

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 1, 2011

A. John Voelker
Acting Clerk of Court of Appeals

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.

Appeal No. 2010AP1668

Cir. Ct. No. 2009SC2021

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

DENNIS DRESLER,

PLAINTIFF-APPELLANT,

V.

JAMES WOZNIAK AND CAROLYN WOZNIAK,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for St. Croix County:
HOWARD W. CAMERON, JR., Judge. *Affirmed and cause remanded with directions.*

¶1 BRUNNER, J.¹ Dennis Dresler appeals from a small claims judgment in favor of James and Carolyn Wozniak. Dresler challenges both the

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

circuit court's dismissal of his claim for damaged carpet and the court's determination that he was only entitled to prorated rent for the month of August. We reject Dresler's arguments and affirm. We also agree with the Wozniaks that pursuant to WIS. STAT. § 100.20(5), they are entitled to costs and reasonable attorney fees associated with defending this appeal; therefore, we remand for a determination of costs and attorney fees.

BACKGROUND

¶2 The Wozniaks rented a townhouse from Dresler. The written lease provided a rental period of "2 months" with the "term beginning on 6/6, 2009 and ending July 31, 2009." Monthly rent was \$1,275 and the Wozniaks paid a \$1,000 security deposit. Dresler admits he knew the Wozniaks intended to rent his property for a short period of time because they were looking for a home to purchase.

¶3 The Wozniaks paid June and July rent. They closed on a home on August 6, 2009 and moved out of Dresler's property on August 7. On August 21, Dresler emailed Carolyn informing her he forwarded three pieces of personal mail to her new address. He also noted carpet damage in the master bedroom and requested August rent. On August 23, Dresler sent an accounting of the security deposit to the Wozniaks' old address. He did not return any of the Wozniaks' security deposit and instead he credited the entire amount against unpaid August rent and carpet damage. Dresler requested the Wozniaks pay the remaining balance. When he did not receive a response, Dresler brought a small claims

action against the Wozniaks, seeking the outstanding balance of the August rent and carpet repair costs.²

¶4 The Wozniaks filed an answer and counterclaim, denying liability and seeking double damages plus reasonable attorney fees pursuant to WIS. STAT. § 100.20(5). Specifically, the Wozniaks alleged they were entitled to double damages because Dresler had violated WIS. ADMIN. CODE ATCP § 134.08(3) (Nov. 2006), by having a lease that included an invalid attorney fees provision, and WIS. ADMIN. CODE ATCP § 134.06, by failing to return the security deposit and an accounting of the security deposit to the Wozniaks' last known address within twenty-one days after they vacated the property.

¶5 After a hearing in front of the court commissioner, Dresler petitioned the circuit court for review. The circuit court held a court trial. Prior to trial, both parties agreed that the attorney fees provision in the lease violated the administrative code³ and thus rendered the entire lease unenforceable against the Wozniaks pursuant to *Baierl v. McTaggart*, 2001 WI 107, 245 Wis. 2d 632, 629

² In Dresler's small claims complaint, he originally sought monetary damages for numerous items; however, during the court trial and on appeal, Dresler only requested August rent and damages for the carpet.

³ The lease provision required the Wozniaks to pay any costs and attorney fees incurred by Dresler in enforcing the lease. This provision violates WIS. ADMIN. CODE ATCP § 134.08(3) (Nov. 2006), which provides: "No rental agreement may ... [r]equire 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."

N.W.2d 277.⁴ Additionally, both parties agreed the Wozniaks had damaged the master bedroom carpet—their new bedroom furniture left indelible wood-colored stains.

¶6 At trial, Dresler asserted he was entitled to \$540 in damages for the cost of replacing the carpet even though he testified he had not actually replaced or repaired the carpet. Then, Dresler argued he was entitled to rent for the entire month of August because without a valid lease, the Wozniaks were monthly “periodic tenants” and were required to give twenty-eight days’ notice prior to moving out. In support of the lack of notice, Dresler testified that on July 5, the Wozniaks only notified him they put an offer on a house. On July 17, the Wozniaks notified him the closing date was tentatively set for August 6, but they wanted a few weeks to put the house in move-in condition prior to moving out of Dresler’s property. On August 5, they notified him that the closing date was on August 6 and they would be moving out on August 7.

¶7 Carolyn testified she thought the two-month lease began running on June 6 and ended August 6. James testified that they notified Dresler on July 5 that the bank had accepted their offer, the closing date was August 6, and they planned to move out on August 6. He testified that Dresler did not inform him they would be responsible for the entire month of August rent. James testified that they spoke to Dresler on July 17 to confirm their August 6 move out date. James

⁴ In *Baierl v. McTaggart*, our supreme court concluded that if a provision in a lease violates the administrative code, the illegal provision is not severable from the lease because it would frustrate the protections offered to tenants and the purpose of the administrative code. *Baierl v. McTaggart*, 2001 WI 107, ¶¶33, 40, 245 Wis. 2d 632, 629 N.W.2d 277. As a result, the court held that if a lease contained an illegal provision, the entire lease is unenforceable against the tenant. *Id.*, ¶¶2, 40. However, the tenant could enforce the lease against the landlord. *Id.*, ¶20.

further testified that on August 5, he contacted Dresler to inform him the movers could not come until August 7. During that conversation, James asked Dresler where to leave the keys and instructed Dresler to deduct their August 1 through August 7 rent from their security deposit.

¶8 The circuit court denied Dresler's \$540 request for damages to the master bedroom carpet, reasoning that Dresler was not entitled to damages because he did not actually repair or replace the carpet and thus incurred no loss. Additionally, the circuit court denied Dresler's request for rent for the entire month of August, reasoning that, although the written lease provided the rental term ended on July 31, 2009, there was a discussion among the parties that the "lease was extended by a mutual albeit an unwritten agreement to August 7." The court determined the Wozniaks owed Dresler prorated rent from August 1 through August 7.

¶9 Finally, the circuit court determined Dresler violated the administrative code by failing to send notice of the security deposit withholding to the Wozniaks' last known address within the mandated twenty-one days. The court reasoned that Dresler had forwarded three pieces of mail to the Wozniaks' new address before sending the security deposit accounting to their old address. The court determined Dresler knew the Wozniaks' new address but failed to comply with the administrative code. Consequently, the circuit court awarded double damages, costs, and reasonable attorney fees pursuant to WIS. STAT. § 100.20(5) for Dresler's violation of the administrative code and improper withholding of the security deposit.

DISCUSSION

¶10 On appeal, Dresler asserts the circuit court erred by failing to award him damages for the unrepaired carpet and determining that he only should receive prorated rent. The Wozniaks argue they are entitled to attorney fees and costs associated with defending this appeal.

I. Carpet Damage

¶11 Dresler argues that the circuit court erred by relying on our recent decision in *Boelter v. Tschantz*, 2010 WI App 18, 323 Wis. 2d 208, 779 N.W.2d 467, to deny costs after it determined no repairs had taken place. Dresler asserts he is entitled to damages for the unrepaired carpet pursuant to WIS. STAT. § 704.07(3)(a)⁵ because the Wozniaks admitted they damaged the carpet and did not argue \$540 was an unreasonable amount to replace the carpet.

¶12 Dresler's argument is misplaced. Although WIS. STAT. § 704.07(3)(a) requires a tenant who damages the premises to "reimburse the landlord for the reasonable cost thereof," in *Boelter*, we determined "the statute allows reimbursement only for actual *costs* incurred." *Boelter*, 323 Wis. 2d 208, ¶10. Here, Dresler did not incur any costs because he made no repair. Therefore,

⁵ WISCONSIN STAT. § 704.07(3)(a) provides: "If the premises are damaged by the negligent or improper use of the premises by the tenant ... the landlord may elect to undertake the repair or redecoration, and in such case the tenant must reimburse the landlord for the reasonable cost thereof; the cost to the landlord is presumed reasonable unless proved otherwise by the tenant."

the circuit court properly determined he was not entitled to damages for replacing the carpet.⁶

II. August Rent

¶13 Dresler argues he is entitled to rent for the entire month of August. He contends that “because the written lease was invalid,” we should determine the Wozniaks were monthly periodic tenants⁷ and then conclude that, because they did not move out on July 31, they are responsible for all of August rent.

¶14 We reject Dresler’s argument for two reasons. First, the Wozniaks are not periodic tenants because they still have an enforceable lease against Dresler. Dresler fails to recognize that his violation of the administrative code did not nullify the Wozniaks’ lease. *See Baierl*, 245 Wis. 2d 632, ¶20. Rather, his violation only means he cannot enforce the lease against the Wozniaks. *See id.*, ¶¶20, 33, 40. Nothing prevents the Wozniaks from enforcing the lease against Dresler. *See id.*, ¶20. As a result, we will not conclude the Wozniaks are periodic tenants.

¶15 Second, and more importantly, the circuit court determined that there was a mutual understanding between the parties that the rental agreement would extend until August 7. We may not set aside a circuit court’s finding of facts and credibility determinations unless they are clearly erroneous. *Dickman v. Vollmer*,

⁶ We also note this is not a situation where Dresler could not afford to repair or replace the carpet. He told the circuit court that he had the money to replace the carpet but chose not to do it.

⁷ WISCONSIN STAT. § 704.21(2) defines a periodic tenant as a “tenant who holds possession without a valid lease”

2007 WI App 141, ¶14, 303 Wis. 2d 241, 736 N.W.2d 202. The circuit court concluded that because of this mutual understanding, the Wozniaks were obligated to pay Dresler prorated rent from August 1 through August 7. The circuit court's determination is supported by James Wozniak's testimony. James testified that they notified Dresler on July 5 of their plans and intention to vacate and instructed Dresler to take prorated rent from August 1 through August 7 from their security deposit. Although Dresler testified he did not receive notice of the intention to vacate until August 5 and never agreed to prorated rent, the trial court is the assessor of credibility. See *State v. McCallum*, 208 Wis. 2d 463, 488, 561 N.W.2d 707 (1997). We conclude that the court's findings are not clearly erroneous, and we affirm the circuit court's determination that Dresler was entitled to prorated rent from August 1 through August 7.

¶16 Finally, because we affirm the circuit court's determination of prorated rent and because Dresler has not alleged that he complied with the administrative code in reference to the Wozniaks' security deposit or that the circuit court's damage award was unreasonable, we also affirm the circuit court's award of double damages, costs, and attorney fees.

III. Appellate Costs and Attorney Fees

¶17 The Wozniaks contend they are entitled to appellate costs and attorney fees, and they promote two theories in support of their claim. First, they argue Dresler's appeal is frivolous, and thus, they are entitled to costs and attorney

fees pursuant to WIS. STAT. RULE 809.25(3). In the alternative, the Wozniaks request costs and attorney fees pursuant to WIS. STAT. § 100.20(5).⁸

¶18 We determine the Wozniaks are entitled to appellate costs and attorney fees pursuant to WIS. STAT. § 100.20(5) because Dresler violated the administrative code in regard to the Wozniaks' security deposit. In *Shands v. Castrovinci*, 115 Wis. 2d 352, 359, 340 N.W.2d 506 (1983), our supreme court interpreted WIS. STAT. § 100.20(5) to include appellate costs and attorney fees and held "a tenant who has suffered pecuniary loss because of a violation of WIS. ADM. CODE Ch. Ag 134 shall recover reasonable attorney fees for appellate review undertaken to attack or defend a trial court's decision in the suit."

¶19 Because the Wozniaks are entitled to appellate costs and attorney fees pursuant to WIS. STAT. § 100.20(5), we have no need to determine whether they are entitled to costs and attorney fees for a frivolous appeal. See *Gross v. Hoffman*, 227 Wis. 296, 300, 277 N.W. 663 (1938) (only dispositive issues need be addressed). We remand to the circuit court for a determination of costs and reasonable attorney fees associated with defending this appeal.

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

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

⁸ WISCONSIN STAT. § 100.20(5) provides: "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."

