**COURT OF APPEALS DECISION DATED AND FILED**

November 17, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

**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* § 808.10 and RULE 809.62, STATS.**

**No. 98-0856**

**STATE OF WISCONSIN** **IN COURT OF APPEALS**
**DISTRICT I**

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**TIMOTHY M. KRAUSE AND CHRISTINE P. KRAUSE,**

**PLAINTIFFS-RESPONDENTS,**

**V.**

**DONALD KAMINSKI AND MARCIA KAMINSKI,**

**DEFENDANTS-APPELLANTS.**

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APPEAL from a judgment of the circuit court for Milwaukee County: MICHAEL G. MALMSTADT, Judge. *Affirmed.*

WEDEMEYER, P.J.[1] Donald and Marcia Kaminski appeal from a judgment entered in favor of Timothy M. and Christine P. Krause ordering the Kaminskis to return the Krauses' $20,000 earnest money deposit on a real estate transaction. The Kaminskis claim that the trial court erred when it interpreted

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[1] This appeal is decided by one judge pursuant to § 752.31(2), STATS.

WIS. ADM. CODE § 10.80 ILHR to be unambiguous and should have deferred to the agency's interpretation of the provision. Because the provision is not ambiguous, the trial court's interpretation and decision were correct and this court affirms.

## I. BACKGROUND

In November 1996, the Krauses contracted to purchase a residential property in River Hills owned by the Kaminskis. The agreed upon sales price was $632,500. The Krauses deposited $20,000 in earnest money. In return, the Kaminskis agreed to remove an unused and abandoned 1,000 gallon underground gasoline storage tank (UST) from the property. The contractual language relative to the removal of the UST provided: "In accordance with all applicable federal, state and local laws and regulations, Seller shall at its cost and expense … remove any abandoned underground storage tank and its associated piping, including the tank identified in the Property Condition report dated November 10, 1996." The Kaminskis had the UST removed on December 5, 1996. A state-licensed tank inspector certified that no contamination had been discovered and, therefore, no site assessment/soil sampling was performed.

The closing on the property was set for January 15, 1997. On January 10, 1997, Mr. Krause contacted his realtor to inquire about soil sampling data regarding the removal of the UST. Krause discovered that no soil sampling had been performed. The Krauses did not appear at closing, alleging that the Kaminskis failed to remove the UST in accordance with all applicable state laws as required by the contract. The Krauses alleged that as a result of the failure to remove the UST in accordance with applicable law, the Kaminskis breached the contract.

The Kaminskis kept the $20,000 earnest money as liquidated damages. The Krauses commenced this action to recover the earnest money. The trial was to the court and it ruled that the UST was not removed in accordance with WIS. ADM. CODE § 10.80 ILHR, which required soil sampling. The failure to comply with this provision meant that the Kaminskis had breached the contract and, therefore, the Krauses were entitled to the return of their $20,000 earnest money. Judgment was entered. The Kaminskis now appeal.

## II. DISCUSSION

The issue in this case is whether the trial court's interpretation of § 10.80 ILHR was correct. The trial court ruled the provision was not ambiguous and clearly required soil sampling when the UST at issue in this case was removed. Because the soil sampling was not performed, the Kaminskis breached the contract as they did not comply with state law. The Kaminskis argue that the trial court's interpretation was erroneous because this code provision is ambiguous. This court's review demonstrates that the trial court did not err in its interpretation.

This court's review is independent from the trial court's as construction of an administrative rule is a question of law. *See* ***State ex rel. Staples v. DHSS***, 136 Wis.2d 487, 494, 402 N.W.2d 369, 374 (Ct. App. 1987).

Review in this case necessarily involved examination of ILHR, section 10 of the Wisconsin Administrative Code. Subchapter VI of this section provides "General Requirements for Groundwater Protection" and includes sections 10.50 through 10.738. Relative to this decision, the pertinent portions of this subchapter provide:

> **ILHR 10.50 Applicability. (1)** GENERAL. The requirements of this subchapter apply to all owners and operators of an UST system as defined in s. ILHR 10.01 except as otherwise provided in subs. (2) to (3)….
>
> **(2)** EXCLUSIONS. The following UST systems are excluded from the requirements of this subchapter:
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> ….
>
> (e) Any farm or residential UST system of 1,100 gallons or less capacity used for storing motor fuel for noncommercial purposes.
>
> ….
>
> **ILHR 10.732 Permanent closure and changes-in-service. (1)** NOTIFICATION. At least 15 days before beginning either permanent closure or a change-in-service under sub. (2) or (3) or within another reasonable time period determined by the department, owners and operators shall notify the authorized agent of their intent to permanently close or make the change-in-service, unless such action is in response to corrective action. A site assessment of the excavation zone in accordance with s. ILHR 10.734 shall be performed after notifying the authorized agent but before completion of the permanent closure or a change-in-service.
>
> ….
>
> **ILHR 10.734 Site assessment. (1)** GENERAL. When a site assessment is required by this chapter, or when directed by the department, owners and operators must measure for the presence of a release where contamination is identified or is most likely to be present at the UST site.

Subchapter VII provides rules governing "Groundwater Protection for Small Farm and Residential Motor Fuel USTs and for Heating Oil USTs" and includes sections 10.74 through 10.805. The section at issue in this case provides:

> **ILHR 10.80 Temporary and permanent closure and change-in-service.** All owners of storage tank systems within the scope of this subchapter shall comply with ss. ILHR 10.73, 10.731, 10.732 and 10.738 as they relate to changes-in-service, out-of-service storage tank systems and closure of storage tank systems.

It is undisputed that the UST that was removed from the Kaminskis' property is governed by subchapter VII, rather than subchapter VI, because of its small size

and location. The only dispute is whether subchapter VII's 10.80 provision is ambiguous because subchapter VI's 10.50 provisions specifically exclude the type of UST at issue here from subchapter VI's provisions.

This court concludes that section 10.80 is not ambiguous. Section 10.80 references several portions of subchapter VI that are applicable to the residential USTs governed by subchapter VII. Specifically, section 10.80 provides that when the owners are changing or removing a UST from service, they are bound by ILHR 10.73, 10.731, 10.732 and 10.738. Section 10.732, in turn, requires that an assessment be performed in accordance with section 10.734, which requires soil sampling. There is nothing ambiguous about these provisions. The fact that references are made to other sections of the code does not render section 10.80 ambiguous. These types of cross-references are common throughout the code and our statutes.

Moreover, subchapter VI's general exclusion of residential USTs does not render section 10.80 ambiguous. Rather, it simply provides that, in general, residential USTs are not governed by subchapter VI. Residential USTs are governed by subchapter VII. The fact that subchapter VII incorporates *certain portions* of subchapter VI does not make section 10.80 ambiguous nor does it render section 10.50 surplusage. The section 10.50 exclusion exempts residential USTs from most of subchapter VI's requirements, thus serving its purpose within the subchapter.

In sum, this court concludes that the plain language of ILHR 10, subchapter VII, clearly requires that soil tests be performed when removing the tank at issue in this case. Because this court has so concluded, it is not necessary to look to anything beyond the language of the provision. *See* ***Honeywell, Inc. v.***

***Aetna Cas. & Sur. Co.***, 52 Wis.2d 425, 428-29, 190 N.W.2d 499, 501 (1971). Accordingly, this court rejects the Kaminskis' contention that the trial court should have deferred to the agency's written materials interpreting the provision.

Because the plain language of the provision requires soil sampling, and because the Kaminskis failed to have soil sampling performed, the UST was not removed in accordance with state laws as required by the contract. Accordingly, the Kaminskis breached the contract prior to the scheduled closing and the Krauses' refusal to close on the property was justified. Therefore, the Krauses are entitled to the return of the $20,000 earnest money.

In their appellate brief, the Krauses argue that the trial court erred in allowing certain documents into evidence, that the trial court erred in refusing to hold that the Kaminskis breached the contract when they did not remove all USTs,[2] and that the trial court erred in refusing to hold that the Kaminskis' retention of the earnest money constituted an unearned windfall and unfair penalty. Because of this court's resolution of the case, however, it is not necessary to address any of these arguments. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issues need be addressed).

*By the Court.*—Judgment affirmed.

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

[2] Subsequently, another underground storage tank was discovered on the property.