**COURT OF APPEALS
DECISION
DATED AND FILED**

October 31, 2000

**Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin**

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.

No. 00-0896-FT

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

MARY LOU MIENTKE,

PLAINTIFF-APPELLANT,

V.

MARC A. DENZIN, D/B/A DENZ INVESTMENTS, LLC,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Marathon County: RAYMOND THUMS, Judge. *Affirmed and cause remanded with directions.*

¶1 HOOVER, P.J.[1] Mary Lou Mientke appeals a small claims judgment.[2] She claims that the trial court erred by requiring her to prove by clear

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a). All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted. This is an expedited appeal under WIS. STAT. RULE 809.17.

[2] Mientke appeals the entire judgment, which she asserts denied her all claims for relief.

and convincing evidence the date her former landlord, Mark Denzin, had actual knowledge that she had vacated the premises, for purposes of providing her with a twenty-one-day security deposit withholding notice. Mientke further contends that she was required only to prove when Denzin should have known she had surrendered the premise, rather than actual knowledge of surrender. She also claims that the security deposit withholding notice contained intentional misrepresentations or falsifications, subjecting Denzin to double damages and reasonable attorney fees. Finally, Mientke claims that she is entitled to have returned earnest money she paid to Denzin.

¶2 A review of the record demonstrates that the trial court granted Mientke judgment for the earnest money's return.[3] The matter is therefore remanded with directions to correct the written judgment to reflect the award of $350 earnest money and costs to Mientke. Mientke's other contentions are without merit and the judgment is affirmed in all other respects.

FACTS

¶3 On May 1, 1999, the parties entered into a month-to-month lease at which time Mientke paid a $500 security deposit. The lease originally called for a monthly rental payment of $600. Mientke, however, expressed an interest in purchasing the rental property and, on May 14, the parties entered into a purchase agreement that reduced Mientke's rent to $500 a month. Under this agreement, she also paid $350 earnest money. On July 8, Mientke and Denzin entered into an

[3] A judgment is granted when given orally in open court on the record. *See* WIS. STAT. § 806.06(1)(d).

amended offer to purchase that contained what Mientke describes as an "indefinite financing contingency."

¶4 On July 30, Mientke informed Denzin that she was unable to obtain financing for the real estate purchase. Denzin told Mientke "to pack up and get out of his house."

¶5 Denzin was in the apartment on August 6, 7 and 9. Mientke had already begun packing by those dates. She vacated the premises on August 10.[4] Thirty-one days thereafter, on September 10, Mientke received a security deposit withholding notice from Denzin. He testified that he first had actual notice on August 19 that Mientke had surrendered the property.

ISSUES

¶6 Mientke frames the issues as follows:

> 1. Is clear and convincing evidence of a landlord's actual acceptance of or notice of surrender of a premises necessary to establish a violation of the Wisconsin Administrative Code § ATCP 134.06(2), which requires a landlord to provide a notice of withholding a security deposit within 21 days after the landlord learns that a tenant vacated a rental residence?
>
> 2. May a landlord withhold amounts from a former tenant's security deposit for normal cleaning costs, lawn mowing, late fees, utility charges not owed by the landlord, and other items specifically excluded by the Wisconsin Administrative Code § ATCP 134.06(3) without violating § ATCP 134.06(4), which prohibits a landlord from intentionally misrepresenting or falsifying withholding claims?

[4] It was disputed whether Denzin was at the premises on that date. The court did not make an express finding in this regard.

> 3. Is a prospective purchaser of a property entitled to return of earnest money, if the Offer to Purchase is void because the financing contingency is indefinite?

In addition to the issues Mientke specifically identifies, she also implicitly argues that the trial court erred by requiring her to prove the date by which Denzin had actual notice that Mientke had vacated the premises. She claims on appeal that surrender occurs when the landlord should have been aware that the tenant has vacated the premises, thus triggering the duty to provide the tenant with a notice of security deposit withholding within twenty-one days.

STANDARD OF REVIEW

¶7 The trial court's factual findings are reviewed under a clearly erroneous standard, and this court will give due regard to that court's ability to assess witness credibility. WIS. STAT. § 805.17(2). A court's factual findings will be upheld as long as they are supported by any credible evidence or reasonable inferences that can be drawn therefrom. *See* ***In re Estate of Cavanaugh v. Andrade***, 202 Wis. 2d 290, 306, 550 N.W.2d 103 (1996).

¶8 "When interpreting an administrative regulation, we generally use the same rules of construction and interpretation as applicable to statutes." ***State v. Busch***, 217 Wis. 2d 429, 441, 576 N.W.2d 904 (1998).

ANALYSIS

A. WIS. ADMIN. CODE § ATCP 134.06, Burden of Proof and Actual Notice

¶9 WISCONSIN ADMIN. CODE § ATCP 134.06 governs the withholding and return of security deposits. WISCONSIN ADMIN. CODE § ATCP 134.06(2) provides that within twenty-one days after a tenant surrenders the rental premises,

the landlord must return the full amount of the deposit less any amounts properly withheld under WIS. ADMIN. CODE § ATCP 134.06(3)(a). WISCONSIN ADMIN. CODE § ATCP 134.06(4)(a) requires the landlord to "describe each item of physical damages or other claim made against the security deposit, and the amount withheld as reasonable compensation for each item or claim."

¶10 At the conclusion of the evidence, the trial court held that there was "no clear and convincing evidence" showing when Denzin received actual notice that Mientke had vacated. Mientke asserts that WIS. ADMIN. CODE § ATCP 134.06 does not impose the clear and convincing standard and, therefore, the court "should have looked to the preponderance of credible evidence as the appropriate standard."

¶11 Mientke also contends that she was not required to prove that Denzin had actual notice that she had vacated. Rather, she asserts, it was sufficient to show that Denzin should have been aware that Mientke had vacated. This is because "[t]he public policy and intent to equal the bargaining field between landlords and tenants will be eviscerated[] if a landlord is allowed to declare when he or she accepts surrender of a premises and thus is allowed to set the triggering date of the 21 day notice requirement." Mientke also relies upon an attorney general's opinion[5] for the proposition that rental premises are surrendered under WIS. ADMIN. CODE § ATCP 134.06(2) when a tenant physically vacates the premises and when the landlord knows or has reason to know that fact.

¶12 Mientke did not draw the trial court's attention to her contention that it applied an incorrect burden of proof to the issue of when Denzin had notice she

---

[5] 80 Op. Att'y Gen. 86 (1991).

had vacated the premises. While an appellate court may, in a proper case, consider new issues for the first time on appeal, *see* ***State ex rel. GMC v. City of Oak Creek***, 49 Wis. 2d 299, 319, 182 N.W.2d 481 (1971), generally, the province of this court is to correct trial court errors. Here, the trial court was not given an opportunity to consider Mientke's argument and either correct itself or make a ruling that this court could then review. *See* ***Hillman v. Columbia County***, 164 Wis. 2d 376, 396, 474 N.W.2d 913 (Ct. App. 1991). This factor is particularly significant in this case because the trial court may have made the same finding under the preponderance burden.[6] Another reason for deciding only those issues the trial court considered is that this court would otherwise be deprived of the informed thinking of the trial judge on the matter. *See* ***Terpstra v. Soiltest, Inc.***, 63 Wis. 2d 585, 593, 218 N.W.2d 129 (1974). This court therefore declines to consider this issue. *See* ***id.***

¶13 Similarly, Mientke never alerted the trial court to her appellate contention that the issue was not when Denzin had actual notice, but when he should have known that Mientke had vacated. The supplemental trial brief Mientke submitted to the court focused on the evidence that she asserted proved that Denzin knew she had vacated by a certain date. The trial brief did not suggest, let alone address, the specific argument raised on appeal. Indeed, when the court expressly indicated that the issue was when Denzin actually knew of the vacation, Mientke agreed.[7]

---

[6] Indeed, it appears from the record that the trial court may have implicitly found that Mientke merely proved that Denzin had reason to believe Mientke was in the process of moving, not that she had vacated on the dates she claims Denzin had constructive notice.

[7] The following colloquy occurred:

(continued)

B. WISCONSIN ADMIN. CODE § ATCP 134.06(4)(b), Intentional Misrepresentation

¶14 WISCONSIN ADMIN. CODE § ATCP 134.06(3)(a) identifies the items that landlords may withhold from a tenant's security deposit.[8] WISCONSIN ADMIN. CODE § ATCP 134.06(4)(b) prohibits landlords from intentionally misrepresenting or falsifying any claim against a security deposit.[9] Mientke argues that withholding a part of the security deposit for items not authorized under § ATCP

> THE COURT: Well, but there has to be actual notice to the landlord. The question is when he had actual notice.
>
> [COUNSEL]: That's correct.
>
> ….
>
> THE COURT: … it's a question of when he gets actual notice.
>
> [COUNSEL]: That's correct.

[8] WISCONSIN ADMIN. CODE § ATCP 134.06(3)(a) provides:

> A landlord may withhold from a tenant's security deposit only for the following:
>
> 1. Tenant damage, waste or neglect of the premises.
> 2. Unpaid rent for which the tenant is legally responsible, subject to s. 704.29, Stats.
> 3. Payment which the tenant owes under the rental agreement for utility services provided by the landlord but not included in the rent.
> 4. Payment which the tenant owes for direct utility service provided by a government-owned utility, to the extent that the landlord becomes liable for the tenant's nonpayment.
> 5. Unpaid mobile home parking fees which a local unit of government has assessed against the tenant under s. 66.058(3), Stats., to the extent that the landlord becomes liable for the tenant's nonpayment.
> 6. Other reasons authorized in the rental agreement according to par. (b).
> 7.

[9] WISCONSIN ADMIN. CODE § ATCP 134.06(4)(b) provides: "No landlord may intentionally misrepresent or falsify any claim against a security deposit, including the cost of repairs or withhold any portion of a security deposit pursuant to an intentionally falsified claim."

134.06(3)(a) constitutes an intentional misrepresentation in or falsification of the security deposit withholding notice. Her analysis starts with the proposition that:

> If a landlord is specifically prohibited from withholding certain charges and withholds them anyway, he is intentionally misrepresenting or falsifying the withholding notice in violation of the Wisconsin Administrative Code § ATCP 134,06(4)(b), which mandates that no landlord may intentionally misrepresent or falsify any claim against a security deposit, including the cost of repairs, or withhold any portion of the security deposit pursuant to an intentionally falsified claim.

Mientke next relies on ***Pierce v. Norwick***, 202 Wis. 2d 587, 550 N.W.2d 451 (Ct. App. 1996), for the proposition that "[i]ntentional misrepresentation of a withholding pursuant to § ATCP 134.06(4)(b) was implicitly recognized by the Court of Appeals." Finally, she argues why the security deposit withholding notice contained certain claims not authorized by § ATCP 134.06(3)(a). This court concludes that Mientke's contention is without merit.

¶15 Mientke offers no authority for a proposition that is at odds with the commonly understood meaning of the phrase "intentionally misrepresenting or falsifying." The trial court consistently held, in the face of Mientke's relentless insistence, that Mientke was confusing a failure of proof with misrepresentation and falsification (sometimes referred to during the proceedings as "fraud") and that such failure is not the equivalent of fraud or misrepresentation.[10] This court

---

[10] Some of Mientke's arguments were extreme. For example, she argued that because Denzin "corrected" a charge against her security deposit in an amended notice by lowering it, the original charge was therefore a misrepresentation. As another example:

> [COUNSEL]: … And then when he comes to the deposition with a new revised withholding and has all of these claims on it, knowing full well that I have been asking for proof that those charges were there even before filing the suit, that is falsification.

(continued)

agrees. It does not logically follow that, for example, because WIS. ADMIN. CODE § ATCP 134.06(3)(a) may not authorize charges for lawn mowing, the charges were themselves false, i.e., that they were not incurred. Further, Mientke never proved that Denzin was aware of the limitations under § ATCP 134.06(3)(a). At best, she established that Denzin *tries* to be fully familiar with the code. This does not, by itself, support a reasonable inference that Denzin was aware of the precise restrictions of § ATCP 134.06(3)(a). She offers no authority for her tacit contention that misapprehension, misapplication or ignorance of the law concerning what may be charged against the security deposit constitutes intentional misrepresentation or falsification. Finally, and dispositively, to the extent that Mientke identifies arguably false charges,[11] the court rejected her interpretation of the evidence.

¶16 The trial court found that Denzin's conduct was not fraudulent. At the close of the first day of trial, after Denzin had testified[12] and been cross-examined at length, the court stated that, "I am not going to find [Denzin] did it

---

> THE COURT: No, that's failure to prove. … Whether or not he can prove his case to you doesn't make [it] fraudulent. People make all kinds of claims.
>
> [COUNSEL]: What is fraudulent is representing that she still owes these charges, and what I am saying is he should know full well that these charges are not there. He is a landlord, he has been doing this for 10 years.
>
> THE COURT: But that takes another stretch. That takes another stretch if he would do this intentionally.

[11] Mientke claims that Denzin withheld utility charges that were not assessed to him but were transferred to Mientke's new address. She further alleges that Denzin withheld a late fee for June rent that was paid on time.

[12] Denzin gave brief, mostly cumulative testimony at the end of the second day of trial as well.

fraudulently …." It is true that the court then made a reference to not knowing "what in the heck [fraudulent] means …." Placed, however, in the context of the numerous exchanges between the court and Mientke's counsel regarding their respective views of what would constitute fraud under the code, this court is satisfied that the trial court was indulging in facetiousness. Mientke has not satisfied this court that the trial court's finding, dependent as it is upon its credibility assessment, is clearly erroneous. Therefore, her claim under WIS. ADMIN. CODE § ATCP 134.06(4)(b) fails.[13]

EARNEST MONEY

¶17 Mientke argues that she is entitled to have returned the earnest money she gave to Denzin in connection with the purchase agreement. While she advances a legal argument based upon the validity of the agreement, it appears from the trial transcript that the trial court agreed with Mientke. Early in the proceedings, the court expressly ruled that Mientke was entitled to receive her $350 earnest money. When the subject was later revisited, the court confirmed its ruling, stating, "I have ruled on it. … She's got her $350 coming back."[14]

¶18 The judgment does not reflect the trial court's earnest money ruling. The matter is therefore remanded for the purpose of correcting the judgment to reflect the award of $350 earnest money and costs to Mientke.

[13] In addition, Mientke's claim for attorney fees under WIS. ADMIN. CODE § ATCP 134.06 fails because the trial court made a fact finding that the amount of fees Mientke had incurred were unreasonable, stating that the amount charged indicated "over-lawyering."

[14] On the second day of trial, almost two months after the first day, the trial court indicated that it was not going to return the earnest money to Mientke because "she's going to have to sue for it." Apparently, in the hiatus the court forgot that Mientke included this claim in her complaint.

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

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