IN THE SUPREME COURT OF THE STATE OF MONTANA

DA 24-0303

CB1, INC., Plaintiff and Appellee, v. KATELYN N. HOVE and IRA HOVE, Defendants and Appellants v. HEALTHCARE SERVICE CORPORATION d/b/a BLUE CROSS AND BLUE SHIELD OF MONTANA, Third-Party Defendant and Appellee	

ANSWER BRIEF OF APPELLEE CB1, INC.

On Appeal from Montana Thirteenth Judicial District Court, Yellowstone County
The Honorable Ashley Harada, Presiding

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STATEMENT OF THE ISSUES

There are two issues on appeal, as follows:

1. Did the district court properly disregard the declaration of Katelyn Hove and the EOB as inadmissible hearsay? [1]

2. Did the defendants raise a genuine issue of material fact that prevented the district court from entering summary judgment against them?

STATEMENT OF THE CASE

In 2018, Katelyn Hove received healthcare treatment and services from Billings Clinic (the "Clinic") and Billings Anesthesiology ("BA"). The Hoves did not pay for the services. The accounts were assigned to Plaintiff/Appellee CB1, Inc. ("CB1") for collection. CB1 filed a complaint in the District Court, to which the Defendants/Appellees (the "Hoves") filed an answer and a third-party complaint against Health Care Service Corporation d/b/a Blue Cross and Blue Shield of Montana.

CB1 moved the District Court for summary judgment supported by affidavits of Billings Clinic and CB1. The Hoves answered, disputing only a

[1] The Hoves assert a third issue on appeal: may a sworn declaration under Mont. Code Ann. § 1-6-105 replace an affidavit for purposes of summary judgment under Rule 56, Mont. R. Civ. Pro. The issue is moot because the declaration was inadmissible hearsay. Any decision on the issue would be advisory only, and the Court does not render advisory opinions. *E.g., Clark v. Roosevelt County*, 2007 MT 44, ¶11, 336 Mont. 118, 154 P. 3d 48.

portion of Clinic account, and silent as to the BA Account, supported by the undated declaration of Katelyn Hove.[2] CB1 responded, again supported by an affidavit of Billings Clinic. After a hearing, the District Court granted summary judgment in favor of CB1 on two independent grounds: (1) the declaration of Kaitlyn Hove (the "Declaration")[3] and the attached explanation of benefits (the "EOB"), were inadmissible hearsay; and (2) the Clinic had no privity of contract with Blue Cross/Blue Shield of Texas ("BCBS of TX") and BCBS of TX's adjustments or final patient liability in the EOB were not correct. The District Court subsequently denied the Hoves' motion to alter or amend pursuant to Rule 59, M.R.Civ.Pro (the "Rule 59 Motion"). The Hoves appealed.[4]

STATEMENT OF THE FACTS

The summary judgment record reveals the following undisputed, dispositive material facts. In 2017 and 2018, Katelyn Hove received healthcare services and treatment from the Clinic. *Compl.* ¶¶20-21 [dkt. 1]; *Defs.' Ans*, ¶¶20-21 (admitting) [dkt. 4]. After applying all payments and adjustments, there remained

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[2] The Hove's only challenged the Clinic encounters listed on the Blue Cross/Blue Shield of Texas explanation of benefits.

[3] Kaitlyn Hove subsequently filed an affidavit with the Rule 59 Motion. Because her affidavit is identical to the Declaration, it suffers from the same fatal flaws as the Declaration. For purposes of this brief, references to the Declaration also refer to the affidavit of Kaitlyn Hove.

[4] The Hoves did not appeal the district court's grant of summary judgment for the BA Account.

an outstanding balance due to the Clinic of $39,410.52. *Compl.* ¶23 [dkt. 1]; *1st Aff. Brian Brown* ¶23 (Jan. 26, 2023) [dkt. 13]; *1st Aff. Joy S. Depanfilis* ¶16 (Jan. 26, 2023) [dkt. 13]. The Clinic was entitled to receive payment of the outstanding balance. *Compl.* ¶24 [dkt. 1]; *Defs.'s Ans*, ¶¶24 (admitting) [dkt. 4]. The Hoves did not pay the account. *Aff. Depanfilis* ¶17 [dkt. 13]. On January 16, 2019, the Clinic assigned the account to CB1 for collection. *Id.*; *Aff. Brown*, ¶¶15-16 [dkt. 13] Despite demand, the Hoves still did not pay the Clinic account. The Clinic did not have privity of contract with BCBS of TX, BCBS of TX did not process the EOB correctly, and the EOB does not state the correct patient responsibility. *1st Aff. Rebecca Kelly*, ¶¶18-20 (Aug. 29, 2023) [dkt. 19]; *Order Granting Plf.'s Mot. Summary J.*, p 5 (Mar. 1, 2024) [dkt. 25].

SUMMARY OF ARGUMENT

First, the Hoves argue for the first time on appeal that the EOB is excepted from the hearsay rule under the business records exception and the residual exception. The Court does not consider arguments made for the first time on appeal. Second, the court properly disregarded the Declaration and the EOB because they are inadmissible hearsay. Specifically, the Hoves did not verify or authenticate the EOB, the EOB does not fall within the business records exception, and the EOB does not fall within the residual exception. Third, the Hoves did not establish a genuine issue of material fact because the EOB was inadmissible and

not part of the summary judgment record, and the court cannot draw inferences in the absence of evidence or from evidence not in the record. Finally, even if the District Court erred in not admitting the EOB, the EOB is not probative evidence, and the error will not affect the result; hence, the Court should not overturn the District Court.

STANDARD OF REVIEW

The Supreme Court reviews a district court's granting summary judgment *de novo*, applying the criteria in Rule 56, Mont. R. Civ. Pro. *TCF Enterprises, Inc. v. Ramses, Inc.*, 2024 MT 38, ¶14, 415 Mont. 306, 544 P.3d 206.

The Supreme Court reviews a district court's decision on the admissibility of evidence under the abuse of discretion standard. *Id.* at ¶15. "'A district court has broad discretion in determining whether evidence is relevant and admissible. It abuses its discretion when it acts arbitrarily without employment of conscientious judgment or so exceeds the bounds of reason as to work a substantial injustice.'" *Id.* (citations omitted). This standard applies when reviewing a district court's decision to exclude or admit hearsay evidence. *See State v. S.T.M.*, 2003 MT 221, ¶13, 317 Mont 159, 75 P.3d 1257.

ARGUMENT

I. The Court Cannot Consider the Proposed Hearsay Exceptions because the Hoves Did not Advance the Theory before the District Court.

The Hoves argue for the first time on appeal that the Declaration and the EOB are excepted from the hearsay rule under Rule 803(6) and (24), M.R.Evid. "The rule is well established that this Court will not address an issue raised for the first time on appeal." *State v. Martinez*, 2003 MT 65, ¶17, 314 Mont. 434, 67 P.3d 207. This rule includes arguments based on exceptions to the hearsay rule. *See In re Marriage of Yates*, 1998 MT 154, ¶12, 971 P.2d 1249 (Table) (refusing to address arguments based on hearsay exceptions that were raised for the first time on appeal and not advanced in the district court); *see also State v. Martin*, 2020 MT 84N, ¶11, 400 Mont. 556, 460 P.3d 438 (Table) (declining to consider the argument made for the first time on appeal that evidence should have been admitted under the business records exception under Rule 803(6)).

At the summary judgment hearing, CB1 moved the District Court to issue summary ruling in its favor on the grounds that the Declaration and the EOB were inadmissible hearsay. The Hoves had three opportunities to advance a hearsay exception under Rule 803(6) or (24), M.R.Evid.: during oral argument; in post-hearing briefing granted by leave of the District Court; and in their Rule 59 Motion. They did not advance any hearsay exception until now. Because they raise these arguments for the first time on appeal, this Court cannot address them.

II. The District Court Properly Declined to Admit the Declaration and the EOB because They Are Inadmissible Hearsay without Exception.

Assuming *arguendo*, that the Court decides to address the Hoves' hearsay arguments, the District Court properly declined to admit the Declaration or EOB. For purposes of opposing summary judgment, a supporting affidavit (or, in this case, the Declaration) must set forth specific facts based on the affiant's personal, knowledge based on personal firsthand observation or knowledge—and not based on what another person said—that establish a genuine issue of material fact. *Smith v. Bur. Northern and Santa Fe Ry. Co.*, 2008 MT 225, ¶¶38- 39, 344 Mont. 278, 187 P. 3d 639. Although the court draws all reasonable inferences from the admissible evidence in favor of the non-moving party, it only considers substantive evidence that would be admissible at trial and "does not consider conclusory statements lacking specific factual support in the record." *In re Estate of Mead*, 2014 MT 264, ¶14, 376 Mont. 386, 336 P. 3d 362.

A condition precedent to the admissibility of evidence is authentication, or "evidence sufficient to support a finding that the matter in question is what its proponent claims." M.R.Evid. 901(a). Hearsay is not admissible except as allowed by statute or other applicable rules. M.R.Evid. 802. "Affidavits [or declarations] made without personal knowledge or based on hearsay evidence should not be considered in a motion for summary judgment." *Smith*, at ¶39. The

Declaration and the EOB are both inadmissible hearsay, which the District Court properly excluded.

A. The District Court Properly Declined to Admit the Declaration and the EOB as Hearsay.

Before the District Court and in their opening brief before this Court, the Hoves focus on the form of the Declaration, arguing the District Court should have accepted the Declaration. This argument misses the point. The District Court expressly stated the fatal issue was not the form of the Declaration but its contents:

> Defendants Hove assert that the Court, "relied heavily upon the fact that Katelyn Hove had submitted an unsworn declaration under penalty of perjury in her statement opposing summary judgment", as opposed to an affidavit. This is misplaced. ...
>
> Hove's declaration purports to provide "proof" that she never received treatment in the intensive care unit (ICU) by attaching an unverified explanation of benefits (EOB) from BlueCross Blue Shield of Texas, and an unverified email from the Montana Commissioner of Securities and Insurance (Office of the Montana State Auditor). These two attached items-documents are inadmissible hearsay because they were created by others and unverified. ... Rule 56(e) makes clear that statements in affidavits made without personal knowledge, or based on hearsay, are not admissible and cannot be considered on summary judgment.

Rule 59 Order, pp 4-5 [dkt. 32] (citations omitted) (emphasis added).[5]

The District Court employed conscientious judgment when it determined the Declaration and the EOB were inadmissible hearsay. It reviewed them both. It

[5] The district court also noted that the Declaration did not comply with the express requirements Mont. Code Ann. § 1-6-105.

determined that the statements were not based on Katelyn Hove's personal knowledge, that someone other than Katelyn Hove created the EOB, and that the EOB was unverified. Hence, the District Court properly concluded that the EOB and the Declaration were inadmissible hearsay.

The District Court's declining to admit the Declaration and EOB was manifestly within the bounds of reason. The Hoves had the affirmative duty to place supporting affidavits in the summary judgment record. *Disler v. Ford Motor Credit Co.*, 2000 MT 304, ¶10, 302 Mont. 391, 15 P.3d 864. They had ample time to secure an affidavit from BCBS of TX to authenticate the EOB. They chose not to do so and must bear the consequences of their choice. A district court—and now this Court—must make its decision based on the admissible facts in the record. *Id.* at ¶13.

For the above reasons, the District Court properly did not admit the Declaration and the EOB.

B. The business record exception to hearsay does not apply.

The business record exception to the hearsay rule permits a court to admit a business record made and kept in the regular course of business activity "as shown by the testimony of the custodian or other qualified witness". M.R.Evid. 803(6). The business record exception expressly requires the testimony of the custodian or

another qualified witness with personal knowledge of their genuineness, relevance, and contents to establish the authenticity of the business record. *See Smith*, at ¶39.

In *Disler*, this Court affirmed the grant of summary judgment. It held that the District Court properly refused to consider three loan documents attached to the nonmovant's answer brief, reasoning: "Basically, without an affidavit or sworn discovery response of a Ford employee with personal knowledge of the genuineness, relevance and contents of the documents, the attachments to Ford's brief were little more than inadmissible hearsay." *Id.* at ¶11; *see Smith*, at ¶45 ("While BNSF claims it could establish a foundation for these documents under the public and business records exception to the hearsay rule, M.R. Evid. 803, the fact is it did not do so, either in its briefs, affidavits, or in oral argument before the District Court.") Both *Disler* and *Smith* are squarely on point in this regard. The EOB is inadmissible hearsay without an affidavit or sworn discovery response from an employee of BCBS of TX with personal knowledge of the genuineness, relevance, and contents.

The Hoves erroneously argue that Rebecca Kelly verified the EOB. Ms. Kelly is not a BCBS of TX employee. She did not represent she had any personal knowledge of the genuineness of the EOB or its contents and did not state that the Clinic acquired and kept the EOB as a business record. To the contrary she specifically declared the Clinic "did not see the TX EOB until the Hoves filed it

with the Court as an exhibit." *Aff. Kelly*, ¶17 [dkt. 19]. Ms. Kelly is not a BCBS of TX employee or another qualified witness that can verify or authenticate the EOB.

The Hoves also argue that they received the EOB and, as insured, can authenticate it as a business record. This Court has expressly rejected this theory, stating Rule 803(6), M.R.Evid., "requires the entity creating the business record—not the entity receiving it—to establish that the record was prepared in accordance with its regular and trustworthy business practices." *State v. Blaze*, 2011 MT 52, ¶19, 359 Mont. 411, 251 P.3d 122 (emphasis in original).

For the above reasons, the District Court did not abuse its discretion when it decided the EOB was inadmissible hearsay.

C. The residual exception to hearsay does not apply.

There is a "residual exception" to the hearsay rule for statements "not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness." M.R.Evid. 803(24). The residual exceptions "are not broad licenses ... to admit hearsay statements that do not fall within the established exceptions of Rule 803 and 804. The residual exceptions should be used sparingly, and only in exceptional circumstances." *State v. Brown*

(1988), 231 Mont. 334, 338, 752 P.2d 204, 207.[6] Rather, the residual exception applies when there is "a 'new or unanticipated situation' requiring the 'growth and development' of hearsay law". *Id.*.

Nelson v. Davis Modern Machinery (1986), 220 Mont. 347, 715 P. 2d 1052, is directly on point. In *Nelson*, the plaintiff offered a repair bill from Stedje Brothers as evidence of a debt without testimony from a representative of Stedje Brothers to establish the authenticity of the bill. *Id.*, at 353, at 1056. This Court held the bill was inadmissible hearsay. *Id.* Specifically, the Court held that the bill was not admissible under Rule 803(24), M.R.Evid., because there were no circumstantial guarantees of reliability. *Id.*

The Hoves leap to the conclusion that the unauthenticated EOB they proffer to support their claims "has the guarantees of trustworthiness whether offered by the insurer, insured or provider/payee". They cite no authority to support their conclusion. They cite no facts on the record and offer no testimony, authority, or explanation as to the guarantees of trustworthiness for the EOB. They do not explain how the EOB is a new or unanticipated situation (because it is not) that requires growth and development of hearsay law (because it does not).

[6] The case discussed both residual exceptions, in Rules 803(24) and 804(b)(5), M.R.Evid. The second residual exception addresses the unavailability of a declarant as a witness.

III. There Are no Issues of Material Fact.

In this case there are no issues of material fact. The Hoves assert there are disputed facts based on the "logical inference" of a coding error and competing or conflicting EOBs. Their alleged inferences lack factual foundation in the record.

While a court must take all reasonable inferences in favor of the non-moving party for purposes of summary judgment, the inferences must be supported by specific facts in the record. *Estate of Mead*, at ¶14; Mont. Code Ann. § 26-1-501. For purposes of summary judgment, the "'absence of evidence cannot—under law or common sense—establish a genuine issue of material fact precluding summary judgment' ... an inference is not appropriate for summary judgment if it requires a 'speculative leap.'" *Young v. Era Advantage Realty*, 2022 MT 138, ¶22, 409 Mont. 234, 513 P.3d 505 (internal cites omitted).

In this case, there is no evidence in the record that supports the Hoves' proposed inferences. There is no fact in the record to support a reasonable inference of a coding error. First, the EOB is inadmissible hearsay and is not evidence in the record. The Declaration relies wholly on inadmissible hearsay, and the District Court properly declined to admit it. *See Eberl v. Scofield* (1990), 244 Mont. 515, 519, 798 P.2d 536, 538 (holding the court properly struck an affidavit that was based on hearsay). As a result, the EOB is not part of the summary judgment record and was not before the District Court. Because the EOB was not

before the District Court, there are no competing or conflicting EOBs and no evidence whatsoever of any coding error. The Hoves offered only allegations in the pleadings and unsupported suspicions, conclusions, and speculation, which are not enough to raise an issue of material fact. *E.g.*, *Putnam v. Central Mont. Medical Center*, 2020 MT 65, ¶12, 399 Mont. 241, 460 P.3d 419.

Second, CB1 offered an affidavit that placed the following uncontroverted material facts on the record:

> 18. BC [i.e., Billings Clinic] has a contract with Blue Cross Blue Shield of Montana. Blue Cross Blue Shield of Texas administers for the Hoves' group plan "Ptw Energy Services, Inc." and is subject to the terms of BC's contract with Blue Cross Blue Shield of Montana via the BlueCard Program.
>
> 19. BC's contract with Blue Cross Blue Shield of Montana only applies to "Covered Services." "Noncovered Services" are, by definition in the contract, not subject to the contract. The contract allows BC to collect copayments, coinsurance, deductible amounts, and amounts for all Noncovered Services.
>
> 20. Although Blue Cross Blue Shield of Texas is subject to the terms of the contract between BC and Blue Cross Blue Shield of Montana, it did not process the TX EOB correctly in accordance with that contract. The MT EOB is processed correctly in accordance with the contract between BC and Blue Cross Blue Shield of Montana.

Aff. Kelly, ¶¶18-20 [dkt. 19]. In other words, the only facts in the record establish that BCBS of TX improperly processed its EOB. The proposed inference of a coding error by the Clinic directly at odds with the uncontroverted facts.

The Hoves' also claim that the District Court weighed the evidence or chose one disputed fact over another. This is not true because the Hoves did not tender any admissible evidence. There simply are no disputed facts or conflicting evidence in the summary judgment record.

The court properly concluded there was no genuine issue of material fact in dispute.

IV. The Clinic Did Not Have Privity of Contract with BCBS of TX and Admitting the EOB Would Not Have Changed the Result.

Assuming *arguendo*, that the District Court should have admitted the Declaration and the EOB, the result will not change. The Hoves conceded that the Clinic did not have privity of contract with BCBS of TX. The District Court found that, because they lacked privity of contract, the EOB did not bind the Clinic, and the Clinic had no obligation to accept BCBS of TX's incorrect EOB and final patient responsibility. The Hoves did not appeal this part of the judgment.

As noted above, Ms. Kelly's uncontroverted affidavit establishes that BCBS of TX did not process the EOB correctly and the EOB incorrectly states the Hoves' patient responsibility. *See Aff. Kelly*, ¶¶18-20 [dkt. 19]. Because the EOB is incorrect and is not binding on the Clinic, it is not probative evidence the outstanding balance. Even if this Court determines the District Court erred in declining to admit the EOB, the admission of the EOB would not have changed the result of the case; this Court must disregard such error and not reverse the District

Court. *See Maier v. Wilson*, 2017 MT 316, ¶17, 390 Mont. 43, 409 P.3d 878 (stating the well-established rule that the Court will not reverse the district court for errors in admissibility of evidence unless the error "'be of such character to have affected the result'" (quoting *Howard v. St. James Cmty. Hosp.*, 2006 MT 23, ¶17, 331 Mont. 60, 129 P.3d 126 (quoting *Payne v. Knutson*, 2004 MT 271, ¶20, 323 Mont. 165, 99 P.3d 200)).

CONCLUSION

The District Court did not err in excluding the declaration and the EOB as inadmissible hearsay. Because the Hoves failed to proffer any admissible evidence, there was no genuine issue of material fact. CB1 is entitled to judgment as a matter of law. The District Court properly granted summary judgment in favor of CB1. This Court should affirm the District Court.

DATED this 6 day of August 2024.

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CERTIFICATE OF COMPLIANCE

Pursuant to the Montana Rules of Appellate Procedure, I hereby certify that this Appellant's Opening Brief is printed with proportionately spaced Times New Roman typeface of 14 points; is double spaced except for lengthy quotations or footnotes, and does not exceed 10,000 words, excluding the Table of Contents, the Table of Authorities, Certificate of Service, and Certificate of Compliance, as calculated by my Microsoft Word software.

Dated this 6 day of August 2024.

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CERTIFICATE OF SERVICE

The undersigned certifies that on this 6 day of August 2024 a copy of the foregoing *Motion to Dismiss Appeal* was duly served via email and first-class mail, postage prepaid, upon the following:

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