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**NO. 22AP0182**

# In the Supreme Court of Wisconsin

KOBLE INVESTMENTS,
*Plaintiff-Respondent-Petitioner*,

*v.*

ELICIA MARQUARDT,
*Defendant*,

JAMES MILLER,
*Intervenor Appellant-Respondent*.

On Appeal from the Circuit Court for Marathon County,
Case No. 2020SC000979
The Honorable Lamont K. Jacobson, Presiding Judge

## BRIEF OF NON-PARTY COALITION FOR MAINTAINING AFFORDABLE NEIGHBORHOODS, UA, AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF-RESPONDENT-PETITIONER

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## INTRODUCTION

The Court of Appeals' decision, if upheld, will eliminate residential tenant protections, destabilize the rental housing market, impose new and unpredictable business risks, increase the financial burden on low-income tenants, and ultimately encourage gentrification of historically affordable neighborhoods. Given the vital importance of preserving safe, affordable, and modern housing, the Coalition for Maintaining Affordable Neighborhoods, UA respectfully urges this Court to reverse the Court of Appeals' decision, apply established law, and prevent the displacement of low-income tenants from their existing neighborhoods.

By incentivizing wide-scale and financially devastating lawsuits, the Court of Appeals' decision is driving up costs for low-income tenants. Since the opinion's publication, multiple cases and counterclaims, including class actions, have been filed against residential landlords throughout Wisconsin on behalf of tenants claiming their leases are void and unenforceable. The tenants claim they are entitled to recover double the rent they paid to live in their rental units, plus attorney fees. If this Court does not intervene, such claims will introduce unsustainable legal and financial risk for landlords, reduce tenant protections, and encourage corporate ownership and gentrification within Wisconsin's rental housing market.

This Court must reaffirm fundamental tenets of landlord-tenant law by declining to apply the Wisconsin Consumer Act to residential leases, and establishing clear precedent that a tenant may not recover double damages under section 100.20(5) without proving a pecuniary loss caused by the alleged violation.

## STATEMENT OF INTEREST

Low- and moderate-income tenants rely on Wisconsin's rental market for stable and affordable housing. Approximately 32% of all housing units in Wisconsin are rentals, and over 44% of the tenants renting those units pay more than 30% of their income for rent.

*Selected Housing Characteristics*, U.S. Census Bureau (last visited May 16, 2025), https://data.census.gov/table/ACSDP1Y2023.DP04?g=040XX00US55.

This amicus brief is submitted on behalf of the Coalition for Maintaining Affordable Neighborhoods, UA ("Coalition"), a coalition of Wisconsin businesses – including residential landlords – primarily serving low- and modest-income neighborhoods. The Coalition's members are united by a common goal: to preserve existing affordable housing options for Wisconsin residents, especially in communities vulnerable to displacement through gentrification. The Coalition advances its mission by identifying and supporting policies that promote preservation of safe, modern, and affordable housing, and by engaging with stakeholders to implement those policies. Key to their success is the consistent and fair administration of Wisconsin's landlord-tenant law.

## ARGUMENT

### I. THE PROVISIONS OF THE WISCONSIN CONSUMER ACT, INCLUDING SECTION 427.104(1), DO NOT APPLY TO RESIDENTIAL LEASES

The legislature did not intend for the Wisconsin Consumer Act ("WCA"), codified in chapters 421-427, to apply to residential leases. When the legislature states a statute's purposes, the Court must interpret the statute in light of those purposes. *Kalal v. Cir. Ct. for Dane County*, 2004 WI 58, ¶49, 271 Wis. 2d 633, 681 N.W.2d 110. The WCA was expressly enacted to simplify and clarify the law regarding consumer transactions and debt collection practices. Wis. Stat. § 421.102(2). Applying the WCA to the landlord-tenant relationship for the first time in over 50-years would do precisely the opposite, causing confusion and uncertainty.

As the Department of Agriculture, Trade, and Consumer Protection ("DATCP") explains, "Many disputes between landlords and tenants can be avoided if both parties understand their legal rights and responsibilities." DEP'T. OF AGRIC., TRADE, AND

CONSUMER PROT., LANDLORD-TENANT, https://datcp.wi.gov/Pages/Publications/LandlordTenantGuide.aspx (last visited May 16, 2025). DATCP's guidance describes the comprehensive statute and administrative code governing landlord-tenant relations. *See* DEP'T. OF AGRIC., TRADE, AND CONSUMER PROT., LANDLORD TENANT GUIDE 1-9 (2023) https://datcp.wi.gov/Documents/LT-LandlordTenantGuide497.pdf, (*discussing* Wis. Stat. ch. 704 and Wis. Admin. Code ch. ATCP 134). These provisions address lease requirements, eviction procedures, and tenant rights, and provide clear remedies for violations. Notably, DATCP's guidance does not mention the WCA. This is because applying the WCA on top of the existing comprehensive regulatory scheme would cause confusion and increase landlord-tenant disputes, in contravention of the legislature's intent to simplify and clarify the law.

Another stated purpose of the WCA is to coordinate regulation of consumer credit transactions with the policies of the federal Consumer Credit Protection Act ("CCPA"), 15 U.S.C. §§ 1601-1693r. Wis. Stat. § 421.102(d). However, applying the WCA to residential leases directly contradicts the CCPA. Over the last 40 years, "considerable judicial consensus has …emerged that there is no right to deferred payment…where an exchange of value between parties is contemporaneous or substantially contemporaneous," such as in a typical residential lease. *Consumer Fin. Prot. Bureau v. Snap Fin. LLC,* No. 2:23-cv-00462-JNP-JCB, 2024 WL 3625007, at *7 (D. Utah Aug. 1, 2024). The Seventh Circuit agrees, holding that a typical residential lease does not involve a credit transaction and is not a deferred payment of debt under Title VII of the CCPA. *Laramore v. Ritchie Realty Mgmt. Co.*, 397 F.3d 544, 547 (7th Cir. 2005). Rather, a tenant paying a landlord at the beginning of the month for the right to continue occupancy for the coming month involves a contemporaneous exchange of consideration. *Id.* Pursuant to the legislature's directive to maintain consistency between the WCA and the CCPA, typical residential leases are not

consumer credit transactions, do not involve deferred payment, and thus cannot be subject to the WCA.

## II. WHEN A RESIDENTIAL TENANT DOES NOT PROVE THAT SHE SUFFERED ANY PECUNIARY LOSS BECAUSE OF A VIOLATION OF AN ORDER ISSUED UNDER SECTION 100.20, DAMAGES ARE NOT RECOVERABLE UNDER SECTION 100.20(5)

The Court of Appeals' holding that pecuniary loss is equal to all rent paid under the lease was based on flawed analysis and should be reversed. Specifically, the Court of Appeals improperly equated the validity of a tenancy to the validity of a lease, declared validly paid rent a pecuniary loss, and ignored the tenant's burden to demonstrate the pecuniary loss was caused by the violation. But, regardless of its decision on the facts of this case, we urge this Court to clarify that a void lease does not convert all previously-paid rent into a *de facto* pecuniary loss.

### A. Established law distinguishes between a valid lease and a valid tenancy.

Contrary to the arguments accepted by the Court of Appeals, chapter 704 clearly explains the consequences of a void lease. When a lease is "void and unenforceable" under the § ATCP 134.08 or section 704.44, the basic landlord-tenant relationship is not destroyed because the validity of a tenancy is distinct from the validity of a lease.

In *Baierl v. McTaggart*, this Court held that a lease violating § ATCP 134.08(3) was unenforceable *by the landlord*. 2001 WI 107, ¶2, 245 Wis. 2d 632, 629 N.W.2d 277. However, this Court rejected the tenants' framing of the lease as *per se* void, explaining that a tenant may still enforce the lease. *Id.* at ¶¶19-20. Later, in *Dawson v. Goldammer*, the Court of Appeals reinforced that a tenant is entitled to reside in his apartment even if the lease is void under § ATCP 134.08 or section 704.44. 2006 WI App 158, ¶¶ 13, 17-18, 295 Wis.2d 728, 722 N.W.2d 106.

Thus, if a lease is void, the tenant may choose to sever the unenforceable provisions and enforce the remainder. Alternatively, if the tenant chooses not to enforce the lease, the tenancy becomes - by operation of law - a periodic tenancy. *See Dawson*, 295 Wis. 2d at ¶¶5, 19 (explaining an unenforceable lease results in "a month-to-month tenancy."); *Sutherland v. Drolet*, 154 Wis. 619, 143 N.W. 663, 665 (1913) (when a lease is void, a tenancy becomes a periodic tenancy). In either event, the tenancy is still valid even if the lease is not.

This Court should reverse the Court of Appeals decision because it contradicts precedent and would effectively eviscerate the rights of tenants when a lease is void. The decision ignores the established principle that the validity of a lease is distinguishable from the validity of a tenancy, accepting Intervenor Appellant-Respondent's flawed (but unrebutted) argument that if there is no lease, there is no tenancy, and therefore the tenant's rent payments constitute a pecuniary loss. *Koble Invs. v. Marquardt*, 2024 WI App 26, ¶¶48-19, 412 Wis. 2d 1, 7 N.W.3d 915.

But a tenant who enforces valid portions of a lease still holds a valid tenancy, as does a tenant who becomes a periodic tenant because of a void lease. A periodic tenant is "a tenant who holds possession without a valid lease and pays rent on a periodic basis," including a tenant from month-to-month or other recurring time interval. Wis. Stat. § 704.01(2). Periodic tenants are afforded important rights, including exclusive possession of the premises, and advanced written notice prior to termination of the tenancy. Wis. Stats. §§ 704.05(2), 704.19(1)(a). Periodic tenants remain obligated to pay rent, as the right to exclusive possession is conditioned on the tenant not being in default. Wis. Stat. § 704.05(2).

If this Court accepts the decision equating the validity of the tenancy to the validity of the lease, tenants with a void lease would enjoy none of the protections provided in chapter 704 or ATCP ch. 134.

### B. Rent paid under a void lease is not a *de facto* pecuniary loss.

A person suffering a pecuniary loss because of a violation of an order issued under section 100.20 shall recover twice the amount of that loss. Wis. Stat. § 100.20(5). A pecuniary loss is a "loss of money or of something having monetary value." *Pecuniary Loss*, BLACK'S LAW DICTIONARY (11th ed. 2019).

The Court of Appeals incorrectly relied on caselaw applying this double recovery rule to a landlord who violated section 100.20 by failing to return a security deposit. *Koble Invs.*, 412 Wis. 2d 1, ¶45 (citing *Shands v. Castrovinci*, 115 Wis. 2d 352, 358, 340 N.W.2d 506, 509 (1983)).[1] However, unlike when a landlord unlawfully retains a security deposit, if a DATCP rule under section 100.20 does not prohibit the retention or receipt of funds, pecuniary loss is calculated using "the concept of damages in contract law" so "[a] party who is injured should, as far as it is possible to do by monetary award, be placed in the position in which he or she would have been had the contract been performed." *Benkoski v. Flood*, 2001 WI App 84, ¶32, 242 Wis. 2d 652, 626 N.W.2d 851 (internal citation omitted); *see also United Leasing & Financial Servs., Inc. v. R.F. Optical, Inc.*, 103 Wis. 2d 488, 492, 309 N.W.2d 23 (Ct. App. 1981) ("The elementary rule of contract damages is that a party is entitled to be placed in the same position as if the breach had not occurred"); *Maryland Arms Ltd. Partnership v. Connell*, 2010 WI 64, ¶¶22-23, 326 Wis. 2d 300, 786 N.W.2d 15 (applying tenets of contract interpretation to residential lease).

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[1] When a DATCP rule issued under section 100.20 "prohibits the retention or receipt of the [tenant's] money, the [tenant] suffers a pecuniary loss under § 100.20(5) in the amount that was wrongfully retained or received." *Kaskin v. John Lynch Chevrolet-Pontiac Sales, Inc.*, 2009 WI App 65, ¶24, 318 Wis. 2d 802, 767 N.W.2d 394. Thus, a tenant suffers a pecuniary loss equal to the amount of their security deposit if their landlord unlawfully retains the security deposit. *Moonlight v. Boyce*, 125 Wis. 2d 298, 305-06, 372 N.W.2d 479 (Ct. App. 1985).

By finding the pecuniary loss equal to all prior rent payments, the Court of Appeals placed the tenant in a far better position because she received the goods or services (i.e., an apartment) that she paid for. *See Reusch v. Roob*, 2000 WI App 76, ¶32, 234 Wis. 2d 270, 610 N.W.2d 168 (despite unfair trade practice, claimants cannot receive photos they bargained for and also recover all money they paid). Further, payment of periodic rent is an ongoing statutory obligation for periodic tenants who continue to reside in their rental unit. *See supra* Part II.A; Wis. Stat. § 704.05(2).

### C. Section 100.20(5) places the burden on the claimant to show the violation caused the pecuniary loss.

The Court of Appeals premised its decision on a finding that "Koble conceded [the] argument" by "not respond[ing] to Attorney Miller's arguments . . . [and] in particular [failing] to develop an argument that the claimed pecuniary loss was not caused by Koble's violation of § 704.44(10) and § ATCP 134.08(10)." *Koble Invs.,* 412 Wis. 2d 1, ¶ 49. This misstates Koble's arguments and the burden of proof.

First, Koble argued "the tenant's request to get all of the money she paid for rent under the Lease would be an absurd result and create a massive windfall that the Wisconsin statutes never intended." Brief of Plaintiff-Respondent at 18, *Koble Invs. v. Marquardt*, 2024 WI App 26 (No. 2022AP000182) (Ct. App. June 14, 2022). Second, the statute and related precedent place the burden of establishing causation on the tenant. This Court has held "a party asserting a pecuniary loss" must show "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*, 2009 WI App 65, ¶14 ("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."). Therefore, even if Koble's argument refuting that paid rent was pecuniary loss was

underdeveloped, the tenant cannot be relieved of her burden to show a causal connection.

Notably absent from the decision is any support that the tenant's rent payments were *caused by* the lack of a domestic violence clause in the lease. The tenant did not argue, and the Court of Appeals did not find, any evidence that the rent payments were caused by the violation of § ATCP 134.08(10). Because there is no causal connection between the damages and the violation, the tenant is not entitled to recover her rent payments.[2]

If this Court upholds the decision of the Court of Appeals, a tenant with a "void and unenforceable" lease would receive a windfall where the tenant owes no rent and is effectively eligible to receive a free apartment until they vacate. With the decision awarding double damages, not only would the tenant be able to reside in the unit for free, but the landlord would be paying the tenant the cost of rent for the privilege. This outcome ignores the well-established concept of periodic tenancy, and the benefit of the bargain received by the tenant.

### D. If this Court agrees that Marquart is entitled to damages, it should limit its holding to this case and clarify that rent paid under a residential lease determined to be void under § ATCP 134.08 is not a *de facto* pecuniary loss.

Should this Court uphold some or all of the Court of Appeals' decision, the Court should limit that holding to the facts of the current case. The Court should clarify that it is not setting the precedent that any rent paid under any void residential lease is a *de facto* pecuniary loss.

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[2] Even if this Court agrees that Koble somehow conceded that the rental payments were a pecuniary loss, given the wide-reaching results of the decision, this Court should exercise its inherent authority to address the merits of an unpreserved argument. *Village of Trempealeau v. Mikrut*, 2004 WI 79, ¶ 17, 273 Wis. 2d 76, 681 N.W.2d 190.

Reliance on the decision has substantially increased landlord-tenant litigation. Since the decision, multiple cases, including class actions, have been filed against landlords, seeking double recovery of rent payments.[3] This increases landlords' risk, which in turn, increases costs such as insurance premiums and legal expenses. Should this trend continue, landlords of every nature will be forced to raise rents and/or reduce expenses through deferred maintenance or reduced services. Increased rents, deferred maintenance, and reduced services will hit low-income tenants the hardest because they, by definition, lack discretionary funds to cover these additional expenses.

This trend could also result in fewer protections for tenants. The obvious method for landlords to avoid an allegation that a lease is void (and a claim for double all rent paid under the lease) is to avoid written leases. Written leases provide clarity to both parties and reduce potential disputes between landlords and tenants. A shift away from written leases in favor of oral rental agreements will increase landlord-tenant disputes. This would also disproportionately impact low-income tenants, who do not have the resources to obtain legal representation.

These risks are particularly problematic for small landlords operating in areas with low-income rental housing. Large corporations stand to benefit as they are most likely to step in to purchase properties from small landlords who can no longer afford mounting costs. These larger entities are often profit-driven, and therefore less invested in local communities and more likely to gentrify low-income neighborhoods.

This Court should take these issues into account and restore the legal framework that safeguards the rights of both tenants and landlords.

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[3] *See e.g.*, Defendants' Answer and Class Action Counterclaim, *Offer Investment Prop. Mgmt. v. Ingraham*, No. 2024SC001276 (Fond du Lac Co. Cir. Ct. Sept. 20, 2024).

## CONCLUSION

For the reasons above described, this Court should reverse the decision of the Court of Appeals.

Dated: May 16, 2025.

Respectfully submitted,

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## FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in section 809.19(8)(b), (bm), and (c) for a brief produced with a proportional serif font. The length of this brief is 2,852 words according to Microsoft Word.

Dated: May 16, 2025.

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## CERTIFICATE OF SERVICE

I hereby certify that in compliance with Wis. Stat. § 801.18(6), this brief and the accompanying certification and appendix have been electronically filed with the clerk of court using the Wisconsin Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated: May 16, 2025.

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