COURT OF APPEALS
DECISION
DATED AND FILED

January 17, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

No. 99-1586

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

SALLY A. WEBER, ON BEHALF OF HERSELF AND ALL PERSONS SIMILARLY SITUATED,

PLAINTIFF-APPELLANT-CROSS-RESPONDENT,

V.

HUMANA WISCONSIN HEALTH ORGANIZATION INSURANCE CORPORATION,

DEFENDANT-RESPONDENT-CROSS-APPELLANT.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Milwaukee County: JOHN A. FRANKE, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

¶1 FINE, J. Sally A. Weber appeals from a judgment dismissing her complaint against Humana Wisconsin Health Organization Insurance Corporation. Weber seeks compensatory damages, both in contract and tort, and punitive damages because she contends that Humana tried to illegally enforce a subrogation clause in its agreement with its health-care plan members. Although my colleagues and I differ in our respective reasons, we affirm.[1]

I.

¶2 Sally Weber was injured in an automobile accident in 1990. Her father was a member of a prepaid health-care plan administered by Humana, and she received health-care services contemporaneous with the accident through the plan. The plan agreement gave to Humana subrogation rights to recover from those who may be liable to those who receive benefits under the plan:

> To the extent the Plan provides services [where the recipient of plan benefits has a right "to recover expenses for treatment of an injury or illness for which another person or organization is legally liable"], the Plan will be subrogated to all the [recipient]'s rights of recovery against the responsible person or organization ... [and] any money recovered by suit, settlement, or otherwise for medical, hospital, or other health service benefits provided by the Plan must be paid over to the Plan.

Sally Weber settled her claim against the tortfeasor for $6,000. Afterwards, the plan sent to Sally Weber's father, William Weber, a letter seeking "reimbursement of medical benefits totaling $303.75." William Weber paid the reimbursement claim, marking the check for $303.75 as "paid in full." Sally Weber submitted an affidavit averring that her father paid the $303.75 "on my behalf." Subsequently, Humana

[1] An *amicus curia* brief has been submitted by the Wisconsin Association of Health Plans.

sought additional sums from William Weber to which it claimed a subrogation-right of reimbursement. He never paid that additional claim, and asserted that his check was in "accord and satisfaction" of whatever additional money Humana said was owed, noting that he considered his check for $303.75 to be payment "in full" for what he characterized as "my debt."

¶3 Sally Weber's complaint sought compensatory and punitive damages from Humana "on behalf of herself and all persons similarly situated," asserting the following "causes of action": "breach of contract," "breach of implied covenant of good faith and fair dealing," "bad faith," "breach of fiduciary duty," "accounting," "unconscionability," "intentional misrepresentation," "misrepresentation; negligence," "wrongful conversion," and "unjust enrichment." (Uppercasing omitted.) Sally Weber is the only plaintiff. The case was never certified as a class action, *see* WIS. STAT. Rule 803.08; ***Schlosser v. Allis-Chalmers Corp.***, 86 Wis. 2d 226, 233, 271 N.W.2d 879, 883 (1978) (whether to certify class action is vested in the trial court's discretion), and the trial court granted summary judgment to Humana on all claims, in essence holding that the subrogation agreement was lawful and did not violate public policy.[2]

[2] Humana counterclaimed against Sally Weber and the putative class, seeking *inter alia*, the full value of medical services provided. The counterclaim was dismissed without prejudice, and neither party has appealed from that dismissal.

(continued)

II.

¶4 The *sine qua non* of a plaintiff's right to recover in court is the invasion of a legal right. Thus, a plaintiff may not recover damages on a contract-based claim unless that plaintiff proves that he or she has suffered damages. *See* ***Hanz Trucking, Inc. v. Harris Bros. Co.***, 29 Wis. 2d 254, 268, 138 N.W.2d 238, 246 (1965) ("Contract damages are to be compensatory. A party is not entitled to be placed in a better position because of a breach than he would have if the contract had been performed.") (internal citation omitted). The rule is the same for claims founded on tort. *See* ***Kehl v. Economy Fire & Cas. Co.***, 147 Wis. 2d 531, 535, 433 N.W.2d 279, 280–281 (Ct. App. 1988) (to recover in tort a plaintiff must prove "actual damage"). Moreover, punitive damages may not be recovered unless the plaintiff has suffered actual damage. *See* ***id.***, 147 Wis. 2d at 534, 433 N.W.2d at 280.

¶5 It is undisputed on this record that Sally Weber received medical treatment that was provided as a consequence of her father's membership in the Humana plan; there is no claim that Humana defaulted in its obligation to provide that care. Further, it is undisputed on this record that the only "reimbursement" payment to Humana for Sally Weber's medical treatment was *via* a check drawn

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Humana has cross-appealed from the trial court's judgment, asserting alternative grounds to sustain the trial court's dismissal of Sally Weber's complaint (the "economic loss doctrine" and "accord and satisfaction"). The cross-appeal does not seek modification of the judgment, and, accordingly, was not necessary because we may affirm the trial court for any reason, whether or not the party who has prevailed before the trial court cross-appeals. *See* WIS. STAT. RULE 809.10(2)(b) ("A respondent who seeks a *modification* of the judgment or order appealed from or of another judgment or order entered in the same action or proceeding shall file a notice of cross-appeal.") (emphasis added); ***Wisconsin Bell, Inc. v. Wisconsin Department of Revenue.***, 164 Wis. 2d 138, 141 n.2, 473 N.W.2d 587, 588 n.2 (Ct. App. 1991) (cross-appeal not necessary to review errors that, if corrected, would sustain the judgment); ***State v. Holt***, 128 Wis. 2d 110, 124, 382 N.W.2d 679, 687 (Ct. App. 1985) ("It is well-established that if a trial court reaches the proper result for the wrong reason, it will be affirmed.").

on the account of William C. Weber and June P. Weber—*not* from Sally Weber or any funds either controlled by her or held in trust for her. Indeed, William Weber characterized his $303.75 check as payment "in full" for "my debt" under the subrogation clause. Simply put, there is no evidence in this record that Sally Weber has suffered *any* loss as a result of the matters about which she complains. Accordingly, in my view, she has no claim against Humana, and we must affirm. *See* ***State v. Holt***, 128 Wis. 2d 110, 125, 382 N.W.2d 679, 687 (Ct. App. 1985) ("An appellate court may sustain a lower court's holding on a theory or on reasoning not presented to the lower court.").[3]

By the Court.—Judgment affirmed.

Publication in the official reports is not recommended.

[3] As noted, although Sally Weber's complaint asserts that it seeks to raise class-action claims, no class action was ever certified. She has not sustained any damages and is not, therefore, as a matter of law, a suitable representative of persons in connection with the matters encompassed by her complaint. *See* ***Ramon v. Aries Insurance Co.***, 769 So. 2d 1053 (Fla. Dist. Ct. App. 2000) (person who suffers no damage may not represent class of persons who may have suffered damages) (opinion not yet released for publication).

¶6 WEDEMEYER, P.J. *(concurring).* I agree with the result reached by the majority opinion, but for a different reason. In a letter dated April 30, 1991, an agent of Humana sent a letter to William C. Weber seeking reimbursement of $303.75, which the plan indicated it had paid to two providers who had treated Sally Weber. In the comment section of the bill from the two providers was a notation that "more claims may be paid on this file" and, therefore, bills may be subject to change. On May 6, 1991, William sent a check to the plan for $303.75. He wrote "paid in full" on the check. In July 1991, an agent of Humana attempted to recover additional subrogation amounts from William. William responded in October 1991, indicating that his $303.75 check constituted accord and satisfaction of the debt. The plan accepted this explanation and closed the file.

¶7 Based on the foregoing, I conclude that this case should be affirmed. An accord and satisfaction is an agreement to discharge an existing disputed claim and constitutes a defense to an action to enforce a claim. "An accord and satisfaction requires a bona fide dispute as to the total amount owing, an offer, an acceptance and consideration." ***Butler v. Kocisko***, 166 Wis. 2d 212, 215, 479 N.W.2d 208 (Ct. App. 1991). The standard of review for whether an accord and satisfaction has been met is *de novo*. *See* ***Cooke & Franke, S.C. v. Meilman***, 136 Wis. 2d 434, 440, 402 N.W.2d 361 (Ct. App. 1987).

¶8 I conclude those requirements are satisfied in this case. The notation that more charges may be forthcoming, and William's response to that of writing "paid in full" on the check, support a finding that a bona fide dispute existed as to

what may be owed. William offered the $303.75, the plan accepted it by cashing the check, and the payment served as consideration. Accordingly, in my view, that transaction ended the matter.

¶9 SCHUDSON, J. *(concurring).* Although I find no flaw in Judge Fine's opinion, I am reluctant to resolve this complicated case on a basis not addressed by the appellate briefs. I do, however, agree with Judge Wedemeyer's concurring opinion, resolving this case on the basis of accord and satisfaction, which was extensively addressed by the parties. I also accept Humana's additional argument that the statute of limitations precluded Weber's tort claims. Accordingly, I respectfully concur.