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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

REPLY BRIEF OF PLAINTIFF-RESPONDENT KOBLE INVESTMENTS

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INTRODUCTION

Intervenor-Appellant James Miller ("Attorney Miller")[1] largely concedes either by silence or by outright rejection of the Court of Appeals' reasoning below that reversal is warranted. Even looking past these concessions, the pertinent arguments Attorney Miller does raise fail on their merits. This Court should reverse the Court of Appeals' decision in its entirety.

ARGUMENT

I. This Court should hold that Wisconsin Stat. § 427.104(1) does not apply to a landlord attempting to enforce a residential lease.

A. Judicial Restraint

Judicial restraint counsels strongly in favor of declining to hold, over fifty years after its enactment, that the Wisconsin Consumer Act (the "Act") governs the landlord-tenant relationship. Opening Br. at 20-23. Attorney Miller's counterargument attempts to transform the issue of whether this Court *should* make such a determination into whether the Court *can* do so. Resp. Br. at 20-22.

Of course this Court can engage in statutory interpretation. Koble does not argue otherwise.

[1] Attorney Miller refers in his briefing to appellate arguments being raised by Defendant "Marquardt." *See, e.g.*, Resp. Br. at 18-19, 23-24, 26. Marquardt did not participate in this appeal and so for clarity Koble will refer solely to Attorney Miller when referring to appellate proceedings.

Koble's argument is that, given the legislature's explicit and pervasive regulation governing landlord-tenant relations on the one hand, and the silence of the Act—and over fifty years of case law—as to those relations on the other, this Court should defer to the legislature to accomplish any expansion of the law through the legislative process. That rationale is exactly what the ***Copper Beech*** court espoused. *See* ***State ex rel. Morrisey v. Copper Beech Townhome Communities Twenty-Six, LLC***, 806 S.E.2d 172, 177 (W. Va. 2017).

Rather than confront the rationale of the ***Copper Beech*** court, Attorney Miller blithely states that "we do not particularly care what West Virginia courts think." Resp. Br. at 22. Be that as it may, this Court can and should care about whether it is appropriate to dramatically expand the realm of landlord-tenant law based on a statute which does not address the topic.

Attorney Miller's remaining arguments on this point are equally unpersuasive. He protests that Koble makes an "inaccurate representation" which "diminish[es] its credibility before this Court." Resp. Br. at 22. The representation in question is Koble's claim that it is not aware of any legal source "holding or arguing" that the Act regulates the landlord-tenant relationship." Opening Br. at 21. The smoking gun which belies this claim––according to Attorney Miller—is the *Wisconsin Landlord and Tenant* (the "*Manual*"). *See* R30: 10-18.

A cursory read of the cited material, however, simply reinforces Koble's argument. The *Manual*, and specifically the one-paragraph of Section 9.9, recognizes that no Wisconsin court has held that the Act governs landlord-tenant relations, and it does not argue for any such conclusion. R30: 18. Instead, it states generally that collecting unpaid rent "may" be governed by the Act and that "if" an action complained of does violate the Act, certain remedies are available. ***Id.***

If any party misrepresents the *Manual*, it is Attorney Miller. He cites to the *Manual* to support his argument that the Act is "based upon and largely consistent with the federal debt collection law (FDCPA), which has been applied to residential tenancies." Resp. Br at 21. Left unsaid by Attorney Miller, however, is the *Manual*'s explicit recognition that the "FDCPA does not apply to a landlord collecting debt owned by that landlord." R30: 16; *Manual*, §9.6. *See also* ***Gokey v. Rookside MHP, LLC***, No. 25-CV-117-JDP, 2025 WL 993898, at *1 (W.D. Wis. Mar. 19, 2025).

B. Text of the Act

Assuming that this Court does address whether the Act, and specifically Wis. Stat. § 427.104(1), governs landlord-tenant relations, the answer should be a resounding "no" because a residential lease is not an "agreement to defer payment." This conclusion is highlighted and compelled by Attorney Miller's effective concession that the Court of Appeals made a fundamentally flawed assumption that a tenant becomes responsible to pay

an entire years' worth of rent at signing of a lease, but then by agreement defers payment over twelve months in equal installments. Resp. Br at 22-24.

Comparing the language of the Court of Appeals' decision with Attorney Miller's response brief makes this conclusion inescapable. The Court of Appeals held that "Marquardt was not required to pay the total amount of rent *due* for her one-year lease up front; she was permitted to pay one-twelfth of that amount each month." ***Koble Invs. v. Marquardt***, 2024 WI App 26, ¶22, 412 Wis. 2d 1, 7 N.W.3d 915 (emphasis added). Attorney Miller now argues that "rent payments need not be paid until they become *due*—later. Stated otherwise, since they *are not due yet*, the payments are not debt." Resp. Br at 22 (emphases added).

This concession is further reinforced by Attorney Miller's failure to address the case law Koble cited in support of its argument that undermine the foundation of the Court of Appeals' holding. *Compare* Opening Br. at 26 *with* Resp. Br at 22-24. That case law establishes that rent does not accrue upon the signing of a residential lease, but only as rent periodically becomes due during the term of the lease.

A payment is not delayed if it is required to be paid when due. "Defer" means "[t]o postpone; to delay until a later date." *Defer*, Black's Law Dictionary 513 (10th ed. 2014). "Payment" means the "[p]erformance of an obligation[.]" *Payment*, Black's Law Dictionary 1309 (10th ed. 2014). If the obligation to pay rent does not arise or accrue until the first of each month

and a tenant is required to pay that rent when it becomes due, there is necessarily no agreement to defer payment. Standing alone, this warrants reversal of the Court of Appeals' decision that Wis. Stat. § 427.104(1) governs a landlord's attempt to enforce a residential lease.

Attorney Miller also argues that a residential tenant falls within the Act's definition of a "customer." The Act defines a customer as one who "seeks or acquires" real property. *See* Wis. Stat. § 421.301(17). In turn, if the residential tenant is a "customer," then a residential lease is a "consumer transaction" as defined by Wis. Stat. § 421.301(13).

There is a material difference between one who actually "acquires real property" and one acquires the necessarily more limited "leasehold interest" in real property. The Court of Appeals erred in holding that by doing only the latter, a residential tenant qualifies as a customer.

Rather than dispel this notion, Attorney Miller's arguments confirm it. First, Attorney Miller points to Wis. Admin. Code § DFI-WCA 1.05. This rule speaks to the "acquisition of a leasehold interest in real property." ***Id.*** In the very next rule, a customer is defined for purposes of Wis. Stat. § 421.301(1) as one who "seeks or acquires real property." By omitting the caveat "of a leasehold interest" in real property, this choice of language reveals that there must be a difference between acquiring real property and acquiring a mere leasehold interest in real property. In other words, the two concepts are not synonymous.

Attorney Miller also cites Wis. Stat. § 990.01(2), which defines "acquire" to mean "acquisition by purchase, grant, gift or bequest." Resp. Br. at 15. A lease is clearly not a grant, gift or bequest; accordingly a lease would only fall under this definition if a lease is a purchase. The definition of "purchase," notably fails to include a lease amongst its numerous examples of the type of transaction which constitutes a purchase of real property. *See Purchase*, Black's Law Dictionary 1429 (10th ed. 2014) (A purchase means the "acquisition of an interest in real or personal property by sale, discount, negotiation, mortgage, pledge, lien, issue, reissue, gift, or any other voluntary transaction.").

Regardless, for the reasons explained above, this Court need not even reach the issue of whether a residential tenant qualifies as a "customer" under Wis. Stat. § 421.201(17), because a residential lease does not qualify as an "agreement to defer payment," as is necessary to trigger application of Wis. Stat. § 427.104(1).

II. The lease did not violate Wis. Stat. § 704.44(10) and Wis. Admin. Code § ATCP 134.08(10).

Attorney Miller either misunderstands or refuses to engage with Koble's argument regarding the interplay between Wis. Stat. §§ 704.05(3) and 704.44(10). Koble's argument is that the Court of Appeals' interpretation of Wis. Stat. § 704.44(10) violated the statutory command to

interpret statutes not in isolation, but in the context of Wis. Stat. Ch. 704 as a whole. Opening Br. at 29-32.

Wis. Stat. § 704.05(3) prohibits every tenant in Wisconsin from using leased premises "for any unlawful purpose [or] in such manner as to interfere unreasonably with use by another occupant of the same building or group of buildings."[2] The lease here did not put any additional restriction on Marquardt, nor does Attorney Miller argue as such.

If the Court of Appeals were correct that the lease provision at issue satisfied the statutory trigger of "allow[ing] the landlord to terminate the tenancy of a tenant for a crime committed in relation to the rental property," then that entire statutory clause is surplusage. Every single lease in Wisconsin would always trigger that clause.

Attorney Miller's quibble about whether the clause at issue "incorporates" Wis. Stat. § 704.05(3) or is "consistent" with it is ultimately a distinction without any difference. The lease and the statute are substantively identical, and Attorney Miller does not argue otherwise.

Attorney Miller's remaining argument is that Koble's admission in the circuit court forecloses its current argument. But the request for admission quite literally posed the question of whether the lease allowed Koble to "terminate the tenancy of a tenant for a crime committed on the

[2] *See* Wis. Stat. § 704.05(3).

rental premises" in isolation. (R16: 5). That approach directly conflicts with the rules of statutory interpretation. *See* ***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 not construed in isolation, but rather "in the context in which it is used" and "as part of a whole").

III. Marquardt did not prove any pecuniary loss.

Confronted with the long line of case law holding that a party asserting a pecuniary loss for the purposes of Wis. Stat. § 100.20(5) must show that there is a causal nexus between a claimed violation and their alleged pecuniary loss, *see* Opening Br. at 34-37, Attorney Miller offers no comment. Instead, he presents two pages of argument, unsupported by citation to any relevant legal authority—or even addressing a *single* case cited by Koble in support of its pecuniary loss argument—that boils down to a claim that the Court of Appeals correctly decided 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.

Attorney Miller does not even address Koble's argument that Marquardt continued to owe rent to Koble as a periodic tenant, even assuming the lease was void and unenforceable. This overall failure to respond to Koble's argument concedes that there was no causal nexus between the claimed violation and any alleged pecuniary loss. *See* ***Charolais***

Breeding Ranches, Ltd. v. FPC Securities, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

Moreover, beyond ignoring the long-standing causal nexus requirement, Attorney Miller repeatedly refers to "charges" as being sufficient to establish a pecuniary loss. Not so. To establish a pecuniary loss within the meaning of Wis. Stat. § 100.20(5), a claimant must prove the amount of "unauthorized charges" that were actually "paid." ***Kaskin v. John Lynch Chevrolet-Pontiac Sales, Inc.***, 2009 WI App 65, ¶24, 318 Wis. 2d 802, 767 N.W.2d 394.

The "ledger" here established no such thing. *See* R27: 22-23. The "ledger" does not constitute proof that (1) any of the so-called "charges" were wrongful (or even what they were for); (2) that Marquardt herself actually paid any of the alleged improper charges; or (3) that Koble and Marquardt did not agree to any of the allegedly improper charges. *See* R27: 22-23 and R29: 4. No such proof was ever offered because Marquardt did not personally participate in the case below after the parties briefed the above issue. Consequently, Attorney Miller's incredible claim that this matter should be remanded because the "record is undeveloped" must fail. Resp. Br. at 30.

IV. Attorney Miller concedes he has no legal right to be awarded attorney fees.

Attorney Miller does not respond to the substantive argument that the Court of Appeals erred in awarding *him* attorney fees, and thereby concedes the issue in full. ***Charolais***, 90 Wis.2d 97 at 109. The argument he does raise regarding Koble's "standing" also fails on its merits.

Nothing about the circuit court's order stated that Attorney Miller could intervene to seek *his own* attorney fees; it stated he could intervene to pursue an "appeal of the issues underlying the request for statutory fee-shifting attorney fees/costs." (R45: 2). Under the relevant statutes, Attorney Miller could argue that *Marquardt* was entitled to attorney fees, but there is no cogent argument that Attorney Miller could be awarded his own attorney fees.

V. Koble's arguments should all be addressed on their merits.

Finally, Attorney Miller makes two cursory references in the body of his brief to Koble forfeiting arguments by failing to raise them in either the circuit court or appellate court.[3] He supports both with citation to ***Veritas Steel, LLC v. Lunda Constr. Co.***, 2020 WI 3, ¶¶4, 38-43 389 Wis. 2d 722, 937 N.W.2d 19.

[3] Attorney Miller also makes a passing reference to "new issues that were long-since forfeited" in the conclusion paragraph of his brief. Resp. Br. at 33.

But all of the issues raised and argued in Koble's opening brief were laid out in its petition for review. Attorney Miller unsuccessfully opposed that petition by making the same forfeiture references, supported by the same citations to ***Veritas Steel***. These arguments have not become any stronger in the interim.

In addition, forfeiture "is a rule of judicial administration," and courts "may disregard a forfeiture and address the merits of an unpreserved issue in an appropriate case" ***State ex rel. Davis v. Cir. Ct. for Dane Cnty.***, 2024 WI 14, ¶ 22, 411 Wis. 2d 123, 132, 4 N.W.3d 273. Assuming that Koble did forfeit any arguments, this Court should, in its discretion, address the merits of all the issues. After all, Attorney Miller himself argues that there is a "dearth of landlord-tenant law" in Wisconsin. This case presents a ripe opportunity for this Court to address significant questions raised by the Court of Appeals' decision below and provide guidance to the bench and bar, as well as landlords and tenants throughout the state.

CONCLUSION

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

Dated this 16th day of May, 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 2,992 words.

Dated this 16th day of May, 2025.

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