

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 20, 2007

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

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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.

Appeal No. 2006AP96

Cir. Ct. No. 2003SC34053

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

WANDA WELCH,

PLAINTIFF-APPELLANT,

v.

ARETHA JACKSON,

DEFENDANT-RESPONDENT.

APPEAL from orders¹ of the circuit court for Milwaukee County:
PATRICIA D. MCMAHON, Judge. *Affirmed.*

¶1 KESSLER, J.² Wanda Welch appeals from orders dismissing her complaint, ordering sanctions, holding her eviction of Jackson to be retaliatory and

¹ Orders were entered on November 17, 2004, December 17, 2004, February 14, 2005, October 11, 2005 and October 27, 2005.

² This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2005-06).

assessing costs and attorney fees. Welch rented a residential property to Aretha Jackson beginning August 1, 2003. Before entering into the lease, Welch did a background check on Jackson, and allowed the property to be inspected by Jackson and the Milwaukee Rental Assistance Program inspector. Almost immediately, Welch began complaining to Jackson and others about Jackson's conduct and what Welch considered violations of the lease. Between October 20 and 28, 2003, Jackson complained to various government agencies about the condition of the property and some terms of Welch's lease. On or about October 30, 2003, Welch was notified of repairs Rent Assistance required her to make, and also knew of Jackson's complaint to the Department of Neighborhood Services. On November 13, 2003, Welch, through an attorney, began eviction proceedings against Jackson by serving a five-day notice of eviction.

¶2 In the eviction proceeding, Jackson counterclaimed for statutory damages under WIS. STAT. § 704.45 (2003-04)³ and WIS. ADMIN. CODE § ATCP 134.09(5) (Jan. 1999), alleging that Welch's eviction action was in retaliation for Jackson's complaints to various government agencies. Jackson voluntarily vacated the premises after receiving the five-day notice. During a lengthy, and tortured, pretrial process, Welch, through her attorney, waived her claim for damages because Jackson had vacated the property. Thirteen months after the action began, on December 16, 2004, the court entered an order based upon a November 17, 2004 hearing, stating: "The Plaintiff's claim for damages as listed in the complaint is dismissed. The only action remaining for trial is the defendant's counterclaim." Discovery matters continued for another nine months.

³ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

Jackson's counterclaim for retaliatory eviction was tried to the court on October 10 and 11, 2005.

¶3 The court weighed the evidence presented, evaluated the credibility of the various witnesses and found that Welch's testimony, and that of her property manager/fiancé, was not credible. The court concluded that Welch's conduct amounted to retaliatory eviction, awarded doubled damages and reasonable attorney fees pursuant to statute, and entered judgment thereon. Welch appeals. We affirm.

¶4 When trial is held to the court, the trial court's factual findings will not be reversed unless they are clearly erroneous. *Noll v. Dimiceli's, Inc.*, 115 Wis. 2d 641, 643, 340 N.W.2d 575 (Ct. App. 1983). The trial court is the ultimate arbiter of the credibility of the witnesses. *Id.* at 644. This includes the testimony of expert witnesses. *State v. Kienitz*, 227 Wis. 2d 423, 440, 597 N.W.2d 712 (1999). Where more than one reasonable inference can be drawn from the credible evidence, this court must accept the inference drawn by the trial court. *Noll*, 115 Wis. 2d at 644. When portions of the trial court record are not provided,⁴ we assume that those portions of the record support the circuit court's findings and conclusions. *See T.W.S., Inc. v. Nelson*, 150 Wis. 2d 251, 254-55, 440 N.W.2d 833 (Ct. App. 1989); *Haack v. Haack*, 149 Wis. 2d 243, 247, 440 N.W.2d 794 (Ct. App. 1989). Furthermore, although we do not ordinarily defer to

⁴ We note that the trial exhibits were withdrawn by stipulation and thus none of the letters of complaint, the lease addendum, the inspection reports or orders (other than court orders) involved in this case are part of the record before us. To the extent the trial court based its findings upon such documents, we assume the documents support the trial court's findings because those documents have not been made part of the appellate record. *Haack v. Haack*, 149 Wis. 2d 243, 247, 440 N.W.2d 794 (Ct. App. 1989).

the trial court's conclusions of law, we will give weight to a legal determination that is intertwined with the factual findings in support of that determination. *Wassenaar v. Panos*, 111 Wis. 2d 518, 525, 331 N.W.2d 357 (1983).

¶5 At the conclusion of the trial to the court, the court made the following findings on the record:

[A]t this time, the only issues remaining based upon prior proceedings and waiver of various claims is the defendant's claim for the return of the security deposit and the defendant's claim for retaliatory eviction.

There was a violation of the Ag Code [in] the lease; and therefore, the remedy there is twice the security deposit plus attorneys' fees.

[T]he plaintiff owned the property at 8648 West Fairy Chasm Road in the city and county of Milwaukee.

[The property] was available for rent. She rented the property and the defendant moved in around August 1st, 2003. A security deposit in the total amount of \$765 was paid. The property was qualified for rent assistance.

[Defendant's] portion of the rent was paid as required throughout the tenancy.

From the defendant's viewpoint, the plaintiff made some promises about the condition of the unit, promises as to what would be done or what wouldn't be done and what would be fixed. From the defendant's viewpoint, that was not done ... and the defendant complained to the plaintiff about this.

The plaintiff's viewpoint is the property was in spotless condition ready to move in and that the defendant caused problems and damaged the property and that the plaintiff was complaining to the defendant about damages.

There is no evidence defendant did anything to cause these problems [basement drain, and leaky toilets]. Other than the conclusory statement of the plaintiff that the defendant caused the problems, there was [sic] no specifics as to what it was she did or could have done to cause these problems.

The witnesses from the various agencies supported the substance of the defendant's complaints....

There were problems and the landlord was required to address them.... [*Id.*]

[T]he defendant made complaints and wrote letters ... October 20th, [20]03 with a copy to the plaintiff. October 23 [defendant] wrote to Rental Assistance with a copy to plaintiff. October 28, [2003] there was the inspection and notice of necessary repairs sent October 30th, [2003] to the plaintiff....

[Plaintiff] knew of it when the notice was given to make the repairs and that Neighborhood Service was contacted and there was notice of that contact to the plaintiff on November 11.

Then on November 13th, 2003, Plaintiff had served through her counsel a five-day notice of eviction....

[G]iven the timing of the complaint to the agencies, the notice, the presumption ... is a strong presumption of a retaliatory eviction.

[T]he defendant has established that there was a retaliatory eviction in the five-day notice.

Plaintiff contends there were other notices, and the one notice is the 28-day notice. I find the [credible] evidence does not support this....

I find there is not credible testimony that a 28-day notice was ever given to the defendant in this case, and so it is not valid in an effort to defeat the claim of retaliatory eviction.

[The] notice that is in the file ... is undated, unsigned. There is nothing on there other than a date that tells the defendant to move out.

Frankly, I find it is bogus; and that is a strong word, but it reflects the strength of the evidence. It was first mentioned in this trial despite extensive pretrial work and discussions and proceedings.

I reread the Summons and Complaint. There is no mention of a 28-day notice....

[E]very other document that Plaintiff gave to the defendant, she copied Rent Assistance and it's noted on the copy to

Rent Assistance “copy to Rent Assistance.” What is the one document that isn’t? The 28-day notice.

Moreover, it’s not in the Rental Assistance file.... The credible evidence is it’s not in the file because it was never given to Rent Assistance.

I found Miss Jackson to be credible. Her testimony was clear, consistent.... [Her complaints] were consistent. They didn’t shift around.

Whatever the disagreements between the parties, it was clear it came to a head when Miss Jackson went to the agencies and complained. And Miss Welch found out about these complaints; not only found out, but found out she was going to be ordered to make repairs. That is when she issued the eviction notice.

That is classic retaliatory eviction that the statute protects against.... I am awarding the \$765 [security deposit] times two plus all costs and attorneys’ fees.

¶6 It is apparent from her briefs that Welch believes the trial court made the wrong choice as to which party to believe and which inferences to draw from disputed facts. However, our role is not to retry the case. If there are facts in the record from which a reasonable judge could come to the conclusions to which the trial court came, that is, if there is credible evidence upon which the trial court can base the findings it made, we will not overturn those findings. *See* WIS. STAT. § 805.17(2); *Becker v. Zoschke*, 76 Wis. 2d 336, 346, 251 N.W.2d 431 (1977). We review separately Welch’s various issues raised on appeal.

Illegal lease

¶7 Here, the trial court concluded that Welch’s lease violated the provisions of the Administrative Code. Welch admits in her brief that her lease included a requirement that Jackson pay “attorney fees” involving any dispute about the lease. That provision is prohibited by WIS. ADMIN. CODE § ATCP

134.08 (Jan. 1999), entitled, “Prohibited rental agreement provisions,” which, in applicable part, makes it an unfair trade practice for a residential landlord to:

(3) Require payment, by the tenant, of attorney’s fees or costs incurred by the landlord in any legal action or dispute arising under the rental agreement....

¶8 In *Baierl v. McTaggart*, 2001 WI 107, ¶13, 245 Wis. 2d 632, 629 N.W.2d 277, where a residential lease provision required the tenant to indemnify the landlord for costs and attorney fees incurred in enforcing the lease, our supreme court held that the lease violated Wisconsin law and that:

The Department of Agriculture, Trade and Consumer Protection (Department) has exercised its rule-making authority under Wis. Stat. § 100.20(2)(a) and specifically determined that the inclusion of such a clause in a residential lease is an unfair trade practice. The conduct of inserting the clause into a lease constitutes the violation and is punishable by law.

The *Baierl* court went on to note that finding this violation permitted the trial court, pursuant to WIS. STAT. § 100.20(5),⁵ to double the award of damages found and to award the tenant reasonable attorney fees. *Id.*, ¶¶8, 40.

¶9 Here, the trial court found: “There was a violation of the Ag Code [in] the lease; and therefore, the remedy there is twice the security deposit plus attorneys’ fees.” The trial court properly relied on *Baierl* and WIS. STAT.

⁵ WIS. STAT. § 100.20, entitled “Methods of competition and trade practices,” states, in relevant part:

(5) 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.

§ 100.20(5), when it awarded damages in the amount of the security deposit paid (which Welch had not refunded), doubled the damage award, and awarded attorney fees, which the trial court found to be reasonable.

Reasonable attorney fees

¶10 Welch objects to the reasonableness of the attorney fees awarded. After the conclusion of the trial, the trial court directed Jackson's attorney to submit her fee request by affidavit. The affidavit details the time spent, the hourly rate requested, and the basis for that hourly rate. Welch does not claim she never received the affidavit. The court awarded \$17,920 in attorney fees. Neither prior to, nor after, the trial court's award did Welch object before the trial court as to the reasonableness of the amount requested and awarded. Having made no objection, Welch cannot now fairly be heard to complain about the reasonableness of the fee. *See* WIS. STAT. § 805.11(1) and (2); *Village of Trempealeau v. Mikrut*, 2004 WI 79, ¶16, 273 Wis. 2d 76, 681 N.W.2d 190.

¶11 The process the trial court followed for determining reasonable attorney fees is consistent with established law. *See Milwaukee Rescue Mission, Inc. v. Redevelopment Auth. of the City of Milwaukee*, 161 Wis. 2d 472, 494, 468 N.W.2d 663 (1991) (attorney fee award is a finding of fact which will not be overturned in the absence of an erroneous exercise of discretion); *Tesch v. Tesch*, 63 Wis. 2d 320, 334, 217 N.W.2d 647 (1974) (trial court has the expertise to evaluate reasonableness of fees); *Lucareli v. Vilas County*, 2000 WI App 157, ¶12, 238 Wis. 2d 84, 616 N.W.2d 153 (itemized bill submitted by affidavit may be sufficient). The trial court here supervised the handling of this case from the beginning, and was well-situated to evaluate both the reasonableness and necessity

of the services provided. The record before us supports the award the trial court made.

Retaliatory eviction

¶12 Wisconsin statutes prohibit a landlord from evicting a residential tenant because the tenant complains to the landlord or a government agency about defects in the rented property. See WIS. STAT. § 704.45(1).⁶ The statutory prohibition is essentially echoed in regulations of the Department of Agriculture, Trade and Consumer Protection.⁷ Welch argued that the eviction action was not in

⁶ WISCONSIN STAT. § 704.45, entitled, “Retaliatory conduct in residential tenancies prohibited,” states, in relevant part:

(1) Except as provided in sub. (2), a landlord in a residential tenancy may not increase rent, decrease services, bring an action for possession of the premises, refuse to renew a lease or threaten any of the foregoing, if there is a preponderance of evidence that the action or inaction would not occur but for the landlord’s retaliation against the tenant for doing any of the following:

(a) Making a good faith complaint about a defect in the premises to an elected public official or a local housing code enforcement agency.

(b) Complaining to the landlord about a violation of s. 704.07 or a local housing code applicable to the premises.

(c) Exercising a legal right relating to residential tenancies.

(Emphasis added.)

⁷ WISCONSIN ADMIN. CODE § ATCP 134.09, entitled, “Prohibited practices,” states, in relevant part:

(5) RETALIATORY EVICTION. No landlord shall terminate a tenancy or give notice preventing the automatic renewal of a lease, or constructively evict a tenant by any means

(continued)

retaliation for Jackson's complaints to Rent Assistance and the Department of Neighborhood Services, but was: (a) commenced by a twenty-eight-day notice served before Jackson's complaints; (b) because Jackson damaged the premises; and (c) because of Jackson's improper personal conduct towards Welch.

¶13 The trial court specifically found that a twenty-eight-day notice had never been served on Jackson and the document submitted by Welch was "bogus." The trial court came to this conclusion because it found that the document purporting to have been delivered by Welch's property manager/fiancé had no signature, had no reference to delivery of a copy to Rent Assistance, and did not appear in the Rent Assistance files. This was significant to the trial court because it also found that all other documents Welch delivered to Jackson were copied to Rent Assistance, had a notation that they were so copied, and appeared in the Rent Assistance files. These facts amply support the trial court's inferences and conclusion that no twenty-eight-day notice was ever delivered to Jackson.

¶14 The trial court also found that there was insufficient credible evidence that Jackson damaged the premises to sustain such a finding. Much of the damage dispute involved a plumbing problem. There is evidence from a licensed plumbing contractor that the problem involved a grease clog under the basement floor. Having found Welch and her property manager/fiancé not to be credible witnesses, the trial court was permitted to conclude that Welch's

including the termination or substantial reduction of heat, water or electricity to the dwelling unit, in retaliation against a tenant because the tenant has:

(a) Reported a violation of this chapter or a building or housing code to any governmental authority, or filed suit alleging such violation....

testimony regarding such things as broken door handles from moving a basketball backstop inside (after Welch objected to it being on the driveway) and holes in the walls (some of which were to hang pictures), as well as Welch's assertion that Jackson damaged the plumbing, was not credible evidence of damage. Likewise, having found Welch not credible, the trial court was under no obligation to accept her testimony that the real reason for the eviction was Jackson's allegedly improper conduct towards Welch.

Discovery sanctions

¶15 Circuit courts have discretion to impose sanctions for discovery abuses. *Paytes v. Kost*, 167 Wis. 2d 387, 393, 482 N.W.2d 130 (Ct. App. 1992). Sanctions are appropriate if “the record contains a reasonable basis for a circuit court’s determination that the [sanctioned] conduct was egregious and that there was no clear and justifiable excuse.” *Monson v. Madison Family Inst.*, 162 Wis. 2d 212, 215, 470 N.W.2d 853 (1991).

¶16 After this case had been pending for thirteen months,⁸ discovery problems still existed. On November 17, 2004,⁹ the trial court ordered that “[P]laintiff turn over to Defendant all documents listed in her pretrial report on or before December 1, 2004. If the Plaintiff fails to provide said documentation, the Court shall assess sanctions.” Defendant’s counsel subsequently filed a motion for sanctions alleging that the documents were delivered, essentially, in an unorganized mass that did not match the exhibit list. Defense counsel complained

⁸ The five-day notice was dated November 13, 2003.

⁹ Apparently this ruling was not reduced to a written order until later; the order was signed December 16, 2004.

of not receiving eight items listed on the exhibit list, of getting multiple copies of the same document, of getting documents with no labels, of getting extraneous documents such as certified mail receipts not listed on the exhibit list, and of getting a videotape that could not be viewed. The trial court then concluded:

Discovery has been an ongoing problem in this case....

We received a document filed with the Court on November 8, 2004 that lists 1 through 20 exhibits on the list; and the Court ordered that all of those items, if they are going to be used, be provided to the defense.

I don't think that is an excuse for just dumping and giving a bunch of things.

....

I think the exhibits have to be listed individually and provided in a format so Counsel can [identify them].

....

I'm going to give a second deadline, an opportunity to clarify [the production]; but I am assessing sanctions for failing to do it and provide the documents in a usable format.

¶17 The record reflects a scheduling order dated May 11, 2004, requiring a pretrial report. That report, to be filed by October 11, 2004, was required to include:

A list of exhibits to be offered at trial. Plaintiff shall designate its exhibits using the numbers #1-100.... The exhibits shall be marked and made available for inspection upon the request of any other party as of the filing of the Exhibit List. Exhibits not timely listed and made available for inspection shall not be used at trial, except for good cause shown.

¶18 We conclude that the trial court did not erroneously exercise its discretion when it effectively concluded that it was egregious, thirteen months

after the action began, for a litigant represented by counsel to deliver a mass of unidentified documents as a production of exhibits for trial. The record before the trial court supports the conclusion that Welch did not demonstrate reasonable compliance with prior court orders for production of these documents or good cause for not complying with the prior orders. The trial court had the discretion under WIS. STAT. § 804.12(1)(b) to impose as sanctions the costs of the motion to compel the ordered discovery. That is what the trial court did.

Dismissal of landlord damage claim

¶19 Welch alleged in her eviction action that she was entitled to \$1227 as three times the rent because Jackson should have been out by November 18, 2003. Dismissal of Welch's damage claim appears three times in the record. First, the order resulting from the November 17, 2004 hearing acknowledges dismissal of the claim. The dismissal is noted a second time at the December 17, 2004 motion hearing when the trial court summarized the status of the case. Finally, on the first day of trial, the trial court again summarized the status of the case as involving only Jackson's claim of retaliatory eviction. We search the record in vain for any objection at any time by Welch or her counsel to any of these clear statements that Welch's claim for damages has been dismissed. On the contrary, Welch, through her counsel, agrees that the trial court has accurately summarized the status.

¶20 Welch argues before this court that she never authorized her attorney to agree to dismissal of her damages claim. Having failed to communicate this claimed error to the trial court by objecting, when her objection could have been resolved by the trial court, *see* WIS. STAT. § 805.11(1) and (2), an appellate court will not generally review an issue raised for the first time on appeal. *See Jackson*

v. Benson, 218 Wis. 2d 835, 901, 578 N.W.2d 602 (1998); *State v. Gaulke*, 177 Wis. 2d 789, 793-94, 503 N.W.2d 330 (Ct. App. 1993). We conclude that Welch has waived the issue of her right to damages in the eviction action.

By the Court.—Orders affirmed.

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

