



PUBLIC LEGAL MEMORANDUM

PLM-2

TOPIC: Excluding Persons from Rental Premises

RELATED TERMS: “Trespassing”
“Right of Possession”
“Landlord & Tenant”

STATUTES: Wisconsin Statutes Ch. 704 and § 943.13

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When a landlord leases property to a tenant, the landlord could contact the police department to remove a non-tenant from the property. This memorandum summarizes why the City enforces trespassing laws against the guest of a tenant when the landlord wants to exclude the guest.

APPLICATION

This memorandum only addresses the trespassing statute, and not the common law tort of trespass. The statute says any person who “[e]nters or remains on any land of another after having been notified by the owner or occupant not to enter or remain on the premises” is guilty of trespass to land.¹ The analysis below applies the trespassing statute to residential rental properties.

RULES

Rules on statutory interpretation require that if a reasonable person could interpret a statute more than one way, courts look to extrinsic sources to discern a meaning. There are two reasonable ways to interpret the trespassing statute:

1. In order for a third party to be on the property, both the landlord and tenant must consent. The owner or occupant may simultaneously exclude persons from the property, and each party has the right to exclude a person to which the other party consents. The word “or” means the authority is simultaneously shared between landlord and tenant

¹ Wis. Stat. § 943.13(1m)(b)

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2. In order for a third party to be on the property, that person needs only the consent of one party: the landlord or the tenant. The owner has the exclusive right to exclude persons from the property unless there is a non-owner occupant. Only one of the parties has the exclusive right to exclude persons from the property depending on whether the owner or a tenant occupies the land. The word “or” means the authority is fully vesting in one or the other, but not both.

First, a court would look at legislative history to interpret the meaning of that paragraph. The only substantive change to the trespass to land statute was when it was decriminalized to a forfeiture in 1983 Wis. Act 418. Despite over about a dozen other minor changes over the past 40 years, the phrase “owner or occupant” has remained.

Second, a court will look at the context of the law and attempt to give it meaning that fits with related statutes. A recent amendment to the trespass statute suggests that the legislature intended the first interpretation. Section 943.13(1m)(c)1. states that no one can enter land “after the owner of the residence, if he or she has not leased it to another person, or the occupant of the residence has notified the actor not to enter or remain at the residence while carrying a firearm or with that type of firearm.” That phrase is the more specific way of describing the second interpretation above and the legislature could have used the same language in para. (b) if that is the intended meaning of para. (b). If the legislature intended the phrase “owner or occupant” to have the second interpretation, it would have used that same phrase when it created para. (c)1. But instead, the legislature chose much more specific language in para. (c)1., which suggests the meaning of “owner or occupant” in para. (b) is not the same as para. (c)1.

In addition, subs. (4) and (5) grant certain occupants the ability to determine who may enter and remain on land they occupy. If the occupant already had the sole authority to determine who could be on the property (as the second interpretation suggests), these subsections are superfluous. Courts always read statutes in a manner that avoids superfluous language, and the first interpretation gives a great deal of meaning to subs. (4) and (5) because it changes the authority the owner would have under para. (b). Overall, the first interpretation fits into the statutory scheme in a manner that gives meaning to the other parts of the trespass law, whereas the second interpretation does not.

Furthermore, if the legislature wanted only the occupant or possessor of property to have the right to exclude trespassers, it would not have included the word “owner” in the law and instead just used words like occupant or possessor. However, the legislature chose to include the word “owner” which suggests that the owner of the land must have the right to exclude persons from the property even when that person is not the occupant. The right to exclude others from land is “one of the most essential sticks in the bundle of rights that are commonly characterized” by real property ownership, so the first interpretation also fits with the principles of American real property ownership. Dolan v. City of Tigard, 512 U.S. 374, 384 (1994).

Finally, while not directly on point, a Wisconsin case supports the idea that an owner can identify non-tenants as trespassers. In Johnson v. Blackburn, 220 Wis. 2d 260 (Ct. App. 1998), the parents of two children sued a homeowner for a fire that occurred in the basement where the children slept (one died and the other was seriously injured). The homeowners argued the children were trespassers because they were guests at the property longer than the 14 days

permitted by the terms of the lease (if the children were trespassers, the homeowner's duty of care owed to them is lower). The court disagreed and found that the children's status as guests did not change because the homeowners had to give the tenants notice to cure a lease violation and failed to do so. The case could have held that the children could never be trespassers because tenants have the sole authority to determine who may be on the premises. However, the court instead held that the children were not trespassers because the landlord had not followed the proper procedure to declare them trespassers. A reasonable inference to draw is that the landlord holds the authority to deem non-tenants trespassers as long as the landlord follows the proper process. If the landlord notified the children that they could not enter or remain on the property prior to the fire, they would have been trespassers and subject to the lower duty of care. Johnson suggests that the non-occupant owner can label an occupant's guests as trespassers.

One could argue that the right to possession of real property includes the right to permit guests to be on the property despite the landlord's wishes. In a lease, the tenant has "exclusive possession" of the property unless otherwise limited by the terms of the lease. Wis. Stat. § 704.05(2). Under common law trespass, one must have exclusive possession of property to have the authority to restrict trespassers. However, the common law tort of trespass is different from the trespassing statute in state law. The state law could have used the word "possessor" or "person in possession," of land, but instead chose to use the phrase "owner or occupant."

The right to exclude has limits. For example, a tenant may not exclude the landlord from the property under certain conditions. Wis. Adm. Code § ATCP 134.09(2)(a). The landlord may not exclude a tenant from the property unless the landlord satisfies certain conditions. Wis. Stat. § 704.05(2). Neither the tenant or the landlord may exclude government officials who have a warrant to enter. Wis. Stat. §§ 66.0119 & 968.12. However, the only statute that restricts a landlord's ability to exclude a tenant's guests is for labor union organization and employer-provided housing. See Wis. Stat. §§ 943.13(4) & (5).

Even if a court would consider common law trespass to help to interpret the statutory trespass language, other states who have addressed this issue tend to find that the more of a duty the landlord has to maintain, repair, protect, or provide services on the rented property, the greater the landlord's possessory interest and greater right of exclusion:

State v. Oien, 717 N.W.2d 593 (N.D. 2006) – Court found that the lease "allowed the landlord to exclude Jones' guests from the property," so it upheld a 'no trespass' order.

Motchan v. STL Cablevision, Inc., 796 S.W.2d 896 (Mo. Ct. App. 1990) – because landlords retain control over and could be subject to liability for injuries occurring in the common areas, they retain sufficient possession of the common areas to support an action for trespass.

Aberdeen Apartments v. Cary Campbell Realty Alliance, Inc., 820 N.E.2d 158 (Ind. Ct. App. 2005) – Because Indiana landlords have a duty to maintain common areas in a safe condition and can be held liable for injuries occurring in those areas, we hold that landlords retain sufficient possession over common areas to maintain an action for trespass. "The trial court's denial of the Apartments' motion for a preliminary injunction denies the Apartments their right to exclude trespassers from their property."

Under Wis. Stat. § 704.07(2), a landlord has a duty to keep the property in a good state of repair and comply with all building and housing codes. This duty remains even when damage is caused

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by other tenants or third parties. If Wisconsin courts analyze this issue in the same manner, they would likely find that a landlord has a sufficient possessory interest to exclude a tenant's guest from the property.

CONCLUSION

Wis. Stat. § 943.13(1m)(b) allows a landlord or a tenant to exclude individuals from a rental property, with certain exceptions specifically listed in statute. Put another way, both a landlord and a tenant must explicitly or implicitly consent to allow a third party to be on the property.