

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

March 11, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

**No. 96-1947-FT**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

**Sharon I. O'Malley,**

**Plaintiff-Respondent,**

**v.**

**Lora McKizzie,**

**Defendant-Appellant.**

APPEAL from a judgment of the circuit court for Milwaukee County: WILLIS J. ZICK, Reserve Judge. *Vacated and cause remanded with instructions.*

SCHUDSON, J.<sup>1</sup> Lora McKizzie appeals from the Notice of Entry of Judgment, following the trial of a small claims eviction action, awarding \$1,850.73, plus costs, to her former landlady, Sharon O'Malley. McKizzie argues that the trial court erred by failing to award attorney fees and double damages to her after it found that O'Malley had violated WIS. ADM. CODE § ATCP 134.09(4). Because the record does not reveal any basis on which the trial court

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<sup>1</sup> This appeal is decided by one judge pursuant to § 752.31(2), STATS.

entered judgment for O'Malley and because the trial court offered inconsistent comments and no definitive findings regarding O'Malley's alleged violation of WIS. ADM. CODE § ATCP 134.09(4), this court vacates the judgment and remands with instructions.

According to the trial testimony, in February 1994, McKizzie entered into a month-to-month lease agreement with O'Malley. According to the terms of the agreement, McKizzie was to rent O'Malley's single-family residence for \$550.00 a month, with payment due on the first of each month. Among other things, the lease required the tenant to pay the utility bills and tend to the yard work. In addition, the lease did not permit the tenant to keep pets on the premises without O'Malley's permission.

On January 6, 1995, pursuant to § 704.17, STATS., O'Malley served a 14-day notice informing McKizzie that her tenancy would terminate on January 20, 1995, due to her failure to pay rent on December 1, 1994 and January 1, 1995, and because of other violations of the rental agreement: keeping domestic animals on the premises without permission, changing the locks without landlady's consent, defaulting on rental payments in October and November 1994, and failing to maintain the yard.

In late January, McKizzie began removing her property from the residence. After learning from one of McKizzie's neighbors that McKizzie had removed appliances and furniture from the home, O'Malley contacted the gas company and was informed that the gas would be turned off on February 3, 1995. On February 4, 1995, O'Malley went to the home to determine whether anyone was living there. Upon arrival, she perceived the premises to be vacant. To determine whether the heat and water had been turned off, O'Malley contacted Milwaukee Police and, in their presence, entered the home.

Upon entry, O'Malley discovered that the residence was in complete disarray. With the exception of a broken bed, miscellaneous personal items, and cats, the house was empty. According to O'Malley's testimony, cats had defecated throughout the house. Believing that the residence had been abandoned, O'Malley attempted to clean it and, upon the advice of the officer who had accompanied her, she secured the home by having the locks changed.

Later that week, McKizzie contacted O'Malley to arrange a time to remove the items remaining in the house. The two agreed on February 12, 1995 as the final moving day. In the interim, O'Malley sorted through the soiled items and discarded what she believed to be junk. On February 12, McKizzie returned to the home and removed her remaining property, except for a washing machine.

Although judgment was entered for O'Malley, McKizzie contends that she is entitled to double damages and attorney fees because, she argues:

The court found that [O'Malley] had changed the locks and disposed of personalty (sic) of [McKizzie].

....

The lockout was the start of a self-help eviction by the landlord without a surrender by Ms. McKizzie or the execution of a writ by the Sheriff. [O'Malley] violated [WIS. ADM. CODE §] ATCP 134 by locking the tenant out preventing her from having access to the property on February 4, 1994 (sic) and by removing the tenants' personal property on February 4, 1995.

O'Malley responds that the trial court never made that finding and, therefore, that the judgment should be affirmed.

Thus, the issue on appeal—whether the trial court found that O'Malley had carried out a self-help eviction—should easily be resolved by reference to the record simply to ascertain the trial court's finding. Unfortunately, however, while the record reveals many trial court musings on the subject, it offers inconsistent comments and no definitive findings or conclusions.

Both McKizzie and O'Malley point to the trial court's comments in support of their respective arguments. For example, McKizzie emphasizes that the trial court stated:

I guess once the landlady deprives the tenant of the right of possession, then she can't claim rent any longer. I guess that's the law. I guess that's what you call self-help eviction.

O'Malley finds equally supportive trial comments such as:

I had said earlier I view this as a self-help eviction thing because she locked it up and deprived her of possession, but [Plaintiff's counsel] raised another variation on the thing. He said, hey, she acquiesced on the eviction.

At the conclusion of the court trial, and at several points near the conclusion of its comments, the trial court expressed its need to further consider the matter. It requested briefs and, within a few weeks, the parties submitted them. Surprisingly, however, the trial court never rendered an oral or written decision resolving the issues it had identified.<sup>2</sup>

Therefore, nothing in the trial record provides any basis on which this court could determine: (1) what the trial court found; or (2) whether the trial court found anything forming the basis for the clerk's Notice of Entry of Judgment. Accordingly, this court vacates the judgment and remands this case to the trial court with instructions to complete its review of the case and provide factual findings, legal conclusions, and whatever order or judgment may be appropriate.

*By the Court.* – Judgment vacated and cause remanded with instructions.

This opinion will not be published. See RULE 809.23(1)(b)4, STATS.

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<sup>2</sup> The record includes a docket entry of March 7, 1996 indicating that the trial court would be providing a written decision. No such decision, however, is in the record. The record also includes docket entries of May 22, 1996 indicating that the trial court entered judgment on May 22. The record, however, includes no transcript or other document to support that entry.

