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DISTRICT IV

January 11, 2024

To:

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Electronic Notice

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You are hereby notified that the Court has entered the following opinion and order:

2022AP861

Country View Mobile Home Community LLC v. Douglas Sutfin
(L.C. # 2022SC575)

Before Nashold, J.¹

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Douglas Sutfin appeals a judgment entered against him in an eviction action filed by Country View Mobile Home Community LLC (Country View). He challenges the circuit court's rulings related to punitive damages, WIS. STAT. § 100.20, and WIS. ADMIN. CODE § ATCP

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2021-22). All references to the Wisconsin Statutes are to the 2021-22 version.

134.07 (Oct. 2021).² I conclude that this case is appropriate for summary disposition, *see* WIS. STAT. RULE 809.21(1), and affirm the judgment.

Country View is the owner of a mobile home park in which Sutfin rents a mobile home unit. Country View brought an eviction action against Sutfin in small claims court, alleging that Sutfin breached his lease with Country View by failing to pay rent for 21 months, failing to maintain the premises (*i.e.*, committing “waste”), and failing to allow workers access to the premises to make repairs. Country View further alleged that Sutfin’s unit was unfit for human habitation, that the City of Fitchburg had ordered that the unit be vacated for health code and other ordinance violations, and that Sutfin refused to comply with the City’s order. Country View sought eviction and unpaid rent.

Sutfin counterclaimed, alleging two specific causes of action: (1) that Country View violated WIS. STAT. § 704.07(2) by failing to keep the premises in a reasonable state of repair, and (2) that Country View violated Sutfin’s right to quiet enjoyment of the premises. Sutfin requested “an award of emotional distress damages,” punitive damages for “intentional disregard of [Sutfin’s] rights,” and attorney fees.

Sutfin demanded a jury trial. Approximately a week before the scheduled trial, the parties filed proposed jury instructions and proposed special verdict questions. Pertinent here, Sutfin included a proposed jury instruction and special verdict question related to punitive

² All references to the Wisconsin Administrative Code Chapter ATCP 134 are to the October 2021 register.

damages upon a finding that Country View acted maliciously toward Sutfin or with an intentional disregard of Sutfin's rights.³

Country View filed an objection to Sutfin's proposed jury instructions and special verdict questions. Relevant here, Country View objected to any instruction or special verdict question related to punitive damages because Sutfin's counterclaims for violation of WIS. STAT. § 704.07 and breach of the right to quiet enjoyment were contract claims for which punitive damages are not available, and because any claims in tort would be barred by the economic loss doctrine. Country View also argued that the only remedy for a violation of § 704.07 is rent abatement and that the only remedy for a breach of the right to quiet enjoyment is to obtain an injunction of the breach or to leave the premises.

Two days before the scheduled trial, the circuit court held a hearing. At the hearing, Sutfin, through counsel, stated his intention to seek punitive damages and to introduce evidence and submit questions to the jury on that issue. In addition, Sutfin stated for the first time that he would be seeking double damages under WIS. STAT. § 100.20 for violation of WIS. ADMIN. CODE § ATCP 134.07. Section ATCP 134.07 sets forth certain requirements regarding a landlord's promises to repair. Relevant here, § 100.20 entitles any person suffering pecuniary loss as a result of a violation of § ATCP 134.07 to recover double damages plus reasonable attorney fees.

³ See WIS. STAT. § 895.043(3) (allowing punitive damages upon a showing that the party against whom punitive damages are sought "acted maliciously" toward, or with "intentional disregard of the rights" of, the party seeking punitive damages).

See § 100.20(5).⁴ In response, Country View argued that Sutfin failed to raise a claim under § 100.20 and § ATCP 134.07 in his answer or counterclaims, that Sutfin’s counterclaims alleged only two specific causes of action (violation of WIS. STAT. § 704.07 and breach of the right to quiet enjoyment), and that punitive damages were not available for these contract claims.

Sutfin countered that the answer and counterclaims need not specifically reference WIS. STAT. § 100.20 or WIS. ADMIN. CODE § ATCP 134.07 because, consistent with notice pleading requirements, Sutfin need only “plead[] the facts” and need not “plead legal remedies.” Sutfin further argued that, based on the evidence that would be presented at trial, the jury could find that Country View’s conduct was intentional or malicious and that the court should therefore submit the issue of punitive damages to the jury.

Ultimately, the circuit court deferred a decision on whether a special verdict would be submitted to the jury on these issues, informing the parties that they could submit additional briefing on the topics prior to trial. The following day, the parties submitted briefs reiterating their arguments as to whether the jury should be permitted to consider WIS. STAT. § 100.20, WIS. ADMIN. CODE § ATCP 134.07, or punitive damages. At no point did Sutfin move to amend his counterclaims to add a counterclaim under § 100.20 and § ATCP 134.07, nor did he submit a proposed jury instruction or special verdict question specifically addressing these provisions.

⁴ Double damages under WIS. STAT. § 100.20 are distinct from common law punitive damages. *See, e.g., Carlson & Erickson Builders, Inc. v. Lampert Yards, Inc.*, 190 Wis.2d 650, 660 n.9, 529 N.W.2d 905 (1995) (Our supreme court “has recognized ... that common-law punitive damages are ‘distinguishable from statutory multiple damages’ and ‘the two forms of damages must be treated separately.’” (quoted source omitted)).

The case proceeded to trial the following day.⁵ At the close of Country View’s case, Sutfin asked the circuit court to enter a “partial directed verdict with respect to a finding of liability under [WIS. STAT. §] 100.20 and [WIS. ADMIN. CODE §] ATCP 134.07.” Country View opposed the request, again arguing that Sutfin failed to allege a counterclaim under these provisions and instead brought counterclaims for violation of WIS. STAT. § 704.07(2) and breach of the right of quiet enjoyment, for which punitive damages were not available. The circuit court denied the motion for directed verdict and ruled that it would not instruct the jury on punitive damages or on § 100.20 and § ATCP 134.07.⁶ The court explained that “[t]he four corners of the answer and counterclaim nowhere mentions [§] 100.20,” and that although the answer did mention punitive damages, it did not allege a cause of action that would give rise to punitive damages.

Also, at the close of evidence and prior to jury instructions, the circuit court observed that, after hearing the evidence, the court would not have found that a claim under WIS. STAT. § 100.20 or punitive damages should have gone to the jury, had such a claim been properly raised. When Sutfin’s counsel responded that he “curtailed” his witnesses’ testimony based on the court’s prior ruling, the court requested an offer of proof as to what evidence would have been presented. After counsel’s response, the court stated that even with the offer of proof provided, the court would not have found that punitive damages or damages under § 100.20 should be submitted to the jury.

⁵ It is undisputed that Sutfin had abandoned his counterclaim for breach of the right to quiet enjoyment by the time of trial.

⁶ The circuit court did not specifically reference WIS. ADMIN. CODE § ATCP 134.07 in its ruling; however, as pertinent here, WIS. STAT. § 100.20 would only apply if there were a violation of § ATCP 134.07.

The jury found that Sutfin owed Country View \$8,250 in unpaid rent for a 15-month period. The jury further found that Sutfin did not commit waste. The jury also found that, for part of that 15-month period, Country View failed to maintain the mobile home unit or keep it in a reasonable state of repair, awarding Sutfin \$2,750 in rent abatement. The circuit court subsequently entered judgment on the jury's verdict, granting Country View a monetary award for unpaid rent in the amount of \$5,500 (\$8,250 minus \$2,750), and 30 days later, entering the judgment for eviction. At no point did Sutfin file any post-trial motions.

On appeal, Sutfin challenges the circuit court's rulings with respect to punitive damages, WIS. STAT. § 100.20, and WIS. ADMIN. CODE § ATCP 134.07.⁷ I construe Sutfin as challenging the court's ruling denying the motion for directed verdict with respect to § 100.20 and § ATCP 134.07, as well as the court's rulings denying a jury instruction and special verdict question with respect to these provisions and on punitive damages.⁸ Sutfin's arguments are

⁷ It appears that Sutfin sometimes equates double damages under WIS. STAT. § 100.20 with punitive damages under WIS. STAT. § 895.043(3). For example, the conclusion in his reply asks this court to "hold that Sutfin sufficiently ple[d] a violation of [§] 100.20 for which he could recover pecuniary and punitive damages, and remand for a new trial." Thus, it may be that Sutfin only challenges the circuit court's rulings with respect to § 100.20 and WIS. ADMIN. CODE § ATCP 134.07, and does not separately challenge the court's rulings with respect to punitive damages under § 895.043(3). However, at other points, Sutfin refers to § 895.043(3)'s standard for punitive damages, involving malicious conduct or intentional disregard of rights. I construe Sutfin's briefing in his favor so as to encompass challenges with respect to both types of damages.

⁸ Country View construes Sutfin as challenging the circuit court's ruling denying his motion for directed verdict; however, Sutfin responds that he does "not appeal from the denial of the motion for a directed verdict; he appeal[s] from the [c]ircuit [c]ourt's ruling that his pleadings did not allege a claim for relief under [WIS. STAT. §] 100.20 ... and [WIS. ADMIN. CODE §] ATCP 134.07." However, the court did not render its conclusion in a vacuum; rather, as is generally the case, the court addressed this issue in response to a motion or other request and arguments from the parties. Here, the court was responding to Sutfin's requests for a jury instruction and special verdict question related to punitive damages, and a motion for a directed verdict under § 100.20 and § ATCP 134.07.

(continued)

predicated on his contention that he was not required to specifically refer to § 100.20 or § ATCP 134.07 in his pleadings and that his pleadings sufficiently alleged facts with respect to these provisions and to punitive damages.

In response, Country View argues, among other things, that by failing to raise these issues in a motion after the verdict, Sutfin waived any challenge to the court's rulings.⁹ Country View cites several cases for this proposition. For example, in *Suchomel v. University of Wisconsin Hospital & Clinics*, the court of appeals explained, "The well-established law in Wisconsin is that 'the failure to include alleged errors in the motions after verdict constitutes a waiver of the errors.'" *Suchomel v. University of Wis. Hosp. & Clinics*, 2005 WI App 234, ¶10, 288 Wis. 2d 188, 708 N.W.2d 13 (quoting *Ford Motor Co. v. Lyons*, 137 Wis. 2d 397, 417, 405 N.W.2d 354 (Ct. App. 1987)). The *Suchomel* court further noted, "'This rule applies where a proper objection is made during the course of trial, but the error is not included in the motions after verdict.'" *Id.* (quoting *Ford*, 137 Wis. 2d at 417). Thus, the court rejected the appellant's argument that "he preserved the objection by raising it during the jury instruction conference as required by WIS. STAT. § 805.13(3)," and instead concluded that because the appellant "did not preserve his objection to the ... [jury] instruction in a motion after verdict, he has waived his

Moreover, although Sutfin suggests that his appeal does not challenge the denial of his motion for directed verdict, he proceeds to argue that "[t]he evidence in the record would have required the [c]ircuit [c]ourt to enter a directed verdict." Thus, I construe Sutfin to be challenging all of the court's rulings related to punitive damages, WIS. STAT. § 100.20, and WIS. ADMIN. CODE § ATCP 134.07.

⁹ In discussing this issue, the parties and the case law cited in this opinion use the term "waiver." This opinion likewise uses the term "waiver," without addressing whether the term "forfeiture" might be more apt. See *State v. Ndina*, 2009 WI 21, ¶29, 315 Wis. 2d 653, 761 N.W.2d 612 ("Although cases sometimes use the words 'forfeiture' and 'waiver' interchangeably, the two words embody very different legal concepts. 'Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right.'" (quoted source omitted)). The result in this case would be the same under a forfeiture analysis.

right to object to it on appeal.” *Suchomel*, 288 Wis. 2d 188, ¶11; *see also* Michael S. Heffernan, *Appellate Practice and Procedure in Wisconsin*, § 3.5 (8th ed. Jan. 2020) (“In civil cases, errors that might be corrected by a new trial, except challenges to the sufficiency of the evidence, must be raised by posttrial motion as a prerequisite for appeal even if they were previously raised at trial.” (citing *J.K. v. Peters*, 2011 WI App 149, ¶25, 337 Wis. 2d 504, 808 N.W.2d 141)).

This conclusion was reiterated in *Peters*. *Peters*, 337 Wis. 2d 504, ¶¶25-27. The *Peters* court also explained that the reasons for requiring alleged errors to be raised in motions after verdict is so that circuit courts are “given an opportunity to correct [errors] and avoid costly and time consuming appeals” and to elaborate upon and explain their rulings. *Id.*, ¶27.

However, the *Peters* court further observed that “[we may] review a waived claim when doing so is in the interest of justice,” but that “such action is not to be taken by us unless we are convinced, on the record as a whole, that there has been a probable miscarriage of justice.” *Id.*, ¶29 (quoting *Ford*, 137 Wis. 2d at 418). “A probable miscarriage of justice exists only if the evidence and law are such that the defendant[] probably should have won and therefore deserve[s] another chance.” *Id.*, ¶29 (alterations in original) (quoting *Ford*, 137 Wis. 2d at 422).

Sutfin does not dispute that he failed to file a post-trial motion in circuit court, nor does he engage with the case law on this issue. Instead, he argues that whether to apply the waiver rule is discretionary and that the issues he is raising “were not trial issues, and [that] even if they were, they were purely legal rulings made based on the four corners of the pleadings, not on events or testimony at trial, and so this [c]ourt has authority to rule on those fully-briefed issues.”

These arguments are undeveloped and thus need not be considered, particularly given Sutfin's failure to apply pertinent case law. See *State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (we need not address undeveloped arguments). Moreover, as in *Peters*, a review of the evidence of record does not reveal that a miscarriage of justice occurred or that Sutfin “probably should have won.” *Peters*, 337 Wis. 2d 504, ¶29 (quoted source omitted). Accordingly, I conclude that Sutfin has waived these issues by failing to raise them in a post-trial motion.

Finally, Country View requests an award of costs and attorney fees incurred in this appeal pursuant to WIS. STAT. § 809.25 on the ground that Sutfin's appeal is frivolous. Whether an appeal is frivolous is a question of law. *Howell v. Denomie*, 2005 WI 81, ¶9, 282 Wis. 2d 130, 698 N.W.2d 621. To award costs and attorney fees under § 809.25, “an appellate court must conclude that the entire appeal is frivolous.” *Id.* Sanctions for a frivolous appeal will be imposed if the court concludes that the “party or party's attorney knew, or should have known, that the appeal ... [had no] reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law.” *Id.* (alterations in original) (quoting § 809.25(3)(c)2.). When determining whether an appeal is frivolous, appellate courts “look[] to what a reasonable party or attorney knew or should have known under the same or similar circumstances.” *Howell*, 282 Wis. 2d 130, ¶9. “[A]ll doubts about whether an appeal is frivolous must be resolved in favor of the appellant.” *Larson v. Burmaster*, 2006 WI App 142, ¶48, 295 Wis. 2d 333, 720 N.W.2d 134.

In its motion for sanctions, Country View focuses almost exclusively on the circuit court's ruling denying Sutfin's motion for a directed verdict for a violation under WIS. STAT. § 100.20 and WIS. ADMIN. CODE § ATCP 134.07. Country View only briefly addresses in a

footnote the court's decision not to instruct the jury or provide special verdict questions with respect to these provisions or on punitive damages. Country View argues that the appeal is frivolous because Sutfin clearly waived his appellate arguments by failing to raise them in a post-trial motion and because there is no reasonable basis or good faith argument that the court's rulings were in error.

As discussed in this opinion, I agree that Sutfin waived the issues he raises on appeal by failing to raise them in a post-trial motion. Thus, this opinion does not address the parties' other arguments. For purposes of addressing Country View's motion for sanctions, however, I note that none of Sutfin's arguments are persuasive. That said, I am not convinced that they are made in bad faith or without any basis in law, particularly given that any doubts as to whether an appeal is frivolous must be resolved in favor of the appellant. Accordingly, I conclude that Sutfin's appeal is not wholly frivolous, and I deny Country View's motion.

IT IS ORDERED that the circuit court's judgment is summarily affirmed pursuant to WIS. STAT. RULE 809.21(1).

IT IS FURTHER ORDERED that Country View's motion for costs and attorney fees pursuant to WIS. STAT. § 809.25 is denied.

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

Samuel A. Christensen
Clerk of Court of Appeals