) Nothing in this subsection shall be construed as authorizing any withholding for normal wear and tear or other damages or losses for which the tenant is not otherwise responsible under applicable law.

A landlord who withholds amounts which are not allowable under this section is in violation of the code. See *Armour v. Klecker*, 169 Wis.2d 692, 699, 486 N.W.2d 563, 566 (Ct. App. 1992).

Section 100.20(5), STATS., provides:

Any person suffering pecuniary loss because of a violation by any other person of any order issued under this section may sue for damages therefor in any court of competent jurisdiction and shall recover twice the amount of such pecuniary loss, together with costs, including a reasonable attorney's fee.

Thus, if a court determines that a landlord has violated WIS. ADM. CODE § ATCP 134.06(3), it is required under § 100.20(5), STATS., to award double damages and reasonable attorney's fees. See *Armour*, 169 Wis.2d at 698, 486 N.W.2d at 565. The purpose of awarding double damages and reasonable attorney's fees is to encourage tenants to enforce their legal rights even when the amount of loss involved would not ordinarily justify the expense of litigation. *Id.* at 699-700, 486 N.W.2d at 566.

*a. Additional payments for late rent.*

The tenants first contend that the additional charges for late payment of rent are “late fees” which are not authorized to be withheld from security deposits under WIS. ADM. CODE § ATCP 134.06(3).

Whether the additional payments are rent or late fees involves the interpretation of the terms of the lease. Leases are to be interpreted as are other contracts, with the ultimate aim of ascertaining the intent of the contracting parties. *See Central Auto Co. v. Reichert*, 87 Wis.2d 9, 19, 273 N.W.2d 360, 364-65 (Ct. App. 1978). If the language of the lease is ambiguous, the court may consider extrinsic evidence of the parties’ intent. *See id.* Construction of a written contract is normally a matter of law for the court, but where words or terms are to be construed by extrinsic evidence, the question is one for the trier of fact. *See id.* When the trial court acts as the finder of fact, it is the ultimate arbiter of credibility and the trial court, not an appellate court, is charged with resolving conflicts in the testimony. *See Gehr v. City of Sheboygan*, 81 Wis.2d 117, 122, 260 N.W.2d 30, 33 (1977). We will reverse the trial court’s finding of fact only if it is clearly erroneous. *See* § 805.17(2), STATS.

The trial court determined, on the basis of the testimony and evidence presented at trial, that the parties intended to create a two-tiered rent agreement, and that the additional amount required if the rent were paid after the third of the month was intended as rent and not late fees. The inserted words and form language on the pre-printed lease is somewhat awkward and may be susceptible to various interpretations. The tenants’ proffered interpretation, however, that the plain language of the lease established that the rent would be only \$60 per month if paid by the third of the month, is absurd. The trial court found that the testimony at trial did not contradict the terms of the lease, which categorized the \$2/day payments as rent. In essence, the trial court determined

that the language of the lease established a nominal rent of \$490 per month, which was to be discounted to \$430 if the rent were paid by the 3rd of the month. The trial court's finding is not clearly erroneous.<sup>3</sup>

The tenants contend, alternatively, that the \$2/day charge is usurious, in violation of § 138.05(1), STATS. According to the tenants, the usury violation makes the entire lease void and renders the landlords' withholding of any security deposit unlawful. Because we affirm the trial court's determination that the additional charges were rent, we need not address the question of whether a perpetually accruing \$2/day late fee in a residential lease would be usurious. The landlords did not interpret or attempt to enforce the two-tiered rent agreement in a way that produced exorbitant or perpetually accumulating late charges.<sup>4</sup>

*b. The carpet-cleaning charge.*

The tenants next contend that the landlords wrongly withheld the cost of carpet cleaning from their security deposit. Under WIS. ADM. CODE § ATCP 134.06(3), a landlord may withhold a security deposit for "tenant damage, waste or neglect of the premises." A landlord may not, however, withhold a deposit for normal wear and tear. *See id.* The tenants here contend that the

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<sup>3</sup> One of the landlords testified that the initial \$430 and \$445 per month figures "are discounted rents, and the additional \$2.00 a day, up to \$60 per month is still market rent for that apartment, and there is no penalty there. It's an incentive for the person to pay the rent on the 1st of the month ...."

<sup>4</sup> The landlords withheld only \$101 from the security deposit as late rent, although it appears from the record that the tenants had not paid their rent in full by the third day of at least ten separate months during their occupancy. Thus, the landlords would have been entitled to claim several times the amount withheld as additional rent due under the lease. The landlords also introduced an exhibit at trial showing that a total of 367 "days late" in the payment of rent had accumulated during the term of the tenants' occupancy. When cross-examined on the exhibit, one of the landlords testified that he could not in good conscience have charged \$2 for each of the 367 "days late" under the lease.

cleaning of the carpets in their apartment was a routine response to normal wear and tear, and that the trial court committed clear error by finding that the cleaning was necessitated by the tenants' damage, waste or neglect. We disagree.

The tenants are wrong in claiming that there was no evidence of their damage, waste or neglect in relation to the carpets. The landlords produced evidence from which the trial court could conclude that the carpet cleaning was not occasioned simply by normal wear and tear. The landlords produced a letter from a carpet cleaner which stated that the carpet had iron and cigarette burns. One of the landlords also testified directly to the existence of the burn marks. There was also evidence that the tenants kept a puppy and a kitten in the apartment during their tenancy, which would justify the landlords' action in having the carpet cleaned, deodorized and sanitized. The trial court's finding that the carpet-cleaning charge was caused by the tenants' damage, waste or neglect is not clearly erroneous, and we will not disturb it. *See* § 805.17(2), STATS.

*c. Attorney's fees.*

The tenants' final contention is that the trial court improperly determined the amount of attorney's fees to which they were entitled. They contend, generally, that the trial court erred by not explicitly applying the factors set out in *Pierce v. Norwick*, 202 Wis.2d 587, 550 N.W.2d 451 (Ct. App. 1996),<sup>5</sup>

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<sup>5</sup> In *Pierce*, we said:

Among the factors to be considered by courts when determining attorney's fees are the amount and type of services rendered, the labor, time and trouble involved, the character and importance of the litigation, the professional skill and experience called for, the standing of the attorney, the general ability of the client to pay and the pecuniary benefit derived.

*Pierce v. Norwick*, 202 Wis.2d 587, 597, 550 N.W.2d 451, 455 (Ct. App. 1996).

but they point to no specific amounts they believe should have been awarded but were not. The tenants also do not expressly challenge the trial court's authority to apportion and allow attorney's fees only for the limited issue on which they were successful. The court appropriately apportioned fees on that basis. When Wisconsin regulatory statutes provide for the recovery of reasonable attorney's fees by a successful party, a party who prevails on some, but not all, issues is entitled to recover the part of his or her attorney's fees attributable to the successful claim. *See, e.g. Chmill v. Friendly Ford-Mercury*, 154 Wis.2d 407, 418, 453 N.W.2d 197, 201 (Ct. App. 1990); *Footville State Bank v. Harvell*, 146 Wis.2d 524, 540, 432 N.W.2d 122, 130 (Ct. App. 1988).

A circuit court has discretion to determine the amount of attorney's fees that are reasonable in a given case. *See Michael A.P. v. Solsrud*, 178 Wis.2d 137, 153, 502 N.W.2d 918, 925 (Ct. App. 1993). We analyze discretionary decisions to determine whether the circuit court logically interpreted the facts of record and whether it applied the correct legal standard to those facts to reach a rational result. *See State v. Behnke*, 203 Wis.2d 43, 58, 553 N.W.2d 265, 272 (Ct. App. 1996). We will not reverse a discretionary determination by the trial court if the record shows that discretion was exercised and we can perceive a reasonable basis for the court's decision. *See Prahl v. Brosamle*, 142 Wis.2d 658, 667, 420 N.W.2d 372, 376 (Ct. App. 1987).

We see no erroneous exercise of discretion here. The record shows that the trial court exercised discretion in awarding reasonable attorney's fees to the tenants, and we conclude that there is a reasonable basis for the court's award. The trial court acknowledged that it had received the tenants' affidavit showing the attorney's fees they had incurred, although the affidavit is not a part of the record on appeal. The court also stated, correctly, that it is "required to award

attorneys fees in a reasonable amount together with reasonable costs.” It concluded that:

[T]he reasonable value of attorneys fees as they pertain to the finding of double damages resulting from the wrongful withholding of the utility bill to be \$250.00 and the reasonable amount of costs to be filing fees of \$61.00.

The court finds it unreasonable to award attorney fees for the entire litigation when the plaintiff was unsuccessful on a majority of the lawsuit. The court accordingly will not award the attorney fees in the total amount of \$3,263.00.

The tenants’ complaint alleged three causes of action, and they prevailed only on a minor part of one of those three causes. Nothing in the record before us suggests that the trial court’s determination of reasonable attorney’s fees was arrived at by other than a rational, reasoned decision-making process, based on the facts before it, and applying the correct legal standard. As we have noted, the tenants’ affidavit of attorney’s fees is not in the record, and neither is there a transcript of any evidentiary or other proceedings in the trial court regarding the attorney’s fee issue.<sup>6</sup>

An appellant bears the burden of ensuring that all matters necessary to sustain the claims of error raised on appeal are contained in the record presented to this court for review. See *State v. Smith*, 55 Wis.2d 451, 459, 198 N.W.2d 588, 593 (1972). Absent any basis in the record from which we might determine that the trial court should have awarded a larger sum, we must presume that the record

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<sup>6</sup> Following the entry of judgment, the tenants moved the trial court for reconsideration of its decision. The motion recites that it is “based upon the Brief attached hereto and incorporated by reference herein.” No brief in support of the motion to reconsider is contained in the appellate record. Thus, we are also unable to ascertain whether the tenants raised any issues in their reconsideration motion regarding the attorney’s fees award. The court did not act on the motion and it was thus deemed denied ninety days after entry of judgment. See § 805.17(3), STATS.

before the trial court supported the court's stated rationale in awarding the amount of attorney's fees which it did. This is especially so when we are presented with only a general claim that the trial court should have allowed a larger sum for attorney's fees, unaccompanied by any argument explaining how much more should have been awarded and why. See *State v. Pettit*, 171 Wis.2d 627, 646, 492 N.W.2d 633, 642 (Ct. App. 1992) ("We may decline to review issues inadequately briefed."). Accordingly, we affirm the trial court's award of reasonable attorney's fees in the amount of \$250.

We are also satisfied that the trial court's judgment in favor of the tenants for double the amount of the wrongfully withheld utility bill, plus reasonable attorney's fees and costs, is sufficient to serve the purpose behind § 100.20(5), STATS. As we have noted, awarding double damages and reasonable attorney's fees to prevailing tenants in disputes with their landlords encourages tenants to enforce their legal rights even when the amount of loss involved would not ordinarily justify the expense of litigation. See *Armour*, 169 Wis.2d at 699-700, 486 N.W.2d at 566. The present judgment accomplishes that end. When tenants prevail on only a minor part of their claim against their landlords, however, awarding the full amount of attorney's fees incurred (here, over \$3,000), or any sum approaching that amount, would serve only to erode incentives for tenants to reasonably evaluate their claims and to pursue reasonable settlements in lieu of litigation.

For the reasons discussed above, we affirm the trial court's judgment in all respects. Because the tenants' appeal is not successful, we also deny their request for additional attorney's fees incurred in bringing this appeal.

*By the Court.*—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.

