

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 18, 2003

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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

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

**Appeal No. 03-0047
STATE OF WISCONSIN**

Cir. Ct. No. 01-SC-007009

**IN COURT OF APPEALS
DISTRICT IV**

MICHAEL KIDD,

PLAINTIFF-APPELLANT,

V.

DIANNA L. MCMASTER,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Dane County:
ROBERT DeCHAMBEAU, Judge. *Reversed and cause remanded with
directions.*

¶1 DYKMAN, J.¹ Michael Kidd appeals from a judgment awarding
Dianna L. McMaster \$18,029.93. He contends the trial court erred by finding that

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(b) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

Federal Express is not a statutorily approved method of transporting a security deposit to a tenant under WIS. ADMIN. CODE § ATCP 134.06(2)(a). He also claims the trial court erred when it awarded McMaster all of her attorney fees because that amount included attorney fees incurred by defending Kidd's claims. We conclude that Federal Express is an acceptable equivalent to the U.S. Postal system for purposes of transporting a security deposit. Since we reverse McMaster's judgment, McMaster has not prevailed and is not entitled to attorney fees.

FACTS

¶2 McMaster was Kidd's tenant, pursuant to the terms of a written lease. The lease required McMaster to pay \$795 per month from August 19, 2000, until June 30, 2001, and to provide a security deposit of one month's rent. The parties also entered into a separate, verbal arrangement to board two horses, whereby McMaster would pay an additional \$50 per month per horse.

¶3 On June 30, 2001, McMaster vacated the apartment. On the twenty-first day after the lease terminated, Kidd sent McMaster via Federal Express a letter itemizing deductions from her security deposit. McMaster received the letter on July 23, 2001.

¶4 Kidd sued McMaster in small claims court to recover \$1,000 for nonpayment of ten months of boarding horses and \$550 for the replacement of the apartment front door. McMaster counter-claimed and alleged that, among other things, Kidd violated WIS. ADMIN. CODE § ATCP 134.06(2)(a) by not delivering or mailing her security deposit or a statement accounting for amounts withheld from the security deposit within twenty-one days after she surrendered the rental premises.

¶5 The trial court found that McMaster owed Kidd \$986.67 for horse boarding fees. It also found that Kidd violated WIS. ADMIN. CODE § ATCP 134.06(2)(a) and awarded McMaster \$18,029.93, which included \$15,171.69 in reasonable attorney fees. Kidd appeals.

STANDARD OF REVIEW

¶6 This appeal requires us to decide whether the term “mail” in WIS. ADMIN. CODE § 134.06 includes postal services provided by Federal Express. We construe administrative rules and regulations in the same manner as statutes. *Moonlight v. Boyce*, 125 Wis. 2d 298, 303, 372 N.W.2d 479 (Ct. App. 1985). Applying a statute to undisputed facts constitutes a conclusion of law. *Kania v. Airborne Freight Corp.*, 99 Wis. 2d 746, 758, 300 N.W.2d 63 (1981). We review matters of law without deference to the trial court. *First Nat’l Leasing Corp. v. Madison*, 81 Wis. 2d 205, 208, 260 N.W.2d 251 (1977).

DISCUSSION

¶7 Kidd’s appeal presents an issue of first impression: does Federal Express qualify as mail for the purpose of delivering a security deposit or itemization of deductions under WIS. ADMIN. CODE § ATCP 134.06(2)(a)?² He contends that the regulation is ambiguous because federal courts cannot agree on how to define mail. While we agree with Kidd’s conclusion, we do not adopt his reasoning. “A statute is ambiguous if reasonably well-informed persons may

² WISCONSIN ADMIN. CODE § ATCP 134.06(2) provides: “RETURNING SECURITY DEPOSITS. (a) Within 21 days after a tenant surrenders the rental premises, the landlord shall deliver or mail to the tenant the full amount of any security deposit held by the landlord, less any amounts properly withheld by the landlord under sub. (3).”

differ as to its meaning.” *Pierce v. Norwick*, 202 Wis. 2d 587, 593, 550 N.W.2d 451 (Ct. App. 1996). McMaster asserts that “mail” exclusively indicates the U.S. Postal Service; Kidd contends that mail has a broader definition that includes private services such as Federal Express. These two contrary, but reasonable, interpretations render “mail” as used in § ATCP 134.06(2)(a) ambiguous.

¶8 To construe this ambiguous term, each party urges us to follow federal jurisdictions that support their respective positions. The case law they provide primarily relates to the use of mail in service of process under the Federal Rules of Civil Procedure. We will not impute such reasoning to WIS. ADMIN. CODE § ATCP 134.06(2)(a) because the differences in public policy between those two areas of law are significant.

¶9 We construe statutes in order to ascertain the legislature’s intent, which can be found in the “scope, history, context, subject matter and object of the statute.” *Id.* Kidd asserts that the purpose of WIS. ADMIN. CODE § ATCP 134.06(2)(a) is to ensure that a landlord returns security deposits or itemizations of deductions to former tenants within twenty-one days.

¶10 We turn to the Wisconsin Supreme Court to discern the general purposes and policy interests behind WIS. STAT. § 100.20(5).³

In *Shands v. Castrovinci*, 115 Wis. 2d 352, 340 N.W.2d 506 (1983), our supreme court laid out these policies. First, the awarding of double damages and attorney fees encourages those injured by unfair trade practices in violation of the administrative regulations to bring forward their causes of action. Second, the statutory remedies encourage individuals to act as “private attorney generals” in enforcing their rights, with the aggregate effect of these

³ ATCP adopted chapter 134 under the authority of WIS. STAT. § 100.20(5).

individual actions operating to enforce the public's rights. Third, the statutory remedies deter impermissible conduct that violates administrative regulations because they subject the violator to double damages, attorney fees and costs. Fourth, private actions augment enforcement of the administrative regulations by the department of justice, which has insufficient resources to prosecute all violations.

Benkoski v. Flood, 2001 WI App 84, ¶17, 242 Wis. 2d 652, 626 N.W.2d 851 (citation omitted). We have also interpreted the statute “to strengthen the bargaining power of tenants in dealing with landlords” and “to discourage landlords from withholding security deposits except in the clearest of cases.” *Pierce*, 202 Wis. 2d at 594.

¶11 McMaster does not argue that we would undermine or violate the purpose of WIS. ADMIN. CODE § ATCP 134.06(2)(a) or WIS. STAT. § 100.20(5) if we include Federal Express as an acceptable form of mail. And we decline to infer any such argument. We discern no reason why Federal Express is not a reliable substitute for the U.S. Postal Service. McMaster does not seem to dispute the quality of Federal Express's service. The sanctions § 100.20(5) imposes are not insignificant; violations create liability for attorney fees. While the purpose of § ATCP 134.06(2)(a) is to enhance the tenant's bargaining power and to protect against unfair landlord practices, we will not find liability in employing Federal Express rather than the U.S. Postal Service to deliver a security deposit or itemization statement. The object of the rule is a prompt return of security deposits or itemization statements. Either delivery service would have accomplished what the rule requires.

¶12 McMaster argues that WIS. ADMIN. CODE § ATCP 134.06 would be internally inconsistent if Federal Express constituted mail. She contends that the *in pari materia* doctrine requires us to find that Federal Express is not mail

because § ATCP 134.06(2)(c) references a forwarding address. She argues that the “drafters must have been aware that individuals can have their mail forwarded by submitting a forwarding request to the United States Post Office. Forwarding would not occur if the security deposit were sent via Federal Express.” But forwarding does not occur where a tenant leaves no forwarding address. And a tenant who expects the return of a security deposit can easily give a landlord an address where the check can be sent. Holding that Federal Express is a form of mail for purposes of § ATCP 134.06(2)(a) does not render § ATCP 134.06(2)(c) inconsistent, meaningless, or absurd.

¶13 McMaster contends that our construction of WIS. ADMIN. CODE § ATCP 134.06(2)(a) will lead to “no stopping point” of what else may suffice as mail. She argues that our holding expands the meaning of “mail” such that a landlord could use a neighbor or friend to deliver the “mail.” But those are not the facts of this case. Moreover, Federal Express is an international business that competes with the U.S. Postal Service. Its revenue exceeded \$18 billion in the 2003 fiscal year.⁴ It services 215 countries and has 106 locations near Madison, Wisconsin.⁵ Kidd’s package arrived at McMaster’s address two days after he mailed it. The U.S. Post Service could not have done much better.

¶14 Finally, McMaster claims that Kidd did not deliver the required deposit or information within twenty-one days. We do not need to decide this issue, however, because we conclude that he mailed the requisite materials within twenty-one days.

⁴ Found at <http://www.fedex.com/us/about/overview/economy/economicimpact.html>.

⁵ See <http://www.fedex.com/us/dropoff/?link=1>.

CONCLUSION

¶15 Because the term “mail” in WIS. ADMIN. CODE § ATCP 134.06(2)(a) encompasses the private services of Federal Express, Kidd has not violated WIS. STAT. § 100.20(5). We reverse McMaster’s judgment: she has not prevailed and is not entitled to attorney fees. The trial court shall enter judgment accordingly.

By the Court.—Judgment reversed and caused remanded with directions.

Not recommended for publication in the official reports. *See* WIS. STAT. RULE 809.23(1)(b)4.