

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 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. 98-2722

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

LLOYD DEJONG, II,

PLAINTIFF-RESPONDENT,

V.

GERALD HOORNSTRA,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Racine County:
ALLAN B. TORHORST, Judge. *Affirmed.*

SNYDER, P.J. Gerald Hoornstra appeals from a judgment of the trial court finding him liable to Lloyd DeJong, II, under an agreement entered into with Patrick McCrory to perform remodeling work. Hoornstra first contends that the court erred by allowing a third party, DeJong, to present a claim based on a contract to which he was not a party. In addition, Hoornstra argues that the trial court erred by admitting statements attributed to McCrory while suppressing

others under the “Dead Man’s Statute.” We are not persuaded by either argument and thus affirm the award to DeJong.

In September 1997, Hoornstra entered into an oral contract with McCrory to perform cleanup and repair work on a fire-damaged building owned by Hoornstra. According to the terms of the agreement, materials used for the project were to be paid upon submission of billing statements, and labor was to be paid upon completion of all of the work. McCrory hired DeJong to work for him on the project. On January 2, 1998, McCrory died. Prior to his death, McCrory and DeJong completed much of the repair work. Shortly after McCrory’s death, DeJong spoke with George Meyers, Hoornstra’s manager for the building, who instructed DeJong to finish the job. On approximately January 25, 1998, DeJong completed the work and sent Hoornstra the billing statements. Upon receipt of the bills, Hoornstra ordered DeJong off the job site. DeJong initiated this action in small claims court to recover for the work he had performed.

The trial court found that a valid contract existed between Hoornstra and McCrory and between McCrory and DeJong. The court, relying on Wisconsin’s probate code, summarily settled DeJong’s claim against the estate by assigning him McCrory’s claim for services and labor against Hoornstra. The court then awarded DeJong \$5000 based on McCrory’s claim. Hoornstra appeals.

A. The Contract Claim

In reviewing the trial court’s findings of fact, we shall sustain such findings “unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.” Section 805.17(2), STATS.; see *State v. Long*, 190 Wis.2d 386, 393, 526 N.W.2d 826, 828 (Ct. App. 1994). Whether the relationship between two parties creates contractual

obligations is a question of law. *See Wojahn v. National Union Bank*, 144 Wis. 646, 666, 129 N.W. 1068, 1077 (1911).

The trial court found Hoornstra liable to DeJong under an oral contract that Hoornstra had made with McCrory by using the probate code to assign McCrory's claim to DeJong. The court then based DeJong's award on the amount "to be due [McCrory] by [Hoornstra]." The trial court, however, did not observe the procedural requirement that a formal petition be filed with the court before claims against an estate can be settled or assigned. *See* §§ 867.01(3), 867.02(2), STATS. Under § 856.07(1) and (2), STATS., DeJong had standing to make such a petition and had a cause of action against the estate because more than thirty days had passed without a petition for administration from "any executor named in the will or by any person interested." However, the record does not show, and the trial court did not find, that DeJong made a formal petition to the court for either settlement under § 867.01 or assignment under § 867.02. Therefore, we conclude that assignment of McCrory's claim under the probate code was not warranted in this case.

DeJong urges us to find a contract implied in law, or unjust enrichment, in order to uphold the trial court's decision. An action for a contract implied in law requires proof of three elements: "(1) a benefit conferred on the defendant by the plaintiff, (2) appreciation or knowledge by the defendant of the benefit, and (3) acceptance or retention of the benefit by the defendant under circumstances making it inequitable for the defendant to retain the benefit." *Watts v. Watts*, 137 Wis.2d 506, 531, 405 N.W.2d 303, 313 (1987). Our review of the record, however, convinces us that the court's findings of fact support more than unjust enrichment through a benefit conferred by the plaintiff; we conclude that

Hornstra requested the services DeJong provided, and, thus, a contract implied in fact existed between Hornstra and DeJong.¹

A contract implied in fact is established if (1) the defendant requested the plaintiff to perform the services, (2) the plaintiff complied with the request, and (3) the services were valuable to the defendant. *See Theuerkauf v. Sutton*, 102 Wis.2d 176, 185, 306 N.W.2d 651, 658 (1981). If these conditions are satisfied, “the existence of a promise on the part of the defendant to pay the plaintiff for the reasonable value of the services [rendered]” has been established. *Id.*

All three conditions for a contract implied in fact are met in this case, and the trial court made findings of fact to support a damages award based on the value of DeJong’s services. Under the first requirement, the trial court found that a contract existed between Hornstra and McCrory for the “cleanup and restoration of the burned premises to the point of repair just short of drywall installation to the property on a time and materials basis.” Hornstra also testified that when he requested McCrory to take on the project, he knew DeJong would be doing the work subject to McCrory’s supervision. Hornstra therefore admitted that his request for work to be performed on the building directly led to DeJong’s participation in the project. Under these circumstances, we conclude that the defendant’s request for work was directed to both McCrory and DeJong.

¹ Hornstra contends that no contract existed between DeJong and himself and, separately, that DeJong was not a third-party beneficiary to enforce McCrory’s contract with Hornstra. We reject these arguments because we determine that Hornstra is bound by a contract implied in fact. Although the trial court did not consider this position, we note that we may affirm the trial court on grounds different from those the trial court relied upon. *See Vanstone v. Town of Delafield*, 191 Wis.2d 586, 595, 530 N.W.2d 16, 20 (Ct. App. 1995).

Testimony also shows that after McCrory's death DeJong was authorized to complete the work through Hoornstra's agent, Meyers. At trial, Hoornstra specifically testified that Meyers, through his property management company, was Hoornstra's agent for purposes of the construction work. Hoornstra does not dispute Meyers' agency relationship. As Hoornstra's agent, Meyers discussed the work that DeJong was to complete for the project:

Well, after [McCrory] died I was over there and we had gone over a couple things that [DeJong] needed to – or that needed to get just completed. In other words, things were dropped right in the middle of things.... [A]t the time I went over with [DeJong] he told me a couple things he needed to do just to tie up the things that were hanging, loose ends.

Therefore, after McCrory's death, DeJong's services were requested through Meyers, Hoornstra's agent.

Under the second element of a contract implied in fact, we look to whether DeJong complied with the request to perform the work. In this case, the court considered the invoices and photographs submitted by DeJong, as well as the "testimony and observations" of Meyers as to DeJong's presence at the site and the type of work done. The trial court concluded that DeJong had performed the work requested. We conclude that the trial court's findings of fact are not clearly erroneous and that DeJong performed the work requested.

The last requirement is that the services were valuable to the defendant. Although there is no testimony detailing the value of the services to Hoornstra, Hoornstra admits that he would pay McCrory's estate for the services rendered. We interpret this as an admission that the services were of some value to Hoornstra. In addition, Hoornstra does not contest whether the services provided by DeJong were valuable. Instead, he merely contends that DeJong does

not have standing to enforce a claim against Hoornstra as a third party to the contract.

We are satisfied that all three conditions are met for a contract implied in fact. Therefore, we must consider the proper measure of damages for DeJong's claim. Quantum meruit is used to determine damages for a contract implied in fact. See *id.* at 197, 306 N.W.2d at 663. “[D]amages in a quantum meruit claim are measured by the reasonable value of the plaintiff services.” *Ramsey v. Ellis*, 168 Wis.2d 779, 785, 484 N.W.2d 331, 333-34 (1992). Here, the trial court awarded DeJong \$5000 for his services. This determination was based on the invoices and photographs submitted by DeJong, the testimony of Meyers corroborating DeJong's rate of pay, and the absence of evidence offered by Hoornstra to refute DeJong's evidence. We conclude that the trial court's findings were not clearly erroneous.

B. Admissibility of Evidence

Next, Hoornstra contends that the trial court erred in precluding certain evidence under § 885.16, STATS.,² the Dead Man's Statute. First, Hoornstra contends that the Dead Man's Statute cannot be used “to exclude testimony while at the same time allowing other testimony violative of the same section.” He argues that the trial court disallowed his testimony “concerning the details of his contract with [McCrory],” but permitted opposing counsel “on

² Section 885.16, STATS., states in part:

No party or person in the party's or person's own behalf or interest, and no person from, through or under whom a party derives the party's interest or title, shall be examined as a witness in respect to any transaction or communication by the party or person personally with a deceased or insane person in any civil action or proceeding, in which the opposite party derives his or her title or sustains his or her liability to the cause of action....

adverse examination” to elicit those details. Second, he argues that because DeJong did not meet the stringent standard set for offering an objection under the Dead Man’s Statute, Hoornstra’s testimony should have been permitted.

The Dead Man’s Statute is not looked upon with favor and must be strictly interpreted to prevent its use whenever possible. *See Hunzinger Constr. Co. v. Granite Resources Corp.*, 196 Wis.2d 327, 333, 538 N.W.2d 804, 807 (Ct. App. 1995). Strict rules exist for the use of the Dead Man’s Statute, and unless a proper objection is made, the statute will not be applied. *See Giese v. Reist*, 91 Wis.2d 209, 222, 281 N.W.2d 86, 92 (1979). A proper objection must be directed to the competency of the witness to testify, not to the testimony or the evidence. *See id.* at 223, 281 N.W.2d at 92.

At trial, when Hoornstra’s counsel asked Hoornstra about the details of his agreement with McCrory, DeJong’s counsel initiated an objection under the Dead Man’s Statute:

Just wait one second. I know this is Small Claims Court and I guess no deadman’s rules or anything apply in Small Claims Court. Am I correct, Judge, there’s no rules of evidence?

The court ruled that because Hoornstra “ha[d] testified that he acknowledge[d] a contract with the decedent and he acknowledge[d] full liability to the decedent for whatever that contract was, the question [was] going to be allowed because he [was] already on it.” The court permitted Hoornstra to detail his agreement with McCrory except that he was precluded from “testifying as to facts that can’t be corroborated.” Hoornstra then gave his testimony which included a statement that he had agreed to pay McCrory ten dollars an hour for his services.

In its decision, the court admitted the testimony of Hoornstra and DeJong concerning the existence of a contractual relationship but not the actual terms of the agreement. The court determined that Hoornstra's testimony regarding a pay rate of ten dollars an hour was inadmissible and incredulous. The court concluded that the parties had agreed to sixteen dollars an hour. Hoornstra now contests the court's finding that his testimony was inadmissible.

We acknowledge that it is debatable whether DeJong's counsel made a proper objection under the Dead Man's Statute regarding Hoornstra's agreement with McCrory. However, we need not decide this question because even if the court erred in finding Hoornstra's statements inadmissible, the court also determined that Hoornstra's statements were incredulous. We are satisfied by the court's findings of fact. The trial court is in the best position to determine the credibility of witnesses and its findings will be upheld unless clearly erroneous. *See* § 805.17(2), STATS. In this case, we cannot conclude that the trial court's conclusions were clearly erroneous because the evidence of the details of the contract was corroborated by a third party, Meyers. Thus, because the court's findings were not in error and because a contract implied in fact existed between DeJong and Hoornstra, we affirm the court's award.

By the Court.—Judgment affirmed.

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

