**COURT OF APPEALS**
**DECISION**
**DATED AND RELEASED**

September 21, 1995

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. 94-1933-FT**

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

**MACK SEAY,**

**Plaintiff-Appellant-Cross-Respondent,**

**v.**

**DEL GARDNER, and**
**LUCREETA GARDNER,**

**Defendants-Respondents-Cross-Appellants.**

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Dane County: ANGELA B. BARTELL, Judge. *Affirmed*.

Before Gartzke, P.J., Dykman and Vergeront, JJ.

PER CURIAM. Mack Seay appeals, and Del and Lucreeta Gardner cross-appeal, from a judgment awarding the Gardners money damages. The litigation concerned the Gardners' tenancy on property owned by Seay. The jury found that Seay breached the rental contract in several

respects and brought an eviction action against the Gardners in retaliation when they consequently withheld rent.

The issues on appeal are whether the trial court properly sanctioned Seay by excluding certain evidence at trial, whether the evidence absolutely established a defense to the retaliatory eviction claim, and whether the trial court erred by awarding damages on an unpleaded claim. On cross-appeal, the issue is whether the Gardners are entitled to additional damages. We conclude that any error in excluding evidence was harmless, that Seay did not prove an absolute defense to the retaliatory eviction claim, and that the court properly allowed recovery on the unpleaded claim. We also conclude that the Gardners should not receive additional damages. We therefore affirm.[1]

The Gardners began renting from Seay on October 2, 1993. After moving in, they discovered numerous problems with the condition of the premises. As a result of Seay's failure to remedy those problems, the Gardners withheld one-half of the November rent, pursuant to the rent abatement statute, § 704.07(4), STATS.

Seay responded with a five-day notice to pay the remaining rent due or vacate the premises. When the Gardners did neither, he commenced an eviction action. On November 30, 1993, the trial court dismissed the eviction complaint and held that no additional rent was due for November, in effect upholding the Gardners' rent abatement claim.

Several hours later, still on November 30, Seay served the Gardners with another five-day notice, demanding that they pay the November rent that the trial court had just declared not due, and the December rent, or vacate the premises. When the Gardners again failed to do either, Seay commenced this action, on December 22, 1993, with another eviction complaint.

[1] This is an expedited appeal under RULE 809.17, STATS.

In their answer to the complaint, the Gardners alleged retaliatory eviction and counterclaimed for actual and punitive damages. Seay did not file a timely reply to the counterclaim. The trial court then ordered him to reply within seven days. When he failed to do so, the Gardners moved for a default judgment. Seay finally filed his reply several days after the trial court's deadline. The Gardners then moved to strike the reply as late. Seay failed to appear at the hearing on the Gardners' motions. The court struck the reply, granted default judgment on the retaliatory eviction claim, and set the damage issue for trial.

Seay subsequently dropped the eviction complaint. The Gardners left the premises about three weeks before the trial.

At trial, the court revised its earlier ruling and required the Gardners to prove retaliatory eviction, as well as damages. The only sanction the court actually imposed on Seay for defaulting was an order precluding him from introducing affirmative evidence on the retaliatory eviction issue. The jury found for the Gardners on all issues and awarded them $675 in actual damages for the retaliation and $3,800 in punitive damages. The Gardners also received an award of $450 representing the reduced rental value of the premises due to Seay's failure to repair various defects.

WISCONSIN ADM. CODE § ATCP 134.09(5) provides that "[n]o landlord shall terminate a tenancy ... in retaliation against a tenant because the tenant has: ... (c) [a]sserted, or attempted to assert any right specifically accorded to tenants under state or local law." Violation of this rule entitles any person suffering pecuniary loss as a result to recover double damages plus a reasonable attorney's fee. Section 100.20(5), STATS. On motions after verdict, the Gardners moved under § ATCP 134.09(5) to double the $675 awarded for retaliatory eviction damages and for an additional $1,000 in reasonable attorney's fees.[2] Seay moved to set aside the verdict.

[2] The trial court had awarded $7,640 in attorney's fees. That award is not challenged on appeal.

At the hearing on these motions, the Gardners also asked the court to resolve the parties' newly added dispute regarding return of the Gardners' security deposit. The court noted that it was not pleaded or tried, but informed Seay that if it was not now resolved, the Gardners could bring a separate action for double damages and attorney's fees under WIS. ADM. CODE § ATCP 134.06 and § 100.20(5), STATS. Seay agreed that the court should decide it and the court did, in the Gardners' favor.

The court also denied Seay's motion to set aside the verdict and the Gardners' claim for double damages and $1,000 in additional attorney's fees under § ATCP 134.09(5). The court reasoned that the rule applied only to successful, not attempted, terminations of tenancies. The court added that even if double damages were available, the Gardners would have to elect between receiving double damages under the rule or actual damages plus the $3,800 in common law punitive damages awarded in the verdict. The court entered judgment accordingly, awarding the Gardners their actual and punitive damages, plus damages on their security deposit claim, plus $7,640 in attorney's fees, less the amount of rent the Gardners still owed Seay.

Seay first contends that the trial court exceeded its authority by sanctioning him under the default judgment statute, § 806.02, STATS. Under that section, the trial court can only sanction a defendant. ***Pollack v. Calimag***, 157 Wis.2d 222, 235, 458 N.W.2d 591, 598 (Ct. App. 1990). However, we need not decide whether the decision to exclude liability evidence was an impermissible exercise of authority under § 806.02 because Seay was not harmed by that decision. Seay stated throughout the proceeding that he wanted to defend the retaliatory eviction claim by collaterally attacking the trial court's decision in the first eviction action. However, Seay never appealed that decision and it was final and therefore binding on him when this trial occurred. Once the trial court took judicial notice of the decision that no rent was due for November, and instructed the jury accordingly, Seay's defense no longer remained available to him.

The Gardners' remaining evidence on retaliatory eviction was the timing of the notice and a letter Seay received from the Gardners' counsel, before he commenced the eviction proceeding, advising him that he could not evict the Gardners for nonpayment of rent that the trial court held was not due. Seay did not dispute this evidence and therefore needed no defense to it. In

effect, once the jury learned of the trial court's eviction decision, the timing of the notice, and Seay's disregard of the subsequent warning not to evict, only one reasonable inference was available. Seay could have done nothing to avoid that inference. The error complained of therefore provides no basis for reversal. *See* § 805.18(2), STATS. (no judgment shall be reversed unless the error complained of has affected the substantial rights of the party seeking reversal).

Seay did not have an absolute defense to the retaliatory eviction claim. He relies on § 704.45(2), STATS., providing that an eviction action is not retaliatory if the tenant has not paid rent that is due. However, Seay ignores the fact that the eviction action he commenced here was based on failure to comply with the five-day notice served on November 30, 1993. When he served that notice, the Gardners had just received a judicial declaration that no rent was due. Therefore, the Gardners' subsequent decision to withhold some of December's rent did not permit the eviction action because no subsequent termination notice was served on them for that act of withholding.

The trial court properly resolved the security deposit dispute on motions after verdict. Seay contends that the trial court obtained his uninformed consent to trying that issue by advising him, incorrectly, that the Gardners could commence a separate action against him if he did not so consent. He contends that the trial court was wrong because the claim preclusion doctrine would bar any such action. That is not correct. Having just moved out, the Gardners' cause of action on the security deposit would not have accrued before the trial. Seay's consent was not, therefore, based on misinformation from the court.

The Gardners are not entitled to additional damages under § ATCP 134.09(5) and § 100.20(5), STATS. A purpose of statutory double damages under § 100.20(5) is to deter wrongful acts. ***Armour v. Klecker***, 169 Wis.2d 692, 701, 486 N.W.2d 563, 566 (Ct. App. 1992). That is also the purpose of punitive damages. WIS J I—CIVIL § 1707 (1994). The Gardners' acceptance of the punitive damages award therefore precluded a duplicative recovery on their § 100.20(5) claim.[3] We therefore need not decide whether the statutory

[3] If given the choice, the Gardners would not have elected statutory damages over punitive damages, because the latter award far exceeded their combined claim for damages and attorney's fees under § 100.20(5), STATS.

damages were available despite the fact that Seay was unsuccessful in his eviction attempts.

*By the Court.*—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.