

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 7, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 99-0483

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

AVCO FINANCIAL SERVICES,

PLAINTIFF-RESPONDENT,

v.

SUSANNE MUSGROVE,

DEFENDANT,

BRIAN MUSGROVE,

DEBTOR-APPELLANT.

APPEAL from an order of the circuit court for Jefferson County:
JACQUELINE R. ERWIN, Judge. *Reversed and cause remanded with directions.*

¶1 EICH, J.¹ This is a small claims garnishment case in which the garnishee defendant, Brian Musgrove, appeals [from an order denying his motion](#)

¹ This appeal is decided by a single judge pursuant to § 752.31(a), STATS.

to have the judgment underlying the garnishment proceedings declared null and void, and for attorney fees. The garnishment action is based on a stipulated default judgment in an action commenced by Avco Financial Services against Musgrove's wife, Susanne, of which Musgrove had no notice; and Musgrove claims Avco's complaint in that action should be held null and void for failure to comply with various statutory requirements. The circuit court declined to consider the merits of Musgrove's challenge to the legality of Avco's complaint in the underlying action, concluding that it constituted an impermissible collateral attack on the judgment.

¶2 Musgrove argues on appeal that: (1) he is not bound by his wife's stipulation to entry of judgment in the underlying action, and is entitled to challenge the alleged defects in Avco's complaint against Susanne in this proceeding; and (2) if successful in his claim, he is entitled to attorney fees under the Wisconsin Consumer Act.

¶3 We conclude that Musgrove should not be barred from challenging the legal sufficiency of the complaint in the underlying action and we remand the case to the circuit court to hear and determine the merits of Musgrove's challenge, and, if the court upholds that challenge, to consider his motion for attorney fees.

¶4 The facts are not in dispute. Susanne Musgrove defaulted on a personal loan and was sued by Avco for the sum of \$5,082. Brian Musgrove was neither named in the complaint nor served with a copy. At the time the action was filed, the Musgroves had been separated for several weeks and were contemplating divorce. On the small claims return date, Susanne Musgrove appeared personally and consented to the entry of judgment against her in the amount sought in Avco's

complaint. The judgment was entered on August 5, 1998, and the parties commenced divorce proceedings the same day.

¶5 A week or so later, Avco filed the instant garnishment proceedings against Brian Musgrove. Musgrove objected, arguing that Avco's complaint against Susanne was invalid because it failed to meet the express pleading requirements of the Wisconsin Consumer Act. After hearing his objections, the trial court denied Musgrove's motion, ruling that Susanne's rights under the Marital Property Act to manage and control her property, § 766.51, STATS., included the right to settle or compromise Avco's claim by stipulating to the entry of judgment, and that Brian Musgrove's objections amounted to a collateral attack on that judgment which would be contrary to established law.

¶6 Avco does not challenge Musgrove's assertions regarding the defects in its complaint against Susanne; nor does it dispute that the Consumer Act provides that "judgment may not be entered" on a complaint that fails to meet the stated requirements of the statute. Section 425.109(3), STATS. Avco argues instead that § 425.109(3) does no more than provide an affirmative defense which Susanne could, and did, waive in the underlying action; and it says she had the right to do this under the Marital Property Act—specifically § 766.51(11), which gives spouses the right to manage and control marital property, including the right to "defend a civil action regarding or otherwise deal with property as if it were property of an unmarried person."

¶7 Musgrove, pointing to another provision of the Marital Property Act, § 766.565(3), STATS., which states that the spouse of a person incurring an obligation under the Consumer Act has all the rights and remedies available to the incurring spouse, claims that he was denied the opportunity to exercise those

rights because he was not a party to, and had no notice of, Avco's action against Susanne. He claims the first time he had such an opportunity was when he was served with the garnishment papers, and that to deny him an opportunity to challenge the legality of Avco's complaint in the underlying action not only nullifies § 766.565(3), but abridges his constitutional right to due process of law.²

¶8 There is no question that affirmative defenses—such as the failure of the complaint to state a claim, or to comply with statutory requirements—may be waived by a defendant. See *Ford v. First Am. Nat'l Bank*, 82 Wis.2d 200, 205, 262 N.W.2d 98, 101 (1978). Nor does Musgrove seriously dispute Susanne's right under the Marital Property Act to compromise a claim made against her. The issue is whether he may be precluded from challenging the legality of the complaint under these facts. Avco agrees that, under § 766.565(3), STATS., Musgrove, as the “non-incurring spouse,” has all of the rights and remedies available to Susanne with respect to the Avco obligation—and, presumably, with respect to the underlying lawsuit. The problem is that Avco's position—and the position taken by the trial court—would deprive Musgrove of any opportunity to exercise those rights.

¶9 As Musgrove notes, he had no actual notice of Avco's action against Susanne. Indeed, Avco notes in its brief that he first became aware of the judgment against Susanne when the garnishment papers were issued by the court and served on him. Avco's position is that, even so, Musgrove didn't lose

² Musgrove's constitutional argument is, in essence, that he is in the same situation as one whose wages are garnished prior to judgment—a practice declared unconstitutional by the United States Supreme Court in *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969). Because, as will be seen, we think the case may be resolved on statutory grounds, we need not consider the constitutional argument.

anything because he could have sought to be joined as a defendant in Avco's action against Susanne under the joinder statute, § 803.04(3), STATS.,³ and then either: (1) moved for relief from the judgment under § 806.07, STATS.; (2) moved for relief from Susanne's and Avco's stipulation under § 799.29(2), STATS.;⁴ or (3) moved for a new trial under § 799.28, STATS.⁵ "Under any of these ... statutes or procedures," says Avco, "[Musgrove] would have had the right to ... object to the form of the complaint" We disagree.

¶10 Avco's position is grounded on the proposition that the joinder provisions of § 803.04, STATS., may be invoked by a non-party *after* the action has been terminated by the entry of a final judgment; but he offers no authority for the validity of such a proposition. And the fact is, as we have noted above, that Musgrove had no notice of the action or the judgment until he was served with the garnishment papers. And we think he is correct when he suggests that this is contrary to both the letter and spirit of the Consumer Act and the Marital Property Act.

¶11 The Consumer Act, as Musgrove points out, has several underlying purposes and policies, including simplification of the laws governing consumer transactions, the protection of consumers against unfair practices of merchants, and encouraging the development of fair consumer practices in consumer

³ Section 803.04(3), STATS., states that, "[I]n an action affecting the interest of a spouse in marital property ... a spouse who is not a real party in interest ... may join in or be joined in the action."

⁴ Section 799.29(2), STATS., permits the court to relieve persons from the effect of stipulations in small claims actions.

⁵ Section 799.28, STATS., permits motions for a new trial within twenty days "after the verdict" in small claims cases.

transactions. Section 421.102, STATS. It also safeguards consumers' property against being taken by creditors without fundamental requirements of due process. Thomas D. Crandall, *The Wisconsin Consumer Act: Wisconsin Consumer Credit Laws Before and After*, 1973 WIS. L. REV. 334, 370 (1973). Certainly placing stumbling blocks such as those suggested by Avco in the path of one in Musgrove's position—one who is facing garnishment of his wages pursuant to a judgment of which he had neither knowledge nor notice—runs counter to those policies. Similarly, the policy underlying applicable provisions of the Marital Property Act is to place one in Musgrove's position "in the shoes of" his wife insofar as rights and remedies under the Consumer Act are concerned. Legislative Council Note to 1885 Act 37, § 109, WISCONSIN STATUTES ANNOTATED, § 766.565. Avco's position would deny Musgrove that placement, suggesting instead that he seek to avail himself of "remedies" that are amorphous at best in that they are all grounded on his being made a party to an action that had already proceeded to final judgment.

¶12 That is, we think, the bottom line in this case is: Musgrove's wages are being attached by a creditor of his wife, pursuant to a small-claims judgment she and her creditor stipulated to—all in a case to which Musgrove was not a party and of which he had no knowledge. And his wife's creditor, Avco, is not only attaching his wages but is attempting to bar him from asserting a defense given him by both the Marital Property Act and the Consumer Act which would have prevented the judgment from being entered in the first place.⁶ We agree with

⁶ As we have noted above, § 425.109(3), STATS., states plainly that no judgment may be entered based on a complaint which doesn't comply with the statute's requirements; and, as we also have indicated, it appears to be conceded in this case that Avco's complaint in its action against Susanne Musgrove does not meet those requirements.

Musgrove that such a result would run contrary to both the letter and the spirit of the applicable laws. We therefore reverse the circuit court's order and remand for the purposes outlined at the beginning of this opinion.

By the Court.—Order reversed and cause remanded with directions.

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

