

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 28, 2008

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. 2007AP2361-FT

Cir. Ct. No. 2005CV9

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

NCO PORTFOLIO MANAGEMENT, INC.,

PLAINTIFF-RESPONDENT,

V.

MYRON O. CRANE,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dunn County:
WILLIAM C. STEWART, JR., Judge. *Reversed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Myron Crane appeals an order granting NCO Portfolio Management, Inc.'s motion for relief from an order awarding attorney

fees.¹ Crane argues the circuit court erred by vacating the attorney fee award when the underlying judgment forming the basis for that award remains in effect. We agree and, therefore, reverse the order vacating the attorney fee award.

BACKGROUND

¶2 NCO purchased Crane's overdue credit card account and, in January 2005, brought an action to collect the amount due on it. Crane filed a motion to dismiss on grounds that NCO had failed to state a claim upon which relief could be granted. Specifically, Crane argued that NCO failed to comply with the pleading requirements of the Wisconsin Consumer Act. *See* WIS. STAT. § 425.109. NCO countered that as an assignee, it was not a "creditor" within the meaning of the WCA and, therefore, not subject to the WCA's pleading requirements. In August 2005, the circuit court rejected NCO's arguments and granted Crane's motion to dismiss. The court directed Crane to submit an affidavit asserting applicable fees and costs for its consideration of the appropriate attorney fee award pursuant to WIS. STAT. § 425.308. In June 2006, the circuit court entered a judgment awarding \$2,734.97 in attorney fees and costs to Crane.

¶3 At the time the attorney fee award was entered, the case of *Rsidue, LLC v. Michaud*, 2006 WI App 164, 295 Wis. 2d 585, 721 N.W.2d 718, was pending in this court. *Michaud* involved the determination of whether an assignee was a creditor and, thus, subject to the WCA's pleading requirements. In July 2006, the *Michaud* court ruled assignees were not "creditors" subject to the WCA's pleading requirements. In March 2007, NCO filed a WIS. STAT. § 806.07

¹ This is an expedited appeal under WIS. STAT. RULE 809.17. All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

motion for relief from the order and judgment awarding attorney fees. The circuit court granted the motion for relief and this appeal follows.

DISCUSSION

¶4 Crane argues the circuit court erred by granting NCO's motion for WIS. STAT. § 806.07 relief from judgment. On appeal, we review a circuit court's order granting or denying a motion for relief under WIS. STAT. § 806.07 for an erroneous exercise of discretion. See *Lenticular Europe, LLC v. Cunnally*, 2005 WI App 33, ¶9, 279 Wis. 2d 385, 693 N.W.2d 302. "We affirm a discretionary decision if the circuit court examined the relevant facts, applied the correct law, and using a rational process reaches a reasonable result." *Id.*

¶5 WISCONSIN STAT. § 806.07 grants courts the power to relieve parties from judgments, orders and stipulations. Paragraph 806.07(1)(h) is a "catch-all" provision allowing relief from judgment for "any other reasons justifying relief." Paragraph (1)(h) "gives the trial court broad discretionary authority and invokes the pure equity power of the court." *Mullen v. Coolong*, 153 Wis. 2d 401, 407, 451 N.W.2d 412 (1990). However, the provision permits reopening of judgments based on subsequent changes in the law only in very limited circumstances, and only if the motion is made within a reasonable time. *Brown v. Mosser Lee Co.*, 164 Wis. 2d 612, 616-18, 476 N.W.2d 294 (Ct. App. 1991).

¶6 Here, the circuit court granted relief from the attorney fee award, noting that "the issue is now settled law and obviously favors the position of [NCO] in this case as to the non-applicability, under the current law, of the Wisconsin Consumer Protection Act." The court acknowledged, however, that NCO had not sought relief from the court's "judgment on the merits." Crane, therefore, argues that the circuit court erred by vacating the attorney fee award

when the underlying judgment forming the basis for that award remains in effect. We agree.

¶7 Citing *Schwochert v. American Family Mutual Insurance Co.*, 172 Wis. 2d 628, 494 N.W.2d 201 (1993) and *Mullen*, NCO contends that the circuit court properly granted relief from the judgment awarding attorney fees because NCO was a “victim of circumstance.” NCO emphasizes that this court’s ruling on “the same issue” in its favor was not rendered until after the trial court had dismissed NCO’s suit and awarded attorney fees. *Schwochert* and *Mullen*, however, are distinguishable on their facts, as the moving parties in those cases sought WIS. STAT. § 806.07 relief from the substantive judgments. *See Schwochert*, 172 Wis. 2d at 633, *Mullen*, 153 Wis. 2d at 405. Here, NCO did not move for relief from the underlying judgment of its case-in-chief but, rather, only from the attorney fee award. NCO nevertheless contends that under WIS. STAT. § 425.308, an award of attorney fees is only appropriate when a party “prevails” in an action. Because the underlying judgment is still in force, Crane remains the prevailing party. Under the circumstances of this case, we conclude the circuit court erroneously exercised its discretion by vacating the attorney fee award.

By the Court.—Order reversed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

