

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 2, 2009

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. 2008AP2945-FT

Cir. Ct. No. 2007SC746

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

ARROW FINANCIAL SERVICES, LLC,

PLAINTIFF-RESPONDENT,

V.

THOMAS D. LUNEMANN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dunn County:
ROD W. SMELTZER, Judge. *Reversed and cause remanded with directions.*

¶1 BRUNNER, J.¹ Thomas Lunemann appeals an order denying his request for attorney fees after a voluntary dismissal of Arrow Financial Services,

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). This is an expedited appeal under WIS. STAT. RULE 809.17. All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

LLC's case against him. Lunemann claims he was entitled to attorney fees under the Wisconsin Consumer Act or, alternatively, that the court erroneously exercised its discretion by failing to adequately explain its basis for denying fees under WIS. STAT. § 805.04(2). We reverse the order and remand for the court to reconsider whether Lunemann should receive attorney fees and costs under § 805.04(2).

BACKGROUND

¶2 On October 4, 2007, Arrow filed this small claims action against Lunemann. Arrow alleged Lunemann was delinquent on a credit card account that Arrow owned. Lunemann filed a motion to dismiss alleging violations of the Wisconsin Consumer Act. *See* WIS. STAT. ch. 425. After Arrow failed to comply with discovery requests, Lunemann filed a motion to compel discovery.

¶3 The parties entered into a stipulation that was reflected in a court order. The order provided that if Arrow did not “make discovery” by a specified date, the case would be voluntarily dismissed without prejudice. The order also required that Arrow pay \$200 to Lunemann for costs related to his motion to compel discovery. Additionally, the order provided that Lunemann would be able to pursue his claim for attorney fees and costs in case of dismissal.

¶4 Pursuant to the order, the court later dismissed Arrow's case without prejudice after Arrow did not meet the discovery deadline. Lunemann then filed a motion for attorney fees and costs, claiming he was entitled to fees and costs as a prevailing party under the Wisconsin Consumer Act and, alternatively, that the court should award fees and costs under WIS. STAT. § 805.04.² Both parties

² As an additional alternative basis, Lunemann sought fees and costs under WIS. STAT. § 814.07. However, he does not assert that statute as a basis for fees and costs on appeal.

submitted briefs and the court heard arguments at a motion hearing. The court subsequently entered an order denying Lunemann's motion. The court's stated basis for its decision was:

This Court previously awarded \$200.00 as costs in favor of the defendant regarding a motion to compel. ... Where this Court has not ruled on the merits and the defendant is not the prevailing party, no further attorney's fees shall be awarded.

DISCUSSION

¶5 Lunemann claims the court should have awarded him attorney fees under WIS. STAT. § 425.308(1) of the Wisconsin Consumer Act because he was the prevailing party as a result of the voluntary dismissal. Section 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 consumer is entitled to attorney fees and costs under § 425.308(1) "if he or she achieves some significant benefit in litigation involving the creditor's violation of the [Wisconsin 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, 596 N.W.2d 799 (1999).

¶6 Lunemann contends Arrow violated the Wisconsin Consumer Act and that the voluntary dismissal rendered him the prevailing party under WIS. STAT. § 425.308(1). Lunemann argues Arrow violated WIS. STAT. § 427.104(1)(j), which states it is a prohibited practice to "[c]laim, or attempt or

threaten to enforce a right with knowledge or reason to know that the right does not exist[.]” Lunemann contends Arrow knew it did not have the ability to produce evidence supporting its claim against Lunemann. He also asserts Arrow violated WIS. STAT. §§ 425.104 and 421.105 by not providing him with a notice of right to cure default before filing suit. Lunemann contends his motion to dismiss was the catalyst for the voluntary dismissal rendering him the prevailing party under *Johnson*.

¶7 In *Johnson*, several debtors moved to reopen default judgments against them and dismiss the cases for improper venue. *Johnson*, 221 Wis. 2d at 770. They each averred facts in affidavits supporting their claims of improper venue. *Id.* The circuit court reopened the judgments. *Id.* However, before any ruling on their motions to dismiss, the creditor obtained a voluntary dismissal. *Id.* at 771. Addressing whether the debtors were entitled to costs and attorney fees under WIS. STAT. § 425.308(1), we concluded the debtors were the prevailing parties because they obtained significant benefits from eliminating the default judgments against them. *Id.* at 774. We also concluded the creditor violated the Wisconsin Consumer Act because, based on the debtors’ affidavits, the creditor filed suit against the debtors in a county where the debtors did not have sufficient connection to provide proper venue. *Id.* at 774-75. Because we concluded the debtors would have prevailed on their motions to dismiss had the motions been addressed, and because the voluntary dismissal achieved the same result the debtors were seeking, we determined the debtors were the prevailing parties. *Id.* at 775. We concluded the debtors’ motions to dismiss were the catalyst for the voluntary dismissal, noting an “obvious link” between the motions and the creditor’s pursuit of the dismissal. *Id.* at 775-76.

¶8 Here, we conclude Lunemann is not entitled to attorney fees and costs under WIS. STAT. § 425.308(1). Unlike the debtors in *Johnson*, we cannot conclude Lunemann achieved a significant benefit in the litigation rendering him the prevailing party. The debtors in *Johnson* had the default judgments against them lifted, which helped their credit standing and eliminated the creditors' ability to garnish their wages and pursue other remedies. *Id.* at 774. Here, all we have is a voluntary dismissal.

¶9 Moreover, unlike the creditor in *Johnson*, we cannot conclude Arrow violated the Wisconsin Consumer Act. In *Johnson*, our conclusion that the debtors would have succeeded on their motion to dismiss for improper venue was based on the debtors' affidavits establishing improper venue. *See id.* at 775. Here, Lunemann points to no affidavits establishing Arrow's alleged violations. Instead, Lunemann relies on Arrow's failure to present evidence contradicting the allegations in his motion. We conclude the record is insufficiently developed to establish Arrow violated the act or that Lunemann's motion to dismiss would have been granted had it been addressed. For the same reason, we cannot conclude Lunemann's motion to dismiss was the catalyst for the voluntary dismissal as he claims. *See id.* at 775-77. Given the state of the record, the circuit court properly denied Lunemann attorney fees and costs under WIS. STAT. § 425.308(1).

¶10 Lunemann also claims the court erroneously exercised its discretion when denying attorney fees and costs under WIS. STAT. § 805.04(2). That statute allows a court to make a voluntary dismissal contingent on a party satisfying terms and conditions imposed by the court. *See id.* Lunemann contends the court erred by not considering the relevant factors for determining whether a voluntary dismissal should be conditioned upon the plaintiff's payment of a defendant's attorney fees and costs.

¶11 A circuit court properly exercises its discretion when it examines the relevant facts, applies a proper standard of law, and uses a demonstrated rational process to reach a reasonable conclusion. *Loy v. Bunderson*, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982). In *Dunn v. Fred A. Mikkelson, Inc.*, 88 Wis. 2d 369, 382, 276 N.W.2d 748 (1979), our supreme court held that:

[F]actors to be considered in assessing attorney fees against a plaintiff in a voluntary dismissal include (1) the utility of the work performed for future proceedings should the plaintiff reinstitute the action; (2) the good faith of the plaintiff; (3) the stage to which the proceedings had progressed; (4) the complexity of the work performed; (5) whether it would result in undue hardship on the plaintiff; and (6) any factors which would result in unique prejudice to the defendant.

¶12 Lunemann contends the court erroneously exercised its discretion by failing to demonstrate it considered these factors. We agree. While both parties argued the relevant factors, the court gave no consideration to them on the record or in its written order. Because the record does not demonstrate the court considered the relevant facts and applied the appropriate law to reach a reasonable conclusion, *see Loy*, 107 Wis. 2d at 414-15, we conclude the court erroneously exercised its discretion when denying attorney fees under WIS. STAT. § 805.04(2). On remand, the court should reconsider whether to award attorney fees and costs under § 805.04(2) in light of the factors stated in *Dunn*.

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.

