COURT OF APPEALS
DECISION
DATED AND FILED

September 14, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

No. 00-0292

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

WAUTOMA PRESCHOOL, INC.,

PLAINTIFF-RESPONDENT,

V.

ANDREA JAHNZ-BERTOTTO,

DEFENDANT-APPELLANT,

DOUG NELSEN,

DEFENDANT.

APPEAL from a judgment of the circuit court for Waushara County: LEWIS R. MURACH, Judge. *Affirmed.*

¶1 ROGGENSACK, J.[1] Andrea Jahnz-Bertotto appeals from a small claims judgment awarding Wautoma Preschool $395.08 for unpaid charges for day care provided to her two sons, prejudgment interest and costs. She claims that the circuit court erred in admitting hearsay evidence and in finding that Jahnz-Bertotto had requested the services. In response, Wautoma Preschool asks us to assess costs against Jahnz-Bertotto for pursuing a frivolous appeal. Because we conclude that the circuit court properly exercised its discretion in admitting evidence and that the circuit court's finding that Jahnz-Bertotto had requested Wautoma Preschool to provide day-care services for her sons is not clearly erroneous, we affirm the judgment of the circuit court. We also conclude that Jahnz-Bertotto's appeal is not frivolous.

BACKGROUND

¶2 Wautoma Preschool sued Jahnz-Bertotto in small claims court to recover $225.68 owed for day care services provided to Jahnz-Bertotto's two sons in 1995, plus prejudgment interest and costs. At trial, Dawn Roggenberger, an employee of Wautoma Preschool, produced a ledger page containing Jahnz-Bertotto's name and address and the names of her sons. The ledger page listed the weeks the boys had attended the preschool, the amount billed for each week, and one payment received, which Roggenberger said had been made by Jahnz-Bertotto. Roggenberger explained that she had no other records that reflected the boys' attendance, but she stated that the ledger was compiled from daily timesheets, summarized on a weekly basis. Jahnz-Bertotto admitted that she had

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (1997-98). Additionally, all further references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

lived at the address on the ledger sheet, but she denied that she had enrolled the boys in the preschool or contracted to pay for day care. The court found for Wautoma Preschool and entered judgment. Jahnz-Bertotto appeals. Wautoma Preschool contends the appeal is frivolous.

DISCUSSION

Standard of Review.

¶3 We will not overturn a circuit court's rulings on the manner in which a trial is conducted unless it has erroneously exercised its discretion. *See* ***Gainer v. Koewler***, 200 Wis. 2d 113, 120, 546 N.W.2d 474, 477 (Ct. App. 1996). "Findings of fact [by a trial court] shall not be set aside unless clearly erroneous …." WIS. STAT. § 805.17(2). We decide as a matter of law whether an appeal is frivolous. *See* ***NBZ, Inc. v. Pilarski***, 185 Wis. 2d 827, 841, 520 N.W.2d 93, 98 (Ct. App. 1994).

Evidentiary Issues.

¶4 Jahnz-Bertotto contends that the bookkeeping ledger and portions of Roggenberger's testimony were inadmissible hearsay. As a result, she argues, the circuit court could not rely solely on them in determining that she had requested day-care services for her sons, Dylan and Jordan. We disagree.

¶5 The rules of evidence do not apply in small claims hearings. *See* WIS. STAT. § 911.01(4)(d). However, "[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." WIS. STAT. § 799.209(2). Contemporaneous records of regularly conducted activity are admissible as an exception to the hearsay rule. *See* WIS. STAT. § 908.03(6); ***City of Milwaukee v. Allied Smelting Corp.***, 117

Wis. 2d 377, 391, 344 N.W.2d 523, 529 (Ct. App. 1983) (concluding that a summary of sewer examination reports was an exception to the hearsay rule), *rev'd on other grounds*, ***Just v. Land Reclamation, Ltd.***, 155 Wis. 2d 737, 759, 456 N.W.2d 570, 578 (1990). Section § 908.03(6) states in relevant part:

> RECORDS OF REGULARLY CONDUCTED ACTIVITY. A memorandum, report, record, or data compilation, in any form, of acts, [or] events … 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, [are not excluded by the hearsay rule] unless the sources of information or other circumstances indicate lack of trustworthiness.

¶6 Roggenberger testified about Wautoma Preschool's business practice of keeping daily records of the time children entered and left the preschool.[2] Every week, the preschool would summarize this information in a ledger by multiplying the number of hours by the hourly rate and entering the result. She said that the ledger page attached to the complaint was the record that pertained to the plaintiff's children and that the preschool had received one payment for the boys' care from Jahnz-Bertotto. Therefore, we conclude that there was ample testimony from which the circuit court could conclude that the ledger was admissible as an exception to the hearsay rule for contemporaneous

[2] On appeal, Jahnz-Bertotto argues that Roggenberger was not qualified to testify about the ledger because she did not first establish that she is Wautoma Preschool's bookkeeper or accountant. However, we do not address this argument because Jahnz-Bertotto did not raise this objection during trial. *See* ***Caccitolo v. State***, 69 Wis. 2d 102, 114, 230 N.W.2d 139, 146 (1975).

records of a regularly conducted activity and that its use in combination with Roggenberger's testimony did not violate WIS. STAT. § 799.209(2). [3]

Sufficiency of the Evidence.

¶7 Jahnz-Bertotto also contends that the circuit court erred in concluding that she contracted for the day care services for her sons. During the trial, the circuit court stated:

> You have to understand I'm not God. I can't see into people's souls. I don't know what actually occurred. Are there other possibilities that could have occurred? Certainly there are other conceivable explanations. But I am satisfied that based on the evidence presented to me today that by a slim preponderance, the evidence offered by the plaintiff is more convincing than that offered by the defendant.

Based on this statement, Jahnz-Bertotto argues that the circuit court rendered a speculative verdict. We disagree.

¶8 The record supports a finding that Jahnz-Bertotto asked to have Wautoma Preschool provide day care for her sons. Roggenberger testified that Jahnz-Bertotto had paid for some of the services, pursuant to the payment shown on the ledger. Wautoma Preschool's ledger contained a page with Jahnz-Bertotto's name, the names of her two sons, and the weekly amount billed for the time each child had spent at the preschool. Jahnz-Bertotto admitted that she had lived at the address listed on the ledger page. As a result, we conclude that the circuit court's finding that Jahnz-Bertotto had requested Wautoma Preschool to

[3] WISCONSIN STAT. § 799.209(2) prohibits a circuit court in a small claims trial from making an essential finding of fact based solely on an oral hearsay statement. While Roggenberger's testimony about who made the payment is hearsay, it is not the sole support for the circuit court's finding of which Jahnz-Bertotto complains.

provide day-care services to her sons was not clearly erroneous. Additionally, it was not disputed that the services had been provided and full payment had not been made. Therefore, the circuit court's finding in combination with the provision of services for which payment was due is sufficient to prove the contractual claim at issue here.

Respondent's Motion.

¶9 Wautoma Preschool argues that Jahnz-Bertotto's appeal lacks any reasonable basis in law and asks us to declare it frivolous and award costs under WIS. STAT. § 809.25(3). An appeal is frivolous if "the party … knew, or should have known, that the appeal was without any reasonable basis in law or equity." ***Stern v. Thompson & Coates, Ltd.***, 185 Wis. 2d 220, 253, 517 N.W.2d 658, 671 (1994). Jahnz-Bertotto's appeal made a plausible argument that the circuit court had erroneously admitted hearsay evidence and found a fact without sufficient evidence. While her appeal was not successful, we conclude that it had a reasonable basis in law and therefore is not frivolous.

CONCLUSION

¶10 Because we conclude that the circuit court properly exercised its discretion in admitting evidence and that the circuit court's finding that Jahnz-Bertotto had requested Wautoma Preschool to provide day-care services for her sons is not clearly erroneous, we affirm the judgment of the circuit court. We also conclude that Jahnz-Bertotto's appeal is not frivolous.

By the Court.—Judgment affirmed.

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