

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 9, 2010

David R. Schanker
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. 2009AP676

Cir. Ct. No. 2007SC437

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

AUTO CASH TITLE LOANS OF WISCONSIN, INC.,

PLAINTIFF-RESPONDENT,

V.

PAUL WEBSTER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for St. Croix County:
ERIC J. LUNDELL, Judge. *Reversed and cause remanded with directions.*

¶1 HOOVER, P.J.¹ Paul Webster appeals an order denying his motion for costs and attorney fees for violations of the Wisconsin Consumer Act.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

Webster argues that violations of the consumer act's procedural requirements may entitle a prevailing party to recover costs and attorney fees, and that his motion was timely filed. We agree and reverse and remand for the circuit court to determine and award costs and attorney fees.²

BACKGROUND

¶2 Auto Cash Title Loans of Wisconsin, Inc. obtained a small claims default judgment of replevin for possession of Webster's truck and approximately \$260 in costs. Webster later moved to reopen and dismiss the case, alleging violations of the consumer act.³ The circuit court determined Auto Cash violated WIS. STAT. § 425.109(1)(h) because it had failed to file a copy of the writings evidencing the credit transaction. In a written decision and order signed September 2, 2008, the court granted the motion to reopen, vacated the default judgment, and dismissed the complaint without prejudice.⁴

¶3 On November 20, 2008, Webster moved for costs and attorney fees under WIS. STAT. § 425.308. Auto Cash argued the motion should be denied because it was not filed within thirty days of the entry of judgment, citing WIS. STAT. § 806.06(4). It further argued costs and attorney fees were not awardable

² Arguing Webster's appeal was frivolous, Auto Cash moved for an award of costs and attorney fees pursuant to WIS. STAT. RULE 809.25(3). The appeal is not frivolous, and we therefore deny the motion.

³ Webster's motion was also based on assertions that no complaint had been filed and that, contrary to WIS. STAT. §§ 801.10(4)(b) and 801.11, accompanying the affidavit of publication there was no affidavit stating the summons and complaint had been mailed to Webster's last known address. The record on appeal contains no complaint—only a summons.

⁴ WISCONSIN STAT. § 425.109(3) provides, "A judgment may not be entered upon a complaint which fails to comply with this section."

when a party prevails because of mere procedural violations of the consumer act, citing *Rsidue, LLC v. Michaud*, 2006 WI App 164, 295 Wis. 2d 585, 721 N.W.2d 718.

¶4 The circuit court agreed with Auto Cash’s arguments and denied Webster’s motion in a written decision and order.⁵ In doing so, the court applied WIS. STAT. § 806.06(4) because it concluded “[WIS. STAT. ch.] 799 does not provide a time period for a litigant to request costs and fees,” and WIS. STAT. § 799.04(1) provides that the rules of civil procedure apply unless ch. 799 expressly provides differently. Webster appeals the order denying costs and attorney fees.

DISCUSSION

¶5 We first address whether, assuming a timely motion, Auto Cash’s violation of the consumer act’s procedural requirements would entitle Webster to recover costs and attorney fees. WISCONSIN STAT. § 425.308(1), provides:

If the customer prevails in an action arising from a consumer transaction, the customer shall recover the aggregate amount of costs and expenses determined by the court to have been reasonably incurred on the customer’s behalf in connection with the prosecution or defense of such action, together with a reasonable amount for attorney fees.

A customer is said to prevail for purposes of § 425.308(1) “if he or she achieves some significant benefit in litigation involving the creditor’s violation of the

⁵ The circuit court also emphasized, as argued by Auto Cash, it was unfair to entertain the motion for attorney fees because it was filed after Auto Cash’s time for appeal had expired. Auto Cash does not rely on this reasoning on appeal. In any event, for the reasons set forth infra, Auto Cash’s time for appeal had, in fact, not expired because the time for appeal was ninety days.

[consumer act].” *Community Credit Plan, Inc. v. Johnson*, 221 Wis. 2d 766, 773-74, 586 N.W.2d 77 (Ct. App. 1998), *aff’d*, 228 Wis. 2d 30, 35, 37, 596 N.W.2d 799 (1999) (“adopt[ing] the reasoning and decision of the majority of the court of appeals”).

¶6 Like here, the customers in *Community Credit* had small claims default judgments of replevin entered against them. *Id.* at 770. The judgments were ultimately dismissed without prejudice due to violations of the consumer act’s venue provisions. *Id.* at 770-71. We concluded the customers “achieve[d] a significant benefit in the litigation at the trial court level” and were, therefore, prevailing parties. *Id.* at 774. Because the dismissals resulted from a violation of the consumer act, the customers were entitled to their costs and attorney fees. *Id.* at 775, 777.

¶7 We reject Auto Cash’s argument that *Rsidue* precludes an award of costs and attorney fees where a customer prevails due to a procedural violation of the consumer act. *Rsidue* did not involve any issue of costs and attorney fees under WIS. STAT. § 425.308(1). Rather, we held the consumer act’s pleading requirements did not apply to *Rsidue* because it did not come within the act’s definition of a creditor. *Rsidue*, 295 Wis. 2d 585, ¶14.

¶8 The customer there argued it nonetheless was entitled to the act’s protections because, as an assignee of a creditor, *Rsidue* was “‘subject to all *claims and defenses* of the customer against the assignor arising out of the transaction.’ [WIS. STAT. §] 422.407(1).” *Id.*, ¶18 (emphasis added). We rejected that argument, concluding the act’s procedural pleading requirements created neither claims nor defenses, which involve “substantive legal principles.” *Id.*, ¶19. We reasoned this was so because failure to comply with the pleading requirements

might be remedied by amending the complaint or refile the action. *Id.* Conversely, we stated, “When a defendant prevails on a ‘claim’ or ‘defense,’ the defendant becomes entitled to a judgment on the merits in the defendant’s favor, or, at a minimum, to the entry of a smaller judgment in the creditor’s favor than what was sought.” *Id.*

¶9 However, our reasoning in *Rsidue*, that any benefit from dismissal was merely temporary, had been long-since rejected in the context of costs and attorneys fees issues under WIS. STAT. § 425.308(1). See *Community Credit*, 221 Wis. 2d at 774, 777-78 (majority, and Curley, J., dissenting), *aff’d*, 228 Wis. 2d 30, 35-37. Thus, the portion of the *Rsidue* holding Auto Cash relies upon is quite limited. Because it pertained only to the interpretation and application of the “claims and defenses” language of WIS. STAT. § 422.407(1), the holding has no application here.⁶ Subsection 425.308(1) refers to neither claims nor defenses.⁷

⁶ Our conclusion that *Rsidue*’s holding is narrowly limited does not run afoul of the rule prohibiting us from overruling our prior decisions. See *Rsidue, LLC v. Michaud*, 2006 WI App 164, 295 Wis. 2d 585, 721 N.W.2d 718; *Cook v. Cook*, 208 Wis. 2d 166, 190, 560 N.W.2d 246 (1997). Indeed, *Cook* compels our conclusion. If we were to interpret *Rsidue* as applicable to the costs and attorney fees context under WIS. STAT. § 425.308(1), then we would have to disregard *Rsidue* as contrary to the prior decisions by both this court and our supreme court in *Community Credit Plan, Inc. v. Johnson*, 221 Wis. 2d 766, 774, 777-78, 586 N.W.2d 77 (Ct. App. 1998) (majority, and Curley, J., dissenting), *aff’d*, 228 Wis. 2d 30, 35-37, 596 N.W.2d 799 (1999). See *Cuene v. Hilliard*, 2008 WI App 85, ¶15, 312 Wis. 2d 506, 754 N.W.2d 509 (To the extent a court of appeals holding conflicts with an earlier supreme court holding, we follow the supreme court’s pronouncement.).

⁷ Webster further argues our holding in *Rsidue* was dicta, and erroneous because it does not account for WIS. STAT. § 425.302, which provides for recovery of twenty-five dollars plus “actual damages, including any incidental and consequential damages, sustained by the customer by reason of the violation” for “all violations for which no other remedy is specifically provided.” We need not address this issue. See *Mercado v. GE Money Bank*, 2009 WI App 73, ¶2 n.2, 318 Wis. 2d 216, 768 N.W.2d 53 (declining to address, as nondispositive, whether pleading deficiencies under WIS. STAT. § 425.109(1)(h) could form the basis of substantive claims).

¶10 Additionally, as Webster aptly argues, the benefit may or may not be merely temporary, depending on the facts in any given case. For any number of reasons, a creditor might simply decide not to, or no longer be able to, proceed with a new case. Or, quite possibly, the creditor or subsequent assignees may be unable to locate a copy of the parties' credit contract. In that case, a customer will have a complete defense in the WIS. STAT. § 425.109(1)(h) pleading requirement. Regardless, as we determined in *Community Credit*, which was adopted by our supreme court, the dismissal of a case without prejudice constitutes a "significant benefit in the litigation" entitling a customer to costs and attorney fees. *Community Credit*, 221 Wis. 2d at 773-74. The focus of the test is not on how the consumer act was violated, but on whether the customer obtained a significant benefit because of a violation. *See id.*⁸

¶11 Auto Cash seeks to distinguish *Community Credit* on the basis of our supreme court's observation on review that the holding was supported by "one of the purposes behind the [consumer act], which is to 'protect customers against unfair, deceptive, false, misleading and unconscionable practices by merchants.' WIS. STAT. § 421.102(2)(b)." *Community Credit*, 228 Wis. 2d at 36. First, that observation was not part of the direct analysis, but was made in response to the court of appeals' dissenting opinion, which had placed the blame on the circuit

⁸ Auto Cash further attempts to distinguish *Community Credit Plan, Inc. v. Johnson*, 221 Wis. 2d 766, 586 N.W.2d 77 (Ct. App. 1998), *aff'd*, 228 Wis. 2d 30, 596 N.W.2d 799 (1999), arguing: "Venue violations have long been treated as a substantive violation of the Consumer Act. *See Kett v. Community Credit Plan*, 222 Wis. 2d 117, 586 N.W.2d 68 (Ct. App. 1988)." Contrary to Auto Cash's foregoing citation, however, *Kett* was not decided in 1988. Rather, it was decided a decade later on September 23, 1998—shortly *after* we decided *Community Credit Plan, Inc. v. Johnson*. *Kett v. Community Credit Plan, Inc.*, 222 Wis. 2d 117, 586 N.W.2d 68 (Ct. App. 1998), *aff'd*, 228 Wis. 2d 1, 596 N.W.2d 786 (1999). Our supreme court then decided the two cases on the same day.

court for granting the default judgment, rather than on the creditor for filing in an improper venue. *See id.* The same rejected argument could be made here because, like there, the relevant statute indicates the circuit court should not have entered judgment in the absence of the credit contract. *See* WIS. STAT. § 425.109(3). Thus, in this respect the cases are comparable, rather than distinguishable. Moreover, our holding serves the same underlying purpose of protecting consumers from unscrupulous practices. For instance, WIS. STAT. § 425.109(1)(h) prevents a creditor or assignee who has misplaced, or would misrepresent the terms of, the credit contract from filing an action in the hope of obtaining a default judgment due to the customer's failure to appear.

¶12 Having concluded Webster would be entitled to his costs and attorney fees for Auto Cash's violation of the consumer act, we now address whether his motion was time-barred by WIS. STAT. § 806.06(4). We conclude it was not.

¶13 We first observe that the general rules of civil procedure apply to small claims proceedings unless WIS. STAT. ch. 799 provides otherwise. WIS. STAT. §§ 799.04(1), 801.01(2); *Mock v. Czemierys*, 113 Wis. 2d 207, 210, 336 N.W.2d 188 (Ct. App. 1983). Next, we set forth a number of pertinent definitions concerning judgments. A judgment is:

rendered by the court when it is signed by the judge or by the clerk at the judge's written direction[;]

entered when it is filed in the office of the clerk of court[; and]

perfected by the taxation of costs and the insertion of the amount thereof in the judgment.

WIS. STAT. § 806.06(1)(a)-(c) (emphasis added).⁹ Further, § 806.06(3) indicates that “after an order or judgment is entered, either party may serve upon the other a written notice of entry containing the date of entry.” Finally, we get to the provision that is the focus of our review:

A judgment may be rendered and entered at the instance of any party either before or after perfection. If the party in whose favor the judgment is rendered causes it to be entered, the party shall perfect the judgment within 30 days of entry or forfeit the right to recover costs. If the party against whom the judgment is rendered causes it to be entered, the party in whose favor the judgment is rendered shall perfect it within 30 days of service of notice of entry of judgment or forfeit the right to recover costs.

WIS. STAT. § 806.06(4). It is on this subsection that the circuit court relied to deny as untimely Webster’s request for costs and attorney fees.

¶14 The foregoing provisions, however, where conflicting, must give way to the direction of WIS. STAT. §§ 799.24 and 799.25. Subsection 799.24(1) requires that:

When a judgment or an order is rendered, the judge ... or clerk of court shall immediately enter it in the court record and note the date thereof which shall be the date of entry of judgment or order. The clerk of circuit court ... shall mail a notice of entry of judgment to the parties ... within 5 days of its entry.

Importantly, § 799.25 then provides: “The clerk shall without notice to the parties tax and insert in the judgment as costs in favor of the party recovering judgment the following: ...” The statute then lists various statutory fees and costs,

⁹ Similarly, WIS. STAT. § 807.11 provides that an *order* is rendered when it is signed by the judge, and is entered when it is filed in the office of the clerk of court.

concluding with: “(13) ADDITIONAL COSTS AND DISBURSEMENTS. The court may permit additional costs and disbursements to be taxed pursuant to ch. 814.”

¶15 The interpretation and application of statutes to undisputed facts presents questions of law subject to our independent review. See *WIREDATA, Inc. v. Village of Sussex*, 2008 WI 69, ¶45, 310 Wis. 2d 397, 751 N.W.2d 736. The circuit court in this case concluded the application of WIS. STAT. § 806.06(4) rendered Webster’s costs and attorney fees motion untimely because it was not filed within thirty days of the entry of judgment. The court did not, however, address which party caused the judgment to be entered. The § 806.06(4) deadline only runs from the entry of judgment if “the party in whose favor the judgment is rendered causes it to be entered.”

¶16 There is no dispute that the judgment¹⁰ of dismissal was entered in Webster’s favor. But, pursuant to small claims procedure, the judgment is entered immediately by the court or its clerk when it is rendered. See WIS. STAT. § 799.24. Thus, neither party in a small claims action will be the one who “causes it to be entered.”¹¹ WIS. STAT. § 806.06(4). Reading the statutes in harmony, if

¹⁰ Webster argues WIS. STAT. § 806.06(4) is inapplicable because the decision and order dismissing the case was, by name, not a judgment. We reject this argument. WISCONSIN STAT. § 806.01(a) provides the following definition: “A judgment is the determination of the action. It may be final or interlocutory.” The circuit court’s order dismissing the action satisfies this definition.

¹¹ Auto Cash argues the party who filed the motion or took other action that precipitated the court’s ultimate judgment is the party who caused the judgment to be entered under WIS. STAT. § 806.06(4). Accordingly, Auto Cash asserts Webster caused entry because he moved for dismissal. We reject this interpretation as contrary to the plain language of the statute, particularly, the definition of “entered” and the first sentence of subsec. (4), which Auto Cash ignores. Further, the intent of the statute is clear on its face that the thirty-day timeframe for perfection not commence until the prevailing party is aware the judgment has been entered.

§ 806.06(4) applies in a small claims case, then its thirty-day timeline should not commence until service of notice of entry of judgment on the prevailing party.

¶17 This leads to another issue. As we observed in *Mock*, 113 Wis. 2d at 209, “Small claims procedures differ sharply from those prescribed for large claims with regard to notice of entry of judgments.” While WIS. STAT. § 806.06(3) provides that either party may serve notice of entry of judgment, WIS. STAT. § 799.24(1) requires the clerk of court to serve the notice within five days of entry of judgment. In *Mock*, we concluded the clerk’s service of a notice of entry of judgment with an incorrect date of entry was not effective to reduce the appeal time from ninety days to forty-five days. See WIS. STAT. § 808.04(1); *Mock*, 113 Wis. 2d at 210-11.

¶18 Despite WIS. STAT. § 799.24(1)’s mandate, the clerk of court here never served the parties an entry of judgment following the court’s decision and order dismissing the case. Nor did Auto Cash elect to serve notice on Webster. Thus, it appearing from the record that Webster was not served with any notice of entry of judgment, we are compelled to conclude that WIS. STAT. § 806.06(4) did not bar Webster’s costs and attorney fees motion. Simply put, neither of the statute’s two alternative events necessary to trigger the deadline occurred.

¶19 Finally, we briefly address another interconnected issue, albeit out of order. In our foregoing discussion we assumed WIS. STAT. § 806.06(4) was applicable to attorney fees demanded under the consumer act. Webster argues attorney fees are not subject to § 806.06(4) because that statute refers only to costs. We need not decide this issue, given our conclusion the statute, if applicable, would not bar Webster’s motion as untimely. See *State v. Castillo*, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997) (cases should be decided on the narrowest

possible grounds). Nonetheless, we observe Webster's argument is less than compelling, for the reasons set forth in Auto Cash's response brief.

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

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

