COURT OF APPEALS
DECISION
DATED AND FILED

November 15, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2970 **Cir. Ct. No. 2011SC3476**

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

WILLIAM X. KEALEY,

PLAINTIFF-RESPONDENT,

V.

BRAYDEN HOLMQUIST,

DEFENDANT-APPELLANT,

KERRAH HOLMQUIST,

DEFENDANT.

APPEAL from a judgment of the circuit court for Rock County: JAMES E. WELKER, Judge. *Affirmed*.

¶1 BLANCHARD, J.[1] This court is presented with two issues in this tenants' appeal, brought pro se, from a judgment of eviction awarded to their landlord, William Kealey. The tenants, Brayden and Kerrah Holmquist, state the issues as follows:

> (1) "Did the court … err in leading Kealey's examination of his witness, … and [in] allowing [the witness] to take over as speaker for Kealey in the hearing?"
>
> (2) "Did the court err by not recognizing [the tenants'] rights under the Wisconsin Landlord/Tenant Protection Act and Wisconsin Statute 846.35(2)(a)2.," a statute (now repealed) that addressed a tenant's right to withhold rent equal to the security deposit when the rented property is sold at foreclosure?

This court is not persuaded by the Holmquists' limited and undeveloped arguments on each issue. Accordingly, the judgment is affirmed.

BACKGROUND

¶2 In November 2011, Kealey filed a small claims action for eviction and a money judgment against the Holmquists. Kealey alleged, in part, that the Holmquists failed to pay full rent on a residential unit for the months of April through August and failed to pay any rent for the months of September through November.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

¶3 At a hearing on the eviction, Kealey represented himself, while the Holmquists appeared with an attorney. There was no dispute that there was a rental agreement. However, there was a dispute as to whether the Holmquists were current on rent as of September 8, 2011.

¶4 Kealey called his first and only witness, the property manager for the rental unit, Steve Budick. Kealey elicited testimony from Budick that rent was not received from the Holmquists for September, October, or November. Kealey then asked the circuit court, "What else do you want to know?" The court responded, "It's your case, sir[,]" but then instructed Kealey briefly on what Kealey needed to prove, and allowed Kealey to continue questioning Budick.

¶5 When Kealey then continued with a line of questioning about rent that did not seem to provide any additional material evidence, the circuit court asked Kealey if Kealey thought he might need an attorney, because, "You obviously don't know what you're doing here." Budick then indicated that he usually "speak[s] for" Kealey and deals directly with Kealey's tenants, including collecting rent from them.

¶6 At this point in the hearing, the court began to question Budick, asking him how much unpaid rent had accumulated, whether and when he served notice to quit or pay rent, and whether the tenants were still in possession of the premises. In the course of Budick's testimony in response to the court's questioning, Budick identified exhibits providing evidence to support eviction and damages. In particular, Budick identified an exhibit showing a notice to terminate and confirming unpaid rent and water bills.

¶7 On cross-examination, the Holmquists' attorney asked Budick whether he and the Holmquists had entered into an agreement allowing the

Holmquists to pay a reduced amount of rent. Budick stated that he and the Holmquists agreed in April that Kealey would accept reduced rent of $1,000 per month (instead of $1,200 per month), but that the Holmquists broke this agreement by not paying even the reduced amount for September, October, and November. Budick also testified that the Holmquists informed him that they were concerned about the possibility of foreclosure on the rented property in July 2011. In addition, Budick testified that the Holmquists informed him that they intended to use their security deposit to pay September and October rent, but that Budick told them that the security deposit was "void" because of unauthorized changes the Holmquists had made to the rental unit.

¶8 Before the close of the hearing, the circuit court again questioned Budick, asking whether the Holmquists agreed that Budick could retain their security deposit to cover any damage associated with the alleged unauthorized changes to the rental unit. Budick testified that they did not expressly agree to this, and testified further that in his view nothing legally permitted him to retain the security deposit at the time the Holmquists vacated the unit.

¶9 The Holmquists produced no witnesses and neither of them testified.

¶10 Based upon Budick's testimony and admitted exhibits, the circuit court found that Budick had provided the Holmquists with a notice to vacate and that the Holmquists had failed to vacate. It further found that Kealey was entitled to a judgment of eviction and a writ directing the sheriff to put Kealey in possession of the premises. However, the court also found that a decision on Kealey's request for money damages was premature, apparently because Kealey had not yet issued any notice to the Holmquists stating that he was keeping the security deposit and, if so, on what basis.

¶11 Accordingly, the circuit court entered a judgment of eviction and a writ of restitution directing the sheriff to put Kealey in possession of the premises, but denying Kealey's request for money damages.

DISCUSSION

A. Standard of Review

¶12 In reviewing a circuit court's findings of fact, we will not set aside the court's rulings unless they are clearly erroneous. ***Mudrovich v. Soto***, 2000 WI App 174, ¶14, 238 Wis. 2d 162, 617 N.W.2d 242. Whether the facts fulfill the legal standard is a question of law we review de novo. ***Id.***

B. Issue 1: Court Involvement in Proceedings

¶13 As indicated above, the Holmquists first argue that the circuit court erred "in leading … Kealey's examination of his witness, Steve Budick" and in "allowing [Budick] to take over as speaker for [Kealey] in the hearing."

¶14 Taking the second part of this argument first, this court sees no possible merit in it. Budick did not "take over" for Kealey as "speaker" or take over in any other sense. Rather, Budick simply testified as the only witness, giving relevant testimony as the property manager.

¶15 Turning to the first part of the Holmquists' argument, this court is uncertain what the Holmquists mean to claim when they argue that the court erred by "leading" examination of Budick. The only colorable argument this court can discern from the Holmquists' briefing is that the Holmquists mean to contend that the circuit court unfairly involved itself in the proceedings, acting in effect as an advocate for Kealey's interests once it appeared that Kealey did not understand

how to prove up his case. This involved the court eliciting testimony from Budick that established Kealey's right to an eviction. If this is the Holmquists' argument, the court is not persuaded for the following three reasons.

1. Appellants' Failure to Properly Develop Argument on Appeal

¶16 First, the Holmquists' argument is inadequately developed, and this court generally declines to review such arguments. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (the court of appeals need not address the merits of inadequately developed arguments that do not conform to rules of appellate procedure). In ***Pettit***, the court declined to address an appellant's purported arguments that violated appellate rules, were not developed, and failed to cite legal authority. ***Id.*** Similar to the situation in ***Pettit***, the Holmquists speak in unexplained generalities, and provide no citations to legal authority, or even any legal reasoning, in support of an argument that the circuit court's questioning was improper. This approach violates WIS. STAT. RULE 809.19(1).[2] Their entire argument on this issue, apart from the issue statement and brief recitation of record facts, consists of two sentences.

¶17 It is true that courts may make allowances for failure to abide by briefing rules. *See* ***Pettit***, 171 Wis. 2d at 647. It is also true that the Holmquists are pro se on appeal and that the court may give leeway to a pro se party. *See* ***Waushara County v. Graf***, 166 Wis. 2d 442, 452, 480 N.W.2d 16 (1992). However, pro se parties must still comply with relevant rules of procedural and

[2] WISCONSIN STAT. RULE 809.19(1)(e) provides, in relevant part, that "[t]he argument on each issue … is to contain the contention of the appellant, the reasons therefor, with citations to the authorities, statutes and parts of the record relied on as set forth in the Uniform System of Citation and SCR 80.02."

substantive law. ***Id.*** This court generally will not overlook failures to comply with the rules when a brief is "so lacking … [in] substance" that the court would have to wholly develop an appellant's argument for it in order to decide an issue. ***Pettit***, 171 Wis. 2d at 647. That is the situation here. Accordingly, the court rejects the Holmquists' argument regarding the circuit court's involvement in proceedings as inadequately developed.

2. Forfeiture of Argument Before Circuit Court

¶18 Additionally, the Holmquists' attorney failed to object in the circuit court to the circuit court's questioning of Budick, which would have given the court an opportunity to consider altering its approach or to explain the reasoning behind the court's approach. Ordinarily, the failure to raise a timely objection during trial constitutes forfeiture for the purposes of an appeal. *See* ***Allen v. Allen***, 78 Wis. 2d 263, 270, 254 N.W.2d 244 (1977) (concluding that the Wisconsin Supreme Court has consistently held it will not entertain issues raised for the first time on appeal); *see also* ***Terpstra v. Soiltest, Inc.***, 63 Wis. 2d 585, 594, 218 N.W.2d 129 (1974) (concluding that specific objections must be made at the trial court level in order to be preserved). If there is some reason why the forfeiture rule should not be applied here, the Holmquists have not identified it.

3. Purported Argument Appears to Fail on Its Merits

¶19 As indicated, the Holmquists' argument is too undeveloped for this court to definitively resolve it on its merits. However, even if this court entertains the only colorable contention, namely, that the Holmquists mean to argue that the circuit court unfairly involved itself in the proceedings, the Holmquists have not persuaded the court that this contention may have merit. As noted above, as best as this court can ascertain from the Holmquists' undeveloped argument, they may

mean to argue that the circuit court, in effect, unfairly became an advocate for Kealey by questioning Budick, or at least by questioning Budick so extensively. This court disagrees.

¶20 Contrary to what the Holmquists may be arguing, WIS. STAT. § 799.209(1) permits a circuit court to conduct small claims actions informally, and § 799.209(3) permits the court to question witnesses "to ensure that the claims or defenses of all parties are fairly presented."[3] Here, this is what the circuit court did, gearing its line of questioning for the purpose of disclosing facts pertinent to making a proper determination on the issues. This court notes that at least some of the circuit court's questioning, namely that resulting in Budick's concession that he was aware of no legal basis to withhold the Holmquists' security deposit, favored the Holmquists and lends support to a conclusion that the court was not acting unfairly as an advocate for one side. In addition, this case does not involve a jury trial, so there was no risk that a jury would be improperly influenced by any aspect of the judge's involvement.

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[3] WISCONSIN STAT. § 799.209 provides, in part, as follows:

> **Procedure.** At any trial, hearing or other proceeding under this chapter:
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> **(1)** The court or circuit court commissioner shall conduct the proceeding informally, allowing each party to present arguments and proofs and to examine witnesses to the extent reasonably required for full and true disclosure of the facts.
>
> ….
>
> **(3)** The court or circuit court commissioner may conduct questioning of the witnesses and shall endeavor to ensure that the claims or defenses of all parties are fairly presented to the court or circuit court commissioner.

¶21 Of course, circuit courts must not function as partisans or advocates or engage in excessive examination. *See* ***State v. Carprue***, 2004 WI 111, ¶44, 274 Wis. 2d 656, 683 N.W.2d 31; *see also* ***State v. Jiles***, 2003 WI 66, ¶39, 262 Wis. 2d 457, 663 N.W.2d 798 (holding that a trial judge must not permit himself or herself to become an advocate for one party). However, the record does not support a view that this occurred here.

¶22 In ***Jiles***, "[w]hen the State showed surprise that [a defendant] had filed a suppression motion, the circuit court intervened and assumed the State's burden of establishing the existence of proper ***Miranda*** warnings and voluntariness." ***Jiles***, 262 Wis. 2d 457, ¶38. The court took over, sua sponte, and dominated the hearing to such an extent that counsel for the State could barely get a word in, much less present evidence. ***Id.*** Based partially on the circuit court's failure to provide a full and fair evidentiary hearing, the Wisconsin Supreme Court overturned the defendant's conviction. ***Id.***, ¶49.

¶23 This court does not view the court's questioning here as resembling the advocacy or excessive examination that occurred in ***Jiles***. Although the line may not always be clear, this court can confidently say that the circuit court here did not cross it. This is particularly true given the relatively informal nature of small claims proceedings, such as the landlord-tenant dispute at issue here, which may often require a court or commissioner to examine witnesses at least to some degree. *See* WIS. STAT. §§ 799.209(1) and (3).

¶24 It is possible that the Holmquists intend to argue that they were deprived of their right to an impartial judge, a fundamental element of due process. *See* ***Franklin v. McCaughtry***, 398 F.3d 955, 959 (7th Cir. 2005). However, we presume that a judge has acted fairly, impartially, and without bias,

unless that presumption is rebutted. ***State v. Gudgeon***, 2006 WI App 143, ¶20, 295 Wis. 2d 189, 720 N.W.2d 114. When evaluating whether a defendant has rebutted the presumption in favor of the judge's impartiality, we generally apply two tests, one subjective and one objective. ***State v. Rochelt***, 165 Wis. 2d 373, 378, 477 N.W.2d 659 (Ct. App. 1991). Because the Holmquists do not develop any argument showing there was either subjective or objective bias the presumption is not rebutted here.

C. Issue 2: WISCONSIN STAT. § 846.35(2)(a)2. and "Landlord/Tenant Protection Act"

¶25 The Holmquists next argue that the circuit court erred by not recognizing their rights under the "Landlord/Tenant Protection Act" and under WIS. STAT. § 846.35(2)(a)2. For the following reasons, this court is not persuaded.

1. Failure to Properly Develop Argument on Appeal

¶26 The Holmquists' reliance on the "Wisconsin Landlord/Tenant Protection Act" is undeveloped. One major defect in the argument is that they cite no specific statutory provision. It may be that the Holmquists intend to refer to some provision in WIS. STAT. ch. 704 ("LANDLORD AND TENANT"). However, without citation to a particular statute or any further explanation, this court is unable to address any argument based on broad reference to that chapter as a whole. *See* ***Pettit***, 171 Wis. 2d at 646.

¶27 The Holmquists' argument based on WIS. STAT. § 846.35(2)(a)2. is also too brief and not well developed. Although the Holmquists cite to a specific statutory provision, § 846.35(2)(a)2., they simply restate the language of the statute and fail to include any analysis, based on the facts, as to how or why it

applies here.[4] Therefore, the court could decline to address their § 846.35(2)(a)2.-based argument further.

2. WISCONSIN STAT. § 846.35(2)(a)2. Argument Would Fail on the Merits

¶28 Even if this court were to address the merits of the Holmquists' WIS. STAT. § 846.35(2)(a)2.-based argument, as best this court understands it, their argument would likely fail, because the unrefuted evidence in the record shows that the Holmquists failed to pay (or withheld) at least $3,600 in rent, which is more than the total amount of their security deposit, $2,400. If there is some reason why this evidence is not dispositive on the applicability of the statute, the Holmquists have failed to point it out. There may be additional reasons why the Holmquists' reliance on the statute fails, but it is enough for this court to identify one reason.[5]

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[4] WISCONSIN STAT. § 846.35(2)(a) provides, in pertinent part, as follows:

> **Protections for tenants in foreclosure actions.**
>
> ….
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> **(2)** EXTENDED POSSESSION OF PREMISES; WITHHOLDING LAST MONTH'S RENT. (a) Notwithstanding ch. 704, all of the following apply to a tenant whose tenancy is terminated as a result of a foreclosure judgment and sale with respect to the rental property:
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> **….**
>
> 2. The tenant may withhold rent in an amount equal to the security deposit during the last period the tenant actually retains possession of the rental unit ….

[5] 2011 Wisconsin Act 32, enacted on June 26, 2011, repealed WIS. STAT. § 846.35(2)(a)2., with an effective date relating to the date a foreclosure action is commenced. *See* 2011 Wis. Act 32, §§ 3492m and 9355. For purposes of this opinion, this court will assume, without deciding, that the effective date of the repeal does not necessarily preclude the statute's (continued)

CONCLUSION

¶29 For the reasons stated above, this court affirms the circuit court's judgment of eviction, which also upholds the writ directing the sheriff to put Kealey in possession of the premises.

By the Court.—Judgment affirmed.

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

applicability to this case. This court notes that it received no response brief from Kealey and therefore does not have the benefit of his position on this or other issues.