

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 25, 2014

Diane M. Fremgen
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. 2013AP2246

Cir. Ct. No. 2013SC808

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

PETE MERCIER AND BARB MERCIER,

PLAINTIFFS-APPELLANTS,

V.

KATIA PROPERTIES, LLC,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Outagamie County: DEE R. DYER, Judge. *Affirmed.*

¶1 MANGERSON, J.¹ Pete and Barb Mercier appeal a summary judgment dismissing their small claims action against Katia Properties, LLC, for failing to return a security deposit or provide an accounting of the deposit. 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 2011-12 version unless otherwise noted.

circuit court granted summary judgment in favor of Katia because the Merciers expressly agreed in their lease that the deposit would be returned to ALE Solutions, Inc., which was the entity that paid the deposit. We conclude the Merciers lack standing to maintain their claim against Katia, and we affirm.

BACKGROUND

¶2 In early 2012, the Merciers' house was damaged by a fire. Their homeowner's insurer, Liberty Mutual Insurance Company, hired ALE to locate and provide temporary housing for the Merciers while their house was being repaired. ALE found a house for the Merciers to rent that was owned by Katia.

¶3 The Merciers and Katia entered into a lease for the property. As relevant to this appeal, the lease provided the security deposit "shall be returned to ALE Solutions, interest state sensitive, and less any set off for damages to the Premises upon the termination of this Agreement."

¶4 Separately, ALE and Katia entered into an agreement whereby ALE agreed to pay the security deposit and the monthly rent on behalf of the Merciers. ALE then paid the \$3400 security deposit as well as monthly rent to Katia.

¶5 On June 4, 2012, ALE notified Katia the Merciers intended to vacate the property, and thereby terminate the tenancy, on July 9, 2012. The notice advised Katia that "within 30 days of termination," it needed to return the security deposit to ALE along with an accounting for any deduction. The Merciers vacated the property on July 9.

¶6 On August 3, 2012, Katia provided ALE with a security deposit accounting, which outlined the amounts Katia was going to withhold from the deposit. Katia then sent the balance of the deposit to ALE.

¶7 In March 2013, the Merciers brought a small claims action against Katia, arguing Katia violated WIS. ADMIN. CODE § ATCP 134.06 by failing to return their security deposit or an accounting of the deposit within twenty-one days after they vacated the property. The Merciers sought double damages, or \$6800, attorney’s fees, and costs.

¶8 Katia answered, and then filed a motion to dismiss/motion for summary judgment. Katia argued the Merciers lacked standing to assert their claim because the Merciers “sustained no injury tangible or otherwise.” Katia emphasized that ALE, not the Merciers, paid the security deposit and that the lease between Katia and the Merciers provided Katia needed to return the security deposit to ALE.

¶9 The Merciers responded to Katia’s motion, arguing they had standing and were entitled to the security deposit because Liberty Mutual paid their insurance benefits to ALE, who in turn, used the benefits to pay the security deposit to Katia.

¶10 The circuit court granted summary judgment in favor of Katia. It reasoned the issue in the case was “simple contract interpretation, not one of standing, insurance benefits, or landlord/tenant law.” The court reasoned Katia was entitled to summary judgment “because the Merciers agreed to the lease provisions stating that the security deposit would be returned to ALE[.]” It concluded the Merciers “waived any claim to the security deposit under landlord/tenant law when they agreed to the terms of the lease[.]” The Merciers appeal.

DISCUSSION

¶11 The Merciers argue the circuit court erred by granting summary judgment in favor of Katia based on the provision in their lease. They assert they never “waive[d] their right to a written statement accounting for any withholding from their security deposit and have certainly not waived the protection of the requirement that the landlord provided either the itemization or return of the security deposit within twenty-one days.” The Merciers renew their argument that Katia violated WIS. ADMIN. CODE § ATCP 134.06 by failing to return their security deposit and provide them with an accounting of the deposit. They argue that, even if Katia has a valid defense for returning the security deposit to ALE instead of the Merciers, Katia failed to provide them with an accounting of the security deposit and, as a result, the Merciers “suffered pecuniary damage in the amount of the security deposit.” Finally, the Merciers argue the lease between the Merciers and Katia is unenforceable due to a prohibited, but unrelated, provision in the lease.

¶12 Katia responds the circuit court properly granted summary judgment in its favor based on the lease provision that provided the security deposit would be returned to ALE. Katia argues that, given the language in the lease, Katia owed no duty to return the deposit or provide any accounting of the deposit to the Merciers. Katia contends any duties under the administrative code with regard to the security deposit were to ALE. Katia also renews its argument that the Merciers lack standing to bring their claim. Katia asserts the Merciers suffered no loss and have no personal stake in whether Katia properly returned the security deposit to ALE. Katia emphasizes ALE paid the security deposit, the Merciers agreed in their lease the security deposit would be returned to ALE, and Katia returned the security deposit to ALE. Finally, Katia argues the Merciers are

precluded from asserting the lease as a whole is unenforceable because the Merciers never made that argument in the circuit court.

¶13 The circuit court granted summary judgment in favor of Katia based simply on the language in the Merciers' lease directing Katia to return the security deposit to ALE. We, however, conclude the lease between Katia and the Merciers prevents the Merciers from having standing to maintain this action against Katia. *See Mercado v. GE Money Bank*, 2009 WI App 73, ¶2, 318 Wis. 2d 216, 768 N.W.2d 53 (appellate court may affirm on different grounds).

¶14 “In order to have standing to sue, a party must have a personal stake in the outcome ... and must be directly affected by the issues in controversy.” *Village of Slinger v. City of Hartford*, 2002 WI App 187, ¶9, 256 Wis. 2d 859, 650 N.W.2d 81 (internal citation omitted).

[S]tanding depends on (1) whether the party whose standing is challenged has a personal interest in the controversy (sometimes referred to in the case law as a “personal stake” in the controversy); (2) whether the interest of the party whose standing is challenged will be injured, that is, adversely affected; and (3) whether judicial policy calls for protecting the interest of the party whose standing is challenged.

Foley-Ciccantelli v. Bishop's Grove Condo. Ass'n, 2011 WI 36, ¶40, 333 Wis. 2d 402, 797 N.W.2d 789 (footnotes omitted). Whether a party has standing is a question of law, which we review de novo. *Chenequa Land Conservancy, Inc. v. Village of Hartland*, 2004 WI App 144, ¶12, 275 Wis. 2d 533, 685 N.W.2d 573.

¶15 The Merciers argue that, irrespective of what they agreed to in the lease, they have standing to sue Katia for failing to return the security deposit or provide them with an accounting because ALE used their insurance money to pay the security deposit. However, even assuming the Merciers' allegation is true, the

Merciers only have standing if they have a personal stake in the outcome and will be directly affected by the issue in controversy. *See Village of Slinger*, 256 Wis. 2d 859, ¶9.

¶16 Here, ALE posted the security deposit, the lease between the Merciers and Katia provided the security deposit would be returned to ALE, and Katia returned the security deposit and an accounting of the deposit to ALE. Given these undisputed facts, the Merciers have no personal stake in whether Katia returned the security deposit or an accounting of the deposit in compliance with the administrative code. Rather, Katia performed pursuant to the lease and returned the security deposit to ALE instead of the Merciers. Any claim that Katia violated the administrative code in regard to the security deposit can be brought only by ALE. Further, because only ALE was entitled to the return of the security deposit, only ALE would be entitled to any damages for Katia's alleged violation of the administrative code. The Merciers lack standing to sue Katia for any violation of the administrative code in regard to the security deposit.

¶17 The Merciers, nevertheless, argue that, even if they waived their right to the security deposit under the lease, they never waived their right to receive an accounting of the security deposit. They argue that, because they never received an accounting of the security deposit from Katia, they were harmed and are therefore entitled to damages in the amount of double the security deposit. We disagree. The Merciers' argument ignores the fact that the Merciers have no

interest in the security deposit. Accordingly, they cannot claim they were harmed when they did not receive an accounting of the deposit.²

¶18 Finally, we reject the Merciers' argument that the lease as a whole is unenforceable due to a rent acceleration clause. The Merciers never made this argument in the circuit court. We will not consider it. *See State v. Huebner*, 2000 WI 59, ¶¶10-12, 235 Wis. 2d 486, 611 N.W.2d 727 (arguments raised for the first time on appeal need not be considered). Moreover, the Merciers do not respond to Katia's argument that they have forfeited this argument by failing to raise it earlier. *Charolais Breeding Ranches v. FPC Secs. Corp.*, 90 Wis. 2d 97, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments deemed conceded).

¶19 In short, pursuant to the lease, the Merciers have no personal stake in whether Katia complied with the administrative code when it returned the deposit to ALE. The only party with standing to sue Katia for any violation of the administrative code in regard to the security deposit is ALE.

By the Court.—Judgment affirmed.

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

² Because we conclude the Merciers lack standing, we need not determine whether Katia violated the administrative code in regard to the security deposit. *See State v. Blalock*, 150 Wis. 2d 688, 442 N.W.2d 514 (Ct. App. 1989) (cases should be decided on narrowest possible ground).

