COURT OF APPEALS DECISION DATED AND RELEASED

November 12, 1996

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.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-2486

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

Harris, Luck, Rubin, et al.,
d/b/a the Madison Parkview Company,

Plaintiff-Appellant,

v.

Lynelle S. Turenske,
n/k/a Lynelle S. Calewarts, and
Reneene Leiner,

Defendants-Respondents.

APPEAL from an order of the circuit court for Milwaukee County: JACQUELINE D. SCHELLINGER, Judge. *Affirmed and cause remanded with directions*.

Before Wedemeyer, P.J., Fine and Schudson, JJ.

WEDEMEYER, P.J. Harris, Luck, Rubin, et al., d/b/a Madison Parkview Company (Parkview), appeals from the trial court's order of summary judgment granted in favor of tenants Lynelle Turenske and Reneene

Leiner (collectively, "Turenske"). Parkview claims the trial court: (1) erroneously granted Turenske's motion for summary judgment; (2) erroneously found the rental agreement void as a matter of law; and (3) erroneously exercised its discretion by awarding excessive attorney's fees to Turenske. Because summary judgment for Turenske was proper, because the trial court did not erroneously rule that the rental agreement was void as a matter of law, and because the trial court did not erroneously exercise its discretion in awarding attorney's fees, we affirm.

I. BACKGROUND

In June 1993, Parkview accepted a personal check from Turenske in the amount of $175 as one-half of a $350 security deposit toward the rental of an apartment. Parkview did not provide the tenants with a copy of the written rental agreement or any rules and regulations regarding the tenancy at that time. The rent for the apartment was $660 per month and the term of the rental agreement was one year, commencing on August 1, 1993.

Turenske moved in on August 1, and notified the landlord that one of the bedroom windows was broken. Two attempts were made by the landlord's handyman to repair the window without success. On August 25, 1993, the apartment was broken into and burglarized. The burglars had entered the apartment through the broken window.

As a result of this incident, Turenske gave notice that they were vacating and did so on or about September 1, 1993. The $350 security deposit was not returned. Parkview brought this action against Turenske in small claims court, demanding damages for the alleged breach of the year lease. Turenske filed a counterclaim against Parkview, claiming that the rental agreement was void because it violated WIS. ADM. CODE Chapter ATCP 134 (April 1993).

A small claims hearing was held before a Milwaukee County Court Commissioner on November 28, 1994. The commissioner ruled in favor of Parkview. Turenske filed a demand for trial before the circuit court. The case was scheduled for an August 3, 1995, trial before the circuit court. Prior to trial,

both parties filed motions for summary judgment. The trial court ruled that the rental agreement was void as a matter of law and granted Turenske's motion for summary judgment. The trial court awarded double damages and reasonable attorney's fees to Turenske, and one month's rent to Parkview. Parkview filed a motion for reconsideration. The trial court denied the motion. Judgment was entered and Parkview now appeals.

II. DISCUSSION

Parkview claims it is entitled to summary judgment because Turenske breached the lease without justification. Turenske argues that the lease with Parkview was void and unenforceable. Neither party claims there are any unresolved issues of material fact. The methodology for reviewing summary judgment grants is well established and need not be repeated here. *See* ***Grams v. Boss***, 97 Wis.2d 332, 338-39, 294 N.W.2d 473, 476-77 (1980). Our review is *de novo.* ***Voss v. City of Middleton***, 162 Wis.2d 737, 748, 470 N.W.2d 625, 629 (1991).

A. Turenske's Summary Judgment Claim.

We turn first to Turenske's claim for summary judgment. Our initial task is to determine whether the lease between Parkview and Turenske was valid and enforceable. Our review is *de novo* because this issue involves construction of WIS. ADM. CODE Chapter ATCP 134 and § 100.20, STATS. ***Three & One Co. v. Geilfuss***, 178 Wis.2d 400, 413, 504 N.W.2d 393, 398 (Ct. App. 1993). Our construction of both addresses a question of law. ***Huff & Morse, Inc. v. Riordon***, 118 Wis.2d 1, 4, 345 N.W.2d 504, 506 (Ct. App. 1984) (citations omitted).

It is undisputed that Parkview required Turenske to pay $175 at the time she applied for tenancy. It is also undisputed that Parkview failed to provide Turenske with a copy of the rental agreement and/or the rules and regulations for Parkview's tenants at the time Parkview accepted the $175. This is a clear violation of § ATCP 134.03(1) of the Wisconsin Administrative Code, which states:

> **(1)** COPIES OF RENTAL AGREEMENTS, RULES. Rental agreements and rules and regulations established by the landlord, if in writing, shall be furnished to prospective tenants for their inspection before a rental agreement is entered into, and before any earnest money or security deposit is accepted from the prospective tenant.

Parkview attempts to characterize the $175 as an "application fee" or earnest money, and argues that it was not a security deposit subject to § ATCP 134.03(1). In support of this argument, Parkview cites the definition of earnest money provided in Black's Law Dictionary. Earnest money, however, is specifically defined in § ATCP 134.02(3). It is: "the total of any payments or deposits, however denominated or described, given by a prospective tenant to a landlord in return for the option of entering into a rental agreement in the future, or for having a rental application considered by the landlord."

This code definition is clear on its face and we will not look outside the language of the code provision in applying it. ***Wisconsin Elec. Power Co. v. Public Service Comm'n***, 110 Wis.2d 530, 534, 329 N.W.2d 178, 181 (1983). Based on this definition, the $175 accepted by Parkview constitutes earnest money and according to § ATCP 134.03(1), Parkview should have provided the tenants with the rental agreement for inspection prior to accepting the check. By failing to do so, Parkview clearly violated § ATCP 134.03(1).

The issue we must address is what effect a violation of this administrative code section has. Although there is no case law directly on point, there are several cases that have addressed the effect of other violations of the Agriculture Trade and Consumer Protection Code provisions of the Wisconsin Administrative Code. In ***Perma-Stone Corp. v. Merkel***, 255 Wis. 565, 39 N.W.2d 730 (1949), our supreme court held that a violation of an administrative code section relating to home improvement work on a consumer's residence rendered the agreement between the consumer and contractor void. ***Id.*** at 570-71, 39 N.W.2d at 733.

Perma-Stone held that a contract entered into in violation of an administrative code provision, which was issued pursuant to § 100.20, STATS.,

renders the contract void because it violates the statute prohibiting deceptive trade practices. Section 100.20(2), STATS., provides in pertinent part: "The department ... may issue general orders forbidding methods of competition in business or trade practices in business which are determined by the department to be unfair." Contracts entered into in violation of a statute are void and unenforceable as a matter of law. ***Id.*** at 570-71, 39 N.W.2d at 733.

A similar result was reached in ***Huff & Morse, Inc.***, 118 Wis.2d 1, 345 N.W.2d 504 (Ct. App. 1984), with respect to an auto repair shop that failed to provide the customer with a written estimate at the time of the first face-to-face meeting, in violation of an administrative rule requiring it to do so. ***Id.*** at 10, 345 N.W.2d at 508. The ***Huff & Morse, Inc.*** court held that the effect of the violation was that the contract at issue must be rendered invalid and unenforceable. ***Id.*** at 8, 345 N.W.2d at 508.

The code section which is the subject of this appeal, Chapter ATCP 134 was also adopted pursuant to § 100.20, STATS. *See* Chapter ATCP 134, note. We conclude that a violation of § ATCP 134.03(1) has the same effect as the violations in ***Perma-Stone*** and ***Huff & Morse, Inc.*** Because Parkview violated the code provision, the rental agreement violates § 100.20, and constitutes an unfair trade practice. As a result, the rental agreement between Parkview and Turenske is void as a matter of law and will not be enforced by the court. ***Perma-Stone***, 255 Wis. at 570-71, 39 N.W.2d at 733. Absent a valid rental agreement, Turenske prevails as a matter of law and the trial court was correct to grant summary judgment in favor of Turenske.[1]

B. Turenske's Counterclaims.

The trial court found that Parkview illegally retained Turenske's $350 security deposit in violation of § ATCP 134.06. The trial court further ruled

[1] Because the rental agreement was void, Parkview cannot enforce any of the lease provisions. As a result, the tenancy was construed to be a month-to-month rental and, because Turenske failed to give 28 days notice of her intent to vacate, Parkview was entitled to one month's rent. The trial court properly awarded one month's rent to Parkview. This determination was not appealed.

that § ATCP 134.06, and § 100.20(5), STATS., required Parkview to pay Turenske an award of twice the pecuniary loss, plus reasonable attorney's fees. We agree.

Section 100.20(5), STATS., provides in pertinent part: "Any person suffering pecuniary loss because of a violation by any other person of any order issued under this section may sue for damage therefor ... and shall recover twice the amount of such pecuniary loss, together with costs, including a reasonable attorney's fee."

Parkview's claim to Turenske's security deposit clearly violates § ATCP 134.06(3) and (4). Section 134.06(3) provides in pertinent part:

> **(3)** LIMITATIONS ON SECURITY DEPOSIT WITHHOLDING. (a) Except for other reasons clearly agreed upon in writing at the time the rental agreement is entered into ... security deposits may be withheld only for tenant damage, waste or neglect of the premises, or the nonpayment of:
>
> 1. Rent for which the tenant is legally responsible, subject to s. 704.29, Stats.
>
> ....
>
> (b) Nothing in this subsection shall be construed as authorizing any withholding for ... other damages or losses for which the tenant is not otherwise responsible under applicable law.

Section 704.29, STATS., provides in pertinent part:

> **(1)** SCOPE OF SECTION. If a tenant unjustifiably removes from the premises prior to the effective date for termination of the tenant's tenancy and defaults on payment of rent ... the landlord can recover rent and damages except amounts which the landlord

> could mitigate .... [T]his section applies to the liability of a tenant under a lease, a periodic tenant, or an assignee of either.

We have already determined that the rental agreement was void and unenforceable. Accordingly, any provisions in the rental agreement providing Parkview with the right to retain the security deposit "for other reasons clearly agreed upon in writing," are irrelevant. The fact that Parkview withheld the security deposit based on the belief that it had a valid claim for unpaid/lost rent does not absolve Parkview's error. ***Armour v. Klecker***, 169 Wis.2d 692, 699-700, 486 N.W.2d 563, 566 (Ct. App. 1992). Parkview's recourse was to return the security deposit and sue Turenske to recover this rent in a separate action under § 704.29, STATS. ***Id.*** at 701, 486 N.W.2d at 566. Parkview, however, was not free to retain Turenske's security deposit. Parkview's decision to reject the proper procedure and withhold Turenske's security deposit violated § ATCP 134.06(3).

Parkview also violated § ATCP 134.06(4), which provides in pertinent part:

> **(4)** SECURITY DEPOSIT WITHHOLDING; STATEMENT OF CLAIMS. (a) If any portion of a security deposit is withheld by a landlord, the landlord shall, within [21 days] ... deliver or mail to the tenant a written statement accounting for all amounts withheld. The statement shall describe each item of physical damages or other claim made against the security deposit, and the amount withheld as reasonable compensation for each item or claim.

Parkview provided the required statement of accounting to Turenske and offered the following reasons for withholding the security deposit: (1) lost rent; (2) late rent charges; (3) advertising costs; (4) rental commissions; and (4) credit reports. As stated above, Parkview was not free to retain the security deposit in lieu of lost rent. We do not believe any of the other reasons Parkview offers in its Statement of Claims are sufficient to withhold the

security deposit within the meaning of § ATCP 134.06(3) or (4).[2] Accordingly, we affirm the trial court's determination that Turenske is entitled to recover double her pecuniary loss, plus reasonable attorney's fees as mandated by § 100.20(5), STATS.

C. Reasonable Attorney's Fees.

Parkview does not dispute the award of attorney's fees in this case. Instead, it maintains the attorney's fees awarded by the trial court were excessive. Turenske submitted documentation of 46.30 hours of service at $125/hour, plus costs. The trial court awarded $5,821.90. We reject Parkview's argument that this award was excessive and affirm the determination of the trial court. In addition, we direct the trial court to address and award additional attorney's fees to Turenske for the defense of this appeal.

The trial court awarded attorney's fees to Turenske based on the facts presented. The general rule in Wisconsin is that a trial court's findings of fact will not be disturbed on appeal unless they are clearly erroneous. ***Three & One Co.***, 178 Wis.2d at 415, 504 N.W.2d at 399. An exception to this rule exists with respect to determination of the value of legal services. ***Id.*** The proper factors to be considered by courts when determining reasonable attorney's fees include: the amount and character of the services rendered; the character and importance of the litigation; the amount of money or value of the property affected; the professional skill and experience called for; the standing of the attorney in the profession; the general ability of the client to pay; and, the pecuniary benefit derived from the services. ***Id.***

We are satisfied that the trial court addressed these factors when it considered Turenske's request for attorney's fees. The trial court examined the itemized billings offered by counsel for Turenske, and determined they were reasonably related to the work required. The court concluded:

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[2] Parkview also claimed it was withholding money attributable to damages for: carpet cleaning, a burned out oven bulb, one hour of painting and a gallon of paint. The trial court found that these items constituted normal wear and tear items and could not be reasonably withheld from the security deposit. We agree.

> THE COURT: The court does award $125.00 [per hour] ... and further, court does find that there was significant research done in this case.
>
> There was obviously a tremendous amount of work that was put into relating the facts of this case to the Administrative Code and Wisconsin Statutes.
>
> As I look over the various itemized billings in this case, they appear to be necessary and reasonably related to the matter before the court.

While the trial court did not engage in a process of "checking off" each item listed in ***Three & One Co.***, we are satisfied that the trial court looked to and considered the facts of the case and reached a conclusion a reasonable judge could reach consistent with the case law. Accordingly, we affirm the trial court's award of attorney's fees in the trial court. *See* ***Steinbach v. Gustafson***, 177 Wis.2d 178, 185-86, 502 N.W.2d 156, 159 (Ct. App. 1993) (discretionary determination by the trial court will not be reversed if the record shows discretion was exercised and the appellate court can perceive a reasonable basis for the trial court's decision). We further conclude that all of Turenske's costs and attorney's fees, including those incurred on appeal, should be assessed against Parkview. *See* ***Shands v. Castrovinci***, 115 Wis.2d 352, 359, 340 N.W.2d 506, 509 (1983) ("To permit recovery of attorney's fees for successful appellate work is simply to recognize that an attorney's effort at that stage is essential to the tenant's success as is an attorney's work at the trial court level."). We therefore direct the trial court to address and award additional attorney's fees and costs for the defense of this appeal.

III. CONCLUSION

We conclude that Turenske was entitled to an award of summary judgment because the rental agreement with Parkview was void and unenforceable as a matter of law. We also conclude that the trial court properly awarded double damages for Parkview's improper withholding of Turenske's security deposit. We further conclude that the trial court did not erroneously exercise its discretion in awarding attorney's fees, and that additional attorney's fees are warranted for costs incurred defending the appeal.

By the Court.—Order affirmed and cause remanded with directions.

Recommended for publication in the official reports.