COURT OF APPEALS
DECISION
DATED AND FILED

December 15, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 99-1175

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

THOMAS JELINSKI,

PLAINTIFF-RESPONDENT,

V.

MICHAEL BARR,

DEFENDANT,

SECURITY MANAGEMENT COMPANY, INC.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Fond du Lac County: JOHN G. BUCHEN, Judge. *Affirmed.*

¶1 SNYDER, J. Security Management Company, Inc. (SMC) appeals from a money judgment awarding Thomas Jelinski the sum of $670, plus costs and fees, in a small claims apartment lease action. Jelinski sued for the return of his

security deposit less an agreed-upon amount to be deducted for damages to the apartment. SMC denied that Jelinski was entitled to the return of his security deposit balance and counterclaimed for an additional $565.85 to cover the total damages to the apartment carpet. The case was tried to the court on February 17, 1999. A written trial court decision was filed on March 25, 1999, and a money judgment was entered on March 30, 1999. Because the evidence supports the trial court's damages award, we affirm the judgment.

¶2 SMC challenges the legal standards used by the trial court, so we begin by establishing the standards of review that attend the trial court's findings and conclusions and that apply to our review in this case. In Wisconsin a tenant can be held responsible for damages caused by the negligent or improper use of the premises. *See* § 704.07(3), STATS. Damages are set at the smaller of either the cost of repairs or the diminution in the use of the property. *See* ***Laska v. Steinpreis***, 69 Wis.2d 307, 313-14, 231 N.W.2d 196, 200-01 (1975). It is not the landlord's burden to show alternative damages, but the tenant may present evidence of a smaller measure of damages. *See* ***id***. at 314, 231 N.W.2d at 200.

¶3 When property is destroyed beyond repair, the usual measure of damage is the market value of the chattel at the time and place of destruction with adjustments for salvage value. *See* ***Nelson v. Boulay Bros.***, 27 Wis.2d 637, 644, 135 N.W.2d 254, 257 (1965). Where the fact of some damage is clear and certain but the amount is a matter of some uncertainty, the trial court has the discretion to fix a reasonable amount; simply because the amount is uncertain, the trial court should not deny recovery altogether. *See* ***Cutler Cranberry Co. v. Oakdale Elec. Coop.***, 78 Wis.2d 222, 233-34, 254 N.W.2d 234, 240-41 (1977).

¶4 Jelinski and Karilyn Wallender, who identified herself as an SMC assistant manager, testified at the court trial. Jelinski appeared at the trial pro se. SMC appeared pro se through a corporate agent, Randy Rich,[1] who was not sworn and did not testify at trial. In addition, the appellate record includes several written items marked as Record Document 12 and entitled "Documents submitted and received into evidence."[2] The trial court is the fact finder and the final arbiter of the credibility of witnesses and the weight of the evidence. *See* ***Mielke v. Nordeng***, 114 Wis.2d 20, 27, 337 N.W.2d 462, 466 (Ct. App. 1983). Findings of fact by the trial court shall not be set aside by this court unless clearly erroneous. *See* § 805.17(2), STATS.

¶5 Jelinski testified that on June 16, 1997, he entered into a lease for an apartment in Countryside Villas Phase III, owned by SMC, and that he vacated the unit at the end of August 1998. Jelinski had paid a $720 security deposit with SMC at the lease inception. In accord with the lease agreement, Jelinski had the apartment carpets professionally cleaned, and he inspected the apartment for damage with Wallender on September 1, 1998. Jelinski agreed that he was responsible for two small carpet stains noted during the inspection and described by the professional cleaner as stains "that cannot be extracted."[3]

---

[1] Randy Rich is identified in the transcript of the trial proceedings as an attorney appearing on behalf of SMC. However, SMC concedes that Rich is not an attorney and was appearing at trial as SMC's authorized agent.

[2] None of the eleven separate documents designated as Record Document 12 are marked as trial exhibits, and we cannot locate in the record where an exhibit was identified as such and received into evidence. The documents are, however, in the paginated appellate record, and we will consider them as necessary to address the issues raised on appeal based upon the parties' concession that the documents are part of the total evidence available to the trial court.

[3] Jelinski testified that he noticed a "single small red spot about one inch in diameter ... near the kitchen in the hall" and that there was a small red spot somewhere in the dining area.

¶6 An INCOMING/OUTGOING INSPECTION form (IF) provided by SMC was used to memorialize the apartment's condition when Jelinski moved in on June 16, 1997, and when he terminated occupancy on the September 1, 1998.[4] Jelinski testified that he signed the IF agreeing to pay carpet stain repair damages "[f]or the two spots [Wallender] assessed" and "that $20.00 was a reasonable charge." The IF reviewed by the trial court, however, included a $50 assessment for "Sm. Red Spots" on the living room carpet. Jelinski testified that "[t]he [IF] document that I signed, the outgoing inspection, was altered after my signature to make it appear that I agreed with the altered charges."

¶7 Wallender agreed with Jelinski that $20 was initially assessed on September 1, 1998, as damages for carpet repair. However, Wallender testified that "[t]he next day [after the IF inspection] my people went back into the apartment and came and told me, Karilyn, you got to go look at the carpet again." She then advised Jelinski that the carpet was unacceptable and Jelinski provided an additional carpet cleaning, which did not improve the carpet condition. On September 18, 1998, SMC sent Jelinski a letter acknowledging retention of the security deposit of $720, assessing a carpet replacement cost of $1300 and requesting that Jelinski pay a balance due of $580.[5] Jelinski refused to pay the replacement cost and filed this action.

---

[4] This is one of the documents contained in Record Document 12 and discussed in footnote 2 above. SMC agent Rich advised the trial court that the IF was an internal SMC form used in its rental business. The document was the subject of testimony during the court trial. The trial court found that it was signed by both Jelinski and Wallender on September 1, 1998, and that it "was received into evidence."

[5] The notice document is included in Record Document 12 as related in footnote 2. Wallender testified that the notice had been sent by SMC and Jelinski testified that he received the notice on September 21, 1998.

¶8 The trial court found that the IF had been changed after Jelinski signed it to include the entries of "may need to change carpet" and "$1,300.00 carpet replacement." Those findings are supported by Wallender's testimony that damages in excess of the $20 agreed-upon carpet repair were not noticed until the day after the inspection. The trial court, noting the disparity between Jelinski's agreed-upon carpet repair cost of $20 and the IF repair entry of $50, found that Jelinski would be obligated to pay the amount of $50 because "[t]his court cannot determine if or when the change was made and the document clearly shows $50."

¶9 Jelinski presented evidence during trial of a smaller measure of damages to the apartment carpet which the trial court accepted as reasonable damages caused by Jelinski's negligence. We conclude that the trial court's findings of SMC's damages are not clearly erroneous. SMC concedes that Jelinski had deposited $720, and because it follows that Jelinski would be entitled to the balance of his security deposit less the $50 damages found by the trial court, we affirm the $670 judgment in favor of Jelinski.

¶10 SMC next contends that the trial court wrongly considered whether Jelinski had renter's insurance in determining the damages award of $50 entered against Jelinski. We agree with SMC that § 704.07(3)(a), STATS., provides for rights and duties between landlords and tenants regardless of whether either party has insurance coverage. We disagree with SMC's conclusion that it is entitled to relief from the judgment because the trial court inquired whether Jelinski had renter's insurance and stayed the issuance of the trial court's findings and conclusions for ten days to allow Jelinski a further opportunity to contact his insurer.

¶11 Jelinski is correct in responding that SMC's agent, Randy Rich, raised the issue of Jelinski's rental insurance coverage in argument to the court.[6] In response to SMC's raising of the insurance issue, Jelinski advised the trial court that he had renter's insurance, had inquired as to coverage and had not heard from his insurer at the time of the trial. Because Jelinski had not heard from his insurer as to coverage, the trial court allowed Jelinski a period of ten days to again contact his insurer and to advise the court if he had insurance coverage.[7] The trial court filed its decision on March 25, 1999.

¶12 We can hardly fault the trial court for its inquiry concerning the very issue raised by SMC. We need not determine if the trial court's procedure was error. SMC invited the trial court's attention to the possible existence of Jelinski's renter's insurance and we do not review invited error. *See* ***Shawn B.N. v. State***, 173 Wis.2d 343, 372, 497 N.W.2d 141, 152 (Ct. App. 1992).

¶13 Lastly, Jelinski contends that the trial court erred in not awarding him double damages as provided under § 100.20(5), STATS.[8] He argues that his entire security deposit, less the $50 for negligent damages, was wrongfully

---

[6] Jelinski testified that he signed "a house policy which included procedures for vacating the premises." Rich later told the trial court, "I have a copy of the house policy which I would like to submit, and the first line of that recommends that renters should have renters insurance to protect them.... And in most situations when renters have renters insurance, if items are damaged because of their negligence, they would cover any costs of that."

[7] Record Document 12 includes a letter dated February 17, 1999, from Allstate to Jelinski indicating that his renter's policy did not provide carpet stain coverage.

[8] Section 100.20(5), STATS., reads:

> 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.

withheld by SMC. SMC responds that Jelinski is not entitled to an appellate review of his damages because he failed to file a cross-appeal. SMC is correct.

¶14 Rule 809.10(2)(b), STATS., requires a respondent who seeks modification of the judgment or order appealed from to file a timely notice of cross-appeal or lose the right to appellate review. In his brief, Jelinski recognizes the application of this rule as fatal to his double damages claim on appeal.[9] We affirm the judgment as entered by the trial court.

By the Court.—Judgment affirmed.

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

[9] Concerning the issue of double damages, Jelinski states in his brief, "Athough I did not appeal the Circuit court judgment, and would accept the Court of Appeals affirmation a question remains if the case is remanded to the circuit court."