COURT OF APPEALS
DECISION
DATED AND RELEASED

January 25, 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(1), STATS.

NOTICE

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No. 94-2564

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

EAGLE PROPERTY MANAGEMENT,

Plaintiff-Respondent,

v.

GLORIA SMALL,

Defendant-Third Party Plaintiff-Appellant,

DOUGLAS D. SMILJANIC,

Third Party Defendant-Respondent.

APPEAL from an order of the circuit court for Dane County: ANGELA B. BARTELL, Judge. *Affirmed*.

Before Eich, C.J., Gartzke, P.J., and Sundby, J.

PER CURIAM. Gloria Small appeals from an order granting an eviction claim against her and dismissing her counterclaims. We affirm.[1]

Summary judgment methodology is well established and need not be repeated. *See, e.g.*, ***Grams v. Boss***, 97 Wis.2d 332, 338-39, 294 N.W.2d 473, 476-77 (1980). Eagle Property Management and Douglas Smiljanic[2] ("Smiljanic") commenced this small claims action in April 1994 for eviction of Small. The complaint alleged that Small's tenancy was lawfully terminated as of March 31, 1994, and that she was holding over. There is no dispute that the complaint states a claim for eviction.

Small answered and counterclaimed against the plaintiffs. So far as is relevant to this appeal, Small asserted as an affirmative defense that her eviction was illegal housing discrimination under § 101.22(2)(f), STATS., because it was based on her lawful source of income. That income, according to Small, is her participation in the federal "section 8" housing subsidy program. Smiljanic argues that her answer fails to rebut the eviction complaint because such a defense may not be raised in an eviction action. We agree.

The chapter relating to landlords and tenants does not describe what defenses are available in an eviction action. *See* §§ 704.23 to 704.27, STATS. The statutes governing eviction actions do not describe or limit the available defenses. *See* §§ 799.40 to 799.45, STATS. However, the supreme court has expressly limited the available defenses, based on common law, and discrimination is not among them.[3] Small argues that judicial creation of a discrimination defense would be consistent with the already existing defenses. In view of the supreme court's role in developing the common law of this state,

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[1] The chief judge granted Small's motion for a three-judge panel.

[2] According to the order appealed from, the circuit court granted a motion to amend the complaint to include Smiljanic as a plaintiff, and to consider Small's counterclaims against Eagle as also being against Smiljanic.

[3] In ***Scalzo v. Anderson***, 87 Wis.2d 834, 847-48, 275 N.W.2d 894, 899 (1979), the court recited the available defenses as follows: a landlord-tenant relationship exists between the parties; the tenant is holding over; proper notice was given; the landlord has proper title to the premises; or the landlord is attempting retaliatory eviction.

these arguments are more properly directed to that court. However, we briefly address the major ones.

Small argues that failure to allow discrimination as an eviction defense defeats the important public policies underlying discrimination law and makes the courts enforcers of illegal housing discrimination. These arguments assume relief from discrimination cannot be obtained if it is not available in the eviction action. However, as Small acknowledges, a tenant who commences a separate discrimination action may seek injunctive relief.[4] Small offers no reason to believe such relief could not include a prohibition against eviction. Small argues that availability of such injunctive relief would depend on "the financial, intellectual and physical abilities and resources of the tenant to get the relief either pro se or otherwise." However, this is true regardless of which method a tenant uses to raise the issue. While the procedures of small claims court may be less daunting, the complexities of substantive discrimination law and injunctive relief will be the same, regardless of the forum.

Small also argues that judicial economy is frustrated by forcing tenants to commence separate discrimination proceedings. This is not necessarily so. It is not clear that the eviction and discrimination proceedings would have significant overlap.

In addition to arguing for judicial creation of a discrimination defense, Small argues that because the enactment of § 101.22, STATS., occurred

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[4] If the tenant presents her claim through the administrative process of the Department of Industry, Labor and Human Relations, the department, under § 101.22(6)(d), STATS.,

> may file a petition in the circuit court ... seeking a temporary injunction or restraining order against the respondent to prevent the respondent from performing an act that would tend to render ineffectual an order that the department may enter with respect to the complaint, pending final determination of proceedings under this section.

If the tenant presents her claim by civil action, the court "may issue a permanent or temporary injunction or restraining order to assure the rights granted by this section." Section 101.22(6m)(c).

after the supreme court's most recent enumeration of the eviction defenses, the statute itself creates a new defense. She relies on that part of § 101.22(2)(f), STATS., which provides that it "is unlawful for any person to discriminate" by "causing the eviction of a tenant from rental housing." If a discriminatory eviction is unlawful, Small argues, then surely the legislature intended that tenants be empowered to halt such evictions.

We reject the argument. If a statute is not ambiguous, we give the statute its obvious and plain meaning. ***Bindrim v. B. & J. Ins. Agency***, 190 Wis.2d 525, 534, 527 N.W.2d 320, 323 (1995). This statute is not ambiguous. The language of § 101.22, STATS., makes no reference to eviction actions. When creating § 101.22, the legislature did not amend ch. 799, STATS., with regard to evictions. This result is not contrary to the legislature's intent to prevent discriminatory eviction because, as discussed above, the tenant may allege discrimination and seek injunctive relief in a separate proceeding under § 101.22.

Small also argues that she may raise the discrimination defense under § 704.45(1), STATS., which provides in relevant part:

> [A] landlord in a residential tenancy may not ... bring an action for possession of the premises ... if there is a preponderance of evidence that the action ... would not occur but for the landlord's retaliation against the tenant for doing any of the following:
>
> ....
>
> (c) Exercising a legal right relating to residential tenancies.

Small argues that by continuing to participate in the federal "section 8" housing subsidy program, she was "exercising a legal right relating to residential tenancies." We assume, without deciding, that Small was exercising such a right. However, "retaliation against the tenant" suggests that the landlord is acting vengefully toward the tenant in response to some action by the tenant which has harmed the landlord.[5] Therefore, for Small to be able to

[5] "Retaliate" is defined as "to return the like for : repay or requite in kind (as an injury)"

raise this defense, there must be some basis on which to conclude that her participation in the section 8 program was harmful to the landlord, something which could provoke a vengeful reaction. Small does not tell us what that basis might be. While her answer does allege facts from which it might be inferred that Smiljanic sought to cease participation in the section 8 program, nothing about that inference or those facts suggests his intent was to take vengeful action against Small.[6]

Therefore, we conclude that Small's answer does not state a defense to the eviction complaint. Small's answer also presented these same issues as counterclaims. It is not clear whether she continues to argue that she may do so. If she does, we agree with the trial court's conclusion that she may not. *See* §§ 799.02(2) and 799.43, STATS.; ***Scalzo v. Anderson***, 87 Wis.2d 834, 848-49, 275 N.W.2d 894, 899 (1979). Because our decision on these issues resolves the appeal, we do not address other issues argued.

By the Court.—Order affirmed.

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

(..continued)
and "to put or inflict in return." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1938 (1976). The dictionary lists "retaliate" as a synonym of "reciprocate," and states that retaliation usually "implies a paying back in exact kind, often vengefully." ***Id.*** at 1895.

[6] Indeed, Small's answer does not even allege that the eviction was in retaliation for her exercise of a right to participate in the section 8 program. Rather, her sixteenth affirmative defense asserts that the eviction was in retaliation for "assertion of her right to quiet enjoyment." We have some doubt about whether Small may properly raise a new defense to summary judgment in trial court and appellate briefs. *Cf.* ***C.L. v. Olson***, 143 Wis.2d 701, 720-21 n.13, 422 N.W.2d 614, 621 (1988) (plaintiff may not make new allegations in summary judgment affidavit).