

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 30, 2010

A. John Voelker
Acting Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2010AP759
2010AP1826
STATE OF WISCONSIN**

Cir. Ct. No. 2008SC13460

**IN COURT OF APPEALS
DISTRICT IV**

HSBC BANK NEVADA NA,

PLAINTIFF-RESPONDENT,

V.

GREG GRISWOLD,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: DAVID T. FLANAGAN, III, Judge. *Reversed and cause remanded.*

¶1 VERGERONT, P.J.¹ This case arises out of a small claims collection action alleging that Greg Griswold defaulted on credit card payments

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) and (3) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

owed to HSBC Bank Nevada. Griswold appeals the circuit court's grant of summary judgment to HSBC and the court's order denying his motion for reconsideration. The circuit court concluded that HSBC had made a prima facie case for summary judgment and Griswold had not presented materials disputing those facts. The court also concluded that Griswold had not stated a claim for relief on his affirmative defenses or counterclaim.

¶2 On appeal, Griswold makes several arguments that are not fully developed. We address only those arguments we conclude are adequately developed. *See State v. Butler*, 2009 WI App 52, ¶17, 317 Wis. 2d 515, 768 N.W.2d 46. The issues we address are: (1) did the circuit court err by not dismissing HSBC's complaint for noncompliance with the requirements of WIS. STAT. § 425.109(1); and (2) did the circuit court err by determining that HSBC's affidavits made a prima facie case for summary judgment?

¶3 We conclude the complaint complies with the requirements of WIS. STAT. § 425.109(1) but that HSBC's affidavits do not establish a prima facie case for summary judgment. Because our conclusion requires a reversal of the summary judgment and remand for further proceedings, we do not address Griswold's argument that the circuit court erroneously exercised its discretion in declining to adjourn the summary judgment proceedings for further discovery.

¶4 In addition, because we conclude the circuit court erred in granting summary judgment, we reverse the circuit court's denial of Griswold's motion for reconsideration.

BACKGROUND

¶5 HSBC’s complaint alleged that Griswold entered into a credit card agreement with HSBC and that he subsequently defaulted on his payments. Included in the complaint was a chart containing the account number, amount owing, payments received, and a balance due of \$1,319.45. Griswold, proceeding *pro se*, filed an answer in which he stated that, since the complaint did not attach a copy of the credit card agreement giving rise to the alleged obligations, he was “without sufficient information as to form a belief” as to most of the allegations. Griswold also alleged several affirmative defenses and a counterclaim.

¶6 HSBC moved for summary judgment. In support of this motion, HSBC submitted the affidavits of Ryan Peterson, one of its attorneys, and Charmain Hopper, an HSBC business analyst. Monthly billing statements for Griswold’s account are attached to both affidavits. In response, Griswold submitted his own affidavit. This affidavit did not dispute the averments made in the affidavits HSBC submitted or the accuracy of the attached account statements. The circuit court granted summary judgment in favor of HSBC.

¶7 Griswold filed a motion for reconsideration. Prior to the circuit court’s decision on this motion, Griswold filed a notice of appeal from the final judgment. The circuit court subsequently denied the motion for reconsideration, and Griswold filed a notice of appeal from that order. We consolidated the appeals.

DISCUSSION

¶8 We review *de novo* the grant of summary judgment, employing the same methodology as the circuit court. *Green Spring Farms v. Kersten*, 136

Wis. 2d 304, 314-16, 401 N.W.2d 816 (1987). A party is entitled to summary judgment when there are no genuine issues of material fact and that party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).

¶9 We first examine the complaint to determine whether a claim for relief has been stated. *Hoida, Inc. v. M&I Midstate Bank*, 2006 WI 69, ¶16, 291 Wis. 2d 283, 717 N.W.2d 17. If it does and if the answer is sufficient to join issue, we examine the moving party's affidavits and other submissions to determine if they make a prima facie case for summary judgment. *Id.* Once the moving party has made a prima facie case, the non-moving party may not rest upon the pleadings, but must, by affidavits or other means prescribed in the statute, set forth specific facts showing that there is a genuine issue of material fact. WIS. STAT. § 802.08(3).

I. Sufficiency of the Complaint under WIS. STAT. § 425.109(1)

¶10 Griswold contends that the circuit court erred by not dismissing HSBC's complaint for failure to comply with the pleading requirements of WIS. STAT. § 425.109(1). He asserts that, pursuant to this statute, HSBC was required to attach the credit card agreement and monthly account statements to the complaint, and since it did not do so, HSBC did not provide the "figures necessary for computation of the amount" of the debt, as required by § 425.109(1)(d). Therefore, he contends, the circuit court was required to dismiss the complaint.

¶11 A resolution of this issue requires us to construe a statute and apply it to the facts of the case. Statutory interpretation and application of a statute to undisputed facts are questions of law, which we review de novo. *Warehouse II, LLC v. DOT*, 2006 WI 62, ¶4, 291 Wis. 2d 80, 715 N.W.2d 213.

¶12 WISCONSIN STAT. § 425.109(1)(d) requires that “[a] complaint by a creditor to enforce any cause of action arising from a consumer credit transaction shall include ... [t]he actual or estimated amount ... that the creditor alleges he or she is entitled to recover and the figures necessary for computation of the amount....” In addition to this requirement, the complaint must include “[a]n accurate copy of the writings, if any, evidencing the transaction” unless the claim arises out of an open-ended credit plan, in which case the complaint must include “a statement that the creditor will submit accurate copies of the writings evidencing the customer’s obligation to the court and the customer upon receipt of the customer’s written request therefore on or before the return date or the date on which the customer’s answer is due.” § 425.109(1)(h). The statute thus clearly establishes that the pleading requirements for claims arising out of open-ended credit plans differ from those for claims arising out of other consumer credit transactions.

¶13 HSBC argues that the debt owed by Griswold arises out of an open-ended credit plan. Because Griswold does not contest this characterization, we take his failure to do so as a concession that HSBC is correct on this point. *See Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979). HSBC’s complaint contained the required statement for open-ended credit plans: that HSBC would submit the writings evidencing Griswold’s obligation upon his request. Under the plain language of the statute, the complaint did not need to attach the writings.

¶14 Griswold also contends that, if the complaint did not attach these writings, HSBC was required to provide them prior to the date on which Griswold’s answer was due, pursuant to WIS. STAT. § 425.109(1)(h). Griswold misconstrues the statute. It is Griswold’s request that must be made “on or before

the return date or the date on which the customer's answer is due.” § 425.109(1)(h), (2). See also *Estate of Newgard v. Bank of America*, 2007 WI App 161, ¶10, 303 Wis. 2d 466, 735 N.W.2d 578 (“[C]reditors on open-end credit plans may submit the required documentation if and when the customer requests it in writing.”). Griswold did make the request within this time frame and he does not contend that HSBC did not provide him with copies of the monthly statements in response to his request.² The circuit court properly concluded that the complaint was not subject to dismissal for failure to comply with § 425.109(1).

II. Sufficiency of HSBC's Affidavits

¶15 We next consider Griswold's arguments that HSBC's affidavits were insufficient to establish a prima facie case. Under WIS. STAT. § 802.08(3), affidavits made in support of a motion for summary judgment “shall be made on personal knowledge and shall set forth evidentiary facts as would be admissible in

² In the context of his arguments regarding the sufficiency of the complaint under WIS. STAT. § 425.109(1), Griswold claims that HSBC failed to state a claim on which relief could be granted because HSBC did not at any time provide him with a copy of the credit card agreement. The circuit court explicitly concluded that the monthly billing statements, which Griswold did not contend were inauthentic or inaccurate, contained information sufficient to show the existence of a credit card agreement between Griswold and HSBC. Though on appeal Griswold claims that HSBC was required to provide him with a copy of the actual credit card agreement, he does not present a developed argument that the monthly account statements are insufficient to show the existence of this agreement or the amount he owes. We therefore do not address this issue. However, we note that the supreme court recently accepted *Capital One Bank v. Summers*, Nos. 2009AP1337 and 2009AP1338, unpublished slip op. (Wis. Ct. App. May 26, 2010), for review of the issue “whether WIS. STAT. §§ 425.109(1) and 425.109(2) require a creditor to produce upon request by the debtor evidence of the credit agreement contract as part of a prima facie case for summary judgment.” WISCONSIN SUPREME COURT, TABLE OF PENDING CASES 15 (Dec. 23, 2009), <http://wicourts.gov/sc/sccase/DisplayDocument.pdf?content=pdf&seqNo=58326>. Nothing in this opinion precludes Griswold from raising in the proceedings on remand the issue whether HSBC must produce the credit card agreement.

evidence.” The “personal knowledge” requirement of § 802.08(3) tracks the evidentiary rule, § 906.02, which 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.

¶16 On summary judgment the party submitting the affidavit need not submit sufficient evidence to conclusively demonstrate the admissibility of the evidence it relies on in the affidavit. *Palisades Collection LLC v. Kalal*, 2010 WI App 38, ¶10, 324 Wis. 2d 180, 781 N.W.2d 503 (citation omitted). The party need only make a prima facie showing that the evidence would be admissible. *Id.* If admissibility is challenged, the circuit court must then determine whether the evidence would be admissible at trial. *Id.*

¶17 The admissibility issue here concerns the monthly statements attached to the affidavits of Hopper and Peterson. HSBC implicitly concedes that these statements are essential to making a prima facie case that Griswold owes HSBC the amount it seeks. In the circuit court HSBC asserted that these statements were admissible because they are kept in the ordinary course of its business. Although HSBC did not expressly refer to WIS. STAT. § 908.03(6), the hearsay exception for business records, that is evidently what HSBC meant. The circuit court understood this to be HSBC’s contention and concluded that

Hopper’s affidavit “properly authenticated [the statements] as business records, admissible pursuant to sec. 908.03(6), Wis. Stats.”³

¶18 Under WIS. STAT. § 908.03(6), business records are admissible if they were “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” As we discussed in *Palisades*, to satisfy this requirement at the summary judgment stage, it must be reasonable to infer from the affidavit that the witness is “qualified to testify that (1) the records were 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.” *Palisades*, 324 Wis. 2d 180, ¶15. Thus, “the witness must have personal knowledge of how the records were made” *Id.*, ¶22.

¶19 We limit our examination to Hopper’s affidavit.⁴ HSBC does not contend that Attorney Peterson’s affidavit establishes the admissibility of the monthly statements attached to it. Rather, HSBC explains, Attorney Peterson’s affidavit was intended to establish that the law firm representing HSBC sent the attached monthly billing statements to Griswold.

³ The court said “the Peterson affidavit” rather than “the Hopper affidavit,” but we are satisfied that the circuit court misspoke. As we explain in paragraph 19, HSBC acknowledges that the Peterson affidavit does not purport to establish the admissibility of the statements as business records.

⁴ Griswold makes some arguments relating to an unsigned affidavit of Hopper that was not filed with the court and apparently sent to Griswold in error. We do not address this document but only the signed, notarized affidavit filed with the court.

¶20 In her affidavit, Hopper avers that she is a business analyst at HSBC, a custodian of HSBC's records, which are kept in the ordinary course of business, and she is familiar with the records of Griswold's account. She also avers:

3. The Defendant applied for an HSBC credit card account, which application was approved. As the result of receiving and approving said Application, HSBC opened said account for the Defendant and issued to him a credit card to make charges thereon.

4. During the time period indicated on the attached itemized monthly statements, the Defendant made the charges and payments indicated thereon, resulting in a balance due and owing in the amount of \$1,319.45 as of the date of the last of such statements, plus any applicable interest, penalties and late fees accruing after such date.⁵

¶21 HSBC contends that we should review the circuit court's decision on the sufficiency of Hopper's affidavit as a discretionary decision. As we explained in *Palisades*, while we employ the summary judgment methodology de novo, some decisions by the circuit court on whether an affidavit meets the requirement that it is made "on personal knowledge and ... set[s] forth such evidentiary facts as would be admissible in evidence" may involve the exercise of the circuit court's discretion, just as it would if the court were ruling on the issue of admissibility at trial. *Palisades*, 324 Wis. 2d 180, ¶¶13-14 (quoting WIS. STAT. § 802.08(3)). When we review a circuit court's discretionary decision, we inquire whether the circuit court examined the relevant facts, applied a proper legal standard, and,

⁵ With respect to paragraph 4 of Hopper's affidavit, nothing in the affidavit suggests it is based on Hopper's personal knowledge. The only reasonable inference from her affidavit is that this statement is based on her reading of the monthly statements, and HSBC does not argue otherwise. Accordingly, as we have already explained, the critical issue is the admissibility of the monthly statements.

using a demonstrated rational process, reached a reasonable conclusion. *Martindale v. Ripp*, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698.

¶22 In this case, we conclude, as we did in *Palisades*, that it does not matter which standard of review we employ for the circuit court’s decision on the sufficiency of Hopper’s affidavit. See *Palisades*, 324 Wis. 2d 180, ¶15. Under no reasonable view of Hopper’s affidavit does it show that Hopper had personal knowledge that monthly statements were “made at or near the time by, or from information transmitted by, a person with knowledge.” WIS. STAT. § 908.03(6).

¶23 Absent from Hopper’s affidavit is any averment from which one can reasonably infer that the monthly statements “were made at or near the time by, or from information transmitted by, a person with knowledge.” WIS. STAT. § 908.03(6). This is not a reasonable inference to draw from the averment that the records are kept in the ordinary course of HSBC’s business. The “ordinary course of business” element is a distinct requirement for admissibility under § 908.03(6) and does not address how the records are prepared, as does the requirement that they “were made at or near the time by, or from information transmitted by, a person with knowledge.” § 908.03(6).

¶24 HSBC argues that Hopper’s affidavit is sufficient because, unlike the affiant in *Palisades*, Hopper avers that she works for the original creditor rather than a debt collector. See *Palisades*, 324 Wis. 2d 180, ¶4. In *Palisades* we concluded that the affidavit was insufficient because, although it averred that the records met the two elements of WIS. STAT. § 908.03(6), it was not reasonable to infer from her position with the debt collection agency that she “held a position from which one could reasonably infer that she has some basis for personal knowledge of how [the creditor] prepared the accounts.” *Id.*, ¶23. It is true that

Hopper's position with HSBC makes it reasonable to infer that she has firsthand knowledge about how Griswold's monthly statements were prepared.⁶ But she does not state in her affidavit how they were prepared. Thus, the affidavit does not make a prima facie case that they were prepared as required by § 908.03(6). Nothing in *Palisades* suggests that, simply because the affiant is an employee of the original creditor, the affidavit need not aver that the records were made as required by § 908.03(6).⁷

¶25 As an alternative to arguing that Hopper's affidavit shows the statements' admissibility under WIS. STAT. § 908.03(6), HSBC argues, for the first time on appeal, that the statements are computer-generated statements and are not hearsay. HSBC points out that "hearsay" is "a statement [made out of court] by the declarant ... offered in evidence to prove the truth of the matter asserted," § 908.01(3); and a "statement" is "an oral or written assertion or ... nonverbal conduct of a person," § 908.01(1) (emphasis added). See also § 908.01(2) ("A 'declarant' is a person who makes a statement."). According to HSBC, the authorities it cites support the view that computer-generated statements do not

⁶ Griswold apparently argues that Hopper's affidavit is insufficient because it does not use the words "personal knowledge." This argument has no merit. WISCONSIN STAT. § 802.08(3) requires that the affidavit must be "made on personal knowledge." This means that the affidavit must aver facts showing the affiant's personal knowledge of the evidentiary facts set forth in the affidavit. The term "personal knowledge" is not necessary.

⁷ *Palisades Collection LLC v. Kalal*, 2010 WI App 38, 324 Wis. 2d 180, 781 N.W.2d 503, was decided after the circuit court granted summary judgment to HSBC, but before Griswold filed his motion for reconsideration. Griswold relied on *Palisades* in his motion for reconsideration. In its denial of the motion, the circuit court did not address *Palisades*. That may be because, as we explain above, the issue in *Palisades* was the meaning of a "qualified witness" in WIS. STAT. § 908.03(6), and on this point Hopper's affidavit does not have the same problem as did the affidavit in *Palisades*. However, both before and after *Palisades*, the qualified witness must have firsthand knowledge that (1) the records were made at or near the time by, or from information transmitted by, a person with knowledge; and (2) this must have been done in the course of a regularly conducted activity. § 908.06(3); *Palisades*, 324 Wis. 2d 180, ¶¶21-22.

meet the definition of hearsay and the only issues regarding their admissibility are authentication and relevance. *See* 7 Daniel D. Blinka, WISCONSIN PRACTICE SERIES: WISCONSIN EVIDENCE §§ 801.1-801.2 (3d ed. 2008).

¶26 Griswold responds that we should not address this alternative theory because it was not raised in the circuit court. He does not discuss the merits of HSBC's argument.

¶27 Although we have the authority to address issues not raised in the circuit court, *State v. Sveum*, 2010 WI 92, ¶40, ___ Wis. 2d ___, 787 N.W.2d 317, we decline to decide whether these monthly statements are or contain statements that are hearsay within the meaning of WIS. STAT. § 908.01(1)-(3). If we were to agree with HSBC on this point, the issue would become: does Hopper's affidavit provide an adequate foundation for authentication of these documents? The authorities on which HSBC relies indicate the affidavit is not adequate, even under HSBC's alternative theory.⁸

¶28 “The requirements of authentication or identification ... are satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” WIS. STAT. § 909.01. To demonstrate the authenticity of computer-generated records, HSBC must introduce “[e]vidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.” § 909.015(9). *See* 7 Blinka, *supra*, § 9015.9 (“This

⁸ HSBC cites *State v. Zivcic*, 229 Wis. 2d 119, 131, 598 N.W. 2d 565 (Ct. App. 1999), in which we held that a circuit court properly exercised its discretion in deciding that an intoxilyzer printout was not hearsay. *Zivcic* supports HSBC's argument that the monthly statements are not hearsay. However, in *Zivcic* we were not presented with the issue whether there was adequate foundation for the printouts as non-hearsay. *Zivcic* does not suggest that the fact that a document is not hearsay means that it is admissible without any foundation.

method of identification may be employed to identify or authenticate such things as computer generated evidence....”). *People v. Houston*, 679 N.E.2d 1244, 1249 (Ill. App. Ct. 1997), on which HSBC relies, is consistent with this rule. That case holds that computer-generated records are admissible if there is testimony that the recording device was accurate and operating properly when the evidence was generated. *Id.* (citing *State v. Holowko*, 486 N.E.2d 877, 879 (Ill. 1985)). *See also* Timothy M. O’Shea, THINKING OUTSIDE THE “BUSINESS RECORDS” BOX: EVIDENTIARY FOUNDATIONS FOR COMPUTER RECORDS, 81 WISCONSIN LAWYER, No. 2, Feb. 2008, at 61-62, on which HSBC relies (arguing that the foundation for records created by a process requires showing “reliability of the computer and the programs that created the records” under §§ 909.01 and 909.015(9)).⁹

⁹ HSBC cites to another article, William Andrew McNeal, ADMISSIBILITY OF CREDIT CARD ACCOUNT STATEMENTS, AM. BANKR. INST. J., July/Aug. 2007, at 12, 58-59, which contends that credit card account statements can be self-authenticating by satisfying the requirements of FED. R. EVID. 902(11), the federal counterpart of WIS. STAT. § 909.02(12). Section 909.02(12) provides:

Certified domestic records of regularly conducted activity.

(a) The original or a duplicate of a domestic record of regularly conducted activity that would be admissible under s. 908.03(6) if accompanied by a written certification of its custodian or other qualified person, in a manner complying with any statute or rule adopted by the supreme court, certifying all of the following:

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.

(continued)

¶29 Hopper’s affidavit does not mention the process that generated the monthly statements, nor does the affidavit make any averments from which one might infer that the computer system was accurate and working properly. Therefore, assuming without deciding that the monthly account statements are not hearsay, the affidavit does not show the foundation required for their admissibility under the authorities HSBC provides.¹⁰

¶30 Because Hopper’s affidavit does not show that the monthly statements are admissible, HSBC has not made a prima facie showing that it is entitled to the amount it seeks from Griswold. Accordingly, we reverse the court’s

(b) A party intending to offer a record into evidence under par. (a) must provide written notice of that intention to all adverse parties and must make the record and certification available for inspection sufficiently in advance of the offer of the record and certification into evidence to provide an adverse party with a fair opportunity to challenge the record and certification.

We have already explained that Hopper’s affidavit does not make the showing required by WIS. STAT. § 908.03(6). Therefore, Hopper’s affidavit does not meet the requirements for certification in § 909.02(12).

¹⁰ HSBC raises another theory for admission of the monthly account statements that was not raised in the circuit court. This theory assumes the monthly statements are hearsay but asserts that they come within the residual hearsay exception of WIS. STAT. § 908.03(24). This exception applies to “statement[s] not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness.” *Id.* We decline to address this exception because the argument is inadequately developed. *See State v. Butler*, 2009 WI App 52, ¶17, 317 Wis. 2d 515, 768 N.W.2d 46. First, HSBC does not explain why the credit card statements, if hearsay, are not “specifically covered” by § 908.03(6), the business records exception. Second, two of HSBC’s suggested indicia of “comparable circumstantial guarantees of trustworthiness” are indistinguishable from many business records: a nationwide company and the appearance of the business’s logo on the records. Third, the fact that Griswold does not contend that these are not his statements—assuming that this is a correct characterization of the record—does not mean that he is agreeing they accurately reflect what he owes. HSBC’s contention on this point puts the burden on Griswold to prove the unreliability of the statements, but it is HSBC’s burden to establish the foundation for the admissibility of the statements—whether through the business record exception for hearsay or, under its alternative theory, through evidence meeting the authentication requirements of § 909.015(9).

grant of summary judgment in favor of HSBC and remand for further proceedings. Nothing in this opinion precludes HSBC from raising in the circuit court on remand its alternative theory that the monthly statements are not hearsay.

CONCLUSION

¶31 We reverse the circuit court's grant of summary judgment to HSBC and remand for further proceedings consistent with this opinion. Because we conclude the circuit court erred in granting summary judgment, we also reverse the circuit court's denial of Griswold's motion for reconsideration.

By the Court.—Judgment and order reversed and cause remanded.

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

