

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

May 13, 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. 96-2655**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

---

**JENNIFER REDDING AND AMY BOYLAN,**

**PLAINTIFFS-RESPONDENTS,**

**v.**

**MARK RALFS,**

**DEFENDANT-APPELLANT.**

---

APPEAL from a judgment of the circuit court for Milwaukee County: ROBERT W. LANDRY, Reserve Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

CURLEY, J. Mark Ralfs, a residential landlord, appeals from a small claims judgment arising out of a landlord-tenant dispute with Jennifer Redding and Amy Boylan. The trial court awarded Redding and Boylan \$1,780 in double damages and costs—that is, twice the amount of their security deposit withheld by Ralfs. Ralfs raises two issues for review: (1) whether the trial court

erred when it concluded that Redding and Boylan raised a valid defense of constructive eviction; and (2) whether the trial court erred when it granted Redding and Boylan double damages. This court concludes that the trial court properly determined that the tenants were constructively evicted; however, the trial court erred when it granted double damages. Accordingly, the judgment is affirmed in part and reversed in part, and remanded with directions.<sup>1</sup>

### I. BACKGROUND.

This case arises out of a *pro se* small claims action filed by Redding and Boylan seeking \$890 for a security deposit withheld by their landlord, Ralfs. Ralfs filed a counterclaim seeking the rent that he alleged Redding and Boylan owed him because they unilaterally terminated their residential lease prior to the end of the lease term.

Redding and Boylan entered into a one-year residential lease for an upper apartment at 2431 North Cramer Street in the City of Milwaukee. Their monthly rent of \$690 was due to Ralfs on the first of every month. Further, they made a security deposit of \$890. The lease commenced on June 10, 1995.<sup>2</sup>

In mid-September 1995, Redding and Boylan attempted to turn on the apartment's heat. The furnace did not work and they notified Ralfs, who told them that a heating company was going to fix the lower unit's furnace and that they should contact the heating company to check the upper unit's furnace. On September 23, the heating company inspected the upper unit furnace, found that it

---

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

<sup>2</sup> The lease is not included in the record before this court.

had a cracked heat-exchanger, and shut the furnace down for safety reasons. Ralfs informed Redding and Boylan that because the furnace was old, the new parts were on back-order and the furnace would not work until the new parts arrived and could be installed.

As the outside temperature dropped in October, the tenants notified Ralfs that the apartment was getting cold. Ralfs offered them the use of space heaters, but the tenants declined because they were attempting to heat the apartment with their own space heaters. It is undisputed that the temperature fell below sixty-eight degrees in the apartment, and that the space heaters did not heat the entire apartment so the tenants “kept them in one bedroom and just stayed in there for heat.”

On November 2, 1995, Redding and Boylan notified Ralfs that they would be terminating the lease on December 1, because, among other things, the “[f]urnace coinciding with unit in question was not operating.” On November 3, 1995, the furnace was fixed. On November 7, Redding and Boylan signed a new lease with another apartment and on November 15, they vacated the North Cramer apartment. Ralfs notified them that he would be withholding the \$890 security deposit and that they would be responsible for the remainder of the rent under the lease until the apartment was rented again.

This action commenced and a bench trial was held. After the closure of the evidence, the trial court found that Redding and Boylan had been constructively evicted due to the heating problems in the apartment. Accordingly, the court rejected Ralfs’s counter-claim for breach of contract, and awarded Redding and Boylan double the amount of their security deposit plus costs. Ralfs now appeals.

## II. ANALYSIS.

Ralfs first argues that the trial court erred when it concluded that Redding and Boylan had presented a valid defense of constructive eviction. This court disagrees.

The following general principles of constructive eviction have been repeatedly stated:

“[A]ny disturbance of the tenant’s possession by the landlord, or someone acting under his authority, which renders the premises unfit for occupancy for the purposes for which they were demised or which deprives the tenant of the beneficial enjoyment of the premises, causing him to abandon them, amounts to a constructive eviction, provided the tenant abandons the premises within a reasonable time.

A mere slight temporary inconvenience to the tenant does not justify him in throwing up his lease. A trivial breach is not sufficient, but the breach must be substantial and of such duration that it can be said that the tenant has been deprived of the full use and enjoyment of the leased property for a material period of time ....

The landlord is entitled to notice ... and has a reasonable time after notice is given to remedy the defect complained of, and until such time has elapsed the tenant has no right to quit the premises because of the alleged breach.”

*Kersten v. H.C. Prange Co.*, 186 Wis.2d 49, 57-58, 520 N.W.2d 99, 103 (Ct. App. 1994) (citation omitted). While the trial court’s findings of fact will be sustained unless they are clearly erroneous, *see id.* at 56, 520 N.W.2d at 102, the question of whether those facts fulfill a legal standard is a question of law that this court reviews *de novo*. *Id.*

Ralfs argues that the loss of heat was not a “substantial interference” with the tenant’s use of the apartment. He argues that the furnace was repaired within a month’s time from when he was notified of the problem.

The trial court disagreed, concluding that the time of the year—that is, the month of October, involved in this case made the loss of heat “untenable.” The undisputed facts support this conclusion. Redding testified that, despite the use of space heaters, the tenants were obligated to spend most of their time in one bedroom—the only location that the space heaters occupied. The lack of heat began in September and continued to November 3. Further, Redding provided evidence that the temperature in the apartment was below sixty-eight degrees. From this evidence, the trial court could conclude that the lack of heat was both “substantial” and lasted “for a material period of time.” *Id.*

Next, Ralfs argues that Redding and Boylan did not vacate the property within a reasonable period of time. Again, this court disagrees.

Ralfs argues that he received notice on November 2, 1995, that they were ending their lease on December 1. In effect, he is arguing that by not immediately vacating the apartment when they notified Ralfs, they waived their ability to claim constructive eviction. The trial court concluded that the tenants “did not lose the benefit of the rights that they have under the law of constructive eviction by going through the extra burden ... of giving a 28-day notice.” The court further noted that the tenants moved out before the end of the month. The undisputed facts show that they moved out on November 15, two weeks after giving formal notice that they were terminating the lease. In addition, Ralfs had been on notice of the heating problem since September 23, and had discussed the matter with the tenants at least once in October when the temperature dropped.

Finally, the tenants had already paid the full rent for the month of November. The trial court could properly conclude that the tenants vacated within a reasonable time. *See* 2 POWELL ON REAL PROPERTY § 16B.03[3] at 16B-38.13-38.14 & accompanying notes (1996).

In sum, the trial court could properly find that, given the facts presented at trial, the lack of heat from the end of September to early November was sufficient to trigger a constructive eviction. *See Kersten*, 186 Wis.2d at 57-58, 520 N.W.2d at 103.

Ralfs next argues that the trial court erred when it awarded Redding and Boylan double damages. We agree.

Under § 100.20(5), STATS., and WIS. ADM. CODE § ATCP 134.06 (4)(b), a tenant is entitled to double damages when a landlord misrepresents or falsifies a claim against the tenant's security deposit. *See also Pierce v. Norwick*, 202 Wis.2d 588, 593-94, 550 N.W.2d 451, 453 (Ct. App. 1996). Contrary to Redding and Boylan's argument, there is nothing in the record that supports a finding that Ralfs misrepresented or falsified a claim against their security deposit. The trial court made no findings to support its conclusion that the tenants were entitled to the double damages. A review of the record shows that Ralfs, in withholding the security deposit, was exercising a proper remedy for what he thought was a breach of the lease on the part of the tenants. The fact that his breach of contract counter-claim was rejected after a trial does not support a finding that his claim was either a misrepresentation or falsified.

In sum, this court: (1) affirms that portion of the trial court's judgment concluding that Redding and Boylan were constructively evicted; (2) reverses that portion of the judgment awarding them double damages; and

(3) remands the matter to the trial court with directions to enter a new judgment consistent with this opinion.<sup>3</sup>

*By the Court.*—Judgment affirmed in part; reversed in part and cause remanded with directions.

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

---

<sup>3</sup> This court also reject Redding and Boylan's call for awarding appellate costs. Ralfs's appeal was not frivolous.

