COURT OF APPEALS
DECISION
DATED AND FILED

April 5, 2007

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2006AP1351 **Cir. Ct. No. 2004SC11414**

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

PER MAR SECURITY AND RESEARCH CORP.,

PLAINTIFF-RESPONDENT,

V.

JOHN LIVESEY, JR.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: RICHARD G. NIESS, Judge. *Affirmed*.

Before Dykman, Vergeront and Higginbotham, JJ.

¶1 VERGERONT, J. This is a breach of contract action with affirmative defenses and counterclaims arising under the Wisconsin Consumer Act (WCA). John Livesey appeals the summary judgment dismissing his counterclaims and awarding Per Mar Security and Research Corp. $825 on its

claim that Livesey breached their agreement regarding an alarm system and monitoring services provided by Per Mar. Livesey contends the circuit court erred in concluding that: (1) he repudiated the contract and Per Mar was entitled to $825 in damages; (2) Per Mar was not required to give him notice of default and an opportunity to cure under WIS. STAT. § 425.104 and WIS. STAT. § 425.105 (2005-06)[1]; (3) the contract was not unconscionable; and (4) he was not entitled to attorney fees under the WIS. STAT. § 425.308.

¶2 Based on the undisputed facts, we conclude: (1) Livesey repudiated the contract and Per Mar was entitled to $825 in damages; (2) Per Mar was not required to give Livesey notice of default and an opportunity to cure under WIS. STAT. § 425.104 and WIS. STAT. § 425.105; (3) the circuit court correctly decided the unconscionability argument that Livesey presented in the circuit court; and (4) Livesey is not entitled to attorney fees under WIS. STAT. § 425.308. We therefore affirm.

BACKGROUND

¶3 According to the facts stipulated by the parties, in July 2002, Livesey signed a written contract drafted by Per Mar for additions to a home security system at Livesey's residence. The agreement provided that Per Mar was to install a security monitoring system in Livesey's home for $1,580, to be paid upon installation; in addition, Livesey was to pay $300 annually for monitoring services for five years. Livesey paid the $1,580 upon installation of the equipment.

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

¶4 In June 2004, Livesey sold his home and moved to another residence. Before the sale of his home, Livesey had timely made all installment payments required by the contract. Livesey called Per Mar in June 2004 and said he was moving and would no longer need the home monitoring services. By letter dated June 18, 2004, Per Mar stated that Livesey's account was cancelled, but Per Mar was still entitled to $825 for the thirty-three months remaining on the contract. Livesey declined to pay because he was no longer receiving any monitoring services.

¶5 Per Mar filed a small claims action against Livesey, alleging that Livesey owed $825 "as the balance due of contract fees." Livesey filed an answer denying that he owed the money and a counterclaim alleging several violations of the WCA. The counterclaim sought a return of all sums Livesey had paid Per Mar under the agreement, rescission of the agreement, damages, costs, and attorney fees.

¶6 The court commissioner determined that Livesey owed Per Mar $825 and Livesey requested a trial de novo before the circuit court. The parties agreed that the matter should be decided using summary judgment procedure and submitted affidavits along with a stipulation of fact.

¶7 The court concluded that Per Mar was entitled to $825 on its breach of contract claim and that Livesey was not entitled to either damages or attorney fees under the WCA. The court rejected Livesey's argument that Per Mar accelerated payments due under the contract and that this was unlawful because there was no acceleration clause in the contract. Instead, the court concluded, Per Mar did not accelerate the payments, but was pursuing its lawful remedy for

Livesey's premature termination of the contract. The undisputed evidence of Per Mar's loss as a result of that breach, the court concluded, was $825.

¶8 The court decided that the WCA applied to the contract. However, it concluded that it was not unconscionable within the meaning of WIS. STAT. § 425.107 for Per Mar to attempt to collect on the remaining balance under the contract. The court also rejected Livesey's argument that Per Mar was barred from bringing the action because it had not provided notice of default and the opportunity to cure under WIS. STAT. § 425.105; the court concluded those requirements did not apply because Livesey had prematurely terminated the entire contract.

¶9 The court agreed with Livesey that the contract violated the WCA and did not comply in these respects: it did not contain a warning against signing a document with blank spaces, notice of the right to seek a partial refund of finance charges by paying in advance, or notice of the right to have an exact copy, *see* WIS. STAT. § 422.303(2); it stated that Iowa law applied, *see* WIS. STAT. § 421.201(10); and it required the consumer to pay prejudgment interest.[2] *See* WIS. STAT. § 422.413. However, based either on Livesey's explicit or implicit concessions, the court concluded that none of these violations had resulted in damages to Livesey. The court rejected Livesey's argument that Per Mar's contract language relating to notice on the reverse side did not comply with that requirement in § 422.303(3).

[2] Livesey also asserts that the contract contains an illegal attorney fee provision, but he provides no record citation to the court's ruling on this. Whether this is an additional violation does not affect our analysis because Livesey is not contending he was damaged by this violation.

¶10 With respect to Livesey's request for attorney fees, the court concluded he was not entitled to them because he himself had achieved no significant benefit. The court considered Livesey's argument that the public had benefited by the rulings that the contract violated the WCA in certain respects, even if he was not personally damaged by those violations. However, the court decided the case law did not to support this argument. In addition, the court stated it was speculative on this record whether those rulings did in fact substantially benefit the public.

DISCUSSION

¶11 We review de novo the grant of summary judgment, employing the same methodology as the circuit court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 314-15, 401 N.W.2d 816 (1987). Summary judgment is proper when there are no issues of material fact and one party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2). In evaluating the evidence, we consider whether more than one reasonable inference may be drawn from undisputed facts; if so, the competing reasonable inferences may constitute a genuine issue of material fact. *See* ***Hennekens v. Hoerl***, 160 Wis. 2d 144, 162, 465 N.W.2d 812 (1991). Whether an inference is reasonable and whether more than one reasonable inference may be drawn are questions of law. ***Id.*** A factual issue is genuine if the evidence is such that reasonable jurors could return a verdict for the non-moving party. ***Baxter v. DNR***, 165 Wis. 2d 298, 312, 477 N.W.2d 648 (Ct. App. 1991) (citation omitted).

I. Repudiation of Contract and Damages under Common Law

¶12 Livesey contends he did not repudiate the contract but simply cancelled the services he was entitled to under the contract. In addition, or

perhaps in the alternative, Livesey argues that, because his only obligation is the installment payment of money, Per Mar has no claim for all future payments but may recover each installment only when it is due under the contract. Finally, Livesey asserts that the court impermissibly allowed Per Mar to accelerate all the future payments even though the contract did not provide for this.

¶13 Both parties cite to ***Ambler v. Sinaiko***, 168 Wis. 286, 170 N.W. 270 (1919), as setting forth the applicable law on repudiation of a contract. In that case, a party to a contract that called for installment deliveries and payment of goods refused to pay for a delivery until all the goods had been delivered, even though all deliveries were not yet due under the contract terms; thereupon the other party refused to make further deliveries. ***Id.*** at 292-93. The court first concluded that the party refusing to pay had materially breached the contract, thus justifying the other party's refusal to make further deliveries. ***Id.*** at 294. The court then identified another "well established principle which seems decisive of the case": "where one party to an executory contract deliberately declares that he will not perform on his part, the other party may at his option treat the contract as terminated." ***Id.*** This, the court found was "in effect, what the defendants did … when they declined to pay anything until all the coal had been delivered." ***Id.***

¶14 A more recent case, ***Menako v. Kassien***, 265 Wis. 269, 273, 61 N.W.2d 332 (1953) (citations omitted), succinctly states the law:

> Where a party bound by an executory contract repudiates his obligation before the time for performance, the promisee has, according to the great weight of authority, an option to treat the contract as ended so far as further performance is concerned, and to maintain an action at once for the damages occasioned by such anticipatory breach.

¶15 We first address Livesey's argument that he did not repudiate the contract, but instead cancelled the services. The following facts are not disputed. Livesey transmitted a letter to Per Mar on June 8, 2004, stating: "I hereby authorize you to cancel my security monitoring as of 6/10/04 as I will be moving to a new home. If you have any questions, please call me at [xxx-xxx-xxxx]. Thanks." He received a letter from Per Mar dated June 18, 2004, stating:

> Your account has been canceled effective 06/10/04. Our records indicate:
>
> ….
>
> 33 months remaining on your contract: $825.00
>
> Total balance due is: $825.00
>
> Since your account was canceled, we are invoicing you for the remaining amounts due.
>
> If there is a problem regarding your account, please advise us so we can address the problem and resolve it. If there are no problems, we would appreciate a return reply with your remittance within five business days from the receipt of this letter.
>
> ….
>
> Please feel free to contact me at the number listed above if you have any questions or comments.

Livesey and Per Mar stipulated that "[b]ecause Mr. Livesey was no longer receiving any monitoring services from Per Mar, he declined to pay the $825.00."

¶16 Livesey argues that his letter to Per Mar shows only that he was cancelling the services, not the contract, and thus does not constitute a repudiation of the contract. However, Livesey did not make this argument in the circuit court. Rather, he argued (as he also does on appeal) that Per Mar could not "accelerate the payments" as it did in response to his letter and was required to give him a

notice of default and the opportunity to cure. In the context of making those arguments, he described what he did as 'terminating the contract." In "Defendant's Brief in Support of Summary Judgment as to All Issues," Livesey stated: "Both customers [Livesey and the customer in another case decided in Milwaukee Circuit Court] terminated the agreements prior to the five year term." In "Defendant's Reply Brief in Support of Motion for Summary Judgment," Livesey stated:

> When Mr. Livesey sold his home and could no longer utilize Per Mar's home security services (because he no longer owned the home), he provided notice to Per Mar and *requested cancellation of his contract*. What did Per Mar do? It agreed to cancel Mr. Livesey's contract, but it demanded an early termination penalty of $825, or approximately 125% of the cost of services it actually provided…. Such a practice is entirely unconscionable….

(Emphasis added.)

¶17 Although our review of summary judgment is de novo, we generally do not address an issue raised for the first time on appeal where the opposing party might well have presented additional factual submissions for the circuit court's consideration. ***Gruber v. Village of N. Fond du Lac***, 2003 WI App 217, ¶27, 267 Wis. 2d 368, 671 N.W.2d 692. In this case, we cannot tell whether Per Mar would have presented additional factual submissions in the circuit court had Livesey argued that he intended only to cancel the services, not to terminate or repudiate his payment obligations under the contract. However, even if we consider this new argument, we conclude it does not entitle Livesey to summary judgment or to a trial. Even if Livesey's letter read in isolation creates a reasonable inference that he wanted only to cancel services and still intended to make the future installment payments when due, Livesey stipulated that he did not pay in response to Per Mar's letter "because he was no longer receiving any monitoring services." Given

that it is undisputed that he was not receiving any more services because he asked Per Mar not to provide any more services, the only reasonable inference from the stipulation, together with the two letters, is that he did not intend to make any future payments. Based on this evidence, no reasonable jury could find that he did intend to make the future payments.

¶18 Livesey also argues that the remedy for a breach where the breaching party owes money payable only in installments is to enforce the payments as agreed, not to recover all the payments now. He cites RESTATEMENT (SECOND) OF CONTRACTS § 243 (1981) which provides:

> (3) Where at the time of the breach the only remaining duties of performance are those of the party in breach and are for the payment of money in installments not related to one another, his breach by non-performance as to less than the whole, whether or not accompanied or followed by a repudiation, does not give rise to a claim for damages for total breach.

Per Mar contends in response that this provision is not applicable here, and Livesey does not dispute this in his reply brief. We take this as a concession that Per Mar is correct. ***Schlieper v. DNR***, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994).

¶19 Finally, Livesey argues that the court impermissibly allowed Per Mar to accelerate the future payments even though the contract did not provide for that. This is not an accurate characterization of the court's ruling. After the court concluded that it was undisputed that Livesey repudiated the contract, the court considered the amount of damages to which Per Mar was entitled at common law (before taking up the issue whether the WCA barred recovery). The court expressly stated that "Per Mar was not accelerating payments due under the contract, but was pursuing its lawful remedy for the total breach of the contract by

defendant. Worded differently, plaintiff Per Mar was not seeking to accelerate the payments under the contract, because the contract had already been terminated." To further explain this distinction, the court cited CORBIN ON CONTRACTS § 965 (revised edition):

> What the plaintiff asks for and what he is given is a judgment for money damages. It is merely an accidental circumstance that where the contractual duty is a duty to pay money, but performance that is expressly promised is identical in character with the performance that is required by a judgment for money damages … Therefore, a plaintiff should not be deprived of his remedy in damages for an anticipatory repudiation merely because the promised performance is similar in character of the performance that is required by the judicial remedy that is commonly given for all kinds of breaches of contract.

The court awarded $825, the remaining balance, as damages because it stated that was the only evidence on damages. The court further explained: "Per Mar did not seek to collect interest on the damages, although they were clearly liquidated, and defendant Livesey did not satisfy his burden to reduce the damages to present value."

¶20 Livesey has provided no authority for the proposition that, when there is a repudiation of a contractual obligation that consists of future installment payments, the court may not base the award of damages on that remaining balance. Nor did he present any evidence from which the circuit court could decide that the remaining balance should be reduced by a particular amount to accurately reflect the damage to Per Mar. If it is true, as Livesey contends, that Per Mar is in a better position than if the contract had continued, that is not because the court impermissibly accelerated future installment payments, but because Livesey did not present any evidence to support damages in an amount less than the remaining balance. We therefore conclude the circuit court did not

err in deciding that, based on the undisputed evidence, the damages for Livesey's repudiation of the contract are $825.

II. Notice of Default and Opportunity to Cure under the WCA

¶21 Livesey contends that, under the WCA, Per Mar was obligated to provide him with a notice of default and opportunity to cure; since Per Mar did not, it is barred from bringing this action. The circuit court erred, he asserts, in deciding that these statutory requirements did not apply because he had repudiated the contract.

¶22 The following sections of the WCA are relevant to a resolution of this issue. WISCONSIN STAT. § 425.103(1) and (2)(a) provide:

> **Accrual of cause of action; "default". (1)** Notwithstanding any term or agreement to the contrary, no cause of action with respect to the obligation of a customer in a consumer credit transaction shall accrue in favor of a creditor except by reason of a default, as defined in sub. (2).
>
> **(2)** "Default", with respect to a consumer credit transaction, means without justification under any law:
>
> (a) With respect to a transaction other than one pursuant to an open-end plan; … if the interval between scheduled payments is more than 2 months, to have all or any part of one scheduled payment unpaid for more than 60 days after its scheduled or deferred due date; … For purposes of this paragraph the amount outstanding shall not include any delinquency or deferral charges and shall be computed by applying each payment first to the installment most delinquent and then to subsequent installments in the order they come due;

WISCONSIN STAT. § 425.104 provides:

> **Notice of customer's right to cure default. (1)** A merchant who believes that a customer is in default may give the customer written notice of the alleged default and,

> if applicable, of the customer's right to cure any such default (s. 425.105).
>
> **(2)** Any notice given under this section shall contain the name, address and telephone number of the creditor, a brief identification of the consumer credit transaction, a statement of the nature of the alleged default and a clear statement of the total payment, including an itemization of any delinquency charges, or other performance necessary to cure the alleged default, the exact date by which the amount must be paid or performance tendered and the name, address and telephone number of the person to whom any payment must be made, if other than the creditor.

WISCONSIN STAT. § 425.105(1)-(3) provides:

> **Cure of default. (1)** A merchant may not accelerate the maturity of a consumer credit transaction, commence any action except as provided in s. 425.205 (6), or demand or take possession of collateral or goods subject to a consumer lease other than by accepting a voluntary surrender thereof (s. 425.204), unless the merchant believes the customer to be in default (s. 425.103), and then only upon the expiration of 15 days after a notice is given pursuant to s. 425.104 if the customer has the right to cure under this section.
>
> **(2)** Except as provided in subs. (3) and (3m), for 15 days after such notice is given, a customer may cure a default under a consumer credit transaction by tendering the amount of all unpaid installments due at the time of the tender, without acceleration, plus any unpaid delinquency or deferral charges, and by tendering performance necessary to cure any default other than nonpayment of amounts due. The act of curing a default restores to the customer the customer's rights under the agreement as though no default had occurred.
>
> **(3)** A right to cure shall not exist if the following occurred twice during the preceding 12 months:
>
> (a) The customer was in default on the same transaction or open-end credit plan;
>
> (b) The creditor gave the customer notice of the right to cure such previous default in accordance with s. 425.104; and

(c) The customer cured the previous default.

¶23 The circuit court relied on the reasoning in ***Rosendale State Bank v. Schultz***, 123 Wis. 2d 195, 365 N.W.2d 911 (Ct. App. 1985), in concluding that WIS. STAT. § 425.105(1) and (2) did not apply to the undisputed facts in this case. In ***Rosendale***, the consumers failed to pay two installment loans, secured by mortgages on their residence, by the expiration date of the loans. ***Id.*** at 196. The consumers moved to dismiss the resulting foreclosure action on the ground that the bank had failed to give them a notice of the right to cure default under § 425.105(1). ***Id.*** We concluded the consumers had no right to cure the default. We first emphasized that WIS. STAT. § 425.104 provides that "a merchant *may* give customer notice of an alleged default and, *if applicable*, notice of the customer's right to cure any such default." ***Id.*** at 197 (emphasis original). We then analyzed § 425.105 as follows:

> The notice of right to cure a default assures that a customer has knowledge of the default and is given an opportunity to tender the amount due. The act of curing restores the loan to a current status and prevents a merchant from accelerating an obligation without giving the customer a fair opportunity to keep payments on an installment basis. *See* sec. 425.105(2), Stats.
>
> In describing how a customer may cure the default, the statute indicates that the customer may tender "the amount of all unpaid instal[l]ments due … without acceleration …." Sec. 425.105(2), Stats. This language indicates that the act of curing relates to a point of time in the customer-merchant relationship where the entire amount or final installment of the obligation is not yet due. Furthermore, sec. 425.105(2) indicates that the act of curing restores a customer to his or her rights under the agreement as though no default occurred. This language contemplates a continuing relationship between the customer and merchant after the default is cured. In interpreting a similarly worded Colorado statute, one court has explained:
>
> The purpose of giving notice of the debtor's right to cure is to permit the debtor-creditor relationship to continue if the default is cured. By requiring notice of the default, the

> statutory preference is to cure rather than to disrupt the debtor-creditor relationship by judicial or extra-judicial action against the debtor and the collateral.

Id. at 198-99 (citation omitted).

¶24 The circuit court in this case reasoned that where, as here, the consumer repudiates a contract, the consumer has expressed an intent not to continue in the contractual relationship with the merchant. Thus, in the circuit court's analysis, the purpose of WIS. STAT. § 425.105(1) and (2) is not served by requiring notice of the right to cure.

¶25 Livesey argues that ***Rosendale*** is wrongly decided because it ignores the exceptions in WIS. STAT. § 425.105(3). According to Livesey those are the exclusive exceptions and ***Rosendale*** adopts another exception that is not permitted by statute and has the potential to undermine the purposes of the WCA. Therefore, Livesey argues, ***Rosendale*** should either be reversed or limited to its facts.

¶26 Of course, this court does not have the authority to reverse ***Rosendale*** even if we agreed with Livesey that it is wrongly decided. But we do not agree with Livesey that ***Rosendale*** recognizes an exception to WIS. STAT. § 425.105(1) and (2). Rather, in ***Rosendale*** we concluded that § 425.105(1) and (2) did not apply; we therefore never reached the issue of whether one of the exceptions in subsec. (3) was applicable.

¶27 We conclude our construction of WIS. STAT. § 425.104 and WIS. STAT. § 425.105(1) and (2) in ***Rosendale*** is binding in this case. To the extent this case presents issues of statutory construction not decided in ***Rosendale***, we apply the established principles of statutory construction. We begin with the language of

the statute and give it its common, ordinary, and accepted meaning, except that technical or specially defined words are given their technical or special definitions. ***State ex rel. Kalal v. Circuit Court for Dane County***, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110. We interpret statutory language in the context in which it is used, not in isolation but as part of a whole, in relation to the language of surrounding or closely related statutes, and we interpret it reasonably to avoid absurd or unreasonable results. ***Id.***, ¶46. We also consider the scope, context, and purpose of the statute insofar as they are ascertainable from the text and structure of the statute itself. ***Id.***, ¶48. If, employing these principles, we conclude the statutory language has a plain meaning, then we apply the statute according to that plain meaning. ***Id.***, ¶47.

¶28 Turning to the language in WIS. STAT. § 425.105(1) and (2), the notice of a default and the right to cure the default within fifteen days plainly hinge on the definition of "default" in WIS. STAT. § 425.103(2). Livesey does not explain how this definition of "default"—"all or any part of one scheduled payment unpaid for more than sixty days after its scheduled or deferred due date…," WIS. STAT. § 425.103(2)(a), applies to the facts of this case. It is undisputed that Livesey was not in default when he wrote the letter to Per Mar. We cannot tell from the record when the next installment, after his letter to Per Mar, was due and Livesey does not mention that date in his argument. It appears that Livesey is arguing that his letter to Per Mar is what triggered his right to a notice of default and opportunity to cure. However, that letter plainly does not meet the definition of "default" in § 425.103(2).

¶29 The contents of the notice in WIS. STAT. § 425.104 are also plainly dependent upon a "default" as defined in WIS. STAT. § 425.103(2). The notice

must contain "a statement of the nature of the alleged default and a clear statement of the total payment … [and] the exact date by which the amount must be paid."

¶30 In ***Rosendale***, 123 Wis. 2d at 199, we reasoned from the language of WIS. STAT. §§ 425.104 and 425.105(1) and (2) that the purpose of the notice of default and opportunity to cure is to permit the merchant-customer relationship to continue if the default is cured. When, as here, a customer who is not in default repudiates a contract, the customer has made a decision to terminate its relationship with the merchant, and the notice of default and opportunity to cure as defined in those provisions does not serve that purpose.

¶31 In his affidavit, Livesey avers:

> At no time did Per Mar provide [him] with a Notice of Default, or any opportunity to cure. Had [he] been given such an option [he] might have either continued making the payments in installments, or sought to transfer the home security services to [his] new home. Alternatively, [he] could have transferred the services to the individual who purchased [his] home. [He] was not given an opportunity to do any of these things.

Livesey does not explain how a notice meeting the requirements of § 425.104(2) would have given him an opportunity to do anything that he could not already have chosen to do: pay future installments or transfer the services. Per Mar did notify him that he was liable for the balance of the contract even if he cancelled the services. In response, Livesey could have done any of the things he avers he might have wanted to do.

¶32 What Livesey really seems to be saying is that Per Mar should have informed him of the remedies available to it at common law if Livesey persisted in repudiating the contract. However, we do not see how WIS. STAT. § 425.104 and WIS. STAT. § 425.105(1) and (2) can reasonably be read to require this type of

notice. To the extent his point is that § 425.105(1) and (2) modify a merchant's remedies at common law for repudiation of a contract, he has not presented a developed argument to support that.

¶33 We conclude the circuit court correctly decided that, based on the undisputed fact, Livesey was not entitled to a notice of default and opportunity to cure under WIS. STAT. § 425.104 and WIS. STAT. § 425.105 before Per Mar commenced this action.

III. Unconscionability

¶34 Livesey argues that the contract is procedurally and substantively unconscionable for a number of reasons and therefore he is entitled to the remedies in WIS. STAT. § 425.107(5).[3]

[3] WISCONSIN STAT. § 425.107 provides:

> **Unconscionability. (1)** With respect to a consumer credit transaction, if the court as a matter of law finds that any aspect of the transaction, any conduct directed against the customer by a party to the transaction, or any result of the transaction is unconscionable, the court shall, in addition to the remedy and penalty authorized in sub. (5), either refuse to enforce the transaction against the customer, or so limit the application of any unconscionable aspect or conduct to avoid any unconscionable result.
>
> **(2)** Specific practices forbidden by the administrator in rules promulgated pursuant to s. 426.108 shall be presumed to be unconscionable.
>
> **(3)** Without limiting the scope of sub. (1), the court may consider, among other things, the following as pertinent to the issue of unconscionability:
>
> (a) That the practice unfairly takes advantage of the lack of knowledge, ability, experience or capacity of customers;

(continued)

(b) That those engaging in the practice know of the inability of customers to receive benefits properly anticipated from the goods or services involved;

(c) That there exists a gross disparity between the price of goods or services and their value as measured by the price at which similar goods or services are readily obtainable by other customers, or by other tests of true value;

(d) That the practice may enable merchants to take advantage of the inability of customers reasonably to protect their interests by reason of physical or mental infirmities, illiteracy or inability to understand the language of the agreement, ignorance or lack of education or similar factors;

(e) That the terms of the transaction require customers to waive legal rights;

(f) That the terms of the transaction require customers to unreasonably jeopardize money or property beyond the money or property immediately at issue in the transaction;

(g) That the natural effect of the practice would reasonably cause or aid in causing customers to misunderstand the true nature of the transaction or their rights and duties thereunder;

(h) That the writing purporting to evidence the obligation of the customer in the transaction contains terms or provisions or authorizes practices prohibited by law; and

(i) Definitions of unconscionability in statutes, regulations, rulings and decisions of legislative, administrative or judicial bodies.

(4) Any charge or practice expressly permitted by chs. 421 to 427 and 429 is not in itself unconscionable but even though a practice or charge is authorized by chs. 421 to 427 and 429, the totality of a creditor's conduct may show that such practice or charge is part of an unconscionable course of conduct.

(5) In addition to the protections afforded in sub. (1), the customer shall be entitled upon a finding of unconscionability to recover from the creditor or the person responsible for the unconscionable conduct a remedy and penalty in accordance with s. 425.303.

¶35 We agree with Per Mar that, in the circuit court, Livesey's developed argument on unconscionability was limited to Per Mar's "demand for payment for services not rendered…." The court determined this was not unconscionable within the meaning of WIS. STAT. § 425.107. We do not address the other instances of unconscionability raised for the first time on appeal because Per Mar did not have the opportunity to respond in the circuit court with additional factual submission. *See* ***Gruber***, 267 Wis. 2d 368, ¶27.

¶36 As for the unconscionability issue that was raised in the circuit court and rejected, the record does not contain the transcript of the hearing at which the court orally made that decision. We have only a subsequent written decision that states: at the October 17, 2005 hearing, "[t]he court also held that Per Mar's attempt to collect the remaining balance on the contract as remedy for Livesey's breach was not 'unconscionable' within the meaning of § 425.107, Stats. That October 17, 2005 ruling, on the record in open court, is reaffirmed here in its entirety."

¶37 We assume the court's rejection of Livesey's unconscionability argument was based on its ruling that, given the undisputed facts, Livesey had repudiated the contract and Per Mar was exercising its option to treat the contract as terminated and sue for damages.[4] Livesey's argument on unconscionability assumes this ruling by the circuit court was incorrect. We have already concluded this was a correct ruling and we have explained why the court's award of the

[4] If the court gave other reasons for its decision at the October 17, 2005 hearing on unconscionability that Livesey believes was in error, it was incumbent on him, as the appellant, to provide us with the transcript. *See* ***Fiumefreddo v. McLean***, 174 Wis. 2d 10, 26, 496 N.W.2d 226 (Ct. App. 1993).

remaining balance as damages was not error, given the undisputed evidence, and was not based on an acceleration of future installment payments. Livesey presents no argument to explain how the court's decision on unconscionability can be in error if the court was correct on the points we have already affirmed. We therefore affirm the circuit court's ruling on unconscionability.

IV. Attorney Fees

¶38 Livesey contends that, even if he does not prevail on any issue he raises on appeal, he did prevail in the circuit court on his contentions that the WCA applies to this contract and the contract violates the WCA in several respects. While acknowledging that prevailing in these issues did not benefit him financially, he asserts that the public will benefit, and this will further the purpose of the WCA consumer protection.

¶39 WISCONSIN STAT. § 425.308(1) provides:

> **Reasonable attorney fees. (1)** 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.

¶40 In ***Footville State Bank v. Harvell***, 146 Wis. 2d 524, 539, 432 N.W.2d 122 (Ct. App. 1988), we construed "prevailing party" to "permit a customer who prevails on some but not all issues to recover part of his or her attorney's fees." However, we went on to say:

> This is not to say that a customer who proves only a minor violation may recover attorney's fees. Rather, we apply to sec. 425.308 the definition of "prevailing party" which we used in ***Matter of Protective Placement of J.S.***, 144 Wis. 2d 670, 679, 425 N.W.2d 15, 19 (Ct. App. 1988): that a

> party has prevailed if he or she succeeds on any significant issue in litigation which achieves some of the benefit sought by bringing suit.

Id. at 539-40. We decided in ***Footville State Bank*** that the plaintiff was entitled to attorney fees incurred in presenting a defense that "substantially reduce[ed] his preverdict interest liability [because] [t]his was a significant issue in litigation…." ***Id.*** at 540.

¶41 In ***Community Credit Plan, Inc. v. Johnson***, 221 Wis. 2d 766, 774, 586 N.W.2d 77 (Ct. App. 1998), we utilized the definition of "prevailing party" in ***Footville State Bank*** and stated that a "customer 'prevails' for [WIS. STAT.] § 425.308 … purposes if he or she achieves some significant benefit in litigation involving the creditor's violation of the WCA." We concluded that the customers there had achieved a significant benefit by succeeding on motions to reopen and dismiss based on improper venue default judgments that allowed repossession of the customers' property and garnishment of their wages.[5] ***Id.*** at 774. The supreme court adopted our reasoning and affirmed. ***Community Credit Plan, Inc. v. Johnson***, 228 Wis. 2d 30, 35-36, 596 N.W.2d 799 (1999).

¶42 Livesey argues that the definition of "prevailing party" applied in these cases does not preclude an award of attorney fees where, as here, the court holds that a contract violates the WCA, but there are no resulting damages to the consumer who is a party. Implicitly, Livesey concedes that there is no significant benefit to himself—pecuniary or otherwise. But, he asserts, that "significant

[5] We went on to conclude that the voluntary dismissal by the creditor did not prevent the consumers from being the "prevailing parties" under the "catalyst test." ***Community Credit Plan, Inc. v. Johnson***, 221 Wis. 2d 766, 776-77, 586 N.W.2d 77 (Ct. App. 1998). That ruling, too, was affirmed in ***Community Credit Plan, Inc. v. Johnson***, 228 Wis. 2d 30, 35-36, 596 N.W.2d 799 (1999). However, this issue is not relevant to this appeal.

benefit" for purposes of the definition of "prevailing party" includes a benefit to the public and that is the case here. We know there is a significant benefit to the public, he continues, because this is a standard form contract used with large numbers of consumers and now it "can no longer" fail to comply with the WCA provisions the court concluded were violated. Livesey supports his argument by referring to the purpose of WIS. STAT. § 425.308 as recognized in ***First Wisconsin National Bank v. Nicolaou***, 113 Wis. 2d 524, 538-39, 335 N.W.2d 390 (1983):

> To a large extent the WCA depends upon private lawsuits for its enforcement. Ordinarily, however, the amount of damages flowing from a WCA violation is insufficient to make it economical for a consumer to initiate legal action. Indeed, the cost of legal representation will often exceed the recovery in a WCA case. However, WCA actions frequently present important legal questions for both the consumer and the creditor which bear on the public policy of consumer protection. The potential impact of these cases over the long run induces creditors to litigate them to the fullest. The result being that, in the absence of a sufficient attorney fee awards, consumers will be financially unable to maintain meritorious claims. By the same token, the prospect of only a meager fee for a great deal of work will make WCA actions unattractive to attorneys. In short, the policies of the WCA will not be effectively carried out through private enforcement unless adequate attorney fees are awarded to prevailing consumers.

¶43 We have several difficulties with Livesey's argument. To begin with, we are uncertain how a court is to determine whether there is a significant benefit to the public where the party does not achieve a significant benefit. The benefit to a party can be determined as a factual matter based on the record. There is no record in this case on which a court can determine whether its rulings provide a significant benefit to the public. Livesey presumes we have a sufficient record because the contract is a form contract of an entity that does business in

Wisconsin and apparently has a large number of Wisconsin customers.[6] But if these violations caused no damage to Livesey, on what basis are we to assume that other consumers have been or will be damaged? Livesey does not tell us. We are not minimizing the importance of compliance with all WCA requirements, but a minor violation, or violations, is not sufficient for attorney fees. *See* ***Footville State Bank***, 146 Wis. 2d at 539. We see no basis for concluding, based on the record before us, that the violations in this case were a significant benefit to the public.

¶44 We also are not persuaded that the purpose of WIS. STAT. § 425.308 supports dispensing with the requirement of a significant benefit to the consumer or consumers who are parties to the action. The supreme court's statement in ***First Wisconsin National Bank*** is premised on the recognition that "ordinarily, … *the amount of damages flowing from a WCA violation is insufficient* to make it economical for a consumer to initiate legal action." 113 Wis. 2d at 538 (emphasis added). There is no suggestion that the supreme court believes that, in order to effectuate the policies of the WCA, it is necessary to award attorney fees where there are WCA violations but no damages or other benefit to the consumer who brings the claim.

¶45 Finally, we observe that Livesey's argument assumes that it is desirable to have consumers bring claims of WCA violations even though they cannot prove they are damaged by the violations. Whether this is the case requires a careful evaluation of the advantages and disadvantages of such an approach in

[6] Livesey's attorney attached to his affidavit information on Per Mar that he obtained from the internet. The attachments state that Per Mar has offices in Wisconsin and three other states and monitors more than 30,000 accounts.

light of all the purposes of the WCA. Livesey's argument is not sufficiently developed to enable us to undertake such an analysis; and he cites to no cases that, under analogous fee-shifting statutes, employ such an approach.

¶46 Based on the argument Livesey has presented, we decline to broaden the definition of "prevailing party" in WIS. STAT. § 425.308 to include a party who has achieved no benefit for himself or herself but has proved that a contract violates the WCA in one or more respects. Because it is undisputed that Livesey achieved no benefit for himself in this litigation, we conclude he is not a prevailing party within the meaning of § 425.308. Therefore, the circuit court correctly denied his request for attorney fees.

CONCLUSION

¶47 For the reasons we have explained above, we conclude that, based on the undisputed facts: (1) Livesey repudiated the contract and Per Mar was entitled to $825 in damages; (2) Per Mar was not required to give Livesey notice of default and an opportunity to cure under WIS. STAT. § 425.104 and WIS. STAT. § 425.105; (3) the circuit court correctly decided the unconscionability argument that Livesey presented in the circuit court; and (4) Livesey is not entitled to attorney fees under WIS. STAT. § 425.308. We therefore affirm the summary judgment.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.