

Dahl is a tenant of Investor Trustee Services Real Estate Holdings LLC (Investor Trustee Services). In 2021, Dahl complained to his landlord about a number of issues regarding the condition of his living unit. After his landlord failed to take action, Dahl contacted the City of Cudahy.

Three inspections took place. A letter dated December 22, 2021 from Cudahy's Inspection Department Manager to the landlord, stated that a number of violations were found in Dahl's unit, including: broken and missing windows in the front porch; loose treads in the front staircase; a damaged wall in the living room; and a damaged carpet section. The letter stated that the landlord would "be given [thirty] days from the date of this letter in which to resolve the above named violations." The letter further stated that failure to resolve the violations within the given time would result in an inspection non-compliance fee, an abatement order, or a municipal citation.

A second letter dated January 10, 2022, indicated that there was a missing smoke alarm, a pitted flue pipe needing replacement, and water heater venting that needed to be properly installed. The letter repeated the same consequences if the landlord failed to resolve the violations within five days.

A third letter dated January 20, 2022, indicated that the ceiling fan in the bedroom was missing pieces, other ceiling fans had broken pieces, and that the chimney was crumbling and needed to be assessed by a qualified contractor.

Dahl contacted an attorney, who reached out to Joel Bosley of Community Advocates, a non-profit organization which conducts formalized rent abatement in the City of Milwaukee. Based on the inspection letters, Bosley recommended a thirty-five percent abatement of Dahl's

rent. Subsequently, in February 2022, Dahl sent a letter to his landlord saying that he would be abating thirty-five percent of his rent and therefore would only pay \$580 of the \$900 rent.²

A five-day notice to remedy the default or vacate the premises was sent to Dahl. The five-day notice alleged in pertinent part that Dahl had unpaid rent in the amount of \$320, which was due on February 1, 2022. On March 9, 2022, a small claims eviction action was filed in Milwaukee County Circuit Court.

In defense, Dahl argued that rent abates to the extent the tenant is deprived of full normal use of the premises under WIS. STAT. § 704.07(4), that Dahl was entitled to abate some of his rent, and that an eviction would be prohibited as retaliatory conduct under WIS. STAT. § 704.45. The circuit court ruled that because the City of Cudahy did not issue or charge an inspection noncompliance fee, an abatement order, or any municipal citation, that Dahl “did not have a legal right to abate rent[.]” As a result, the tenancy was terminated and a Writ of Restitution was granted. This appeal follows.

On appeal, Dahl contends that the circuit court erred when it determined that Dahl did not have a right to abate rent when there was not a direct authorization from the City of Cudahy. According to Dahl, a tenant does not need to take any action in order to have a right to abatement. Dahl points to the language in WIS. STAT. § 704.07(4), which provides in relevant part that:

If the premises become untenable because of damage by fire, water, or other casualty or because of any condition hazardous to health, *or if there is a substantial violation of sub. (2) materially*

² I note that 65% of \$900 is \$585, not \$580.

affecting the health or safety of the tenant, the tenant may remove from the premises unless the landlord proceeds promptly to repair or rebuild or eliminate the health hazard or the substantial violation of sub. (2) materially affecting the health or safety of the tenant; or the tenant may remove if the inconvenience to the tenant by reason of the nature and period of repair, rebuilding, or elimination would impose undue hardship on the tenant. If the tenant remains in possession and the condition materially affects the health or safety of the tenant or substantially affects the use and occupancy of the premises, rent abates to the extent the tenant is deprived of the full normal use of the premises. This section does not authorize rent to be withheld in full, if the tenant remains in possession. If the tenant justifiably moves out under this subsection, the tenant is not liable for rent after the premises become untenable and the landlord must repay any rent paid in advance apportioned to the period after the premises become untenable. This subsection is inapplicable if the damage or condition is caused by negligence or improper use by the tenant.

(Emphasis added.) Dahl further contends that a tenant could abate rent on their own, or use a third party, such as Community Advocates, and that a City Authority was not required to take any action in order for a tenant to have the right to abate rent under the statute.

In response, Investor Trustee Services filed a letter with this court stating that it “takes no position” on the appeal of the circuit court’s decision. The letter further stated that Investor Trustee Services did not intend to file a response brief, and requested that the appeal proceed on Dahl’s brief alone.

After receiving Investor Trustee Services’ letter, this court issued an order stating that the case would be submitted on Dahl’s brief alone. This court advised Investor Trustee Services that the “[f]ailure to file a respondent’s brief tacitly concedes that the [circuit] court erred,” *see State ex rel. Blackdeer v. Township of Levis*, 176 Wis. 2d 252, 260, 500 N.W.2d 339 (Ct. App. 1993) (citation omitted), and that this allows us to assume that the respondent concedes the issues raised by the appellant. *See Charolais Breeding Ranches, Ltd. v. FPC Securities Corp.*, 90 Wis. 2d 97, 108-09, 279 N.W.2d 493 (Ct. App. 1979); *United Coop. v. Frontier FS Coop.*, 2007

WI App 197, ¶39, 304 Wis. 2d 750, 738 N.W.2d 578. This court further indicated that if anything in the order caused Investor Trustee Services to re-evaluate its decision not to file a respondent's brief, it could move for reconsideration of the order.

Investor Trustee Services has not moved for reconsideration. As a result, I construe Investor Trustee Services' letter as a concession that the circuit court erred in this case. *See United Coop.*, 304 Wis. 2d at 108-09. While there may be a counterargument to Dahl's argument, Investor Trustee Services has not made it, and this court will not abandon its role as a neutral arbiter to develop contrary arguments. *See State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (stating that a court "cannot serve as both advocate and judge").

Therefore, as requested by Dahl, I reverse the judgment granting the writ of restitution and remand to the circuit court to determine whether the amount abated by Dahl was proportional to the extent that Dahl lost his full normal use of the premises.

IT IS ORDERED that the judgment granting the writ of restitution is summarily reversed under WIS. STAT. RULE 809.21(1) and the cause is remanded for further proceedings consistent with this opinion.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals