COURT OF APPEALS
DECISION
DATED AND FILED

February 20, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP2674 **Cir. Ct. No. 2012SC1424**

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

FRANELLA NGABOH-SMART,

PLAINTIFF-RESPONDENT-CROSS-APPELLANT,

V.

BETTY THOMPSON,

DEFENDANT-APPELLANT-CROSS-RESPONDENT.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Dane County: FRANK D. REMINGTON, Judge. *Affirmed*.

¶1 LUNDSTEN, J.[1] This is an appeal and cross-appeal from a circuit court judgment resolving a landlord-tenant dispute between landlord Betty

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

Thompson and tenant Franella Ngaboh-Smart. The dispute arose after Thompson withheld Ngaboh-Smart's security deposit in September 2011. The appeal and cross-appeal raise several issues, including whether a statute enacted in December 2011 applies retroactively to bar Ngaboh-Smart from making claims based on a local security deposit ordinance. I affirm the circuit court with respect to all issues.

Background

¶2 The parties entered into a one-year residential lease for an apartment in Madison for a term ending in August 2011. After the lease expired and Ngaboh-Smart vacated the apartment, Thompson sent Ngaboh-Smart a statement in September 2011 indicating that Thompson was withholding Ngaboh-Smart's security deposit of $315. The statement provided a list of reasons for withholding the deposit, including excessive cleaning and repairs totaling more than $315.

¶3 In February 2012, Ngaboh-Smart filed a small claims action against Thompson, alleging that Thompson wrongfully withheld the security deposit in violation of a Madison security deposit ordinance. Thompson denied the allegation, and counterclaimed for the cost of cleaning and repairs.

¶4 The circuit court concluded that Thompson violated the ordinance because the September 2011 statement Thompson sent to Ngaboh-Smart failed to fully comply with a part of the ordinance requiring a "notice, in a minimum of ten-(10) point font, that the tenant will be provided a copy of … photographs documenting any damage … if requested by the tenant in writing within 30 days of receipt of the notice." *See* Madison General Ordinance (MGO) § 32.07(7)(b).

¶5 The circuit court awarded Ngaboh-Smart damages for Thompson's ordinance violation in the amount of her $315 security deposit. The court rejected Thompson's argument that WIS. STAT. § 66.0104, enacted in December 2011, applied retroactively to bar Ngaboh-Smart from making claims based on the ordinance. In addition, the circuit court found that Thompson proved $849 in damages for excessive cleaning and needed repairs. The court offset Thompson's $849 damages award against the $315 damages award, for a net damages award of $534 in favor of Thompson. Finally, the circuit court awarded Ngaboh-Smart reasonable attorney's fees. The result was a net judgment in favor of Ngaboh-Smart for $4,383.

¶6 I reference additional facts as needed when discussing particular issues below.

Discussion

THOMPSON'S APPEAL

¶7 The primary issue presented by Thompson's appeal is whether WIS. STAT. § 66.0104 applies retroactively to bar Ngaboh-Smart from making claims based on the Madison ordinance. In addition, Thompson argues that, regardless of § 66.0104, she did not violate the ordinance. She also argues that the circuit court erred in awarding attorney's fees. For the reasons explained below, I reject each of Thompson's arguments in her appeal.

A. Whether WIS. STAT. § 66.0104 Applies Retroactively To Bar Ngaboh-Smart From Making Claims Based On The Madison Ordinance

¶8 The first issue is the retroactivity of WIS. STAT. § 66.0104. As an initial matter, I note that Thompson's appellate brief reframes the issue of

§ 66.0104's applicability as one of "preemption." In the circuit court, however, Thompson repeatedly asserted that the issue was retroactivity.[2]

¶9 If Thompson is trying to draw some meaningful distinction between "preemption" as she is using that term and retroactivity, it is not clear to me what that distinction would be. Regardless, by failing to raise the argument in the circuit court, Thompson has forfeited any argument regarding WIS. STAT. § 66.0104 that does not involve retroactivity. *See* ***Townsend v. Massey***, 2011 WI App 160, ¶¶25-27, 338 Wis. 2d 114, 808 N.W.2d 155 (failure to timely raise an argument in the circuit court forfeits the argument on appeal). Accordingly, I limit my analysis of § 66.0104 to the retroactivity issue.

¶10 Whether a statute is retroactive requires interpretation of the statute and application of the statute to the facts. ***Matthies v. Positive Safety Mfg. Co.***, 2001 WI 82, ¶15, 244 Wis. 2d 720, 628 N.W.2d 842. This is a question of law for de novo review. ***Id.***

¶11 WISCONSIN STAT. § 66.0104 provides, in pertinent part:

> **(2)** ….
>
> (b) No city, village, town, or county may enact an ordinance that places requirements on a residential landlord with respect to security deposits or earnest money or pretenancy or posttenancy inspections that are additional to the requirements under administrative rules related to residential rental practices.
>
> **(3)** If a city, village, town, or county has in effect on December 21, 2011, an ordinance that is inconsistent

[2] When the circuit court asked Thompson's counsel, "[A]re you suggesting that[] [WIS. STAT. § 66.0104 is] retroactive," counsel responded, "Yes, I am indeed." Similarly, counsel asserted in the circuit court that "the legislature did intend to make [the statute] retroactive."

> with sub. (2), the ordinance does not apply and may not be enforced.

It is undisputed that the pertinent provisions in the Madison ordinance are "additional to" the requirements under administrative rules and, therefore, "inconsistent with" subsection (2) of the statute.

¶12 Thompson relies on the "does not apply and may not be enforced" language in subsection (3) of the statute, and focuses in particular on the "may not be enforced" language. She argues that the circuit court erred because this language plainly and unambiguously prohibits anyone from bringing an action to "enforce" an inconsistent ordinance on or after the statute's effective date of December 21, 2011. In other words, Thompson argues that what matters under the statute is whether a claimant brings an action before December 21, 2011.

¶13 Ngaboh-Smart argues that WIS. STAT. § 66.0104 is not clear as to its intended effect on cases like hers, that is, when the violation of an ordinance occurred before the statute's effective date. She points to case law stating that "[t]he general rule in Wisconsin is that 'legislation is presumed to be prospective unless the statutory language clearly reveals by express language or necessary implication an intent that it apply retroactively.'" ***Chappy v. LIRC***, 136 Wis. 2d 172, 180, 401 N.W.2d 568 (1987) (quoted source omitted).[3]

¶14 As far as I can tell from Thompson's briefing, Thompson does not dispute this presumption under ***Chappy***. Rather, Thompson's position on

[3] Ngaboh-Smart argues in the alternative that a term in her lease expressly incorporates existing laws and ordinances and, therefore, that retroactive application of WIS. STAT. § 66.0104 to her situation would unconstitutionally impair her right to contract. Because I reject Thompson's retroactivity argument, I need not and do not reach Ngaboh-Smart's impairment-of-contract argument.

retroactivity seems to be that the statutory language "'clearly reveals by express language … an intent that it apply retroactively.'" *See* ***id.*** (quoted source omitted). I am not persuaded.

¶15 It is true that the December 21, 2011 date in WIS. STAT. § 66.0104(3) is the effective date of the statute. *See* 2011 Wis. Act 108. However, "'[t]he establishment of effective dates does not determine whether a statute will apply retroactively. All statutes have effective dates.'" ***Trinity Petroleum, Inc. v. Scott Oil Co.***, 2007 WI 88, ¶38, 302 Wis. 2d 299, 735 N.W.2d 1 (quoted source omitted).

¶16 Read as a whole, the statutory language shows that the legislature intended both to prevent local governments from enacting inconsistent ordinances after the statute's effective date and to bar the application and enforcement of inconsistent ordinances existing as of that date. The statutory language does not, however, clearly show that the legislature intended to bar a claim, like Ngaboh-Smart's, that had ripened before the effective date.

¶17 Thompson interprets the statute as if it clearly addresses applicability to claims that were ripe prior to the statute's effective date, but it does not. In effect, Thompson interprets the statute as if it reads something like this: "If a city, village, town, or county has in effect on December 21, 2011, an ordinance that is inconsistent with sub. (2), the ordinance does not apply and may not be enforced *by means of any action commenced on or after December 21, 2011*."

¶18 As Ngaboh-Smart points out, the legislature in other contexts has made clear when an action must be filed before an effective date, but the legislature did not use such language in WIS. STAT. § 66.0104. *See, e.g.*, ***Matthies***, 244 Wis. 2d 720, ¶16 (referencing statute that first applies "to civil actions

commenced on the effective date of this subsection"); *see also, e.g.*, ***State v. Alger***, 2013 WI App 148, ¶3, 352 Wis. 2d 145, 841 N.W.2d 329 (referencing a statute that first applies "to actions or special proceedings that are commenced on the effective date of this subsection").

¶19 Two simple hypotheticals help further illustrate why the statutory language here is not as straightforward as Thompson argues. Suppose that Ngaboh-Smart brought her action before December 21, 2011, but the circuit court did not enter judgment until after that date. It would seem that, under Thompson's view, the plain language of the statute would prohibit enforcement, even in the context of a previously filed action. But it is hard to imagine that the legislature intended to stop an ongoing lawsuit in its tracks. Similarly, suppose that the circuit court entered judgment just prior to the effective date of the new statute, on December 20, 2011, and Thompson refused to pay the judgment. Suppose further that Ngaboh-Smart sought remedies to collect on the judgment. Would Ngaboh-Smart be seeking "enforcement" of the ordinance after the statute's effective date, contrary to the statute?

¶20 My point here is that the statutory language is not as plain as Thompson suggests. The "may not be enforced" language is not a simple and clear directive that no claim or suit based on an inconsistent ordinance may be brought or maintained after the statute's effective date. It follows that the statute does not, as Thompson contends, plainly prohibit claims that ripened prior to the effective date.

¶21 Although one reasonable legislative approach might have been to apply the statute to lawsuits filed as of the statute's effective date, I am not persuaded that the statute clearly indicates that this is what the legislature

intended. Certainly, Thompson does not identify what language in the statute supports her interpretation over other possible interpretations suggested by the discussion above.

¶22 Thompson points to other statutes, including other landlord-tenant statutes, that, in her view, clearly show a legislative intent to "preserve rights." Thompson argues that these other statutes show that the legislature knows how to "preserve rights" when it wants to, and that here the legislature "clearly chose to cut off … rights for suits filed as of the effective date of the statute."

¶23 For example, Thompson points to a statute pertaining to a landlord's disposal of tenant property, in which the legislature specified that the pertinent provision "first applies to property left behind by a tenant on the effective date" of the statute. *See* 2011 Wis. Act 143, § 38(1)(a). However, I fail to see how the specificity in a statute like that one clarifies the silence in the statute before us.

¶24 Thompson asserts that "[n]o case interprets th[e 'does not apply and may not be enforced'] language, though it appears repeatedly throughout ch. 66." She briefly addresses a handful of the other provisions containing such language. Thompson fails, however, to systematically analyze those provisions or to explain why they should affect my analysis of WIS. STAT. § 66.0104.

¶25 In sum, I am not persuaded that WIS. STAT. § 66.0104 clearly indicates a legislative intent that the statute apply retroactively to bar a claim like Ngaboh-Smart's. Because such clarity is required, *see* ***Chappy***, 136 Wis. 2d at 180, I must reject Thompson's argument that the statute bars Ngaboh-Smart from making claims based on the Madison ordinance.

B. Whether Thompson Violated The Ordinance

¶26 Thompson argues that, contrary to the circuit court's conclusion, she did not violate the ordinance. The interpretation and application of an ordinance to undisputed facts is a question of law for de novo review. ***Town of Rhine v. Bizzell***, 2008 WI 76, ¶13, 311 Wis. 2d 1, 751 N.W.2d 780. I agree with the circuit court and Ngaboh-Smart that Thompson violated the ordinance by failing to provide the required notice pertaining to photographs.

¶27 The ordinance states that the landlord has 21 days after the tenant surrenders the rental premises to provide the tenant with one of the following:

> (a) The full security deposit; or
>
> (b) A written, itemized statement showing the specific reason or reasons for the withholding of the deposit or any portion of the deposit, applicable receipts and estimates including the necessary hours and the wage rate for the work done or to be done[,] any rent credit due, and a notice, in a minimum of ten-(10) point font, that the tenant will be provided a copy of the photographs documenting any damage, waste or neglect of the premises being charged to the tenant if requested by the tenant in writing within 30 days of receipt of the notice.

MGO § 32.07(7). As most pertinent here, the ordinance required Thompson to provide Ngaboh-Smart with "notice, in a minimum of ten-(10) point font, that the tenant will be provided a copy of the photographs documenting any damage … if requested by the tenant in writing within 30 days of receipt of the notice." MGO § 32.07(7)(b).

¶28 There is no dispute that the September 2011 statement that Thompson sent to Ngaboh-Smart is in a 10-point or larger font and included the following language: "If you like I did take pictures and can send them to you" and "I do have pictures I can send you."

¶29 Thompson argues that she complied or "overcomplied" with the ordinance because she informed Ngaboh-Smart that Ngaboh-Smart could request photographs without requiring Ngaboh-Smart to make the request in writing within 30 days. Thompson argues in the alternative that she "substantially complied" with the ordinance. I reject both arguments.

¶30 As to actual compliance, or "overcompliance," I conclude that the notice does not comply because it does not include the required language. While it may not be necessary to track the ordinance language verbatim, the ordinance plainly requires language informing the tenant that a request must be in writing and that the tenant has 30 days to make the request. Thompson's notice did not, in any words, inform Ngaboh-Smart of the requirement that the request be in writing or of the 30-day time limit. And, as I explain next, this omission is not inconsequential.

¶31 Thompson contends that she substantially complied with the statute. She provides case law stating that the test for substantial compliance is "'actual compliance in respect to the substance essential to every reasonable objective of the statute.'" *See* ***Midwest Mut. Ins. Co. v. Nicolazzi***, 138 Wis. 2d 192, 200, 405 N.W.2d 732 (Ct. App. 1987) (quoted source omitted).

¶32 It is not clear that Thompson sufficiently raised the issue of substantial compliance in the circuit court and, therefore, the argument appears to have been forfeited.[4] However, even assuming forfeiture, I have the discretion to

[4] The circuit court characterized Thompson's violation as "hyper-technical," but this characterization did not appear to be in response to any substantial-compliance argument by Thompson.

address the issue, and I exercise that discretion here. Applying the substantial compliance test that Thompson provides, I conclude that Thompson did not substantially comply with the ordinance.

¶33 The plain intent of the ordinance's notice requirement is to create a clear process with actions that trigger rights and to ensure that both landlords and tenants understand that process. For example, a landlord would not need to respond to an oral request for photographs or to a request made after 30 days. That is to say, compliance with the specifics of the ordinance is in the best interests of both tenants *and landlords*. A notice like the one Thompson provided creates ambiguity and a greater potential for a factual dispute. For example, with no specified time limit, would Thompson have needed to respond to a request after the 30-day limit? And, by removing the writing requirement, a dispute is much more likely to arise as to whether the tenant in fact made such a request. Thus, I reject Thompson's argument that she substantially complied with the ordinance when she deviated from the procedure in the ordinance to the alleged benefit of Ngaboh-Smart. At least in view of the arguments before me, it appears that "substantial compliance" includes adhering to the procedure specified in the ordinance.

¶34 In sum, I agree with the circuit court that Thompson violated the ordinance.[5]

[5] The parties dispute whether Thompson also violated the ordinance by failing to provide Ngaboh-Smart with applicable receipts and sufficient estimates. I see no need to resolve that issue given my conclusion that Thompson violated the ordinance by failing to provide the required notice pertaining to photographs.

C. Attorney's Fees

¶35 Thompson's appeal raises two issues relating to attorney's fees: (1) whether Ngaboh-Smart was entitled to attorney's fees, and, if so, (2) whether the circuit court used the proper method to calculate the amount of the fees.

1. Whether Ngaboh-Smart Was Entitled To Attorney's Fees

¶36 In the circuit court, Ngaboh-Smart argued that she was entitled to attorney's fees for Thompson's ordinance violation for two reasons.

¶37 First, Ngaboh-Smart argued that Thompson violated WIS. ADMIN. CODE § ATCP 134.06, entitling Ngaboh-Smart to attorney's fees under WIS. STAT. § 100.20(5).[6] The circuit court appears to have agreed with this argument.

¶38 Second, Ngaboh-Smart argued that the ordinance violation entitled Ngaboh-Smart to attorney's fees under the ordinance. The circuit court did not appear to reach this alternative argument.

¶39 Thompson argues that she did not violate WIS. ADMIN. CODE § ATCP 134.06. She also argues that the ordinance violation she was found to have committed does not invoke the attorney's fees provision in the ordinance. Therefore, Thompson argues, the circuit court erred in awarding attorney's fees to Ngaboh-Smart.

¶40 As explained in detail below, I agree with Thompson that the circuit court erred when it concluded that she violated WIS. ADMIN. CODE § ATCP

[6] WISCONSIN STAT. § 100.20(5) provides, in pertinent part, that "[a]ny person suffering pecuniary loss because of a violation by any other person of any order issued under this section … shall recover … costs, including a reasonable attorney's fee."

134.06. I disagree, however, that attorney's fees are not available under the ordinance, and affirm on that alternative basis. *See* ***Milton v. Washburn Cnty.***, 2011 WI App 48, ¶8 n.5, 332 Wis. 2d 319, 797 N.W.2d 924 ("[I]f a circuit court reaches the right result for the wrong reason, we will nevertheless affirm.").

a. Whether Thompson Violated WIS. ADMIN. CODE § ATCP 134.06

¶41 The question of whether Thompson violated WIS. ADMIN. CODE § ATCP 134.06 boils down to a dispute over the proper interpretation of § ATCP 134.06. The interpretation of an administrative code provision is a question of law for de novo review. ***Orion Flight Servs., Inc. v. Basler Flight Serv.***, 2006 WI 51, ¶18, 290 Wis. 2d 421, 714 N.W.2d 130.

¶42 Boiled down further, the parties' dispute revolves around the following language in paragraph (3)(c) of the regulation:

> (c) This subsection [providing allowable reasons for withholding a security deposit] does not authorize a landlord to withhold a security deposit for normal wear and tear, or for other damages or losses for which the tenant cannot reasonably be held responsible under applicable law.

WIS. ADMIN. CODE § ATCP 134.06(3)(c).

¶43 The parties' dispute over this language is best explained, and resolved, by starting with Ngaboh-Smart's argument. Ngaboh-Smart argues as follows:

- The phrase "applicable law" in the regulation can include local ordinances;
- Under the Madison ordinance, Thompson forfeited her right to the security deposit when she violated the ordinance;

- Because Thompson forfeited her right to the deposit, she was not "authorize[d]" to withhold the security deposit "under applicable law";
- Therefore, Thompson violated § ATCP 134.06 by withholding the security deposit.

¶44 Thompson does not appear to dispute the first two bullet points. Thompson argues, however, that Ngaboh-Smart misconstrues the regulation, and in particular misconstrues the phrase "under applicable law." I agree with Thompson.

¶45 Ngaboh-Smart interprets the regulation as if withholding a security deposit contrary to any law, including any ordinance, is a violation of WIS. ADMIN. CODE § ATCP 134.06. However, that is plainly not what § ATCP 134.06(3)(c) provides. "[A]pplicable law" is limited to provisions addressing whether a tenant is reasonably held responsible for "damages or losses" to the rental property. It clearly does not refer to other types of provisions that might control whether a landlord has wrongfully withheld a security deposit, including provisions like the notice requirement in the Madison ordinance that Thompson violated. Thus, Ngaboh-Smart's third and fourth bullet points do not follow from her first and second. That is, even though Thompson may have wrongfully withheld the security deposit under the Madison ordinance, she did not withhold the deposit "for … damages or losses for which the tenant cannot reasonably be held responsible under applicable law." Therefore, Thompson did not violate § ATCP 134.06.

b. Whether Thompson's Ordinance Violation Invokes The Ordinance's Attorney's Fees Provision

¶46 The question remains whether Ngaboh-Smart was entitled to attorney's fees under the ordinance. It is not apparent that this type of attorney's

fees issue will be a significant legal issue moving forward in other cases because WIS. STAT. § 66.0104 seemingly, at a minimum, defeats claims like Ngaboh-Smart's ripening as of December 21, 2011, the effective date of the statute. But here the issue is significant and must be resolved.

¶47 The part of the ordinance addressing attorney's fees states that a tenant has the right to reasonable attorney's fees if the landlord fails to comply with any of various provisions in the ordinance. *See* MGO § 32.07(10). As most pertinent here, the ordinance states that the tenant has the right to reasonable attorney's fees if the landlord fails to "return [the] security deposit or provide [the] written statement of reasons for withholding under Sec. 32.07(7)(a) & (b)." MGO § 32.07(10)(d).

¶48 Also pertinent is the complete text of subsection (7)(b) of the ordinance. As indicated above, that subsection refers to the "statement" the landlord must provide if the landlord does not return the full security deposit within 21 days after a tenant surrenders the rental premises. More specifically, the landlord must provide:

> (b) A written, itemized statement showing the specific reason or reasons for the withholding of the deposit or any portion of the deposit, applicable receipts and estimates including the necessary hours and the wage rate for the work done or to be done[,] any rent credit due, and a notice, in a minimum of ten-(10) point font, that the tenant will be provided a copy of the photographs documenting any damage, waste or neglect of the premises being charged to the tenant if requested by the tenant in writing within 30 days of receipt of the notice.

MGO § 32.07(7)(b).

¶49 Thompson argues that she provided the required "statement" even though she failed to provide the required "notice." She asserts that a "statement"

is not a "notice" and that the attorney's fees provision in subsection (10) applies to the "statement" but not the "notice." In essence, Thompson interprets subsections (10) and (7)(b) as making clear that a tenant is entitled to attorney's fees if the landlord fails to provide a written description showing "the specific reason or reasons for the withholding" but not if the landlord fails to comply with any of the other requirements in subsection (7)(b).

¶50 Although Thompson's reading of the ordinance is understandable in the sense that "statement" and "notice" might be read as distinct requirements, at best this reading suggests ambiguity. Assuming ambiguity, I conclude that the most reasonable reading of the ordinance is that the "statement" referenced in subsections (10) and (7)(b) must *include*—or, in the terms of subsection (7)(b), "show[]"—each of the items that follow in the ordinance: the "reasons" for the withholding, "applicable receipts and estimates including the necessary hours and the wage rate for the work done or to be done," "any rent credit due," and "a notice, in a minimum of ten-(10) point font, that the tenant will be provided a copy of the photographs documenting any damage, waste or neglect of the premises being charged to the tenant if requested by the tenant in writing within 30 days of receipt of the notice."

¶51 The ordinance drafters plainly intended to provide a timely and orderly process for withholding a security deposit, one purpose of which is to ensure that tenants receive detailed documentation to support any withholding. In light of this purpose, it makes little sense to conclude that the drafters would have imposed attorney's fees for a landlord's failure to provide a written description of "reasons" for the withholding but not for a failure to comply with the other closely related requirements.

2. Method To Calculate Amount Of Attorney's Fees

¶52 I turn to Thompson's challenge to the method the circuit court used to calculate the amount of attorney's fees. I conclude that her argument, raised for the first time on appeal, is forfeited.

¶53 "When a circuit court awards attorney fees, the amount of the award is left to the discretion of the court." ***Kolupar v. Wilde Pontiac Cadillac, Inc.***, 2004 WI 112, ¶22, 275 Wis. 2d 1, 683 N.W.2d 58. Here, the circuit court awarded Ngaboh-Smart $4,917 of her requested $13,478.75 in attorney's fees. The court applied the "lodestar" approach, considering various factors to determine the amount of the fees. *See* ***id.***, ¶¶24-30 (describing lodestar approach).

¶54 Thompson does not take issue with the factors the circuit court applied but argues that the circuit court should have considered *additional* factors that the legislature added to WIS. STAT. § 814.045 ("Attorney fees; reasonableness") in December 2011. Thompson also argues that the court should have applied an added presumption that "reasonable attorney fees do not exceed 3 times the amount of the compensatory damages awarded."[7] *See* § 814.045(2)(a). Thompson argues that § 814.045 as amended in December 2011 is "retroactively applicable" here.

¶55 Thompson fails to show that she raised these arguments in the circuit court, and I see nothing in the record demonstrating that she did. Unlike my decision above to ignore forfeiture and address an issue, here judicial economy

[7] The statute states that the presumption "may be overcome if the court determines, after considering the factors set forth in sub. (1), that a greater amount is reasonable." WIS. STAT. § 814.045(2)(a).

considerations that underlie the forfeiture rule weigh against deciding the issue. *See* ***State v. Agnello***, 226 Wis. 2d 164, 173, 593 N.W.2d 427 (1999) (the forfeiture "rule exists in large part so that both parties and courts have notice of the disputed issues as well as a fair opportunity to prepare and address them in a way that most efficiently uses judicial resources"). Thus, I decline to address these forfeited arguments further.

NGABOH-SMART'S CROSS-APPEAL

¶56 Ngaboh-Smart raises two issues in her cross-appeal. One relates to whether she was entitled to double damages and the other relates to the sufficiency of the evidence supporting one portion of Thompson's damages.

A. Double Damages

¶57 In the circuit court, Ngaboh-Smart asserted that she was entitled to double damages based on Thompson's violation of WIS. ADMIN. CODE § ATCP 134.06. The circuit court agreed with Thompson, however, that, even if Thompson violated § ATCP 134.06, the decision in ***Pierce v. Norwick***, 202 Wis. 2d 587, 550 N.W.2d 451 (Ct. App. 1996), required the court to offset Ngaboh-Smart's damages against Thompson's damages before any doubling could occur. Because Ngaboh-Smart's damages ($315) were less than Thompson's damages ($849), the circuit court's decision in effect denied double damages to Ngaboh-Smart.

¶58 Ngaboh-Smart argues that the circuit court erred in its reliance on ***Pierce***. I need not reach this argument because, for the reasons stated in ¶¶41-45 above, I agree with Thompson that she did not violate WIS. ADMIN. CODE § ATCP 134.06. I uphold the circuit court's denial of double damages on this

alternative basis. *See* ***Milton***, 332 Wis. 2d 319, ¶8 n.5. Ngaboh-Smart does not argue that she is entitled to double damages even if Thompson did not violate § ATCP 134.06.

B. Sufficiency Of The Evidence

¶59 Ngaboh-Smart challenges the sufficiency of the evidence to support $300 of the $849 in damages that the circuit court awarded to Thompson. This $300 was for damage to the wood floors. I will affirm the fact finder's damages award if there is any credible evidence to support it. ***Water Quality Store, LLC v. Dynasty Spas, Inc.***, 2010 WI App 112, ¶47, 328 Wis. 2d 717, 789 N.W.2d 595.

¶60 As far as I can tell, Ngaboh-Smart does not dispute that there was credible evidence that repair of the wood floors would cost Thompson at least $300. Rather, as I understand it, Ngaboh-Smart argues that the evidence was insufficient because Thompson failed to make the repairs by the date of trial.

¶61 For support, Ngaboh-Smart relies on ***Boelter v. Tschantz***, 2010 WI App 18, 323 Wis. 2d 208, 779 N.W.2d 467 (WI App 2009). Ngaboh-Smart asserts that, under ***Boelter***, the pertinent test is whether the landlord incurred "actual costs." Ngaboh-Smart argues that Thompson has not incurred "actual costs" unless she actually makes the repairs.

¶62 It is true that ***Boelter*** appears to state that a landlord is limited to "actual costs" for repairs or maintenance when deducting from a security deposit. *See* ***id.***, ¶10. However, I do not read ***Boelter*** as suggesting that a landlord must make repairs by the date of trial in order to incur "actual costs." The pertinent issue in ***Boelter*** was not the timing of repairs. Rather, the issue related to whether a landlord could charge a professional rate for services when the landlord had not

identified evidence that the landlord would actually incur costs at that rate. *See* ***id.***, ¶¶9-12. Therefore, I am not persuaded by ***Boelter***, and reject Ngaboh-Smart's challenge to the sufficiency of the evidence.

Conclusion

¶63 In sum, for the reasons stated above, I affirm the circuit court's judgment.

By the Court.—Judgment affirmed.

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