

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 19, 2014

Diane M. Fremgen
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. 2013AP2063

Cir. Ct. No. 2012SC2537

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

KYLE THON,

PLAINTIFF-APPELLANT,

V.

GREG HAMILTON,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Outagamie County: GREGORY B. GILL, JR., Judge. *Reversed and cause remanded for further proceedings.*

¶1 MANGERSON, J.¹ Kyle Thon appeals a small claims judgment entered in favor of his former landlord, Greg Hamilton. Thon argues the circuit

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

court erred by determining Hamilton did not terminate Thon's tenancy or constructively evict Thon when Hamilton changed the locks on Thon's rental unit. Thon also argues Hamilton is not immune from liability for changing the locks because Hamilton did not act in accordance with WIS. STAT. § 704.16(4).

¶2 We conclude that, by changing the locks, Hamilton constructively evicted Thon and terminated Thon's tenancy. We also conclude Hamilton did not change the locks in accordance with WIS. STAT. § 704.16(4) and, therefore, the statutory safe harbors do not apply. We reverse and remand to the circuit court to determine damages.

BACKGROUND

¶3 We take the facts as found by the circuit court following the small claims hearing.² In March 2012, Thon and Heather Langley entered into a one-year lease with Hamilton. They paid a \$1000 security deposit. On April 18, 2012, following an incident with Langley, Thon was charged with strangulation, misdemeanor battery, and disorderly conduct—all charges carried domestic abuse and repeater enhancers. A bond was issued the next day, ordering Thon to have no contact with Langley.

¶4 Langley contacted Hamilton and made an oral request that he change the locks on the unit she shared with Thon. Based on Langley's oral request, and because Hamilton had a general understanding that the law required the landlord to change the locks under such circumstances, Hamilton changed the locks.

² The circuit court held a small claims evidentiary hearing on May 31, 2013 and issued an oral ruling on July 30, 2013. The transcript from the small claims evidentiary hearing is not included in the record.

¶5 Thon made no effort to return to the property. After Hamilton changed the locks, Thon requested Hamilton return his security deposit. Hamilton did not provide Thon with his security deposit at that time. However, within twenty-one days of the expiration of Thon and Langley’s one-year lease, Hamilton notified Thon of his entitlement to the security deposit, and a portion of the deposit was returned to Thon.

¶6 Thon brought the present small claims action against Hamilton, arguing Hamilton terminated Thon’s tenancy and constructively evicted Thon by changing the locks on Thon’s rental unit. Thon argued he should have been provided with his security deposit within twenty-one days of the locks being changed. Because Hamilton failed to provide Thon with the security deposit within the statutory time frame, Thon asserted he was entitled to double damages. Hamilton responded he was immune from liability based on WIS. STAT. § 704.16(4)(d).

¶7 In its oral decision, the circuit court first observed WIS. ADMIN. CODE § ATCP 134.06(2)(a) provides that the landlord is required to return the tenant’s security deposit, less any properly withheld amounts, within twenty-one days after the tenant “surrenders the premises.” The court concluded that, in this case, Hamilton’s obligation to return the security deposit before the end of the lease was never triggered because the “tenant” never surrendered the premises. It stated that the lease defined “tenant” as Thon and Langley and, because Langley continued to reside in the property, no “tenant” ever surrendered the premises.

¶8 Alternatively, the court concluded that, even if “tenant” referred to each person living in the unit, such that Hamilton would have an obligation to return the security deposit to Thon within twenty-one days after Thon was deemed

to have “surrender[ed] the premises,” Thon failed to prove he “surrender[ed] the premises” before the end of the lease. Specifically, the court observed Thon was trying to establish he “surrender[ed] the premises” under WIS. ADMIN. CODE § ATCP 134.06(2)(b)3., which provides a tenant “surrenders the premises” when the tenant is evicted.³

¶9 The court concluded changing the locks, by itself, did not amount to an eviction. It observed Thon made no attempt to ask for a key or to gain admission to the rental unit. Because the court found there was no eviction, the court concluded Hamilton had no obligation to return the security deposit before the end of the lease. The court therefore reasoned it was not necessary to determine whether Hamilton was immune from liability for changing the locks under WIS. STAT. § 704.16(4).

DISCUSSION

¶10 On appeal, Thon renews his argument that Hamilton terminated his tenancy and constructively evicted him by changing the locks. Thon argues the court erred by determining the time period for returning the security deposit was never triggered because Langley continued to reside in the residence or, alternatively, because Thon was not evicted by Hamilton’s changing of the locks.

³ WISCONSIN ADMIN. CODE § ATCP 134.06(2) provides:

(b) A tenant surrenders the premises under par. (a) on the last day of tenancy provided under the rental agreement, except that:

....

3. If the tenant is evicted, surrender occurs when a writ of restitution is executed, or the landlord learns that the tenant has vacated, whichever occurs first.

Thon also argues Hamilton is not immune from liability because Hamilton did not change the locks in accordance with WIS. STAT. § 704.16(4).

¶11 Interpretation of a statute and its application to undisputed facts are questions of law that this court determines independently of the circuit court. *Pawlowski v. American Family Mut. Ins. Co.*, 2009 WI 105, ¶16, 322 Wis. 2d 21, 777 N.W.2d 67. Statutory interpretation “begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry.” *State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110.

¶12 At the outset, we observe that, except for a few statutory exceptions, a tenant has the exclusive right to possession of the premises during the term of the lease. *See* WIS. STAT. § 704.05(2). A landlord cannot interfere with the tenant’s right to possession. *Id.* If the landlord does interfere with the tenant’s right to possession, the landlord’s actions can amount to an eviction. *See First Wis. Trust Co. v. L. Wiemann Co.*, 93 Wis. 2d 258, 267, 286 N.W.2d 360 (1980). In this case, it is axiomatic that excluding a co-tenant from the property by changing the locks has the effect of depriving that tenant of his or her right to possession. It is further self-evident that excluding a tenant from the property constitutes, in essence, an eviction, regardless of whether a non-excluded co-tenant continues to reside at the property.

¶13 Accordingly, we reject the circuit court’s conclusion that Hamilton never terminated Thon’s tenancy by changing the locks and excluding Thon from the premises. By changing the locks, Hamilton interfered with Thon’s right to possession, evicted Thon, and terminated the tenancy as to Thon. It is immaterial that Langley continued to reside at the property and did not “surrender[] the

premises,” or that Thon did not attempt to gain access but simply asked for the return of his security deposit. The fact of the matter is Hamilton’s actions forced Thon to “surrender the premises” and therefore triggered the twenty-one-day time period for returning the security deposit. *See* WIS. ADMIN. CODE § ATCP 134.06(2).

¶14 That being said, our legislature has recognized the need to protect certain co-tenants from other co-tenants. If Hamilton changed the locks and excluded Thon pursuant to WIS. STAT. § 704.16(4), Thon’s tenancy would not have been terminated and the twenty-one day time period for returning the security deposit would not have been triggered. *See* WIS. STAT. § 704.16(4)(c)2. Section 704.16(4) is entitled, “Changing locks” and provides:

(a) Subject to pars. (b) and (c), regardless of whether sub. (1) applies, at the request of a residential tenant who provides the landlord with a certified copy of a document specified in sub. (1)(b)1. to 7.,⁴ a landlord shall change the locks to the tenant’s premises.

⁴ The documents specified in WIS. STAT. § 704.16(1)(b) include:

1. An injunction order under s. 813.12(4) protecting the tenant from the person.
2. An injunction order under s. 813.122 protecting a child of the tenant from the person.
3. An injunction order under s. 813.125(4) protecting the tenant or a child of the tenant from the person, based on the person’s engaging in an act that would constitute sexual assault under s. 940.225, 948.02, or 948.025, or stalking under s. 940.32, or attempting or threatening to do the same.
4. A condition of release under ch. 969 [bail] ordering the person not to contact the tenant.

(continued)

(b) A landlord shall have the locks changed, or may give the tenant permission to change the locks, within 48 hours after receiving a request and certified copy under par. (a). The tenant shall be responsible for the cost of changing the locks. If the landlord gives the tenant permission to change the locks, within a reasonable time after any lock has been changed the tenant shall provide the landlord with a key for the changed lock.

(c)1. If the person who is the subject of the document provided to the landlord under par. (a) is also a tenant of the specific premises for which the locks are requested to be changed, the landlord is not required to change the locks under this subsection unless the document provided by the tenant requesting that the locks be changed is any of the following:

a. A document specified in sub. (1)(b)1., 2., or 3. that directs the tenant who is the subject of the document to avoid the residence of the tenant requesting that the locks be changed.

b. A document specified in sub. (1)(b)4. that orders the tenant who is the subject of the document not to contact the tenant requesting that the locks be changed.

2. Nothing in this subsection shall be construed to relieve a tenant who is the subject of the document provided to the landlord under par. (a) from any obligation under a rental agreement or any other liability to the landlord.

(d) A landlord is not liable for civil damages for any action taken to comply with this subsection.

5. A criminal complaint alleging that the person sexually assaulted the tenant or a child of the tenant under s. 940.225, 948.02, or 948.025.

6. A criminal complaint alleging that the person stalked the tenant or a child of the tenant under s. 940.32.

7. A criminal complaint that was filed against the person as a result of the person being arrested for committing a domestic abuse offense against the tenant under s. 968.075.

¶15 As evidenced above, WIS. STAT. § 704.16(4)(c)1. requires a landlord to change the locks and exclude an offending co-tenant upon receipt of a certified court document. Further, because the legislature presumably recognized that changing the locks and excluding an offending co-tenant from a premises has the effect of an eviction, our legislature enacted what are in essence two safe harbors. First, § 704.16(4)(c)2. provides, “Nothing in this subsection shall be construed to relieve a tenant who is the subject of the document provided to the landlord ... from any obligation under a rental agreement or any other liability to the landlord.” Second, § 704.16(4)(d) provides, “A landlord is not liable for civil damages for any action taken to comply with this subsection.”

¶16 The problem in this case is that Hamilton changed the locks and excluded Thon from the premises without receiving a copy of Thon’s conditions of bond. *See* WIS. STAT. § 704.16(4)(c)1.b. Before the circuit court, and now on appeal, Thon argues that, because Hamilton changed the locks before receiving the required document, Hamilton did not change the locks in accordance with § 704.16(4). As a result, Thon contends the safe harbors in § 706.16(4) do not apply, he was evicted when Hamilton changed the locks, and Hamilton was required to return his security deposit within twenty-one days of the locks being changed.

¶17 Hamilton does not address Thon’s argument that he did not change the locks in accordance with WIS. STAT. § 704.16(4). *See Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments deemed conceded). In any event, Hamilton does not dispute the circuit court’s determination that he changed the locks based on Langley’s oral request and did not change them upon receipt of a copy of Thon’s bond.

¶18 Rather, Hamilton asserts, without citation to legal authority, we are precluded from considering WIS. STAT. § 704.16(4)'s implication in this case because the circuit court specifically concluded it was not addressing § 704.16(4). We disagree. The underlying facts are undisputed and Thon properly raised the applicability of § 704.16(4) in the circuit court and again on appeal. We will address the applicability of § 704.16(4) because, as Hamilton recognizes in his brief, the application of facts to a statute is a legal question that we decide independently. *See Pawlowski*, 322 Wis. 2d 21, ¶16.

¶19 Because Hamilton changed the locks based on Langley's oral request and without one of the statutorily required court documents, we conclude Hamilton did not change the locks in accordance with WIS. STAT. § 704.16(4). Although we recognize a bond ordering Thon to have no contact with Langley was in existence, we conclude a landlord must receive one of the enumerated court documents *before* changing the locks in order to receive the protections offered in § 704.16(4).

¶20 Hamilton, nevertheless, argues public policy supports his actions in this situation. He contends if tenants "feel[] in danger under the present or similar facts, they should be able to have their locks changed upon a request to their landlord." He continues, "It is prudent for a landlord to protect a tenant first, sort out the details later."

¶21 However, the legislature has already addressed Hamilton's public policy concern through the enactment of WIS. STAT. § 704.16(4). If a circuit court has ordered a co-tenant to stay away from another co-tenant, the landlord shall, upon receipt of one of the enumerated court documents, change the locks to protect the remaining co-tenant. *See* WIS. STAT. § 704.16(4)(c)2.

Section 704.16(4)(c)'s requirement that the landlord change the locks upon receipt of one of the enumerated court documents balances the need to protect victimized co-tenants with the need to protect co-tenants from any unfounded accusations interfering with their right to possession. A landlord who changes the locks upon receipt of one of the court documents and excludes a co-tenant from the property receives the benefit of immunity, *see* § 706.16(4)(d), and the benefit that the offending co-tenant is not released from any obligations under the rental agreement, *see* § 704.16(4)(c)2.

¶22 Hamilton also argues Langley and Thon were joint and liable tenants and Hamilton was permitted to take direction to change the locks from either tenant. While nothing prevents a landlord from agreeing to change the locks at one co-tenant's request, the problem in this case is that Hamilton never provided Thon with a new key once the locks were changed. As a result, Hamilton's actions excluded Thon from the property.

¶23 Because Hamilton did not change the locks in accordance with WIS. STAT. § 704.16(4), Hamilton terminated Thon's tenancy and evicted Thon when he changed the locks. These actions triggered the twenty-one day time period for the return of the security deposit. *See* WIS. ADMIN. CODE. § ATCP 134.06(2). Because Hamilton did not return Thon's security deposit within twenty-one days, Thon is entitled to damages. Hamilton is not immune from liability under WIS. STAT. § 704.16(4)(d). We reverse and remand to the circuit court to determine damages.

By the Court.—Judgment reversed and cause remanded for further proceedings.

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

