

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 10, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 98-1945-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

WISCONSIN GAS COMPANY,

PLAINTIFF,

v.

ALLOS, INC.,

DEFENDANT-APPELLANT,

v.

DEBRA WALKER,

THIRD-PARTY DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Milwaukee County: MICHAEL G. MALMSTADT, Judge. *Affirmed.*

CURLEY, J.¹ Allos, Inc. (Allos) appeals the trial court's judgment, following a court trial, requiring Allos to pay the outstanding gas bills for a property owned by Allos. Allos argues that the trial court erroneously exercised its discretion in accepting the Wisconsin Gas representative's testimony that notices and gas bills were sent to the property's owner which led to the trial court's finding that the statutory underpinnings of § 196.643, STATS., had been met, obligating Allos to pay for gas service. Allos argues that the testimony of Allos's sole stockholder, Jerome Randall, that he never received any bills or notices from Wisconsin Gas for either unit, was more credible than that of the gas company employee. Additionally, Allos argues that the trial court erred in not requiring the upper unit's tenant, Debra Walker, to be responsible for the gas bill provided to her unit. This court concludes that the trial court's acceptance of the business records of Wisconsin Gas over Randall's contrary testimony was not clearly erroneous, nor was the trial court's finding that Walker was not liable for the gas bill because she never agreed to pay it; thus, this court affirms.

I. BACKGROUND.

Wisconsin Gas sued Allos, the current owner of 2200-2202 West Vine Street, for gas service provided to the upper and lower units of the residence. Wisconsin Gas sought \$1,682.66 for the outstanding bills for both units. Allos brought a third-party complaint against Walker, claiming she should be responsible for the bill to the upper unit because she occupied the premises for twelve of the fourteen months of the billed period.

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

The gas company presented only one witness who testified that the business records of the company reflected that notices were sent to either Allos or Randall some months before and that after receiving no response, the service was transferred to Allos's name and the monthly gas bills were sent out to either Allos or Randall for the period in dispute.

At trial, Debra Walker testified she rented the upper unit in June 1996 from Raymond Fleming, an agent of the then-owner, Oscar Shannon. Shannon deeded the property to Allos in lieu of a foreclosure a month later. She testified that during her conversation with Fleming there was no mention of who was to pay for the gas or electric service. Walker related that when she rented the unit, the gas and electric services were turned on. She explained that about one month after moving in, she received a cut-off notice from the electric company which led her to put the electric service in her name. She claimed, however, that she had no contact with Wisconsin Gas nor received any gas bills in the mail in anyone's name until approximately one year later, in July 1997, when the gas service was turned off. Walker informed the court that, at this time, after she failed in her attempt to have the gas service turned on in the name of her cousin, the gas service was inexplicably turned on in the name of Jerome Randall. Randall testified that when he learned that the service was in his name in the summer of 1997, he immediately had the gas service disconnected. Ultimately, the gas service was placed in Walker's name. Randall also denied receiving any notices or gas bills from the gas company before this time.

The trial court found that Wisconsin Gas followed the procedure set forth in § 196.643, STATS., which made Allos responsible for the gas service, and the trial court found that Walker never contracted with the landlord to be responsible for gas service and that she did not receive a benefit from Allos

requiring reimbursement; thus, she was not responsible for the bill. Consequently, the trial court ruled in favor of Wisconsin Gas and Walker, finding Allos responsible for both bills.

II. ANALYSIS.

When reviewing a trial court's findings, this court will not set aside the trial court's findings unless clearly erroneous. *See Noll v. Dimiceli's, Inc.*, 115 Wis.2d 641, 643, 340 N.W.2d 575, 577 (Ct. App. 1983).

Allos argues that the trial court erred in finding Allos responsible for the outstanding bills. Allos makes two arguments in support of its position. First, it contends that the trial court erred in finding that Wisconsin Gas properly placed the gas service in Allos's name pursuant to § 196.643, STATS., which holds that the owner of a residential property is responsible for the gas bill if the owner is sent notice by the utility and the owner fails to respond within fifteen days. Allos argues that the business records of Wisconsin Gas should not have been relied upon by the trial court because Wisconsin Gas kept no records of the actual notices or the monthly gas bills allegedly sent to Allos or Randall. Further, Allos contends that its witness, Jerome Randall, effectively countered the gas company's business records by testifying that neither he nor Allos ever received a bill or notice from the gas company. Allos also contends that Walker's testimony that she received no gas bills in the mail at the residence in either her name or anyone else's name supports its position that no bills were sent to Allos or Randall. Thus, Allos argues the trial court erroneously exercised its discretion in determining that Allos was responsible for the outstanding bills under the statute because neither Randall nor Allos was ever sent a notice, ever received a monthly bill for gas

service to either unit, and neither requested gas service. This court is not persuaded.

Addressing whether the default procedure provided by § 196.643 had been proved, the trial court found the gas company's witness credible and convincing. Although Randall argued that he received no notices or bills and that he would not lie to the court over a couple of thousand dollars, the trial court chose to give the gas company witness's testimony more weight than Randall's testimony. Conflicts in testimony are to be decided by the trier of fact, in this case the trial court. The trial court's finding in this regard was not "clearly erroneous."

Next, Allos contends that Walker should have been held responsible for the bill. Allos concedes that Fleming testified that he never mentioned to Walker that the gas was to be paid by her, but Allos nevertheless contends Walker should be held responsible since Fleming testified he never told Walker that heat *was* included in the rent. Thus, Allos maintains that Walker should be held responsible as it is "unreasonable to conclude that a term, as significant in Wisconsin as who pays the heat when not mentioned during the rental negotiation, would be included with the rent as a matter of law." Allos offers no citations for its contention, and this court knows of no case law automatically requiring tenants to be responsible for utility bills in the absence of an agreement with the utility or the landlord.

The trial court found that the rental agreement between Walker and Fleming required neither the tenant nor the owner to pay the utilities. The trial court then determined that, in the absence of any contractual agreement between the owner and the tenant for the payment of the gas service, § 196.643, STATS. obligates the property owner to pay for this service if the owner has been notified

and failed to contact the gas company within fifteen days. The trial court found this procedure was properly utilized by the gas company and Allos was responsible for gas service. The trial court did not accept Allos's contention that in the absence of any agreement between a landlord and a tenant over the payment of utilities, the tenant should be held responsible.

Additionally, this court notes that, although neither pled as a cause of action, nor articulated in its brief, Allos argues essentially that Walker should be held liable under an unjust enrichment theory. Allos contends that it was unfair for the trial court not to order Walker to pay for the gas service because "she was getting away with something" and "if the owner was obligated to pay a bill for gas service that should have been paid by the tenant, that tenant is obligated to reimburse the owner." Further, this court notes that the trial court's decision, while never specifically mentioning unjust enrichment as a possible reason for finding Walker liable, nevertheless implicitly addressed this theory and found there was insufficient evidence to relieve Allos of its obligation under this theory.

Pursuant to WIS J I—CIVIL 3028, entitled "Contracts Implied in Law (Unjust Enrichment)," one of the elements of unjust enrichment is that a benefit must have been conferred on another. The trial court found that there was no benefit conferred on Walker by Allos's paying the gas bill because the poor condition of the home's roof made it difficult to heat. Essentially, the trial court found that Allos's failure to fix the roof contributed to the gas bill and, therefore, the first element of unjust enrichment was not met. Under the circumstances, the trial court's conclusion that no reimbursable benefit was conferred on Walker was a reasonable one. Consequently, this court is satisfied that a claim of unjust enrichment, had it been properly alleged and actually argued, would not have been supportable under the submitted facts.

In sum, this court concludes that the trial court's findings that the appellant was obligated to pay for the gas service provided to the appellant's property because Wisconsin Gas gave notice to the owner and received no response within fifteen days is not clearly erroneous and is supported by the testimony of Wisconsin Gas's witness. Further, the trial court's finding that Walker is not responsible for the gas bill because the rental agreement made no mention of it is also not clearly erroneous. Allos's novel theory that in the absence of an agreement over who pays the utilities, the tenant is responsible, is rejected by this court as not being the current law in Wisconsin. Finally, although the appellant argues that it is unfair for the tenant to receive the benefit of gas service at the expense of the owner, no unjust enrichment claim was ever advanced by Allos. Moreover, the trial court's determination that no benefit was conferred on Walker by Allos's payment of the gas bill makes such a claim unwarranted under the circumstances. Therefore, the trial court's decision is affirmed.

Finally, the respondent seeks frivolous costs for this appeal under § 809.25(3), STATS., claiming that it is entitled to its actual costs and attorney fees because this appeal was undertaken by Allos without any reasonable basis in law, nor can the appeal be supported by a good faith argument for an extension. This is a question of law to be decided *de novo*. See *Lessor v. Wangelin*, 221 Wis.2d 659, 666, 586 N.W.2d 1, 4 (Ct. App. 1998).

This court concludes that this is not a frivolous suit. Distilled to its essence, the primary argument posited by the appellant is that insufficient evidence was presented to apply the statutory presumption that the property owner is responsible for gas service if no other party has contracted for the service and the owner has been notified but fails to respond within fifteen days. The appellant maintained that the testimony of Jerome Randall was more credible when he

testified no notices or gas bills were ever received than the circumstantial evidence presented by the respondent through its business records. Although this court, after applying the required standard of review, was obligated to conclude that the trial court's findings on this issue were not clearly erroneous; nevertheless, the appellant presented a good faith argument for its contention.

Consequently, the request for frivolous costs and fees is denied.

By the Court.—Judgment affirmed.

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

