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SUPREME COURT OF WISCONSIN

DANELLE DUNCAN,

Plaintiff-Appellant,
v.

Appeal No.
2019AP001365

ASSET RECOVERY SPECIALISTS, INC., GREG STRANDLIE and WELLS FARGO BANK, N.A.,

Defendants-Respondents-Petitioners.

Appeal from an Order of the Dane County Circuit Court,
Hon. Stephen E. Ehlke, Presiding, Case No. 2017-CV-001704

AMICUS CURIAE BRIEF AND APPENDIX OF THE WISCONSIN CREDIT UNION LEAGUE AND AMERICAN FINANCIAL SERVICES ASSOCIATION

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INTEREST OF AMICUS CURIAE

As trade associations representing lenders that extend safe and affordable credit to Wisconsin consumers, the Wisconsin Credit Union League and American Financial Services Association have a special interest in ensuring that such credit remains available. These amici have a strong interest in the issues presented by this case, as many of their members extend credit or provide financing for which the repayment is secured by motor vehicle collateral. When the customer is in default, and typically as a last resort, these members from time to time repossess collateral in Wisconsin.

ARGUMENT

Repossessions of collateral securing consumer credit transactions are conducted pursuant to the requirements and prohibitions of the Wisconsin Consumer Act ("WCA"), a comprehensive consumer credit code. The lender and the repossessor — indeed, all those involved in these activities — depend and reply upon the consistent application of the WCA.

Creditors may exercise the right to take possession of motor vehicle collateral securing consumer credit transactions pursuant to Wis. Stat. §§ 425.205 or 425.206(1). They may obtain a replevin judgment and take possession of the collateral.

They may obtain a writ of repossession and alternatively enlist the sheriff in executing the repossession. Finally, they may conduct a non-judicial repossession by sending certain notice to the customer, and, if the customer does not demand a judicial replevin within 15 days, take possession of the collateral. Wis. Stat. § 425.205(1g). This procedure was permitted by amendment of the WCA in 2006 and is the method most often used by creditors.

Generally, the law affords creditors the privilege to come onto the real property of the debtor to repossess collateral. *See Callaway v. Whittenton*, 892 So. 2d 852, 858 (Ala. 2003) (UCC Article 9 gives a secured creditor the right to enter a debtor's land for the purpose of repossession).[1] Repossessions from open garages, carports, and driveways have been permitted by courts throughout the U.S. (Def-Pet Brf. at 25-26).

Consistent with these principles, the WCA places two limitations on repossessions: the merchant may not breach the peace, and it may not "[e]nter a dwelling used by the customer as a residence" without consent:

[1] *E.g., Butler v. Ford Motor Credit Co.*, 829 F.2d 568, 570 (5th Cir. 1987) (Repossessions from driveways or streets do not breach the peace and will be upheld absent customer objecting to repossession).

> (2) In taking possession of collateral or leased goods, no merchant may do any of the following:
>
> (a) Commit a breach of the peace.[2]
>
> (b) Enter a dwelling used by the customer as a residence except at the voluntary request of a customer.

Wis. Stat. § 425.206(2) (emphasis added).

Violations of this section are subject to substantial penalty: voiding the loan, refunding payments, and terminating the lien. Wis. Stat. § 425.305.

Typically, repossessions are not performed by the creditor itself, but are performed by repossession professionals. In those circumstances, creditors do not exercise control over the conduct of the repossession and the repossessor determines the particulars of how and when to repossess. Creditors are often sued for this conduct under a theory of vicarious liability and they may oppose such liability.[3] Although both the repossessor and creditor were sued in this case, the question of

[2] In Wisconsin, a breach of the peace occurs when property is repossessed with the customer present and unequivocally objecting to the repossession. *Hollibush v. Ford Motor Credit Co.*, 179 Wis. 2d 799, 810, 508 N.W.2d 449 (Ct. App. 1993)

[3] *Jackson v. Toyota Motor Credit Corp.*, 2009AP2941, 2011 WL 9385 (Ct. App.) (unpublished and authored) (court properly rejected claim for wrongful repossession against creditor where it did not control the conduct of the repossession.)

the creditor's vicarious liability for the repossessor's conduct was not presented.

I. The Court of Appeals Abandoned Established Statutory Construction Rules and Improperly Rewrote and Expanded WCA § 425.206(2)(b).

The court of appeals abandoned the well-established methodology for statutory construction and instead engaged in a policy-oriented search for extrinsic indicia to rewrite the statute. Likewise, in this case the plaintiff, Danelle Duncan ("Duncan"), argues for application of the WCA not according to its plain terms, but rather "liberally" construed to serve identified policy goals.

The Court should reject these approaches, as the expectations and interests of all stakeholders— consumers, creditors and their vendors, the courts, and the public—require the WCA to be applied as written. If allowed to stand, the court of appeals' novel approach to statutory construction would inject uncertainty into the meaning of the WCA's provisions, increasing a lender's risk in extending credit to consumers and possibly reducing consumers' access to affordable credit.

In this case, after meeting all WCA preconditions, defendants exercised the right to repossess the vehicle. Specifically, the repossessor located the vehicle in the open,

quasi-public, multi-unit parking garage on the ground floor below Duncan's apartment building. Duncan was not present and there was no objection voiced to the repossession to give rise to a breach of the peace under § 425.206(2)(a). Duncan asserts that, in taking the vehicle from the open, multi-unit parking garage, defendants "[e]nter[ed] a dwelling used by the customer as a residence," violating § 425.206(2)(b). On summary judgment, the circuit court found this statute was not violated, applying these plain statutory terms to the undisputed facts.

On appeal, the court of appeals abandoned the required methodology for statutory construction, failing to first determine and apply the plain meaning of the words of the statute. This is the first step (and often the last) in statutory construction.[4] The court wrongly skipped this required step and instead searched outside the statute to apply inapplicable terms to expand its scope and meaning and then "liberally construe" it.

[4] *See In re. Sorenson*, 2000 WI 43, ¶ 15, 234 Wis. 2d 648, 611 N.W.2d 240 (If the "manifest intent of [the statute]" is clear from "the plain language," the Court must "give effect to that intent and look no further."); *see also Benson v. City of Madison*, 2017 WI 65, ¶ 25, 376 Wis. 2d 35, 897 N.W.2d 16 (" 'Statutory language is given its common, ordinary, and accepted meaning' and … '[i]f the meaning of the statute is plain, we ordinarily stop the inquiry.' "); *Brunton v. Nuvell Credit Corp.*, 2010 WI 50, ¶ 16, 325 Wis. 2d 135, 785 N.W.2d 302 (same).

This flawed construction was premised in part upon the WCA's liberal construction provision, Wis. Stat. § 421.102(1). However, where, as here, the statute is unambiguous, liberal construction does not apply. *State of Wisconsin Dep't of Justice v. State of Wisconsin Dep't of Workforce Dev.*, 2015 WI 114, ¶ 32, 365 Wis. 2d 694, 875 N.W.2d 545 ("'[A] provision can be construed 'liberally' as opposed to 'strictly' only when there is some ambiguity to construe[.]")

Section 421.102(1) is frequently invoked to argue for liability under circumstances where, as here, the creditor fully complied with the WCA and there is no ambiguity in the statute. To ensure certainty for all stakeholders, the Court should put an end to this practice and reaffirm that the WCA cannot be rewritten and expanded under the guise of liberal construction. Rather, it must be interpreted and applied according to its plain terms. The analysis must begin—and end—with the plain words of section 425.206(2)(b).

Skipping the required first step, the court of appeals turned instead to other WCA statutes and sources to define the word "dwelling." It wrongly imported the definition of "dwelling" from Wis. Adm. Code § DFI-WCA 1.392, a definition expressly for "the purposes of" a separate statute,

Wis. Stat. § 422.419(1)(a).[5] However, the regulation's definition is not included in section 425.206(2)(b) and, therefore, does not apply to that statute.[6] Nevertheless, the court applied that rule's definition to the word "dwelling" in section 425.206(2)(b) to hold that the statute's prohibition bars repossession from quasi-public multi-unit parking garages not "used by the customer as a residence."

Under a proper statutory construction, because the words "enter," "dwelling," and "residence" are undefined but have a common meaning, the Court should consult the dictionary to determine the words' meanings in the statute.[7]

The word "enter" means "to go or come in" or "to come or go into." "Enter," Merriam-Webster.com; Am-App.28. The word "dwelling" means "a shelter (such as a house) in which people live." "Dwelling," Merriam-Webster.com; Am-App.35.

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[5] The regulation was not raised in circuit court or in the parties' appellate briefs and therefore was an improper basis to reverse. Further, it is arguably invalid because it rewrites section 422.419, defining "dwelling" to include buildings beyond dwellings as commonly defined. Heiser, Edward J. Jr., "Wisconsin Consumer Act - A Critical Analysis," 57 Marq. L. Rev. 389, 448 n.116 (1973-1974).

[6] Scalia & Garner, Reading Law: The Interpretation of Legal Texts 93 (2012) ("Nothing is to be added to what the text states or reasonably implies."; "[A] matter not covered is to be treated as not covered.").

[7] *State v. McKellips*, 2016 WI 51, ¶¶ 32-33, 369 Wis. 2d 437, 881 N.W.2d 258 (applying common meaning of words in phrase "computerized communications systems").

"Residence" means "the place where one actually lives." "Residence," Merriam-Webster.com; Am-App.40.

Therefore, to "enter" a dwelling requires the merchant to physically go into the customer's dwelling. And what is "entered" must be the structure (apartment, house, etc.) where the customer "actually lives."

In section 425.206(2)(b), the Legislature chose not to define "dwelling" to broaden it beyond its common meaning. Rather, the statute delineates a narrow subcategory of "dwelling" places, prohibiting entry not into all dwellings, but only into dwellings "used by the customer as a residence."[8] The court of appeals wrongly excised from the statute that the "dwelling" "enter[ed]" must be "used by the customer as a residence." There is no statutory basis to rewrite the statute to expand what is prohibited. As defined by the Legislature, section 425.206(2)(b) does not prohibit entering a parking garage in which the customer does not live.

[8] Similarly, for criminal trespass, the Legislature has defined "dwelling" to "mean[] a structure or that part of a structure which is used or intended to be used as a home, residence or sleeping place …." Wis. Stat. § 943.13(1e)(ar); Wis. Stat. § 943.14(1). Where it wishes to define "dwelling" more broadly to include garages, outbuildings, and other structures, it does so, expressly. *See, e.g.*, Wis. Stat. § 895.07(1)(h).

Because the plain language of the statute is clear and unambiguous, the Court must give effect to its words and look no further. It should reverse the court of appeals decision to avoid the consequence in which the WCA is hereafter construed not according to its plain terms, as required, but instead construed liberally to achieve particular policy purposes found by the courts.

II. Section 425.107 Establishes Only an Unconscionability Defense, Not an Affirmative Claim.

Section 425.107(1) permits a court to refuse to enforce unconscionable aspects of the transaction or to limit the effect of unconscionable conduct "by a party to the transaction." It notes that unconscionability may be defined by statute, the DFI,[9] or case law. *See* Wis. Stat. § 425.107(3)(i).

Duncan asserted an affirmative claim for unconscionability under Wis. Stat. § 425.107 based on the conduct of the repossession and activities afterwards. She contends that persons were rude to her and she did not understand explanations concerning her personal property.

[9] DFI unconscionability definitions are rebuttable because those prohibited practices are only "presumed unconscionable." Wis. Stat. § 425.107(2). *See* Heiser, *supra*, at page 475.

The described conduct does not fit any definition of unconscionability. The Legislature has determined that non-judicial repossessions are permitted. See pages 1-2, above. Because it is an approved enforcement tool, repossessions cannot be an "unconscionable" practice. Nor is rude conduct or unclear communications by repossession personnel "unconscionable" conduct "by a party to the transaction" under any definition of the term. No statute, regulation, or case law declares this conduct unconscionable.

Beyond failing to prove unconscionability, the claim was properly dismissed also because unconscionability is a defense, not an affirmative claim. Unconscionability is a defense to a creditor's enforcement action, found within Subchapter I, "Creditors' Remedies." It is a contract defense recognized by common law and the UCC and it is not an affirmative claim.[10]

Consistent with the UCC and common law, Wisconsin federal courts have held that Wis. Stat. § 425.107 may only be

[10] Unconscionability is only a defense to enforcement of a contract. 8 WILLISTON ON CONTRACTS §§ 18:1, 18:3 (1998) (under common law, unconscionability is a ground for refusing to enforce a contract; under the UCC, upon a finding of unconscionability a court may refuse to enforce the contract or limit the application of the unconscionable term). *See also Mitchell v. Ford Motor Credit Co.*, 68 F. Supp. 2d 1315, 1318 (N.D. Ga. 1998) (unconscionability does not provide a basis for affirmative relief); *Best v. U.S. Nat. Bank of Oregon*, 714 P.2d 1049 (Or. App. 1986) (action alleging that bank fees were unconscionable and seeking restitution of fees paid; holding that restitution is not available under this theory).

used as a shield (a defense) but not a sword (an affirmative claim). *Riel v. Navient Solutions Inc.*, 2017 WL 168900, *3 (E.D. Wis.) (unambiguous language of Wis. Stat. § 425.107 "confers no independent right of action"); *VanHuss v. Rausch, Sturm, Israel, Enerson & Hornik*, 2017 WL 1379402, *10 (W.D. Wis.) (unconscionability must be asserted as a defense to a creditor's lawsuit).

The court of appeals followed suit in *Security Finance v. Kirsch*, approving these federal authorities and holding that section 425.107 establishes a defense to liability but cannot be the basis for an affirmative claim. *Kirsch*, 2017AP1408, 2018 WL 1756126 (Ct. App.) (authored, but unpublished), *aff'd*, 2019 WI 42, 386 Wis. 2d 388, 926 N.W.2d 167. Perhaps realizing the merit of this holding, Kirsch did not include section 425.107 within the issues submitted to this Court.

This Court should adopt *Kirsch*'s well-reasoned decision following suit with the federal courts:

> Our review of the statute [§ 425.107] leads us to the same conclusion. As the court in *Riel* explained, subchapter one of Wis. Stat. ch 425 is subject to Wis. Stat. § 425.102, which provides that "[t]his subchapter applies to actions or other proceedings brought by a creditor to enforce rights arising from consumer credit transactions and to extortionate extensions of credit under [Wis. Stat. §] 425.108." By the statute's plain language, this

> scope provision does not permit Kirsch to enforce a claim for unconscionability against a creditor via a separate lawsuit.

Kirsch, 2018 WL 1756126, ¶ 18.

The available relief for alleged wrongful repossession is provided in Wis. Stat. § 425.206. Repossessions are expressly permitted, and beyond the prohibitions provided in Wis. Stat. § 425.206, the Legislature does not impose liability.

On the section 425.107 claim, the court of appeals again abandoned its duty to apply the plain language of the statute, opening the door to invite courts to allow the unconscionability defense to turn into a catch-all affirmative (and redundant) claim wielded any time a consumer dislikes the creditor's exercise of its rights under the contract. That effort should be rejected and section 425.107 applied as written, as a defense to unconscionable terms and practices.

III. The Decision Has Wide-Ranging Negative Consequences.

If the court of appeals decision is allowed to stand, in addition to condoning expansion of the WCA by way of improper statutory construction, it would have other broad negative consequences.

First, by holding that repossessions of collateral in parking garages associated with customer dwellings are prohibited by 425.206(2)(b), the decision eliminated a broad category of repossessions that was heretofore allowed. This ruling exposes merchants to significant liability for completed peaceful repossessions.

Second, creditors will be forced to repossess on public streets, at store parking lots, at the customer's workplace, or the like, and will also increase the number of repossessions in the daytime. The possibility of contentiousness and potential breach of the peace is greater in such situations.

Third, lenders also may instead choose to file actions to obtain a writ of replevin to be executed by a sheriff. This will result in a slow-down of repossessions, diminishing the value of vehicles securing the defaulted debt and increasing the amount of deficiency owed by the customer after sale of the vehicle. Further, it will also greatly inconvenience consumers. When non-judicial repossession was enacted in 2006, it was in large part a reaction to the detriment that judicial replevins imposed on customers. Customers would take a half-day off work to appear at the hearing, often agreeing to their default, and then also have to pay the creditor's court costs. If the court of

appeals decision stands, it would turn back time and vitiate one of the primary purposes behind non-judicial repossession.

Fourth, the court's decision could reduce the availability of credit and increase the cost of credit for less creditworthy consumers. Lenders must consider the risks and costs associated with non-judicial repossession in underwriting procedures and when establishing credit costs (*e.g.* interest rates and fees). As such, to the extent lenders face expanded liability, those risks are inevitably, as a result of good business practices and safe and sound lending, passed on to consumers by way of stricter underwriting guidelines and higher credit costs. Accordingly, if the court of appeals decision stands and lenders face more non-judicial repossession risk, that risk, in turn, could restrict access to credit and increase the cost of credit for consumers who do not have safe and economically viable alternative lending options.

This is contrary to the purpose of non-judicial repossession, which is to decrease costs for creditors and consumers, and to reduce unnecessary court litigation where the customer would not otherwise challenge the repossession.

Finally, the decision has substantial negative consequences extending beyond the WCA context. The court's

interpretation increases and expands liability exposure. For example, criminal trespass statutes define dwelling essentially the same as Wis. Stat. § 425.206(2)(b). *See* footnote 8, above. Since they are similarly worded, the expansive definition of "dwelling" would apply to those statutes, thus expanding liability to merchants, who may face civil liability based on criminal trespass claims.

Dated this 22nd day of April, 2021.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19 for a brief produced with a proportional serif font: Min. printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of min. 2 points, maximum of 60 characters per full line of body text. The length of this brief is 2,993 words.

Dated this 22nd day of April, 2021.

Lisa M. Lawless

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

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Lisa M. Lawless

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I hereby certify that:

I have submitted an electronic copy of this appendix, which complies with the requirements of § 809.19(13). I further certify that:

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Dated this 22nd day of April, 2021.

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Lisa M. Lawless

APPENDIX CERTIFICATION

I certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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Lisa M. Lawless

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