

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 22, 2008

David R. Schanker
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. 2008AP455

Cir. Ct. No. 2007SC1501

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

ALAN SCHMIDT,

PLAINTIFF-APPELLANT,

V.

MARY WEGNER,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Outagamie County: MICHAEL W. GAGE, Judge. *Reversed and cause remanded with directions.*

¶1 HOOVER, P.J.¹ Alan Schmidt appeals a judgment dismissing his claim for damages against his previous tenant, Mary Wegner. We conclude 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 2005-06 version unless otherwise noted.

trial court erroneously shifted the burden to Schmidt to prove that his efforts to mitigate damages were reasonable. There is no evidence in the record to suggest Schmidt's efforts were not reasonable. We therefore reverse and remand for reinstatement of the damages previously awarded to Schmidt.

BACKGROUND

¶2 Wegner entered a written lease agreement with Schmidt for a one-bedroom home. The lease term ran from June 1, 2006 to May 31, 2007. The rent was \$600 per month. Wegner sent a letter to Schmidt on October 31, 2006, indicating she planned to vacate the rental property on December 31, 2006. Schmidt then sent Wegner a letter stating there were no provisions in the lease for early termination, but she had the right to sublet or find a person willing to enter into a new lease.

¶3 Wegner did not respond to Schmidt's letter until approximately December 15, when she contacted Schmidt for a rental application. A prospective tenant filled out the application. The prospective tenant had recently gained employment that afforded an income of \$600 a month. She also stated she received \$1,000 per month in child support. Schmidt checked the prospective tenant's history of evictions on the Wisconsin Circuit Court Access page. He found she had an outstanding judgment for eviction with a monetary component that remained unpaid. Schmidt denied her application. After Wegner vacated the property, Schmidt placed a "for rent" sign in the front yard and ran newspaper advertisements. The property was eventually rented in July 2007 for \$560 a month. Schmidt sought damages for unpaid rent as well as advertising costs.

¶4 At trial, Schmidt testified that he managed a number of properties and had fifty to sixty tenants. He stated that in his experience child support was

not a reliable source of income and was therefore not considered in determining an applicant's income. He stated he denied the prospective tenant's application due to her small income and her eviction history. In a written decision, the court dismissed Schmidt's petition for damages, finding:

[Schmidt] did not make inquiry of [the prospective tenant] concerning the reliability or regularity of these [child support] payments to her, nor apparently did he investigate payment history in some other way.

....

... Mr. Schmidt did not report any inquiry of either [the prospective tenant] or further inquiry into the court record concerning the circumstances of the eviction action.

....

... No inquiry was made of the circumstances, such as whether by default, whether with notice, whether there was practical ability to raise a defense, or whether the amount at issue might indicate practical reasons not to contest.

....

Clearly, the Court must find that reasonable efforts require at least some inquiry beyond the face of the application and the CCAP disclosure of an eviction judgment... Mr. Schmidt produced no evidence that normally he does not question a prospective tenant about his or her ability to pay. There is no disclosure of "local rental practice" in regard to the initiatives taken here, except the presumption that Mr. Schmidt is conscientious about what he does....

Under the circumstances, some inquiry of the reliability of support payments to the household would seem required as a "reasonable effort." Similarly, some inquiry of the circumstances of the CCAP report of an eviction judgment would seem to be required as part of the landlord's duty to make reasonable efforts and thereby mitigate his damages.

DISCUSSION

¶5 WISCONSIN STAT. § 704.29(2) reduces a landlord's recovery by "net rent obtainable by reasonable efforts to re[-]rent the premises." Reasonable efforts are "those steps that the landlord would have taken to rent the premises if they had

been vacated in due course, provided that those steps are in accordance with local rental practice for similar properties.” *Id.* “The landlord must allege and prove that the landlord has made efforts to comply with this section. The tenant has the burden of proving that the efforts of the landlord were not reasonable [or] that the landlord’s refusal of any offer to rent the premises ... was not reasonable. WIS. STAT. § 704.29(3).

¶6 Whether facts satisfy the legal standard of reasonableness presents a question of law which we decide independently. *See Langreck v. Wisconsin Lawyers Mut. Ins. Co.*, 226 Wis. 2d 520, 524, 594 N.W.2d 818 (Ct. App. 1999). However, “whether a course of action is reasonable can be intertwined with factual findings surrounding the conclusion, and in that case we give weight to the fact finder’s decision, but not controlling weight.” *Id.*

¶7 Schmidt testified to the efforts he took to re-rent the property. The burden was then on Wegner to show that Schmidt’s efforts were unreasonable. More precisely, she had to prove that the steps Schmidt took were not those that he would have taken to rent the premises if they had been vacated in due course, or that the steps taken were not in accordance with the local rental practice for similar properties. *See* WIS. STAT. § 704.29(2). Wegner provided no testimony or evidence regarding other steps Schmidt would ordinarily take that were omitted here² and no proof concerning local rental practices. As noted by the trial court,

² Wegner argues on appeal that Schmidt did not take the same steps as he would have if she had vacated in due course because he did not advertise prior to her vacating the premises. However, Schmidt stated that tenants often decide not to terminate their lease early after they learn they will be responsible for the rent and he received no indication that she still planned to vacate the premises until December 18 when he received a rental application from the prospective tenant. Further, he testified that he ran the ads in the same manner as he did for all his other properties, on Wednesdays and Sundays.

“There is no disclosure of ‘local rental practice’ in regard to the initiatives taken here, except the presumption that Mr. Schmidt is conscientious about what he does....” There was no evidence that local rental practices required Schmidt to further inquire into the reliability of the proposed tenant’s child support payments or seek details beyond those provided on CCAP regarding the applicant’s previous eviction action. The trial court erroneously shifted the burden from Wegner to Schmidt to prove that his efforts were in fact reasonable.³ We therefore instruct the trial court to reinstate the damages previously awarded to Schmidt.

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

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

³ Wegner also argues that we should affirm on alternate grounds because Schmidt’s efforts to re-rent were unreasonable due to the timing of his efforts. Specifically, Schmidt did not advertise the property or put up a sign until after she had vacated the premises and he admitted that if she had been vacating in due course, he would have begun advertising approximately thirty days prior to her move-out date. However, Schmidt sent a letter to Wegner, dated November 5, explaining there was no provision in her lease for early termination and asking if she wanted a sign placed in her yard. She did not respond to that letter and did not contact Schmidt again until December 15, when she requested a rental application. Schmidt stated that she was not in breach at the time she sent him the letter and “more often than not, some tenants will decide not to move out once they realize that they – they are obligated for – for the contract.”

