Case No. 2022-AP-000182

In the Supreme Court State of Wisconsin

KOBLE INVESTMENTS,

Plaintiff-Respondent,

v.

ELICIA MARQUARDT,

Defendant,

JAMES MILLER,

Intervenor-Appellant.

On Appeal from the Circuit Court for Marathon County,
Case No. 2020-SC-979
The Honorable Lamont K. Jacobson, Presiding Judge

INITIAL BRIEF OF PLAINTIFF-RESPONDENT-PETITIONER

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INTRODUCTION

In 1971, the Wisconsin legislature enacted the Wisconsin Consumer Act, Wis Stat. chs. 421-27 (the "Act"). *See* 1971 Wis. Act 239. More than fifty years later, the Court of Appeals held in its decision below that, as a matter of first impression, the Act applies to and governs landlords' attempts to enforce a residential lease. Standing alone, this dramatic expansion of Wisconsin's landlord-tenant law—in the absence of explicit legislative intent to do so—constitutes reversible error. The Court of Appeals' decision also rested on an incorrect interpretation of (1) the Act's definition of a "customer"; and (2) the statutory phrase "an agreement to defer payment."

The Court of Appeals further held that the incorporation into a residential lease of Wis. Stat. § 704.05(3) triggered a violation of Wis. Stat. § 704.44(10) and Wis. Admin. Code § ATCP 134.08(10), because the lease did not also include the mandatory domestic abuse notice called for by Wis. Stat. § 704.14. If the legislature intended for such a result, it could have done so by simply stating that any lease which fails to include the notice called for by Wis. Stat. § 704.14 is void and unenforceable.

Moreover, in holding that a tenant can establish a per se pecuniary loss even when a landlord indisputably never attempts to enforce a lease provision which violates Wis. Stat. § 704.44, the Court of Appeals failed to recognize the causal connection explicitly required by both Wis. Stat. § 100.20(5) and a long line of case law interpreting the same.

Finally, even assuming that the Court of Appeals properly determined that the tenant in this case was entitled to statutory damages of any kind, it erred by holding, without explanation or analysis, that Intervenor-Respondent James Miller ("Attorney Miller")—the tenant's former attorney who successfully moved the circuit court to allow him to withdraw his representation prior to initiating this appeal—was the party entitled to recover "his" own attorney fees in pursuing this action, up to and through his appeal.

This Court should reverse the Court of Appeals.

In regard to the Act, this Court should clarify that the Act does not govern a landlord's attempt to enforce a residential lease. In the alternative, this Court should hold that a residential tenant is not a "customer" as defined by the Act, nor is a residential lease an "agreement to defer payment."

As to the provisions of Wis. Stat ch. 704, this Court should hold that a lease that merely incorporates the provisions of Wis. Stat. § 704.05(3) does not violate Wis. Stat. § 704.44(10) and Wis. Admin. Code § ATCP 134.08(10), even if the lease fails to include the notice of domestic abuse protections required by Wis. Stat. § 704.14. If this Court disagrees, it should nevertheless hold that in the absence of any causal connection between the claimed violation and evidence of a pecuniary loss, a tenant is not entitled to recover any damages under Wis. Stat. § 100.20(5).

Finally, if this Court holds that the Court of Appeals properly determined that there a proven violation that would, in isolation, entitle the tenant to statutory attorney fees, it should hold that an attorney who no longer represents his or her client does not have any right to collect statutory attorney fees to which the tenant, not the attorney, is entitled.

ISSUES PRESENTED FOR REVIEW

The issues accepted for review are:

I. Do the provisions of Wis. Stat. § 427.104(1) apply to a landlord attempting to enforce a residential lease?

The circuit court determined that a residential tenant does not qualify as a "customer" for purposes of the Act, and thus that the prohibited practices set forth in Wis. Stat. § 427.104(1) were not implicated by a landlord's attempt to enforce a residential lease.

The Court of Appeals reversed, holding that: (1) a residential tenant falls within the Act's definition of a "customer" who enters into a "consumer transaction" when he or she enters into the residential lease; and (2) a standard residential lease calling for monthly payments of rent qualifies as an "agreement to defer payment" within the meaning of Wis. Stat. § 427.104(1).

II. If a residential lease incorporates the provisions of Wis. Stat. § 704.05(3), does the lease violate Wis. Stat. § 704.44(10) and Wis. Admin. Code § ATCP 134.08(10) by failing to include the notice of domestic abuse protections required by Wis. Stat. § 704.14?

The circuit court determined that a residential lease's incorporation of Wis. Stat. § 704.05(3) does not, standing alone, render the lease void and unenforceable under Wis. Stat. § 704.44(10) and Wis. Admin. Code § ATCP 134.08(10), regardless of whether the lease includes the domestic abuse notice provision set forth in Wis. Stat. § 704.14.

The Court of Appeals reversed, holding that by incorporating the provisions of Wis. Stat. § 704.05(3) into a residential lease, a landlord violates Wis. Stat. § 704.44(10) and Wis. Admin. Code § ATCP 134.08(10) unless the lease also includes the notice of domestic abuse protection required by Wis. Stat. § 704.14.

III. When a residential tenant does not prove that he or she suffered any pecuniary loss because of a violation of Wis. Stat. § 704.44 or Wis. Admin. Code § ATCP 134.08(10), are damages recoverable under Wis. Stat. § 100.20(5)?

The circuit court did not reach this issue because it determined the landlord's conduct did not violate Wisconsin law.

The Court of Appeals held—notwithstanding the fact that the allegedly aggrieved tenant did not appeal the circuit court's decision and never alleged that the landlord attempted to enforce a lease provision prohibited by Wis. Stat. § 704.44(10) or Wis. Admin. Code § ATCP 134.08(10)—that the tenant was "entitled to recover [under Wis. Stat. § 100.20(5)] all of the payments that she made under the void and unenforceable lease, without any offset for the value of the benefit that she received from living in the rental premises."

IV. Can an attorney, who has withdrawn from representing a residential tenant, directly pursue and recover his or her own attorney fees—including those incurred on appeal—under Wis.

Stat. §§ 100.25(1) or 425.308(1) based upon a landlord's alleged violation of Wisconsin landlord-tenant law?

The circuit court did not reach this issue because it determined the landlord's conduct did not violate Wisconsin law.

The Court of Appeals held that an attorney—acting on his own behalf after withdrawing from representing his client—could directly pursue and recover his or her own attorney fees under Wis. Stat. §§ 100.20(5) and 425.308(1) based upon a landlord's alleged violation of Wisconsin landlord-tenant law.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This case is appropriate for oral argument and publication.

STATEMENT OF THE CASE

A. Nature of the Case.

This case began as an eviction action by Plaintiff-Respondent-Petitioner Koble Investments ("Koble") against its tenant, Defendant Elicia Marquardt ("Marquardt"). (R2: 1) Marquardt and Koble entered into a twelve-month residential lease in May 2019. (R5: 1). The lease provided that Marquardt would pay Koble monthly rent of $700, due on the first day of each month. (R5: 1).

Less than a year later, following the onset of the COVID-19 pandemic, Governor Tony Evers issued an emergency order prohibiting landlords "from serving any notice terminating a tenancy for failure to pay rent" during a sixty-day moratorium period. (R9: 3-5). While the moratorium was still in effect, Koble delivered to Marquardt a five-day eviction notice for nonpayment of rent. (R3: 1). Koble subsequently filed its eviction action against Marquardt, seeking both a judgment of eviction and $1,548 in monetary damages. (R2: 1-3).

Marquardt filed an answer and counterclaim. (R9: 1-2). She claimed, as relevant here, that her lease was void and unenforceable under Wis. Stat. § 704.44(10) and Wis. Admin. Code § ATCP 134.08(10), and that Koble had violated Wis. Stat. § 427.104(1) by serving the five-day eviction notice while the moratorium period was still in effect. (R9: 1-2).

After a court commissioner granted Koble's request to dismiss its eviction claim at the July 1, 2020, return date (R:20: 1), Koble filed a reply to Marquardt's counterclaims. (R13: 1-2). Koble admitted in its reply that it had delivered the eviction notice to Marquardt during the moratorium period. (R13: 1-2).

On September 22, 2020, Attorney Miller filed three motions: (1) a motion for attorney fees (R16); (2) a motion to intervene (R17); and (3) a contingent motion to withdraw from representing Marquardt. (R18). In the motion for attorney fees, Attorney Miller, despite being a non-party to the case at that time, ostensibly moved the court both on behalf of Marquardt and himself for an award of attorney fees. (R16: 1-4).

In the motion to intervene, Attorney Miller argued that he should be allowed to personally intervene in the case because he had an "interest in recovering his statutory fee-shifting costs, expenses, and reasonable attorney fees in this action," but that his interests were "not adequately protected by the Defendant, because she has stopped communicating with Attorney Miller, and therefore appears unlikely to continue litigating her defenses and/or counterclaims in this action." (R17: 1).

In the contemporaneously filed "contingent motion to withdraw," Attorney Miller argued that if his motion to intervene were granted, then he should be allowed to withdraw from representing Marquardt because she had "unreasonably failed to communicate with Attorney Miller in violation of her

obligation under the client representation agreement, rendering Miller unable to proceed with presenting her counterclaims." (R18: 1).

At a subsequent hearing at which Marquardt failed to appear, a court commissioner dismissed Marquardt's counterclaims, denied the motion for attorney fees, and denied the motion to intervene. (R20: 1-2). The court commissioner determined that the Act did not apply, and that Marquardt's lease was not void and unenforceable. (R20: 2).

Marquardt, through Attorney Miller, then sought a trial de novo before the circuit court (R21: 1-2). Attorney Miller, despite still being a non-party, also filed a renewed motion for attorney fees on behalf of both Marquardt and himself. (R25: 1-2). Attorney Miller also renewed his motion to intervene. (R24: 1-4). While still counsel of record for Marquardt, Attorney Miller filed a "combined brief" in support of the renewed motions for intervention and attorney fees in which he expressly disclaimed any intention "to further pursue his client's counterclaims for money damages at trial." (R27: 2).

In opposing the motion for attorney fees, Koble argued in pertinent part that Marquardt was not entitled to attorney fees under Wis. Stat. § 100.20(5) because "Marquardt has not proven any damages to the Court and will not be able to prove any damages to the Court if she is not a part of this action." (R29: 4.) Koble further explained that "Marquardt needs to testify that she suffered damages or, at the very least, provide an affidavit that she

suffered damages before the Court can even begin to make a decision regarding whether or not Marquardt suffered damages resulting from the actions of Koble." (R29: 4).

On March 26, 2021, in a written decision, the circuit court denied the motion for attorney fees and the motion to intervene. (R34: 1-8) The court concluded that Marquardt was "not a 'customer' under the Act because she did not acquire real property; she acquired only a leasehold interest in real property" and "residential leases do not fall under the Act." (R34: 3).

The circuit court further concluded that Marquardt's lease was not void and unenforceable under Wis. Stat. § 704.44(10) and Wis. Admin. Code § ATCP 134.08(10) because:

> The lease does not authorize eviction based on the commission of a crime. The closest that it comes to mentioning crime is this restriction on the use of the premises: "Neither party may (1) make our [sic] knowingly permit use of the premises for any unlawful purpose, [or] (2) engage in activities which unduly disturb the neighbors[.]" That lease provision incorporates Wis. Stat. § 704.05(3), which says, 'The tenant cannot use the premises for any unlawful purpose nor in such manner as to interfere unreasonably with use by another occupant of the same building or group of buildings.' Only a strained reading of the lease provision would allow for the possibility that a tenant who was a crime victim could be evicted for permitting a crime to occur; victims are victims because of things that happened against their will, and the lease provision is not violated if the tenant did not permit the criminal activity to occur (that is, if it occurred without the tenant's permission).

(R34: 4-5.)

In addition, the circuit court determined that, because the lease was not void and unenforceable, Marquardt did not suffer any pecuniary

damages. (R34: 5). The court then denied Attorney Miller's motion to intervene, reasoning:

> Attorney Miller asserted that his fee agreement with [Marquardt] gives him 'the right to recover his fees directly from the Plaintiff under applicable statutory fee-shifting provisions.' However, he did not cite any specific language in the contract in support of his argument, and none is apparent. The fee agreement specifically gives Attorney Miller a lien on 'any monies or property' that Ms. Marquardt recovers, but at this point, there is no recovery for the lien to operate on. And nothing about the fee agreement explicitly assigns to Attorney Miller the right to pursue attorney fees directly; in the absence of such an assignment, an award of attorney fees belongs to the client, not the attorney. ***Betz v. Diamond Jim's Auto Sales***, 2014 WI 66, ¶¶30–36, 355 Wis. 2d 301, 849 N.W.2d 292.

(R34: 7 (internal record citations and footnotes omitted)).

At a January 19, 2022, de novo hearing on Marquardt's remaining counterclaims, Marquardt again failed to appear (R54: 2). As such, Attorney Miller informed the circuit court that he could not call her as a witness and introduce evidence through her testimony. (R54: 6-7). After Marquardt's remaining counterclaims were dismissed, Attorney Miller orally renewed his motion to withdraw, stating: "I do not intend to represent the client further, and I will not represent her on appeal." (R54: 12). The circuit court therefore granted the motion to withdraw and Attorney Miller's motion to intervene "for the sole purposes of the attorney fees." (R54: 13.)

B. Relevant Procedural History.

Following the circuit court's oral decision at the January 19, 2022, de novo hearing, the circuit court entered a written order dismissing the claims and granting Attorney Miller's motion to intervene. (R45: 1-2.) This order

also granted Attorney Miller's motion to withdraw as Marquardt's counsel. (R45: 2).

Attorney Miller then individually filed (i.e., not on behalf of Marquardt) a notice of appeal. (R48: 1-2.) He subsequently filed a motion for a three-judge panel, arguing that "this appeal presents several unresolved legal questions that are ripe for review and may impact thousands of tenants … [t]his is an area of law that needs development with published precedent, which rarely occurs because most tenants cannot afford to take a case all the way to appeal." (R50: 2.)

Following an initial round of briefing, the appeal was submitted on briefs to the Court of Appeals for consideration. *See* Ct. App. Order, Appeal No. 22-AP-182, dated June 30, 2022. Fifteen months later, the Court of Appeals granted the pending motion for a three-judge panel. *See* Ct. App. Order, Appeal No. 22-AP-182, dated September 18, 2023. Two months after that, the Court of Appeals issued another notice that the case had been submitted on briefs for consideration. *See* Ct. App. Order, Appeal No. 22-AP-182, dated November 20, 2023.

On January 23, 2024, the Court of Appeals, on its own motion, directed the parties to file supplemental briefs in this matter that addressed the following issue:

> WISCONSIN STAT. § 427.104 lists a number of things that a debt collector may not do "[i]n attempting to collect an alleged debt arising from a consumer credit transaction or other consumer transaction, including a transaction primarily for an agricultural purpose, where there is an agreement to defer payment[.]" Assuming that Elicia Marquardt's lease of residential property from Koble Investments constituted a "consumer transaction," as that term is defined by the Wisconsin Consumer Act, was there "an agreement to defer payment" for purposes of § 427.104?

See Ct. App. Order, Appeal No. 22-AP-182, dated January 23, 2024.

Following the submission of the supplemental briefs, the Court of Appeals issued a published decision reversing the circuit court on April 23, 2024. ***Koble Invs. v. Marquardt***, 2024 WI App 26, 412 Wis. 2d 1, 7 N.W.3d 915. The Court of Appeals concluded:

> the circuit court erred by determining that the [Act] did not apply to Marquardt's residential lease, and we further conclude that the undisputed facts show that Koble violated WIS. STAT. § 427.104(1)(j). Additionally, we agree with Attorney Miller that Marquardt's lease was void and unenforceable under WIS. STAT. § 704.44(10) and WIS. ADMIN. CODE § ATCP 134.08(10) because the lease allowed Koble to evict a tenant for a crime committed on the rental premises but failed to include the mandatory domestic abuse notice. We therefore reverse the circuit court's decision and remand for a determination of Attorney Miller's reasonable attorney fees and costs, and for a determination of the damages that Marquardt is entitled to recover on her void lease claim.

Id., ¶2.

STANDARD OF REVIEW

This appeal involves questions of statutory interpretation, which this Court reviews de novo. ***McNeil v. Hansen***, 2007 WI 56, ¶7, 300 Wis. 2d 358, 731 N.W.2d 273. Likewise, the application of public policy considerations to a contract presents a question of law subject to de novo

review. ***Betz v. Diamond Jim's Auto Sales***, 2014 WI 66, ¶25, 355 Wis. 2d 301, 849 N.W.2d 292.

ARGUMENT

I. Wisconsin Stat. § 427.104(1) does not apply to a landlord attempting to enforce a residential lease.

The decision below erred in determining that a provision of the Act––Wis. Stat. § 427.104(1) —applies to and regulates the actions of a landlord enforcing a residential lease. The Court of Appeals' decision was in error for two reasons.

First, the landlord-tenant relationship in Wisconsin is already pervasively regulated by the legislature through the comprehensive statutory scheme of Wis. Stat. ch. 704, as well as by Department of Agriculture, Trade and Consumer Protection ("DATCP") through Wis. Admin. Code ch. ATCP 134 pursuant to its rule-making authority under Wis. Stat. § 100.20(2)(a). For the Court of Appeals to decide for the first time, over fifty years after the Act was enacted, that the landlord-tenant relationship is also governed by the Act was, at bottom, a policy decision that should be left to the legislature.

Second, the Court of Appeals erred in interpreting the Act's relevant language to hold that a landlord's attempts to enforce a residential lease fall within the purview of Wis. Stat. § 427.104(1). This conclusion follows because a tenant does not fall within the Act's definition of a "customer," nor

does a residential lease represent an "agreement to defer payment" between a landlord and a tenant.

Either of the above reasons, standing alone, justifies reversal on this issue.

A. The Act does not regulate the residential landlord-tenant relationship.

The Act was adopted by our legislature over fifty years ago, with the express purpose to simplify, clarify, and modernize the law governing consumer transactions. *See* ***Duncan v. Asset Recovery Specialists, Inc.***, 2022 WI 1, ¶19, 400 Wis. 2d 1, 968 N.W.2d 661 (citing Wis. Stat. § 421.102(2)(a)). In the intervening five decades, until the decision below, Koble is not aware of a single published case, law review article, or secondary source holding or arguing that the Act, and specifically its debt collection chapter, Wis. Stat. ch. 427, applies to govern and regulate the landlord-tenant relationship.

The dearth of case law, or even legal discussion, concerning the applicability of the Act's debt collection provisions to landlord-tenant relations exists for good reason. Even assuming that the Court of Appeals' statutory interpretation in relation to the Act was proper—which, for the reasons below, it was not—there is no credible argument that the Act explicitly governs landlord-tenant relations. Indeed, the Court of Appeals reached its holding by engaging in complex statutory interpretation,

involving cross-references to multiple statutory definitions from multiple chapters of the Act. *See* ***Koble***, 412 Wis. 2d 1, ¶¶13-27.

In a case essentially on all fours with this one, the Supreme Court of Appeals of West Virginia determined that if its legislature intended for its Consumer Credit and Protection Act ("CCPA") to apply to residential leases of real property, "it would have done so explicitly." ***State ex rel. Morrisey v. Copper Beech Townhome Communities Twenty-Six, LLC***, 806 S.E.2d 172, 177 (W. Va. 2017). The ***Copper Beech*** court therefore declined to hold, as a matter of first impression forty-three years after the CCPA was enacted, that the CCPA applies to and regulates the landlord-tenant relationship. ***Id.*** at 175-76.

This Court should do the same. Like the CCPA, the Act does not contain any provision, either its general definitions or specific debt collection provisions, that speak explicitly to landlord-tenant relations. *Compare* ***Koble***, 412 Wis. 2d 1, ¶¶13-27, *with* ***Copper Beech***, 806. S.E.2d at 177-81. And, like West Virginia, Wisconsin's landlord-tenant relations are already pervasively regulated by both statutes (Wis. Stat. ch. 704) and regulations (Wis. Admin. Code ch. ATCP 134). *Compare* ***State v. Lasecki***, 2020 WI App 36, ¶39, 392 Wis. 2d 807, 946 N.W.2d 137 *with* ***Copper Beech***, 806. S.E.2d at 177-81. In fact, Wisconsin's regulations are not only pervasive, they expose a landlord to criminal penalties for acts such as failing to provide a

tenant with a statement of withholding when retaining some or all of a tenant's security deposit. ***Lasecki***, 392 Wis. 2d 807, ¶63.

Faced with its legislature's explicit and pervasive regulation governing landlord-tenant relations on the one hand, and the silence of its consumer credit protection act on the other hand, the ***Copper Beech*** court showed restraint in deferring to its legislature to decide whether to extend its act to cover the landlord-tenant relationship. In doing so, it noted that its supreme court did not sit as a "superlegislature," and any extension of its laws "should be accomplished through the legislative process, which entails that all interested parties, including *all* landlords and tenants who wish to be heard, be given the right to have their concerns addressed and considered." ***Copper Beech*** 806 S.E.2d at 181.

The same principle applies here. Shortly after the Act was enacted, this Court noted that it "does not sit as a superlegislature debating and deciding upon the relative merits of legislation. It looks for a reasonable basis upon which the legislature might have acted and assumes that the legislature had such a purpose in mind when it enacted the law in question." ***Coffee-Rich, Inc. v. Dep't of Agric.***, 70 Wis. 2d 265, 269, 234 N.W.2d 270 (1975). As noted above, the legislature's stated purpose in enacting the Act was to simplify, clarify and modernize consumer law. This Court should decline to hold over five decades later that, in doing so, the legislature silently and implicitly decided to also govern residential landlord-tenant relations.

B. The Act's relevant definitions do not apply to a landlord's attempts to enforce a residential lease.

Wisconsin Stat. § 427.104(1) prohibits a "debt collector" from engaging in certain practices "[i]n attempting to collect an alleged debt arising from a consumer credit transaction or other consumer transaction, including a transaction primarily for an agricultural purpose, where there is an agreement to defer payment." The Court of Appeals' determination that this language applied to a landlord's attempt to enforce a residential lease rested on its interpretation of two key statutory phrases.

First, the Court of Appeals concluded that a residential lease is a "consumer transaction." ***Koble***, 412 Wis. 2d 1, ¶14. Second, it concluded that a residential lease represents "an agreement to defer payment." ***Id.***, ¶18. Both of these conclusions are infirm.

1. A residential lease is not a "consumer transaction."

The phrase "consumer transaction" is broadly defined by the Act to include "a transaction in which one or more of the parties is a customer for purposes of that transaction." Wis. Stat. 421.301(13). A customer, in turn, is defined as "a person other than an organization … who seeks or acquires real or personal property, services, money or credit for personal family or household purposes[.]" Wis. Stat. § 421.301(17).

In reversing the circuit court's apt determination that a residential tenant does not "acquire" real property and thus cannot be considered a

"customer" under the Act, the Court of Appeals relied on a single and isolated statement from this Court in 1961 that a "tenant is a purchaser of an estate in land." ***Id.***, ¶15 (citing ***Pines v. Perssion***, 14 Wis. 2d 590, 594-95, 111 N.W.2d 409 (1961)). But the Court of Appeals never explained how or why a tenant's purchase of *some* temporary interest in land qualifies as an acquisition of land for the purposes of Wis. Stat. § 421.301(13).

The plain and ordinary meaning of "acquire" means "to get as one's own." *See Acquire*, https://www.merriam-webster.com/dictionary/acquire (last visited May 23, 2024). Purchasing a temporary, limited estate in real property by means of a residential lease is thus materially different than acquiring the property. This conclusion is buttressed by the language of Wis. Stat. § 704.01(1), which confirms that a residential lease involves only a "transfer of *possession* of real property." (Emphasis added). Because a residential does not receive the real property as "one's own," the tenant does not acquire the property and is therefore not a "customer" for purposes of the Act.

2. A residential lease is not an "agreement to defer payment."

Even if a residential lease qualifies as a "consumer transaction" for purposes of Wis. Stat. § 427.401(1), it certainly is not an "agreement to defer payment" within the meaning of the statute. The Court of Appeals reached an opposite conclusion because it started its analysis with a fundamentally flawed assumption. Specifically, the decision below relied on the premise

that Marquardt somehow became responsible to pay "the full amount of rent for the entire twelve-month period upon signing the lease." ***Koble***, 412 Wis. 2d 1, ¶18.

For good reason, the Court of Appeals' proposition was not supported by citation to any legal authority or provision in the lease. Indeed, Wisconsin courts have recognized for well over 100 years that a lessee does not become obligated to pay rent until that rent becomes dues during the term of the lease. ***Palmer v. City Livery Co.***, 98 Wis. 33, 73 N.W. 559, (1897). In ***Palmer***, the supreme court succinctly explained that rent "accrues" not upon execution of a lease, but as it periodically becomes due during the term of the lease.

This understanding endures to this day, as confirmed by the Supreme Court in ***First Wisconsin Tr. Co. v. L. Wiemann Co.***, 93 Wis. 2d 258, 273, 286 N.W.2d 360 (1980). The ***First Wisconsin*** court, in analyzing the effect of a landlord's duty to mitigate damages under Wis. Stat. § 704.29, reaffirmed that, a landlord "cannot collect rent which *would have accrued* under the lease" unless the landlord complies with Section 704.29. ***Id.*** (emphasis added). Put another way, prospective rent that would become due under a lease is not a present debt for which payment has been delayed; it is a "future damage" for which there is a "possibility" that payment may one day become due. ***CCS N. Henry, LLC v. Tully***, 2001 WI App 8, ¶6, 240 Wis. 2d 534, 624 N.W.2d 847.

Black's Law Dictionary defines "accrue" as "to come into existence as an enforceable claim or right." *Accrue*, Black's Law Dictionary 25 (10th ed. 2014). As such, until rent actually becomes due pursuant to the terms of a lease, there is no obligation for a tenant to make any payment whatsoever. This truth completely undermines the Court of Appeal's unmoored conclusion that there was an agreement to delay an obligation for Marquardt to pay an entire years' worth of rent into twelve equal installments. *See* ***Koble***, 412 Wis. 2d 1, ¶19.

To the contrary, Marquardt's obligation to pay her rent arose on the first of each month, which she was then responsible to pay so that she would have the right to continue to occupy the leased premises for that upcoming month (R5: 1). And that is exactly what the lease here says, when it explains that rent of $700 "**due** on the 1st day of each month." (R5: 1, emphasis added).

The Court of Appeals essentially rewrote the lease to say that rent of $8,400 was due upon execution of the lease but could be paid off in twelve monthly installments. It is well established that "in the guise of construing a contract, courts cannot insert what has been omitted or rewrite a contract made by the parties." ***Levy v. Levy***, 130 Wis. 2d 523, 533, 388 N.W.2d 170, 174–75 (1986).

Lest there be any doubt that the above is correct, the Seventh Circuit Court of Appeals concisely explained the fallacy in the logic of the decision

below in ***Laramore v. Ritchie Realty Mgmt. Co.***, 397 F.3d 544, 546 (7th Cir. 2005). The ***Laramore*** court, although analyzing a different statutory scheme, addressed the same question as the Court of Appeals did in this case: that is, whether "a residential lease amounts to the right of a lessee to defer payment of a debt for the purchase of property or services already purchased." ***Id.*** at 546. The Court unanimously, and correctly, reached the opposite conclusion than that reached by the Court of Appeals:

> The typical residential lease involves a contemporaneous exchange of consideration—the tenant pays rent to the landlord on the first of each month for the right to continue to occupy the premises for the coming month. A tenant's responsibility to pay the total amount of rent due does not arise at the moment the lease is signed; instead a tenant has the responsibility to pay rent over roughly equal periods of the term of the lease. The rent paid each period is credited towards occupancy of the property for that period (i.e., rent paid November 1 is credited towards the right of a tenant to occupy the premises in November). As such, there is no deferral of a debt, the requirement for a transaction to be a credit transaction under the Act.

Id. at 547.

In all, in no way does a lessee become responsible for the "full amount" of rent payable over the term of the lease upon execution of the lease. The Court of Appeals' unsupported statement to the contrary led to its unjustifiable conclusion that a residential lease is an "agreement to defer payment" that falls within the ambit of Wis. Stat. § 427.104. A typical residential lease (and the lease in this case) is the exact opposite of an agreement to defer payment. A tenant pays rent as it accrues (here, on the 1st of each month); there is no "delay" in payment such that a residential

lease constitutes an "agreement to defer payment" as is necessary to implicate Wis. Stat. § 427.104(1).

II. A lease that merely incorporates the language of Wis. Stat. § 704.05(3) does not violate Wis. Stat. § 704.44(10) and Wis. Admin. Code § ATCP 134.08(10), even if it fails to include the notice of domestic abuse protections required by Wis. Stat. § 704.14.

In Wis. Stat. § 704.05(3), the legislature made a policy determination that, for every lease in this state that does not specifically include a contrary provision,[1] a tenant has a duty to "not use the premises for any unlawful purpose." The lease in this case incorporated that provision, stating that the tenant could not "make [or] knowingly permit use of the premises for any unlawful purpose." ***Koble***, 412 Wis. 2d 1, ¶36.

The Court of Appeals concluded that, because the lease failed to include the mandatory domestic abuse notice required by Wis. Stat. § 704.14,[2] the incorporation of Wis. Stat. § 704.05(3) into the lease rendered it

[1] It is dubious, at best, as to whether a lease could contain a contrary provision to the command that a tenant cannot use leased premises for an unlawful purpose (i.e., a provision authorizing the tenant to use premises for an unlawful purpose), as a "contract provision that violates the law is void." ***Glendale Pro. Policemen's Ass'n v. City of Glendale***, 83 Wis. 2d 90, 98, 264 N.W.2d 594 (1978).

[2] Wis Stat. § 704.14 requires a residential lease to include the following notice:

> **NOTICE OF DOMESTIC ABUSE PROTECTIONS**
>
> (1) As provided in section 106.50(5m)(dm) of the Wisconsin statutes, a tenant has a defense to an eviction action if the tenant can prove that the landlord knew, or should have known, the tenant is a victim of domestic abuse, sexual assault, or stalking and that the eviction action is based on conduct related to domestic abuse, sexual assault, or stalking committed by either of the following:

void and unenforceable pursuant to Wis. Stat. § 704.44(10) and Wis. Admin. Code § ATCP 134.08(10). Those latter provisions both state that that a residential lease is void and unenforceable if it "allows the landlord to terminate the tenancy of a tenant for a crime committed in relation to the rental property and the rental agreement does not include the notice required under s. 704.14, Stats." Wis. Stat. § 704.44(10) and Wis. Admin. Code § ATCP 134.08(10).

The statutes do not provide a definition of a "crime committed in relation to the rental property." However, the inclusion of that phrase must have some meaning, otherwise the statute would simply say that a lease is void and unenforceable if it does not include the notice required by Wis. Stat. § 704.14. ***State ex rel. Kalal v. Cir. Ct. for Dane Cnty.***, 2004 WI 58, ¶46, 271 Wis. 2d 633, 681 N.W.2d 110 ("Statutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage.")

Relatedly, this Court presumes that the legislature was aware that Wis. Stat. § 704.05(3) already mandated that every tenant has a duty to not use

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(a) A person who was not the tenant's invited guest.

(b) A person who was the tenant's invited guest, but the tenant has done either of the following:

1. Sought an injunction barring the person from the premises.

2. Provided a written statement to the landlord stating that the person will no longer be an invited guest of the tenant and the tenant has not subsequently invited the person to be the tenant's guest.

leased premises for an unlawful purpose when it enacted Wis. Stat. 704.44(10). *See* ***Schill v. Wisconsin Rapids Sch. Dist.***, 2010 WI 86, ¶103, 327 Wis. 2d 572, 786 N.W.2d 177. Because the legislature knew that all residential tenants are required to avoid using their leased premises for an unlawful purpose, it must have intended that the phrase "crime committed in relation to the property" be given a narrower meaning than the one adopted by the Court of Appeals. Otherwise, Wis. Stat. § 704.44(10) would be triggered in all cases by the existence of Wis. Stat. § 704.05(3). If that result was what the legislature intended, it could have done so by, again, simply stating that every residential lease which does not include the Wis. Stat. § 704.14 notice is void.

But that is not what the legislature did. It included the "crime committed in relation to the rental property" language quoted above, which must be given meaning. That meaning was correctly determined below by the circuit court. Specifically, a lease provision that would impermissibly permit a landlord to evict a tenant for a "crime committed in relation to the rental property" must be a provision that could be construed to allow for the eviction of a tenant belonging to the class protected by the statutory domestic abuse provision: "a victim of domestic abuse, sexual assault, or stalking." Wis. Stat. § 704.14(1).

This interpretation reflects the well-established principle that statutes must be read as a "coherent whole." ***Kalal***, 271 Wis. 2d 633, ¶49. The circuit

court properly applied that principle to the lease here to determine that the lease was not void and unenforceable. The lease, consistent with Wis. Stat. § 704.05(3), prohibited a tenant from making or knowingly permitting use of the premises for an unlawful purpose.

But, as the court aptly explained, "victims are victims because of things that happened against their will, and the lease provision is not violated if the tenant did not permit the criminal activity to occur." If the challenged lease provision, like the one in this case, would never allow a tenant who is victim of domestic abuse, sexual assault, or stalking to be evicted because of the crime committed against them, then it does not trigger Wis. Stat. § 704.44(10) or Wis. Admin. Code § ATCP 134.08(10).

For the above reasons, this Court should hold that a lease that merely incorporates the statutory command of Wis. Stat. § 704.05(3) is not void and unenforceable under Wis. Stat. § 704.44(10) or Wis. Admin. Code § ATCP 134.08(10), even if it fails to include the notice required by Wis. Stat. § 704.14.

III. Assuming that the lease was void and unenforceable, Marquardt is not entitled to any damages under Wis. Stat. § 100.20(5) because she failed to prove that she suffered a pecuniary loss.

In the decision below, the Court of Appeals held that "as a result of Koble's violation of Wis. Stat. § 704.44(10) and Wis. Admin. Code § ATCP 134.08(10), Marquardt is entitled to recover all of the payments that she made under the void and unenforceable lease, without any offset for the value

of the benefit that she received from living in the rental premises." ***Koble***, 412 Wis. 2d 1, ¶¶49-50. Even assuming for purposes of this section that the lease here did violate Wis. Stat. § 704.44(10) and Wis. Admin. Code § ATCP 134.08(10), the Court of Appeals' decision as to the proper remedy conflicts with a long line of case law, ignores the relevant statutes, and injects uncertainty into landlord-tenant law. It should be reversed.

The Court of Appeals' reached its erroneous conclusion by, once again, beginning its analysis with a fundamentally flawed assumption. In this instance, the Court accepted Attorney Miller's so-called concession that Wis. Stat. ch. 704 is "silent" as to the effect of a lease being deemed void and unenforceable. *See* ***Koble***, 412 Wis. 2d 1, ¶47.

In truth, Wis. Stat. ch. 704 speaks directly to the effect of a residential lease being deemed void. Wisconsin Stat. § 704.01(2) provides that "tenant who holds possession [of leased premises] without a valid lease" is a periodic tenant who "pays rent on a periodic basis." Consequently, notwithstanding the absence of a valid lease, a periodic tenant does not occupy the leased premises in a legal vacuum. Instead, Wisconsin law grants such a tenant certain legal rights, while also imposing legal obligations on the tenant.

For example, Wis. Stat. § 704.05 sets forth a comprehensive scheme outlining "the rights and duties of the landlord and tenant in the absence of any inconsistent provision in writing signed by both the landlord and the tenant. Except as otherwise provided in this section, this section applies to

any tenancy." Section 704.05(1). Section 704.05(2) specifically speaks to periodic tenants, providing that "until ... the termination of a periodic tenancy … and so long as the tenant is not in default, the tenant has the right to exclusive possession of the premises except as hereafter provided."

Wisconsin Stat. § 704.05 is not the only statutory provision speaking to the obligations of a periodic tenant. Wis. Stat. § 704.19(6) provides that "if any periodic tenant vacates the premises without notice to the landlord and *fails to pay rent when due* for any period, such tenancy is terminated as of the first date on which it would have terminated had the landlord been given proper notice on the day the landlord learns of the removal." (Emphasis added).

Plainly, Wisconsin law recognizes the unremarkable proposition that a tenant—regardless of whether they occupy leased premises pursuant to a written lease—owes his or her landlord rent for the right to so occupy the leased premises. The Court of Appeals decision to elide over these statutory commands has no basis in the law.

With the above statutory framework in mind, any claim that Marquardt is entitled to damages pursuant to Wis. Stat. § 100.20(5) quickly falls apart. To recover damages under § 100.20(5), a person must suffer "pecuniary loss because of a violation" of a DATCP order. Section 100.20(5). The Court of Appeals, prior to its decision in this case, had consistently held that a "a party asserting a pecuniary loss for the purposes

of Wis. Stat. § 100.20(5) must show that there is a causal connection between a prohibited trade practice ... and the damage incurred." ***Grand View Windows, Inc. v. Brandt***, 2013 WI App 95, ¶21, 349 Wis. 2d 759, 837 N.W.2d 611; *see also* ***Kaskin v. John Lynch Chevrolet-Pontiac Sales, Inc.***, 2009 WI App 65, ¶14, 318 Wis. 2d 802, 767 N.W.2d 394 ("We have no quarrel with the assertion that a violation of the code must 'cause' a pecuniary loss to the consumer. In fact, that is exactly what the statute and the code mean to say.").

The consistent requirement that there must be some link between the claimed violation (here, the failure to include the domestic abuse protection notice in the lease) and the alleged pecuniary loss (here, "all" of Marquardt's payments pursuant to the lease) is evident in previous decisions from the Court of Appeals. For instance, in ***Moonlight v. Boyce***, 125 Wis. 2d 298, 305–06, 372 N.W.2d 479, 484 (Ct. App. 1985), the Court of Appeals held that when a landlord violated the administrative code provision requiring a landlord to provide a tenant with a written statement of damages within 21 days to justify the withholding of said deposit, the tenant's pecuniary loss under Wis. Stat. § 100.20(5) was the amount of the security deposit withheld.

Similarly, in ***Pierce v. Norwick***, 202 Wis. 2d 587, 591-96, 550 N.W.2d 587 (Ct. App. 1996), the Court of Appeals held that when a landlord violated an administrative code provision by unlawfully withholding a security deposit based on a false representation, the tenant's pecuniary loss

under Wis. Stat. § 100.20(5) was the amount that remains of the security deposit after an offset for the landlord's actual damages.

The above cases teach that a tenant must show that the landlord's violation of the code provision must somehow be linked (i.e. have a causal connection to) the claimed monetary loss to be a damage compensable under Wis. Stat. § 100.20(5). Marquardt inarguably did not, and could not, do so in this case because she failed to appear for multiple evidentiary hearings, and she never submitted any affidavit to support her claim. This led to Attorney Miller conceding to the circuit court that Marquardt was unable to "pursue … money damages at trial."

The lack of a nexus between the claimed violation and any pecuniary loss is also highlighted by the fact that Koble's action against Marquardt was not based on anything other than her failure to pay rent, and there is no evidence that her failure to pay rent was somehow caused by the lack of the required domestic abuse notice in the lease. Stated differently, there is no evidence giving rise to any inference that any crime ever occurred on the leased premises, and certainly not any evidence that Marquardt was a victim of a crime.

Presumably because of the inability to prove a causal connection between Marquardt's claimed damages and a violation of a DATCP order—especially when Marquardt did not appear at multiple hearings or otherwise communicate with him—Attorney Miller essentially invited the Court of

Appeals to transform Wis. Stat. § 100.20(5) into a strict liability statute. By accepting this invitation, the Court of Appeals effectively rewrote Wis. Stat. § 100.20(5) and the case law which repeatedly has held that there must be a causal nexus between the claimed violation and the alleged pecuniary loss.

Because there is no evidence whatsoever of a causal nexus between any pecuniary loss and the claimed violation as required by the plain and unambiguous language of Wis. Stat. § 100.20(5), this Court should reverse the Court of Appeals on this issue.

IV. Attorney Miller has no independent right to recover attorney fees under Wis. Stat. §§ 100.25(1) or 425.308(1) because he withdrew from representing Marquardt.

The Court of Appeals awarded attorney fees to "Attorney Miller" under both Wis. Stat. §§ 425.308(1) and 100.20(5), based on its determinations that Koble violated, respectively, Wis. Stat. § 427.104(1) and Wis. Admin. Code § ATCP 134.08(10). ***Koble***, 412 Wis. 2d 1, ¶¶32, 50. With regard to the attorney fees award pursuant to its found violation of § ATCP 134.08(10), the Court of Appeals specified that the award included Attorney Miller's "attorney fees and costs incurred on appeal." ***Koble***, 412 Wis. 2d 1, ¶50.

The award of attorney fees directly to Attorney Miller—which the Court of Appeals made without explanation—as opposed to Marquardt, has no basis in statutory text or the relevant case law. It is also in direct conflict

with the Court of Appeals' prior holding in ***Dickie v. City of Tomah***, 190 Wis. 2d 455, 462, 527 N.W.2d 697 (Ct. App. 1994).

Begin with Wis. Stat. § 425.308(1). That statute provides that "if the *customer* prevails in an action arising from a consumer transaction, the *customer* shall recover the aggregate amount of costs and expenses … together with a reasonable amount for attorney fees." (Emphasis added.) Similarly, § 100.20(5) provides that "any *person* suffering pecuniary loss because of a violation … [of] any order issues under this section … shall recover … a reasonable attorney fee." (Emphasis added.)

The Court of Appeals held that Marquardt was a customer for purposes of the Act (and that Koble violated the Act) and also held that Marquardt was the person who suffered a pecuniary loss because of Koble's violation of Wis. Admin. Code § ATCP 134.08(10). ***Koble***, 412 Wis. 2d 1, ¶¶32, 50. Assuming those holdings were correct, there is still no justification or explanation in the decision for why the Court of Appeals awarded Attorney Miller *his* attorney fees.

When a fee-shifting statute identifies to whom attorney fees may be awarded, the statutory award of attorney fees belongs to that person alone, not the person's attorney. ***Betz***, 355 Wis. 2d 301, ¶30. Moreover, even assuming that Marquardt could contravene the language of the statute by assigning her rights to Attorney Miller (and that the assignment could endure after she failed to join in this appeal, which is no small assumption) —the

circuit court determined that Marquardt did not make any such assignment. Attorney Miller never challenged that determination on appeal.

The only potential clue as the Court of Appeals direct award of attorney fees to Attorney Miller is in its citation to ***Shands v. Castrovinci***, 115 Wis. 2d 352, 359, 340 N.W.2d 506 (1983). *See* ***Koble***, 412 Wis. 2d 1, ¶50. In ***Shands***, the plaintiff tenant, while represented by a legal services organization, successfully sued a defendant-landlord and prevailed upon appeal. ***Id.*** at 355. However, the plaintiff's request for appellate attorney fees under Wis. Stat. § 100.20(5)(1981–82) was summarily denied by the Court of Appeals. ***Id.*** at 356.

The ***Shands*** Court reversed and determined that the plaintiff could recover appellate attorney fees under the applicable statute, based on the public policy underpinnings of the fee statute. ***Id.*** at 358-59. In so deciding, this Court also noted that the statutory fee award could be awarded to a plaintiff receiving free legal representation from a legal aid organization. The ***Shands*** court held that plaintiff tenants "are entitled to an attorney fees award even when *they are represented at no charge* by a legal services organization. We caution, however, that the attorney fees award is the property of the organization providing the legal services." ***Id.*** at 361. (emphasis added). This result was based "on the public policy of assisting nonprofit legal organizations in taking cases that serve the public interest

without remuneration directly from the aggrieved client." ***Gorton v. Hostak, Henzl & Bichler, S.C.***, 217 Wis. 2d 493, 504, 577 N.W.2d 617 (1998).

The situation here is materially different than in ***Shands*** in two respects. First, Attorney Miller was not performing services for Marquardt through a nonprofit legal organization.[3] He was performing legal services on behalf of a private firm, pursuant to a fee agreement.[4]

That difference is critical, as in such scenarios it is the client alone who is entitled to the statutory attorney fee award. ***Gorton***, 217 Wis. 2d at 504-05 (a statutory award of attorney fees initially vests in the party entitled to the fee, not that party's attorney); *see also* ***Betz***, 355 Wis. 2d 301, ¶30. Under ***Gorton***, the ultimate *disposition* of that award could be affected by the terms of an attorney-client agreement, but the award itself could only be made to Marquardt. ***Id.*** at 505.

Second, unlike in ***Shands***, Attorney Miller is not actually representing Marquardt on appeal and has not represented her since the circuit court granted his motion to withdraw. To be sure, it is well-established in Wisconsin that attorneys are agents of their clients. ***Estate of Miller v. Storey***, 2017 WI 99, ¶61, 378 Wis. 2d 358, 903 N.W.2d 759.

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[3] Attorney Miller was employed by Cveykus Law Office when he first appeared in this action. (R8: 1). He subsequently moved to Dempsey Law Firm, LLP. (R39: 1).

[4] As explained in the background section above, the circuit court determined that the fee agreement between Attorney Miller and Marqaurdt (R24:2-4) not contain any language assigning any of Marquardt's rights to attorney fees to Attorney Miller, and Attorney Miller did not appeal that determination. (R34: 7; *see also* R#).

But, of course, Marquardt is not Attorney Miller's client on appeal. His representation of her, and any agency relationship with her, was terminated when the circuit court granted his motion to withdraw.

In sum, the only party authorized by statute to be entitled to an award of attorney fees (Marquardt) is not a party to this appeal, either directly or through her representative. There is no justification for the Court of Appeals' award directly to Attorney Miller.

Separately from the statutory issues with the Court of Appeals' award of attorney fees, its decision also directly conflicts with its prior opinion in ***Dickie v. City of Tomah***, 190 Wis. 2d 455, 462, 527 N.W.2d 697 (Ct. App. 1994). Attorney Miller could not have been clearer in the circuit court that he would not be representing Marquardt on appeal, and in fact Marquardt was not a party to the appeal.

Attorney Miller represented himself on the appeal, and it has been the law for three decades that "attorney fees cannot be awarded to a litigant unless an attorney/client relationship exists." ***Dickie*** 190 Wis. 2d at 462. This principle is the law in Wisconsin:

> for the same reason the United States Supreme Court gave in ***Kay v. Ehrler,*** 499 U.S. 432, 111 S.Ct. 1435, 113 L.Ed.2d 486 (1991). The ***Kay*** court held that a pro se litigant-attorney is not entitled to recover fees under 42 U.S.C. § 1988 even though that statute authorizes allowing the prevailing party a reasonable attorney fee. ***Kay,*** 499 U.S. at 437–38, 111 S.Ct. at 1053–54. It concluded that the purpose of the statute is to ensure the effective prosecution of meritorious claims with independent counsel, and that the attorney who represents himself is deprived of the judgment of an independent third party.

Id.

This Court recently reaffirmed that the Court of Appeals cannot render an opinion that directly conflicts with a prior published opinion. ***Wisconsin Voter All. v. Secord***, 2025 WI 2, ¶¶31-40,, 414 Wis. 2d 348, 15 N.W.3d 872. This restriction exists because the court of appeals must "speak with a unified voice." ***Id.***, ¶33 (quoting ***Cook v. Cook***, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997)). A unified court of appeals is so critical to advancing the "principles of predictability, certainty and finality relied upon by litigants, counsel and the circuit courts" that the Court of Appeals should not publish a decision contradicting a prior decision if it so much as perceives a conflict in the case law. ***Id.***, ¶¶36, 40.

Here, the Court of Appeals recognized in its opening paragraph that Attorney Miller was Marquardt's "former" attorney, yet it chose to award Attorney Miller his own attorney fees, including those incurred on appeal, in the absence of an attorney/client relationship. This decision clearly in direct conflict and should be reversed pursuant to the reasoning set forth in ***Secord.***

CONCLUSION

For the reasons given, Koble respectfully requests that this Court reverse the Court of Appeals.

Dated this 28th day of March, 2025.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in § 809.19(8) (b), (bm), and (c) for a brief. The length of this brief is approximately 7,010 words.

Dated this 28th day of March, 2025.

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