COURT OF APPEALS
DECISION
DATED AND FILED

July 16, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-3580

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

DEAN MEDICAL CENTER,

PLAINTIFF-RESPONDENT,

V.

KARRI P. HUBANKS AND MICHAEL A. HUBANKS,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment and an order of the circuit court for Dane County: RICHARD J. CALLAWAY, Judge. *Affirmed.*

DEININGER, J.[1] Karri and Michael Hubanks appeal a small claims judgment in favor of Dean Medical Center, S.C. (Dean) for $3,128 plus costs and pre-judgment interest, for medical services rendered to Karri. They also appeal an order denying their motion to reconsider. The Hubanks contend that the trial court

[1] This appeal is decided by one judge pursuant to § 752.31(2)(a), STATS.

should have dismissed Dean's collection action because Dean failed to establish a prima facie case. According to the Hubanks, Dean's case was defective because the collection statement introduced to prove that services were rendered to Karri was inadmissible hearsay. Because we conclude that the collection statement was properly admitted under the hearsay exception for records of a regularly conducted activity, we affirm the judgment and order.

BACKGROUND

Karri Hubanks received prenatal and obstetrical care from physicians and nurses at the Dean Medical Center. When Dean did not receive payment for these services, it filed a small claims collection action. At trial, Dean called one witness, Teresa Addison, supervisor of Dean's collections department, and introduced a "collection statement," which itemized the services rendered to Karri, showing their total cost to be $3,128. Addison testified that the statement was generated by Dean's billing department, and that the statement was based on Karri's medical records. Addison also testified that according to Dean's standard procedures, doctors and nurses recorded the services rendered to a patient on the patient's medical record. Addison testified further that she had personally reviewed Karri's medical record; that the collection statement sent to the Hubanks accurately reflected the customary charges for the services shown on Karri's medical record; and that the statement accurately reflected all payments made on the Hubanks' account.

At the close of Dean's case, the Hubanks moved for dismissal under § 805.17(1), STATS.[2] The Hubanks argued that Dean's case was deficient because

[2] Section 805.17(1), STATS., provides in relevant part as follows:

(continued)

an essential fact—that Karri had received the medical services for which the Hubanks were billed—had been established only by hearsay. The trial court denied the motion to dismiss. At the close of all evidence, the trial court found that Karri had received the medical services for which the Hubanks had been billed. The court awarded Dean $3,128 plus costs and pre-judgment interest. The Hubanks appeal the judgment entered against them and the trial court's subsequent order denying their motion for reconsideration. Dean has moved for costs and attorney's fees under § 809.25(3), STATS., on the grounds that the Hubanks' appeal is frivolous.

ANALYSIS

No express contract between Dean and the Hubanks was argued or proven. Dean's suit is thus an action in quantum meruit based on an implied contract for services. The elements of an implied contract are: (1) the defendant requested a service, (2) the service was performed, and (3) the plaintiff expected reasonable compensation. *See* ***Ramsey v. Ellis***, 168 Wis.2d 779, 784, 484 N.W.2d 331, 333 (1992). When an implied contract is found to exist, a service provider is entitled to recover the reasonable value of the services provided. *See* ***id***. at 785, 484 N.W.2d at 333-34.

> After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his or her evidence, the defendant, without waiving his or her right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff on that ground or may decline to render any judgment until the close of all the evidence.

The Hubanks do not dispute that Karri requested medical services or that Dean expected reasonable payment for the services. The only issue disputed in this appeal is whether Dean properly proved that the billed medical services were actually performed. The Hubanks contend that the trial court should have granted their motion to dismiss at the close of Dean's case because Dean's only evidence that the medical services were performed was the collection statement, and the collection statement was inadmissible hearsay. In support of their contention, the Hubanks cite § 799.209(2), STATS., which provides that "[a]n essential finding of fact may not be based solely on a declarant's oral hearsay statement unless it would be admissible under the rules of evidence."

Thus, the resolution of this appeal involves, in part, a determination of whether the collection statement is inadmissible as hearsay. The application of the hearsay rule to undisputed facts is a question of law, which we review de novo. *See* ***Scholten Pattern Works, Inc. v. Roadway Express, Inc.***, 152 Wis.2d 253, 257, 448 N.W.2d 670, 671 (Ct. App. 1989). The interpretation and application of § 799.209(2), STATS., also presents a question of law which we decide de novo. *See* ***id***.

We conclude that the trial court did not err in denying the Hubanks' motion to dismiss because the collection statement is admissible as a record of a

regularly conducted activity under § 908.03(6), STATS., which is an exception to the rule barring hearsay.[3] Under § 908.03(6):

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, all in the course of a regularly conducted activity, as shown by the testimony of the custodian or other qualified witness, unless the sources of information or other circumstances indicate lack of trustworthiness.

The Hubanks offer three reasons for their assertion that the collection statement does not fit this hearsay exception, but we find none persuasive. First, the Hubanks argue that the collection statement was not made at or near the time of the acts it purports to document, as required by the statute. Although the collection statement itself was *printed* on August 5, 1993, Addison's testimony indicates that the statement is a compilation of data from medical records that were prepared contemporaneously with the rendering of each medical service.

Second, the Hubanks contend that, because Addison did not provide the specific identity of the persons who made the notations on the medical records, Dean failed to establish that the medical records were made by a person with knowledge. The exception, however, does not require the specific identification of the persons who made the record. It requires only that the record custodian, or another qualified witness, testify that the record meets the requirements of

[3] The trial court relied on the hearsay exception for health care provider records under § 908.03(6m), STATS. Dean did not avail itself of the health care provider records exception, however. That exception allows the admission of health care provider records without an authenticating witness, provided the proponent of the records provides advance notice and makes copies of the records available to all parties. We may affirm the admission of evidence so long as there is a proper basis for it in the law, even if our rationale differs from that of the trial court. *See* ***State v. Amrine***, 157 Wis.2d 778, 783, 460 N.W.2d 826, 828 (Ct. App. 1990).

§ 908.03(6), STATS. Addison testified that according to Dean's standard procedure, a doctor or nurse makes a notation in the medical record of services he or she renders to a patient. This testimony establishes that entries in the collection statement were "made … by, or from information transmitted by, a person with knowledge." Section 908.03(6).

Finally, the Hubanks contend that Addison's testimony suggested that the circumstances surrounding the collection statement lacked trustworthiness. We disagree because the Hubanks' cited examples of untrustworthiness are not supported by the record. There was one duplicate entry on the collection statement for services rendered on August 28, 1992, but the error had been corrected. Although Addison was unable to explain every entry in detail, the charges on the collection statement were hardly "inexplicable," as the Hubanks suggest. Addison did not testify that the "package price" for all of Karri's maternity services was $1,383, but that the $1,383 covered only the physician's fee for routine care and the delivery. And, as the trial court noted, the collection statement indicates that a Dean physician, but not necessarily Dr. Holtzman, delivered Karri's baby, and that the Hubanks' account had been charged for the delivery and for Dr. Holtzman's prenatal care on August 28, 1992, the date of the delivery.

We are thus satisfied that the trial court did not rely on inadmissible hearsay in denying the Hubanks' motion and in entering judgment against them. Moreover, we would affirm on this record even if the collection statement were not admissible under a recognized hearsay exception. In small claims proceedings, a court may admit most evidence "having reasonable probative value." Section 799.209(2), STATS. Although "[a]n essential finding of fact may not be based solely on a declarant's oral hearsay statement unless it would be

admissible under the rules of evidence," ***id***., Dean's collection statement is not excluded under this provision because the statement is not an *oral* statement—it is a written record.[4] We also note that the trial court did not enter judgment against the Hubanks solely on the basis of the collection statement. Karri Hubanks admitted that she had received some of the services for which the Hubanks had been billed, and she did not deny receiving any of the procedures reflected on the collection statement. The trial court's finding that Karri had received the medical services from Dean for which the Hubanks were billed is thus not clearly erroneous. *See* § 805.17(2), STATS., ("Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.").

The Hubanks also contend in the "conclusion" of their opening brief that the damages awarded to Dean cannot exceed $1,383, which they contend was the agreed-upon "package price" for maternity services. Because the Hubanks in no way develop or discuss this assertion in the body of their brief, we need not consider it. *See* ***State v. Gulrud***, 140 Wis.2d 721, 730, 412 N.W.2d 139, 142-43 (Ct. App. 1987). We note, however, that a reduction in the amount of damages would be inconsistent with the facts as found by the trial court. *See* § 805.17(2), STATS., quoted in the preceding paragraph. We also note that the trial court did not allow testimony from Karri Hubanks concerning the quality of services provided to her, on the grounds that the testimony amounted to an allegation of

[4] The Hubanks' reliance on ***Scholten Pattern Works, Inc. v. Roadway Express, Inc.***, 152 Wis.2d 253, 448 N.W.2d 670 (Ct. App. 1989), to attack the sufficiency of Dean's prima facie case is thus misplaced. In ***Scholten Pattern Works, Inc.***, the prima facie case was insufficient because an essential element was supported only by inadmissible oral hearsay. ***Id***. at 255-57, 448 N.W.2d at 671. The Hubanks confuse Addison's oral testimony to support the collection statement's admissibility under § 908.03(6), STATS., with an out-of-court oral statement. Only the latter is oral hearsay. *See* § 908.01(3), STATS.

malpractice which was irrelevant to the collection action. Although this testimony may have been relevant to a determination of the "reasonable value" of the medical services provided, because the issue is not raised or briefed on appeal, we do not consider it. *See* ***Waushara County v. Graf***, 166 Wis.2d 442, 451, 480 N.W.2d 16, 19 (1991).

Finally, we address Dean's motion for costs and attorney's fees under § 809.25(3), STATS., on the grounds that the Hubanks' appeal is frivolous. We previously ordered that the motion be held in abeyance until we reached a resolution on the merits of the appeal. A frivolous appeal is one "filed, used or continued in bad faith, solely for purposes of harassing or maliciously injuring another," or one that is "without any reasonable basis in law or equity" and for which no "good faith argument for an extension, modification, or reversal of existing law" can be supported. Section 809.25(3)(c). Although we were not persuaded by the Hubanks' claim of error, the claim was not "without any reasonable basis in law or equity," nor can we conclude that this appeal was filed in bad faith or for purposes of harassing or maliciously injuring Dean. Consequently, we deny the motion.

By the Court.—Judgment and order affirmed.

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