

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 13, 2012

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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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. 2011AP2855

Cir. Ct. No. 2008CV208

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**EA RESTORATION, LLC D/B/A PAUL DAVIS RESTORATION
OF THE FOX VALLEY,**

PLAINTIFF-RESPONDENT,

v.

JOSHUA DIEHM,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Marquette County:
RICHARD O. WRIGHT, Judge. *Affirmed in part and reversed in part.*

Before Higginbotham, Sherman and Blanchard, JJ.

¶1 SHERMAN, J. Joshua Diehm appeals a money judgment entered by the circuit court in favor of EA Restoration, LLC, following a jury trial in which the jury determined that both Diehm and EA Restoration breached their contract with one another, and EA Restoration breached WIS. ADMIN. CODE ch.

ATCP 100 (June 2011) (the home improvement code), and postverdict motions. Following postverdict motions, the court awarded each party attorney fees, which the court offset against one another, and it offset the damages awarded by the jury, which resulted in a net judgment in favor of EA Restoration.

¶2 Diehm contends the circuit court erred in refusing to: (1) set aside the breach of contract damages awarded to EA Restoration; (2) double the damages awarded to him for EA Restoration's breach of the home improvement code; (3) reduce the attorney fees awarded to EA Restoration; and (4) order that the attorney fees awarded to him be payable directly to his attorney, and not be offset against those attorney fees awarded to EA Restoration. For the reasons that follow, we affirm in part and reverse in part.

BACKGROUND

¶3 In 2007, Diehm executed a work authorization form, authorizing EA Restoration to provide restoration services and materials for a residential property owned by Diehm that was largely destroyed by a fire. The work authorization provided that EA Restoration would be paid for its services in three installments—one-third before the project began, one-third when drywall work was completed, and the balance when the project was completed. There is no dispute that during the pendency of the project, payments were made to EA Restoration in compliance with the work authorization, except that Diehm failed to authorize the final payment.

¶4 EA Restoration brought suit against Diehm, alleging breach of contract and unjust enrichment, and sought a judgment in the amount of \$34,350.93, the amount EA Restoration alleged it was still owed, plus interest. Diehm counterclaimed, alleging that EA Restoration had breached its contract

with him based on alleged work performance issues, and had violated the home improvement code, WIS. ADMIN. CODE ch. ATCP 110.

¶5 Following a trial, the jury found that Diehm breached his contract with EA Restoration, and awarded EA Restoration damages in the amount of \$34,000. The jury further found that EA Restoration had also breached the contract, and awarded Diehm damages in the amount of \$2,000. The jury also found that EA Restoration had violated the home improvement code, and awarded Diehm \$8,000 in damages for that breach.

¶6 Both EA Restoration and Diehm filed postverdict motions. EA Restoration moved the court to change the verdict answers relating to its violation of the home improvement code, and for attorney fees and costs. Diehm moved the court to change the verdict answers relating to his breach of contract, to double the damages awarded for EA Restoration's breach of the home improvement code, and for an award of attorney fees under the home improvement code. The circuit court awarded each party attorney fees, which the court offset against one another, but otherwise denied both parties' postverdict motions. In its order addressing each party's postverdict motion, the court ruled that damages awarded to EA Restoration would be offset by the \$10,000 awarded by the jury to Diehm for EA Restoration's breach of contract and a violation of the home improvement code, which resulted in a total judgment in favor of EA Restoration in the amount of \$24,339.14. Diehm appeals.

DISCUSSION

¶7 Diehm raises multiple challenges to the circuit court's postverdict order, wherein the court awarded Diehm attorney fees, which were offset against

attorney fees awarded to EA Restoration, but denied Diehm's other request. We address Diehm's arguments in turn below.

A. *EA Restoration's Damages*

¶8 Diehm contends that the circuit court erred in refusing to set aside the damages awarded to EA Restoration.

¶9 Diehm argues that "every single duty EA [Restoration] had under the contract was required to be performed before EA [Restoration] could ask Diehm for a final payment." (Emphasis omitted.) Diehm argues that because EA Restoration breached the contract by failing to perform each and every duty required by the contract, he had a right to repudiate the entire contract and refuse to pay the remaining balance. We understand Diehm to argue that any breach of the contract by EA Restoration of the work authorization contract, material or otherwise, relieves him of his financial obligations to EA Restoration under the contract. We disagree.

¶10 Diehm fails to cite to any Wisconsin legal authority supporting his claim that he is relieved from his obligations under the contract, regardless of the nature of the breach. The law in Wisconsin is well established that a non-breaching party is excused from his or her obligations under a contract only in the case of a *material breach*. *Management Computer Servs., Inc. v. Hawkins, Ash, Baptie & Co.*, 206 Wis. 2d 158, 183, 557 N.W.2d 67 (1996). A material breach is one that destroys the "essential purpose of the contract." *M & I Marshall & Ilsley Bank v. Pump*, 88 Wis. 2d 323, 333, 276 N.W.2d 295 (1979). Facts to consider in determining the materiality of a breach include the character of the performance, the purpose expected to be served by it, the extent to which nonperformance defeats that purpose, and the reasons for the failures. *Id.* Whether a party's

breach is material presents a question for the trier of fact. See *Management Computer Servs.*, 206 Wis. 2d at 184.

¶11 We read Diehm’s briefs as arguing that the jury found that EA Restoration’s breach of contract was material because the jury was given an instruction on substantial performance, which asked the jury to determine whether the “defect or uncompleted performance is of such extent and nature that there has been no practical fulfillment of the terms of the contract.” WIS JI—CIVIL 3052. However, the special verdict form asked the jury only whether EA Restoration breached the contract. The jury was not asked to determine the materiality of EA Restoration’s breach for the purpose of determining whether Diehm was relieved from further contract performance as a result of EA Restoration’s breach. Moreover, Diehm has not made a showing on appeal that EA Restoration’s breach of contract was material. Accordingly, we reject Diehm’s argument.

¶12 Diehm also argues that because EA Restoration violated the Home Improvement Trade Code, Diehm had the option of voiding the contract, which he did, and therefore EA Restoration did not have the right to recover any damages for his breach of contract. Diehm relies on *Baierl v. McTaggart*, 2001 WI 107, 245 Wis. 2d 632, 629 N.W.2d 277, where the supreme court held that a lease agreement was unenforceable because the agreement included a provision specifically prohibited by the Wisconsin Administrative Code. *Id.*, ¶¶1-2. We read Diehm’s brief as arguing that because both *Baierl* and the present case concern administrative regulations promulgated under WIS. STAT. § 100.20 (2009-

10),¹ EA Restoration’s violation of the home improvement code must result in the unenforceability of the contract, as in *Baierl*.

¶13 In *Baierl*, however, the supreme court rejected the argument that a violation of administrative regulations promulgated under WIS. STAT. § 100.20 necessarily results in the unenforceability of a contract, stating that it is “‘grave error’ to assert that all contracts in violation of a statute are unenforceable.” *Id.*, ¶¶16-19 (citation omitted). The court explained that it is ultimately the intent underlying the provision that was violated which controls whether a statutory or regulatory violation renders a contract unenforceable. *Id.*, ¶19, 21. The question is therefore “not whether the [contract] is void ... [t]he question is one of the enforceability of the [contract] by [Diehm] in light of the intent underlying the regulation at issue.” *Id.*, ¶20. Diehm does not develop an argument regarding the guiding question in determining whether the contract is unenforceable as a result of EA Restoration’s breach of the home improvement code. Accordingly, we do not further address this argument. See *State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (an appellate court may decline to address issues that are inadequately briefed).

B. Doubling Damages for Breach of the Home Improvement Code

¶14 Diehm contends that the circuit court erred in failing to double the \$8,000 in damages he was awarded pursuant to WIS. STAT. § 100.20(5) as a result of EA Restoration’s failure to comply with the home improvement code. We agree.

¹ All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

¶15 WISCONSIN STAT. § 100.20(5), provides that a person who suffers a pecuniary loss from a result of unfair trade practices that violate the administrative regulations “shall recover twice the amount of such pecuniary loss, together with costs, including a reasonable attorney’s fee.”² (Emphasis added.) In *Shands v. Castrovinci*, 115 Wis. 2d 352, 357, 340 N.W.2d 506 (1983), the supreme court held that the word “shall” in § 100.20(5) indicates that an award of attorney fees under that statute is mandatory. We conclude that the use of the word “shall” indicates that an award of double damages under § 100.20(5) is likewise mandatory. Accordingly, we conclude that the circuit court erred in failing to double the damages awarded to Diehm for EA Restoration’s breach of the home improvement code.

C. EA Restoration’s Entitlement to Attorney Fees and Interest

¶16 Diehm contends that EA Restoration is not entitled to an award of the full amount of attorney fees that it requested after trial.

¶17 Following the verdict, EA Restoration moved the circuit court for attorney fees and costs pursuant to a provision of the contract, which provided: “in the event it becomes necessary for the contractor to turn this matter over to its

² WISCONSIN ADMIN. CODE. ch. ATCP 110, which is entitled “Home Improvement Practices,” was adopted under the authority of WIS. STAT. § 100.20, the fair trade practices statute. The introduction to ch. ATCP 110 states that the chapter was “adopted under authority of [WIS. STAT. §] 100.20(2)” and that “[a] person who suffers a monetary loss because of a violation of this chapter may sue the violator directly under [WIS. STAT. §] 100.20(5).” Section 100.20(5) provides: “Any person suffering pecuniary loss because of a violation by any other person of any order issued under this section may sue for damages therefor in any court of competent jurisdiction and shall recover twice the amount of such pecuniary loss, together with costs, including a reasonable attorney’s fee.” WIS. ADMIN. CODE § ATCP 110.02 has been interpreted as creating an “order” that was “issued” under § 100.20. *Stuart v. Weisflog’s Showroom Gallery, Inc.*, 2008 WI 22, ¶86, 308 Wis. 2d 103, 746 N.W.2d 762.

attorneys for collection, owners agree to pay attorneys' fees and court costs as incurred for such collection."

¶18 Diehm argues EA Restoration is prohibited from collecting attorney fees for anything "not expressly 'incurred for such collection'" because the provision in the contract regarding attorney fees is ambiguous as to whether fees incurred in defending against his claim that EA Restoration violated the home improvement code is "the same as fees 'incurred for such collection.'" Assuming, without deciding, that Diehm's reading of this part of the contract is correct, a division of attorney fees would require factual findings by the circuit court. However, the record does not contain a transcript of the court's hearing on the parties' postverdict motions. It is the appellant's obligation to provide all of the record that we need to consider the issues raised. In the absence of the necessary record, we assume that the missing transcript supports the circuit court's ruling. See *Fiumefreddo v. McLean*, 174 Wis. 2d 10, 26-27, 496 N.W.2d 226 (Ct. App. 1993). We therefore assume the transcript would show that the court properly awarded attorney fees to EA Restoration.

¶19 Diehm also argues that EA Restoration's award of attorney fees should have been reduced pro rata by the percentage its recovery was reduced. Diehm relies on *Borchardt v. Wilk*, 156 Wis. 2d 420, 428, 456 N.W.2d 653 (Ct. App. 1990), wherein this court stated that where an agreement between two parties on attorney's fees recovery is ambiguous, the "better reasoned rule" is that:

where reasonable attorney's fees or some designated percentage is provided for in the note, and the plaintiff recovers on the note and the defendant recovers on the counterclaim, the amount recoverable for attorney's fees is reduced in proportion to the amount recovered on the note less the amount recovered on the counterclaim.

¶20 Diehm argues that because the provision regarding attorney fees is ambiguous and because EA Restoration sought a judgment in the amount of \$34,339.14, but was only awarded damages in the amount of \$24,339.14, EA Restoration should only have been awarded 70% of the attorney fees it requested. We reject this argument. EA Restoration was not awarded damages in the amount of \$24,339.14 as Diehm claims. The jury awarded EA Restoration damages in the amount of \$34,000. The fact that the court ultimately offset the amount Diehm owes EA Restoration by the amount of damages awarded to Diehm for ease of collection does not change the fact that the jury awarded EA Restoration nearly the full amount of damages sought.³

D. Payment of Fees

¶21 Diehm contends that the circuit court erred in offsetting the attorney fees awarded to him against the attorney fees awarded to EA Restoration. Diehm argues that, although the court may offset damages awarded for a violation of the home improvement code, attorney fees awarded for such a violation are payable to the attorney and may not be offset. Diehm relies on *Shands*, 115 Wis. 2d 352, arguing that in that case, the supreme court held that attorney fees awarded under WIS. STAT. § 100.20(5) belong to the attorney, not the client. Diehm misinterprets the court's holding in *Shands*.

¶22 In *Shands*, the supreme court addressed whether Legal Action of Wisconsin, Inc., a public interest legal services organization that provided free legal representation to Shands during the action, was entitled to recover attorney

³ Diehm concedes as much, noting that the \$23,339.14 is the “amount [of] the jury’s award to EA [Restoration] after offset by \$10,000.”

fees under WIS. STAT. § 100.20(5). *Id.* at 360. The court held that even when a plaintiff is represented at no charge by a legal services organization, such as LAW, the plaintiff is entitled to an attorney fee award under § 100.20(5); however, in those situations, the attorney fee award is the property of the organization providing the free legal services. *Id.* at 361. The court reasoned:

By bringing actions on behalf of indigent clients, LAW advances the objectives of [WIS. STAT. § 100.20(5)] by litigating individual claims, by enforcing the more general public policy objective of protecting tenants' rights, and by encouraging landlords to comply with their statutory duties. In advancing these objectives, LAW is no different from the private attorney litigating like claims. Similarly, LAW has finite financial resources and, like the private bar, cannot absorb the costs of litigation itself without limiting the number of cases it can pursue. We agree with the following analysis:

... When free legal services are provided there may be no direct barrier to the courtroom door, but if no fees are awarded, the burden of the costs is placed on the organization providing the services, and it correspondingly may decline to bring such suits and decide to concentrate its limited resources elsewhere, thereby curtailing the forceful application of the [statute].... Thus, the denial of fees in this situation indirectly cripples the enforcement scheme designed by [the legislature].

Id. at 360-61 (citation omitted).

¶23 The court in *Shands* did not hold that attorney fees awarded under WIS. STAT. § 100.20(5) *always* belong to the attorney, not the client, as Diehm asserts. Rather, the court held that in situations where an indigent client is represented without cost by a legal services entity, attorney fees are still recoverable under § 100.20(5), but belong to the entity providing the free legal services.

¶24 We read Diehm’s brief as also arguing that the court’s holding in *Shands* should be extended to situations in which a plaintiff has hired a private attorney at the plaintiff’s own expense. Diehm asserts that “[t]here is simply no justification for allowing a pro bono legal services organization to get paid but not requiring that a private attorney get paid” because “such a rule would serve as a disincentive for litigants to hire private attorneys.” We disagree.

¶25 Entities such as LAW provide legal services, free of charge, to individuals who do not have the financial resources to hire an attorney and who, without the services of such an organization, would be severely if not completely limited in their ability to pursue legal relief. That is not the case for individuals such as Diehm, who are not indigent and have the financial means to hire an attorney of their own choosing to represent them. Furthermore, awarding attorney fees to the client and not the attorney does not, as Diehm suggests, mean the client is not required to pay his or her attorney if their contract so provides. In this case, Diehm remains obligated to pay his attorney for the legal services rendered, if they so contracted, regardless of the fact that the attorney fees Diehm was awarded was set off against the attorney fees awarded to EA Restoration.

CONCLUSION

¶26 For the reasons discussed above, we affirm in part and reverse in part.

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

Not recommended for publication in the official reports.

