

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

May 14, 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

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No. 95-2640

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

MICHAEL R. WOLFE,

Plaintiff-Appellant,

v.

**NATHEN SALOCH and
IRENE LORI SALOCH,**

Defendants-Respondents.

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

WEDEMEYER, P.J.¹ Michael R. Wolfe appeals from a judgment rendered after a trial to the court involving a landlord-tenant dispute. Wolfe claims the evidence does not support the trial court's conclusion that Nathen and Irene Lori Saloch are entitled to damages in the amount of \$389, and that the trial court erred in denying Wolfe's claim that the landlord violated

¹ This appeal is decided by one judge pursuant to § 752.31(2), STATS.

Wisconsin Department of Agriculture, Trade and Consumer Protection rules. Because it is not clear from the record exactly what constitutes the \$389 damage figure, this court remands this case to the trial court with directions to conduct further fact-finding and state with particularity what items support the \$389, or to modify the damage award based on the findings previously made by the trial court. Further, because the trial court's findings are not clearly erroneous regarding the alleged landlord violations, and because those findings support the trial court's conclusion that the landlord did not violate any administrative rules, this court affirms that portion of the judgment.

I. BACKGROUND

Wolfe signed a one-year lease with the Salochs in September 1993. Wolfe agreed to pay \$289 per month for a bedroom with the use of a bathroom and kitchen. In entering into the lease, Wolfe paid a security deposit in the amount of \$289 and an additional \$289 for the last month's rent. Wolfe's bedroom was located in the upper unit of a home near the University of Milwaukee campus. There were two other tenants in the upper unit, each having his own bedroom, but sharing the common bath and kitchen.

On January 2, 1994, Wolfe received a five-day notice to vacate or pay the January rent. On January 4, 1994, Wolfe gave written notice that he was vacating the premises because he felt the Salochs had breached the lease by allowing their son, Peter Saloch, to enter the upper unit unannounced and use the bathroom. Wolfe vacated the premises on January 8th or 9th. In a letter dated January 27, 1994, the Salochs advised Wolfe that they would not refund his security deposit. The letter provided in pertinent part:

According to our records and after inspection of the above premises, the following is an itemized list of security deposit deductions:

(1) Late January rent	\$ 45.00
(2) Cleaning fees as per contract/ addendum (see attached list)	110.00
(3) Bad painting on partial wall (entire room will need repainting)	75.00

(4) Costs to mitigate damages (re-rent to date	134.16
(5) November, 1993, rent (partial) unpaid	10.00
(6) Accustat cover, pin, time and labor	34.77
(7) Electricity share above \$40.00	7.90
(8) Malicious damage to door (intentional)	75.00
(9) Holes in wall	25.00
(10) Clogging of sink (intentional)	<u>150.00</u>
	\$666.83.

The letter advised that because this total exceeded the \$289 security deposit, the deposit would not be returned and Wolfe should submit \$377.83 to cover the additional expenses.

Wolfe disputed these charges and filed suit against the Salochs for violating Wisconsin Department of Agriculture, Trade and Consumer Protection RULES 134.06(3) & (4), which prohibit withholding security deposits for items for which a tenant is not responsible, and for failing to provide a tenant with an accurate itemized list of damages and portions of the security deposit. Wolfe sought double the amount of the security deposit, plus costs and attorney's fees pursuant to § 100.20(5), STATS. The Salochs filed a counterclaim.

After a trial to the court, it disallowed the Salochs's claim for the late January rent; stated there was not enough evidence to support the claim for the accustat cover (\$34.77); found that Wolfe was responsible for the door damage in the amount of \$75; and allowed the clogged sink charge, but reduced the \$150 amount to \$60. The trial court did not address any of the remaining items listed in the January 27 letter.

The trial court also determined that the January 27 letter was in compliance with the aforementioned rules and, accordingly, did not award Wolfe any double damages, costs, or attorney's fees.

Based on the foregoing, the trial court found that the Salochs were entitled to the sum of \$389 for damages, but that they had already received \$289 in the retained security deposit. Therefore, the trial court entered judgment against Wolfe in the sum of \$100. Wolfe now appeals.

II. DISCUSSION

A. *The \$389 Damage Award.*

As noted above, the Salochs's itemized damages totalled \$666.83. The trial court only addressed the January rent, the accustat, the damaged door and the clogged sink. It failed to address the remaining items in the January 27 letter. Accordingly, the record is unclear as to how the trial court reached the total damage figure of \$389. The only items expressly allowed by the trial court were the \$75 for the damaged door and the \$60 for the clogged sink. The sum of these items is \$135. It is unclear from the record whether the trial court's \$389 figure was simply an erroneous calculation or whether the trial court found, without stating it on the record, that certain other items listed in the January 27 letter were recoverable.

Because this court does not act as a finder of fact, this matter must be remanded to the trial court for clarification. Upon remand, the trial court is instructed to make specific findings with respect to what additional items were awarded in reaching the damage award of \$389. If, however, the trial court simply made an erroneous calculation and found that only the door damage and the clogged sink costs were recoverable, the damage award should be modified accordingly.²

² The Salochs agree that the record is unclear as to exactly how the \$389 figure was reached. They argue that the trial court intended to include in its award all the remaining items in the January 27 letter that it did not specifically disallow. They argue that on this basis, the damage award should have been \$497.06. They request that this matter be remanded for a damage hearing so that the damage award can be increased.

This court rejects the Salochs's arguments. The Salochs failed to file a cross-appeal in this matter and, accordingly, the only valid argument the Salochs can assert on appeal is a request to

B. Violation of Rules/Statutes.

Wolfe also claims that the trial court erred in failing to award double damages, costs, and attorney's fees for the Salochs's violations of administrative rules. Specifically, Wolfe addresses the Salochs's charge of \$150 for a clogged sink, when the lease specifically limited the charge for a clogged sink to a maximum of \$60. Wolfe contends that this excessive charge was an attempt by the Salochs to falsify a claim against his security deposit or hold monies for an intentionally falsified claim in violation of the Wisconsin Department of Agriculture, Trade and Consumer Protection RULE 134.06(5).

The trial court determined that the Salochs did not violate any rules. This court reviews a trial court's findings of fact under the clearly erroneous standard. *See* § 805.17(2), STATS. If this court concludes that the findings of fact are not clearly erroneous, they will not be overturned. Further, if a trial court's conclusions of law are supported by the sustained findings of fact, this court will uphold the trial court's conclusions.

There is evidence in the record that the overcharge for the clogged sink may have been an attempt to falsely withhold Wolfe's security deposit. Specifically, Peter Saloch testified that despite knowing about the \$60 limit, he charge \$150 because "I was really out of my mind. I was very angry. Distressed, I suppose." This testimony may lead to the conclusion that the landlord falsified the clogged sink charge. However, Saloch's testimony on this issue is more extensive than the above excerpt. He also testified that he charged more than \$60 because Wolfe clogged more than one sink, the sinks were

(..continued)

affirm the judgment. *See* 809.10(2)(b), STATS.; *Auric v. Continental Cas. Co.*, 111 Wis.2d 507, 515, 331 N.W.2d 325, 330 (1983).

In response to the Salochs's attempts to seek a modification of the judgment despite their failure to file a cross-appeal, Wolfe argues that he sustained costs and attorney's fees for having to argue against the Salochs's frivolous argument. This court agrees. It is clear under our laws that a respondent who has not filed a cross-appeal may not seek modification of a judgment. *Id.* Accordingly, upon remand, this court instructs the trial court to conduct a hearing to determine the appropriate award of costs and attorney's fees that Wolfe incurred in defending against the Salochs's improperly raised argument.

clogged on more than one occasion, and he thought that the lease allowed him to charge more than the \$60 limit if multiple cloggings were involved.

When the trial court acts as the finder of fact, it is the ultimate arbiter of credibility and the trial court, not an appellate court, is charged with resolving conflicts in the testimony. *Gehr v. City of Sheboygan*, 81 Wis.2d 117, 122, 260 N.W.2d 30, 33 (1977). Further, if more than one reasonable inference can be drawn from the evidence, this court will defer to the inference that the fact finder accepted. *Rivera v. Eisenberg*, 95 Wis.2d 384, 388, 290 N.W.2d 539, 541 (Ct. App. 1980). In the instant case, the trial court determined that Saloch's testimony that he believed the lease allowed him to exceed the \$60 charge in multiple clogging situations was credible. This determination necessarily rejects Wolfe's contention that the excessive charge constituted an attempt to falsely withhold his security deposit in violation of the administrative rules. In reviewing the record, this court concludes that the findings of the trial court in this regard were not clearly erroneous and that the trial court's conclusion that the Salochs did not violate the administrative rules is logically supported by the trial court's findings.

Accordingly, this court rejects Wolfe's claim that the trial court erred in denying his claim for double damages, costs, and attorney's fees based on the landlord's violation of the administrative rules.³

III. CONCLUSION

In sum, this court affirms that portion of the judgment that denied Wolfe's claim seeking double damages, costs and attorney's fees; this court reverses the judgment in part and remands on the issue of the \$389 damages found by the trial court, directing the trial court to conduct further fact-finding to support the \$389 award, or to amend the judgment to reduce the award to conform to the findings originally rendered; this court also instructs the trial court on remand to determine the amount of costs and attorney's fees that

³ This court does not agree with Saloch that Wolfe's claim in this regard was frivolous. Accordingly, Saloch's motion seeking costs and attorney's fees is denied.

should be awarded to Wolfe for having to respond to the arguments that the Salochs improperly raised on appeal.

By the Court.—Judgment affirmed in part, reversed in part and cause remanded with directions.

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