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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2018AP2340-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TROY R. LASECKI,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF, ENTERED IN THE OUTAGAMIE COUNTY CIRCUIT COURT, THE HONORABLE MARK J. McGINNIS, PRESIDING

AMICUS BRIEF AND SUPPLEMENTAL APPENDIX OF THE WISCONSIN ATTORNEY GENERAL IN SUPPORT OF THE STATE OF WISCONSIN

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INTRODUCTION

This Court invited the office of the Attorney General to submit an amicus brief in this matter, where Defendant-Appellant Troy Lasecki attacks his conviction on multiple grounds. This brief addresses one of Lasecki's arguments: that after recent amendments to Wis. Stat. ch. 704, a landlord's failure to provide a written statement of withholdings from a residential security deposit is no longer a criminal offense in Wisconsin. Lasecki makes this argument notwithstanding Wis. Admin. Code ATCP § 134.06(4)(a), which explicitly requires a written statement and criminalizes the failure to provide one.

Lasecki's argument is wrong, as made clear by the plain language of the relevant statute, Wis. Stat. § 704.95. That language preserves the existing administrative rules governing unfair trade practices in the landlord-tenant realm, including Wis. Admin. Code ATCP § 134.06(4)(a)'s requirement of a written statement of security-deposit withholdings. This statutory language is confirmed by closely related statutes, legislative history, and the absurd results that would follow from Lasecki's proposed approach.

In short, failing to provide a written statement of security-deposit withholdings remains a crime, as it was before the amendments to Wis. Stat. ch. 704. Insofar as Lasecki was otherwise validly convicted of that offense, his conviction should be affirmed.

STATEMENT OF INTEREST

The Attorney General and the Wisconsin Department of Justice (DOJ) represent the Wisconsin Department of Agriculture, Trade and Consumer Protection (DATCP) in civil and criminal actions enforcing rules promulgated under Wis. Stat. § 100.20, relating to unfair trade practices. *See* Wis. Stat. § 165.25(4)(ar). This includes enforcement

actions against landlords who violate Wis. Admin. Code ATCP § 134.06. DOJ therefore has an interest in this case given the potential ramifications it could have on future enforcement actions.

RELEVANT BACKGROUND

In 1980, DATCP promulgated the rules governing residential rental practices, including Wis. Admin. Code ATCP § 134.06. *See* Wis. Admin. Code Ag § 134.06 (Feb. 1980). The rules were the result of an extensive study of Wisconsin landlord-tenant relations that was ordered by the Legislature, *see Baierl v. McTaggart*, 2001 WI 107, ¶ 27, 245 Wis. 2d 632, 629 N.W.2d 277, and were promulgated explicitly under Wis. Stat. § 100.20(2)'s grant of rulemaking power to define unfair trade practices. *See* Wis. Stat. § 100.20(2); *see also* Wis. Admin. Code ATCP § 134.01 (intro.). From the beginning, those rules included the requirement that landlords provide tenants a written statement of amounts withheld from security deposits. *See* Wis. Admin. Code Ag § 134.06(4) (the "written-statement requirement"). From 1980 to 2011, Wis. Admin. Code ATCP § 134.06 was the only Wisconsin law that addressed residential rental security deposits.

In 2012, the Legislature enacted 2011 Wis. Act 143, "relating to[ ] miscellaneous landlord–tenant provisions and prohibiting a local government from imposing a moratorium on eviction actions." 2011 Wis. Act 143 (intro.). This enactment included Wis. Stat. § 704.28, governing withholdings from and return of security deposits. 2011 Wis. Act 143, § 22. Wisconsin Stat. § 704.28's language mirrored much but not all of Wis. Admin. Code ATCP § 134.06. In particular, the statute prescribed some different deadlines for the return of the security deposit. *Compare* Wis. Stat. § 704.28, *with* Wis. Admin. Code ATCP § 134.06 (Oct. 2004). The statute also did not include

the rule's requirement that landlords provide tenants a written statement of security deposit deductions. *Id.*

In the same bill, the Legislature also enacted Wis. Stat. § 704.95, entitled "Practices regulated by the department of agriculture, trade and consumer protection." 2011 Wis. Act 143, § 36. That statute provides that

> Practices in violation of s. 704.28 or 704.44 may also constitute unfair methods of competition or unfair trade practices under s. 100.20. However, the department of agriculture, trade and consumer protection 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.

ARGUMENT

Failure to provide a written statement of security-deposit withholdings remains a crime after the recent amendments to Wis. Stat. ch. 704.

Lasecki argues that he was wrongly convicted in part because "his failure to provide a statement of withholdings[ ] is not a crime recognized under Wisconsin law." (Lasecki Opening Br. 17.) He argues that because the requirement to provide a written statement of security deposit deductions was not included in Wis. Stat. § 704.28, the requirement was implicitly negated by Wis. Stat. § 704.95. (*Id.* at 9–13.)

The Court should reject Lasecki's argument and instead recognize that the written-notice requirement in Wis. Admin. Code ATCP § 134.06(4)(a) remains valid—and

that violation of that requirement is a criminal offense. This is made clear, most importantly, in the language of Wis. Stat. § 704.95. For one thing, Wis. Stat. § 704.95's limitation applies only to a "right or duty *arising under*" Wis. Stat. ch. 704. The duty to provide a written-statement requirement does not "aris[e] under" Wis. Stat. ch. 704, which is totally silent on the topic. Wisconsin Stat. § 704.95's limitation therefore has no bearing on the written-statement requirement. Additionally, Wis. Stat. § 704.95's language establishes a prospective limitation on DATCP's ability to "issue an order or promulgate a rule," with no suggestion of limiting DATCP's ability to enforce *existing* rules.

This reading is confirmed by surrounding statutes, legislative history, subsequent regulatory enactments, and the absurdity resulting from Lasecki's interpretation. All factors relevant to the statutory-construction inquiry thus demonstrate that failure to provide a written statement of withholdings remains a criminal offense.

A. Wisconsin Stat. § 704.95's plain language does not alter Wis. Admin. Code ATCP § 134.06(4)'s written-statement requirement.

Nothing in the language of Wis. Stat. § 704.95 limits DATCP's ability to enforce *existing* rules, particularly those governing rights and duties arising under a separate statutory chapter.

To begin, the first sentence of Wis. Stat. § 704.95 confirms that DATCP retains independent authority to regulate unfair trade practices within the landlord-tenant

realm under Wis. Stat. § 100.20. That statute provides that "[u]nfair methods of competition in business and unfair trade practices in business are . . . prohibited," Wis. Stat. § 100.20(1), and authorizes DATCP to promulgate rules "proscrib[ing] specific unfair trade practices," *Baierl*, 245 Wis. 2d 632, ¶ 23; *see also* Wis. Stat. § 100.20(2).[1] DATCP has prescribed those rules under Wis. Admin. Code ATCP ch. 134.

The second sentence of Wis. Stat. § 704.95 then imposes a narrow limitation on DATCP's rulemaking authority, dictating that DATCP cannot promulgate a rule that "*changes* any right or duty *arising under this chapter*." The necessary implication, however, is that if a right or duty arises under another chapter and Wis. Stat. ch. 704 is silent on the topic, Wis. Stat. § 704.95 has no bearing on DATCP's rulemaking authority over that subject-matter.

The duty to provide a written statement of security-deposit withholdings does not arise under Wis. Stat. ch. 704; it arises under Wis. Stat. § 100.20. Indeed, as noted, Wis. Admin. Code ATCP § 134.06(4) long predates Wis. Stat. § 704.28's provisions regarding security deposits. And even now, Wis. Stat. ch. 704 (including Wis. Stat. § 704.28) is silent on whether a landlord must provide a written statement of withholdings. Wisconsin Stat. § 704.28 imposes a duty on landlords to return security deposits within 21 days of the end of the tenancy, minus authorized deductions. Wis. Stat. § 704.28(4). But nothing in that chapter says anything about

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[1] Given *Baierl*'s clear recognition of DATCP's rulemaking authority under Wis. Stat. § 100.20(2), this Court should reject out of hand Lasecki's argument that that statute "does not give [DATCP] the authority to issue the 'regulations' of [Wis. Admin. Code ATCP § 134.06]." (Lasecki Opening Br. 11); *see also* Wis. Stat. § 227.01(13) (defining "[r]ule" to include "general order[s]").

providing a written statement. The only law on that topic remains Wis. Admin. Code ATCP § 134.06(4)(a).

The written-notice requirement in Wis. Admin. Code ATCP § 134.06(4)(a) is thus complementary to the rights and duties set forth by Wis. Stat. § 704.28, but it does not "change" any right or duty arising under that chapter. Thus, by its terms, Wis. Stat. § 704.95 simply has no bearing on the written-notice requirement.

The inapplicability of Wis. Stat. § 704.95 to the written-notice requirement is further confirmed by the statute's prospective language, indicating that its prohibition applies only to future rules or orders that DATCP may issue. Wisconsin Stat. § 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." This language demonstrates that Wis. Stat. § 704.95 was not altering orders that DATCP had previously *issued* or rules it had previously *promulgated*.

Not only does this reading give accurate effect to the structure and tense of Wis. Stat. § 704.95, it also comports with the principle that where the Legislature intends to alter or amend statutes or rules, it does so explicitly and directly, not by amending a different statute. *See State v. Black*, 188 Wis. 2d 639, 645, 526 N.W.2d 132 (1994). Implied repeal "is not favored in statutory construction"; instead, courts "must make every attempt to give effect to both by construing them together so as to be consistent with one another." *Id.*

Here, consistency is easily achieved by recognizing that Wis. Stat. § 704.95 did not alter DATCP's existing rules, validly promulgated under the authority of Wis. Stat. § 100.20(2). Accordingly, Wis. Admin. Code ATCP § 134.06(4)(a) remains valid, and violation of that rule remains a criminal offense.

B. The language of related statutes further demonstrates that Wis. Stat. § 704.95 did not alter Wis. Admin. Code ATCP § 134.06(4)(a)'s written-statement requirement.

In 2012, in addition to the amendments to Wis. Stat. ch. 704, the Legislature enacted several statutes relating to the landlord-tenant relationship. *See* 2011 Wis. Act 108, § 1 (enacting Wis. Stat. § 66.1010(3)); 2011 Wis. Act 143, § 1 (enacting Wis. Stat. § 66.0104(2)(b)). The language of these statutes, particularly in relation to that of Wis. Stat. §§ 704.28 and 704.95, makes clear that the Legislature did not intend Wis. Stat. § 704.95 to alter the validity of existing DATCP rules.

As one example, Wis. Stat. § 66.0104 prohibits local ordinances that impose security-deposit requirements "that are *additional to* the requirements under administrative rules related to residential rental practices."[2] Wis. Stat. § 66.0104(2)(b); *see also* 2011 Wis. Act 108, § 1. The statute also states that any ordinance in place that is "inconsistent" with this limitation "does not apply and may not be enforced." Wis. Stat. § 66.0104(3)(a).

The phrase "additional to the requirements under administrative rules," Wis. Stat. § 66.0104(2)(b), indicates that the Legislature expected that the rules governing residential rental practices would continue in force unaltered and that landlords would continue to be bound by those requirements. Further, in contrast to the language used in Wis. Stat. § 704.95, the language in Wis. Stat. § 66.0104(2)(b) and (3)(a) suggest that if the Legislature had intended to alter DATCP's ability to enforce its existing landlord-tenant rules, it would have said so explicitly, as it did for local ordinances

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[2] Although Wis. Stat. § 66.0104 does not cite Wis. Admin. Code ATCP ch. 134, that chapter's title is "residential rental practices."

on the same topic. *See Winebow, Inc. v. Capitol-Husting Co.*, 2018 WI 60, ¶ 30 n.6, 381 Wis. 2d 732, 914 N.W.2d 631 (statutes on same topic must be construed *in pari materia*).

Another example is Wis. Stat. § 66.1010, which was enacted in the same legislation as Wis. Stat. §§ 704.28 and 704.95. 2011 Wis. Act 143, §§ 1, 22, 36; *see Waranka v. Wadena Ins. Co.*, 2014 WI 28, ¶ 17, 353 Wis. 2d 619, 847 N.W.2d 324 (applying *in pari materia* canon to statutory provisions enacted in "the same legislative act on the same subject"). It states that political subdivisions may not "enact *or enforce* an ordinance that imposes a moratorium" on landlords pursuing evictions. Wis. Stat. § 66.1010(2). It goes on to say that any ordinance "in effect" when the statute becomes law that is inconsistent with sub. (2) "does not apply and may not be enforced." Wis. Stat. § 66.1010(3). This statute again shows that when the Legislature wants to preclude enforcement of existing landlord-tenant laws, it explicitly says so.

The exclusion of such language from Wis. Stat. § 704.95 shows that the Legislature did not intend for that statute to alter existing DATCP rules governing the landlord-tenant relationship, other than by preventing future rules that would conflict with the provisions of Wis. Stat. ch. 704.

C. Legislative history confirms that neither the Legislature nor DATCP understood Wis. Stat. § 704.95 to alter the agency's existing authority under Wis. Admin. Code ATCP ch. 134.

Legislative history may be useful to confirm or verify a statute's plain meaning. *See State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 51, 271 Wis. 2d 633, 681 N.W.2d 110. Legislative history documents here could not be clearer in confirming that Wis. Stat. ch. 704 was not intended to alter the operation of Wis. Admin. Code ATCP ch. 134.

During the drafting process for 2011 Wis. Act 143 (which enacted Wis. Stat. § 704.95), an amendment was proposed which would have added a provision nearly identical to Wis. Admin. Code ATCP § 134.06(4)(a), requiring an itemized statement of deductions from security deposits. Senate Substitute Amendment to 2011 Senate Bill 466 (available in drafting file for 2011 Wis. Act 143, Wis. Legis. Reference Bureau, Madison, Wis., http://docs.legis.wisconsin.gov/2011/related/drafting_files/wisconsin_acts/2011_act_143_sb_466/03_ssa1_sb466/11s0335df_pt02of03.pdf); Email from Margit Kelley, Wis. Legis. Council, to Pam Kahler, Wis. Legis. Reference Bureau (Feb. 16, 2012, 12:23 PM CST) (available in drafting file for 2011 Wis. Act 143, Wis. Legis. Reference Bureau, Madison, Wis., http://docs.legis.wisconsin.gov/2011/related/drafting_files/wisconsin_acts/2011_act_143_sb_466/03_ssa1_sb466/11s0335df_pt01of03.pdf) (requesting amendment to 2011 S.B. 466 "revis[ing] [bill] to require a written statement accounting for all amounts withheld from a security deposit, in line with § ATCP 134.06(4)").

But soon thereafter, communications among drafters and DATCP resolved the issue, "keeping the enforcement of the rules intact even though we are copying some of the rules into the statutes." Email from Bob Welch to Lauren Kiesow and Robert Kovach, Wis. Legis. Reference Bureau (Feb. 27, 2012, 10:06 AM CST) (available in drafting file for 2011 Wis. Act 143, Wis. Legis. Reference Bureau, Madison, Wis., http://docs.legis.wisconsin.gov/2011/related/drafting_files/wisconsin_acts/2011_act_143_sb_466/03_ssa1_sb466/11s0335df_pt03of03.pdf.)[3] This result was the product of discussions between the bill's drafters and DATCP representatives, who confirmed that "the intent of the bill is to allow our rules to

[3] A copy of the relevant email exchange is included in an appendix to this brief.

continue to apply as written, but that we may not rewrite the rules in any way that conflicts with the provisions in the bill." *Id.* To capture this intent, DATCP attorneys drafted—and the bill sponsors approved—the language that would become Wis. Stat. § 704.95. *See id.*

The final version of the bill included the language proposed by DATCP, thereby ensuring that the agency could continue applying its existing rules as written. *See* 2011 Wis. Act 143, § 36.

D. Interpreting Wis. Stat. § 704.95 as nullifying the written-statement requirement would have the absurd result of facilitating violations of Wis. Stat. § 704.28.

Under statute and rule, landlords are required to return security deposits, minus authorized deductions, within a set time. Wis. Stat. § 704.28(4); Wis. Admin. Code ATCP § 134.06(2). If landlords violate this requirement, tenants can file a private suit to enforce their rights. Wis. Stat. § 100.20(5). Private enforcement actions are an important mechanism for enforcing landlord-tenant law. The Legislature has encouraged private litigation to enforce tenants' rights by allowing the recovery of attorney fees and double damages. Wis. Stat. § 100.20(5); *Baierl*, 245 Wis. 2d 632, ¶ 31. Given the limited state resources available to address every violation of tenants' rights, private enforcement actions under Wis. Stat. § 100.20(5) allow tenants to serve as "private attorneys general," enforcing their own rights and serving as "a deterrent effect, curbing impermissible conduct by landlords." *Baierl*, 245 Wis. 2d 632, ¶ 31 (citation omitted).

The first sentence of Wis. Stat. § 704.95 shows that the Legislature intends to continue to allow tenants to use private suits to enforce their rights under both Wis. Stat. § 704.28(4) and Wis. Admin. Code ATCP § 134.06(2). Interpreting the

second sentence of Wis. Stat. § 704.95 as Lasecki urges would have the absurd effect of eviscerating the written-statement requirement—the only meaningful mechanism by which tenants can reasonably determine whether a deposit they receive is lawful.

Without the written notice of withholding, tenants could not effectively evaluate whether a withholding complied with the statutes—i.e., whether they have received "the full amount of any security deposit . . . less any amounts that may be withheld [by law]." Wis. Stat. § 704.28(4). A tenant who receives an amount less than their full security deposit would have no legal recourse—short of litigation—to determine whether the withholding was lawful. Compounding that difficulty, the lack of a written statement would almost certainly make it harder for tenants to recruit an attorney to assist in challenging a withholding, even with the prospect of attorney fees.

Lasecki's interpretation would thus deprive tenants of a meaningful mechanism by which to assert their right to have their full deposits timely returned. And in other instances, Lasecki's interpretation would lead to tenants bringing suit just to find out if their deposit was lawfully withheld; thus requiring courts and parties to expend resources processing lawsuits that might have been avoided had written notice been required.

In short, Lasecki's interpretation would facilitate circumvention of the law requiring timely return of the full security deposit less any lawful withholdings. *See* Wis. Stat. § 704.28(4). The absurd results that Lasecki's approach would encourage are readily avoided by applying Wis. Stat. § 704.95 as written.

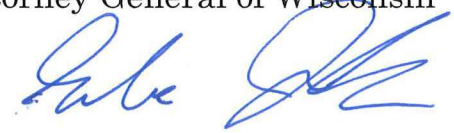
CONCLUSION

Wisconsin Stat. § 704.95 did not alter Wis. Admin. Code ATCP § 134.06(4)(a)'s written-notice requirement. Violation of that requirement remains a criminal offense and, insofar as Lasecki was otherwise validly convicted of that offense, his conviction should be affirmed.

Dated this 24th day of February, 2020.

Respectfully submitted,

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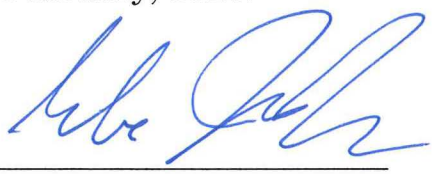
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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2999 words.

Dated this 24th day of February, 2020.



GABE JOHNSON-KARP
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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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. § 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 24th day of February, 2020.



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