**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**OCTOBER 27, 1999**

**Marilyn L. Graves**
**Clerk, Court of Appeals**
**of Wisconsin**



**No. 99-0980**

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

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**JASMINA IVANKOVIC,**

**PLAINTIFF-RESPONDENT,**

**V.**

**BARBARA GIULIANI AND ANN GIULIANI,**

**DEFENDANTS-APPELLANTS.**

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APPEAL from a judgment of the circuit court for Waukesha County: JAMES R. KIEFFER, Judge. *Affirmed in part*; *reversed in part*.

¶1 ANDERSON, J.[1] Tenants Barbara and Ann Giuliani appeal from a judgment awarding their landlord, Jasmina Ivankovic, damages of $3246.11 for redecorating costs plus rent for the month it took to redecorate their apartment after the lease expired and the Giulianis had vacated at Ivankovic's request. The

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

trial court also awarded the Giulianis $3300, which included double their $800 security deposit and $1700 in attorney's fees because Ivankovic had failed to return or account for their deposit. On appeal, the Giulianis argue that the court erred in letting the landlord collect for unsubstantiated repair costs, carpet replacement and rent for the month after they moved out. They also dispute the amount the court awarded for attorney's fees.[2] We reverse in part and affirm in part.

¶2 Barbara and her daughter, Ann, leased an apartment on Cliff Alex Court in Waukesha from Ivankovic on July 1, 1997. Ann's then-boyfriend, Russell Picard, also signed the one-year lease, contributed to the $800 security deposit and lived in the apartment for four and one-half months. The lease set the rent at $815 per month and stipulated that the Giulianis could keep pets in the apartment.[3] During Picard's stay, the pets consisted of a dog owned by Picard and two cats and a bird owned by the Giulianis. About six weeks after Picard and his dog moved out, Ann was given a puppy that she subsequently kept in the apartment. Ivankovic said she gave the Giulianis a sixty-day notice that they needed to move when their lease expired on July 1, 1998, because she was unhappy about the puppy.

¶3 On June 25, 1998, the Giulianis hired a professional carpet cleaner, Adelman, to remove two "red-pink" raspberry tea stains from the living room carpet. By June 29, the Giulianis had moved their belongings from the apartment

[2] Ivankovic argues in response that the Giulianis' attorneys "harassed" her and her family by personal service of court documents. Because Ivankovic did not raise this issue before the trial court, she may not assert it on appeal. *See* ***Saenz v. Murphy***, 162 Wis.2d 54, 63, 469 N.W.2d 611, 615 (1991) (issues raised for the first time on appeal are deemed waived).

[3] As amended the lease allowed "two pet feline" and "one dog."

and arranged to have Adelman clean all the carpets on June 30. After cleaning the apartment on June 29, Ann asked Ivankovic to inspect it. The two discussed damage to the garage door caused by Ann's truck, as well as the condition of the carpet and walls.[4] The parties differ on whether they agreed at the inspection to have a carpet installer look at the carpet the following morning. They also disagree about whether Ivankovic ever learned of the scheduled carpet cleaning.

¶4 The record shows that on June 30, before the Giulianis turned in their keys to the apartment, John Taylor of Carpet Plus, Inc., inspected and measured the carpet so he could give Ivankovic an estimate on replacing it. Taylor testified that the carpet had a "strong odor of urine," as well as some spots. Meanwhile, Ann testified that when she called Ivankovic on June 30 about the carpet cleaning appointment, Ivankovic indicated she did not want the cleaners to proceed. Adelman's subsequent cancellation notice read that, "This was cancelled because landlord refused entry."

¶5 The Giulianis delivered their keys and forwarding address to Ivankovic late in the afternoon on June 30. In early July, Ivankovic spent $980 to replace the carpet and $674.77 to repaint the walls ($473 for labor and $201.77 for paint).[5] She also hired a handyman to replace a linen closet door, vertical blind string, and patio door screen and to repair wood trim on kitchen cabinets, the rear

[4] Testimony established that the apartment had been painted before the Giulianis moved in a year earlier, but Ivankovic determined it needed to be repainted because of the Giulianis' smoking. The lease banned the Guilianis from painting the apartment themselves.

[5] The carpet installer testified about the cost of the carpet replacement. Ivankovic presented copies of a handwritten bill from the painter, a college student who was unavailable to testify at the trial, and the check with which she paid him. The only evidence regarding the cost of paint is Ivankovic's testimony.

entry threshold, wood along the patio door and the doors to both bedrooms. The handyman charged $470 for these repairs.

¶6 Although the Wisconsin Administrative Code requires a landlord to return a tenant's security deposit within twenty-one days of the surrender of rental property and account for any portion of the deposit being withheld, Ivankovic did neither. *See* WIS. ADM. CODE § ATCP 134.06 (2)(a). On Aug. 20, 1998, she filed a small claims complaint against the Giulainis over the cost of redecorating the apartment and making various repairs. The Giulianis countersued over the withheld security deposit.

¶7 The trial court awarded the Giulianis double their security deposit of $800 and attorney's fees of $1700 pursuant to § 100.20(5), STATS., because Ivankovic failed to comply with WIS. ADM. CODE § ATCP 134.06(4). After noting that Ivankovic had "met her burden of proof that there were, in fact, numerous damages inside this apartment" done by the Giulianis, the court found each of Ivankovic's repair or redecorating costs to be "warranted" or "reasonable." In addition to the costs outlined above, the court awarded Ivankovic $150 for the garage door, $62 for a water bill received after the Giulianis moved, $5.99 for a Venetian blind cord that ultimately did not work, $21.02 for one that did, $15.75 for the patio door screen, $1.58 for toilet bleach and $50 for Ivankovic's labor in painting the patio door.

¶8 After adding $815 to cover rent for the month after the Giulianis moved, the court awarded Ivankovic a total of $3246.11. Court costs for both parties offset the Giulianis' award against Ivankovic's award and the final tally resulted in the Giulianis owing Ivankovic $45.01. The Giulianis appeal.

¶9 On appeal, the Giulianis contend that the trial court erred in the following respects. First, they dispute the damages award. They argue it was error for the court to: (1) award Ivankovic an additional month of rent for not renting the apartment during its redecorating, (2) award damages for the carpet replacement cost and painting, and (3) accept Ivankovic's damage claims based solely on her testimony about the amounts. Lastly, the Giulianis dispute the amount the court awarded them for attorney's fees.

¶10 Section 704.07(3), STATS., requires a tenant to repair damage done to the premises or, failing that, to reimburse the landlord for the reasonable cost of the repairs. Where an injury to property is easily repairable and the cost of restoration is readily ascertainable, the cost of repair is the preferred method of calculating damages. *See* ***Laska v. Steinpreis***, 69 Wis.2d 307, 313, 231 N.W.2d 196, 200 (1975). Whether the trial court applied the proper legal standard in determining damages is a question of law which we review de novo. *See* ***Jauquet Lumber Co. v. Kolbe & Kolbe Millwork Co.***, 164 Wis.2d 689, 703, 476 N.W.2d 305, 310 (Ct. App. 1991).

¶11 We first address whether Ivankovic is entitled to rent for the time it took to redecorate the premises after she had terminated the lease. Generally, a landlord who accepts the surrender of premises, and thus termination of a lease, is "deprived of the right to recover damages for future rent." ***First Wis. Trust Co. v. L. Wiemann Co.,*** 93 Wis.2d 258, 274, 286 N.W.2d 360, 368 (1980).[6] In this case,

[6] ***First Wisconsin Trust Co. v. L. Wiemann Co.,*** 93 Wis.2d 258, 262-63, 286 N.W.2d 360, 362 (1980), involved a lease that had not expired at the time the tenant surrendered the premises. The court said the landlord accepted the surrender by making efforts to re-lease the premises and refused to allow the landlord to recover rent for the years remaining on the lease—especially since the landlord sold the building five months later. *See* ***id***. at 274, 286 N.W.2d at 368.

Ivankovic did not just accept surrender of the premises—she made sure the Giulianis vacated the apartment by giving them notice that they had to move once the lease expired. Even though Ivankovic testified that she "couldn't rent the place for a month because of all the repairs and the smell," she also admitted she had trouble finding people to redecorate and make the repairs she wanted. It is elementary that once a lease ends and a tenant moves out that tenant is no longer responsible for paying rent—even if the landlord opts to hold the premises off the market. We thus conclude that the trial court erred by awarding the extra month's rent to Ivankovic.

¶12 Next, we consider whether the trial court erred by allowing Ivankovic to recoup as damages the cost of installing new carpet in and the painting of the apartment. The trial court is in the best position to judge the credibility of witnesses and its findings will not be set aside unless clearly erroneous. *See* § 805.17(2), STATS.

¶13 WISCONSIN ADM. CODE § 134.06(3)(a)(1) states that a landlord may withhold a security deposit for "damage, waste or neglect of the premises." However, the landlord may not withhold a deposit for "normal wear and tear, or for other damages or losses for which the tenant cannot reasonably be held responsible under applicable law." WISCONSIN ADM. CODE § 134.06(3)(c). A note immediately following para. (c) clarifies that "normal wear and tear" includes "routine painting or carpet cleaning, where there is no unusual damage caused by tenant abuse." ***Id.***

¶14 We determine that the facts do not support the court's conclusion that the Giulianis damaged the carpet and should be responsible for its replacement cost. First, Ivankovic undoubtedly expected that the Giulianis' pets

might cause some impairment to the apartment because she set their security deposit $200 higher than the deposits required of other tenants with pets.[7] The extra deposit evidences Ivankovic's anticipation of some pet impairments or extra expenses, perhaps gained from her experience as a landlord who rents apartments to pet owners. Because Ivankovic permitted the Giulianis to have several pets in their apartment, a noticeable pet odor in the apartment before its carpet has been cleaned should not have struck her as "unusual damage caused by tenant abuse." Such a conclusion could only be reasonable after attempts to clean the carpet.

¶15 More significantly, the carpet installer testified that the three-year-old carpet normally lasts about ten years. He also stated that other than the odor of pet urine and spots apparently left by an attempt to clean stains, the carpet was not "worn out or torn away from the walls or anything like that.… [I]t seemed to be in relatively good condition ...." He further testified that, overall, the carpet seemed to display only "normal wear and tear."

¶16 Because the evidence establishes that the carpet exhibited only normal wear and tear, we conclude that Ivankovic decided to replace it solely because of the urine odor and "spots." Nowhere in the record is there evidence that the odor and spots would not have been eliminated by a complete carpet cleaning, which the Giulianis had scheduled for the day before their lease expired. In fact, the evidence instead shows that the landlord refused to allow the carpet to be cleaned. Thus, by determining even before the lease expired to replace the carpet, Ivankovic prevented her tenants from mitigating the damage.

[7] Although Ivankovic first testified that she did not charge tenants with pets a higher security deposit, in explaining why the Giulianis' lease had been changed to require a higher deposit, she testified, "That amount was changed because they had a few more pets than the rest of the tenants so I charged—charged them like 200 extra."

¶17 For example, Wisconsin law requires tenants to repair premises or reimburse a landlord for redecorating due to their negligence. *See* § 704.07(3)(a), STATS. ***Laska*** clarifies this requirement by stating that if the damage is easy to repair then the damages award should be based on the cost of the repair. *See* ***Laska***, 69 Wis.2d at 313, 231 N.W.2d at 200. In this case, if the Guilianis negligently damaged the carpet, the cost of repair could have been the $212.72 that they intended to pay for the carpet cleaning. Ivankovic did not present evidence that the carpet cleaning would not have repaired any possible damage to the carpet. In addition to preventing the Guilianis from repairing any possible damage, Ivankovic failed to submit evidence that the carpet was damaged beyond normal wear and tear. On this basis, we reverse the trial court's award of $980 to the landlord for the cost of replacing the carpet.

¶18 Similarly, Ivankovic failed to present evidence that the apartment's walls displayed "unusual damage" justifying its repainting at the tenant's expense. A tenant is only obligated to pay for repair work if damage results from the tenant's negligence or improper use of the premises. *See* § 704.07(3)(a), STATS. Ivankovic cannot simply pass on her costs for maintaining and redecorating the apartment to the Guilianis unless she demonstrates through the evidence that the Guilianis' negligence damaged the apartment beyond normal wear and tear. We reverse the damages award of $674.77 for painting the apartment.

¶19 The third issue we address is whether the trial court erred in making essential findings of fact based only on hearsay evidence. Specifically, the court awarded damages for repair materials, fixing the garage door, and painting a patio door, all based on hearsay evidence alone. The Guilianis contend that because the court may not rely on the hearsay evidence alone for making an essential finding of fact, there is insufficient evidence to support the court's findings.

¶20 Essential findings in small claims court are required to be founded on more than hearsay evidence; such findings require additional corroborative evidence. *See* ***Scholten Pattern Works, Inc. v. Roadway Express, Inc.***, 152 Wis.2d 253, 258, 448 N.W.2d. 670, 672 (Ct. App. 1989) (analyzing § 799.209, STATS.). Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Section 908.01(3), STATS. In general, hearsay is not admissible evidence. *See* § 908.02, STATS.

¶21 Because this was a small claims proceeding, the court could admit Ivankovic's hearsay testimony. *See* ***Scholten Pattern Works***, 152 Wis.2d at 256, 448 N.W.2d. at 671. However, it was improper to base its factual findings solely upon this testimony without other corroborating evidence.[8] *See* ***id.*** at 257, 448 N.W.2d at __. The record reveals that Ivankovic only presented hearsay evidence to support her damages claim for her expenses repairing the garage door and purchasing the painting supplies and other repair materials.[9] As a result, we reverse the court's award of $446.11 for repair to the garage door, patio door and for repair materials. For this same reason, we conclude that the court erred by allowing Ivankovic to claim $50 for her personal labor painting the patio door because her testimony was without additional evidentiary support. The disputed

[8] The handyman who repaired various items in the apartment did testify in support of Ivankovic; his bills totaled $470.

[9] Although Wisconsin's landlord-tenant law states that the repair or redecorating "cost to the landlord is presumed reasonable unless proved otherwise by the tenant," it also stipulates that the damage must have been caused by "negligence or improper use of the premises by the tenant." Section 704.07(3)(a), STATS. In this case, Ivankovic failed to present evidence that the kitchen counters, patio door and screen, vertical blind, bedroom doors and rear entry threshold were damaged by the Giulianis' negligence or improper use.

$62 water bill, however, stands because the Giulianis did not present any evidence that it was not properly divided between the four tenants as stipulated in the lease.

¶22 Finally, we address whether the trial court abused its discretion by allowing the Giulianis only $1700 in attorney's fees, or about forty percent of the bill submitted. When addressing the valuation of legal services, an exception is made to the general rule that a trial court's finding of fact will not be overruled unless clearly erroneous. *See* ***Touchett v. E Z Paintr Corp.,*** 14 Wis.2d 479, 488, 111 N.W.2d 419, 424 (1961). This is because on appeal "judges who have expert knowledge as to the reasonable value of legal services" review the finding. ***Id***.

¶23 In this case, the court referred to SCR 20:1.5 for a list of factors to be used in determining whether an attorney's fees are "reasonable" and considered all eight factors.[10] While the court noted that it did not dispute that the attorney had logged 30.6 hours on the case, it questioned whether the resulting fee of $3825 (30.6 hours at $125 an hour) was reasonable given the factors under consideration.

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[10] Those factors are:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
> (3) the fee customarily charged in the locality for similar legal services;
> (4) the amount involved and the results obtained;
> (5) the time limitations imposed by the client or by the circumstances;
> (6) the nature and length of the professional relationship with the client;
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the service; and
> (8) whether the fee is fixed or contingent.
>
> SCR 20:15 (West 1998).

Specifically, the court determined that the hours listed for trial preparation and appeal preparation were "somewhat on the high side" for legal issues that were not difficult.

¶24 The Giulianis argue that ***Pierce v. Norwick***, 202 Wis.2d 587, 598, 550 N.W.2d 451, 455 (Ct. App. 1996), shows that reasonable attorney's fees include trial preparation and time spent in trial. Their reliance is misplaced, however, because ***Pierce*** only affirms the trial court's exercise of discretion by awarding compensation for these activities under those particular facts. *See* ***id.*** at 598, 550 N.W.2d at 455-56. The determination of reasonable attorney's fees is made on a case-by-case basis. We affirm the court's attorney's fees award of $1700 (13.6 hours).

¶25 In summary, we conclude that the trial court erred by awarding as damages: rent for the month after the Guilainis' lease terminated; new carpet cost; and repair expenses for painting the apartment and patio door, painting supplies, fixing the garage door and repair materials. We affirm the court's attorney's fees award.

*By the Court.*—Judgment affirmed in part; reversed in part.

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