

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 13, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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No. 97-3836

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

RICKY L. HEATH,

PLAINTIFF-APPELLANT,

v.

**AVCO FINANCIAL SERVICES OF
WISCONSIN, INC.,**

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Eau Claire County: BENJAMIN D. PROCTOR, Judge. *Cause remanded with directions.*

Before Cane, C.J., Myse, P.J., and Hoover, J.

MYSE, P.J. Ricky Heath appeals a judgment dismissing his complaint against AVCO Financial Services of Wisconsin, Inc. He argues that AVCO violated the Wisconsin Consumer Act (1) by calling his employer and leaving a message to return the call, and (2) by later responding to the employer's

inquiry that Heath failed to make a payment.¹ We conclude that the trial court was entitled to find that AVCO's response to the employer's inquiry regarding payment did not violate the Act. Because, however, the trial court's findings do not address whether AVCO violated the Act by calling the employer and leaving a message, we remand for further findings of fact.

Heath brought this action alleging that AVCO, acting as a debt collector, communicated with Heath's employer regarding AVCO's claim and these communications violated § 427.104(1)(d), (e), (h) and (j), STATS. The record discloses that in April 1996, Heath borrowed funds from AVCO and later defaulted on his loan. The parties stipulated that "After July 1, 1996, AVCO acted as a Consumer Act 'debt collector' with respect to the loan" made to Heath. At no time relevant to this case had AVCO obtained a judgment against Heath.

AVCO's telephone log discloses that on September 19, 1996, AVCO telephoned Heath's employer and left a message to call back. Rick Bowe, who had been the district manager for AVCO during the time in question, was asked in reference to the log entry: "So is this an indication that Mr. Forstner [an AVCO employee] had contacted Mr. Heath's employer and left a message for Mr. Heath to call him?" Bowe responded, "Yes."²

Later that day, Heath's employer, Dusty Lundstrom, telephoned AVCO and advised that he had given Heath \$120 to pay on his AVCO loan. The

¹ Heath further argues that the trial court does not have discretion to excuse a technical violation of the Act. At the close of the trial, the court stated: "If there is any violation under these circumstances, however, I find it was purely technical." At motions after verdict, however, the trial court withdrew this finding and concluded there was no violation. Therefore, the record fails to support the claim of error.

² Heath claims that the message was for the *employer* to call back.

employer asked whether Heath had paid the money toward the loan. The AVCO employee who answered the phone informed him that the payment was not made. She testified: “We always answer it, you know, good afternoon, this is Bobbi, AVCO Financial Services. And it was Dusty. And Dusty said, Bobbi, I want to know if Ricky had come in and paid the \$120 I gave him to pay on the loan. ... I said no.”

At trial, Lundstrom testified that he employed an answering service, and any phone calls to his place of business are simply messages for him to call back.

The trial court resolved credibility issues in favor of AVCO and ultimately concluded that Heath failed to meet his burden to show that there was a violation of the Consumer Act.³ At motions after verdict, the trial court elaborated, concluding,

Clearly, the evidence shows that the employer had called AVCO and said did Mr. Heath, or Ricky, make payments, because there was evidence here that – that Dusty had given him money to make payments and he never made them. So I think that there’s a legitimate purpose for contact.

....

I can’t see under any scenario where the answer “no, he hasn’t made this payment” somehow affects his creditworthiness. I just can’t see it.

³ The trial court added, however, that for purposes of the record, if it were to find in the plaintiff’s favor, it would limit damages to \$1,000.

Heath argues that the trial court erroneously concluded that he failed to meet his burden of proof.⁴ He contends that AVCO violated the Act first, by calling his employer and leaving a message to call back and second, by telling his employer that he had failed to make a payment. The trial court delivered its opinion from the bench. Both at the close of trial and at motions after verdict, the trial court concluded that AVCO did not violate the Act by responding to Lundstrom's inquiry. The court did not, however, address whether calling the employer and leaving a message was a violation.

We first address the court's conclusion that AVCO did not violate the Act by responding to Lundstrom's inquiry. Because the trial court accepted AVCO's testimony based upon its credibility determination, the facts are essentially undisputed. As a result, the issue presented is whether the facts present fulfill a legal standard. This issue presents a question of law that we review de novo. *National Amusement Co. v. Wisconsin Dept. of Taxation*, 41 Wis.2d 261, 266, 163 N.W.2d 625, 627 (1969).

A purpose of the Wisconsin Consumer Act is to "protect customers against unfair, deceptive, false, misleading and unconscionable practices by merchants." Section 421.102(2)(b), STATS. Creditors have a duty to act reasonably when collecting debts from their debtors, and in § 427.104, STATS., the legislature codifies rules describing the duty of care debt collectors owe to debtors.

⁴ Heath introduced other evidence at trial, but does not rely on it on appeal. Heath relies solely on the testimony of AVCO witnesses in light of the trial court's assessment of weight and credibility. In doing so, Heath correctly identifies our standard of review. *See Associates Finan. Servs. v. Hornik*, 114 Wis.2d 163, 169, 336 N.W.2d 395, 398 (Ct. App. 1983) ("On questions of credibility, this court is bound by the trier of fact's determinations."). We appreciate counsel's effort at correctly identifying and applying the correct standard, an important matter often neglected.

Associates Finan. Servs. v. Hornik, 114 Wis.2d 163, 168, 336 N.W.2d 395, 398 (Ct. App. 1983). Section 427.104 entitled “Prohibited practices” provides:

(1) In attempting to collect an alleged debt arising from a consumer credit transaction or other consumer transaction where there is an agreement to defer payment, a debt collector shall not:

....

- (d) *Initiate* or threaten to initiate *communication* with the customer’s employer prior to obtaining final judgment against the customer, except as permitted by statute including specifically s. 422.404, but this paragraph does not prohibit a debt collector from communicating with the customer’s employer solely to verify employment status or earnings or where an employer has an established debt counseling service or procedure;
- (e) *Disclose* or threaten to disclose to a person other than the customer or the customer’s spouse *information affecting the customer’s reputation*, whether or not for credit worthiness, *with knowledge or reason to know that the other person does not have a legitimate business need for the information*, but this paragraph does not prohibit the disclosure to another person of information permitted to be disclosed to that person by statute.

Id. (emphasis added).

When responding to Lundstrom’s inquiry, AVCO did not violate the Act under subsection (d) because AVCO did not initiate the communication. It also did not violate the Act under subsection (e) because that section requires that the information be disclosed, or threatened to be disclosed, “with knowledge or reason to know that the other person does not have a legitimate business need for the information.” We agree with the trial court Lundstrom advanced a legitimate business need for the information disclosed. He stated he gave Heath \$120 to pay toward his loan and inquired whether the payment was made. Lundstorm was legitimately entitled to discover whether the money had been used as the employer

intended. There is no evidence that AVCO disclosed more than what was necessary or that AVCO indicated that the loan was in default. Heath failed to prove that the communication violated the Act.

Next, we address whether Heath demonstrated a violation of the Act by showing that AVCO called Heath's employer and left a message to call back. The trial court did not address this specific issue. AVCO argues that Heath waived this issue by failing to raise this argument at trial. Although the record fails to disclose an articulate argument with respect to this call, we are hesitant to find waiver.

In his complaint, Heath alleged that AVCO, acting as a debt collector, communicated with Heath's employer regarding AVCO's claim and that AVCO's communications violated § 427.104(1)(d), (e), (h) and (j), STATS. The complaint also alleged that Heath's employer advised him that his "employment would be terminated if the calls continued." In his trial brief, Heath stated that "AVCO's collection efforts included a number of calls to Mr. Heath's employer, Dusty Lundstrom, regarding Mr. Heath's account." AVCO's records introduced at trial disclosed that on September 19, 1996, AVCO telephoned "his empl[oyer]" and left a message to call back. Although at closing arguments Heath focused on the conversation between AVCO and Lundstrom as evidence of the violation, he did argue that AVCO's phone records disclosed AVCO's call to Lundstrom with a message to call back.⁵

Because the pleadings, trial brief and evidence admitted at trial contain numerous references to AVCO's communications and telephone calls that

⁵ Heath argued: "Dusty returned the call and the conversation ensued."

allegedly violate the Act, we cannot conclude that Heath waived the issue. We understand how the issue may have been overlooked when it was not specifically articulated in counsel's closing statement to the trial court. Nonetheless, the trial court's findings are necessary for our review.

Communication initiated by a debt collector with a customer's employer for the purpose of collecting on a debt is a violation of the Act unless the contact is for one of the purposes this statute permits. *See* § 427.104(1)(d), STATS. The record reflects that AVCO placed a telephone call to Heath's employer on September 19, 1996, which ended in a message to return AVCO's call. The record also reflects that AVCO stipulated that after July 1, 1996, it was acting as a Wisconsin Consumer Act "debt collector" with respect to the loan made to Heath. Because AVCO's call was placed while it was acting as a "debt collector," the idea that the call was made for any other purpose other than to attempt to collect on the loan made to Heath is inconsistent with the stipulation in the record. In addition, the testimony of two AVCO employees indicates that all important activity relating to a customer's account was entered on a computer-generated log. Because the phone call at issue appeared on the log, the only reasonable inference which can be drawn is that this call was made for the purpose of debt collection. Furthermore, the statute requires only that the debt collector "*initiate or threaten to initiate communication with the customer's employer*" *Id.*

Section 427.104(1)(d), STATS., permits a debt collector to communicate with its customer's employer in certain circumstances; however, none of those exceptions appear to apply here. The trial court made no findings whether the call was made for the permitted purposes. The assignment of the burden of going forward with evidence should not be placed on the party least able to introduce evidence on the subject because the plaintiff is not privy to the

finance company's state of mind. The statutorily permitted contacts appear to be affirmative defenses, the proof of which should be borne by the party claiming the benefit of the exception. See *State v. Buelow*, 122 Wis.2d 465, 471, 363 N.W.2d 255, 259 (Ct. App. 1984).

Although we may imply findings when the record supports the trial court's decision, *State v. Echols*, 175 Wis.2d 653, 672-73, 499 N.W.2d 631, 636 (1993), here the record does not lend itself to implied findings. The record fails to indicate whether exceptions permitted by § 427.104(1)(d), STATS., apply. Also, the nature of the call is unclear. Although Bowe testified that the message was left for *Heath* to call back, Heath infers from the phone log that the message was left for the *employer* to call back. This may be an immaterial distinction, however. The plain language of § 427.104(1)(d) prohibits a debt collector, in attempting to collect a debt, from *initiating* communication with a customer's employer. If AVCO identified itself and left a message for either Heath or Lundstrom to return the call, it would have initiated a communication within the meaning of the Act. The reason for our interpretation is that if AVCO identified itself to the employer as a finance company looking for its customer, the employer or coworker who answers the telephone and takes the message would have reason to believe the employee is in debt and probably in default. Consequently, the employee suffers from the embarrassment of disclosure of his or her financial circumstances, a result that the Act seeks to avoid.

We remand the matter with directions to the trial court to determine whether evidence that AVCO telephoned Heath's employer and left a message constituted a prohibited practice under § 427.104(1)(d), STATS. On remand, the court is directed to find the nature and purpose of the call, what specific message was left, and whether AVCO identified itself to the employer. If the court finds a

violation, it is directed to calculate damages based on its new findings. In its discretion, the court may allow additional testimony.

By the Court.—Cause remanded with directions.

Not recommended for publication in the official reports.

97-3836(D)

CANE, C.J. (*Dissenting*). I agree with the majority's conclusion that AVC, Inc.'s, response to the employer's telephone call and question did not constitute a violation of the Wisconsin Consumer Act. I disagree, however, with its remand. Heath argues that the September 19 telephone call from AVCO to his employer violated § 427.104(1)(d), STATS. This argument is meritless. We may imply findings when the record supports the trial court's decision. *State v. Echols*, 175 Wis.2d 653, 672-73, 499 N.W.2d 631, 636 (1993). Therefore, from the record before us, we may imply that the trial court determined that the call from AVCO to the employer resulted only in a message for Heath to return the telephone call. I would agree with the trial court that this evidence is insufficient to demonstrate a violation of the Act. Section 427.104(1)(d) permits a debt collector to contact its customer's employer for some purposes but not for others. *Associated Finan. Servs. v. Hornik*, 114 Wis.2d 163, 170-71, 336 N.W.2d 395, 399 (Ct. App. 1983). Proof of the purpose of the call is necessary to determine whether it constituted a prohibited practice.⁶ Because there is no showing regarding the purpose of AVCO's call, the trial court was entitled to conclude that Heath did not meet his burden of proof.

⁶ Heath does not brief or argue, and therefore we do not discuss, whether § 427.104(a)(d), STATS., shifts the burden to the debt collector to show whether the purpose of the contact fell within permitted exceptions to the prohibition. We have no duty to consider any issues other than those presented to us. *Waushara County v. Graf*, 166 Wis.2d 442, 451, 480 N.W.2d 16, 19 (1992).

