

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 12, 2002

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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

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

Appeal No. 02-0409
STATE OF WISCONSIN

Cir. Ct. No. 01-SC-212

**IN COURT OF APPEALS
DISTRICT III**

SUSAN K. DEFOE,

PLAINTIFF-RESPONDENT,

V.

JODI L. SIGRIST,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Bayfield County:
THOMAS T. LINDSEY, Judge. *Affirmed.*

¶1 CANE, C.J.¹ Jodi Sigrist appeals pro se from a judgment ordering her to pay back rent and utilities to Susan Defoe. Defoe evicted Sigrist for nonpayment of rent and other lease violations. She gave Sigrist a thirty-day

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

notice, but removed her before the period ended. The trial court awarded Defoe back rent and utilities, but reduced the award by amounts Sigrist had to spend to obtain housing between the time she was evicted and the end of the notice period. On appeal, Sigrist argues the trial court erred by not admitting evidence of Defoe's violations of WIS. ADMIN. CODE § ATCP ch. 134, other damages she suffered as a result of the eviction, and of her disabled status. Sigrist also argues she was unfairly prejudiced by the court's admission of evidence submitted by Defoe. She further claims the court erred by restricting her cross-examination of Defoe, basing a factual finding on hearsay alone, and failing to inform the parties how it intended to conduct the trial. Finally, she contends she was entitled to double and punitive damages, and that the court failed to consider her indigent status when it refused to waive the transcription fee. We determine none of Sigrist's errors require us to reverse the trial court and therefore affirm the trial court's judgment.

FACTS

¶2 Sigrist became Defoe's tenant in September 2001. They did not sign a lease nor did Sigrist pay a security deposit. On November 30, 2001, Defoe gave Sigrist a thirty-day notice to vacate her apartment because of nonpayment of rent and for having too many cats in the apartment, in violation of their rental agreement. On December 14, 2001, Defoe filed a small claims action seeking to evict Sigrist and recover back rent and utilities. Defoe removed Sigrist on December 17, 2001, locking Sigrist out of the apartment while she was in the hospital giving birth. Sigrist and her daughters were able to find housing after Sigrist left the hospital.

¶3 Sigrist filed an answer and counterclaim in January 2001, alleging Defoe had wrongfully ejected her and had also shut off her cable television and

telephone prior to the end of the notice period. She counterclaimed to recover the expenses she incurred as a result of her eviction, also requesting punitive damages.

¶4 At trial, the court determined Defoe had improperly evicted Sigrist prior to the end of the notice period. The court limited the trial issues to the amount of back rent and utilities Sigrist owed and the expenditures she made as a result of the improper eviction. The court only considered expenses Sigrist had prior to the end of the notice period because Defoe had a right to evict Sigrist on that date and Sigrist's expenses after this date were not related to the improper eviction. Applying this reasoning, the court determined Sigrist owed \$764.84 to Defoe, but reduced this amount by \$240.66 Sigrist spent prior to the end of the notice period, mostly for housing and transportation. In addition, the court assessed Sigrist costs, awarding Defoe a final judgment of \$613.18. Sigrist appeals.

DISCUSSION

A. Additional damages

¶5 Sigrist raises many arguments on appeal. Several of these claim the trial court erred by not addressing damages Sigrist suffered beyond those directly related to her eviction before the end of the notice period. The trial court refused to consider these damages because it considered them beyond the scope of the eviction proceeding. We agree.

¶6 A very limited number of issues are permissible in an eviction action. *Scalzo v. Anderson*, 87 Wis. 2d 834, 847, 275 N.W.2d 894 (1979). These are (a) whether the relation of landlord and tenant exists between the parties; (b) whether the tenant is holding over; (c) whether proper notice was given;

(d) whether the landlord has proper title to the premises; and (e) whether the landlord is attempting retaliatory eviction. *Id.* at 848. This rule insures that the ultimate issue in any eviction is simply who has the right to possession of the premises. *Id.* A plaintiff in an eviction proceeding may join with the claim for restitution of the premises any other claim against the defendant arising out of the defendant's possession or occupancy of the premises, such as a claim for unpaid rent. WIS. STAT. § 799.40(2). WISCONSIN STAT. §§ 799.02 and 799.43 limit a defendant's counterclaims in an eviction to those related to the rented property that arise out of the same transaction as the subject matter of the plaintiff's claim. Counterclaims in an eviction are not cognizable if they are based on matters extrinsic or collateral to the lease and not arising from the same transaction or occurrence that is the subject matter of the eviction suit, namely the lease and the holdover of possession. *Scalzo*, 87 Wis. 2d at 848.

¶7 Sigrist argues the trial court erred by refusing to address her claim Defoe violated several provisions of WIS. ADMIN. CODE § ATCP 134.09. Specifically, she claims Defoe improperly entered Sigrist's apartment without proper notice, as required by § ATCP 134.09(2); confiscated her personal property, contrary to § ATCP 134.09(4); and engaged in self-help eviction, in violation of § ATCP 134.09(7). Section ATCP ch. 134 was enacted pursuant to WIS. STAT. § 100.20, which prohibits unfair trade practices. Allegations of a landlord's unfair trade practices are outside the scope of an eviction proceeding. *Scalzo*, 87 Wis. 2d at 848. The trial court properly excluded Sigrist's counterclaims.

¶8 Sigrist next argues the trial court erred by excluding evidence that would have supported her claim for additional damages against Defoe. Sigrist contends she should have been able to offer evidence of her moving and storage

expenses, fax and copy costs, damages to her personal possessions, increased expenses as a result of her new living arrangements and punitive damages. The trial court did not consider these damages because it determined they were expenses Sigrist would have incurred regardless of her early eviction or because they were not relevant to the proceeding. We agree.

¶9 Sigrist gave the court several lists of her expenses. One listed expenses Sigrist made from the time of her eviction until the end of the notice period. These included her costs of staying at a motel, the cost of boarding her animals, moving expenses, food costs, fax and copy expenses to obtain new housing, and transportation costs from driving to pick up her personal items from Defoe. The court reduced Defoe's damage award by Sigrist's motel, animal boarding and transportation costs. We conclude the trial court correctly awarded only these costs.

¶10 Any counterclaim in an eviction must arise from the lease or the holdover of possession. *Scalzo*, 87 Wis. 2d at 848. In this case, Sigrist was wrongfully removed prior to the end of the lease period. When she was removed, she was still entitled to possession of the apartment. Sigrist could properly recover her expenses arising from this early removal. Had she not been removed from her apartment early, she would not have had to rent a motel room, board her animals, or driven to get her possessions. These damages arise from her removal prior to the end of the notice period. Sigrist would have, however, eventually incurred moving costs as well as the related fax and copy expenses. She also would have incurred food costs regardless of where she lived. These costs do not arise from her early removal.

¶11 Sigris also submitted a list of expenses for January through March. The court rejected these as well, reasoning they were expenses she would have incurred even if Defoe had complied with the eviction procedures. We agree. Sigris's expenses after the end of the notice period do not relate to the lease or her wrongful removal from the apartment.

B. Disabled status

¶12 Sigris next argues the trial court erred by not considering her disabled status when determining her right to apply for an emergency stay of the eviction proceeding under WIS. STAT. § 799.40(4), and a stay of the writ of restitution under WIS. STAT. § 799.44(3). Specifically, she contends the trial court did not consider that her improper eviction removed her right to apply for these stays due to her pregnancy. Our review of the record does not reveal Sigris ever attempted to raise this issue before the trial court, either in her pleadings or at trial. We do not consider issues raised for the first time on appeal. *Terpstra v. Soiltest, Inc.*, 63 Wis. 2d 585, 593, 218 N.W.2d 129 (1974). In any event, had this denial of the ability to seek a stay resulted in damages, they would have been due to Defoe's self-help eviction and not properly before the trial court. *See Scalzo*, 87 Wis. 2d at 847.

C. Unfair prejudice

¶13 Sigris next argues she was prejudiced by the trial court's admission of several statements and exhibits from Defoe. Specifically, she contends the court improperly admitted evidence regarding Defoe's additional damages, Sigris's refusal to leave the property, and a letter from Sigris's prior landlord. Our review of the record, however, reveals that, contrary to Sigris's claims, the court did not admit this evidence, telling Defoe it did not consider the letter or

Sigrist's refusal to leave the property relevant. The court did not allow Defoe to present any evidence of damages other than unpaid rent and utilities because she failed to plead them in her complaint. Consequently, we reject Sigrist's claim this evidence was improperly admitted.

D. Restriction of cross-examination

¶14 Sigrist also claims the court improperly restricted her ability to cross-examine Defoe. Sigrist alleges the court did not allow her to question Defoe regarding (1) the proper amount of the telephone and cable bills; (2) punitive damages; and (3) a draft letter to social services written by Sigrist, but to be signed by Defoe, with the intent of obtaining money to cover Sigrist's rent. We reject Sigrist's arguments.

¶15 Sigrist's request for punitive damages was based on Defoe's allegations of unfair trade practices, which the court properly refused to address as not relevant to the eviction. Sigrist's arguments regarding the remaining two points of error are undeveloped and we will not consider them. *M.C.I., Inc. v. Elbin*, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988). In her brief, Sigrist asserts the trial court erred by restricting her cross-examination of Defoe. She does not, however, in either instance, explain what she would have elicited from Defoe had she been able to cross-examine her or how the trial court's result would have been different. Without this offer of proof, we will not review Sigrist's alleged evidentiary error. *See* WIS. STAT. § 901.03(1)(b).

E. Finding of fact based on hearsay alone

¶16 Next, Sigrist argues the court erred by making essential findings of fact based on hearsay alone, contrary to WIS. STAT. § 799.209(2). Specifically,

she points to Defoe's recounting a conversation Defoe had with Sigrist's friend David. David had paid Defoe \$75 on Sigrist's behalf, and the court eventually reduced Defoe's damages by this amount. While Sigrist does not identify the factual finding the court made from this testimony, the only one we can discern is that David paid \$75 on her behalf. We do not, however, conclude this finding was made on hearsay alone because Sigrist explained the payment to the court prior to Defoe recounting her conversation with David. Sigrist's own testimony serves as a basis for the court determining David had paid \$75 on her behalf.

F. Failure to inform parties of trial procedure

¶17 Sigrist next contends the court failed to inform the parties how it intended to conduct the trial. She contends the trial was conducted "haphazardly," failed to meet several small claims procedural requirements, and asks that we remand for a more ordered proceeding. We determine, however, the court properly conducted the trial.

¶18 The court is required to establish the order of the trial and the procedure to be followed in the presentation of evidence and arguments in a manner consistent with the ends of justice and the prompt resolution of the dispute on the merits according to the substantive law. WIS. STAT. § 799.209(4). Sigrist's claim the court failed to establish and inform the parties of the order of the trial and the procedure to be followed rests primarily on her evidentiary objections; that is, she contends she was not informed she could not present her other claims for damages. At the start of the trial, however, the court informed the parties: "I went through the file, and I'm going to ... characterize this claim as the plaintiff is seeking money for rent and looks like expenses related to the occupancy, electric bills, telephone charges, all as set forth in the complaint." The court determined

the scope of the proceedings and informed the parties. Sigrist argues the court kept her from presenting her case. Her case, however, was largely irrelevant to the eviction proceeding and the court had no choice but to rebuff her repeated attempts to introduce her other damages evidence.

G. Double damages

¶19 Sigrist also claims the court erred by not awarding double damages under WIS. STAT. § 100.20(5) and punitive damages for Defoe's violations of WIS. ADMIN. CODE § ATCP ch. 134. We have already concluded the trial court properly refused to consider the issue of Defoe's unfair trade practices, if any. Therefore, Sigrist could not recover double damages for any unfair trade practices.

H. Transcript fee

¶20 Finally, Sigrist argues the trial court erroneously exercised its discretion by refusing to waive the costs for transcription fees because she was indigent. When deciding to waive transcription fees under WIS. STAT. § 814.29, the trial court must first consider whether the petitioner is indigent. *See State ex rel. Girouard v. Jackson Cty. Cir. Ct.*, 155 Wis. 2d 148, 157, 454 N.W.2d 792 (1990). If the petitioner is found to be indigent, the court must then determine whether his or her petition has arguable merit. *Id.* at 159. The court may deny the request if it finds the petitioner had not stated a claim, defense or appeal upon which relief can be granted. WIS. STAT. § 814.29(1)(c). Whether the petition has arguable merit is a question of law we review de novo. *State ex rel. Hansen v. Dane Cty. Cir. Ct.*, 181 Wis. 2d 993, 998, 513 N.W.2d 139 (Ct. App. 1994). If the court finds the action is arguably meritorious and the petitioner is indigent, the court must waive the transcription fees. *Girouard*, 155 Wis. 2d at 159.

¶21 Sigris argues the trial court failed to consider her indigency when denying her motion to waive the transcription fees. We agree and determine the court failed to follow the proper procedure in determining whether Sigris was entitled to a waiver. Sigris's affidavit of indigency states she receives food stamps and public assistance. Under WIS. STAT. § 814.29(1)(d)1, the court was required to find her indigent, and then had to determine whether her claim had merit. Instead, the court told Sigris the decision to waive fees was entirely discretionary, and ordered Sigris to pay the transcription costs according to a monthly plan. This was error.

¶22 We do not, however, remand for a resolution of Sigris's claim because we determine her appeal did not state a claim upon which relief could be granted. Nearly all of Sigris's alleged errors related to the trial court's refusal to hear her additional damage claims. The court was obligated to reject these claims as a matter of law. Nor do we determine there is any merit in her points of error regarding the trial court's restriction of her cross-examination of Defoe regarding the letter, the telephone and cable bill. In both instances, Sigris failed to make an offer of proof regarding what she would have asked Defoe. Finally, we conclude her hearsay argument regarding the payment on her behalf was also without merit. Neither Sigris nor Defoe contested the payment and had we determined the ruling was based on hearsay alone, the relief we would have granted would have benefited Defoe, not Sigris.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

