

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 18, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 97-3740

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STEVE HAUSE AND JUSTINE HAUSE,

PLAINTIFFS-APPELLANTS,

V.

ROBERT SAUER AND CHERYL SAUER,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Sauk County:
VIRGINIA A. WOLFE, Judge. *Affirmed in part; reversed in part and cause remanded.*

ROGGENSACK, J.¹ Steve and Justine Hause appeal a judgment awarding them a return of their security deposit but no double damages or attorney's fees. They claim that they were entitled to double damages and

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

attorney's fees under § 100.20(5), STATS., and *Armour v. Klecker*, 169 Wis.2d 692, 486 N.W.2d 563 (Ct. App. 1992). We agree that *Armour* is controlling, and therefore reverse the judgment and remand for a determination of the amount of reasonable attorney's fees.

BACKGROUND

Steve and Justine Hause rented a house on August 1, 1996. On November 1, 1996, Robert² and Cheryl Sauer purchased the house for their own use and received an assignment of the Hause's lease and their \$700.00 security deposit. The Hausers vacated the property later that month, but the Sauers kept \$302.75 of the security deposit for general damage and carpet cleaning. The Hausers commenced a small claims action to recover their security deposit. The circuit court determined that the Sauers had failed to prove that the claimed damage and cleaning were the responsibility of the plaintiffs. However, the court refused to award double damages, reasoning that the Sauers believed they were justified in withholding the deposit, and "the Court did not find a violation of the Code [but rather] that the claimed deductions, which were permitted under the code, had not been proven at trial."

DISCUSSION

Standard of Review.

A circuit court has discretion to determine the amount of attorney's fees which are reasonable in a given case. *Michael A.P. v. Solsrud*, 178 Wis.2d

² Cheryl asks that Robert be taken off of the caption. However, there is nothing in the record to indicate that he was an improper defendant to the suit; therefore, we deny her request.

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. *State v. Behnke*, 203 Wis.2d 43, 58, 553 N.W.2d 265, 272 (Ct. App. 1996). A circuit court misuses its discretion when it operates under an erroneous view of the law. *State v. Keith*, 216 Wis.2d 61, 69, 573 N.W.2d 888, 893 (Ct. App. 1997).

Double Damages and Attorney's Fees.

Wisconsin Administrative Code § ATCP 134.06(3), adopted pursuant to § 100.20, STATS., 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. *Armour*, 169 Wis.2d at 699, 486 N.W.2d at 566.

Section 100.20(5), STATS., located in the chapter of the Wisconsin Statutes dealing with Marketing and Trade Practices, further 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.

“Therefore, if a court determines that a landlord has violated Wis. Adm. Code sec. Ag 134.06, it is required under the plain unambiguous language of sec. 100.20(5), Stats., to award double damages and attorney fees.” *Armour*, 169 Wis.2d at 698, 486 N.W.2d at 565. There is no exception under the statute for a landlord's good faith belief that the security deposit was properly withheld, because the purpose of awarding double damages and 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.

The circuit court found that the Sauers had failed to prove tenant damage, waste or neglect of the premises. Although there was also evidence to the contrary, the court's finding was supported by the inspection report and the itemization on the cleaning bills. It is not clearly erroneous. Based upon that finding, the court correctly determined that the Sauers had improperly withheld \$302.75 from the security deposit.

Where the court erred, however, was in concluding that a withholding which has not been proved³ does not violate the code if the alleged purpose of the withholding was proper. However, nothing in the code indicates that the landlord's subjective purpose in withholding a security deposit is in any way relevant to the validity of that withholding. *Armour*, 169 Wis.2d at 699, 486 N.W.2d at 566. To the contrary, the code plainly provides that withholding for "losses for which the tenant is not otherwise responsible" are unauthorized. WIS. ADM. CODE § ATCP 134.06(3)(b). In short, the wrongful withholding of a tenant's security deposit is always a violation of the code. *Armour*, 169 Wis.2d at 695, 486 N.W.2d at 564. The conclusion that the withholding was wrongful is implicit in the determination that the tenant is entitled to a return of the deposit. Double damages and reasonable⁴ attorney's fees must be awarded. Therefore, we must reverse the decision of the circuit court.

CONCLUSION

The circuit court erroneously exercised its discretion by operating under an erroneous view of the law. We therefore remand for a determination of the reasonable amount of costs and attorney's fees, including any reasonably incurred in the appellate proceedings. *Shands v. Castrovinci*, 115 Wis.2d 352, 362, 340 N.W.2d 506, 511 (1983).

³ The circuit court seemed to reason that if the withholding was done for an item specified in the administrative code, but the proof was insufficient to establish the loss claimed, no violation occurred. While this position has a certain logic, we believe it is contrary to *Armour v. Klecker*, 169 Wis.2d 692, 486 N.W.2d 563 (Ct. App. 1992).

⁴ Respondent contends that she offered to settle by returning all of appellants' money, immediately upon being sued. If that is true, and if her offer was more or equally favorable than the judgment in Hauses' favor, the court could take that into account when determining what amount of attorney's fees are reasonable.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded.

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

