

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

August 20, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-3262

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

WALTER L. MERTEN,

Plaintiff-Respondent,

v.

ROBIN McGRUDER and TED McGRUDER,

Defendants-Appellants.

APPEAL from a judgment of the circuit court for Milwaukee County: FRANK T. CRIVELLO, Judge. *Reversed and cause remanded with directions.*

FINE, J. Ted and Robin McGruder appeal from a judgment awarding Walter L. Merten damages for the McGruders' alleged breach of an apartment-rental application. The McGruders argue that the trial court erred in ruling that Merten was entitled to damages for lost rent and for his costs in attempting to re-rent the apartment unit. The McGruders also argue that the trial court misused its discretion in depriving them of their right to cross-examination. We reverse. The McGruders' argument, asserted during the damages hearing, that they withdrew their offer to rent the apartment before

Merten accepted their application was, in effect, a motion for reconsideration that should have been addressed by the trial court.¹

On October 9, 1994, the McGruders gave Merten a \$250 deposit along with their application to lease an apartment. The application was on a form given to them by Merten. According to the record created during the hearing on Merten's motion for summary judgment, Merten wrote a letter that evening to the McGruders, informing them that they had been selected as tenants. This letter also set forth the time and place for the signing of the lease. Subsequently, Merten was notified by his bank that payment on the \$250 check had been stopped.

The McGruders, appearing *pro se* at the summary-judgment motion hearing, did not offer any evidence as to when they contacted Merten to withdraw their application. The trial court, the Honorable Jacqueline D. Schellinger presiding, granted Merten summary judgment, awarding Merten the \$250 security deposit together with costs. The trial court set the case for trial on Merten's claims for lost rent and related costs.

On August 30, 1995, the Honorable Frank T. Crivello presided over the bench trial to determine whether Merten was entitled to recover lost rents for November and December, 1994, and the related costs of attempting to re-rent the apartment. During this trial, the McGruders repeatedly attempted to offer testimony that they withdrew their offer to rent before Merten notified them that they were accepted as tenants. Judge Crivello refused to consider this testimony, stating: "I cannot revisit that issue. Judge Schellinger has found you are in breach of that contract." The trial court then entered judgment in favor of Merten ordering the McGruders to pay Merten for November and December rent and the related costs of advertising for new tenants.

When trial-court proceedings in a case are split between two or more judges, the successor judge has the power to reconsider a ruling made by

¹ Merten has filed a motion seeking frivolous-appeal costs, as well as a motion seeking costs because the McGruders did not comply with some of the rules of appellate procedure. *See* RULES 809.25(3) & 809.83, STATS. The motions are denied.

the predecessor just as he or she would have the authority to reconsider his or her own rulings. *Dietrich v. Elliott*, 190 Wis.2d 816, 823 & 823 n.4, 528 N.W.2d 17, 20 & 20 n.4 (Ct. App. 1995). Thus, Judge Crivello had the authority to revisit Judge Schellinger's earlier grant of summary judgment. His conclusion to the contrary was wrong. As noted, during the damages hearing before Judge Crivello, the McGruders repeatedly attempted to prove that they withdrew timely their offer to rent the apartment. The McGruders are not lawyers, and their efforts amounted to seeking reconsideration of Judge Schellinger's earlier ruling granting Merten summary judgment. Judge Crivello should have considered their evidence and determined whether, in light of all the circumstances, reconsideration was appropriate.

It appears from the McGruders' arguments that there is a material issue of fact as to whether the McGruders withdrew their offer to rent the apartment before Merten accepted their rental application, and, therefore, summary judgment should not have been granted. See *Zimmerman v. Thompson*, 16 Wis.2d 74, 75-76, 114 N.W.2d 116, 117 (1962) (“[T]he power of the courts under the summary-judgment statute ... is drastic and should be exercised only when it is plain there is no substantial issue of fact or of permissible inference from undisputed facts to be tried.”). Moreover, the rental application has a liquidated-damages clause: “I enclose herewith \$250.00, which will be forfeited, as provided by law, if you accept this application, and I do not take the premises.” In the event the fact-finder rules in favor of Merten on the breach-of-apartment-rental-application issue, his damages are limited to the \$250 liquidated-damages clause provided for by the application. See *Trans World Airlines, Inc. v. Travelers Indemnity Co.*, 262 F.2d 321, 325 (8th Cir. 1959) (“[W]here the parties especially provide or stipulate for liquidated damages, such liquidated damages take the place of any actual damages suffered and that any recovery for breach is limited to the amount so agreed upon.”).

We reverse the judgment granting summary judgment to Merten and remand this case to the trial court so that the trial court can determine whether reconsideration of the grant of summary judgment is appropriate and, if so, whether the McGruders breached the rental-application agreement.

By the Court.—Judgment reversed and cause remanded with directions.

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