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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Case No. 2018AP2340-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

TROY ROBERT LASECKI,

Defendant-Appellant.

ON APPEAL FROM JUDGMENT OF CONVICTION ENTERED IN CIRCUIT COURT ONE FOR OUTAGAMIE COUNTY

The Honorable Mark J. McGinnis, Presiding

BRIEF & APPENDIX OF PLAINTIFF-RESPONDENT

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BRIEF & APPENDIX OF PLAINTIFF-RESPONDENT

QUESTIONS PRESENTED

1. Considering several cases including *State v. Lambert* and *State v. Balistreri* found the criminal penalties in §§ 100.20 and 100.26, stats., for violating the ATCP code provide sufficient notice; do the code and statutes provide sufficient notice to a landlord that withholding a tenant's security deposit without explanation is a crime under §§ 100.20 and 100.26 and the ATCP Code?

The trial court answered yes. This court should answer yes.

2. The law requires landlords either to return the tenant's security deposit in full, or provide a statement of withholdings. Is that requirement too vague for a landlord to understand the requirement that they either return the security deposit or tell the tenant why they are not returning the deposit?

The trial court answered no. This court should answer no.

3. When the Court reads the jury instruction on mitigating damages, evidence is present on mitigating damages, and the parties discuss mitigated damages in opening statements and closing arguments; is the issue of mitigated damages fully litigated?

The trial court answered yes. This court should answer yes.

4. *Boelter v. Tschantz* unequivocally affirms that §100.20(5), stats, provides that a tenant suffering a pecuniary loss because of a violation of § 100.20 shall recover twice the amount of that pecuniary loss. When a landlord violates § 100.20, does a Court violate the landlord's rights when it orders the

landlord to pay the tenant twice the amount of such pecuniary loss?

The trial court answered no. This court should answer no.

POSITION ON ORAL ARGUMENT AND PUBLICATION

The Plaintiff-Respondent does not request oral argument. Pursuant to Rule § 809.22(2)(b), Stats., the briefs fully develop and explain the issues.

The Plaintiff-Respondent believes publication of this case is also unnecessary. Pursuant to Rule § 809.23(1)(b), Stats., this case involves the application of well-settled rules of law.

STATEMENT OF THE CASE

On July 12, 2017, the State of Wisconsin filed a criminal complaint charging Troy Lasecki with two counts of failing to return a security deposit contrary to Wis. Stat. §§100.20(2), 100.26(3) and Wis. Adm. Code § ATCP 134.06(2).[1] R.2 at 1. He was informed of his right to obtain an attorney of his choosing, the charges against him, and the maximum and minimum penalties. R. 70 at 4. The Court

confirmed he spoke English, has a high school diploma, and a work history. R. 75 at 18. The Court ensured Mr. Lasecki understood the basic expectations and documents he needed to represent himself, and Mr. Lasecki showed a basic understanding of the court process through his numerous filings. R. 4; R. 8; R. 9; R. 17; R. 19; R. 20; R. 21; R.22; R. 25; R. 28; R. 73; R. 74; R. 75; and R. 77. Mr. Lasecki freely, voluntarily and knowingly chose the counsel of his friend RB over a state licensed attorney. R. 75 at 18; and R. 77 at 12-15. Mr. Lasecki repeatedly and freely consulted with R.B. [2] (see examples R.77 at 85:12, 86:14, 113:3, 127:21, and 135:23 (not an exhaustive list)).

Trial

The case proceeded to trial on March 27, 2018. After jury selection, the State gave its opening statement. R. 77 at 62. The State explained that the law requires landlords to "either return the full security deposit within 21 days of the end of the lease or provide a written statement with

[1] All references to the Wisconsin Statutes Wis. Adm. Code are to the 2015-16 version unless otherwise indicated.
[2] The totality of the record shows Mr. Lasecki made the deliberate choice to proceed without counsel, was aware of difficulties and disadvantages of self-representation, was aware of seriousness of charges against him, and was aware of general range of penalties that could be imposed. See *Washington v. Boughton, 884 F.3d 692, 702 (7th Cir. 2018), cert. denied, No. 18-7423, 2019 WL 1231872 (U.S. Mar. 18, 2019)* (State may not constitutionally hale a person into its criminal courts and there

withholdings." R.77 at 62. The State repeatedly told the jury during opening statements that the landlord had the choice to either return the deposit in full or provide a statement of withholdings. R. 77 at 62-66.

JB, the first witness in the trial, testified that he rented an apartment from Mr. Lasecki. R. 77 at 70. He also testified that he provided a $730 security deposit. R. 77 at 71. JB testified that, prior to signing the lease, he told Mr. Lasecki he planned to move out before the lease ended. R. 77 at 72. JB moved out of the apartment in June 2016, told Mr. Lasecki he moved out, and continued paying rent after he moved out. R. 77 at 73. JB cleaned the carpets and ensured it was ready to rent. R. 77 at 73. He notified Mr. Lasecki in several ways and several times that he was giving his 60 day notice of intent to vacate. R. 77 at 84. JB testified that even after moving out, he continued trying to work with Mr. Lasecki to help re-rent the apartment and was committed to continuing to pay rent through the end of the lease if a new renter was not located. R. 77 at 89-90.

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force a lawyer upon him); and see also *State v. Klessig*, 211 Wis. 2d 194, 564 N.W.2d 716 (1997).

In September 2016, he observed that the apartment had new tenants. After seeing the apartment was re-rented, he stopped paying rent pursuant to §704.29, stats. R. 77 at 73-74. JB contacted Mr. Lasecki in several manners but never received a response. R. 77 at 74-75. JB testified that he never received the security deposit back from Mr. Lasecki and never received any documents explaining why Mr. Lasecki did not return the deposit. R. 77 at 77-78 and 90.

JJ, the second witness called in the trial, testified that he signed a month-to-month lease for an apartment owned by Troy Lasecki. R. 77 at 92-93. The month-to-month lease was received into evidence. R. 77 at 93; and R. 40. JJ testified that he paid an $840 security deposit. R. 77 at 94.

JJ testified that on April 28 he sent a text message to Mr. Lasecki telling him he was moving out, ending the month-to-month lease, and asked what form Mr. Lasecki wanted for the 60 day notice. R. 77 at 94. Mr. Lasecki responded that he needed the notice in a signed written letter, so JJ provided a signed written letter and placed that letter in the rent drop box as requested by Mr. Lasecki. R. 77 at 94. JJ then moved out of the apartment

on June 11. JJ testified he paid the rent for April, May, June, and July. R. 77 at 100.

JJ contacted Mr. Lasecki, provided his new address, and told Mr. Lasecki he could send the deposit to that address. R. 77 at 98. Mr. Lasecki replied "you are getting your deposit." R. 77 at 98; and R. 41. JJ never received his security deposit back and never received a written explanation of withholdings. R.77 at 95.

HP, the third witness called, testified on cross examination as to how the ATCP responds to complaints, including that the complaint goes to mediation first, before being assigned to an investigator. R. 77 at 107. He testified on cross that an investigator only receives the complaint if there are multiple violations or if a party does not respond. R. 77 at 107. HP laid the foundation for the response he received from Mr. Lasecki regarding the complaints, and that response was received into evidence and published to the jury. R.42 and R. 77 at 108-111, 120, 125.

Upon questioning by the Court, HP testified that his investigation found that neither JJ nor JB received their security deposit and neither received an itemized listing of deductions. R. 77 at 118.

After the required colloquy, Mr. Lasecki chose to testify on his own behalf. R. 77 at 128. He testified that he is an expert in "real estate and real estate brokerage into the intermingling of real estate profession." R. 77 at 150. Mr. Laseki testified regarding the damages he suffered from JB and JJ moving out early, including the lack of a caretaker for that apartment and the difference in rent for a month-to-month lease versus a 12 month lease. R. 77 at 148-149 and 151-153.

During cross-examination, Mr. Lasecki testified that he is a landlord and he owns real estate. R. 77 at 155. He admitted he rented apartments to JB and JJ. R.77 at 156. That he received security deposits from both JB and JJ. R. 77 at 156. That he never sent the security deposits back to either tenant. R. 77 at 156. He then testified that he sent an email communication to JB stating the tenant was not getting the security deposit back. R. 77 at 156.

The Jury asked Mr. Lasecki specifically about unpaid rent and when the apartments were re-rented. R. 77 at 159-162. Mr. Lasecki testified that he agreed JB's apartment was re-rented on October 1, 2016. R. 77 at 159. He then testified the building was not 100 percent occupied, but he did not recall which units were or were not occupied on

October 1, 2016. R. 77 at 160. In response to a jury question, and follow up by the court, Mr. Lasecki testified that he did not know if he received rent payments on those apartments. R. 77 at 161.

During closing arguments the prosecutor highlighted the burden of proof and elements of the offense, including intent and damages. (R.77 at 178:19-22, 179:6-13, 181:12-18, and 183:3-184.5.)

After deliberation, the Jury came to a unanimous verdict, finding Troy Robert Lasecki guilty of all charged offenses. R. 77 at 192-196.

Sentencing

At sentencing, Mr. Lasecki was placed on probation and ordered to pay restitution plus the surcharge and to pay JB an additional $730 and JJ an additional $840, without any surcharge. The Court specifically explained that the non-restitution payments are required "because the statutes and the code in the state of Wisconsin allow for double damages when a landlord violates that section of the code." R. 77 at 218. This appeal followed.

STANDARD OF REVIEW

The issues present mixed questions of law and fact. The issues primarily present questions of law which the court of appeals reviews independently of the circuit court. *Boelter v. Tschantz*, 2010 WI App 18, ¶6, 323 Wis. 2d 208, 213, 779 N.W.2d 469, 470. When issues of fact arise, the court of appeals accepts the circuit court's findings of fact unless they are clearly erroneous. *State v. Fields*, 2000 WI App 218, ¶9, 239 Wis. 2d 38, 619 N.W.2d 279.

The standard of review on appeal for sufficiency of the evidence is "whether the evidence adduced, believed and rationally considered by the trier of fact was sufficient to prove the defendant's doubt." *State v. Blaisdell*, 85 Wis. 2d 172, 180, 270 N.W.2d 69 (1978). "An appellate court must consider the totality of the evidence when conducting a sufficiency of the evidence inquiry." *State v. Smith*, 2012 WI 91, ¶ 36, 342 Wis. 2d 710, 732-33, 817 N.W.2d 410, 421.

ARGUMENT

The public policy behind § 100.20, Stats., is to provide an incentive for tenants to pursue their rights and to discourage landlords from withholding security deposits except in the clearest of cases. *Pierce v. Norwick*, 202 Wis. 2d 587, 594, 550 N.W.2d 451, 454 (Ct. App. 1996); and *Armour v. Klecker*, 169 Wis.2d 692, 699-701, 486 N.W.2d 563, 566 (Ct.App.1992).

The security deposit is the property of the tenant, not the landlord. No reasonable person believes a landlord can withhold a tenant's property, property held in the landlord's exclusive control, unless the landlord provides an itemized receipt explaining the legal basis (reasons) for retaining that property.[3] The administrative code provisions promulgated in response to § 100.20, Stats., require a landlord to deliver or mail to the tenant a written statement accounting for all amounts withheld within 21 days after the tenant surrenders the property.

[3] Because the security deposit is delivered and relinquished by the tenant to the exclusive possession and control of the landlord and the tenant's access to the security deposit is not subject to the tenant's control, no bailment is created but rather the relationship is one of landlord and tenant. *Dahl v. St. Paul Fire & Marine Ins. Co.*, 36 Wis. 2d 420, 423, 153 N.W.2d 624, 625 (1967).

Wis. Adm. Code § ATCP 134.06(4)(a); and *Norwick*, 202 Wis. 2d at 594 (citing *Klecker*, 169 Wis.2d 692, 699-701).

I. The legislature has the constitutional authority to create criminal penalties for violations of administrative law.

The Legislature may constitutionally prescribe a criminal penalty for violation of an administrative rule. *State v. Court*ney, 74 Wis. 2d 705, 709, 247 N.W.2d 714, 717 (1976)(citing *State v. Lambert* 68 Wis. 2d 523, 229 N.W. 622 (1975)). In the 1975 case of *State v. Lambert*, the Wisconsin Supreme Court settled this issue. Mitchell Lambert, like Mr. Lasecki, argued that Wis. Stat. § 100.20 is unconstitutionally vague and fails to give notice of the practices prohibited. The Supreme Court disagreed:

> The Wisconsin legislature specifically assigned criminal sanctions for the violation of Department of Agriculture rules and regulations promulgated pursuant to the legislature's delegation of authority. Sec. 100.26(3), Stats., which sets the criminal penalty for a violation of Ch. Ag 122, is, under the holding of *Grimaud*, constitutional. It is the legislature, not the

> agency, which has determined that violations of agency rules are punishable as crimes.

Lambert, 68 Wis. 2d at 530 (citing *United States v Grimaud*, 220 U.S. 506, 517, 31 S.Ct. 480, 55 L.Ed. 563 (1911)). The technique employed by the legislature, delegating to the agency the responsibility to "fill up the details" provides the necessary specificity required for notice. *Id*.

a. NOTICE

Requiring landlords to be honest and forthright appears offensive only to persons not wishing to be held to any semblance of accountability. *State v. Stepheniewski*, 105 Wis. 2d 261, 277, 314 N.W.2d 98, 105 (1982).

The legislative purpose of section § 704.28 is clear. The Legislature enacted § 704.28 to codify the specific expenses a landlord is allowed to withhold when returning a security deposit; and to prohibit deductions for normal wear and tear. The ATCP Code in no way modifies the rule that a security deposit must be returned in full within 21 days after the tenant vacates, unless the landlord incurred one of the damages specifically enumerated in §704.28(1) or

(2). The ATCP code simply clarifies that the landlord must tell the tenant which deductions were applied.

i. People know stealing is a crime: The statutory scheme that makes stealing a security deposit a crime is not complicated.

A security deposit remains the property of the tenant until the conclusion of an event that entitles a landlord to make a deduction. The ATCP code requiring a statement of deductions is a common sense mechanism to ensure landlords are only deducting costs specifically allowed under §704.28, stats.

ii. No right to engage in unfair trade practices

Tenants have the right to challenge security deposit withholdings. Nothing in Wis. Stat. §704.28 provides a landlord with the right to withhold a security deposit without an explanation of withholdings. Wis. Stat. § 100.20(5); and see *Boelter*, 2010 WI App 18. It is unreasonable to read Wis. Stat. §704.28 as providing the landlord with the right to prevent the tenant from challenging an unlawful withholding by hiding the withholding. Such a reading would directly contradict the public policy behind § 100.20, Stats., to discourage

landlords from withholding security deposits except in the clearest of cases. *Pierce* 202 Wis. 2d 587 at 594.

It is illogical to say ch 100 or the ATCP code violates §704.95 by changing a right to engage in an unfair trade practice, when § 704.95 specifically prohibits unfair trade practices and § 704.28 specifically references the administrative code.

Wisconsin Statutes ch. 704, entitled landlord tenant, specifically directs readers to § 100.20 and ATCP 134.06.[4] That reference could not be more clear, Wis. Stat. §704.95, states: "practices in violation of s. 704.28 and 704.44 may also constitute unfair methods of competition or unfair trade practices under s. 100.20." Unambiguously putting readers on notice that the law requires landlords to engage in fair trade practices and that "unfair trade practices are prohibited." Wisconsin Stat. § 704.95 also specifically directs readers to the statute that authorizes the administrative code, Wis. Stat. §100.20(1); and the annotated statutes for Wis. Stat. § 704.28 provides a specific cross reference to Wis. Adm. Code § 134.06.

[4] Additionally, Wis. Stat. § 704.28 in the annotated statutes specifically cross reference ATCP 134.06, Wis. Adm. code.

iii. Reasonable people know violating the law results in repercussions and penalties.

It is constitutionally proper for the legislature to authorize the imposition of criminal penalties for violations of department rules adopted pursuant to § 100.20, stats. *Lambert*, 68 Wis. 2d 523.

Wisconsin Stat. §100.26(3) states that an intentional violation of §100.20 is a crime and describes the maximum and minimum penalty. The statutes are very straightforward and clear; unfair trade practices constitute crimes.[5]

iv. Complexity of this crime compared to others

In responding to an argument that understanding that failing to return a security deposit is a crime involves too many laws, it seems pertinent to compare the complexity of stealing a security deposit with the complexity of some frequently charged crimes.

The statutory scheme that makes stealing a security deposit a crime is significantly less complicated than knowing the consequences of possessing Oxycodone without a

[5] See *Lambert*, 68 Wis.2d at 530("§100.26(3), Stats., which sets penalty for a violation of Ch. Ag 122, is…constitutional.").

prescription.[6] A person must find §§ 961.41(3g) and 961.41(3g)(am) to learn possession of a schedule I or II narcotic drug without a prescription is a crime and the range of consequences for possessing a narcotic drug. The person then must find Oxycodone on the list of controlled substances located in Wis. Stat. §§961.14, and 961.16, as opposed to those listed in Wis. Stat. §§ 961.18, and 961.20 and 961.22 to determine whether oxycodone is a schedule I or II controlled substance. The person must then look to Wis. Stat. § 961.01(15), (16), (17), and (18) for the definition of a narcotic drug to determine if oxycodone is a narcotic drug. Finally, they must look to Wis. Stat. §939.50(3)(i) to learn the maximum penalty for a class I felony, and §§ 939.62, 939.632, 961.48, 961.495, and 961.50, to determine the maximum and minimum penalties for their specific conduct.

Even if the person looking to possess oxycodone without a prescription fails to obtain that drug, their conduct could still be criminal. Attempting to obtain a prescription drug by deceit or fraud is unlawful under Wis.

6 While this particular crime is arguably one of the more complicated statutory schemes, it is also a very common charge. And conduct very few people are unaware is prohibited.

Stat. §450.11(7)(a), and results in criminal penalties under Wis. Stat. §450.18.

A simpler example, and a crime few will claim ignorance of, is drunk driving. In order to understand that driving drunk may be a crime, the person about to leave the bar must understand Wis. Stat. §§ 346.63, 346.65, 343.307, and 940.09. Determining whether or not it is a crime requires understanding that § 346.63 outlaws driving while under the influence of an intoxicant (DUI), and understanding how §346.65 determines what factors elevate DUI to a crime. If it is a crime based on a prior revocation, §343.307 explains what revocations count and what the time limit is for counting purposes between a first and second offense. And even if the person has no countable prior revocations, the age of passengers and the results of driving could elevate forfeiture level conduct to criminal conduct. (§940.09 (homicide) and 346.65 (minor passenger under 16)). Again, a significantly more complex series of statutes than failing to return a security deposit.

v. The placement in the ATCP code and chapter 100 is logical and provides the most notice.

The Wisconsin Legislature chose to include this crime in ch. 100 based on the conduct involved. Landlords, tenants, and others involved in real estate look to ch. 704 and 100; and the ATCP code for guidance on the legal requirements in rental property. The placement is not only legal but logical. Putting this crime in ch. 943 or any other chapter in the "criminal code" would not provide any additional notice and would separate the prohibited conduct from the other prohibited conduct contained in ch. 100 and Adm. Code § ATCP.

1. A crime is a crime.

The district attorney's office has the authority to charge a person with violating any statute for which the legislature authorized criminal penalties. Wis. Stat. §978.05(1); and *Balistreri*, 87 Wis. 2d at 5. And the circuit court has jurisdiction to hear criminal cases. *Id.*

The number of prior cases involving a specific statute has zero relevance on jurisdiction or notice. Even if it

did, this is not the first time a person has been charged criminally with violating Wis. Stat. §100.26.[7]

In *State v. Balistreri*, Tony Balistreri was charged criminally for violating Wis. Adm. Code ch Ag 110 relating to home improvement trade practices. Agg 110 is now numbered ATCP 110. The code was authorized and criminalized by Wis. Stat. §§ 100.20 and 100.26; just like Wis. Adm. Code ATCP §134 is today. *Id*. at 3.

Like Mr. Lasecki, Mr. Balistreri argued that the Court did not have jurisdiction to impose criminal penalties under those statutes. *Id*. at 4. The appellate court found the criminal court and district attorney have the jurisdiction and authority to seek criminal penalties for violating consumer protection regulations. *Id*. at 5.

Even if no prosecutor had ever charged a person criminally for stealing a security deposit contrary to ATCP § 134, that does not invalidate the law.[8] The legislature

[7] See ex., *Lambert*, 68 Wis. 2d 523; *Clausen*, 105 Wis. 2d 231; and *State v. Longmire*, 2004 WI App 90, 272 Wis. 2d 759, 770, 681 N.W.2d 534, 540.

8 Even if data mining CCAP with a search parameter for the ATCP code does not come up with a hit on CCAP, that is not reliable evidence that this section of the ATCP is charged criminally for the first time. CCAP removes all dismissed criminal cases from CCAP 2 years after dismissal. Meaning, if a deal was reached more than two years ago to dismiss the case in exchange for returning a security deposit, that case would not appear in a data mining search. (As of the last time the Respondent's office checked, the company used by petitioner does offer their services to prosecutors. As such, the Respondent has no way to verify those search results or order similar searches of 100.26 or any other statute.)

has the right to impose criminal penalties. *Id.* The first time it is charged is just as valid as the 100th time it is charged. A crime is a crime.

vi. The statute provided ample notice to Mr. Lasecki, and was not unconstitutionally vague for a person of Mr. Lasecki's background.

Mr. Lasecki seems to argue that he was not in a position to understand the landlord-tenant laws regulating unfair trade practices. The laws are available to the public in many forms as mentioned above. Chapter 704, the statutes Mr. Lasecki argues are the only ones a landlord knows about, specifically prohibits unfair trade practices, and refers readers to Wis. Stat. §100.20, and ATCP 134. Additionally, the Wis. Stat. §704.95 provides that the prohibitions on unfair trade practices remain in effect unless they are inconsistent with ch. 704. These chapters are not inconsistent, ATCP was specifically amended to comply and the legislature had the opportunity to object to the ATCP when the changes were submitted to the legislature. The withholdings and landlord mitigation sections are identical, and nothing in ch 704 makes a statement of withholdings is optional.

Mr. Lasecki's in-court statements show he is in a better position to understand the requirements on a landlord than most landlords. Mr. Lasecki stated that he is a licensed real estate agent and that he owns approximately 100 rental properties in 9 counties. (R.77 at 202:21 - 204:24.) He has been involved in legal disputes regarding his real estate ventures for at least 10 years (R.77 at 206: 16-21.)

Even if Mr. Lasecki was new to landlording, a simple google search of the term "landlord training" comes up with numerous resources for landlords including a Guide for Landlords and Tenants produced and distributed by the DATCP. This guide includes the law on returning security deposits and early move outs.[9] The search also reveals numerous trainings held by municipalities, police agencies, and trade associations. This law is not a secret and is easy to understand.

The law involves one administrative rule, ATCP 134, and two statutes, §§ 100.20 and 100.26. As discussed earlier, this is significantly simpler than drug possession

9 Available at https://datcp.wi.gov/Documents/LT-LandlordTenantGuide497.pdf. see page 3: "The landlord may deduct money from the security deposit …. If the landlord makes any deductions from the

and Operating While Intoxicated crimes. And is certainly no more complicated than contractor fraud, pollution handling, and a plethora of other crimes codified by §100.26.

It is simply not logical to believe a person would not suspect it is a crime to refuse to return a person's property. When it comes to returning personal property, it is not logical to say a person "bent on obedience may not discern when the region of proscribed conduct is neared." *Courtney*, 74 Wis. 2d at 711.

Additionally, HP testified at trial that DATCP attempted to work with Mr. Lasecki to mediate the complaint. (R77 at 107:2-11.) Had Mr. Lasecki complied with the statute at that point, no charges would have been referred to the DA's office.

This conviction is not based on Mr. Lasecki not knowing the law, it is based on his willful and intentional decision to violate the law.

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security deposit, the landlord must give the tenant a written statement itemizing the amounts withheld and why.

b. Vagueness

Statutes and administrative rules and regulations are construed to fulfill the intent of the statute or regulation's manifest object. *Baierl v. McTaggart*, 2001 WI 107, ¶21, 245 Wis. 2d 632, 643-644, 629 N.W.2d 277, 283. Where one of several interpretations of a statute or regulation is possible, the court must ascertain the underlying intent from the language in relation to the subject matter, history, and object intended to be accomplished. *Id*.

Before a statute can be invalidated for vagueness, there must appear uncertainty in "the gross outlines of the duty imposed" … "such that one bent on obedience may not discern when the region of proscribed conduct is neared,…" *Courtney*, 74 Wis. 2d at 711; see also *State v. Evjue*, 253 Wis. 2d 146, 159, 33 N.W.2d 305 (1948). A court cannot void a statute merely upon a showing that the boundaries of the area of proscribed conduct are somewhat hazy, or that a unique situation may exist where the legal nature of the conduct may not be easily ascertainable. *Courtney*, 74 Wis. 2d at 711.

> A statute must be construed, however, in light of its manifest object, the evil sought to be remedied. "Although we recognize the general rule relied upon by the defendants …, that penal statutes are to be strictly construed in favor of the accused, it is equally true that this rule of construction does not mean that only the narrowest possible construction must be adopted in disregard of the purpose of the statute."

Clausen, 105 Wis. 2d at 239-40(internal citations omitted)(quoting *State v. Tronca*, 84 Wis.2d 68, 80, 267 N.W.2d 216 (1978)).

i. Scope and Purpose

Courts ascertain a statute's scope and purpose from its plain language and its relationship to closely-related statutes. *State ex rel Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶ 49, 271 Wis. 2d 633, 665, 681 N.W.2d 110, 125. When considering how to define a word, the court must consider the context in which the word is used, and cannot choose a definition, even a plain-meaning interpretation, that "contravenes a textually or contextually manifest statutory purpose." *Id.*; and *MMSD v.*

Evers, 2014 WI App 109, ¶ 23, 357 Wis. 2d 550, 559-560, 855 N.W.2d 458, 463.

The rights protected by §704.95, stats, applicable to this case are the rights to deduct specific enumerated damages from a security deposit. The statute's intent in prohibiting the administrative code from changing the rights and duties is not to prohibit administrative rules, it is to ensure the specific withholdings enumerated in § 704.28, stats., are not disallowed by an administrative rule. This case does not involve any allegations that the administrative code changed a landlord's right to withhold a portion of the security deposit.

ii. Tenants' right to challenge a withholding

Nothing in Wis. Stat. §704.28 provides a landlord with the right to withhold a security deposit without an explanation of withholdings. Tenants have the right challenge those withholdings. Wis. Stat. § 100.20(5); and See *Boelter*, 2010 WI App 18. It is unreasonable to read Wis. Stat. §704.28 as providing the landlord with the right to prevent the tenant from challenging an unlawful withholding by hiding the illegal reason for the withholding. Such a reading would directly contradict the

public policy behind § 100.20, Stats., to discourage landlords from withholding security deposits except in the clearest of cases. *Pierce*, 202 Wis. 2d at 594 (quoting and citing *Armour*, 169 Wis.2d at 699–701).

The fact that neither ch. 704, ch 100, nor the ATCP prescribes the exact form the statement of withholds must take does not render the requirement unenforceable. No requirement exists for a criminal statute to "set out each of what may be a great number of ways in which" landlord may comply with the statute or code. *Courtney*, 74 Wis. 2d at 712. So long as the requirement is marked out within the regulation in a fashion discernable to an ordinary person. *Id*. at 713. "Not every indefiniteness or vagueness is fatal to a criminal statute … A fair degree of definiteness is all that is required." *Id*. at 710.

iii. Criminal penalties are constitutional

It was constitutionally proper for the legislature to authorize in sub. (3) the imposition of criminal penalties for the violation of department rules adopted pursuant to s 100.20. *Lambert*, 68 Wis. 2d 523. The rule are not vague, and invalidating the rules would the manifest purpose of §704.28 and Adm. Code ATCP § 134.06.

c. Current Administrative Code

The power of the courts (jurisdiction) to preside over the enforcement of the administrative code through criminal proceedings is well established. See ex. *Balistreri*, 87 Wis. 2d at 5.

i. Authority to Promulgate Rules

The Legislature directed the enactment and publication of rules of executive agencies known as the Administrative Code. See Wis. Stat. §§ 100.20, 35.93. and ch 227. The Administrative Code is available at county law libraries, the libraries of the University of Wisconsin Law School and Marquette Law School, the State Historical Society, the Legislative Reference Bureau, the State Law Library, and certain designated public libraries throughout the state. (see "Introduction" page on Administrative Code.) It is also available on the internet website of the Wisconsin legislature at http://docs.legis.wisconsin.gov/code.

Wisconsin Statute § 100.20 requires the Wisconsin Department of Agriculture Trade and Consumer Protection (DATCP) to promulgate rules forbidding unfair trade practices. *Lambert*, 68 Wis. 2d at 528. This delegation of power to the agency to "fill up the details" necessary for

the enforcement of statutes through the promulgation of administrative rules and regulations is appropriate and constitutional. *Id.* at 529 (citing *Petition of State Ex rel. Attorney General(1936)*, 220 Wis. 25, 264 N.W. 633; and *Grimaud*, 220 U.S. at 517).

ii. History of ATCP 134

In order for the administrative code to be enforceable, it must be promulgated in accordance with Wis. Stat. ch 227 and § 100.20. See *Lambert* 68 Wis. 2d at 529; and *Grimaud*, 220 U.S. 506 at 517. DATCP promulgated chapter ATCP 134 in 1980 and amended the rule in 1998. In both cases, DATCP followed the administrative procedures of Wis. Stat. ch. 227 (as it was currently written). Prior to submitting a draft to the DATCP Board for their initial review, DATCP formed an ad hoc committee made up of representatives of the landlord industry as well as tenant representatives. The committee met on several occasions and eventually agreed on the proposed draft to be submitted to the Board. After Board approval, in both cases, DATCP held a number of public hearings around the state to discuss the proposed rules. After the hearing, and after changes made in response to the public comments, DATCP sent the final

proposed draft to a joint legislative committee who had the option of calling more public hearings before approving.

Although the most recent changes (1993, 1998 and 2013) did not involve an ad hoc committee, in each rule-making proceeding DATCP held public hearings throughout the state before submitting a final proposed draft to the legislature. These most recent rule changes did not create significant changes to the rule. For example, DATCP promulgated the amendments in 2015 for the sole purpose of "harmonizing" ch. ATCP 134 to the current Wis. Stat. ch. 704 as required by Wis. Stat. § 704.95. Wisconsin Statute §704.95 specifically states that § 100.20 remains in effect and actions outlawed by that statute are outlawed.

In every rule-making proceeding involving ch. ATCP 134, DATCP made it clear in the rule-making documents that the rule is adopted under the authority of Wis. Stat. s. 100.20(2) as an "order" of the agency. In addition, since its inception, the preamble to the published rule also makes this perfectly clear.[10] The documents filed as part of the rule-making procedures described above are maintained at DATCP.

10 See Wis. Adm Code § ATCP 134.01: "This chapter is adopted under the authority of s. 100.20, Stats."

II. Sufficiency of the Evidence

On March 27, 2018, after a full trial with all the rights and privileges affording by the constitution, the jury concluded that the State proved beyond a reasonable doubt that a crime occurred.

i. Jury Instructions and Arguments

The parties and trial court in this case discussed jury instructions and agreed the elements the State needed to prove included:

1. The defendant was a landlord.
2. The defendant rented an apartment to the tenant
3. The defendant collected a security deposit from the tenant.
4. The defendant did not return the security deposit and/or a statement of withholdings within 21 days after the termination of the rental agreement.
5. The defendant intentionally failed to return the security deposit to the tenant.

(R.77 at 168.) The fifth element required intent, and the Court instructed the jury on finding intent. (R.77 at 168-

169.) The Court also instructed the Jury on a landlord's right to recover unpaid rent. (R.77 at 169.)

Immediately after hearing the instruction on landlords recovering unpaid rent, the Court instructed the jury on the burden, including that the prosecution bears the burden to prove everything beyond a reasonable doubt and that "Mr. Lasecki is not required to prove his innocence." (R.77 at 169-170.)

During closing argument the prosecutor highlighted the burden of proof and elements of the offense, including intent, in closing argument. (R.77 at 178:19-22, 179:6-13, 181:12-18, and 183:3-184.5.)

b. Unanimous Jury

The standard of review on appeal for sufficiency of the evidence is "whether the evidence adduced, believed and rationally considered by the trier of fact was sufficient to prove the defendant's doubt." *Blaisdell*, 85 Wis. 2d at 180. "An appellate court must consider the totality of the evidence when conducting a sufficiency of the evidence inquiry." *Smith*, 2012 WI 91, ¶ 36.

In his brief, Mr. Lasecki argues the verdict does not meet the requirements of a unanimous jury because a jury

could find Mr. Lasecki guilty based on either (1) not returning the deposit, or (2) not providing a statements of withholdings.

During the trial, opening statements, and closing arguments, the jury was told over and over that Mr. Lasecki had to do one of the two. Either return the deposit or explain why he was not returning it. Mr. Lasecki never disputed he did not return the deposits. The question left for the jury was whether he provided an explanation to the tenants. The jury was left to decide whether the testimony from JJ and JB that he did not provide a written statement of withholdings was more credible than Mr. Lasecki's testimony that he sent a notice or "an email confirmation." (R.77 at 156-157.) When the totality of the Record is considered, it is clear that the jury was told the State had to prove he did not send a notice of withholdings and that the jury unanimously found beyond a reasonable doubt that Mr. Lasecki failed to provide that notice of withholdings.

c. Landlord's Right to Mitigation

In his brief, Mr. Lasecki argues he "rightfully withheld the security deposits from both former tenants." (Petitioner's Brief, 16.) Even if that is true, and the

evidence at trial proved it is not true, the law requires the landlord to provide a written explanation of the withholding. Wis. Adm. Code § ATCP 134.06. The landlord has the choice of returning the security deposit in full or providing an explanation for withholding part or all of the security deposit. Wis. Adm. Code § ATCP 134.06. But the landlord has to do one or the other.

Even if the Court nullifies the administrative code and finds landlords are not required to provide a written statement of withholdings, the issue of withholdings was tested during the trial. The question of mitigation was proposed to the jury, evidence was submitted to the jury, the jury instruction was read to the jury, unpaid rent was extensively argued during closing arguments, and the jury unanimously found Mr. Lasecki guilty.

The Court read the "Recovery of rent and damages by landlord; mitigation" instruction to the jury.[11] (R.77 at 169: 17-19.)

The mitigation defense is, at best, an affirmative defense that was thoroughly tested at trial.[12] Both JB and

11 The State filed a motion requesting the jury instruction and sent a copy of the motion and instruction to Mr. Lasecki, on March 1, 2018, a full 3 weeks before trial.

JJ testified as to when they moved out and when they stopped paying rent. JB testified that he moved out of the apartment in June and continued paying rent through September. (R.77 at 72-73.) He also testified that he had the carpets cleaned and everything out of the apartment before he stopped paying rent. (R.77 at 73:17-22.) He only stopped paying rent, 3 months after moving out, once he saw people living in that apartment. (R.77 at 73:23-74:10.)

JJ testified that he gave a written 60-day move out notice. (R.77 at 94:21.) He provided the 60-day notice in the form Mr. Lasecki requested. (R.77,94:15-21.) He testified that he paid rent for those 60 days after the notice. (R.77 at 95:2.) JJ also testified that Mr. Lasecki told him he would receive his security deposit back. (R.77 at 94:11.) And that Mr. Lasecki never returned that deposit or provided a statement of withholdings. (R.77 at 94:11-17.)

Mr. Lasecki admitted he did not know when the apartments were re-rented nor did he provide any evidence of any specific damages or re-renting costs. (R. 77 at 158-161.)

[12] It is only an affirmative defense if the Court nullifies the requirement to provide a withholdings

And the State argued mitigating damages in its closing argument. (R.77 at 179:19-25; 180:17-23; 182:2-19; and 185:5–187:5.)

The evidence at trial established that Mr. Lasecki accepted the surrender of JJ's apartment[13] and that he re-rented JB's apartment.[14] The jury found him guilty after considering evidence of mitigation and the mitigation defense.

d. Harmless Error

Even if the court invalidates the withholdings statement requirement, and finds § 704.28 required the State to prove a lack of authorized withholdings, the issue was fully tried and the totality of the evidence produced at trial meets that burden. As discussed above, the witnesses testified both on direct and cross examination as to when they vacated the apartment, when they stopped paying rent, and why. Both JB and JJ provided ample

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statement. If a withholdings statement is required, it is not a defense to failing to provide that statement.

[13] A month-to-month lease, or a tenancy at will, is terminated after either party provides written notice (minimum 28 days notice), or some other expressly agreed upon method, and the tenant has vacated the apartment. Wis. Stat. §704.19(2). If the tenant vacates without providing written notice, the lease terminates as of the first date on which it would have terminated had the landlord been given proper notice. Wis. Stat. §704.19(6).

[14] See Wis. Stat. § 704.29(2)(b) and (4)(b).

evidence for a reasonable jury to find they did not owe Mr. Lasecki any "unpaid rent."

As to JJ's apartment, Wis. Stat. § 704.28 only requires notice 28 days before vacating on a month-to-month lease. JJ provided a full 60 days written notice in the form expressly agreed upon by Mr. Lasecki.

As to JB's apartment, Wis. Stat. 704.29(2)(b) only requires rent until the unit is re-rented or the original lease expires. JB provided full rent for 4 months after he vacated the apartment, until the unit was occupied by a new tenant.

Even if authorized withholdings is an absolute defense to failing to return a security deposit, the totality of the evidence proved beyond a reasonable doubt that the tenants did not owe unpaid rent.

III. A tenant suffering a pecuniary loss because of a violation of § 100.20 shall recover twice the amount of the loss.

Mr. Lasecki argues as his third, and alternate, claim that he was ordered to pay double restitution. That is not the case.

Wisconsin statute §100.20(5) provides that "Any person suffering pecuniary loss because of a violation … shall recover twice the amount of such pecuniary loss…." *Boelter* 2010 WI App 18 at ¶28. This is a separate requirement from the sentence authorized in § 100.26 and is a separate requirement from the sentence.

The trial court judge in this case made it very clear that he was ordering restitution in the amount of the security deposit and ordered the restitution surcharge based on that amount. (R:77 at 218:15-16.) After ordering restitution, the Court then, pursuant to Wis. Stat. §100.20(5), ordered Mr. Lasecki to pay the victims an additional $730 and $840 as a penalty, not as additional restitution. (R77 at 218:18-20.)

The Court did exactly what the law intended: "provide an incentive for tenants to pursue their rights." *Pierce*, 202 Wis. 2d at 594.

a. Finding §100.20(5) does not apply would create an absurd result.

The public policy behind § 100.20, Stats., is to discourage landlords from withholding security deposits except in the clearest of cases. *Pierce*, 202 Wis. 2d at 594.

If Wis. Stat. § 100.20(5) does not apply to criminal cases, the victims would be required to file a separate small claims case, including, at least initially, paying a filing fee and attorney's fees. The only evidence required in that small claims case would be the judgement of conviction. Once receiving the judgment of conviction, the small claims court would require the landlord to pay filings fees, reasonable attorney fees, and double damages. The victim would not be entitled to actual attorney fees, just the amount the judge deemed reasonable, at times resulting in unrecoverable costs incurred by the victim. As the defendant has a right to a restitution hearing on any

claim for damages by the landlord, that action would not allow for a hearing on damages.

Requiring the victims to file a small claims case to recover what the statute already requires the court to order would serve no legitimate purpose. It would require additional and unnecessary judicial time and resources, and impose an unnecessary burden on victims. See, Wis. Stat. §950.04(1v)(ag) and(k); and Wis. Const. Art. I, §9m.

CONCLUSION

This Court should affirm the trial court's rulings that *Lambert* remains good law and that the use of the administrative code to "fill up the details" provides the necessary specificity required for notice.

This Court should affirm the trial court's rulings that the administrative code and statutes advance the Legislature's policy goals, in a manner that is not unconstitutionally vague.

This Court should affirm the trial court's rulings that the issues in the case were fully litigated and the State presented sufficient evidence for the jury's verdicts.

This Court should affirm the trial court's rulings that *Boelter* remains good law and that the recovery of twice the pecuniary loss is mandatory.

Respectfully submitted this 27th day of March, 2019.

By:_____
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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief and appendix produced with a monospaced font. The length of this brief is 46 pages.

Dated: March 27, 2019

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CERTIFICATION OF THIRD-PARTY COMMERICIAL DELIVERY

I certify that on March 27, 2019, this brief or appendix was delivered to a third-party commercial carrier for delivery to the Clerk of the Court of Appeals within 3 calendar days. I further certify that the brief or appendix was correctly addressed.

Date: March 27, 2019

Signature: _____

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 27th day of March, 2019.

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