COURT OF APPEALS DECISION DATED AND RELEASED

DECEMBER 17, 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(1), 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. 96-1606

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

MARVIN DEGRAVE
AND KAREN DEGRAVE,

Plaintiffs-Respondents,

v.

DOOR COUNTY COOPERATIVE,

Defendant-Appellant.

APPEAL from judgment of the circuit court for Door County: PETER C. DILTZ, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

LaROCQUE, J. The Door County Cooperative appeals a judgment finding it liable to Marvin and Karen DeGrave for violations of the Wisconsin Consumer Act. Chapters 421 through 427, STATS. The co-op argues that its transactions with the DeGraves were not subject to the Act and that it did not violate the Act regardless. The co-op alternatively argues that if they did violate the Act, the trial court imposed an improper remedy.

This court concludes that the credit arrangement between the parties subjected the co-op to the Act, which the co-op violated by failing to

disclose in advance the information required by § 422.308, STATS. However, this court concludes that the co-op did not violate the Act by taking possession of the DeGraves' stock and patronage dividends in the co-op. The judgment of the circuit court is therefore affirmed in part and reversed in part.

The DeGraves' claim was tried to the court. The court made findings of fact, which this court accepts unless they are clearly erroneous. Section 805.17(2), STATS. This court may assume that a missing finding on an issue was determined in support of the circuit court's judgment if there is evidence in the record to support such a finding. ***Sohns v. Jensen***, 11 Wis.2d 449, 453, 105 N.W.2d 818, 820 (1960).

The DeGraves were members of the co-op for over twenty years, periodically making purchases for use on their farm. Some purchases were paid for in cash, while others were made on credit, for which the DeGraves would receive an invoice. Each invoice included language substantially similar to the following:

> **TERMS:** ALL PURCHASES ARE DUE WITHIN THE FOLLOWING MONTH. A **FINANCE CHARGE** OF 1.5% PER MONTH, OR 18% PER YEAR, WILL BE ACCESSED TO THE PREVIOUS BALANCE LESS CREDITS AND PAYMENTS. I AGREE TO THESE TERMS FOR ALL PAST AND FUTURE PURCHASES.

For each purchase made, the DeGraves accumulated stock and patronage dividends in the co-op.

Beginning in 1993, the DeGraves failed to pay the full amount of their co-op bills. Each month, the co-op charged the stated amount of interest on the DeGraves' unpaid balance. Later, the parties agreed that the co-op would not take further collection action against the DeGraves provided the DeGraves make monthly payments of at least $50.[1] However, interest at the

[1] The co-op filed an action in small claims court to recover the amount owed; however, that

stated rate would continue to accrue. On December 30, 1993, the co-op took possession of the DeGraves' stock in the co-op, which was valued at $796.76 at the time, as security for the DeGraves' indebtedness.[2] The co-op also took possession of the stock and patronage dividends earned by the DeGraves for 1993, valued at $48.38 and $12.10, respectively, and charged the DeGraves $45 as a "Small Claims filing fee." The co-op did not notify the DeGraves of these actions.

The DeGraves made monthly payments of $50 from January to November of 1994. In January of 1995, the DeGraves requested a statement of their account. Upon receipt of this statement, the DeGraves were first notified that the co-op had in 1993 taken possession of their stock and patronage dividends and had charged them the $45 small claims filing fee. The DeGraves filed this action alleging that the co-op violated the Wisconsin Consumer Act by charging 18% annual interest on their unpaid balance and by taking possession of their stock and patronage dividends. The trial court entered judgment in favor of the DeGraves and the co-op appeals.

The construction of a statute in relation to a given set of facts is a question of law this court reviews de novo. ***Severson Agri-Service v. Lander***, 172 Wis.2d 269, 272, 493 N.W.2d 230, 231 (Ct. App. 1992). This court concludes that the co-op violated the Act by failing to disclose in advance the information required by § 422.308, STATS. However, this court concludes that the co-op did not violate the Act by taking possession of the DeGraves' stock and patronage dividends in the co-op.

The trial court found that the parties' payment arrangement constituted an open-end credit plan within the meaning of the Act. This court agrees. Section 421.301(27)(a), STATS., defines an open-end credit plan as follows:

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action was voluntarily dismissed when the parties agreed to the payment schedule.

[2] The co-op's articles of incorporation state that it has "a prior lien, with the usual right of enforcement for ordinary liens, upon all outstanding stock, certificates of interest, revolving fund certificates, credits, letters of advice, and all other evidence of patronage equities outstanding on [the co-op's] books, for any indebtedness due [the co-op]."

"Open-end credit plan" means consumer credit extended on an account pursuant to a plan under which:

1. The creditor may permit the customer to make purchases or obtain loans, from time to time, directly from the creditor or indirectly by use of a credit card, check or other device, as the plan may provide;

2. The customer has the privilege of paying the balance in full or in installments;

3. A finance charge may be computed by the creditor from time to time on an outstanding unpaid balance; and

4. The creditor has treated the transaction as open-end consumer credit for purposes of any disclosures required under the federal consumer credit protection act.

All of these elements must be present before a transaction is properly classified an open-end credit plan. The co-op argues that the second element is absent because the DeGraves were never extended "the privilege of paying the balance" to the co-op in installments.[3] This court disagrees.

Within the context of the Act, "payable in instalments" includes situations where payment is permitted to be made in two or more installments where a finance charge is or may be imposed. *See* § 421.301(30)(a), STATS.[4] In

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[3] The circuit court implicitly found all elements contained in § 421.301(27)(a), STATS., present in this case. However, on appeal the parties merely discuss the existence of the second element. Neither party discusses the existence of the other three elements. Because neither party has discussed the existence of the other elements, we consider those arguments waived, *see* ***W.H. Pugh Coal Co. v. State***, 157 Wis.2d 620, 637, 460 N.W.2d 787, 793 (Ct. App. 1990), and the elements established.

[4] Section 421.301(30(a), STATS., states as follows:

"Payable in installments" means that the payment is required or permitted by agreement to be made in:

(a) Two or more installments, excluding the downpayment in a consumer credit sale, with respect to an obligation arising from a consumer credit

this case, the terms described on the co-op's invoices implies permission for a member to pay in multiple payments, including payments after the designated due date. The only consequence of making payments after the due date would be the addition of a finance charge.

The co-op argues that the terms described on the invoices unambiguously required payment by a certain date and that therefore the DeGraves were not granted the privilege of paying in installments. This court disagrees and concludes that a reasonable person reading those terms could believe the co-op permitted payments after the due date. Because the terms are ambiguous, it is appropriate to examine whether the parties intended to allow payments after the due date. *See* ***Capital Invests. v. Whitehall Packing Co.***, 91 Wis.2d 178, 190, 280 N.W.2d 254, 259 (1979). This court concludes that the invoice terms expressed an intent to authorize payments after the specified date, merely with the consequence of the application of the stated finance charge.

In addition to the agreement set forth on the invoices, the October 1993 agreement with the DeGraves confirms such a privilege. That agreement explicitly allowed the DeGraves to pay their debt in $50 installments, with the addition of an 18% annual finance charge on any unpaid balance. Because the DeGraves were extended the privilege of paying their balance in installments, the transactions constituted an open-end credit plan.

Because the transactions were pursuant to an open-end credit plan, the co-op was required to disclose the interest rate to be charged as well as all charges and fees that may be levied upon the account. *See* § 422.308, STATS.[5]

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transaction for which a finance charge is or may be imposed;

(b) More than 4 installments, excluding the downpayment in a consumer credit sale, in any other consumer credit transaction; or

(c) Two or more installments if any instalment other than the downpayment is more than twice the amount of any other instalment, excluding the downpayment.

[5] Section 422.308, STATS., provides in relevant part:

(1) With regard to every open-end credit plan between a creditor, wherever located, and a customer who is a resident of this state and who is

Under § 422.302(2), STATS., these disclosures must be made "before the transaction is consummated." The circuit court concluded that the co-op did not comply with these disclosure provisions and this court agrees. It is undisputed that the DeGraves did not sign a credit application when opening their account with the co-op. The co-op points to the terms recited on its invoices to establish that they complied with § 422.308. These documents are insufficient to constitute prior notice because they were presented to the DeGraves *after* the transaction. Invoices presented to the customer after a transaction has been consummated do not satisfy the prior notification requirements of § 422.302(2). *See* ***Severson***, 172 Wis.2d at 273-74, 493 N.W.2d at 232. In addition, these notices

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applying for the open-end credit plan from this state, every application for the open-end credit plan, including every application contained in an advertisement, shall be appropriately divided and captioned by its various sections and shall set forth all of the following:

(a) The annual percentage rate or, if the rate may vary, a statement that it may do so and of the circumstances under which the rates may increase, any limitations on the increase and the effects of the increase.

(b) The date or occasion upon which the finance charge begins to accrue on a transaction.

(c) Whether any annual fee is charged and the amount of the fee.

(d) Whether any other charges or fees may be charged, what they may be charged for and the amounts of the charges or fees.

(2) With regard to every open-end credit plan between a creditor, wherever located, and a customer who is a resident of this state and who is given the opportunity to enter into an open-end credit plan while present in any establishment located in this state but who is not required to complete an application under sub. (1), the customer shall be given a notice prior to entering into the open-end credit plan. The notice shall be appropriately divided and captioned by its various sections and shall set forth all of the information in sub. (1)(a) to (d).

....

(4) A violation of this section is subject to s. 425.304 unless the violation was the result of an unintentional good faith error.

do not disclose the $45 small claims filing fee imposed upon the DeGraves' account.[6]

Because the co-op violated the Act's disclosure provisions, it is subject to penalties under § 425.304, STATS.[7] *See* § 422.308(4), STATS. This court therefore affirms the circuit court judgment imposing the minimum $100 fine upon the co-op.

However, this court concludes that the co-op did not violate the self-help provisions of the Act by seizing the DeGraves' stock and 1993 patronage dividends.[8] The circuit court concluded that the co-op violated § 425.206, STATS., by seizing the DeGraves' stock and dividends.[9] In doing so, the

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[6] The co-op argues that a 1991 invoice bearing Marvin DeGrave's signature constitutes prior notice of the terms required by § 422.308, STATS. This court disagrees. As stated in ***Severson Agri-Service v. Lander***, 172 Wis.2d 269, 273-74, 493 N.W.2d 230, 231 (Ct. App. 1992), invoices presented after a transaction cannot satisfy the prior notice requirement of § 422.302(2), STATS. Furthermore, there is no allegation in the record that this invoice, or one containing the same language, was presented to the DeGraves before transactions between the parties occurred.

[7] The co-op does not argue that it violated § 422.308, STATS., due to an unintentional good faith error. *See* § 422.308(4), STATS.

[8] The parties dispute whether the co-op "took possession" of the stock and dividends within the meaning of § 425.206, STATS. Because we conclude that the stock and dividends were not "collateral" within the meaning of the Act, it is not necessary that we resolve this issue.

[9] Section 425.206, STATS., states as follows:

(1) Notwithstanding any other provisions of law, no merchant may take possession of collateral or goods subject to a consumer lease in this state by means other than legal process in accordance with this subchapter except when:

(a) The customer has surrendered the collateral or leased goods;

(b) Judgment for the merchant has been entered in a proceeding for recovery of collateral or leased goods under s. 425.205, or for possession of the collateral or leased goods under s. 425.203(2);

(c) The merchant has taken possession of collateral or leased goods pursuant to s. 425.207(2); or

court concluded that the stock and dividends were "collateral" as defined by § 425.202, STATS. That section defines collateral, for purposes of ch. 425, to mean "*goods* subject to a security interest in favor of a merchant which secures a customer's obligations under a consumer credit transaction." (Emphasis added.) The definition of "goods" contained in the Act refers to § 409.105, STATS., which gives the following definition of the term:

> (h) "Goods" includes all things which are movable at the time the security interest attaches ... but does not include money, documents, instruments, accounts, chattel paper, [or] general intangibles ....

Under this definition, the DeGraves' stock and dividends in the co-op cannot be considered "goods" or "collateral." Because the self-help provisions of the Act only prohibit taking possession of collateral or other goods, the co-op's actions in taking possession of the stock and dividends does not violate the Act.

Because the circuit court determined that the co-op violated the self-help provisions of the Act, the court ordered the DeGraves' debt canceled and ordered the co-op to pay the DeGraves the fair market value of the stock and dividends pursuant to § 425.305, STATS.[10] Because this court concludes that the co-op did not violate the self-help provisions of the Act, that portion of the judgment is reversed.

The final issue raised by the parties relates to the circuit court judgment awarding attorney fees to the DeGraves pursuant to § 425.308, STATS.[11] This court affirms that portion of the judgment. A party is entitled to

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(d) The merchant has taken possession of collateral in accordance with s. 425.114.

[10] The DeGraves argue that the court did not award remedies under § 425.305, STATS. This court disagrees. The record reflects that while the court expressed some difficulty with applying remedies under subsec. (2), the court did state that the DeGraves were entitled to the fair market value of their stock and dividends under § 425.305(1). This court concludes that the court also canceled the DeGraves' debt pursuant to that subsection.

[11] In their brief, the DeGraves state that the co-op's actions were unconscionable and not in good faith. Because they do not develop these arguments further, this court declines to address them. *See* ***State v. Pettit***, 171 Wis.2d 627, 647, 492 N.W.2d 633, 642 (Ct. App. 1992).

reasonable attorney fees if the party "prevails in an action arising from a consumer transaction." Section 425.308(1), STATS. Because the DeGraves prevailed in establishing the co-op's violation of the Act's disclosure requirements, they are entitled to fees.

To conclude, that part of the judgment imposing a $100 fine upon the co-op pursuant to § 425.304, STATS., is affirmed. Furthermore, because the 18% interest rate was not authorized, enforcement of the co-op's 18% annual interest claim is barred by § 425.306, STATS.[12] However, that part of the judgment imposing sanctions pursuant to § 425.305, STATS., is reversed. The DeGraves' debt is therefore reinstated. On remand, the circuit court shall recalculate interest retroactively at 5% annually on the total obligation pursuant to § 138.04, STATS., and render judgment accordingly.[13] Finally, upon full payment of the debt, the DeGraves are entitled to the stock and patronage dividends, or their fair market value.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions. No costs on appeal.

This opinion will not be published. RULE 809.23(1)(b)4, STATS.

[12] Section 425.306, STATS., states as follows:

(1) Any charge, practice, term, clause, provision security interest or other action or conduct in violation of chs. 421 to 427, to the extent that the same is in violation of chs. 421 to 427, shall confer no rights or obligations enforceable by action.

(2) This section shall not affect the enforcement of any provision that is not prohibited by chs. 421 to 427.

[13] This court agrees with the co-op's argument that the proper remedy in this case is to remand to the trial court for a recalculation of interest at 5% annually. The trial court did not award this remedy because it canceled the DeGraves' debt pursuant to § 425.305, STATS.