

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

**MARCH 19, 1996**

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62(1), STATS.

**NOTICE**

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

No. 95-2593-CR

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

**STATE OF WISCONSIN,**

**Plaintiff-Respondent,**

**v.**

**MARK R. KUHN,**

**Defendant-Appellant.**

APPEAL from a judgment of the circuit court for Eau Claire County: THOMAS H. BARLAND, Judge. *Reversed.*

LaROCQUE, J. Mark Kuhn appeals a judgment of conviction for violation of § 100.26(3), STATS.,<sup>1</sup> by failing to obey the provisions of the Home Improvement Trade Practices Code, WIS. ADMIN. CODE § ATCP 110, in the operation of his landscaping business. Following a bench trial, the trial court found Kuhn had failed to comply with § ATCP 110.07, failing to either return the buyers' down payment upon demand or, alternatively, failing to deliver the materials purchased with the down payment. Kuhn contends that

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<sup>1</sup> Section 100.26(3), STATS., provides: "Any person who ... intentionally refuses, neglects or fails to obey any regulation or order made or issued under s. 100.19 or 100.20, shall, for each offense, be fined not less than \$25 nor more than \$5,000, or imprisoned in the county jail for not more than one year or both."

the evidence failed to establish a failure to comply with the code because he spent the down payment on black dirt for the job and the buyers failed to make demand for delivery of that material, a prerequisite to a compliance violation. Because the trial court's findings of fact establish that Kuhn did not violate the compliance provisions of § ATCP 110.07(4), the judgment of conviction must be reversed.

### TRIAL EVIDENCE

Casper Hanson contracted with Kuhn for lawn work at the Hanson residence in May 1994. Kuhn agreed to put in a new lawn for \$5,000. Kuhn took a \$1,000 down payment for the job and agreed in writing to complete the job by the "Middle to End of June." Kuhn failed to show up to do the work as agreed, and both Hanson and his wife, Patricia Hanson, advised Kuhn that they were cancelling the contract and demanding the return of the down payment. Patricia sent a letter to Kuhn confirming her telephone conversation with him to this effect. The letter also set forth the reasons for their decision, and, among other things, makes the following reference to preceding events:

On this date, July 9, I called you [and] you told me that you couldn't deliver the black dirt this week because it rained every day, that your truck had broken down and was in the shop, etc.

The Hansons acknowledged that they never made a demand for the delivery of any dirt Kuhn may have purchased. A deputy sheriff investigator with the Eau Claire County Sheriff's Department testified to his conversation with Kuhn:

He indicated that he had taken the thousand-dollar down payment and he spent it on seed--or, black dirt and seed, and he had mentioned he had bought--he buys seed one ton at a time.

Kuhn testified that he took the Hansons' down payment check, cashed it and almost immediately spent it for a bulk order of black dirt in Eleva, Wisconsin. Because the dirt was too wet to use, and because the Hansons were repeatedly calling him to comply with the mid-June provision in his contract, he purchased more accessible dirt from a different source in late June. He produced a written bill of sale dated June 25, 1995, showing he paid in full on that date for the purchase of "500 cu yds @ 3.75 = \$1875.00." Kuhn testified that while the Hanson job required only about 333 cubic yards of dirt, his purchases exceeded the job requirements because dirt sellers require bulk purchases "by the pile," usually 500 cubic yards. He claimed the failure to perform the Hanson job was attributable to an unusual and extended rainy period and, before the weather cleared, the Hansons cancelled the contract. Kuhn said he refused the Hansons' demand for return of their \$1,000 because he had spent it on materials, and claimed to have told them so during the telephone conversation. He said that the Hansons wanted nothing but the return of their money.

At the conclusion of the evidence, the trial court made findings of fact. The court found that Kuhn had used the Hansons' down payment to purchase dirt for the project. The court also found that Kuhn's claim that he informed the Hansons that he had made the purchase was not true, as was Kuhn's claim that Casper Hanson had verbally agreed to a later completion date for a reduced contract price. Finally, the trial court reached the legal conclusion that the buyers' demand for delivery of the materials was unnecessary in light of the seller's failure to inform the buyers that he had purchased the dirt with their money. The court found Kuhn guilty of failing to obey the terms of § ATCP 110.07.

A trial court's findings of fact shall not be set aside on appeal unless they are clearly erroneous. Section 805.17(2), STATS. Further, it is the function of the trial court and not this court to assess the weight and credibility of testimony. *Mullen v. Braatz*, 179 Wis.2d 749, 756, 508 N.W.2d 446, 449 (Ct. App. 1993). On the other hand, an appellate court must decide questions of law independently without deference to the decision of the trial court. *Ball v. District No. 4 Area Bd.*, 117 Wis.2d 529, 537, 345 N.W.2d 389, 394 (1984). The most common questions of law involve the application of a statute to a particular set of facts. See *Kania v. Airborne Freight Corp.*, 99 Wis.2d 746, 758, 300 N.W.2d 63, 68 (1981). The goal of statutory construction is to ascertain the legislature's intent, and the primary source of that intent is the language of the statute itself. *In re Jamie L.*, 172 Wis.2d 218, 225, 493 N.W.2d 56, 59 (1992). It is

this court's duty to give the statutory language its ordinary meaning, unless that language is ambiguous. *Dewey v. Dewey*, 188 Wis.2d 271, 274-75, 525 N.W.2d 85, 86-87 (Ct. App. 1994). The same rules of statutory construction apply to construction of administrative rules. *State v. Bucheger*, 149 Wis.2d 502, 506, 440 N.W.2d 366, 368 (Ct. App. 1989).

Section ATCP 110.07(2) provides in relevant part:

- (2) BUYER'S REMEDIES. If the conditions under sub. (1) are met, the buyer may do all of the following:
- (a) Cancel the contract.
  - (b) Demand return of all payments which the seller has not yet expended on the home improvement.
  - (c) If the seller has used any of the buyer's payments to purchase materials for the home improvement, demand delivery to the home improvement site of those materials which have not yet been used for the home improvement or delivered to the site.

Section ATCP 110.07(4) provides in relevant part:

- (4) COMPLIANCE BY SELLER. (a) If the buyer demands the return of payments to which the buyer is entitled under sub.(2)(b), the seller shall return those payments to the buyer within 15 calendar days after the buyer's demand is served on the seller ....
- (b) If the buyer demands delivery of materials to which the buyer is entitled under sub.(2)(c), the seller shall deliver those materials to the home improvement site within 15 calendar days after the buyer's demand is served ....

Both sides to this appeal agree that the provisions of § ATCP 110.07 under review here are unambiguous, and this court concurs. Section ATCP 110.07(2), entitled "BUYER'S REMEDIES," and § ATCP 110.07(4), entitled "COMPLIANCE BY SELLER," each unequivocally provides that a buyer may demand and a seller must return payments which the seller has not yet expended on the home improvement. The trial court's finding that Kuhn

expended the Hansons' down payment for material for the landscaping job is not clearly erroneous. See § 805.17(2), STATS. The State therefore failed to establish Kuhn's violation of these compliance provisions.

Similarly, §§ ATCP 110.07(2)(c) and (4)(b) unequivocally provide that if a seller has used the buyer's payment to purchase materials for the home improvement, the buyer may "demand delivery ... of those materials" and "[i]f the buyer demands delivery ... the seller shall deliver those materials ...." The evidence here is undisputed: The Hansons did not demand delivery of the material that the court found Kuhn had purchased.

The State argues that Kuhn merely bought "general supplies of black dirt for a number of projects" and that this "can hardly be described as an expenditure on the buyers' project." This argument, however, is at odds with the trial court's express finding:

But I cannot find beyond a reasonable doubt that he intentionally used a part of the money for a purpose other than the payment of materials used in the improvement. *In other words, I'm satisfied that he did purchase dirt with that money and that he intended to use the dirt on the Hanson project. ...*

Now, the Hansons ... demanded the return of the money; they did not ask for delivery of the dirt. And I conclude the reason that Miss Hanson didn't is she didn't know that he had purchased the dirt. She wasn't told of that. He didn't offer to give her the dirt in place of the money. He simply pointedly refused to return saying that wasn't the way he did business; gave no further explanation. (Emphasis added.)

These findings establish that the element of demand, essential as a condition to invoke the compliance provision of § ATCP 110.07(4)(b), is missing.

This court agrees with the trial court's observation that Kuhn's conduct in this case was "outrageous." This court also concurs in the trial court's observation that Kuhn had a moral responsibility to "say if you didn't have the

money that you didn't have it and to offer the equivalent of a thousand dollars at least in material, dirt which was available to you ... then they could have employed somebody else to finish the job ...." This court respectfully and reluctantly disagrees, however, with the conclusion that Kuhn had a legal duty under the code to disclose his purchase of materials. Unless Kuhn had that duty, because this is a criminal prosecution, the absence of a demand for delivery of the material leads to the inescapable conclusion that Kuhn did not "fail to obey" the administrative regulation at issue. *See* note 1.

The code does not leave a buyer without a means to learn whether a seller claims to have purchased materials so that a demand for delivery may be made. Section ATCP(2)(d) allows the buyer to demand a written accounting of all payments the buyer made to the seller. The written accounting must detail how all payments were used by the seller. A seller who fails to comply with a demand for an accounting is in violation of § ATCP 110.07(4)(c). No demand for accounting was made in this case. Thus, Kuhn's conviction for violation of § 100.26(3), STATS., must be reversed.

It is unnecessary to address Kuhn's other argument, that contrary to the trial court's finding, the July 9, 1994, letter from Patricia Hanson to Kuhn demonstrates her awareness that Kuhn had purchased black dirt. Her letter states: "[Y]ou told me that you couldn't deliver the black dirt this week because it rained every day ...." A discussion is unnecessary because the prosecution failed to demonstrate either a demand for delivery of those materials or a demand for an accounting for the payment made to Kuhn.

The extent of the Hansons' civil recourse for damages in light of the provision in § ATCP 110.07(5) that the buyers' remedies in this section are not exclusive is not an issue in this criminal appeal.

*By the Court.* – Judgment reversed.

This opinion will not be published. RULE 809.23(1)(b)4, STATS.