

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 22, 2012

A. John Voelker
Acting 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. 2010AP2831

Cir. Ct. No. 2008CV4410

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

INTEGRITY CONSTRUCTION GROUP, INC.,

PLAINTIFF-RESPONDENT-CROSS-APPELLANT,

V.

JUDY NEARY,

DEFENDANT-APPELLANT-CROSS-RESPONDENT.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Waukesha County: RALPH M. RAMIREZ, Judge. *Affirmed in part and reversed in part.*

Before Neubauer, P.J., Reilly, J., and Neal Nettesheim, Reserve Judge.

¶1 PER CURIAM. This case arises out of a home improvement contract dispute between Judy Neary and Integrity Construction Group, Inc.

Neary appeals from a judgment awarding Integrity its attorney fees and awarding her fifty percent of her attorney fees. Neary contends that this court should deny Integrity an award of attorney fees because prior to trial it represented that it would not seek such a recovery. She further contends that this court should grant her full award of attorney fees.

¶2 Integrity cross-appeals, arguing that the circuit court should not have awarded Neary double damages under WIS. STAT. § 100.20(5) because she suffered no net pecuniary loss.¹ Integrity also argues that the circuit court should not have awarded Neary any attorney fees because she suffered no actual pecuniary loss in the case, or alternatively, because the amount of fees spent was out of proportion to the amount of damages at issue.

¶3 We conclude that the circuit court properly awarded Neary double damages. We further conclude that the circuit court properly awarded Neary fifty percent of her attorney fees. However, we reverse the portion of the judgment awarding Integrity its attorney fees. Therefore, we affirm in part and reverse in part.

¶4 Neary and Integrity entered into a home improvement contract in the fall of 2007. Under the contract, Integrity was to re-shingle Neary's residence with 40-year shingles. Integrity did not complete the job, and Neary did not pay Integrity for the work it had completed. Accordingly, Integrity sued Neary for breach of contract, and Neary counterclaimed, seeking damages for various

¹ All references to the Wisconsin Statutes are to the 2007-08 version.

violations of WIS. ADMIN. CODE § ATCP 110 (Home Improvement Practices Act or HIPA).

¶5 Prior to trial, Neary brought a motion for partial summary judgment, seeking a determination that Integrity's written contract was unenforceable as against public policy. At issue was a clause in the contract which imposed the contractor's attorney fees on the homeowner. Ultimately, Integrity indicated that it would not be seeking attorney fees under this clause. It did so in the following exchange with the court:

[INTEGRITY'S ATTORNEY]: We are not seeking to impose any cost of collection and attorney's fees above those contained in the statute or allowed at the discretion of the Court.

THE COURT: So then my understanding then is that – I guess worded differently – is that you're not attempting to collect costs or attorney's fees pursuant to the contract but as otherwise allowed by statute.

[INTEGRITY'S ATTORNEY]: That's correct.

Based on Integrity's representation, the court denied Neary's motion to find the written contract unenforceable.

¶6 At trial, the jury found that Neary had breached her contract with Integrity and awarded Integrity \$3,000. The jury also found that Integrity had made false, deceptive, or misleading representations to induce Neary to enter into the contract. It awarded Neary \$2,910 for this HIPA violation.

¶7 After the jury's verdict, the circuit court doubled Neary's damages pursuant to WIS. STAT. § 100.20(5), resulting in a new award of \$5,820. Because this \$5,820 award was greater than Integrity's \$3,000 award, the court ruled that Neary was entitled to recover reasonable attorney fees pursuant to § 100.20(5).

However, the court also ruled that Neary would only be awarded fifty percent of her attorney fees. The court explained:

And then the—Miss Neary, the defense, is entitled to attorney’s fees by Statute in a reasonable amount, because she prevailed on her counterclaim. But because she did not prevail on the other claim, the question is what’s reasonable. And I think it’s reasonable to say that one-half of the attorney’s fees can be attributed to her prevailing on the counterclaim, and I don’t know how else to divide it, because I can’t with any preciseness cut apart each and every—and parse out each and every hour, action, or thing that [Neary’s counsel] did.

Because it’s clear that she prevailed on one counterclaim, but lost the claim against her, I think it is fair and reasonable to say that half of the attorney’s fees that were—I was going to say run up, but that has a negative connotation, and I don’t mean to do that. Half of the attorney’s fees that were generated as a result of both the defense and then the prosecution of her claim would be a reasonable amount of attorney’s fees to award her in this case, because the Statute doesn’t allow ... for that. So there should be an offset in that regard.

¶8 Finally, the circuit court awarded Integrity its attorney fees pursuant to its contract, despite Neary’s objection that Integrity was foreclosed from doing so based upon its previous representation. This appeal and cross-appeal follow.

¶9 The first issue we address is whether the circuit court properly awarded Neary double damages. Double damages are an available remedy for HIPA violations, given that WIS. STAT. § 100.20(5) allows for the recovery of “twice the amount of such pecuniary loss....” *Stuart v. Weisflog’s Showroom Gallery, Inc.*, 2008 WI 22, ¶23, 308 Wis. 2d 103, 746 N.W.2d 762.

¶10 Integrity contends that the circuit court should not have awarded Neary double damages under WIS. STAT. § 100.20(5) because she suffered no net pecuniary loss. In support of its argument, Integrity cites *Pierce v. Norwick*, 202

Wis. 2d 587, 550 N.W.2d 451 (Ct. App. 1996), and the jury's offsetting awards for damages in this case.

¶11 Neary responds by asking this court to affirm the circuit court's award. In doing so, she distinguishes *Pierce* and cites two other cases-*Moonlight v. Boyce*, 125 Wis. 2d 298, 372 N.W.2d 479 (Ct. App. 1985) and *Paulik v. Coombs*, 120 Wis. 2d 431, 355 N.W.2d 357 (Ct. App. 1984)-supporting the proposition that she was entitled to double damages prior to any offset for Integrity's damages.

¶12 We begin our analysis by summarizing the cases cited by the parties.² In *Paulik*, 120 Wis. 2d at 434, tenants brought a claim against their landlord for withholding their security deposit and failing to provide them with a written reason for withholding it within twenty-one days as required by law. The landlord counterclaimed for one month's rent due to lack of proper notice of termination of tenancy and for costs of repairs to the premises. *Id.* at 434-35. At trial, the circuit court found that both parties were entitled to damages for their claims. *Id.* at 435. Because the landlord's damages were greater than the tenants' damages, the circuit court denied the tenants' request for attorney fees. *See id.* On appeal, this court reversed, holding that tenants who prevail in an action under WIS. STAT. § 100.20 are entitled to reasonable attorney fees irrespective of the amount of damages that a landlord may recover in a counterclaim. *Paulik*, 120 Wis. 2d at 433. Thus, this court instructed the circuit court on remand to award

² Although *Pierce v. Norwick*, 202 Wis. 2d 587, 550 N.W.2d 451 (Ct. App. 1996), *Moonlight v. Boyce*, 125 Wis. 2d 298, 372 N.W.2d 479 (Ct. App. 1985), and *Paulik v. Coombs*, 120 Wis. 2d 431, 355 N.W.2d 357 (Ct. App. 1984) are all landlord-tenant cases, they are enforced through WIS. STAT. § 100.20 and thus offer appropriate precedent on the issue of offsetting damage awards.

the tenants with double damages and reasonable attorney fees *before* offsetting that amount with damages established by the landlord's counterclaim. *Id.* at 440.

¶13 The next appellate case to address offsetting awards in the context of WIS. STAT. § 100.20(5), was *Moonlight*, 125 Wis. 2d 298. There, a tenant brought a claim against his landlord for withholding his security deposit and failing to provide him with a written reason for withholding it within twenty-one days as required by law. *Id.* at 301. The landlord counterclaimed for damages to the property. *Id.* At trial, the circuit court ruled in favor of the landlord, finding that it had suffered damages exceeding the security deposit it had retained. *Id.* at 301-02. The issue on appeal was whether the tenant had suffered a pecuniary loss under § 100.20(5), when the amount of damages awarded the landlord exceeded the amount of the security deposit. *Moonlight*, 125 Wis. 2d at 299-300. This court concluded that he did, holding “that once it is determined that the landlord has violated the Wisconsin Administrative Code provisions for the return of a tenant’s security deposit, the tenant suffers a pecuniary loss under [§] 100.20(5) ... in the amount of the security deposit *regardless of the amount of damages the landlord may recover on a counterclaim.*” *Moonlight*, 125 Wis. 2d at 305-06 (emphasis in original). Like the *Paulik* court, the *Moonlight* court concluded that the tenant was entitled to double damages and reasonable attorney fees *before* offsetting that amount with damages established by the landlord's counterclaim. *See id.* at 306.

¶14 Subsequent to *Paulik* and *Moonlight*, this court again examined the issue of pecuniary loss and WIS. STAT. § 100.20 in *Pierce*, 202 Wis. 2d 587. There, the tenants brought a claim against their landlords for fraudulently withholding their \$1,000 security deposit. *Id.* at 591. The landlords, who had timely provided the tenants with a written reason for withholding the security

deposit, responded by suing the tenants for unpaid rent and other alleged damages to the premises. *Id.* The suits were consolidated and tried to a jury. *Id.* The jury concluded that: (1) the landlords intentionally misrepresented or falsified their claim for damages against the security deposit and should have returned the entire \$1,000 security deposit; and (2) the tenants caused damage to the premises and owed the landlords a total of \$889 for unpaid rent and damages. *Id.* at 591-92. From these findings, the circuit court concluded that \$111 represented the tenants' entire pecuniary loss for the wrongful withholding and doubled that amount in awarding double damages. *Id.* at 594. On appeal, this court upheld the circuit court's method of calculation, distinguishing the case from *Paulik* and *Moonlight*. The court explained:

There is, however, a significant factual difference between [*Paulik* and *Moonlight*] and the instant case. In both *Paulik* and *Moonlight*, the landlords failed to provide the tenants with a written statement accounting for the amounts withheld. See *Moonlight*, 125 Wis. 2d at 301, 372 N.W.2d at 482; see also *Paulik*, 120 Wis. 2d at 434, 355 N.W.2d at 358. This omission is a critical one.

The precedent established in *Moonlight*, 125 Wis. 2d at 305-06, 372 N.W.2d at 484, is not controlling in the present case. We conclude that the method of damages calculation outlined in *Moonlight* should be confined to those instances where a landlord retains a security deposit and fails to provide an itemization of damages, in violation of [WIS. ADMIN. CODE] § ATCP 134.06(2), (4)(a).

When a landlord complies with the notification requirement and provides a tenant with a written statement accounting for any amount withheld from the security deposit, a later determination that the landlord has violated [WIS. ADMIN. CODE] § ATCP 134.06(4)(b) and misrepresented or falsified damages claims will result in a doubling of only that pecuniary loss which remains after an offset for the landlord's actual damages has been included. This was the method of calculation applied in this case and we conclude that it was proper.

Id. at 595-96.

¶15 Examining these cases, we agree with Neary that the circuit court properly awarded her double damages. Unlike the wrongful withholding claim at issue in *Pierce*, there was no need for the circuit court to take into account any offsets prior issuing its award.³ After all, the jury had already determined the pecuniary loss suffered by Neary for Integrity’s HIPA violation. Whereas the tenants in *Pierce* suffered a pecuniary loss of \$111 due to the landlord’s wrongful withholding of their security deposit, Neary suffered a pecuniary loss of \$2,910 due to Integrity’s false, deceptive, and misleading representations which induced her to enter into the contract. Once that pecuniary loss was established, the circuit court properly awarded Neary double damages and reasonable attorney fees *before* offsetting that amount with the damages established by Integrity’s separate breach of contract claim. *See Paulik*, 120 Wis. 2d at 440.

¶16 The next issue we address is whether the circuit court properly awarded Neary fifty percent of her attorney fees. Our review of this issue is limited to whether the circuit court properly exercised its discretion. *Benkoski v. Flood*, 2001 WI App 84, ¶33, 242 Wis. 2d 652, 626 N.W.2d 851. A circuit court properly exercises its discretion when it considers the relevant facts, applies the correct law, and articulates a reasonable basis for its decision. *See Krebs v. Krebs*, 148 Wis. 2d 51, 55, 435 N.W.2d 240 (1989).

¶17 Neary asks this court to grant her full award of attorney fees. She submits that the circuit court’s decision to award her fifty percent of her attorney fees was arbitrary and without a rational basis. She further submits that she is

³ By its very nature, a claim for wrongful withholding of a tenant’s security deposit contemplates an immediate offset of a landlord’s damages to determine whether a violation even occurred.

entitled to a full award because of the inability to apportion the attorney fees she incurred.

¶18 Integrity, of course, disagrees. It asserts that Neary should not be awarded any attorney fee because she suffered no actual pecuniary loss in the case, or alternatively, because the amount of fees spent was out of proportion to the amount of damages at issue.

¶19 We are satisfied that the circuit court properly exercised its discretion in awarding Neary fifty percent of her attorney fees. Under *Paulik*, 120 Wis. 2d at 433, Neary was entitled to attorney fees irrespective of Integrity's damages because she prevailed on her HIPA claim. However, she was not entitled to those fees attributable to defending against Integrity's breach of contract claim. *See id.* at 439 n.5; *see also Moonlight*, 125 Wis. 2d at 307. Given the jury's apportionment of damages in this case (*i.e.*, awarding \$3,000 to Integrity for Neary's breach of contract and awarding \$2,910 to Neary for Integrity's HIPA violation), the circuit court's splitting of the attorney fees made reasonable sense, as it reflected the fact that each party had won some and lost some at trial. Finally, the fact that Neary's attorney fees were greater than the actual damages at issue does not alter our analysis, as (1) an attorney fee award is mandatory on successful claims under WIS. STAT. § 100.20(5); and (2) awards in consumer protection cases frequently exceed the actual damages claimed, *see, e.g., Boelter v. Tschantz*, 2010 WI App 18, ¶28, 323 Wis. 2d 208, 779 N.W.2d 467.

¶20 The final issue we address is whether the circuit court properly awarded Integrity its attorney fees. Again, the basis for the court's award was Integrity's written contract with Neary.

¶21 Neary asks this court to reverse the circuit court’s award because prior to trial Integrity represented that it would not seek such a recovery. Integrity made this representation when responding to Neary’s claim that its written contract was unenforceable as against public policy due to the clause in the contract which imposed the contractor’s attorney fees on the homeowner.

¶22 Again, Integrity disagrees. It maintains that it never waived its right to seek attorney fees pursuant to its contract. Had it done so, Integrity submits that the circuit court would not have awarded it attorney fees after trial.

¶23 We conclude that Integrity did waive its right to seek attorney fees pursuant to its contract when it confirmed to the circuit court that it was “not attempting to collect costs or fees pursuant to the contract....” Because the circuit court relied on this representation in denying Neary’s motion to find the written contract unenforceable, and because Neary properly preserved this claim for appeal, we will hold Integrity to its original word. Accordingly, we reverse the portion of the judgment awarding Integrity its attorney fees.

¶24 No costs to either party.⁴

By the Court.—Judgment affirmed in part and reversed in part.

⁴ Neary asks that this court remand to the circuit court for further determination of the amount of reasonable attorney fees and costs incurred by her from April 16, 2010 (the date of the circuit court’s oral ruling) to the completion of this case for inclusion in the final judgment, which occurred August 18, 2010. In making this request, Neary does not provide any citation for when she raised this issue in the circuit court. Issues not raised or considered in the circuit court will generally not be considered for the first time on appeal. See *Wirth v. Ehly*, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980), *superseded by statute on other grounds*. Although Neary arguably raised this issue in her post-judgment WIS. STAT. § 806.07 motion, that matter is not before us. See *Appleton Chinese Food Serv., Inc. v. Murken Ins., Inc.*, 185 Wis. 2d 791, 811 n. 10, 519 N.W.2d 674 (Ct. App. 1994) (a motion under WIS. STAT. § 806.07 is a separate proceeding requiring a separate appeal). For these reasons, we decline to consider Neary’s request.

This opinion will not be published. *See* WIS. STAT. RULE
809.23(1)(b)5.

