COURT OF APPEALS
DECISION
DATED AND FILED

MAY 5, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-3686-FT

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

WENDY ENRIGHT,

PLAINTIFF-APPELLANT,

v.

PLEASANT VIEW LTD PARTNERSHIPS,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Racine County: ALLAN B. TORHORST, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

ANDERSON, J.[1] In this appeal, we decide there are no exceptions to the limited circumstances under which a landlord can withhold all or part of a security deposit. Therefore, we reverse that portion of the circuit court's judgment denying Wendy Enright her actual attorney's fees and double damages

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

and remand to the circuit court to award double damages and all attorney's fees she has incurred.

In November 1996, Enright entered into a one-year lease for an apartment in a building owned by Pleasant View Ltd. Partnerships. Under the terms of the lease, Enright was responsible for payment of certain utilities, including the electric bill; she was also required to post a $400 security deposit. While a tenant, Enright was forced out of her apartment on three separate occasions by flooding of her unit. On February 10, 1998, Enright gave notice that she was vacating the premises on April 30, 1998. Within twenty-one days of Enright's moving out, Pleasant View returned $336 of the security deposit; the accompanying letter and reconciliation summary indicated that it was withholding $64 for potential payment of the electric utility bill.

Enright commenced this small claims action seeking abatement of rent; reimbursement of expenses incurred when flooding forced her from her apartment; reimbursement for damages to her personal property; and double damages and attorney's fees pursuant to § 100.20(5), STATS., for failing to return the full amount of the deposit. After a bench trial, the circuit court awarded Enright damages for the abatement of her rent but concluded that she was not entitled to double damages and attorney's fees because the "deduction was legitimate in that it was for utilities yet to be shown to have been paid which were applicable to the premises." Enright appeals the trial court's refusal to award her double damages and attorney's fees under § 100.20(5).

Pleasant View contends that Enright is challenging the sufficiency of the evidence and we cannot set aside a trial court's findings of fact unless clearly erroneous. *See* § 805.17(2), STATS. Pleasant View maintains that we must defer

to the circuit court's credibility findings because when the court acts as the finder of fact, it is the ultimate arbiter of the credibility of the witnesses and of the weight to be given to each witness' testimony. *See* ***Lessor v. Wangelin***, 221 Wis.2d 659, 665, 586 N.W.2d 1, 3 (Ct. App. 1998). Pleasant View's argument overlooks the single issue raised by Enright—whether under § 100.20(5), STATS., she is entitled to double damages and attorney's fees. This issue involves the interpretation of WIS. ADM. CODE § ATCP 134.06 and § 100.20(5).

> The interpretation and application of a statute to a particular set of facts are questions of law that we review de novo. Likewise, the construction of an administrative rule or regulation presents a question of law that we decide without deferring to the trial court.

Armour v. Klecker, 169 Wis.2d 692, 697, 486 N.W.2d 563, 565 (Ct. App. 1992) (citations omitted).

It is general knowledge that landlord-tenant relations are carefully circumscribed by statute and the administrative code. One reason is the superior bargaining position of the landlord. The statutes and code are an attempt to level the playing field. The mandatory nature of the administrative rules prevents a landlord from financially crippling a tenant who moves out of an apartment and who has no leverage for seeking the return of his or her full security deposit.

The code plainly establishes the reasons why a landlord may withhold all or a portion of the security deposit. WISCONSIN ADM. CODE § ATCP 134.06(3)(a) provides in pertinent parts:

> (3) 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:

> ….
>
> 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 non-payment.

From the record it is evident that $64 of Enright's security deposit was withheld for a reason not authorized in the code. The apartment building Enright lived in was managed for Pleasant View by the Meridian Corporation and Merry Miller was the on-site manager. Miller testified that it was common practice to withhold $64 from a tenant's security deposit until the tenant provided proof of payment. The amount withheld was the average utility bill for the units in the apartment building. According to Miller, tenants were responsible for their own utilities. If a tenant failed to pay the final utility bill, the utility notified Meridian that it was cutting off electricity but Meridian would not be liable for payment. It is undisputed that Enright paid the final utility bill within two weeks of moving out.

WISCONSIN ADM. CODE § ATCP 134.06(3)(a) limits a landlord's ability to withhold funds for payment of utilities to (1) the actual amounts owed for utility services provided by the landlord or (2) the actual amounts owed by the tenant to a government-owned utility. Absent from the code is any authority to withhold anticipated utility payments. The only exception is if the landlord and tenant "clearly agreed upon in writing at the time the rental agreement [was] entered into" that the landlord could withhold funds from the security deposit for reasons not enumerated in the code.

There is no evidence that Enright and Pleasant View negotiated different terms for the return of her security deposit and reduced them to writing before Enright moved into the apartment. Pleasant View claims that when Enright checked out, Miller told her of the practice of withholding $64 until the tenant presented evidence of payment of the utility bill. Pleasant View argues that this is sufficient to authorize its withholding of a portion of Enright's security deposit. Pleasant View is wrong because WIS. ADM. CODE § ATCP 134.06(3)(a) requires that any arrangement deviating from its provisions must be agreed to in writing at the time the lease is entered into. Any discussion Miller had with Enright when she moved out is insufficient to fulfill these requirements. Pleasant View's withholding of anticipated utility payments is not an allowable claim under WIS. ADM. CODE § ATCP 134.06(3)(a) and it is in violation of the code.

Enright argues that Pleasant View's violation of the code entitles her to double damages and attorney's fees under § 100.20(5), STATS.:

> 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.

She is correct; there is no exception that saves Pleasant View from the punitive sanctions of the statute. Pleasant View is not saved from the operation of the statute because of a good faith belief that it is entitled to withhold anticipated final utility payments. *See* ***Armour***, 169 Wis.2d at 700, 486 N.W.2d at 566. In ***Armour***, we explained:

> We recognize that requiring a landlord to pay double damages and attorney fees when he believes he has a claim to the security deposit is harsh. This result, however, is consistent with the purpose of the regulations, which is to

> discourage the retention of security deposits except in the clearest of cases.

Id. at 701, 486 N.W.2d at 566.

In an attempt to avoid the operation of the statute, Pleasant View asserts that Enright has not suffered any "pecuniary loss." It argues that although Enright testified that she paid the final utility bill, she failed to present proof of payment. Pleasant View fails to direct our attention to any authority holding that oral testimony of a debt paid is insufficient to prove payment.

We held in ***Armour*** that "[i]f a landlord withholds amounts that do not represent an allowable claim under WIS. ADM. CODE § ATCP 134.06(3), he [or she] is in violation of the code." ***Armour***, 169 Wis.2d at 699, 486 N.W.2d at 566. It follows that the $64 improperly withheld by Pleasant View comprises Enright's "pecuniary loss." Therefore, we conclude that Enright is entitled to recover reasonable attorney's fees and double damages, we reverse that part of the judgment denying her recovery under § 100.20(5), STATS., and we remand to the circuit court to determine the appropriate award.[2]

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

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

[2] Enright is entitled to recover reasonable attorney's fees incurred in prosecuting this successful appeal. *See* ***Shands v. Castrovinci***, 115 Wis.2d 352, 359, 340 N.W.2d 506, 509 (1983).