

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 9, 2007

David R. Schanker
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. 2006AP2976

Cir. Ct. No. 2006SC189

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

PREMIUM AIR, INC., D/B/A ONE HOUR HEATING & AIR

CONDITIONING,

PLAINTIFF-APPELLANT,

V.

GERALD LUCHINSKI AND TAMMY LUCHINSKI,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Calumet County:
DONALD A. POPPY, Judge. *Affirmed and cause remanded.*

¶1 NETTESHEIM, J.¹ This case involves various statutes in the Wisconsin Consumer Act, WIS. STAT. ch. 422. Premium Air, Inc., d/b/a One Hour Heating & Air Conditioning, filed a small claims action against Gerald and Tammy Luchinski. The Luchinskis had not paid for a new furnace One Hour Heating installed and refused the high-interest financing a One Hour Heating employee fraudulently arranged for them. The trial court found that (1) One Hour Heating was a “credit services organization” within the meaning of WIS. STAT. § 422.503; (2) its fraud entitled the Luchinskis to retain the furnace without having to pay for it, pursuant to WIS. STAT. § 425.305; and (3) under WIS. STAT. § 425.308, the Luchinskis could recover their attorney fees for defending the action. We affirm the judgment and remand for a determination of reasonable appellate attorney fees.

¶2 The facts are undisputed. One Hour Heating sells and services heating, ventilation and air conditioning equipment. On November 28, 2005, the Luchinskis signed a contract with One Hour Heating, through one of its salesmen, to have a new furnace installed for \$4993. The Luchinskis did not have the money to pay for the furnace and intended to finance the entire amount. In line with One Hour Heating’s common practice of assisting its potential customers to obtain financing, the salesman helped them fill out a credit application. He informed the Luchinskis that the finance charge would be 9¼ %. One Hour Heating installed the furnace the next day.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

¶3 Two finance companies subsequently denied the Luchinskis' application. The salesman then submitted an application to a third finance company, Carmel Financial Corporation. One Hour Heating stipulated at trial that its salesman forged the Luchinskis' names on the necessary documents. When the Luchinskis learned of the forgery, Gerald told One Hour Heating that "they could pick up their furnace, and that [he] wasn't doing business with them."² One Hour Heating advised the Luchinskis to wait to see what Carmel would do. Carmel agreed to provide financing, but at 17.9 %. The Luchinskis refused to finance through Carmel, and made no payments to One Hour Heating.

¶4 One Hour Heating responded with this small claims action against the Luchinskis, who admitted not paying for the furnace, and claimed as an affirmative defense that One Hour Heating is a credit services organization that violated WIS. STAT. § 422.503 through its employee's fraud. Accordingly, the Luchinskis asserted that the transaction was void under WIS. STAT. § 425.305, they could retain the furnace without obligation, and, under WIS. STAT. § 425.308, they were additionally entitled to recover their costs and attorney fees.

¶5 The Luchinskis moved for judgment on the pleadings, which the court took up on the day of trial. The court directed the Luchinskis' attorney to read *Footville State Bank v. Harvell*, 146 Wis. 2d 524, 432 N.W.2d 122 (Ct. App. 1988), which it believed was on all fours with the case at bar, and "[t]hen I want you to go out and talk to opposing counsel. Then you should settle this case." Because the parties already had stipulated that the furnace's cost was its

² When One Hour Heating learned of the forgery, it immediately fired the salesman and filed a complaint with the sheriff's department.

reasonable value, the court recommended they discuss “what amount of attorney fees should be offset against the furnace.”

¶6 When the parties returned, they advised the court that they still disagreed, and the trial proceeded. The Luchinskis persuaded the court that *Footville State Bank* was not dispositive because it involved a different consumer protection statute which compelled a different result. In its final ruling, the court found that One Hour Heating is a credit services organization. It also found that the conduct of the salesman, One Hour Heating’s agent, operated as a fraud upon the Luchinskis by misrepresenting the finance charge and upon Carmel by misrepresenting the authenticity of the signatures, in violation of WIS. STAT. § 422.503(1)(c). The court acknowledged that One Hour Heating, too, was wronged by its “rogue employee,” but observed that consumer protection laws weigh in favor of consumers. Finally, the court found that One Hour Heating also violated WIS. STAT. § 422.505(2)(a) because the Carmel contract contained a three-day, rather than the required five-day, cancellation period and because the notice of cancellation was not provided along with the forged consumer credit document.

¶7 The trial court concluded that the violations triggered the remedies available through WIS. STAT. § 425.305 entitling the Luchinskis to retain the goods and services provided without obligation to pay for them. It also found

them entitled to reasonable attorney fees and, at a later hearing on the matter, granted them the amount they sought. One Hour Heating appeals.³

¶8 One Hour Heating challenges the finding that it is a “credit services organization” under WIS. STAT. § 422.501(2)(a), which provides:

“Credit services organization” means a person or merchant who, with respect to the extension of credit by others, sells, provides or performs, or represents that the person will sell, provide or perform, any of the following services in return for the payment of money or for other valuable consideration:

1. Improving a buyer’s credit record, credit history or credit rating.
2. Arranging for or obtaining an extension of credit for a buyer.
3. Providing advice or assistance to a buyer with regard to subd. 1. or 2.

The construction of a statute in relation to a given set of facts presents a question of law, which we review de novo. *Turner v. Gene Dencker Buick-Pontiac, Inc.*, 2001 WI App 28, ¶13, 240 Wis. 2d 385, 623 N.W.2d 151.

¶9 The trial court found that One Hour Heating is a credit services organization under WIS. STAT. § 422.501(2)(a) because it is a merchant which arranges the extension of credit for a buyer. One Hour Heating admits that it routinely helps potential customers arrange financing, but argues that it does not

³ The notice of appeal indicates that One Hour Heating appeals only from the attorney fee award portion of the judgment. The record reveals that before the appeal reached this court, the parties corresponded with each other about whether the appeal encompassed the entire judgment or was limited to attorney fees. Evidently they came to some agreement because neither raises the scope of our review as an issue on appeal. Therefore, since technical defects in a notice of appeal do not deprive us of jurisdiction and the Luchinskis have participated without objection, any defect is waived. See WIS. STAT. §807.07(1) and WIS. STAT. RULE 809.83(2).

do so in return for money or other valuable consideration. We disagree. The money it receives from furnace sales via the financing arrangements it facilitates is the valuable consideration. The Luchinskis never intended to pay for the furnace in cash. We agree with the trial court that One Hour Heating is a credit services organization under § 422.501(2)(a).

¶10 We next examine whether One Hour Heating violated WIS. STAT. § 422.503, which provides in relevant part:

422.503 Prohibited activities. (1) A credit services organization, and its salespersons, agents and representatives who offer or sell the services of the credit services organization, may not do any of the following:

....

(c) Make or use any untrue or misleading representations in the offer or sale of the services of the credit services organization or engage, directly or indirectly, in any act, practice or course of business that operates or would operate as a fraud or deception upon any person in connection with the offer or sale of the services of a credit services organization.

(2) A violation of this section is subject to s. 425.305.

¶11 One Hour Heating does not dispute that its salesman’s forgery and misstatement of the finance charge breached WIS. STAT. § 422.503(1)(c), but asks us not to apply subsec. (2). That subsection triggers WIS. STAT. § 425.305, which allows the Luchinskis to retain “the goods, services or money received pursuant to the transaction without obligation to pay any amount.” Instead, One Hour Heating urges us to apply the analysis found in *Footville State Bank*.

¶12 We agree with the trial court and the Luchinskis that, while factually similar, *Footville State Bank* does not control this case. There, Morris Harvell and his son Gus farmed together. *Footville State Bank*, 146 Wis. 2d at 528. Gus

applied for credit and, without Morris' request or signature, made and signed separate applications for Morris. *Id.* Gus' purchases were billed half to him and half to Morris. *Id.* Gus later declared bankruptcy, discharging his debts. *Id.* When Morris failed to make payments on his own account, the bank sued him. *Id.* at 528-29. The bank's failure to furnish him with copies of documents evidencing the obligation Gus had arranged in Morris' name ultimately was held to have violated WIS. STAT. § 422.302(3). *Footville State Bank*, 146 Wis. 2d at 529-30.

¶13 As the Luchinskis do here, Morris argued that his entire obligation was unenforceable under WIS. STAT. § 425.305(1). *Footville State Bank*, 146 Wis. 2d at 535. The supreme court disagreed, holding that a violation of WIS. STAT. § 422.302(3) does not invoke § 425.305, and emphasizing that § 425.305 applies only to those sections that expressly say so. *Footville State Bank*, 146 Wis. 2d at 535.⁴ The court held that since nothing in the Wisconsin Consumer Act directed otherwise, principles of law and equity prevented Morris from escaping all liability for the debts incurred in his name. *Id.* at 536. The court also considered whether under WIS. STAT. § 425.107 any aspect of the consumer credit transaction was unconscionable such that it should not be enforced. *Footville State Bank*, 146 Wis. 2d at 537.

¶14 Equitable principles do not drive the case before us. WISCONSIN STAT. § 422.503(2) unequivocally triggers WIS. STAT. § 425.305 which just as unequivocally voids the transaction freeing a consumer from all obligation to pay.

⁴ WISCONSIN STAT. § 422.503, the statute now at issue, was not among the statutory sections the court recited in *Footville State Bank v. Harvell*, 146 Wis. 2d 524, 535, 432 N.W.2d 122 (Ct. App. 1988), because the statute did not become effective until nearly four years later. See 1991 Wis. Act 244, §§1, 5.

We decline One Hour Heating's invitation to evaluate unconscionability when the statutes are clear and the trial court made no findings in that regard.

¶15 Finally, our decision to affirm is reinforced by the additional violations involving the notice of cancellation. The trial court found that, contrary to WIS. STAT. § 422.505(1)(a) and (2), the notice of cancellation provided only a three-day right to cancel instead of the statutory five, and that this defective notice was not given at the same time as the fraudulently executed consumer credit document. One Hour Heating does not appeal this ruling and issues not briefed generally are deemed abandoned. *See Plourde ex rel. State v. Habegger*, 2006 WI App 147, ¶1 n.2, 294 Wis. 2d 746, 720 N.W.2d 130. We raise it to underscore that if One Hour Heating disagrees that it is a credit services organization, § 422.505 violations also are subject to WIS. STAT. § 425.305, commanding the same result.

¶16 Next, the Luchinskis argue that their right to attorney fees includes reasonable appellate attorney fees. We agree pursuant to *First Wisconsin National Bank v. Nicolaou*, 113 Wis. 2d 524, 335 N.W.2d 390 (1983). A customer who prevails in an action arising out of a consumer transaction shall recover a reasonable amount for attorney fees. WIS. STAT. § 425.308. The use of the word "shall" indicates the attorney fee award is mandatory. *Nicolaou*, 113 Wis. 2d at 536. Because the Luchinskis prevailed on the credit services organization issue, they are entitled as a matter of law to recover reasonable attorney fees expended in litigating it. *See id.* This includes reasonable fees involved in pursuing the appeal. *See id.* at 541; *Footville State Bank*, 146 Wis. 2d at 540.

¶17 An attorney fee award “shall be in an amount sufficient to compensate attorneys representing customers in actions arising from consumer transactions.” WIS. STAT. § 425.308(2). The award is mandatory, but the precise amount is left to the trial court’s discretion. *Nicolaou*, 113 Wis. 2d at 537; see § 425.308(2)(a)-(f). That court is best situated to consider the matter of attorney fees. *Nicolaou*, 113 Wis. 2d at 537; see also *Kolupar v. Wilde Pontiac Cadillac, Inc.*, 2004 WI 112, ¶22, 275 Wis. 2d 1, 683 N.W.2d 58. We therefore affirm the judgment and remand to the trial court for a determination of the Luchinski’s reasonable appellate attorney fees.

By the Court.—Judgment affirmed and cause remanded.

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

