

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 14, 2000

Cornelia G. Clark
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 WIS. STAT. § 808.10 and RULE 809.62.

No. 00-0588

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

BILL A. WELLS,

PLAINTIFF-RESPONDENT,

V.

TONYA PARTEE,

DEFENDANT-APPELLANT,

LEON TAYLOR,

DEFENDANT.

APPEAL from a judgment of the circuit court for Rock County:
JAMES P. DALEY, Judge. *Affirmed.*

¶1 ROGGENSACK, J.¹ Tonya Partee appeals from a judgment of eviction. She claims that the circuit court erred in allowing her landlord to terminate her month-to-month tenancy by means of a five-day notice because she did not owe him any rent. She also contends that the circuit court erred in failing to allow her to testify during her small claims trial. Because we conclude that the circuit court's finding that Partee owed rent when she was served with the five-day notice is not clearly erroneous, that it properly exercised its discretion by the manner in which it permitted the parties to present their cases, and that Partee's defense of retaliatory eviction lacked merit, we affirm the judgment of the circuit court.

BACKGROUND

¶2 Bill A. Wells rented a house to Tonya Partee on a month-to-month lease. The lease required Partee to pay Wells \$670 per month rent, which was discounted to \$650 if she paid by the first of the month. If she paid after the fifth, she was assessed a \$30 late fee, plus an additional fee of \$3 for each day after the fifth. She also was required to pay Wells for the water bill.

¶3 In October 1999, Partee fell behind on her rent. She paid Wells \$650 on October 8, but did not pay the remaining \$20 in rent or \$39 in late fees due under the lease. She paid \$675 on November 4, but she did not pay the rest of the October rent or any of the late fees. She paid \$675 on December 13, but she did not pay the late fees for December's rent, which amounted to \$54, nor did she

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (1997-98). Additionally, all further references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

pay the \$78.23 water bill due on December 1 or the outstanding rent and late fees from October.

¶4 On January 21, 2000, Wells served Partee with a five-day notice to quit or pay rent that required her to vacate the premises within five days unless she paid \$323.23.² Partee did not pay Wells any part of this amount, and she refused to leave the house. Wells sued for eviction in small claims court. At the trial, Wells testified, and Partee cross-examined him. Partee did not ask to testify, although she described the lease, her payment history, her concerns about the late fees, and her retaliatory eviction claim to the court. The court found for Wells and entered a judgment of eviction.³ Partee appeals.

DISCUSSION

Standard of Review.

¶5 Whether a tenant has defaulted on a lease due to the nonpayment of rent is a question of fact. See *Burmeister v. Vondrachek*, 86 Wis. 2d 650, 660, 273 N.W.2d 242, 247 (1979). “Findings of fact [by a trial court] shall not be set aside on appeal unless clearly erroneous” WIS. STAT. § 805.17(2). We will not overturn a circuit court’s rulings on the manner in which a trial is conducted unless it has erroneously exercised its discretion. See *Gainer v. Koewler*, 200 Wis. 2d 113, 120, 546 N.W.2d 474, 477 (Ct. App. 1996). However, we are not bound by a trial court’s conclusions of law, which we review *de novo*. See *First*

² The notice did not explain how Wells had arrived at the \$323.23 which he claimed was due.

³ The circuit court reserved the issue of damages for a later hearing.

Nat'l Leasing Corp. v. City of Madison, 81 Wis. 2d 205, 208, 260 N.W.2d 251, 253 (1977).

Five-Day Notice.

¶6 WISCONSIN STAT. § 704.17(1)(a) applies to the five-day notice given here. It states in relevant part:

If a month-to-month tenant ... fails to pay rent when due, the tenant's tenancy is terminated if the landlord gives the tenant notice requiring the tenant to pay rent or vacate on or before a date at least 5 days after the giving of the notice and if the tenant fails to pay accordingly.

Partee contends that the circuit court erred in ruling that Wells could use a five-day notice to terminate her tenancy because she owed no rent when she was served with the five-day notice. We disagree.

¶7 The record supports a finding that Partee owed Wells rent when he served her with the five-day notice to quit or pay rent. Wells testified that Partee's rent was \$670 per month, although she received a \$20 discount if she paid by the first of the month. According to Wells's testimony (which Partee did not dispute), she paid \$650 for her October 1999 rent on October 8. However, on that date she owed \$670 in rent because she was no longer eligible for the \$20 discount. Neither party testified that she ever fully paid the remaining rent. Therefore, we conclude that the circuit court's finding that Partee had defaulted on her lease because she owed rent is not clearly erroneous.

Mode of Testimony and Defense.

¶8 Partee contends that the circuit court erroneously exercised its discretion in failing to allow her an opportunity to testify during the eviction

hearing. She also argues that the landlord's action for eviction was brought to retaliate for her complaint to the building inspector. We disagree.

¶9 Partee questioned Wells extensively during the trial. While she did so, she also presented her side of the story, a procedure permissible in small claims court because the rules of evidence do not apply. *See* WIS. STAT. § 911.01(4)(d). Once she finished questioning Wells, she answered questions from the court and further explained her position, apparently to her satisfaction, since she never asked to testify. She admitted responsibility for the water bill, although she repeatedly asserted that the late fees were excessive. Following her examination of Wells, she presented her defense of retaliatory eviction, stating:

Can I add that at this time when I received this eviction notice from him, the City of Janesville – I had called the City of Janesville and there's a lot of repairs that he has to get permitted to the premises and all this reclined [sic] together at that particular time, so that's why I feel as if he's being really unreasonable in this.

¶10 We will not disturb a trial court's rulings on the conduct of a trial unless there is prejudice. *See Gainer*, 200 Wis. 2d at 120, 546 N.W.2d at 477. The court has greater latitude in the conduct of small claims trials, as the rules of evidence do not apply. *See* WIS. STAT. § 911.01(4)(d). Partee does not contend that the court did not understand her position or that she asked to present additional evidence that the circuit court refused to hear. She also does not explain how the lack of presenting formally sworn testimony, rather than presenting her case in an informal conversational manner, prejudiced her presentation to the circuit court. Therefore, we conclude that the circuit court properly exercised its discretion by the manner in which it chose to hear evidence.

¶11 A tenant may raise the defense of retaliatory eviction only if he or she does not owe any rent at the time the landlord brings an action for possession of the premises. *See* WIS. STAT. § 704.45(2). Because the circuit court found that Partee owed Wells rent at the time he served her with the five-day notice to quit or pay rent, we conclude that her defense of retaliatory eviction cannot lie under the facts of this case.

CONCLUSION

¶12 Because we conclude that the circuit court's finding that Partee owed rent when she was served with the five-day notice is not clearly erroneous, that the court properly exercised its discretion by the manner in which it permitted the parties to present their cases, and that Partee's defense of retaliatory eviction lacked merit, we affirm the judgment of the circuit court.

By the Court.—Judgment affirmed.

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

