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(Cite as:)

Court of Appeals of Wisconsin.
LYON FINANCIAL SERVICES, INC., d/b/a U.S. Bancorp Business Equipment Finance Group, As Assignee of CoActiv Capital Partners, Plaintiff–Appellant,
v.
Dr. Manelle FERNANDO Medical Clinic, Inc., d/b/a Avisa Medical Clinic & Spa, and Manelle N. Fernando, a/k/a Manelleman Fernando, Defendants–Respondents.

No. 2011AP222.
Nov. 10, 2011.

Appeal from a judgment of the circuit court for Rock County: James Welker, Judge. *Affirmed.*

Before VERGERONT, HIGGINBOTHAM and BLANCHARD, JJ.

¶ 1 VERGERONT, J.

Lyon Financial Services, Inc., appeals the circuit court order dismissing its action to collect payments under an **equipment lease** between another entity and the lessee. The circuit court dismissed the action at the close of Lyon's case because it concluded that the document Lyon relied upon to prove it was the assignee of the lease was inadmissible. For the reasons we explain below, we affirm the judgment of the circuit court.

BACKGROUND

¶ 2 Lyon Financial Services, Inc. filed a complaint alleging that Fernando Medical Clinic entered into a contract with Partners Equity Capital Company LLC, subsequently known as CoActiv Capital Partners ("PECC/CoActiv"), to lease a piece of medical equipment. The complaint alleges that Dr. Manelle Fernando signed the lease on behalf of the clinic and that Fernando signed a personal guaranty for the payment and performance of the clinic's obligations under the lease. Asserting that it is the assignee of PECC/CoActiv, Lyon seeks to collect payment for amounts allegedly due on the basis of the lease and the guaranty. The clinic and Fernando (collectively, the clinic) answered the complaint and denied they owed the amounts claimed.

¶ 3 At a trial to the court, Lyon attempted to have a copy of a document titled "Assignment No. 1" admitted into evidence through the testimony of Shannon Vandevere, the charge-off manager for Lyon's business equipment finance services. Lyon contends this document assigns to it PECC/CoActiv's interest in the lease. The first page of the document states that it assigns to Lyon PECC/CoActiv's interest in the "[t]ransactions described on the attached Schedule 1." [FN1] The document is purportedly signed, on the second page, by "Lamont Melton, Senior Vice President, Credit" on behalf of PECC/CoActiv and there is no other signature. A "Schedule 1," which refers to Fernando, is attached to the first two pages of the purported assignment.

FN1. Assignment No. 1 actually states that Lyon assigns to PECC/CoActiv the transactions, not the other way around. However, this apparent mistake is not relevant on this appeal.

¶ 4 In response the clinic's counsel raised objections to Vandevere's testimony regarding Assignment No. 1 based on lack of foundation and hearsay, as it did to her testimony on the other documents Lyon attempted to admit through her testimony. Lyon's response was that Assignment No. 1 and the other documents were admissible under the exception to the hearsay rule for records of a regularly conducted activity. *See* WIS. STAT. § 908.03(6) (2009–10). [FN2] In response to the clinic's request to voir dire Vandevere, the court stated that it would allow her testimony and, if on cross-examination "it turns out that this witness has no basis for her knowledge, [the court would] strike the testimony."

FN2. All references to the Wisconsin Statutes are to the 2009–10 version unless otherwise noted.

¶ 5 On cross-examination Vandevere testified that she did not negotiate the purported assignment. She acknowledged that the first two pages of Assignment No. 1 did not reference the lease with PECC/CoActiv and she did not know if Schedule 1 was attached to the first two pages at the time the

original document was signed. She also testified that she had never been an employee of PECC/CoActiv.

¶ 6 The only other witness Lyon called was Fernando. After Lyon concluded its questioning of Fernando, the court asked if Lyon had any additional witnesses. Lyon's counsel responded that it did not. The clinic's counsel stated that it wanted to move to dismiss the action. Lyon moved to admit its exhibits, including Assignment No. 1, to which the clinic objected for the reasons it had already presented in objecting to Vandevere's testimony.

¶ 7 The circuit court denied admission of Assignment No. 1 on the ground that it had not been properly authenticated and on the ground that it was hearsay and did not come within the hearsay exception in WIS. STAT. § 908.03(6) for records of a regularly conducted activity. Because that document was inadmissible, the court concluded that Lyon had failed to prove it was entitled to any amounts due under the lease, and the court dismissed the action.

DISCUSSION

¶ 8 On appeal Lyon argues that the court erroneously exercised its discretion in three ways. First, the circuit court refused to admit Assignment No. 1 into evidence despite Vandevere's testimony that it was "integrated" into Lyon's records, which, according to Lyon, satisfies the requirements for the hearsay exception in WIS. STAT. § 908.03(6) for records of a regularly conducted activity. Second, even if the circuit court properly refused to admit Assignment No. 1 into evidence, the court failed to consider, as a basis for Lyon's entitlement to seek damages under the lease, Vandevere's testimony that Lyon purchased the lease. Third, the circuit court dismissed the case before Lyon formally rested. The clinic disputes each of these contentions.

¶ 9 We conclude the circuit court properly exercised its discretion in deciding Assignment No. 1 was inadmissible, but we base our conclusion on the court's ruling on lack of authentication, not on hearsay grounds. We also conclude the circuit court acted reasonably in not considering Vandevere's testimony alone as evidence that Lyon was the assignee and in dismissing the case when it did.

I. Admissibility of Assignment No. 1

¶ 10 We begin with background law on authentication and hearsay in order to provide a context for our discussion of the parties' arguments on the admissibility of Assignment No. 1. The rules governing authentication and hearsay are separate conditions precedent to the admissibility of evidence. *Nelson v. Zeimitz*, 150 Wis.2d 785, 797, 442 N.W.2d 530 (Ct.App.1989).

¶ 11 Authentication is "satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." WIS. STAT. § 909.01. Section 909.015 provides illustrations of the types of testimony and evidence that would provide the authentication required by § 909.01. In addition, there are a number of methods for self-authentication of a document, meaning that no extrinsic evidence is necessary to establish authentication. *See* WIS. STAT. § 909.02.

¶ 12 Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." WIS. STAT. § 908.01(3). The rules governing hearsay are rooted in concerns of the credibility of out-of-court statements that are offered to prove the truth of the matter asserted. *See* DANIEL D. BLINKA, 7 WIS. PRAC., WIS. EVIDENCE § 801.1 (3d ed.2008); *see also* Judicial Council Committee's Note to WIS. STAT. § 908.03, 59 Wis.2d R255 (1973) (explaining that the hearsay exceptions are "possessed of sufficient guarantees of circumstantial trustworthiness to eliminate the need for production of the declarant or conversely to establish the practical unavailability of the declarant"). If evidence does not meet the definition of hearsay, then it need not satisfy any exception or exemption. *See* WIS. STAT. § 908.02 ("Hearsay is not admissible except as provided by these rules or other rules adopted by the supreme court or by statute.").

¶ 13 Although authentication and compliance with the hearsay rules are separate conditions precedent to admissibility, in the particular context of hearsay consisting of records of a regularly conducted activity, self-authentication by certification for such records under WIS. STAT. § 909.02(12) and the hearsay exception in WIS. STAT. § 908.03(6) are co-extensive. Section 908.03(6) provides that the following is admissible even though hearsay:

Records of regularly conducted activity. 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, or by certification that complies with s. 909.02(12) or (13), or a statute permitting certification, unless the sources of information or other circumstances indicate lack of trustworthiness.

Section 909.02(12), in turn, provides that an original or duplicate of a document that is a record of a regularly conducted activity that would be admissible under § 908.03(6) is self-authenticated if accompanied by "a written certification of its custodian or other qualified person" certifying:

> 1. That the record was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters.
>
> 2. That the record was kept in the course of the regularly conducted activity.
>
> 3. That the record was made of the regularly conducted activity as a regular practice.

§ 909.02(12)(a).[FN3]

> FN3. Under WIS. STAT. § 909.02(12)(b), the written certification must be provided to the other party in advance so that there is an opportunity for the other party to object.

¶ 14 Against this background, we examine the circuit court's decision and the parties' arguments on the admissibility of Assignment No. 1. We first address the circuit court's decision on authentication. We generally review a circuit court's decision on authentication as a discretionary decision. *See State v. Smith*, 2005 WI 104, ¶¶ 28–33, 283 Wis.2d 57, 699 N.W.2d 508 (reviewing a circuit court's decision on authentication under the erroneous exercise of discretion standard); *State v. Baldwin*, 2010 WI App 162, ¶ 54, 330 Wis.2d 500, 794 N.W.2d 769 (describing WIS. STAT . § 909.01 as calling for the circuit court to exercise its discretion). We affirm a circuit court's discretionary decision if the court applied the correct law to the facts of record and reached a reasonable result. *State v. Manuel*, 2005 WI 75, ¶ 24, 281 Wis.2d 554, 697 N.W.2d 811 (citation omitted). When we review a circuit court's discretionary decision, we look for support in the record for the decision the court made, even if the court does not fully articulate its reasoning. *Id.* (citation omitted).

¶ 15 The court's conclusion that Vandevere's testimony did not authenticate Assignment No. 1 was based on the following reasoning. The court stated that the document was created by an entity other than Lyon and the only signature is by a person described as an officer of that other entity. Vandevere, the court stated, had not been present during the creation or signing of the document and did not know about it. Vandevere's testimony that it was part of Lyon's business records was not sufficient to authenticate it because, the court reasoned, that testimony shows only that Lyon obtained a copy of a document that purports to be an assignment by another entity.

¶ 16 Although the circuit court did not specifically refer to WIS. STAT. ch. 909, its reasoning fits the authentication method provided in WIS. STAT. § 909.015(1)—authentication by the "testimony of a witness with knowledge that a matter is what it is claimed to be." As with all witnesses except experts, the knowledge of a testifying witness must be "personal knowledge of the matter." WIS. STAT. § 906.02.[FN4] We conclude the circuit court reasonably decided that the evidence did not show that Vandevere had personal knowledge that Assignment No. 1 was an assignment by PECC/CoActiv to Lyon.

> FN4. WISCONSIN STAT. § 906.02 provides:
>
> > A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness. This rule is subject to the provisions of s. 907.03 relating to opinion testimony by expert witnesses.

¶ 17 Although the background section in Lyon's brief on appeal describes the circuit court as holding that Assignment No. 1 had not been properly authenticated, Lyon's argument on admissibility does not

address WIS. STAT. ch. 909. Instead, Lyon addresses only the document's admissibility as a hearsay exception for records of regularly conducted activity under WIS. STAT. § 908.03(6). It may be that Lyon assumes that, because in its view Vandevere's testimony satisfies the requirements for the admissibility of Assignment No. 1 under WIS. STAT. § 908.03(6), her testimony is necessarily sufficient to authenticate it because her testimony is extrinsic testimony that tracks the required contents of a certification under WIS. STAT. § 909.02(12). We therefore consider this argument. We conclude it does not provide a basis for reversing the circuit court's ruling on authentication.

¶ 18 The premise of Lyon's argument based on WIS. STAT. § 908.03(6) is that Assignment No. 1 is hearsay. Whether a statement is hearsay and, if so, whether a particular exception applies are questions of law, which this court reviews de novo. *State v. Sharp*, 180 Wis.2d 640, 650, 511 N.W.2d 316 (Ct.App.1993).

¶ 19 We conclude Assignment No. 1 is not hearsay because it was not "offered in evidence to prove the truth of the matter asserted." WIS. STAT. § 908.01(3). Rather, it was offered to show the legal effect of the document, that is, that Lyon had the legal status of assignee of the lease. *See* 2 MCCORMICK ON EVIDENCE § 249 (6th ed. Supp.2009) (explaining that when a statement is not offered to prove the facts asserted but instead offered as evidence of a legal act, it is not hearsay; and illustrating this concept by explaining that "[w]hen a suit is brought for breach of a written contract, no one would think to object that a writing offered as evidence of the contract is hearsay"); *see, e.g.*, *United States v. Davis*, 596 F.3d 852, 856–57 (D.C.Cir.2010) (checks and money orders are not hearsay because they are legally operative documents); *Kepner–Tregoe, Inc. v. Leadership Software, Inc.*, 12 F.3d 527, 540 (5th Cir.1994) (wills, contracts, and promissory notes have independent legal significance and are nonhearsay); *McDonald v. Nat'l Enters., Inc.*, 547 S.E.2d 204, 210 (Va.2001) (holding that a bill of sale and assignment of loans was "an operative legal document that embodies and evidences [a] conveyance," and because it was not offered for its "truth" but rather its "legal effect," it was not hearsay).[FN5]

FN5. We recognize that the clinic's objections and Lyon's argument in response were directed at all the documents that Lyon sought to admit, not just Assignment No. 1. Undoubtedly, other documents Lyon sought to admit based on Vandevere's testimony, such as records of payment, were hearsay. But we discuss only the admissibility of Assignment No. 1 because that is the only document the circuit court specifically addressed in its ruling. We disagree with Lyon's assertion in its brief that, because the circuit court specifically addressed only this document, the other documents were accepted into evidence by the court. This is a misreading of the court's ruling. Because the court decided Assignment No. 1 was not admissible and because the court decided that was critical to Lyon's proof that it owned the lease, it dismissed the case without ruling on the other documents.

¶ 20 Because Assignment No. 1 is not hearsay, an authentication method based on the hearsay exception identified in WIS. STAT. § 908.03(6) is a misfit. However, even if we set aside for a moment our conclusion that Assignment No. 1 is not hearsay, we do not agree with Lyon's argument that Vandevere's testimony satisfies the requirements of § 908.03(6). Thus, her testimony does not satisfy the requirements for the contents of certification under WIS. STAT . § 909.02(12).

¶ 21 Lyon contends that Vandevere's testimony is sufficient to establish the elements of WIS. STAT. § 908.03(6) with respect to Assignment No. 1 because the custodian or other qualified witness need not have personal knowledge of the creation of the document. While our case law recognizes that the custodian need not have personal knowledge as to the creation of the specific document at issue, the custodian or other qualified witness still needs to have personal knowledge of the process by which the document was created. *See Palisades Collection LLC v. Kalal*, 2010 WI App 38, ¶ 22, 324 Wis.2d 180, 781 N.W.2d 503 ("[A] custodian or other qualified witness does not need to be the author of the records or have personal knowledge of the events recorded in order to be qualified to testify to the requirements of WIS. STAT. § 908.03(6)."). Thus, Vandevere must be qualified to testify that: (1) Assignment No. 1 was made at or near the time by, or from information

transmitted by, a person with knowledge; and (2) this was done in the course of a regularly conducted activity. *See id.*, ¶ 15.

¶ 22 Taking the second point first, there is no evidence that Assignment No. 1 was prepared in the course of a regularly conducted activity. Lyon seems to be of the view that, because Vandevere testified that it was Lyon's regular business to take assignments of **equipment leases**, a copy of each document in Lyon's custody purporting to be such an assignment is "in the course of Lyon's regularly conducted activity." However the plain language of the rule is that the record must be "*made* ... in the course of a regularly conducted activity." WIS. STAT. § 908.03(6) (emphasis added). There was no testimony that this document was "made" in the course of either PECC/CoActiv's regularly conducted activity or Lyon's regularly conducted activity.

¶ 23 Similarly, Vandevere's testimony did not show that Assignment No. 1 was "made at or near the time by, or from information transmitted by, a person with knowledge." *See* WIS. STAT. § 908.03(6). For example, when asked whether Schedule 1 was attached to the first two purported assignment pages when it was signed, Vandevere testified: "I wouldn't know. PECC is the one responsible for that."

¶ 24 We do not agree with Lyon that Wisconsin case law supports its position. Lyon relies on *Town of Fifield v. State Farm Mutual Automobile Insurance Co.*, 120 Wis.2d 227, 353 N.W.2d 788 (1984), in which the court concluded that the testimony of a town chairperson established the requirements of WIS. STAT. § 908.03(6). In that case the chairperson testified from a summary of invoices prepared by the town clerk "in the course of the clerk's usual function of receiving and recording charges made against the town." *Id.* at 229. The summary itself was a business record of the town, and the town chairperson's testimony was based on that business record. *Id.* at 229–30. The summary was not based on a third party's invoices. *See id.*

¶ 25 Lyon also attempts to distinguish the factual contexts in *Palisades*, 324 Wis.2d 180, and *Berg–Zimmer & Associates, Inc. v. Central Manufacturing Corp.*, 148 Wis.2d 341, 434 N.W.2d 834 (Ct.App.1988), in which this court concluded the requirements of WIS. STAT. § 908.03(6) were not established. Although the factual contexts of each of those cases differ from that in this case, both support our conclusion that Vandevere's possession of Assignment No. 1 and familiarity with its content does not qualify her to testify to the elements of WIS. STAT. § 908.03(6).[FN6]

FN6. Lyon relies on cases from other jurisdictions that have interpreted the counterpart to WIS. STAT. § 908.03(6) so that one entity is considered to have "made" a record within the meaning of that provision when it integrates the business records of another entity into its own records. *See, e.g.*, *U.S. v. Adefehinti*, 510 F.3d 319, 326 (D.C.Cir.2007) ("[S]everal courts have found that a record of which a firm takes custody is thereby 'made' by the firm within the meaning of the rule (and thus is admissible if all the other requirements are satisfied). We join those courts."). However, these cases are not consistent with *Palisades Collection LLC v. Kalal*, 2010 WI App 38, 324 Wis.2d 180, 781 N.W.2d 503, or the case we relied on in *Palisades*, *Berg–Zimmer & Associates, Inc. v. Central Manufacturing Corp.*, 148 Wis.2d 341, 434 N.W.2d 834 (Ct.App.1988). *See Palisades*, 324 Wis.2d 180, ¶ 22 (noting that "the witness must have personal knowledge of how the records were made so that the witness is qualified to testify"); *Berg–Zimmer*, 148 Wis.2d 341, 350–51 (opining that the witness was not qualified to lay the foundation for admission of the business records because "[h]e did not possess knowledge to testify concerning the contemporaneousness of the entries, by whom they were transmitted or whether they were made in the course of a regularly conducted activity," and noting that mere possession of the records was not enough).

¶ 26 Because we conclude that Vandevere's testimony does not satisfy the elements of WIS. STAT. § 908.03(6) with respect to Assignment No. 1, any authentication argument Lyon may be making based on that hearsay exception does not succeed.

¶ 27 Lyon does not develop any other argument to explain why the circuit court erroneously exercised

its discretion in deciding that Vandevere's testimony did not show she had personal knowledge that Assignment No. 1 is what it purports to be. Nor does Lyon point to any other basis for authentication under WIS. STAT. ch. 909. Accordingly, we see no reason to reverse as an erroneous exercise of discretion the circuit court's determination that this document was not properly authenticated. We emphasize that this is a narrow holding based on the testimony Vandevere gave, our discretionary standard of review, and the arguments Lyon has made.

II. Vandevere's Testimony Without Admission of Assignment No. 1

¶ 28 Lyon argues that, even if Assignment No. 1 was inadmissible, the circuit court erroneously exercised its discretion in dismissing the case without considering Vandevere's testimony that Lyon owned the lease. According to Lyon, Vandevere's testimony was not contradicted.[FN7]

> FN7. Lyon relies on *Thiel v. Damrau*, 268 Wis. 76, 85, 66 N.W.2d 747 (1954), in which the court stated: "Positive uncontradicted testimony as to the existence of some fact, or the happening of some event, cannot be disregarded by a court or jury in the absence of something in the case which discredits the same or renders it against the reasonable probabilities." The context of this statement is the review of a circuit court's factual findings after a trial to the court. *Thiel* provides no guidance given the record and the procedural posture in this case.

¶ 29 We first note that Lyon's description of Vandevere's testimony as "not contradicted" appears to assume that the circuit court made a final ruling that her testimony was admissible. This is not clear from our reading of the record. Vandevere's testimony did not reveal a basis for her personal knowledge of a transaction between PECC/CoActiv and Lyon other than the documents Lyon was attempting to admit through her testimony. The clinic objected early and often to Vandevere's testimony as hearsay and lacking foundation, and the court initially overruled most of the objections. When the clinic's counsel asked to voir dire Vandevere, the court stated: "I'm going to allow [the testimony]. If on cross-examination it turns out that this witness has no basis for her knowledge, I will strike the testimony." The clinic's attorney continued to make objections to Vandevere's testimony on the same grounds. Although the clinic did not make a motion to strike Vandevere's testimony at the close of its cross-examination of Vandevere, the clinic objected to the admission of all the exhibits Vandevere's testimony was attempting to make admissible, and at the same time it moved to dismiss. The crux of the clinic's argument on the inadmissibility of the exhibits was the inadmissibility of Vandevere's testimony to support their admission, and the circuit court evidently understood this.

¶ 30 However, regardless how one characterizes the status of Vandevere's testimony at the time the clinic made its motion to dismiss, Lyon never asked the circuit court to consider her testimony without Assignment No. 1. The clinic explained that its motion to dismiss and objection to the admission of the exhibits "run hand in hand." The circuit court engaged Lyon's counsel in an exchange probing the admissibility of the documents and, in particular, Assignment No. 1. Although Lyon had the opportunity to do so, it never argued that, even if Assignment No. 1 was inadmissible, Vandevere's testimony established that Lyon owned the lease and therefore dismissal was improper. Accordingly, we conclude the circuit court acted reasonably in not making a separate ruling on this issue and did not erroneously exercise its discretion . [FN8]

> FN8. Lyon frames its challenge on this point and its challenge in the next section as directed to the court's exercise of its discretion. We therefore assume without deciding that the proper standard of review is that for reviewing a circuit court's discretionary decisions. *See State v. Manuel*, 2005 WI 75, ¶ 24, 281 Wis.2d 554, 697 N.W.2d 811 (citation omitted) (opining that we affirm a circuit court's discretionary decision if the court applied the correct law to the facts of record and reached a reasonable result).

III. Timing of the Court's Dismissal of the Case

¶ 31 Lyon contends the circuit court erroneously exercised its discretion because it dismissed the case before Lyon formally rested. The following facts are relevant to this argument.

¶ 32 As already noted, after Lyon concluded its

questioning of Fernando, Lyon told the court it had no additional witnesses. The clinic immediately moved to dismiss the case, but Lyon had not yet moved to admit its exhibits into evidence. Lyon's counsel said to the court: “Judge, before resting, I would move exhibits 1 through 6 into evidence.” The clinic objected. During the clinic's argument to the court, Lyon's counsel interrupted and the following interchange occurred:

> [LYON'S COUNSEL]: Your Honor, is this a closing argument or a motion—
>
> THE COURT: It's a motion to dismiss.
>
> [LYON'S COUNSEL]: All right. I would just move to admit the exhibits. I thought we were concerning ourselves with that.

¶ 33 After extensive argument from both parties on the exhibits, the court made its ruling that Assignment No. 1 was inadmissible. At that point Lyon's counsel asked to recall Fernando to question her about a letter in which Fernando allegedly acknowledged that the lease was assigned. The court denied Lyon's request, stated that the assignment would not be received into evidence, and dismissed the case.

¶ 34 Based on this record, we conclude the circuit court acted reasonably in not allowing Lyon to recall Fernando. Lyon had already informed the court it had no additional witnesses. When the court informed Lyon that it was considering the motion to dismiss, Lyon stated no objection to the court's hearing the motion to dismiss at that time, other than wanting the court first to rule on the request to admit the exhibits. Lyon did not inform the court that, depending upon the court's ruling on the exhibits, it might wish to present additional testimony. Thus, it was reasonable for the court to conclude that Lyon had rested.

CONCLUSION

¶ 35 We affirm the circuit court's judgment of dismissal.

Judgment affirmed.

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