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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Case No. 2018AP2340-CR

TROY R. LASECKI,

Defendant-Appellant.

NON-PARTY BRIEF OF THE UNIVERSITY OF WISCONSIN LAW SCHOOL'S NEIGHBORHOOD LAW CLINIC

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STATEMENT OF ISSUES FOR REVIEW

1. Whether the Department of Agriculture, Trade, and Consumer Protection may create and maintain duties that are in addition to those which arose in Wisconsin Statutes Chapter 704.

The circuit court answered: yes.

STATEMENT OF THE CASE

A jury found Troy Lasecki guilty on two counts of failing to return security deposits to two renters (JB and JJ) in violation of secs. 100.20(2) and 100.26(3) and ATCP 134.06(2). R. 77 at 192:24–193:12. JB paid Lasecki a $730 security deposit. R. 77 at 71:9–17, 156:5–7. Despite JB's requests, Lasecki never returned JB's security deposit. R. 77 at 74:11–76:6, 77:20–22, 156:8–16. Lasecki never provided a written accounting explaining why he withheld JB's security deposit. R. 77 at 77:23–78:1, 90:22–25.

Similarly, JJ paid Lasecki an $840 security deposit. R. 77 at 93:18–94:9. Despite JJ's requests, Lasecki never returned JJ's security deposit. R. 77 at 95:3–98:24; 157:5–14. Lasecki never provided a written accounting explaining why he withheld JJ's security deposit. R. 77 at 95:15–17.

ARGUMENT

For more than 23 years, the Neighborhood Law Clinic at the University of Wisconsin Law School has provided legal services to residents of Dane County and surrounding counties on issues related to rental housing, employment, and public benefits. The Clinic has also taught law students, lessors, lessees, attorneys, and judges about rental housing regulations. We write to explain the history, significance, and statutory source of the regulatory scheme under which Lasecki was convicted—a regulatory scheme that protects hundreds of thousands of Wisconsin renters.[1]

I. ATCP 134.06(4) is a remedial rule that protects Wisconsin renters from unfair business practices.

In 1921, the Legislature declared: "Methods of competition in business and trade practices in business shall be fair. Unfair methods of competition in business and unfair trade practices in business are hereby prohibited." Sec. 1495-14, 1921 Wis. Act. 571; Wis. Stat. § 100.20(1) (2017–18). The Legislature delegated to the Department of Agriculture, Trade, and Consumer Protection ("DATCP") the authority to prescribe conduct it determines to be fair and forbid conduct it determines to be unfair. Wis. Stat.

[1] Of Wisconsin's 2,710,723 housing units, one-third or 897,249 are renter-occupied. *Quick Facts*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/milwaukeecountywisconsin,danecountywisconsin,WI/PST045219. In Dane County, 42 percent or 99,515 units are renter-occupied. In Milwaukee County, 49.5 percent or 207,679 units are renter-occupied. *Id.*

§ 100.20(2)–(3) (2017–18).[2] As such, sec. 100.20 is a remedial statute that seeks to protect consumers from unfair trade practices. *Benkoski v. Flood*, 2001 WI App 84, ¶ 16.

To achieve this protection, DATCP has both rule-making and adjudicative powers. DATCP exercises its rule-making authority by issuing "general orders" that are "broadly applicable regulations." Wis. Stat. § 100.20(2); *State v. Texaco, Inc.*, 14 Wis. 2d 625, 640 (1961) (Hallows, J., dissenting). It exercises its adjudicative authority by issuing "special orders" that "constitute a cease and desist order in enjoining a particular defendant." Wis. Stat. § 100.20(3); *Texaco*, 14 Wis. 2d at 640 (Hallows, J., dissenting).

DATCP issued several special orders against individual landlords in the 1970s. WIS. DEP'T OF JUSTICE, LANDLORD-TENANT LAW: SELECTED LEGAL PROBLEMS 15–23 (Nov. 30, 1978) ("DOJ Report"). While the special orders protected some consumers from landlords' unfair trade practices, they had "limited effect upon the practices of other landlords because the orders [were] not widely known or distributed." *Id.* at 23. As the Wisconsin Department of Justice ("DOJ") concluded: "The identification of prohibited practices by litigating against individual landlords, one by one, tends to be inefficient and time consuming and, because of staff and time limitations, centers on only

[2] This delegation is constitutional. *State v. Lambert*, 68 Wis. 2d 523, 528 (1975).

the most abusive practices." *Id.* Thus, in 1976, the Attorney General formally petitioned DATCP to issue a general order on unfair landlord trade practices. DEP'T OF AGRIC., TRADE, AND CONSUMER PROT., LANDLORD-TENANT REPORT *ii* (Dec. 1, 1978) ("DATCP Report").

In 1977, the Legislature instructed DATCP and DOJ to study landlord-tenant issues. Sec. 923(3), 1977 Wis. Act 418. The Legislature requested that the departments examine security deposits, leases, and landlord-tenant rights and obligations. Letter from Gary E. Rohde to the Joint Committee on Finance, et al. (Dec. 1, 1978) (prefacing DATCP Report). The departments published their findings the following year. *Id.*

DATCP found that "disputes regarding **security deposits rank[ed] as the largest single category of landlord-tenant complaints** received by state consumer protection agencies, tenant unions, and others." DATCP Report at 47 (emphasis added). Two factors caused this phenomenon. First, Wisconsin lacked any meaningful penalties for security deposit misconduct. Department Report at 56. At the time, Wisconsin law

> set[] no time limit for the return of security deposits upon termination of tenancy; **it require[d] no written or itemized accounting of the reasons for deposit withholding**; and it provide[d] no sanctions for landlord failure to return or account for withheld deposits in a timely manner.

Id. (emphasis added). Second, the existing dispute resolution mechanisms—namely, Small Claims Court—deterred tenants from vindicating their rights. *Id.* at 9. In particular, DATCP explained that "the amount of any individual

tenant's deposit may not warrant the trouble and expense of a small claims action." *Id.* at 57. DATCP concluded that the inefficient dispute resolution mechanism and the lack of penalties "virtually invites abuse" by landlords. *Id.*

To remedy these ills, DATCP issued its first ever general order on rental housing in 1980. Cr. Register, Feb. 1980, No. 290 (1980). That general order created ATCP 134. *Id.*[3] Thus, the duty to provide a written accounting that explains any security deposit withholdings arose 40 years ago in the Administrative Code. That duty was published—and still remains—as ATCP 134.06(4). Wis. Admin. Code § 134.06(4).

As history demonstrates, ATCP 134.06(4) is a remedial rule aimed at two evils: (1) theft of security deposits and (2) inefficient dispute resolution mechanisms. *See, e.g.*, *Baierl v. McTaggart*, 2001 WI 107, ¶ 26; *Pierce v. Norwick*, 202 Wis. 2d 587, 596 (Ct. App. 1996). Courts must liberally construe remedial rules to advance the intended remedy: the prohibition of unfair trade practices. *Benkoski*, 2001 WI App 84, ¶ 8.

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[3] Lasecki relies on *Paulik* and *Moonlight* to argue that DATCP does not have the authority to issue ATCP 134 under sec. 100.20(2)(a). Appellant Br. at 11. However, the *Paulik* Court noted that "[t]he rules and regulations governing the rights and duties of landlords and tenants set forth under Wis.Adm.Code, ch. Ag 134 were promulgated under the authority of sec. 100.20(2)." *Paulik v. Coombs*, 120 Wis. 2d 431, 436 (Ct. App. 1984). Similarly, the *Moonlight* Court held that a lease provision was void because it "violated an order issued under sec. 100.20, Stats., namely, Wis.Adm.Code, sec. Ag 134.06(2) and (4)." *Moonlight v. Boyce*, 125 Wis. 2d 298, 304 (Ct. App. 1985). That both courts refer to "rules and regulations" is of no consequence. *See* Appellant Br. at 11. "General orders" are included in the statutory definition of "rule." Wis. Stat. § 227.01(13) (2017–18).

II. ATCP 134.06(4) plays a critical role in resolving rental housing disputes.

In addition to its remedial nature, ATCP 134.06(4) plays a critical role in resolving rental housing disputes. The Legislature developed a system of public and private enforcement for ATCP 134. Public enforcement occurs through sec. 100.26(3), which provides criminal penalties for violations of sec. 100.20 orders. Wis. Stat. § 100.26(3) (2017–18).[4] Private enforcement occurs through sec. 100.20(5), which provides a tenant with the right to sue and recover double damages and a reasonable attorney fee for violations of sec. 100.20 orders. Wis. Stat. § 100.20(5) (2017–18).

Four policy interests underlie the private enforcement mechanism of sec. 100.20(5). *Shands v. Castrovinci*, 115 Wis. 2d 352, 358 (1983). First, it encourages individual tenants to enforce their own rights under the administrative code. *Id.* Second, it permits individual tenants to act "as a 'private attorney general' to enforce the tenants' rights set forth in the administrative regulations. Thus, the individual tenant not only enforces his or her individual rights, but the aggregate effect of individual suits enforces the public's rights." *Id.* Third, it increases the bargaining power of tenants and thus deters unfair trade practices by landlords. *Id.* Fourth, it provides "a necessary backup to the state's enforcement powers." *Id.*

[4] Wis. Stat. § 100.26(3) is constitutional. *Lambert*, 68 Wis. 2d at 528.

ATCP 134.06(4) serves each of these policy interests. First, ATCP 134.06(4) encourages tenants to enforce their own rights. For example, only when a tenant has received a written accounting of security deposit withholdings can they properly assess whether their landlord wrongfully withheld those funds. *See Pierce*, 202 Wis. 2d at 596. ATCP 134.06(4) also encourages parties to resolve disputes without burdening the courts. A written accounting of withholdings is the foundation from which the parties can discuss and debate any disputed withholdings. **"[A] landlord who** retains a security deposit and **fails to provide a tenant with an itemization of damages** within the notification period **has hindered any realistic settlement negotiations**." *Id.* (emphasis added).

Second, the accounting requirement in ATCP 134.06(4) protects both current and future tenants' rights. For example, a new tenant can request a copy of a previous tenant's written accounting. Wis. Admin. Code § ATCP 134.06(1)(b). Thus, ATCP 134.06(4) facilitates the proper application of sec. 704.28(3) and ATCP 134.06(3)(c), by helping new tenants avoid being charged for damages that are not their responsibility (i.e., those caused by a previous renter).

Third, ATCP 134.06(4) increases the bargaining power of tenants. There is "an inherent inequality of bargaining power between landlords and

tenants." *McTaggart*, 2001 WI 107, ¶ 25. Recognizing this power imbalance, this court concluded:

> [W]e believe that in [wrongfully withheld security deposit cases] the burden should rest on the party with more readily accessible knowledge about the fact in question. It is the lessor who is best able to prove that a tenant damaged property during his tenancy. It is the lessor, not the lessee, who has control of the property, conducts an inspection both at the beginning and end of a tenancy, and maintains records as to the condition of an apartment at the commencement of a lease. In sum, the burden is on the lessor to prove up his damages.

Rivera v. Eisenberg, 95 Wis. 2d 384, 387–88 (Ct. App. 1980). Thus, renters have a right to the return of their deposit unless and until the landlord can prove otherwise. *Id.* If a landlord cannot prove (i.e. account for) his withholdings, then he cannot meet his burden. *Id.* This right to information about the reasons for any withholding deters landlord misconduct. *See Armour v. Klecker*, 169 Wis. 2d 692, 701 (Ct. App. 1992).

Fourth, ATCP 134.06(4) supplements the state's enforcement of ATCP 134. The Wisconsin DOJ reported that "the sheer number of [ATCP 134] violations prevent[s] it from proceeding against all violators." *Shands*, 115 Wis. 2d at 358. Landlord-tenant disputes remain a significant source of litigation and administrative complaints. Such complaints consistently rank second on DATCP's list of top ten consumer complaints. *Top Ten Consumer Complaints*, DEP'T OF AGRIC., TRADE, AND CONSUMER PROT., https://datcp.wi.gov/Pages/Publications/TopTenConsumerComplaints.aspx. DATCP received 1,128 landlord-tenant complaints in 2019; 1,188 in 2018;

and 1,141 in 2017. *Id.* By helping informed tenants secure their rights under the landlord-tenant administrative code, ATCP 134.06(4) reinforces the state's enforcement efforts in a high-volume area.

III. DATCP may maintain existing and create additional duties beyond those in ch. 704.

Contrary to Lasecki's contention, DATCP may maintain and create duties in addition to those in ch. 704. *See* Appeal Br. at 12–13; Reply Br. at 4–6. In interpreting a statute, a court must begin by ascribing common meaning to the statutory language. *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 45. Section 704.95 states that DATCP "may not issue an order or promulgate a rule under s. 100.20 that changes any right or duty arising under this chapter." Wis. Stat. § 704.95 (2017–18).

ATCP 134.06(4) does not change any right or duty arising under sec. 704.28 or any other provision of ch. 704. The rights and duties in sec. 704.28 are reiterated verbatim in ATCP 134.06.[5] Rather than changing any duty, ATCP 134.06(4) has, for 40 years, defined an additional duty that gives effect to sec. 704.28. Without an accounting, neither the parties nor the trial court could determine whether security deposit withholdings complied with sec. 704.28(1)–(3). Instead of changing any right or duty arising in ch. 704, ATCP

[5] Where ch. 704 uses subsections, ATCP 134 uses paragraphs. ATCP 134.06(2)(b) includes an extra "the" that is not included in sec. 704.28(4)(b).

134.06(4) codifies a right declared in the common law: a lessee has every right to the return of their security deposit unless and until the lessor can meet its burden to prove any withholdings. *Rivera*, 95 Wis. 2d at 387–88.[6] As described above, the written accounting promotes "realistic settlement negotiations." *Pierce*, 202 Wis. 2d at 596. DATCP can maintain and create additional rights and duties beyond those which arose in ch. 704. Such actions are permissible under the plain language of sec. 704.95. In the case of ATCP 134.06(4), DATCP can maintain long-standing rights and duties that arose decades ago and that give practical effect to the rights and duties in sec. 704.28.

Legislation enacted contemporaneous with sec. 704.95 also supports the conclusion that DATCP may maintain and create duties in addition to those in ch. 704. Courts interpret statutory language in context. *Kalal*, 2004 WI 58, ¶ 46. The Legislature enacted sec. 66.0104(2)(b) three months prior to sec. 704.95. Sec. 1, 2011 Wis. Act 108. That statute states: "No city, village, town, or county may enact an ordinance that places requirements on a residential landlord with respect to security deposits … **that are additional to the requirements under administrative rules related to residential rental practices.**" Wis. Stat. § 66.0104(2)(b) (2017–18) (emphasis added).

[6] Moreover, landlords have also long had a duty, arising under the tax code, to account and report all rental income, expenses, and losses. *See* e.g., *Topic No. 414 Rental Income and Expenses*, IRS, https://www.irs.gov/taxtopics/tc414.

This language is significant for two reasons. First, this language demonstrates that the Legislature viewed the "administrative rules related to residential rental practices" (i.e., ATCP 134) as the permissible ceiling for duties related to security deposits, not ch. 704. Second, it demonstrates that the same Legislature that enacted sec. 704.95 understood how to prevent an entity from creating *additional duties* to those found in a certain source. The Legislature did not use that language when it enacted sec. 704.95. Thus, when the Legislature declared that DATCP may not "change any duty or right," it did not intend to prevent DATCP from creating duties or rights "that are additional to" those in ch. 704. *See Am. Transmission Co. v. Dane Cty.*, 2009 WI App 126, ¶ 14 n.7 ("Where the legislature uses similar but different words in a statute, particularly the same section, we presume the legislature intended that the words have different meanings.").

Furthermore, the Legislature enacted sec. 66.1010 in the same act as sec. 704.95. 2011 Wis. Act 143. Section 66.1010 prohibits political subdivisions from enacting future ordinances and enforcing existing ordinances that impose a moratorium on evictions. Wis. Stat. § 66.1010 (2017–18). The Legislature did so with specific language. First, the Legislature prohibited enactment of future ordinances: "A political subdivision may not enact or enforce an ordinance that imposes [a moratorium on evictions]." Wis. Stat. § 66.1010(2). Then, the Legislature

prohibited enforcement of existing moratoria: "If a political subdivision has in effect on March 31, 2012, an ordinance that is inconsistent with sub. (2), the ordinance does not apply and may not be enforced." Wis. Stat. § 66.0101(3). If the Legislature wanted to prevent the enforcement of ATCP 134.06(4)—an already existing regulation—it would have added similar language to sec. 704.95.

Lastly, an interpretation of sec. 704.95 that prevents DATCP from maintaining and creating duties in addition to those in sec. 704 would create absurd results. Courts must interpret statutory language so as to avoid absurd results. *Kalal*, 2004 WI 58, ¶ 46. If DATCP cannot maintain and create duties in addition to those in ch. 704, then ATCP 134 rules that are not reflected verbatim in ch. 704 would be void. Moreover, all municipal and county rules on security deposits in addition to sec. 704.28 would likewise be void because local rules cannot create security deposit requirements in addition to those imposed by the Administrative Code. Wis. Stat. § 66.0104(2)(b). Such a wholesale rewriting of the Administrative Code is an absurd result that would only harm those whom the Legislature intended to protect when it enacted sec. 100.20: Wisconsin consumers. *See City of Madison v. State Dep't of Workforce Dev., Equal Rights Div.*, 2003 WI 76, ¶ 11 ("In interpreting two statutes that are alleged to conflict, it is our duty to

attempt to harmonize them in a way that will give effect to the legislature's intent in enacting both statutes.").

IV. Harmless Error

In writing this brief, we have focused on the history, significance, and statutory source of the regulatory scheme under which Lasecki was convicted. Lasecki also makes a number of arguments unrelated to these topics. We believe those arguments do not establish grounds for overturning the conviction. The court may not overturn a conviction on the basis of a harmless error. *State v. Sherman*, 2008 WI App 57, ¶ 8. Even if Lasecki's brief identified any error, a rational jury would have still convicted him. *See State v. Travis*, 2013 WI 38, ¶ 67 n.54. Lasecki possessed JB's and JJ's security deposits; he retained possession after they asked him to return them; and he had neither the owners' consent, nor the authority retain them. *See*, *supra*, Statement of the Case. This is theft in violation of sec. 943.20(1)(b). Therefore, any potential errors identified by Lasecki are harmless and cannot serve as grounds for overturning the conviction.

CONCLUSION

The Neighborhood Law Clinic thanks the Wisconsin Court of Appeals for providing us with this opportunity to explain the history, significance, and statutory source of the regulatory scheme under which Lasecki was convicted—a regulatory scheme that protects hundreds of thousands of Wisconsin renters.

Respectfully submitted on February 24, 2020.

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CERTIFICATIONS

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 2,995 words. I further certify that the text of the electronic copy of the brief is the same as the paper copy as required by s. 809.19(12).

Signed:

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